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Henry Early v. Karl L. Jackson : Appellant's Reply Brief

Utah Supreme Court

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IN THE SUPREME COURT
of the
STATE OF UTAH

HENRY EARLY,

Respondent,

— vs. —

KARL L. JACKSON,

Appellant.

No. 7725

APPELLANT'S REPLY BRIEF

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OPENING STATEMENT

In replying to the arguments contained in respondent's brief, we first desire to call attention to the fact that respondent concedes he was guilty of negligence as a matter of law but urges that such negligence was not the proximate cause of the injuries which he sustained. Each of the four points set out in respondent's brief contains the statement that whether the particular conduct of the plaintiff "proximately contributed to the accident" was a question of fact to be decided by the jury. This

obviously limits the issue to be decided by the Supreme Court to one of whether plaintiff's conduct proximately contributed to the accident rather than a determination of whether plaintiff was guilty of negligence. Therefore, appellant in the argument to follow will call the Court's attention to the evidence, which it is claimed shows as a matter of law that the conduct of the plaintiff did "proximately contribute" to his own injury, citing additional authorities in support of such argument.

ARGUMENT

I and II

PARKING PLAINTIFF'S TRUCK ON THE SOUTH HALF OF THE HIGHWAY WITHOUT WARNING LIGHTS OR FLARES PROXIMATELY CONTRIBUTED TO THE ACCIDENT

Respondent's first points urge that the parking of plaintiff's truck in the position it was placed across the highway without flares or other signals, did not, as a matter of law, proximately contribute to the accident. Respondent concedes that the parking of the truck in this position was in violation of the statute and negligence but goes on to say "it was nonetheless for the jury to determine whether such negligence proximately contributed to the accident," citing 4 Blashfield Cyclopedia of Automobile Law and Practice, Part 2, Section 2683. Respondent's argument that the jury, by its verdict, found that the position in which the Early car was parked on the highway did not proximately contribute to the accident is begging the question since it is not what the jury found that determines the matter, but what the jury should have found, as a matter of law, which is before the Supreme Court on appeal.

Of course, of all of the acts committed by the plaintiff, the act of parking his truck was the one most remote in time from the accident, and therefore, to that extent is the least persuasive of the position taken by appellant that plaintiff was negligent as a matter of law, which contributed to his own injuries. We recognize that under certain circumstances the parking of a vehicle momentarily on a highway has been held not to be sufficient to establish "proximate cause" as a matter of law. The facts in this case, however, with respect to the parking of plaintiff's truck across the entire width of the highway reserved for east-bound traffic in such a position that no lights reflected either to the east or to the west, but in a northerly-southerly direction was such as to compel a finding of negligence proximately contributing to the accident.

In the case of *Dragotis v. Kennedy*, (Minn.) 250 N.W. 804, a guest in an automobile sued to recover for damages sustained when he was injured while assisting in repairing a flat tire. The driver of the car in which plaintiff was riding stopped the automobile in the traffic lane, making no attempt to get on to the shoulder, the left wheels of the car being left within two feet of the center line of the pavement. Plaintiff assisted in repairing the tire by holding a flashlight with its rays reflected on the wheel of the car so that others might remove the rim. There were no lights reflected from the rear of the automobile.

An east-bound car being driven by defendant Anderson ran into the parked automobile pushing it against

the plaintiff, causing his injuries. In affirming a direct verdict against the plaintiff for contributory negligence, the Court said:

“True, as argued by plaintiff, it is only in a clear case where from the facts it is plain that reasonable persons can draw only one conclusion that the question of contributory negligence becomes one of law. But, wide as is the latitude for jury consideration, there remains upon trial judges and this court the duty to keep their conclusions within the limits of reason. Those limits are fixed, not by what any one mind does conclude, but by what reasonable minds, functioning without bias, may conclude. In each such case the question presented is whether there is any reasonable ground for absolving the plaintiff from negligence.

“We assume that defendant Anderson was negligent. It is obvious that defendant Kennedy was grossly so. With opportunity to get off the road for a tire change, it is bad enough, the conduct utterly inexcusable both as discourtesy and negligence, to obstruct a highway in the daytime as Kennedy obstructed the road on this occasion. Where darkness, wet pavement, and the absence of taillight or other signal to warn approaching traffic are also factors, it so clearly amounts to gross negligence as to defy further attempts at polite characterization. Plaintiff, not lacking in discernment or other mental capabilities, without protest, actively participated in Kennedy’s conduct. Moreover, he put himself within a foot or so of the center line of the pavement, standing or ‘Squatting,’ with the rays of the flash-light turned downward, ignoring or deliberately risking the danger of his situation and that to other cars com-

ing from the west. *What, if anything, plaintiff and his companions could have done to make the risk greater or more obvious has not been suggested. True, plaintiff was charged with the duty to exercise only due care. But that means a degree of care commensurate with the danger. So, where one actively participates, as plaintiff did, in creating an obvious danger, he cannot escape being charged with contributory negligence as matter of law.*" (Italics added.)

In that case as in the present case the plaintiff attempted to shift the responsibility to the defendant by claiming that he was entitled to assume that other persons approaching would exercise due care. In commenting upon this argument, the Court further stated:

"That rule has no application where it is plain, as it should have been to plaintiff, that even the exercise of great care by others may not prevent injury. It is not due care to depend upon the exercise of another when such reliance is accompanied by obvious danger. *Heath v. Wolesky*, 181 Minn. 492, 233 N. W. 239. It would be difficult for fancy to suppose circumstances making more clearly unreasonable dependence upon careful conduct of others than those of this case, which plaintiff helped to create."

The only distinguishing characteristic in that case was that it was raining slightly and there was poor visibility. On the other hand, we do not have the factors there present as in the instant case of knowledge on the part of the injured party that an automobile was approaching.

In the case of *Haase v. Willers Truck Service*, (S. D.) 34 N. W. 2d 313, the plaintiff appealed from a judgment directed in favor of the defendants. The collision in that case which caused the death of the decedent occurred on U. S. Highway 77, about 2½ miles northwest of Jefferson, South Dakota. The pavement was 20 feet wide with shoulders of approximately 8 feet on each side and then a 6 foot or 7 foot slope to a ditch which was filled with snow. The road was slippery due to ice and snow accumulation. The decedent was called to the scene of the accident with a wrecker to help remove an automobile from the ditch. The wrecker truck was parked diagonally across a portion of the roadway with the front end extending on to the pavement two feet or three feet and in such a position so as to block off the lights of the Sheriff's car from approaching traffic from the west. As in the present case "the head lights of the tow truck cast their rays at an angle with the highway and slightly up." Decedent got out of the tow truck and attempted to place chains on the right rear wheel when the defendant driver operating a truck eastwardly along the highway failed to see the parked wrecker truck until he was approximately one hundred feet or less from it. Defendant's truck struck the wrecker a glancing blow forcing it over the body of decedent, resulting in his death.

In discussing the facts of the case, the Court stated:

"A seeming contempt for a peril with which he was thoroughly familiar was a contributing cause of the death of the decedent. He took an unnecessary risk. He placed his truck so that it

obstructed a portion of the 20-foot ribbon of pavement. No reason is or can be suggested which justified him in failing to remove his truck at least to the 8-foot shoulder while he was putting on his chains. In so doing he failed to conform to the statutory standard of conduct prescribed by SDC 44.0324. *Duncan v. Madrid*, 44 N.M. 249, 101 P.2d 382; *Kassela v. Hoseth*, 217 Wis. 115, 258 N.W. 340; *Huston v. Robinson*, 144 Neb. 553, 13 N.W. 2d 885. He knew the position of his car because he had placed it. He knew that it extended on to the pavement and that it masked the blinker light on the sheriff's car from the right hand, eastbound traffic which his truck obstructed. He knew of the heavy load of trucking and other traffic which traveled that way. The hazard added by the ice was apparent. Because of the ice the most careful driver coming from the west was a source of danger. He knew that no warning flares or guard had been placed to the west. He must have known that positioned as he was, the sheriff offered him little protection. In the face of all of this he crawled under his truck to put a chain on its right wheel. If he had not been under or behind the truck or if it had not extended on to the pavement, decedent would not have been injured." (Italics added.)

See, also, *Russell v. Phillips*, (Colo.) 216 P. 2d 424, where plaintiff filed an action for damages to his automobile resulting when he ran into defendant's parked truck. Defendant filed a counterclaim for personal injuries. The trial court directed a verdict in favor of the plaintiff and against the defendant on defendant's counterclaim from which the defendant appealed. In affirming the judgment the Supreme Court of Colorado stated:

“* * * by defendant’s own testimony, corroborated by all of plaintiff’s witnesses who were present at the time of the accident, and the state patrolman, defendant violated the laws of the state of Colorado as provided by the statutes thereof, admittedly was guilty of negligence which was the proximate cause of his injuries, and therefore, barred his recovery of damages for injuries sustained.

“There being no evidence whatever to support defendant’s counterclaim, and the burden of proving the same by a preponderance of evidence being on him, the trial court was right in directing a verdict in favor of the plaintiff thereon.”

In the case of *Greisen v. Robbins*, (Wash.) 216 P. 2d 210, the Washington Supreme Court in determining that a person, parking a car so as to leave a portion thereof extending out onto the hard surface of the highway, was guilty of contributory negligence “as a matter of law, by reason of his positive violation” of the law, gave the following reasoning:

“The duty of care, imposed by the statute, is for the benefit of all users of the highway. Proof of a user’s negligence, if it is one of the proximate causes of the injury, will, of course, defeat his own recovery, but that is not to say that the violation of the statutes is thereby excused or that the respondent owed to the appellant no duty to obey the statutes because of his intoxication.

“The cited statutes are general in nature, and will not bear a construction which would strike from their purview the applicability of the duty of care in parking therein imposed as to all negligent persons as a class or to intoxicated persons in particular.

“The negligence of others may not be converted from a shield into a sword.

“Accordingly, we hold that the respondent was guilty of contributory negligence, as a matter of law, and that the trial court erred in not granting the motions to dismiss and for judgment n.o.v.

“The respondent had parked his car at the place of the accident at six o'clock in the evening, at the entrance of a private driveway. His negligence must be presumed to have continued until the time of the collision, in the absence of a showing that he could not have removed it from the pavement. He was not in such an inextricable position as to be able to invoke the doctrine of last clear chance. *Chadwick v. Ek*, 1 Wash. 2d 117, 95 P.2d 398; *Coins v. Washington Motor Coach Co.*, *supra*.”

Applying the principles of law set forth in the above cases to the facts of the instant case, we submit the following:

(1) Plaintiff was not required by any emergency to stop his truck upon the highway. This was done for his own convenience and in spite of his knowledge that by so doing he was “taking a big chance” and “creating a dangerous situation on that highway.” (R. 139)

(2) The truck was parked so that the rear extended to the south beyond the hard surface, and the front to the north within a foot of the center line, the headlights facing just a little west of north. (R. 106, 107) The hard surface of the road was slightly rounded so that the rear of the truck would be lower than the front, causing the beam from the headlights to be projected upward and

making it impossible for one approaching to see the truck upon the highway. While several witnesses testified that after the collision they were able to see a light at the scene of the accident from some distance away, none of them was able to identify the source of the light until just before reaching the culvert.

(3) No flares or other warning devices were put out to warn approaching traffic of the obstruction on the highway.

(4) Although plaintiff knew that he was stopping on a through highway (the only one leading from Laketown to Garden City and cities further north in Idaho) he failed to leave sufficient room for cars to pass; failed to keep the motor running on the truck although he claimed he was only going to be stopped for four or five minutes; (R. 139) and failed to keep a lookout for approaching vehicles and therefore saw no one until he heard defendant's truck approaching. (R. 110) At that time the approaching truck was straight west about 1/2 mile (R. 135), coming toward the plaintiff.

III

PLAINTIFF'S CONDUCT IN PROCEEDING WESTWARDLY ON THE NORTH HALF OF THE PAVED HIGHWAY PROXIMATELY CONTRIBUTED TO THE ACCIDENT

In connection with the foregoing point, respondent has cited the case of *Roach v. Kyremes*, Utah, (1949) 211 P. 2d 181, and *Chatelain v. Thackery*, 98 Utah 525, 100 P. 2d 191. In each of those cases the injured person was not walking on the hard-surfaced portion of the highway but was walking on the shoulder so that the facts are dis-

tinguishable from those present in the instant matter.

In the *Thackery* Case the court pointed out that there was a conflict in the evidence as to the position of the Chatelains at the moment of impact, Mr. Chatelain testifying that he and his wife were "at a point about three feet east of the hard-surfaced part of the highway on the gravelled shoulder thereof."

In holding that the matter was one for the jury, the court stated:

"As appears from the rather detailed statement of facts given at the beginning of this opinion, the evidence bearing upon that matter was in conflict, both as to matters of direct testimony and inferences to be drawn from facts and circumstances in evidence. Under such circumstances the trial court properly submitted the question of contributory negligence to the jury."

The same situation existed in the *Roach* Case where the plaintiff and another witness both testified that they were walking on the shoulder on the west side of the street looking behind them for approaching traffic. In the instant case the testimony of the plaintiff is that upon alighting from his truck, he proceeded over to the north half of the paved part of the highway and ran toward the west in the direction from which defendant was approaching. (R. 112)

In response to questions asked by his own counsel, plaintiff testified: (R. 119, 120)

"Q. And then you ran down the highway for a distance of from 100 to 140 feet in the direction which the vehicle was traveling, is that correct?

A. The opposite direction.

Q. Well, I mean toward the vehicle?

A. Yes sir.

Q. And during all of that time were you observing the vehicle?

A. Yes sir.

Q. And you had an occasion to observe the manner in which the vehicle was closing the gap between you and it, is that correct?

A. Yes sir."

As to his position on the hard surface he testified:
(R. 112)

"Q. And what was your position on the highway with reference to the highway at the time when those brakes screeched and you say that is the last remembrance you have?

A. Well, I was right over against the north edge of the oil."

On cross-examination he further testified as follows:
(R. 148)

"Q. Well, you don't know whether you got out of that truck and ran over to the extreme right side and then down the highway or whether you went diagonally across, or otherwise, do you?

A. Well, I just think I went on that side, yes sir.

Q. Well, I don't ask you about what you think. I ask you what your memory is.

A. That is my recollection; that I ran across the road and down.

Q. But you never did get off the paved portion of the highway, did you?

A. I wouldn't know.

Q. What is that?

A. I wouldn't know.

Q. Now when you ran down there he was on the south side of the highway, wasn't he?

A. I presume he was.

Q. Mr. Early, do you remember after I questioned you that day, I think that was in the Federal Building, that Mr. Strong asked you some questions about your course down the highway and here is his examination; by Mr. Strong. This is on page 37. Question, and this is by Mr. Strong: 'I have got one question I want to ask you. At the time when you were struck by the car what was your position on the highway with reference to the paved portion of the road and the north shoulder? Where were you on the road?' And the answer: 'Well, I was over—' and then you hesitated, 'I was as close as I could get to the north side.' Question: 'Of the oiled road?' and your answer: 'Yes sir, and still on the oil.' So you were on the oil when you were hit, weren't you?

A. I wouldn't know that.

Q. Well, you answered Mr. Strong one time that you were?

A. Yes sir."

Not only do we have plaintiff's testimony as to his position on the highway, but we also have the physical

evidence as to the course of travel of defendant's truck from the time the brakes were applied until it came to rest in the slough on the north part of the right-of-way. Roland A. Reese, the State highway patrolman who visited the scene of the accident approximately two days after it happened, testified that he saw two tire marks starting in the middle of the road "straddle" the middle line at a point approximately 114 feet west of the culvert (R. 166, 169). From there the brake marks proceeded in a straight line toward the northeast part of the highway so that by the time they reached the culvert they were entirely off the hard surface and on the graveled shoulder.

Other evidence in the record shows conclusively that plaintiff was on the hard surface, or oiled portion, of the road. In this regard, we call the court's attention to Exhibit, which is the photo of the defendant's truck. This exhibit shows the imprint of plaintiff's body in the grill and hood just off the center line of the vehicle, unmistakably the point of impact. All the evidence is that defendant's truck did not leave the oiled surface of the highway until it was approximately opposite the plaintiff's parked truck.

Plaintiff was not only on the hard surface of the highway, but was necessarily several feet in from the north edge, because he was struck at least two or three feet in from the left front edge of defendant's truck, which in turn was well on the hard surface at the time of impact.

Plaintiff's hat and gloves were found at a point

100 feet west of the culvert, indicating that he must have been at least that far from his truck when he was struck (R. 187, 202-203).

It is apparent from this evidence that the farther west from the truck plaintiff had run before he was struck, the closer to the middle of the hard surface of the highway he must have been. If he had reached a point 100 to 140 feet west of the culvert before he was hit, he was necessarily almost in the middle of the highway. On the other hand if he was approximately 50 feet west of the culvert he would have been near the middle of the north lane. Too, the evidence discloses that the farther one went to the west from the culvert the wider the shoulder became, but that the shoulder was three feet to four feet in width (R. 103). Exhibit 2 indicates the general contour of the hard surface and the extent of the shoulders on either side of the black top.

We, therefore, have the plaintiff running in a westerly direction on the north half of the hard surface, toward the approaching vehicle, after he by his own carelessness had created a dangerous situation with respect to other vehicles attempting to use the roadway. Certainly he is in no better position than a casual pedestrian walking along the roadway on the right side of the road when the statute requires such pedestrian to use the left side of the roadway in order to be aware of approaching traffic.

On this point, in addition to the authorities cited in appellant's brief several other cases have been found

dealing with the question of whether the walking on the hard surface of the highway would, as a matter of law, bar a recovery against the driver of the vehicle colliding with such person.

In the case of *South Hill Motor Company v. Gordon*, 172 Va. 193, 200 S.E. 637, it appeared that plaintiff who was walking on the edge of the hard surface highway was struck by defendant's automobile coming from the opposite direction. In that case plaintiff testified that he saw defendant's automobile approaching when it was four hundred yards distant; that he continued to watch it until it was approximately ten to fifteen steps away, at which time he pulled the brim of his hat down in order to shade his eyes, still watching the approaching automobile and maintaining his position. He further testified that he did not step to the left because he thought the car would clear him.

In reversing a judgment for the plaintiff and directing a verdict to be entered for the defendant, the Court held:

“Under normal conditions, the pedestrian must keep as near as reasonably possible to the extreme left side or edge of the highway, and the operator of a motor vehicle must drive upon his right-hand side of the highway. And when it happens that both of them desire, or require, to use, at the same time, that portion of the highway prescribed for their use, each of them must exercise his respective right to the use with due regard for the right of the other. Neither the pedestrian nor the operator of a vehicle, traveling along the portion of the highway prescribed for

the use of each of them has a 'right of way' thereon over the other, except as expressly provided by statute. The mere right to travel on a specified portion of a highway is not to be confused with a 'right of way' thereon superior to the rights of others also entitled to use the highway. The right to the use is an equal and coordinate right. *Both persons and operators of vehicles are held to the exercise of ordinary care and are bound to respect the rights of each other. And when either observes danger to or from the other, he must exercise ordinary and reasonable care to avoid danger. The duty of each to avoid giving or receiving injury is reciprocal. * * ** The plaintiff can make no stronger case than is shown by his own testimony. He is bound by his account of what he saw and did. His own evidence discloses that he was guilty of contributory negligence as an efficient and proximate cause of the collision. * * * Assuming that the defendant here was negligent in operating his motor vehicle under the conditions recited, he had no knowledge, or anything to put him on notice, that the plaintiff was unable to protect himself. There is no reason for discrediting his testimony, that he was unable to see the plaintiff in time to save him from injury on account of the lights on the approaching cars. There was no time for effective action after the discovery of the peril of the plaintiff. In order to apply the doctrine of last clear chance, the burden was upon the plaintiff to show affirmatively by a preponderance of the evidence that the defendant might have avoided the collision by the use of ordinary care after he discovered, or should have discovered the peril of the plaintiff. The doctrine of the last clear chance, as applying to both parties, has

been so often discussed by us that it is doubtful if anything more of value can be added." (Italics added)

In the above case plaintiff was actually walking on the left side of the highway as required by statute but he failed to move over or get out of the way of the approaching vehicle which he saw at all times. Except for that fact and for the further fact that there was no other obstruction on the highway, the facts in the two cases are very similar. We believe the circumstances in the instant case are much stronger for appellant than those in the *Gordon* case.

In *Flaumers v. Samuels*, 4 Wash. 2d 609, 104 P. 2d 484, the plaintiff sued to recover for personal injuries occasioned when he was struck by an automobile while walking along the left portion of that part of the divided part of the highway reserved for automobiles proceeding in the same direction in which he was traveling. The highway was a six lane highway divided by a strip of gravel in the center. He was pulling a small cart, having one wheel of the cart upon the pavement and one wheel upon the gravel shoulder. Defendant was traveling in the center traffic lane and moved to the left to pass a slower moving vehicle when he was confronted with the cart being pulled by plaintiff. Although defendant attempted to turn to the right he was unable to miss striking plaintiff's cart, throwing it forward against the plaintiff. The case was tried to a jury resulting in a verdict for the plaintiff. On appeal the Supreme Court discussed only the proposition of contributory negligence

of the plaintiff and held, quoting from an earlier case of *Benson v. Anderson*, 129 Wash. 19, 223 P. 163:

“The statutory enactments regulating traffic upon the public highways are made to be obeyed. They are the outgrowth of necessity. On the observance of them depends the safety of the users of such highways. Failure to obey them not only endangers the safety of the person guilty of the disobedience, but it endangers the safety of others using them in a lawful manner. Courts, therefore, should not look lightly upon infractions of these regulations. One injured while in the act of disobedience of them should be compelled to show with clearness that his act in no way contributed to his injury.”

In applying the foregoing principles to the facts in the case before it the Washington Supreme Court held:

“It plainly appears from respondent’s own testimony and from other undisputed facts of the case not only that respondent was guilty of violation of a positive statute, but also that such violation was a substantial factor in producing the injuries. This being so we are compelled to hold, as a matter of law, that respondent was guilty of contributory negligence and cannot recover.”

In *Anderson vs. Holsteen* (Ia.), 26 N.W. 2d 855, the pedestrian was injured while walking on the right side of a gravel highway eighteen inches to two feet from the edge. The defendant, operating an automobile in the same direction approached the point where plaintiff was proceeding. Another pedestrian walking a short distance behind the plaintiff stepped to one side upon hearing defendant’s car, but plaintiff failed to move and was

struck. At the conclusion of plaintiff's evidence, the trial court directed a verdict for the defendant from which the plaintiff appealed. The Supreme Court of Iowa in discussing the case assumed that defendant was negligent in one or more of the particulars charged and considered only the proposition of whether plaintiff was guilty of contributory negligence as a matter of law. In so doing, the court stated:

"Plaintiff urges that the violation of the statute is only prima facie evidence of negligence. Citing *McElhinney v. Knittle*, 199 Iowa 278, 201 N.W. 587; *Lang v. Siddall*, 218 Iowa 263, 254 N.W. 783. In this case, under the facts, there is little difference between negligence per se in violation of a statute and prima facie evidence of negligence. On a showing of violation of the statute, as in this case, the burden is upon the plaintiff to justify such violation. "The effect of the statute and the ordinance is to lay the burden of justification upon the man who was on the wrong side of the street." *Herdman, Adm'r, v. Zwart*, 167 Iowa 500, 149 N.W. 631, 632."

See also *Herzberg vs. White* (Ariz.), 66 P. (2d) 253, in which we believe the principle is very similar to the case here before the court.

The pertinent facts of that case are that the defendant had received a puncture while proceeding on the highway in the State of Arizona, had pulled over to the right of the traveled portion of the highway, which was 36 feet wide and consisted of four traveling lanes, but left his automobile from 3 to 8 feet on to the right most lane of the highway. The defendant had then proceeded

to repair the left rear tire which had become punctured and the deceased, for whom the suit was brought, stood in the next lane of traffic and held a flashlight for the defendant. Another automobile proceeding along the same highway struck both the deceased and the defendant. Since the identity of this automobile was never determined, the suit was brought for the wrongful death of the person holding the flashlight against the defendant, who was the operator of the parked vehicle.

The court held as a matter of law that the defendant was guilty of negligence in parking his car upon the traveled portion of the highway without lights and also held that a finding that this negligent conduct was a proximate cause of the death of the plaintiff's intestate, who was holding the flashlight, was justified.

Because of a constitutional provision requiring the jury to pass upon the defense of contributory negligence and making it a question of fact in all cases, the court could not rule on contributory negligence but nevertheless the court further held that if such conduct was found by a jury to be negligent that such conduct was necessarily a proximate cause of the deceased's death and stated its conclusion as follows:

“We come then to the other defense urged by defendant which is, in substance, that his negligence was not the proximate cause of the accident. It is the law that where an injury is produced by an intervening and superseding cause, even though the original negligence may have been a substantial factor in bringing about the injury, the original actor is not legally responsible therefor.

“Any reasonable person must be held to have known and anticipated, therefore, that cars might pass on the pavement where defendant had parked his car almost momentarily. Under such circumstances, the parking of the car partially on the paved portion of the highway after dark, with the lights out, created a situation of such danger that an ordinarily prudent man should have anticipated that persons standing on the pavement to the left of the car might be struck at any time by a passing automobile. It thus appears that the active intervening cause, being of such a nature that it could or should have been reasonably anticipated by defendant, was not a superseding cause.”

It is to be noted that in the instant case before this court the activities of plaintiff are identical with the conduct of both the defendant and the plaintiff's intestate and in principle it can be seen that the act of parking the car without lights on the highway is a contributing cause to an injury to a person standing in the lane to the left of the parked car, and similarly the act of standing in the lane next to the car so parked is a contributing cause to any injuries received by such person. We submit, therefore, in the instant case, that both the acts of negligence of the plaintiff, that is the parking without lights upon the traveled portion of the highway and proceeding down the other traveled lane of the highway, as a matter of law, contributed proximately to his injuries.

See also *Standridge v. Godsey*, 187 Tenn. 522, 226 S.W. 2d 277; *Henry v. Hallquist*, 226 Minn. 39, 31 N.W.

2d 641; *Wells v. Burton Lines, Inc.*, 228 N.C. 422, 45 S.E. 2d 569; *Saunders v. Temple*, 154 Va. 714, 153 S.E. 691; *Steen v. Hedstrom*, 189 Wash. 75, 63 P. 2d 507.

CONCLUSION

In conclusion we again call attention of the Court to the fact that the plaintiff in this case acted in violation of several laws designed for his own safety and protection. He set the stage for the things which were later to happen. He did it knowingly and with his eyes open. Conscious of this dangerous situation, when he heard the defendant's truck approaching, he lost his head and thereby nearly lost his life. Being the primary factor and moving force in the entire chain of circumstances, he should not now be allowed to recover from the other participant who, of the two, had the less opportunity to avoid the accident.

Respectfully submitted,

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