

1952

O. K. Clay v. Stephen L. Dunford et al : Petition for Rehearing

Utah Supreme Court

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IN THE SUPREME COURT
of the
STATE OF UTAH

O. K. CLAY, Administrator of the
Estate of Arnold Kartchner, also
known as Arnold G. Kartchner, and
Arnold Grant Kartchner, Deceased,
Plaintiff and Appellant,

vs.

STEPHEN L. DUNFORD, **PAUL H.**
STEVENS, **BURNS L. DUNFORD**
and **L. CLAYTON DUNFORD**,
d/b/a The Dunford Bread Co.,
Defendants and Respondents.

PETITION FOR REHEARING

MORETON, CHRISTENSEN &

CHRISTENSEN,

Attorneys for Defendants

and Respondents.

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Clerk, Supreme Court, Utah

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and L. CLAYTON DUNFORD,
d/b/a The Dunford Bread Co.,
Defendants and Respondents.

Case No.
7705

PETITION FOR REHEARING

Defendants and respondents petition this Honorable Court for a rehearing in the above entitled case for the following grounds and reasons:

1. This Honorable Court failed to pass upon and determine all questions of law involved in the case presented upon the appeal and necessary to the final determination of the case contrary to the provisions of Rule 76 (a) U.R.C.P.

2. This Honorable Court erred in holding that the instruction on assumption of risk was prejudicial error.

3. This Honorable Court erred in failing to hold that there was no evidence in the record to warrant a finding that any negligence upon the part of the defen-

dants' driver was the proximate cause of the accident.

4. This Honorable Court erred in failing to hold that the deceased was guilty of contributory negligence as a matter of law barring any recovery in this action.

WHEREFORE, respondents pray that this Court make and enter an order setting aside the opinion and decision of this Court, made and filed on the 24th day of January, 1952, and that it order a rehearing of the above entitled case, and upon rehearing that it make and enter its order affirming the judgment of the trial court.

Respectfully submitted,

MORETON, CHRISTENSEN &
CHRISTENSEN,

*Attorneys for Defendants
and Respondents.*

BRIEF IN SUPPORT OF RESPONDENT'S PETITION FOR REHEARING

PRELIMINARY STATEMENT

In filing this petition for rehearing we are fully cognizant that petitions for rehearing are granted with reluctance and only when the Court is convinced that some salient point has been overlooked or that it has committed serious error. We realize that the Court can never convince losing counsel that he is not entitled to prevail. Likewise we realize that the Court does not have the time to decide every case twice. We are in full

sympathy with the rule which denies a rehearing except in the most unusual case. It is not our practice to file petitions for rehearing, and this petition is filed and urged upon the Court only in the sincere belief that the Court has fallen into grave error, and that the Court has completely overlooked and wholly failed to consider two very important points raised by the respondents in their original brief. With these considerations in mind we proceed to a discussion of the various points upon which our petition is based.

POINT I.

THIS COURT FAILED TO PASS UPON AND DETERMINE ALL QUESTIONS OF LAW INVOLVED IN THE CASE PRESENTED UPON THE APPEAL AND NECESSARY TO THE FINAL DETERMINATION OF THE CASE, CONTRARY TO THE PROVISIONS OF RULE 76 (a) U.R.C.P.

Rule 76 (a) U.R.C.P. provides in part as follows:

“If a new trial is granted the Court shall pass upon and determine *all* questions of law involved in the case presented upon the appeal and necessary to the final determination of the case.” (*Italics ours*).

The reason for this rule is obvious. Where several points of law are presented upon appeal, and the Court determines that a new trial should be granted because of prejudicial error occurring at the first trial, it is to the advantage of both parties as well as to both the trial court and the appellate court that all questions of law be laid to rest at one time. Failure of the Court to rule

upon *all* questions of law presented will result in the probability of the same questions being presented in a subsequent appeal of the same case. This is costly in both time and money to litigants and costly also in the time of the court.

In the case at bar, this Court has apparently overlooked the provisions of this rule. Three points were raised by the appellant upon his appeal and two additional points were raised by the respondents in their brief. All of these issues of law must be resolved, in order that this case may be finally determined. Under the rule above quoted, both parties are entitled to have these issues determined at this time by this Court. Failure upon the part of the Court to determine these questions at this time will give rise to the definite possibility of a subsequent appeal by one party or the other involving the same questions. The undesirability of this we think will be readily apparent to the Court.

In his brief on appeal appellant relied upon three points: First, appellant complained of the Court's instruction on assumption of risk. This issue, and this issue only, this Court determined.

Second, appellant complained of the Court's instruction on contributory negligence. While appellant did not question that the respondents were entitled to an instruction on contributory negligence, he did urge that the instruction given did not correctly state the law and was too favorable to the respondents. Both parties to this action are entitled to a ruling from this Court as to the correctness of this instruction, since the matter

will undoubtedly be presented in a retrial of the case. If the instruction correctly stated the law then the respondent is entitled to have the same instruction given at the retrial of this action. On the other hand, if the instruction does not correctly state the law this Court should point out wherein it is deficient so that the trial court can properly instruct the jury when the case is again tried.

Third, appellant also complained that the Court failed to give an instruction requested by him. If the appellant was entitled to such an instruction this Court should so declare so that the trial judge will be properly guided in considering requests for instructions at the second trial. Contrariwise if the appellant was not entitled to such an instruction this Court should so declare so that the trial judge will not be led into error by any similar request that may be made by appellant at the retrial.

Besides the points raised by the appellant in his brief the respondent raised two additional points as grounds for affirmance of the judgment. In view of the fact that this court reversed the judgment of the trial court, there is an implied holding that these points were without merit. However, there is nothing in either the prevailing opinion, written by Mr. Justice Henriod, or in the concurring opinion, written by Chief Justice Wolfe, which indicates that the two points raised by respondent were even considered by the Court. These two points will be fully discussed in a subsequent portion of our brief so we shall not dwell upon them here. Suffice it

to say that the Court has failed to consider and determine all of the issues of law presented by the parties, and unless those issues are now determined by the Court there is a very good possibility that both parties will be put to additional time and expense in relitigation of the very same questions which the Utah Rules of Civil Procedure specifically declare must be determined at this time.

POINT II.

THIS HONORABLE COURT ERRED IN HOLDING THAT THE INSTRUCTION ON ASSUMPTION OF RISK WAS PREJUDICIAL ERROR.

In its decision this Court held that the trial Court's instruction on assumption of risk was prejudicial error, and on this ground the Court reversed the judgment below and ordered a new trial. On this petition for rehearing we do not ask the court to review its holding that the giving of such an instruction was technical error. However, we do believe, and we do now contend that the error was purely technical and could not have resulted in any prejudice to the appellant. We think there can be no question as to the correctness of the instruction, as an abstract proposition of law. It was taken practically verbatim from a well recognized and frequently quoted text book. 38 Am. Jur. 856; Negligence, Sec. 171. The instruction would have been an equally correct statement of law had the second paragraph been worded to read as follows:

“If you find from the evidence in this case that the deceased, Arnold Kartchner, placed himself in a position of obvious peril when there was no reasonable justification therefor, then the said Arnold Kartchner is deemed to have been guilty of contributory negligence, and your verdict must be in favor of the defendants and against the plaintiff no cause of action.”

The suggested amendment to the instruction merely changes the technical designation of the defense from that of assumption of risk to that of contributory negligence. It could make no difference to the jury what appellation the Court applied to the defense. If there was evidence to support the premises upon which the instruction was based, and the same legal result would follow regardless of the name applied to the defense, any technical error would be wholly immaterial and harmless.

That the deceased placed himself in a position of obvious peril would seem to be too clear to admit of any dispute. At the time deceased alighted from his station wagon the defendant's truck was closely approaching on the right hand side of the road, and its presence was perfectly obvious to anyone who looked. There is nothing in the record to indicate that there was any reason or excuse whatsoever for the deceased to alight on the left hand side toward the 13th South traffic. So far as the record shows, he could have, with equal facility and much greater safety, alighted from the right hand side of his station wagon and onto the sidewalk. That it is contributory negligence for a person to step from a place

of safety directly into the path of approaching traffic is a well established principle. A large number of cases in support of the rule are cited in our original brief, and additional cases will be found cited under Point IV hereof.

There could have been no prejudice to the appellant in the giving of this instruction. The jury could have well found that the deceased placed himself in a position of obvious peril and that there was no reasonable justification therefor. In fact, under the evidence we do not see how the jury could have found any differently. On such a finding the deceased would have been guilty of contributory negligence barring any recovery. The fact that the jury was erroneously advised that this defense was assumption of risk instead of contributory negligence could not possibly affect the outcome of the litigation.

POINT III.

THIS HONORABLE COURT ERRED IN FAILING TO HOLD THAT THERE WAS NO EVIDENCE IN THE RECORD TO WARRANT A FINDING THAT ANY NEGLIGENCE UPON THE PART OF THE DEFENDANT'S DRIVER WAS THE PROXIMATE CAUSE OF THE ACCIDENT.

At the trial of the case, defendants moved for a directed verdict on the grounds that there was no evidence that any negligence on the part of the defendants caused the accident, and that the deceased was guilty of contributory negligence as a matter of law. If we were correct in our position on either of these grounds then there was nothing for the jury to decide and any

error in instructing the jury would be wholly immaterial, and the judgment of the trial court should be affirmed.

In our original brief, commencing on page 25, we attempted to point out to the Court that the plaintiff had wholly failed to sustain the burden of proving that the deceased's fatal injuries were proximately caused by any negligence upon the part of the defendant's driver. Apparently this point has not been considered by the Court. In the opinion of the court, there is not so much as a bare recital that the point has been considered and found to be without merit. We do not see how the Court, with any due consideration to that argument and to the many authorities cited in support thereof, could possibly fail to find merit in the argument. It would seem that the court should at least take the time and trouble to point out why it does not follow the very respectable weight of authority cited in support of the argument. It is interesting to note that the appellant in his reply brief did not even attempt to answer this argument. He has not cited so much as a single case or text book contrary to the position advanced by us.

No rule of law is better settled than that the plaintiff in a personal injury or wrongful death action has the burden of proving by a preponderance of the evidence that the accident and the injuries or death resulting therefrom were proximately caused by some negligence chargeable to the defendant. The record in this case is entirely barren of any evidence which would warrant or support a finding that the fatal injuries sustained by the deceased were caused by any negligence

upon the part of the defendant. The only evidence in the case which in anywise suggests that the defendant's driver was negligent at all was the testimony of a neighbor of deceased, to the effect that some days after the accident she heard the driver say to the family of the deceased that he was not looking. This testimony was flatly contradicted by the defendants' driver who denied that he made any such statement, and who testified positively that he was looking straight ahead. However, let it be assumed that the defendants' driver was not keeping a proper lookout. There is not one shred of evidence in the record which would warrant a finding that such failure to keep a proper lookout was a causative factor in producing this accident. The evidence is all to the effect that immediately upon his alighting from his automobile the deceased was struck. There is *no* evidence whatsoever that the deceased alighted from his automobile sufficiently in advance of the defendants' oncoming truck that the driver of the truck could have, with the utmost vigilance, avoided the accident. Let it be remembered by the Court that at the point of impact the truck was moving away from the station wagon, and that the impact was not upon the front of the truck but upon the side of the truck. The evidence points irresistibly and inevitably to the conclusion that the deceased stepped backward into the truck. It is not the burden of the defendants in this case to prove freedom from negligence; rather it is the burden of the plaintiff to prove negligence and proximate cause. We challenge counsel for the appellant to point to any place in the

record where there is any evidence from which a jury could find that the defendants' driver could have avoided striking deceased after he alighted from the station wagon. There is no evidence whatsoever that the deceased alighted from his station wagon sufficiently in advance of the approach of the defendants' truck that the defendants' driver could have avoided him in the exercise of due care. Although the defendant's truck was not on the main traveled portion of the highway, it was on the roadway where the driver had a right to be, and other persons desiring to make use of the roadway had a duty to anticipate his presence and pay heed to it. We cited in our original brief on pages 28 and 29 many similar cases wherein it was held that there was no evidence of negligence on the part of the defendants. In addition to the cases there cited we invite the attention of the Court to the case of *Bucilli v. Shanahan*, 266 Pa. 342, 109 Atl. 634. See also 2A Blashfield, *Cyclopedia of Automobile Law and Practice*, 122, Sec. 1242, where it is said:

“On the other hand the driver of a motor vehicle is not ordinarily liable if a pedestrian without exercising due care for his own safety suddenly steps into the path of a moving machine from a place of safety.”

In the case of *Chipokas v. Peterson*, 219 Ia. 1072, 260 N.W. 37, cited in our original brief at page 28, the facts are very similar to those of the case at bar. There the defendant was driving twenty to twenty-five miles

an hour and in the case at bar he was driving twenty miles per hour. There the plaintiff ran from behind a parked car whereas here the deceased stepped from inside a parked car. In neither case did the defendant ever see the injured pedestrian before the accident. In the Iowa case the accident occurred in a residential district. Although the evidence in the case at bar is not clear on the question, the accident here apparently occurred in a residential district. In that case the car was parked one foot from the curb line; in the instant case there was no curb line but the station wagon was parked one foot from the sidewalk. In the *Chipokas* case the point of impact was about thirteen feet from the curb. In the instant case the point of impact was about nine feet from the sidewalk. In holding that there was no evidence of negligence upon the part of the defendant the Supreme Court of Iowa said:

“The negligence claimed here is that Peterson failed to maintain a proper look-out and to have his car under control, and that he violated an ordinance of the city of Cedar Rapids prohibiting driving of cars in the residential districts in excess of a speed of 25 miles an hour. Peterson (defendant) himself testified that he did not see the child, and this is easily understood, for the distance from the west curb line of the street to the spot where the child was struck is a little more than 13 feet. She either ran in front or in back of the car that was parked, and this car was parked about a foot from the curb line. The width of the car was approximately six feet. This would take up seven feet of the street, leaving only six

feet in which this youngster was running when Peterson came along. * * * All the other evidence shows that Peterson was driving between 20 and 25 miles an hour. True, he did not sound the horn or give warning, but there was no reason for doing so because he did not see the youngster. And as the child darted out from in front or in back of the parked car, he had no opportunity of seeing her. The scene of the accident was not at a crossing or intersection. Peterson was not guilty of negligence just because this child, unfortunately, suddenly and unexpectedly ran out into the path of his auto. This no doubt, was the view of the jury in the former case, in which the same evidence was submitted, and in which the jury returned a verdict in favor of Peterson.

* * * *

“Peterson had no opportunity to see this child in time to have prevented this accident. He was not driving at an excessive speed. * * * *The appellant has failed to prove that Peterson was guilty of negligence. This was one of the essential elements of his case.* The lower court was right in directing the verdict, and the same must be, and it is hereby, affirmed.” (Italics ours).

The language of the Iowa court would appear to be applicable with equal force to the case at bar.

See also the language of the court in *Gavin v. Jacobs*, 259 Mass. 23, 155 N.E. 926:

“The evidence in its aspect most favorable to the plaintiff tended to show that the plaintiff’s intestate, riding on the back of an ice wagon, dropped off the back of the ice wagon and was almost immediately struck by the defendant’s

automobile. There is no evidence to support a finding of negligence on the part of the defendant. His speed was not excessive, and there is nothing to indicate that he could have foreseen that the plaintiff's intestate would be in contact with his automobile. It is manifest also that the accident could not have occurred if the plaintiff's intestate had used the care reasonably to be expected of a child of his years."

POINT IV.

THIS HONORABLE COURT ERRED IN FAILING TO HOLD THAT THE DECEASED WAS GUILTY OF CONTRIBUTORY NEGLIGENCE AS A MATTER OF LAW BARRING ANY RECOVERY IN THIS ACTION.

The point upon which we most strongly rely in this case is that the deceased was, as a matter of law, guilty of contributory negligence. So far as appears from the opinion of the court, this point has been completely overlooked. Commencing at page 30 of our original brief we cited case after case where it was held under facts similar to those in the case at bar that the plaintiff was guilty of contributory negligence barring his recovery. The rule appears to be universal. In our extensive research on this question we have yet to find a single case closely similar on its facts wherein a plaintiff has been permitted to recover where he has stepped from a place of safety *without any observation whatsoever* immediately into the path of an oncoming vehicle. Not only has the rule found universal acceptance by the courts and text writers, but it has actually been codified in the

law of this state. Section 57-7-142 U.C.A. 1943, provides, in part, as follows:

“* * * no pedestrian shall suddenly leave a curb *or other place of safety* and walk or run into the path of a vehicle which is so close that it is impossible for the driver to yield.” (Italics ours).

The prevailing opinion of the court in the case at bar closes with this sentence:

“Although *the peril was obvious* to anyone who looked and saw, as did the motorist who witnessed the tragedy, *it seems equally obvious that the deceased did not look, did not see, did not appreciate and did not voluntarily place himself in the path of a known danger*, and hence could not be charged with assumption of the risk.” (Italics ours).

With this statement we agree wholeheartedly. We do not know how the Court could have stated more clearly or more emphatically that the deceased was guilty of contributory negligence as a matter of law. Neither counsel for the appellant nor this Court has suggested any reason why the rule devolving upon all persons making use of the highways to observe for other traffic on the highway should not apply to the deceased in this case. In his reply brief appellant suggested that the general rule applied only in commercial districts where traffic is heavy almost to the point of congestion. Nothing could be further from the truth. If this court has

been misled by this suggestion, unsupported by either reason or authority, let us hasten to point out that in many of the cases cited in our original brief the accident occurred elsewhere than in the business district of a large city. In *Woods v. Moore* (Mo. App.), 48 S.W. (2d) 202, cited at page 32 of our original brief, the accident occurred in a rural district. In *Cooper and Co. v. Am. Can Co.*, 130 Me. 76, 153 Atl. 889, cited at page 35 of our brief, the accident occurred in a sparsely settled section on a country road. In *Mingus v. Olsson* (Ut.), 201 Pac. (2d) 495, the accident occurred in a residential section of Salt Lake City. In *Deal v. Snyder*, 203 Mich. 273, 168 N.W. 973, cited in our original brief at page 37, the accident occurred in a farming district. In *Letts v. Cole*, 310 Pa. 509, 165 Atl. 847, cited in our original brief at p. 37, the accident occurred in a country borough. In *Kooch v. Goodnight* (Tex. Civ App.), 71 S.W. (2d) 927, cited at page 38 of our original brief, the accident occurred on a highway between towns. In *Jarvis v. Stone*, 216 Ia. 27, 247 N.W. 393, cited at page 38 of our original brief, the accident occurred on a road three miles out of town. In *Ponder v. Carroll*, 193 Ark. 1120, 105 S.W. (2d) 72, cited in our original brief at page 38, the accident occurred outside of town. In *Rittle v. Zeller*, 100 Pa. Sup. Ct. 516, cited at page 38 of our original brief, the accident occurred in open country. In *James v. Florios*, 248 Mich. 153, 226 N.W. 852, cited in our original brief at page 28, the accident occurred at the western city limits of Detroit. In the following addi-

tional cases the accident occurred other than in the business section of a city :

Heath v. Klosterman (Pa.), 23 Atl. (2d) 209
(residential district);

Hill v. Lappley, 199 Mich. 369, 165 N.W. 657
(country highway);

Gremillion v. Couvillion, 5 La. App. 441 (Church
district);

Valanda v. Baum and Reissman, Inc., 113 Fed.
(2d) 188 (outlying and unbuilt up portion of
borough).

In his reply brief appellant cited *Ketchum v. Pattee* (Cal. App.), 98 Pac. (2d) 1051, and *Stricklin v. Rosemeyer* (Cal. App.), 142 Pac. (2d) 953. Neither case is helpful to the appellant's position. The basis of the *Ketchum* decision was that there was evidence that the plaintiff was not yet out of the car when the collision occurred, but was partly in the car and partly on the running board. The implication of the opinion is that if the plaintiff had alighted from his car prior to the occurrence of the accident the holding would be different. The *Stricklin* case, insofar as it has any relevance to the case at bar, supports the position of the respondents and not that of the appellant. It was there held that it was proper to instruct that where a person has a choice of two ways of performing an act, one of which is safe and the other of which he knows or should know is subject to danger, and such person chooses the dangerous way and as a proximate result thereof is injured,

such person is guilty of contributory negligence. The court said at page 955:

“On the application of the rule it has been frequently stated that the ‘question’ is whether the plaintiff knew that one way was safe and the other dangerous and chose the latter with full knowledge of those conditions. Here the appellant concedes that he had such knowledge and that the chosen way was in fact dangerous. It is a matter of common knowledge that sidewalks are maintained for the safety of pedestrians and that they are ordinarily less dangerous to the pedestrians than the traveled portion of vehicle highways.”

In his original brief appellant conceded that it would have been safer for the deceased to have alighted onto the sidewalk rather than onto the road. The fact that deceased was unaware of the approach of defendants’ truck cannot excuse him. The *slightest* glance to his rear and the *slightest* thought for his own safety would have avoided this accident.

It has also been suggested by counsel for the appellant that the rule of contributory negligence applies only in the cases of pedestrians attempting to cross a street from behind cars, but that it finds no application in the case of persons alighting from parked automobiles toward the street. It is manifest that counsel has not examined the authorities. The rule applies with equal force to persons alighting from automobiles. It is so laid down in 5 Am. Jur. 610, Automobiles, Sec. 191, cited at page 30 of our original brief. The case of *Will v.*

Boston Elevated Railroad Company, 247 Mass. 250, 142 N.E. 44, cited and discussed at pages 34-35 of our original brief also involved a pedestrian alighting from an automobile. The facts in that case were very similar to those in the case at bar. The following additional cases also involve pedestrians alighting from automobiles, trucks and trolleys:

In *Hill v. Lappley*, 199 Mich. 369, 165 N.W. 657, the plaintiff, a 77 year old woman, descended from the back of a truck which was parked on the *right side of a country highway*. She looked to the rear before alighting but after alighting, without looking again, she took three or four steps and was almost instantly struck by defendant's car. In denying recovery the Supreme Court of Michigan said:

"It is obvious, I think from all the testimony, that *plaintiff most unfortunately stepped into the highway directly in front of the defendant's car. The most ordinary care on her part should have prevented her from so doing. She cannot impose upon him consequences for which she was in part responsible.*" (Italics ours).

In *Goff v. Borough of College Hill*, 299 Pa. 343, 149 Atl. 477, the plaintiff was injured alighting from an automobile parked along side the street when he was struck by a truck approaching from the rear. The court held plaintiff guilty of contributory negligence as a matter of law. We quote from the opinion of the court as follows:

"Goff, a very large man and familiar with the street, was alighting from his car without looking for approaching traffic and did not see either the truck or the Studebaker until the instant he was struck. Had he glanced to the south, he would have seen the near approach of the large truck, so close in line with the left side of his car as to leave a clearance of not more than two feet.

"In our opinion plaintiff was guilty of such contributory negligence as to bar a recovery against either defendant. As the automobile traffic upon paved streets is becoming more extensive, the duty of a party to look before entering a cartway becomes more important. We have never departed from the rule stated in *Harris v. Commercial Ice Co.*, 153 Pa. 78, 25 A. 1133, that one who steps into a busy street, and is immediately struck by a passing vehicle, which he could have seen had he looked, cannot recover. * * * One who steps from a vehicle into the cartway of a busy street regardless of the condition of approaching traffic therein is negligent. * * * *What plaintiff did in the present case, was not to step from the curb into the cartway, but to step therein from the street side of his car. * * * We do not doubt his right to alight from his car into the street, but before doing so it was his duty to look for approaching vehicles. Here, plaintiff could have seen the near approach of the large truck; coming along so close as to clear his car by only two feet, and stepping down so near in its path was negligence.*" (Italics ours).

In *Bucilli v. Shanahan*, 266 Pa. 342, 109 Atl. 634, the deceased stepped from the left side of a truck parked along the right hand curb and was immediately

struck and killed by the defendants' truck. The court held there was no evidence of neglect on the part of defendants and added that the deceased's own contributory negligence barred recovery. To the same effect see *Hall v. Freaney*, 345 Pa. 45, 26 Atl. (2d) 454; also *Valanda v. Baum and Reissman, Inc.*, 113 Fed. (2d) 188.

A case very similar on its facts to the case at bar is *Heath v. Klosterman* (Pa.), 23 Atl. (2d) 209. The facts were stated in the opinion of the court as follows:

"The accident happened in broad daylight * * * immediately in front of Dr. Heath's (deceased's) residence. * * * The house was on the right side of the highway, * * * the doctor's auto, headed in the same direction, was then parked in front of his house. Dr. Heath was in the act of alighting from its left door or had just stepped down upon the road, when he was struck by a truck owned and operated by one Charles R. Martin. According to Martin, who was the only eye witness produced by plaintiff, the door of the car suddenly swung open and the doctor stepped out when the truck was almost up to the rear wheel of his auto, and he was struck almost instantly. Martin said he was then driving at approximately 20 miles an hour."

In denying recovery the Supreme Court of Pennsylvania said:

"The testimony leads to the inevitable conclusion, that the real cause of the unfortunate accident was the heedless act of Dr. Heath himself. As shown by positive proof produced by plaintiff, the door of his car was suddenly pushed

open and he stepped into the roadway of this much traveled boulevard without thought or care of traffic. The Martin truck was almost upon him at that moment and he was struck almost instantaneously. Had he only looked before leaving his car in this manner, he would have seen the two trucks and he could have avoided the accident. Where a person steps into a position of danger in the street, and is immediately struck by a passing vehicle, which he could have seen had he looked, he is barred from recovery by his own negligence. [Citations omitted]. Even though Dr. Heath is dead and ordinarily a presumption might arise that he exercised due care, this presumption is destroyed in the instant case by the testimony adduced by plaintiff. * * * This conclusively appeared in the presentation of plaintiff's own case, for the evidence established that Dr. Heath did not look. Moreover, the accident having happened in broad daylight, he must have seen the trucks had he looked before stepping out. There can be no presumption as against facts which are proven.
* * *

"We are forced to conclude that Dr. Heath was guilty of contributory negligence as a matter of law. * * * What Dr. Heath did in the instant case was not to step from the curb into the cartway, but to step therein from the street side of his auto, totally oblivious of traffic then approaching him. * * * While a person has a right to alight from his auto onto the cartway, it is his duty to look and continue to look for approaching traffic when doing so. He must exercise reasonable care under the circumstances. For a person to place himself suddenly in the cartway of a busy highway, with on-coming traffic close by, where a false step by him or a slight deviation of the

course of a vehicle might cause his serious injury or death, constitutes conduct that can only be regarded as being grossly careless and negligent. * * * Unquestionably the conduct of Dr. Heath contributed materially to the accident, and, * * * we are bound to enter judgment for defendant."

The following language from the Supreme Court of Wisconsin in the case of *Brickell v. Trecher*, 176 Wis. 557, 186 N.W. 593, is applicable with equal force to the facts in the case at bar:

"Upon any conceivable construction of the evidence, the plaintiff had ample and unobstructed opportunity to discover the defendant's car in time to have avoided the injury. She could have discovered the on-coming car as soon as the defendant could have discovered her. *If the defendant was guilty of negligence in not discovering plaintiff before she did, the plaintiff was also guilty of negligence in not discovering the car of defendant before it was within five feet of her. From this conclusion we can see no escape.*" (Italics ours).

See also the language of the court in *Levesque v. Dumont*, 116 Me. 25, 99 Atl. 719:

"We are satisfied from a careful examination of the evidence that plaintiff's intestate at the time of the accident was not in the exercise of such care as ordinarily careful boys of his age and intelligence are accustomed to exercise under like circumstances. He started to cross a public city street frequented by teams and autos. Had he looked up the street, he must have seen the

car approaching, and, had he been attentive, he must have seen the lights projecting their rays by the rear of the team in season to have avoided his peril. Heedlessly he passed into the path of the car, so near to it that the accident could not be avoided."

In *Tolmie v. Woodward Taxicab Co.*, 178 Mich. 426, 144 N.W. 855, the court said:

"Under the conditions described by himself, with good eyesight and his wits about him, it seems impossible that plaintiff could not have seen the danger in time to avoid it, had he been reasonably alert and used his eyes and ears as the average reasonably prudent and cautious man should and would under like circumstances, and as his companions did. Instead of showing absence of contributory negligence, his evidence shows its presence.

* * * *

"Here, under the undisputed conditions surrounding the accident and eliminating all issues of fact which conflicting evidence raises, plaintiff's own testimony shows that he failed to use his senses and exercise that reasonable degree of care to avoid injury, proportionate to the circumstances which the law makes essential to recovery, and by his own carelessness and negligence contributed to the same."

In the case of *Pomeroy v. Dykema*, 256 Mich. 100, 239 N.W. 342, the defendant, proceeding along the street, turned to the left to pass around a truck parked against the right hand curb in such fashion that it protruded

nearly to the center line of the street. After clearing the truck defendant turned again to the right and struck the deceased who was attempting to cross the street from behind the parked truck. The defendant did not realize he had struck a pedestrian until he was so advised by a passenger in his car. As in the instant case the marks of impact were on the right side of the defendant's car rather than on the front. The court held the deceased guilty of contributory negligence as a matter of law, saying:

“Careful consideration of the record convinces us that plaintiff's decedent attempted to cross the street, and in passing opposite the parked truck he walked or ran into the side of defendant's car, and in so doing he was guilty of contributory negligence.”

In the case of *Oldroyd v. W. W. Kirby & Son*, 317 Pa. 220, 176 Atl. 203, the plaintiff stepped from in front of a trolley car and into the side of defendant's passing truck. The court held plaintiff guilty of contributory negligence as a matter of law and said:

“It was clear daylight, and, if appellant had been looking, he must have seen and avoided contact with the passing machine; his failure to look was, as a matter of law, contributory negligence.”

A similar case is *MacDiarmid Candy Co. v. Schwartz*, 11 O. App. 303.

In the case of *Cooper v. American Can Co.*, 130 Me. 76, 153 Atl. 889, the court used this language:

“Under the rule requiring every user of the highway to exercise reasonable care for his own safety and protection * * *, a pedestrian crossing or about to cross a street or highway when his view of an approaching motor vehicle is obstructed, is usually required to exercise a greater degree of care than would under other circumstances be necessary * * *, and is negligent if he fails to take proper precautions to discover and observe the approach of such vehicle before placing himself in a position of danger. [Citations] * * *.

“And the question of contributory negligence must be determined without regard to any negligence on the part of defendant. Giving to plaintiff’s evidence all the value to which it is legally entitled, and resolving every reasonable inference which may be drawn therefrom in favor of plaintiff, the inevitable conclusion must be that Mr. Crosby negligently left his place of safety in the obscurity of the loaded truck and stepped directly into the path of the moving auto.”

After citing and discussing many of the cases on the question here under discussion, the court concluded as follows:

“In the case at bar the injured person was a man of 65 years, in the full possession of his faculties.

“In the light of all the circumstances, and with the law as expressed herein, we cannot predicate the jury verdict on sound premises. The pedestrian was negligent, even to the degree of exercising no care for his safety. His negligence continued up to the moment of impact, and, as in *Levesque v. Dumont*, recovery is barred.”

See also the language of the court in *Deal v. Snyder*, 203 Mich. 273, 168 N.W. 973:

“When plaintiff admits that the slightest glance upon his part would have averted the accident, the law cannot aid him, even against one who is concededly negligent.”

The language of the court in *Doyle v. Boston Elevated Ry.*, 248 Mass. 89, 142 N.E. 693, is also applicable to the case at bar:

“The undisputed, indisputable evidence coming from and binding the plaintiff brings this case within the rule laid down where the person injured has stepped from behind of an object in a street in front of another, either without looking or listening. The law is established that on such evidence as is here presented the contributory negligence of the plaintiff is proved as a matter of law, and it is the duty of the court to direct a verdict for the defendant.”

Pedestrians and motorists have equal rights to the use of the highway and both must use them with regard to the rights of the other. The rule is stated by Blashfield as follows:

“In other words, motorists and pedestrians have the same rights to the use of the street or highway, and both are bound to exercise reasonable and ordinary care and must exercise their rights with due regard to the rights of the other.” Blashfield, *Cyclopedia of Automobile Law*, Section 1241.

The rule has been recognized and followed in this state.

In *Mingus v. Olsson* (Ut.), 201 Pac. (2d) 495, this court said:

“The rights of pedestrians to the use of the public streets are the same as those of motorists—neither greater nor less. Hence, the same general duties devolve upon them. A pedestrian crossing a public street in a crosswalk or pedestrian lane, although he may have the right of way over vehicular traffic, nonetheless has the duty to observe for such traffic. Clearly, decedent neglected that duty in this case. It follows that he was contributorily negligent as a matter of law. Of course we do not mean to imply that a mere glance in the direction of the approaching automobile would suffice. The duty to look has inherent in it the duty to see what is there to be seen, and to pay heed to it.”

We also invite the attention of the Court to the excellent discussion of the rule, particularly as it pertains to cases having facts like those in the case at bar, in Huddy, *Cyclopedia of Automobile Law*, 9th Ed. Vols. 5 and 6, Sec. 74, p. 119, Secs. 88 and 89, pp. 154 and 155. We quote as follows:

Sec. 74, page 119: “Pedestrians have equal rights on streets and highways, with automobiles, and, when using the highway, must exercise reasonable care for their own safety, that is to say, the pedestrian must use such care for his own safety as a reasonably prudent man would exercise under the same circumstances.”

Sec. 88, page 154: "If a pedestrian walks or runs against a moving automobile which is readily observable, it may be taken for granted that he did not see the car. On this assumption, he is guilty of negligence either (1) because he did not look for approaching automobiles or (2) because, if he looked, his observation was so careless and inattentive that he did not see the car in question."

Page 155: "One who suddenly places himself immediately in front of a moving automobile which is readily observable is generally guilty of negligence per se."

Sec. 89, page 155: "The rule requiring a pedestrian to look for approaching automobiles applies where a person alighting from another vehicle steps into the roadway. If he fails to look for approaching cars or fails to observe them, he cannot as a rule recover for injuries inflicted by a car running into him."

It appears from the opinion of the Court that it is convinced from its study of the record that the deceased did not look and did not see. It follows as a necessary consequence under the well established law that the deceased was guilty of contributory negligence which bars any recovery by the plaintiff for his death. No valid reason has been suggested and none occurs to us as to why this result should not follow. Our State Legislature has specifically provided that no pedestrian shall suddenly step from a place of safety into the path of an approaching automobile. The reason for the rule appears to be patent enough. Without statutory provision, it has been followed as the rule of decision by

practically every appellate court in the United States. Even in the absence of a legislative mandate there would appear to be no reason why this Court should not also adhere to the rule. It has the judicial sanction of many of the most respected courts of the land and also of leading text writers in the field. If for some obscure reason the rule is not to be followed in this state it would seem that this Court should by clear opinion so advise the trial bench and bar so that other courts and lawyers will not be led into error.

CONCLUSION

The court has failed to decide all of the issues of law presented on appeal. The Court erroneously held that the instruction on assumption of risk was prejudicial error. The Court likewise committed error in failing to hold that the plaintiff had failed to sustain the burden of proving that the death of deceased proximately resulted from negligence imputable to the defendants. The Court particularly erred in failing to hold that the deceased was guilty of contributory negligence as a matter of law.

For the foregoing reasons the respondents are entitled to a rehearing, and upon rehearing being granted, the judgment of the trial court should be affirmed.

Respectfully submitted,

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