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Henry Early v. Karl L. Jackson : Brief of Appellant

Utah Supreme Court

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Edgar C. Jensen; Robert A. Burns; Robert John Jensen; Attorneys for Appellant;

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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 BRIEF

FILED
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Clerk, Supreme Court, Utah

Appeal from the District Court of Salt Lake County,
Utah, Ray Van Cott, Jr. *Judge.*

EDGAR C. JENSEN
ROBERT A. BURNS
ROBERT JOHN JENSEN

Attorneys for Appellant.

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STATEMENT OF THE CASE

This is an appeal from a judgment entered June 13, 1951, (R. 6) in the District Court of Salt Lake County, Utah. Motion for a judgment notwithstanding the verdict was filed June 20, 1951, (R. 8) and denied June 22, 1951 (R. 9-10). Notice of appeal was filed July 18, 1951 (R. 11). The appeal is from the judgment

and the denial of the motion for judgment notwithstanding the verdict. The judgment was against defendant Carl L. Jackson alone as the other defendant was never served nor appeared. Consequently Carl L. Jackson is the only appellant. The case was one for damages arising out of a highway accident near Laketown, Utah, April 3, 1950. The pleas of the parties (R. 1 and 4) were by way of negligence and contributory negligence and by this appeal the only question raised is the sufficiency of the evidence to support the verdict and judgment.

THE FACTS

No attempt will be made here to review the testimony of the medical witnesses as the appellant concedes it, together with other evidence in the record of damage and injury, is amply sufficient to support the amount of the verdict. So we proceed to the facts as we consider them material in view of the question raised by this appeal.

The plaintiff testified he was employed at Laketown, Utah, by one Parnell Johnson, as a butcher and truck driver (R. 96). On April 3, 1950 at about 7:00 or 7:30 when it was dark the accident complained about took place (R. 85). The weather was clear, it had rained that afternoon and the highway was damp. The highway was state highway 3, which runs generally east and west. The highway was about 20 feet wide, had a hard

surface and near the point of the accident a creek crosses under it in a culvert from south to north (R. 99). West of the culvert the highway is straight and level for approximately half a mile (R. 100). Shoulders of three or four feet are on either side of the highway (R. 101). Guard posts were in place on either side of the highway near the culvert on the shoulders (R. 103). From the edge of the highway is quite a steep slope leading down to the creek (R. 104).

On April 3, 1950, plaintiff drove a truck along this highway. He had a load of offal from his employer's slaughter house in the bed of the truck and intended to dump that offal into the creek (R. 105). He parked his truck by backing the same so the rear was over the culvert, his rear wheels two or three feet off the oil. The car pointed in the northeasterly direction and the front of the vehicle was about a foot from the center of the highway (R. 106). After so parking he got out of the cab and into the rear of the truck and started to unload (R. 107). He heard a car approaching and looked up and saw lights approaching from the west (R. 109-11). He got back in the cab, attempted to start the truck, but it wouldn't start and then he got out of the cab and ran down the north side of the highway waving his arm (R. 111). He had left the lights burning on the headlight beams. He thought he was 100 or 140 feet west of the culvert when he heard the brakes screech.

At that time he was at the north edge of the oil. The next thing he knew he waked up in the hospital (R. 113). The rest of his direct examination has to do with his injuries and damages and we do not review it.

On cross examination he stated he had loaded the truck at Laketown with offal from animals slaughtered that day (R. 124); that highway is a through stop highway (R. 125-6); that he had been over the highway many times and the highway led from Garden City to Montpelier, Idaho (R. 123-4). He identified exhibit 1, a photograph, as a picture of the same type of truck with the same type of body as the one he drove that night. Exhibit 2 was also identified by the witness as a picture with the camera pointed east and showing the highway from a point west of the culvert and beyond the culvert (R. 129). The posts shown in the picture are the guard posts he spoke about on direct (R. 130). He parked his truck with the back end to the south and the front toward the north with front nearly to the middle of the highway (R. 131). He used a shovel to push the offal off the truck into the creek. He had turned the motor off but left the headlights on. He had gotten out the driver's side, on the left, to get into the bed of the truck (the side toward the west and the side from which the automobile approached (R. 133). At the point where the creek crosses, and at the point where he parked his truck, there was a six foot drop to the creek (R. 137). He then testified:

Q. Mr. Earley, the manner in which you parked your truck there that night effectively blocked the eastbound lane on that highway, didn't it?

A. The south lane, yes sir.

Q. And anybody who was using that highway, in order to get around you, had to get over on the north side of the highway, on the westbound lane? Did he not?

A. Yes sir.

Q. So you had parked your car entirely across a main lane of traffic on that highway, had you not?

A. Yes sir.

Q. Now you didn't put any flares out on either side of your truck, did you?

A. No sir.

Q. You knew you were taking a big chance when you parked a vehicle in that fashion, didn't you?

A. Yes sir.

Q. And you knew that you were creating a dangerous situation on that highway, didn't you?

A. Yes sir.

Q. How long did you anticipate that it would take you to unload your vehicle?

A. Oh, I would say four or five minutes.

He testified as he was shoveling his back was toward the west (the direction from which the car approached) (R. 139) that he heard the noise and saw the approaching headlights he jumped out of the back of the truck to the ground and then got in the cab behind the wheel and attempted to start the car (R. 140). All this time he kept an eye to his left and saw the car approaching and then he testified he had to do something else (R. 143) and so he got out of the car and started running down the highway waving his arms (R. 144). He testified:

Q. Now Mr. Earley, you knew that this car, in order to get around your car, would have to get over on the north half of the highway, didn't you?

A. Yes sir.

Q. You knew that and appreciated it at the time, didn't you?

A. Yes sir.

Q. And yet knowing all that in your attempts to extricate yourself from this predicament you had put yourself in you went down the north half of that highway? Isn't that right?

A. Yes sir.

Q. Right in the face of that oncoming automobile, isn't that correct?

A. Yes sir.

Q. Knowing full well that that man could not proceed except by getting over in that lane? You knew that, too didn't you?

A. I knew that man could stop if he would.

Q. You knew, too, that he could not proceed except by getting over into that lane, didn't you?

A. Yes sir. Yes sir.

Q. So you had blocked half of the highway with your car, hadn't you?

A. Yes sir.

Q. And now you blocked the other half with yourself, didn't you?

A. I would't say that, no sir.

Q. You wouldn't say that? Well, you were in the other half of the highway, running down there pell mell, weren't you?

A. Yes sir.

Q. Waving your arms?

A. Yes sir.

Q. You knew the highway was twenty feet wide; or thereabouts?

(No answer appears.)

Q. Did you think at the time the man was doing seventy miles an hour?

A. I did, sir.

Q. And yet you expected him to stop?

A. Well, he could have done, I think.

Q. You expected him to stop?

A. Yes sir.

Q. You did? At seventy miles an hour?

A. Yes sir.

Q. And you got down 150 feet from where this car was that you had parked.

A. He could've seen my car.

Q. I didn't ask that. You got down 150 feet from where this car was parked?

A. Approximately.

Q. You had to give him some room to stop in, didn't you?

A. Yes sir.

Q. And you knew very well that in attempting to stop of course he would turn to the left so that if he didn't stop he would at least avoid the parked truck? You knew that, didn't you?

A. No sir, I didn't.

Q. You didn't know?

A. Of anything at the time.

Q. You thought he would go, just go along straight and stop a couple of inches from your truck? Is that what you thought?

A. I was in hopes he would.

Q. He showed no perceptible slowing down, did he?

A. No.

Q. As far as you observed?

A. No sir.

Q. And yet you expected him to stop?

A. I was in hopes of it.

Q. Yes, you were in hopes of it. Why didn't you get entirely off of the highway?

A. You couldn't very handy right there.

Q. You could have moved over to the left, couldn't you, your left, the south side of this highway?

A. I could, yes sir.

Q. As a matter of fact, if you had gone down on the south side of the highway on your left this vehicle never would have struck you, would it?

A. It might not have, I didn't know that.
(R. 147)

He said he was on the oiled highway at all times as he ran to the west toward the approaching car (R. 127) and that at the time he was hit he could have been as close as 50 feet from his parked truck. (R. 50)

Roland Reese testified that he was a state highway patrolman, that he visited the scene of the accident the next day (R. 160). He made some observations at the scene of the accident. He stated the guard posts near the culvert were right near the hard surface portion of the highway; that the highway was 21 feet wide; that the guard posts were about the width of the highway apart (R. 162-3). He stated he found tire tracks 114 feet 6 inches long on the paved portion of the road

going in a diagonal course over to the left side of the highway facing east; that they then went off the paved portion and for 30 feet they continued on the dirt shoulder until they went off the road entirely down the embankment into the creek; that the tire marks off the paved portion showed the car was skidding sideways (R. 166) and that those appeared right over the culvert (R. 167).

He stated at the point the tire tracks first appeared south of the culvert they were astraddle the center of the highway (R. 169). He stated he visited the scene on April 6th, three days after the accident. He further stated the marks on the highway indicated a tire sliding on the road (R. 174).

Several witnesses testified about arriving at the scene of the accident. Muder's automobile (which had struck plaintiff) was north of the highway down over the embankment and somewhat east of the place where plaintiff's truck was still parked on the highway (R. 179). Plaintiff had been knocked into the creek and was brought out by the witness Willis (R. 177). Muder told one of these witnesses he was driving awful fast and he hit Earley awful hard. Some more conversations are detailed at (R. 184 and 185).

One witness stated he drove a car past the parked truck without getting off the highway (R. 184). He stated the Muder car was off the road about 25 feet east

of the highway and in the slough facing the highway (R. 198). He observed tracks on the highway starting about 100 feet west of the culvert and continuing east (R. 202) and to the north until they came opposite to a point where the pickup truck was parked by Earley, where the tracks indicated the rear end of the Muder vehicle had swung around on the shoulder and then down into the slough east of the creek (R. 203).

It was agreed the Johnson truck was driven by plaintiff was 15 $\frac{1}{4}$ feet front bumper to the rear of the bed of the truck and from the front bumper to the farthest portion of the rear tire was 13 $\frac{1}{4}$ feet (R. 215).

The sheriff of the county testified he visited the scene the day following the accident; that he noticed tire marks in the highway commencing in the south (or east-bound lane); that they traveled about 10 feet in the south or east bound lane; that they continued to the northeast; that they got off the oiled road 130 feet from where they started to turn out of the south lane and that it was 144 feet 6 inches from where the marks started to the point where the Muder car came to rest north of the highway and in the slough (R. 219, et seq).

The sheriff identified Exhibit 3, being a picture of the Muder truck as it appeared when he saw it the morning following the accident (R. 226).

Elijah Willis (R. 227) testified about leaving home and going over to the highway and seeing the accident happen. It was he who found plaintiff in the water in the stream and it was he who got Earley out of the stream and up to the highway.

He picked up Earley's hat and gloves on the edge of the oiled road at a guard rail post 45 feet from where he picked Earley up out of the creek (R. 233).

Muder (R. 248) testified on the day in question he was 24 years old; that he was employed by the defendant as a salesman; that he was in the process of driving in his employer's automobile from his residence on Bear Lake to Laketown on some business of his employer when the accident occurred (R. 251). He had been over this highway many times before, having worked in the neighborhood for sometime (R. 252).

He stated after he passed the curve about one-half mile west of the culvert where Big Creek passes under the highway, he was traveling around 45 miles per hour; maybe a little more. His headlights were on high beam (R. 233-4). After he got on the straight away he noticed some headlights facing him up at Laketown. (This was beyond the culvert in the direction he was traveling). As he proceeded along he noticed a small light; and when he saw that he started to brake down. Then he saw the truck across the highway and he could tell his lane

was blocked. He turned left into the north lane, slowing down and got to a point where he was certain he could get past the truck when the man moved up in his headlights with his hands over his head running toward him (R. 255). When he saw the man in front of him he hit his brakes hard and he might have cut back to avoid the man; his truck went into a skid and he slid down the embankment on the east side of the creek (R. 256). When he came to rest he was about 6 feet below the level of the road (R. 257). From the time he saw the light and the truck his attention was directed on it and he kept his eyes on it (R. 257). He estimated he was 30 to 40 feet from the truck when the truck struck Earley and after striking Earley the truck went into a skid and down the embankment. It did not tip over. He got out of the truck and saw a man standing over across the stream (the witness Willis) and got there just as Earley was being pulled out of the stream (R. 258). He stated the highway was damp as he approached the creek and there was mist rising from the creek (R. 261) but this latter statement is contrary to the other witnesses.

Exhibit 3 was identified as a picture of his truck after the accident and he stated the dent shown in the front of the truck was caused when Muder was struck (R. 262). At the time of the collision no part of his vehicle was to the left of the oiled portion of the highway.

His cross examination was essentially the same. He stated visibility was good (R. 265); that he had no particular memory of having looked at the speedmeter but he gauged his speed by reason of his experience with the vehicle and how it operated (R. 266-7). He stated he was blinded by no lights. When asked he testified he was 200 or 300 feet from the culvert when he first saw the low light (the headlight on the parked truck) (R. 268) which light appeared to be in the center of the highway; that he then applied his brakes (R. 269); that in his judgment he was going 25 miles per hour when he saw Earley in front of him; that he traveled probably fifty feet from the time he first noticed the low light (R. 270) until he recognized the truck across his lane; that he got the impression the car was pointed north and east; that he then applied his brakes a little more; that the parked vehicle appeared to be up to the center line of the highway (R. 271); that Earley was from 30 to 50 feet from the parked truck when he got hit; that when he first saw Earley, Earley appeared to be in the center of the road (R. 272); that Earley was 15 or 20 feet in front of him (R. 277); that he hit Earley with such force as to damage the grille and the front portion of the hood and he knocked or carried him into the creek (R. 278).

Muder further testified (and this was the only positive evidence one way or another) that the truck driven by Early had no side lights nor reflectors on the sides (R. 283).

At the close of the evidence defendant moved for a directed verdict (R. 285) and renewed that motion by motion for judgment notwithstanding the verdict (R. 8). Both motions were denied and this appeal followed.

POINTS.

The facts in this case show the plaintiff to be guilty of contributory negligence as a matter of law, and he cannot recover.

ARGUMENT.

The plaintiff parked his automobile in the night-time crosswise of the highway. At the point where he parked his car a stream crossed the highway from south to north, and there was a six foot embankment down to the bed of the stream. He parked his car, not by stopping parallel on the highway, but by backing around so that his vehicle was almost squarely across the eastbound or south portion of the highway and pointed slightly east of north. The rear of the vehicle was at the edge of the south shoulder and the front edge of the vehicle was but inches from the center of the highway. The hard surfaced portion of this highway was 21 feet wide, and for some distance on either side of where this plaintiff parked his truck guard posts were erected

alongside the edge of the hard surfaced road, so that the shoulders were beyond the guard posts, narrowing the highway for vehicular traffic to 21 feet as the shoulders could not be used.

The headlights were pointed slightly east of north and the rear end of the vehicle was hanging out over the edge of the highway toward the south. The headlights were across the highway with nothing to intersect them or reflect them onto the highway and the tail light was shining off to the south. The side of this vehicle was facing the direction from which defendant's automobile approached, and no flares, side-lights nor reflectors were on the vehicle nor placed in the vicinity. The parking of this vehicle in this fashion was entirely for the convenience of the plaintiff. His only purpose in so parking was so he could more conveniently unload his vehicle into the bed of the stream.

In thus parking his vehicle the plaintiff offended against Section 57-7-165, Utah Code, reading:

“Upon any highway outside of a business or residence district no person shall stop, park or leave standing any vehicle, whether attended or unattended, upon the paved or main traveled part of the highway when it is practical to stop, park or so leave such vehicle off such part of said highway, but in every event an unobstructed width of the highway opposite a standing vehicle

shall be left for the free passage of other vehicles and a clear view of such stopped vehicle shall be available from a distance of 200 feet in each direction upon such highway.”

The Supreme Court of Nebraska, in *Huston v. Robinson* (1944), 13 N.W. (2) 885 had this to say about a statute similar to the above quoted section:

“On the other hand, there is danger of being struck from the rear when one stops his car because of poor visibility on a highly traveled highway. The law imposes certain requirements upon a driver in thus blocking the highway. The purpose of the statute hereinbefore quoted is to keep the highway free from obstructions by standing vehicles. The requirement in that respect is positive unless circumstances exist which make moving of the vehicle off the paved, improved or main traveled portion of the highway impracticable.”

The California Supreme Court in *Thomson v. Bayless* (1944), 150 Pacific (2) 413 in construing and applying a section of the California motor vehicle code exactly similar to Section 57-7-165, states:

“A violation of this section, designed to protect persons traveling on the highway, constitutes negligence by the operator of the vehicle. * * * The evidence shows the truck and trailer were parked ‘outside of a business or residence district * * * upon the paved or improved or main traveled portion of the highway’ within the meaning of section 582, and

defendants do not dispute this fact. It follows, therefore, insofar as defendants' negligence is concerned, the only question to be determined is whether or not it was 'practicable' for Bayless to park off the highway.

"Although it may be inconsistent with general rules of statutory construction, * * * the courts in this state have uniformly held for the past 12 years that a prima facie case of negligence is established under section 582 by proof that the vehicle was left on the paved portion of the highway outside of a business or residential district and that the burden to show that it was not practicable to drive off the main traveled portion of the highway rests upon the operator of such vehicle."

Paragraph (13) of Section 57-7-167 prohibits the stopping, standing or parking of a vehicle upon any bridge or other elevated structure. This plaintiff parked his car on the portion of the highway where it was narrowest, where there was a steep embankment six feet or more in height from the level of the highway to the stream, and he had parked it immediately on top of the culvert or opening under the highway through which the stream flowed. Add to this the guard posts erected and in place along the highway at that point and one has the highway passing over a stream on the equivalent of a bridge.

In addition to the plaintiff's negligence in the way he parked his car as shown above, the record

shows that he took no steps whatever to warn any on-coming traffic of the presence of his truck on the traveled portion of the highway.

Section 57-7-191, Utah Code, requires, when there is insufficient light to reveal any person or object within a distance of 500 feet upon such highway, a vehicle parked or stopped shall be equipped with one or more lamps "which shall exhibit a white light on the roadway side visible from a distance of 500 feet to the front of such vehicle and a red light visible from a distance of 500 feet to the rear."

At the time of this accident there was insufficient light to reveal a person or object 500 feet down the highway. The proof was it was nighttime and totally dark, and the defendant, taking the worst of the evidence against him, did not observe the truck until he was about 250 feet away from it. The headlights on plaintiff's vehicle as it was parked constituted no warning of any kind and were not "on the roadway side", as the headlights were pointed away from the approaching automobile. The place where the truck was parked was six feet or more above the level of the surrounding land, and there were no trees or other obstructions off the side of the road which would reflect the headlights of the parked vehicle (exhibit 2). No red lights were showing to the rear

at all. The evidence is uncontroverted there were no reflectors on the side of plaintiff's truck. Clearly the plaintiff violated the provisions of the above statute.

The court's attention is further called to the provisions of 57-7-212 and 57-7-213, which show a clear legislative intent that people operating trucks should give a maximum warning to other users of the highway in the event they are compelled to stop on the highway or the shoulder of the highway in the nighttime. These statutes require the carrying and, in the event of being disabled, exhibiting of flares, lanterns or reflectors at stated distances in front of and behind a truck stopped upon the highway or shoulder thereof.

It is submitted that when such duties are put upon innocent operators of trucks whose trucks break down at times and places beyond their control that similar warning devices or some precautions or warnings must be made by plaintiff under the circumstances of his parking as shown in this case. Here the plaintiff had full control of the situation. He could select the spot at which he wished to stop, he knew how long he would obstruct the highway and he appreciated at the time that he was creating a dangerous situation and a hazard to himself and others on the highway. Notwithstanding all this the defendant did nothing to warn other traffic.

All these statutes which deal with the manner and time a person may park a truck upon the highway point to the fact that the law regards parking and stopping of trucks on rural highways, especially at nighttime, as creating a hazardous situation. Highways are meant for travel purposes, not for the parking of vehicles or for the unloading of them, particularly at nighttime. It was a highly dangerous and negligent situation which plaintiff set up that night. It was fraught with danger to himself and all others using that highway.

Situations where trucks or automobiles have been parked upon the traveled portion of the highway, or even on the shoulders, and where it is night time, have come before the courts on many occasions and they have uniformly held that the failure to have the vehicle properly lighted or to put out flares is negligence per se. In the case of *Newton vs. Pacific Highway Transport Co.*, 139 Pac. (2) 725 (Wash. 1943), where there was a fact dispute as to whether or not the truck occupied the traveled portion of the highway, the court said that if the jury reconciled this conflict against the truck driver, that such parking would be negligence per se. We quote:

“As to the depth it so extended, the evidence is in conflict. It encroached at least to the middle of the south lane, and there is evidence from which the jury could find that it extended to within two feet of the center line of the pavement. Intending to remain there

but a few moments, the driver did not put out flares. Conceding that it was not possible to park in any other manner, the omission to put out flares, since it was dark, was of itself a violation of the statutes, and, therefore, negligence per se.”

A similar decision was reached in *Duncan vs. Madrid*, 101 Pac. (2) 382 (N. Mex. 1940) and in *Barone, et al vs. Jones, et al*, 177 Pac. (2) 30 (Cal. 1947).

Failure to have lights showing on the car parked, stopped but not disabled, is held to be a violation of a statute similar to Utah's and therefore negligence. *Hall, et ux vs. Associated Oil Co., et al*, 65 Pac. (2) 954. *Paulsen, et al vs. Spencer*, 177 Pac. (2) 597, and in *Hine vs. Leppard*, 42 Pac. (2) 389, the court stated as follows:

“The California Vehicle Act (Deering's Gen. Laws (1931 Ed.) Act 5128, sec 106) required the truck to ‘carry at the rear a lighted lamp exhibiting a red light plainly visible under normal atmospheric conditions for a distance of five hundred feet toward the rear. * * *’ Had the truck displayed such a light, the plaintiff might have seen it in time to have avoided the collision. It was not necessary for him to have stopped. Had he seen the truck in time, he could have gone around it.”

In *Ashley vs. Safeway, Inc.*, 47 Pac. (2) 53, the court stated:

“The evidence discloses that the truck was partly upon the gravel shoulder and partly upon the paved or oiled portion of the road, so that a car approaching from its rear and upon that side of the road would have to turn out toward the center of the road in order to pass safely around it. There were no lights burning on the truck either front or back. * * * *”

“There is no merit in the contention that any negligence on the part of Ballard had expended itself prior to the accident. His negligence in allowing the unlighted truck to stand upon the highway in the dark continued as long as he left it standing there in that manner. It is true, as defendant points out, that, while motion is the law of the road, Kitt was not entitled to assume that the highway would be at all times unobstructed in the line of his travel. *Morton v. Mooney*, 97 Mont. 1, 33 P. (2d) 262. Kitt was entitled to assume that a truck standing upon the highway at night would display lights both upon the front and rear thereof. Section 1753, Rev. Codes Mont. 1921, provides in part as follows: ‘During the period between one hour after sunset and one hour before sunrise, every motor vehicle * * * shall display two white lights in front * * * and one light in the rear.’ A violation of this statute constitutes negligence. *Simpson v. Miller*, 97 Mont. 328, 34 P. (2d) 528.”

In *Greisen vs. Robins, et ux*, 216 Pac. (2) 210 (Wash. 1950), where a statute similar to the Utah statute was construed, the court stated the case as follows:

“The respondent parked his car, on the night of September 18, 1948, outside the city limits of Seattle, so that it extended two feet onto the traveled, hard-surfaced portion of the highway. At this point, the pavement was twenty-one feet wide with four and one-half foot shoulders on each side. The automobile was unlighted. This was negligence per se, being in violation of Rem. Rev. Stat., Vol. 7A, Sec. 6360-110, P.P.C. Sec. 295-71, and Rem. Rev. Stat., Vol. 7A, Sec. 6360-19, P.P.C. Sec. 291-11.”

* * * “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.”

Plaintiff appreciated the gravity of the situation he created. He admitted he had effectively blocked one lane of the highway (the lane in which the approaching vehicle was operating). He admits he knew he was taking a chance when he parked his vehicle in that fashion and that he was creating a dangerous situation on the highway. He also admitted he knew that the approaching car, in order to get around him, would have to go over on the north half of the highway, and he stated he appreciated that fact at the time. He also stated that knowing all that he went west on the north half of the highway, right into the face of the oncoming automobile, which automobile gave no indication to him that it was going

to slow down or was slowing down. Nothing the plaintiff could have done would have made it more dangerous for him.

The defendant's automobile took a perfectly normal course under the circumstances. The plaintiff had blocked one-half the highway. It is perfectly natural that the driver of the approaching vehicle should turn to the left to avoid the truck and continue along the highway. In view of the evidence in this case, it is the only thing any person would expect to happen. The statute requires that sufficient of the highway remain open for the passage of vehicles, and the defendant's vehicle had the right to turn to the left and proceed over the unblocked portion of the highway, *Paulsen vs. Spencer, supra*. There was at that time no approaching traffic from the east which would make such a turn dangerous or improper. And the plaintiff expected that to happen as he knew the situation better than anyone—he had created it. In view of the speed at which plaintiff claimed defendant's truck was traveling, and the further fact that plaintiff states defendant showed no indication of ever slowing down, there was nothing plaintiff could expect defendant to do except turn to the left and proceed past the parked car on the unblocked portion of the highway. All this the plaintiff knew, and yet he ran down the highway on the only side left open for passage in an attempt to warn of the danger he had created.

The plaintiff in this action was not only negligent in parking his vehicle in the manner and at the place in which he did, but he was negligent in pursuing the course he followed in his effort to extricate himself and to give warning of the dangerous condition which he erected and brought into being upon the highway.

We refer this court to the case of *Keller v. Breneman* (Wash. 1929), 279 Pacific 588. In that case it appeared plaintiff's truck became stalled on the highway when it ran out of gasoline. He left it with one corner protruding 2 or 3 feet over the center of the highway. He then started out looking for someone to get some gasoline, and was walking near the center of the highway when he was struck by an automobile. At the time he was struck he was walking toward the automobile which struck him. This automobile had come over the top of a grade in the road, on the right side of the highway, and it swerved to the left and struck the plaintiff and his parked truck.

The Supreme Court of Washington held that the plaintiff was negligent, first in running out of gasoline, as he knew how far he was going to go and should have prepared himself, second in leaving his truck in the position he did on the highway contrary to a statute of the state of Washington, and that

* * * "when the appellant left the truck to go upon his errand, he became a pedestrian, subject to the statutes applicable to pedestrians traveling on the public highways."

The court points out that a statute of Washington required pedestrians to travel along the left side of a highway and that the appellant gave no heed to this statute. It also sets out that violation of a statute in Washington is negligence in law. It sustained a holding by the trial court that plaintiff was barred from recovering by reason of his contributory negligence.

Section 57-7-78.5 (d) defines a pedestrian as "any person afoot".

Comparatively recently, this court has decided three cases involving people on foot on the highway. They are

Reid v. Owens (1939), 93 Pacific (2) 680, 98 Utah 50;

Mingus v. Olsson (1949), 201 Pac. (2) 495,

Sant v. Miller (1949), 206 Pac. (2) 719.

In *Reid v. Owens*, the injured person left a trench in the street in which he was working and crossed the highway on an errand and was struck and killed. This court said he had a duty to observe and stated

"He either proceeded without looking or, having seen the approaching car, he chanced crossing in face of the hazard. The approaching vehicle was at the instant of deceased's entry onto the pavement so near that no prudent person would attempt crossing in front of it.

The more reasonable inference is that he did not see the car. But had he looked he would have seen it, and he is charged with knowledge of what he would have seen had he the duty to look. We think that he clearly had such duty."

Mingus v. Olson. The deceased was struck on a cross-walk in Salt Lake City. There was evidence he did not look, and the court remarks that on the evidence it "must be said as a matter of law that deceased either failed to look, or having looked, failed to see what he should have seen."

Sant v. Miller involved a pedestrian crossing a street in Logan not at a crosswalk. He was struck when not looking and the court held it his duty to look. This language of the court we think pertinent:

"Appellant was aware of the fact that he was taking a chance in crossing the street at a place contrary to law. He should also have known that a driver of a vehicle would not ordinarily anticipate the presence of pedestrians on the street at the time and place of the accident. * * * Having omitted to continue to watch, he failed to exercise the degree of care required of a pedestrian who leaves a place of safety and places himself in a position of peril. A greater degree of care is necessary upon the part of a pedestrian who undertakes to cross a city street at a prohibited place than is placed on one who uses a marked crosswalk. And especially is this true when because of darkness and climatic conditions, the opportunity for drivers to clearly discern the presence of individ-

uals on the roadway is greatly restricted. It is not due care for a person to fail to observe what might be approaching danger when there is no necessity to look elsewhere. Appellant was not confronted with a situation which distracted his attention or which precluded him from continuously observing the oncoming traffic. * * *''

The holdings of this court in these three cases were that the injured and deceased persons were guilty of contributory negligence precluding recoveries, because of failure to look or observe what was there to be seen.

On the facts none of the above cases are as strong as the one at bar. This plaintiff by his own testimony stated:

(a) He saw the oncoming automobile;

(b) He knew and appreciated only one lane of travel was open for it to proceed;

(c) He was aware defendant's vehicle was continuing and would continue— it was not diminishing its speed as far as he was concerned;

(d) He took a position on the only part of the highway the approaching automobile could travel upon;

(e) He had opportunity to avoid the accident at any time up until he was struck by stepping off

the travelled portion of the highway. (Defendant's automobile never left the paved portion of this highway until opposite the parked truck, as shown by the tracks.)

Section 57-7-146, Utah Code, reads:

“(b) Where sidewalks are not provided any pedestrian walking along and upon a highway shall when practicable walk only on the left side of the roadway or its shoulder facing traffic which may approach from the opposite direction.”

In view of the above section of the Utah Code, defendant had an absolute right to proceed on the assumption that any person walking down the highway in the vicinity of this parked truck, or otherwise, would proceed toward the defendant on the south edge of the road. It was the plaintiff's failure to abide by the provisions of this statute and his failure to proceed towards the defendant on the south edge of the road, and also the plaintiff's failure to proceed on the shoulder of the road, facing traffic which might approach him from the opposite direction, which placed the plaintiff in such position that he was struck by defendant's vehicle. Had plaintiff obeyed that statute no accident would have happened. But no, he took a course which could lead to nothing but extreme danger for himself in an attempt to give warning of a peril and emergency which he had created. This plaintiff might just as well have run down a railroad track into

the path of an approaching train he knew would not stop. He "hoped" the approaching automobile would stop, but nothing he saw or heard gave him any indication it was going to stop.

The plaintiff's conduct in this case is so novel and unique in its various aspects that the writers of this brief have been unable to find any case specifically in point covering his conduct in running down the highway towards the defendant's automobile. It is submitted, however, that the following rule as a matter of general principle derived from the many many cases cited in support of it, controls in such a situation. We quote from Section 121 of 65 C. J. S. on Negligence, page 727, et seq.:

"One who knows and appreciates, or in the exercise of ordinary care should have known and appreciated, the existence of danger from which injury might reasonably be anticipated must exercise ordinary care to avoid such injury. One must also exercise ordinary care to avoid the consequences of another's negligence. Thus, where the defect or danger is patent or obvious, it is contributory negligence to fail to exercise ordinary care to avoid it. Conduct involving an undue risk of harm to the actor is contributory negligence, and one who by his voluntary acts or omissions exposes himself to danger of which he has actual or imputed knowledge is guilty of negligence, if, under the same or similar circumstances, an ordinarily prudent person would not have incurred the risk of injury which such conduct involved. The rule is equally

applicable to one who, having taken a position of danger without knowledge and appreciation thereof, thereafter becomes fully cognizant of the danger and continues to expose himself to it."

The plaintiff cannot claim that his conduct under the circumstances of this case is to be tested against a background of sudden emergency or sudden peril because one who creates the emergency or sudden peril himself cannot take advantage of it as one of the surrounding circumstances to avoid a charge of contributory negligence. We quote from Section 41, Acts in Emergency or Sudden Peril in 38 *Am. Jur.* on Negligence, page 687:

"Moreover, one placed in sudden danger by reason of an emergency is held responsible for error of judgment, if his own negligent, reckless, or wanton conduct contributed to cause the emergency. One who is at fault in bringing about an emergency is necessarily at fault as to the injurious consequences thereof. The rule that when one faced with sudden peril is compelled to act instinctively, he is not held to the exercise of the same degree of care as if he had time for reflection, cannot be invoked by one who has brought the emergency upon himself by his own wrong or who has not used due care to avoid it. * * * * Before one can absolve himself from liability for injury caused by acting upon emergency to save himself from harm, he must show not only that an emergency existed which was brought about by no negligent act of his own but also that the resultant injury could not have been prevented after the peril to him had ceased."

Utah recognizes that one is not relieved by reason of emergency or peril which he creates himself. We quote from *Harris vs. Parks*, 58 Utah 42, 196 Pac 1002 at page 45 of the Utah Reports:

“Where one is confronted with threatened danger and is suddenly in an emergency *not created by himself*, called upon to determine on his course of action, he is not held to the same care and degree of caution that he might be under different circumstances.” (Italics ours)

This proposition was brought specifically before the District Court of Appeal of the State of California in *Yates vs. Morotti, et al*, 8 Pac. (2) 519, where the court said:

“The doctrine which may excuse one for a lack of sound judgment with respect to his conduct when he is suddenly confronted with imminent peril has no application to one who has brought the emergency upon himself by his own willful, reckless, or negligent conduct. The rule applies to one who, without fault on his own part, finds himself suddenly confronted with imminent peril. *Rush v. Lagomarsino*, 196, Cal. 308, 237 P. 1066; *Neff v. United Railroads*, 188 Cal. 722, 207 P. 243; *Brooks v. City of Monterey*, 106 Cal. App. 649, 657, 290 P. 540; *Gootar v. Levin*, 109 Cal. App. 703, 293 Pac. 706; 3-4 Huddy’s Enc. of Auto. Law (9th Ed.) 348, Sec. 182; 19 Cal. Jur. 602, Sec. 38; 42 C. J. 891, Sec. 592. The doctrine of ‘imminent peril’ is therefore no excuse for the accident.”

Under the circumstances, men of reasonable minds could not differ as to the conduct of the plaintiff. With full knowledge of the danger to himself he proceeded directly into the face of an approaching automobile, which was under his observation at all times. He could have avoided the injury by simply stepping aside to the north edge of the highway, as the physical evidence of the tire track shows that the defendant at no time prior to his passing the parked truck left the oiled portion of the highway. As we have previously stated, the plaintiff knew that the only open lane of traffic was the one he was proceeding in and he knew, or unquestionably should have known, that the defendant would move into that lane to pass the plaintiff's parked truck. The plaintiff further admits that there were no indications at any time that the defendant saw him or was taking any steps to avoid him or to take any steps to stop. Plaintiff knew, or should have known, that with the highway obstructed by his truck the defendant's attention would be focused mainly on safely passing through the opening left between the front of the truck and the poles erected at the left edge of the oiled surface of the highway and that it was reasonably foreseeable that defendant would not observe plaintiff until it was late to avoid him. Yet in spite of the situation, plaintiff proceeded directly into

the face of the oncoming automobile. There is no question of fact to be submitted to a jury as to plaintiff's conduct being negligent and proximately contributing to his injuries.

CONCLUSION

We submit that for all practical purposes the plaintiff blocked one-half of the highway with his truck and then blocked the other half of the highway with himself. The situation developed under his observation at all times. He knew of the approach of the automobile for over half a mile. He knew the entire situation he had erected, then he took the position on the highway occupying the only path which he had left open for travel. Judging the conduct of the plaintiff up to the time he parked his vehicle and started to unload it, and also from the time he left his vehicle and went down the highway, or judging the conduct of the plaintiff on the basis of the situation as a whole, it is inescapable that plaintiff's own acts contributed to and produced the accident and injuries to himself. These acts were careless and negligent in the extreme and done in the face of known, approaching danger.

We submit that defendant's motion for a directed verdict should have been granted because of the contributory negligence of the plaintiff and the defendant's

motion for a judgment notwithstanding the verdict, made after verdict, in which motion defendant renewed his motion for a directed verdict, should also have been granted. This case should be reversed with instructions to dismiss.

Respectfully submitted,

EDGAR C. JENSEN
ROBERT A. BURNS
ROBERT JOHN JENSEN