

1955

Teddy B. Covington v. Mont C. Carpenter : Brief of Respondent

Utah Supreme Court

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Case No. 8386

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IN THE SUPREME COURT
of the
STATE OF UTAH

FILED
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Clerk, Supreme Court, Utah

TEDDY B. COVINGTON, by his
guardian ad litem, **Mrs. J. B. Covington**,

Plaintiff and Appellant,

— vs. —

MONT C. CARPENTER,

Defendant and Respondent.

BRIEF OF RESPONDENT

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IN THE SUPREME COURT of the STATE OF UTAH

TEDDY B. COVINGTON, by his
guardian ad litem, Mrs. J. B. Covington,

Plaintiff and Appellant,

— vs. —

MONT C. CARPENTER,

Defendant and Respondent.

} Case No. 8386

BRIEF OF RESPONDENT

STATEMENT OF FACTS

In this action the plaintiff seeks to recover damages from the defendant for injuries sustained by plaintiff in a motorcycle-automobile accident that occurred October 3, 1953, at 11:25 A.M. in front of the Salt Lake Cleaning and Dyeing Company on 9th South Street between 2nd and 3rd East Streets in Salt Lake City, Utah, (R. 1-2, 24, 25). At the time of the accident plaintiff was 19 years of age, (R. 37). He had, however, married on January 4, 1955, (R. 44), and thereby attained his majority.

Ninth South Street at this point proceeds in a general easterly and westerly direction and is straight and practically level, (R. 46). The weather was clear, the street was dry, and visibility was good, (R. 29, 30, 53). There was a cut-back parking area 19 feet in depth in front of the Salt Lake Cleaning and Dyeing Company located on the north side of 9th South Street, (R. 30). There was an 8 foot parking lane on the north side of 9th South Street, two 10 foot westbound traffic lanes, and a series of 4 center lines in the middle of the street occupying a space of approximately 4 feet. There were also two eastbound traffic lanes each 10 feet in width, and an 8 foot parking lane south of the center line of said street, (R. 25, 35, 36).

The plaintiff had operated his motorcycle north on 5th East to 9th South Street where he made a left turn into the inside lane for westbound traffic and was proceeding west along said 9th South Street about in the middle of the said inside lane for westbound traffic at a speed of approximately 25 miles per hour when he reached 3rd East Street, (R. 37, 48).

The defendant's vehicle had been parked on the north side of 9th South Street in the cut-back parking area in front of the Salt Lake Cleaning and Dyeing Company. The defendant was in the act of backing his auto from said cut-back parking area immediately prior to the time that the accident occurred, (R. 37, 38). The west crosswalk at the intersection of 3rd East and 9th

South Street was located right close to the west curb line of 3rd East, (R. 46, 47). It was undisputed that the impact occurred 137 feet west of the extended west curb line of 3rd East Street and 3 feet into the inside lane for westbound traffic or 7 feet north of the north-most of the series of 4 lines forming the center of 9th South Street, (R. 25, 26, 27, 28, 31, 51, 52).

The plaintiff testified that when his motorcycle was about in the middle of the west crosswalk close to the west curb line of 3rd East Street, he observed the defendant's automobile in the act of backing out in a southeasterly direction from the recessed area in front of the Salt Lake Cleaning and Dyeing Company, (R. 38, 40, 47). At that time he was traveling approximately in the middle of the inside lane for westbound traffic, (R. 47-48). He could definitely see that the car was backing out onto 9th South, (R. 48), but was not clear whether the rear was into the parking lane or whether it may have projected somewhat into the outside traffic lane, (R. 49). At this time there was no other westbound traffic on the street between his motorcycle which was then up in the west crosswalk and the defendant's backing automobile. As a matter of fact, the closest westbound traffic was down near 2nd East Street. There was no eastbound traffic on the street at the time. The plaintiff in this connection testified:

“Q. So you didn't have any traffic in front of you that you had to be concerned with, did you?

A. That is correct.

Q. Either going the same direction you were going or coming towards you?

A. Yes sir.

Q. There was nothing that had to concern or involve you there at all?

A. No sir.

Q. *The only thing that could possibly enter into your path or cause you any concern when you were up by the west cross walk of 3rd East Street was this automobile that was backing out into the street, isn't that correct?*

A. *That is correct.*

Q. *And yet you took your eyes from that automobile for awhile, didn't you?*

A. *Yes sir.*

Q. *And looked to the rear?*

A. *Yes sir.*

Q. And is that the only place that you ever looked, is to the rear?

A. As I recall, yes." (R. 49-50) (Italics ours)

The plaintiff admitted that he did not intend to change lanes, but merely looked to the rear to see what traffic there was (R. 50). As a matter of fact, he admitted that there was no traffic close enough to the rear of his motorcycle to actually cause him any concern, (R. 53).

After taking his eyes from the only car which could cause him any concern, he admittedly traveled forward

a distance of 120-125 feet at a speed of approximately 25 miles per hour, all of the time while continuously looking to the rear, (R. 50-51). When he again looked to the front, he observed the defendant's automobile not more than 10-15 feet away. Its rear end at that time was just barely emerging into the inside traffic lane, (R. 51). He attempted to turn to the left, but in the short space did not have time to completely miss the car, but did succeed in turning the motorcycle away from the car so that no part of his motorcycle came in contact with the vehicle, (R. 39, 44, 45, 52). However, his right leg struck the extreme left rear corner of the automobile about where the left rear tail light was located, (R. 45). At the time of the accident he admitted that the automobile only projected three feet into the inside traffic lane and that he still had seven feet in the inside traffic lane before even reaching the north-most of the four center lines in which he could have traveled to avoid the accident had he seen the car earlier, (R. 51-52). During all of the time he was traveling forward and looking backward, he did not reduce his speed at all, (R. 52). He admitted that the left rear of the automobile was the portion thereof which projected the farthest out into the street, (R. 52).

Following the accident, he was lying on the south side of 9th South Street at a point 75 feet west of the point of impact. His motorcycle came to rest on the south side of 9th South Street 115 feet from the point of impact, (R. 25, 52-53).

The court questioned the plaintiff concerning the manner in which the defendant's automobile was being backed out into the street. The plaintiff admitted that it was being backed in an angular direction; that its speed was moderate, and that there was nothing unusual about its operation:

"THE COURT: And in what manner was the defendant's car being backed out into the road?

A. It was in well, an angular direction.

THE COURT: And do you have any idea how fast it was being backed?

A. No. I have no idea. *All I know it was a moderate back.*

THE COURT: *Nothing unusual about it?*

A. *Well, not that I could recollect.* Except that it just seemed like it was out there and that was it." (R. 54) (Italics ours)

According to Officer Valgardson, the defendant said he hadn't observed any danger, (R. 27), and the defendant further claimed that he had ceased his backward movement and was starting forward when the accident occurred, (R. 30). The plaintiff contended that the defendant's vehicle was still in its backing process at the time of the accident, (R. 53).

The defendant introduced certain photos as exhibits showing the recessed parking area and the street adjacent thereto, (Exhibits 11, 12 and 13). In addition, the

defendant offered in evidence certain photos showing the damage to the defendant's vehicle in the accident, (Exhibits 10, 14 and 15).

The diagram incorporated in the back of the appellant's brief was not an exhibit in the case. It admittedly was not drawn to scale as the 137 feet from the point of impact to the west curb line of 3rd East Street is shown as being much shorter than the 113 feet from the point of impact to the point where the motorcycle came to rest. Obviously, the point of impact is located considerably further from the west curb line than would be indicated in the diagram. The measurements shown thereon, however, were those testified to by the officer and were all made either by steel tape or by a measuremeter, (R. 36).

At the conclusion of the plaintiff's case the defendant moved for a directed verdict on the ground and for the reason that the plaintiff had failed to prove by a preponderance of the evidence that any negligence on the part of the defendant proximately caused the accident and that the plaintiff's own evidence as a matter of law showed that the plaintiff was guilty of contributory negligence which proximately contributed to the accident, (R. 54, 55). The lower court granted the defendant's motion, (R. 55-57), and it is from the judgment of the court on the directed verdict that the plaintiff takes the appeal, (R. 62). The only question is whether the court erred in granting the defendant's motion for a directed verdict.

STATEMENT OF POINTS

POINT I.

THE LOWER COURT DID NOT ERR IN GRANTING DEFENDANT'S MOTION FOR A DIRECTED VERDICT IN FAVOR OF THE DEFENDANT AND AGAINST THE PLAINTIFF AT THE CONCLUSION OF THE PLAINTIFF'S TESTIMONY.

- (a) THE PLAINTIFF FAILED TO PROVE BY A PREPONDERANCE OF THE EVIDENCE THAT THE DEFENDANT WAS GUILTY OF NEGLIGENCE WHICH PROXIMATELY CAUSED THE PLAINTIFF'S INJURIES.
- (b) THE EVIDENCE CONCLUSIVELY AND AS A MATTER OF LAW DISCLOSED THAT THE PLAINTIFF WAS GUILTY OF CONTRIBUTORY NEGLIGENCE WHICH PROXIMATELY CAUSED PLAINTIFF'S ACCIDENT AND INJURY.

ARGUMENT

POINT I.

THE LOWER COURT DID NOT ERR IN GRANTING DEFENDANT'S MOTION FOR A DIRECTED VERDICT IN FAVOR OF THE DEFENDANT AND AGAINST THE PLAINTIFF AT THE CONCLUSION OF THE PLAINTIFF'S TESTIMONY.

- (a) THE PLAINTIFF FAILED TO PROVE BY A PREPONDERANCE OF THE EVIDENCE THAT THE DEFENDANT WAS GUILTY OF NEGLIGENCE WHICH PROXIMATELY CAUSED THE PLAINTIFF'S INJURIES.

The burden of proof was on the plaintiff to show by a preponderance of the evidence that the defendant was negligent and that his negligence proximately caused the accident. The plaintiff's proof indicated that the defendant was in the act of backing his car out into the street and the rear end thereof had emerged into the parking lane or the outside traffic lane when the plaintiff's motorcycle was up near the west curb line of 3rd East Street or approximately 137 feet away. The evidence also indicated that the defendant's vehicle was being operated at a "moderate" speed. There was nothing unusual about it which the plaintiff could recollect. The vehicle was being backed out into the street in an "angular direction" to the southeast. Officer Valgardson's testimony would indicate that the vehicle was backing out into the street at a speed of 2-3 miles per hour, (R. 31). The evidence is undisputed that at the time of the accident the left rear corner of the defendant's automobile projected the farthest out into the street and it was only 3 feet into the inside westbound traffic lane at the time of the accident, leaving 7 feet in that lane to the north-most of the 4 center lines in which the plaintiff could have traveled. The evidence is also undisputed that the plaintiff's motorcycle did not contact the automobile at all, the impact being on the plaintiff's right leg against the extreme left rear corner of the defendant's automobile. Officer Valgardson testified that following the accident the defendant informed him that he did not observe the danger until the moment of the impact.

The above and foregoing is all of the evidence in the case offered by the plaintiff to show negligence on the part of the defendant and to prove that such negligence was the proximate cause of the accident. Certainly, the testimony did not indicate any negligence in the manner or speed at which the vehicle was being operated. The only negligence claimed by the plaintiff in his brief is that the defendant did not yield the right of way to the plaintiff and that the defendant failed to keep a proper lookout. Elsewhere in the plaintiff's brief there are intimations that the defendant was negligent in backing so that the rear of his vehicle projected in any manner into the inside traffic lane.

With reference to the alleged failure to yield the right of way, plaintiff quotes Section 41-6-100 and Section 41-6-106, Utah Code Annotated 1953. Section 41-6-100 has no application whatsoever to the facts in this case. The defendant was not emerging from an alley, driveway, or building. Furthermore, his vehicle had been parked in the recessed parking area which was only 19 feet deep. Before the defendant started the vehicle backward, he would already have been in a stopped position.

Section 41-6-106 does not prohibit a vehicle from backing out into the street, but merely requires that it shall not proceed backward unless such movement can be made with reasonable safety and without interfering with other traffic. The plaintiff's motorcycle was admittedly about 137 feet away when the defendant's vehicle

was already in the process of its backward motion and when the rear end of the defendant's automobile may already have extended out into the outside traffic lane. When the defendant actually started his backward motion, the motorcycle would have been even further away. Considering the admitted low speed of the defendant's auto and the 25 miles per hour at which the plaintiff was traveling, the motorcycle would have to be at least 150 feet or a quarter of a block or more away when the defendant started to back out from his parked position. Under such circumstances it was reasonably safe under the statute for the defendant to back out. It was then the plaintiff's duty to yield the right of way to the defendant. Furthermore, the defendant's backing did not interfere with other traffic. The plaintiff still had 7 feet in his own lane of traffic to the northmost of the four center lines and as a matter of fact all of the rest of the street in which to travel. His progress was not interfered with even on his own side of the road.

See 2 Blashfield Cyclopedia of Automobile Law and Practice, Permanent Edition, 1955 Cumulative Pocket Part, page 45, Sec. 1101, wherein it is said:

“A motorist backing onto a highway, if in the exercise of due care, has the right to assume that an approaching motorist will exercise due care, and the conduct of the backing driver should be measured in view of such assumption.”

With reference to the intimation of negligence on the defendant's part in backing so that the left rear

corner of his car projected 3 feet into the inside lane, it must be borne in mind that an automobile is approximately 20 feet in length. The distance from the curb line out to the farthest point at which the defendant's vehicle projected into the street was only 21 feet. Even though the defendant's vehicle was backing in a southeasterly direction, considering the width of the street and the length of the car, it would require the vehicle to proceed out into the street and somewhat into the inside traffic lane in order to proceed westward along the street. Any reasonably individual would anticipate such action. Accordingly, there can be no negligence on the part of the defendant in this regard.

Even if we are to concede that the defendant was negligent in failing to keep a proper lookout or that he was negligent in either of the other particulars, nonetheless the plaintiff wholly failed to prove that such negligence on the part of the defendant proximately caused the accident. If the defendant had seen the plaintiff's motorcycle when he started to back out into the street, the motorcycle would have been somewhere in the intersection approximately 150 feet or a quarter of a block or more away. This must follow because when the defendant's vehicle was actually in the backing process with its rear extending perhaps into the outside westbound traffic lane, the plaintiff's motorcycle was then admittedly 137 feet away. If in fact the defendant had seen the plaintiff's motorcycle when he started to back, the defendant under such circumstances would have the

right to proceed with his backward motion. If he had seen the plaintiff's motorcycle at the time the plaintiff first saw the defendant's vehicle, the defendant would still have the right to continue in his backward process and to assume that the plaintiff would slow down or turn out without proceeding directly into him. The defendant had not blocked the plaintiff's path. There was still 7 feet in the inside lane for westbound traffic to the northmost of the 4 center lines in which the plaintiff could have traveled. We, therefore, cannot see how any negligence on the part of the defendant in the matter of lookout or otherwise could have been a proximate cause of the accident. The proximate cause of the accident was the plaintiff's failure to slow down, turn out, or otherwise act to avoid the accident with opportunity so to do.

(b) THE EVIDENCE CONCLUSIVELY AND AS A MATTER OF LAW DISCLOSED THAT THE PLAINTIFF WAS GUILTY OF CONTRIBUTORY NEGLIGENCE WHICH PROXIMATELY CAUSED PLAINTIFF'S ACCIDENT AND INJURY.

When the plaintiff was 120-125 feet away, or about in the middle of the west crosswalk, he actually observed the defendant's vehicle in the process of backing out into the street from the 19 foot recessed parking area. The rear of the defendant's vehicle at that time was emerging either into the parking lane or perhaps into the outside westbound traffic lane. Plaintiff attempts to make much of the statement that the vehicle was

backing at an angle to go out into the first lane of traffic. Actually, the plaintiff did not know into what lane of traffic the vehicle was going. He knew that it was backing at an angle in a southeasterly direction, and, what is more important, he knew when he first saw it that it was the only vehicle on the street which could possibly enter his path or cause him any concern. This was what the court had in mind when he said that the plaintiff was aware of a vehicle approaching into his path. The uncontradicted testimony was that there were no other vehicles on the street to cause the plaintiff any concern other than the defendant's backing automobile. The plaintiff admitted this car might enter his path and cause him some concern. Actually, when the plaintiff first saw the defendant's vehicle, all he saw was that it was backing out into the street and might possibly enter his path and cause him some concern. Nonetheless, he took his eyes from the one and only point at which he stated there was any danger, and looked to the rear. Furthermore, he continued to look to the rear for 120-125 feet, all the time while proceeding forward into the one known source of possible danger. Plaintiff claims that by reason of the speed at which the plaintiff was traveling he would cover the distance of 120-125 feet in approximately 3 seconds. This in our opinion makes the plaintiff's conduct even more negligent. To continue to travel forward at a speed of 25 miles per hour into the face of a possible known danger while continuously looking backward is, in our opinion, not only negligent but foolhardy.

Furthermore, there was nothing which required the plaintiff's attention to the rear for a period of 3 seconds or more. He admitted he was not going to change traffic lanes and, as a matter of fact, admitted there were no vehicles close enough to his rear to cause him any concern. Notwithstanding this, he continued to look to the rear when he knew the only possible source of danger was in the front.

Plaintiff claims that when he saw the defendant's vehicle the second time he was too close to it and then was confronted with a sudden emergency and did all that was possible to extricate himself therefrom. The plaintiff is not entitled to the benefit of the sudden emergency doctrine. An emergency must be one that has not been created by the plaintiff. In this case if the plaintiff did find himself in a position from which he could not extricate himself, it was solely due to his negligence in continually looking backward while proceeding forward into his one known possible danger. The sudden emergency doctrine does not apply to the plaintiff under the evidence in this case. See *Blashfield Cyclopaedia of Automobile Law & Practice*, Volume 1, Part 2, Page 547, Sec. 669:

“The rule of sudden emergency * * * cannot be invoked by one who has brought that emergency upon himself by his own wrong or who has not used due care to avoid it.”

See also *Gittens v. Lundberg*, 3 Utah (2d) 392, wherein the Utah Supreme Court said:

“* * * Where the plaintiff creates the peril by his own fault, he may not thereafter urge the sudden emergency doctrine to protect himself from a charge of contributory negligence.”

Plaintiff contends in his brief that when he first saw the defendant's vehicle he had the right to assume that the defendant would not interfere with his approaching motorcycle and thereby infers that he could become completely oblivious to what the defendant did. Plaintiff also takes the position that he had the right to assume that the defendant would back out into the outside traffic lane and by reason thereof was not required to look forward again. Such arguments can have no weight, particularly in view of the plaintiff's admission that he knew when he first saw the defendant's backing automobile that it was the only vehicle on the street which could possibly cross his path or cause him any concern. With such knowledge, the plaintiff had no right to continuously look to the rear.

Plaintiff cites from Blashfield Cyclopedia of Automobile Law and Practice, Volume 2, Par. 1105, page 426, to the effect that an approaching motorist on a highway is entitled to assume that the latter will operate his automobile with due care and caution and leave a space open for his passage. The rights as between the backing driver and the approaching motorist are relative as is clearly indicated by the citation from 2 Blashfield Cyclopedia of Automobile Law and Practice, 1955 Cumulative Pocket Part, page 45, Sec. 1101, *supra*, page

11, wherein the converse of the rule as stated by the plaintiff is set forth. There it is indicated that the backing motorist has the right to assume that the approaching motorist will exercise due care. Regardless of any negligence on the part of the defendant, the conduct on the part of the plaintiff in proceeding forward without reducing his speed and while continuously looking to the rear is contributory negligence as a matter of law, particularly with plaintiff's knowledge of the fact that the vehicle was backing out into the street when he was 120-125 feet away, and with his admission that the backing vehicle was the only one which could possibly cause him any concern.

Conceding for the purpose of argument that the plaintiff had the right of way over the defendant's backing automobile, this would not justify the plaintiff in failing to keep a proper or reasonable lookout for the only vehicle which admittedly could cross his path or cause him any concern. See *Bullock v. Luke*, 98 Utah 501, 98 Pac. (2d) 350. In that case a motorcyclist approaching an intersection at a speed of 25 miles per hour failed to observe a truck on his left until he was within 20 feet of the intersection, notwithstanding the fact that his view was obstructed for a distance of 200 to 800 feet. This Court held the motorcyclist to be guilty of contributory negligence as a matter of law in failing to observe the truck sooner and for insisting upon his right of way. The court said:

“The circumstances may be such, that by his own conduct, he who has the apparent right of way has lost the benefit of that right; or the circumstances may be such that for him to insist that this position on the right entitled him to proceed first through the intersection would be carelessness and negligence upon his part. * * *

In *Hickok v. Skinner*, 113 Utah 1, 190 Pac. (2d) 514, this Court held a plaintiff guilty of contributory negligence as a matter of law for failure to keep a proper lookout, saying:

“Granted that the defendant should have yielded the right of way, that does not absolve plaintiff of negligence for his prolonged inattention to the traffic that was approaching west on 21st South. He testified that, having once seen defendant’s automobile approaching the intersection 400 to 500 feet to the east, he started his car forward from a point 20 feet back from the intersection, drove into and almost across the intersection or a distance of 65 feet, without ever again looking in the direction from which defendant’s car was approaching. For a period of approximately six to seven and one-half seconds, the plaintiff never looked to the east on 21st South Street, from which direction he knew there was a car coming. ***** The fact that the plaintiff had the right of way over the defendant did not permit him, *after having observed the defendant’s car approaching the intersection*, to thereafter completely ignore it, even though at the time he started he might reasonably have believed he had time in which to get safely across. ***** *The time element, even if it were less than is shown by the evidence, was such that a reasonably pru-*

dent and careful person would have glanced to the east several times while traversing the distance from the stop sign to the point of collision.”
(Italics ours)

In *Mingus v. Olsson*, 114 Utah 505, 201 Pac. (2d) 495, this Court held a pedestrian to be guilty of contributory negligence as a matter of law in failing to keep a proper lookout, notwithstanding the fact that he was in the crosswalk and had the right of way over the defendant’s vehicle, saying:

“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.”

In *Conklin v. Walsh*, 113 Utah 276, 193 Pac. (2d) 437, a motorist who was proceeding on an arterial highway was held guilty of contributory negligence as a matter of law in failing to keep a proper lookout for a vehicle approaching from the nonfavored highway. The Court said:

“Defendant’s truck driver, *knowing there was a car approaching from the north*, never again looked in that direction until it was too late to avoid a collision. By his own admission the truck

driver travelled at least one quarter of a block without making any further observation of a car which, at the time he first saw it, was much nearer the intersection than was his. He asserts his attention was focused on traffic that might be coming from the south. If, as he claims, he was unable to get a clear view to the south on 10th East Street, there was nothing to prevent him from reducing the speed of his truck so as to permit a reasonable opportunity to observe the approach of cars from other directions. In this case we have the driver of a truck travelling between 30 and 45 mph who knows a car is approaching from his left, keeping his eyes on what he claims to be a blind corner on his right, and ignoring the approach of the vehicle from his left, because of the assumption that as to the latter car he has the right of way. ***** He thereafter completely ignored the Conklin car and drove blindly ahead without again checking the position and movement of the other car until too late to avoid colliding with it. The defendant truck driver was not justified in thus ignoring the movement of plaintiff's automobile. The duty to keep a proper lookout applies as well to the favored as to the disfavored driver. Neither driver can excuse his own failure to observe because the other driver failed in his duty. Neither driver is at any time to be excused for want of vigilance or failure to see what is plain to be seen. Drivers are permitted to cross over arterial highways after having stopped. True, they must yield the right of way to cars which are close enough to constitute an immediate hazard. This rule, however, requires the exercise of some judgment. There is still a duty on the part of the driver travelling the arterial highway to remain reasonably alert to the possibility of the disfavored

driver starting across the intersection in the belief that he can cross in safety. *The duty of keeping a proper lookout attends all those operating motor vehicles, and other rules of the road do not relieve any driver of the necessity of complying with this requirement.*" (Italics ours)

The plaintiff in his brief relies upon the case of *Martin v. Stevens*, Utah, 243 Pac. (2d) 747. The facts in that case bear no similarity to the facts in the case at bar. In the *Stevens* case both vehicles were approaching a blind intersection. In speakig of the plaintiff's conduct, the court said:

"We must remember that there were three other streets to give some attention to as he approached the intersection. All of the attention could not very well or safely be focused on any one at any given instant. Remaining aware of the others and giving them secondary attention, the plaintiff would look to the west, as he said he did, to observe for the favored traffic to which he must give right of way, if any was near. He then looked to the east and saw no car within the extent of his vision, 150 to 200 feet. At that instant he was entitled to assume, absent anything to warn him to the contrary, that any car approaching from that direction would do so at a lawful rate of speed, that is, not to exceed about 25 miles per hour. He then changed his main attention back to the intersection and the south and west and proceeded." (Italics ours)

In that case in analyzing the cases of *Hickok v. Skinner*, *Conklin v. Walsh*, and *Bullock v. Luke*, *supra*, the Utah Supreme Court said:

“***** the circumstances were such that the driver held to be negligent as a matter of law, either observed, or in the exercise of due care should have observed, the manner in which the other driver was approaching the intersection and clearly could by ordinary reasonable care have avoided the collision.”

The facts in the case at bar come within the doctrine announced in *Hickok v. Skinner*, *Conklin v. Walsh* and *Bullock v. Luke*, and not under the facts in the *Martin v. Stevens* case. In the case at bar the plaintiff actually saw the defendant's vehicle in the process of backing out into the street when he was 120-125 feet away. He actually knew that it was the only vehicle which could possibly cross his path or cause him any concern. There were no other vehicles either eastbound or westbound on the highway in front of him and no vehicles in close proximity to his rear. He was not going to change lanes of traffic and there were no intersecting streets. His attention should have been directed to the one source which admittedly could cause him concern. His failure to continue to make further observations or to slow down while traveling forward a distance of 120-125 feet constitutes contributory negligence as a matter of law. Certainly had the plaintiff been keeping a proper look-out, he could have avoided the accident in its entirety. A change of 2 or 3 feet at most in his course would have completely avoided the accident. He had seven feet on his own side of the road before even reaching the north-most of the four center lines of the highway within

which to make this turn, and, as a matter of fact, he had all of the south half of the road since there were no approaching eastbound vehicles.

A case involving somewhat similar, although distinguishing facts, is *Spackman v. Carson*, 117 Utah 390, 216 Pac. (2d) 640. In that case a motorcyclist sought to recover damages as a result of a collision with a truck. The motorcyclist was proceeding along the highway and first observed the truck at a distance of about 200 feet. It was parked off the paved portion of the highway in front of a dwelling. The motorcyclist did not thereafter observe the truck until it was about 30 feet away and on the highway in front of him, and he was then unable to avoid the accident. In that case it was contended that the motorcyclist was guilty of contributory negligence as a matter of law and that the court erred in failing to grant the defendant's motion for a directed verdict. The Court stated that the facts involved "a close case" and one which "must stand strictly on its own facts." In holding that the defendant's motion for a directed verdict was properly refused, the Court said:

*"Note that this is not the case of a vehicle parked off the pavement under such circumstances as would give warning that the driver had moved off the pavement onto the shoulder of the road only momentarily and might at any moment move back onto it as frequently happens with the traveling public. ***** Had the plaintiff when he observed the truck standing on the shoulder of the highway, known or had reason to believe that the truck was about ready to enter upon the pave-*

ment, there might be merit in the defendant's assignment of error. But according to the plaintiff's testimony, when he first observed the truck it was standing motionless in front of a dwelling and there was no indication whatever that it was about to be moved onto the pavement. *The plaintiff was not alerted to any immediate danger.* Under these circumstances we are convinced that the issue of whether the plaintiff was negligent in failing to keep a more diligent lookout ahead was properly submitted to the jury."

The Court further said:

"It can be seen from the above that any slight change in the situation might change the question from one for the jury to one for the court as a matter of law." (Italics ours)

The Court distinguishes the Spackman case from *Conklin v. Walsh* on the ground that in the Spackman case the plaintiff was not alerted to the danger, whereas in the Conklin case he was. Here again we submit that the one factor which this Court indicated was absent in the Spackman case was in fact present in the case at bar, to-wit: the plaintiff in the case at bar was clearly alerted to the danger. He actually saw the vehicle when 120-125 feet away and admitted that it was the only vehicle which could possibly cross his path or cause him any concern. Nonetheless, he chose to completely disregard its presence.

As we review the Utah divisions where a motorist is alerted to a possible danger he is not thereafter justified

in failing to keep a proper lookout at the source or direction of that danger, and if he fails to do so, he is guilty of contributory negligence as a matter of law. This is exactly what the plaintiff did in the case at bar, and under the Utah authorities it must necessarily follow that he was guilty of contributory negligence as a matter of law in failing to keep a proper lookout.

See also *Murphy v. Watson*, (Pa.) 197 A. 151, wherein it is said:

“After carefully reading the testimony, we are in agreement with the court below that appellant was guilty of contributory negligence as a matter of law. She was injured in a private area-way in use by cars, *and although she knew that an automobile was being operated in dangerous proximity to her*, she did not look out for its approach.” (Italics ours).

In considering the lookout maintained by the plaintiff, it should be borne in mind that there were no circumstances present in the case at bar which would justify the plaintiff in looking anywhere other than straight ahead. The Minnesota court in the case of *Dreyer v. Otter Tail Power Co.*, 285 N.W. 707, has had occasion to comment on distracting circumstances which would justify one in diverting his attention elsewhere. The Court in that case said:

“The argument for plaintiff misconceives what is meant in the law of negligence by the phrase ‘distracting circumstances.’ No court has attempted to give an exclusive definition, and we

make no such attempt. But it is clear that there must be not only another danger from which attention may be diverted, but also that the circumstances relied upon as distracting must be such as of themselves may reasonably be considered to portend danger. *City of Radford v. Calhoun*, 165 Va. 24, 181 S.E. 345, 100 A.L.R. 1378; *Carborne v. Boston & Me. R.* 89 N.H. 12, 192 A. 858, 3 *Blashfield*, *Cyclopedia of Automobile Law and Practice*, Perm. Ed., Sec. 1748."

In the case of *Hickok v. Skinner*, *supra*, the Utah Supreme Court indicated that the evidence in that case failed to establish any traffic situation which would justify the plaintiff in failing to make a further re-appraisal of the situation as he proceeded forward.

See also *Smith v. Bennett*, Utah 2d, 265 Pac. (2d) 401, wherein the Utah Supreme Court has again considered the question of lookout and distracting circumstances. The lower court had directed a verdict in favor of the defendant on the ground that the plaintiff, a pedestrian, was guilty of contributory negligence as a matter of law in failing to keep a proper lookout. In affirming the judgment this court distinguished the *Smith* case from the case of *Martin v. Stevens* and other like cases, saying:

"A major dissimilarity exists between the facts of the case now before the court and plaintiff's authorities. In these cases we were concerned with situations such as intersectional accidents where the plaintiff's attention was demanded in more than one direction or in more

than one place. Since his attention could not be in all places and in all directions at once, it was a question of human judgment as to how his attention should be distributed among the several competing demands. A question of fact for the jury was presented as to whether his distribution of attention was reasonable. *In the instant case there was but one demand upon plaintiff's attention. There is no room for a reasonable difference of opinion as to where her attention should have been concentrated;* it was incumbent upon her to observe the condition of approaching traffic. That she failed to use due care in doing so is manifest from the evidence." (Italics ours).

In the case at bar there was but one demand upon the plaintiff's attention, namely, the defendant's auto, which according to the plaintiff was the only auto which could possibly cross his path or cause him concern. There is therefore no room for a reasonable difference of opinion as to the place where the plaintiff's attention should have been concentrated.

See also *Parrack v. McGaffey*, (Iowa) 251 N.W. 871, wherein the Iowa court said:

"It is the settled rule of law, where one voluntarily places himself in a position of danger which can be seen and appreciated, he is guilty of contributory negligence, as a matter of law."

In this case the plaintiff not only appreciated the possible danger, but continued headlong towards it while

continuously looking to the rear. Under such circumstances he was guilty of contributory negligence as a matter of law.

CONCLUSION

The plaintiff failed to prove by a preponderance of the evidence in the case that the defendant was negligent, or, if negligent, that such negligence was the proximate cause of the accident. Furthermore, the plaintiff's evidence conclusively and as a matter of law showed that the plaintiff was guilty of contributory negligence. The lower court, therefore, properly granted the defendant's motion for a directed verdict. The judgment should be affirmed.

Respectfully submitted,

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