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Yoshitaro Okuda and Jack Aramaki v. Jerry A. Rose : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT
of the
STATE OF UTAH

YOSHITARO OKUDA and JACK
ARAMAKI, the sole heirs
of KIM ARAMAKI OKUDA,
Deceased,

Plaintiffs and Appellants,

— vs. —

JERRY A. ROSE,

Defendant and Respondent.

FILED

JAN 6 - 1955

Supreme Court, Utah

Case No. 8399

BRIEF OF RESPONDENT

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BRIEF OF RESPONDENT

STATEMENT OF THE CASE

This action was brought to recover for the death of Kim Aramaki Okuda by reason of an auto-pedestrian accident. The case was tried before a jury which returned a verdict of no cause in favor of the defendant and respondent. The evidence shows that the deceased was killed when struck by an automobile driven by the defendant at about 1:30 A.M. the morning of October 25, 1953, at about 2200 South Main Street in Salt Lake City, Utah. There was no evidence of the deceased's activities immediately before the accident or how she came

to be in the street where she was struck, except that she was struck at a point in the street anywhere from six to fifteen feet from the west side of the street and was not in a crosswalk or at an intersection at the time. In fact the jury could have found that she was hit at a point directly in the defendant's lane of travel, that being the outside lane for southbound traffic. One of the questions presented by this appeal is whether the court erred under this evidence in instructing the jury as to the deceased's right to be on the highway and her duties while on the highway. The other question raised by this appeal is whether the court under this evidence should have instructed the jury that the deceased was presumed to be exercising due care for her own safety at the time of the accident.

STATEMENT OF FACTS

The facts set out in appellants' brief are substantially correct and we will discuss them only briefly except in those particulars wherein we differ and when we consider the difference material to the issues before this court.

Mrs. Kim Aramaki Okuda, a lady of Japanese descent, seventy-five years of age, had been visiting friends and relatives in Salt Lake City on the Saturday prior to the morning on which this accident occurred. Saturday evening she had attended a Japanese meeting at a Buddhist Church in Salt Lake

City and had then gone to Magna, Utah to visit her sister. Her sister's son, Saige Aramaki, brought Mrs. Okuda back to Salt Lake and let her out of his automobile on First South Street between West Temple and First West Streets at about 11:00 P.M. Where she intended to go when she left Saige Aramaki's car is not known, except that there is a Chinese or Japanese cafe at 128½ West First South Street and she was staying just around the corner at 331½ South Temple, where her husband was waiting for her at the time (R.30). How this lady, who could not speak English and had no reason to be in that neighborhood, came to be at 2200 South Main Street, a point four or five miles from where she was let out of Saige Aramaki's automobile two and a half hours before, remains a mystery (R.30-32).

The defendant, Jerry A. Rose, whose job as rate clerk for the Interstate Motor Lines required that he work irregular hours, had left work about 1:00 P.M. Saturday afternoon (R. 74). On the way home, he bought a pint of whiskey and arrived at his home in Murray, Utah about 2:30 or 3:00 P.M. in the afternoon. He and his wife spent the afternoon at home, with perhaps an excursion to the grocery store, and had had dinner at home before going out that evening at about 8:30 or 9:00 P.M. During the course of the afternoon and evening,

the defendant and his wife had consumed about one-half of the bottle of liquor. At about 8:30 or 9:00 P.M., the defendant and his wife went to the Manhattan Club in Salt Lake City, where they remained until about 1:00 A.M. Sunday morning. During the time they were at the Club, they consumed the rest of the bottle of liquor.

From the Manhattan Club, the couple drove south on Main Street to the intersection of Twenty-First South and Main Streets, where they stopped for a red light (R. 81).

Main Street, below Twenty-First South in the vicinity of this accident, is approximately seventy feet wide. There is a paved street approximately forty feet wide down the center of the street, with fifteen feet of gravel shoulders on either side of the pavement. The paved portion of the highway is marked off into four ten foot traffic lanes, two for northbound traffic and two for southbound traffic. There is a sidewalk, at least on the west side of the street. The Lennox Furnace Company is located on the west side of the street immediately across from where the deceased was hit. (See diagram in appellant's brief). The nearest intersection is one-half block away (R. 94) and the nearest street light a block away (R. 93). The area then was relatively dark. It was raining and visibility was poor (R. 93). There was no crosswalk in the vicinity

where the accident occurred (R. 94), and the defendant had the lights of his automobile turned on.

As the traffic signal changed to green, the defendant proceeded south on Main Street in the outside lane for southbound traffic. As he and his wife proceeded south, a gray two-toned automobile, which the defendant thought was a 1950 or 1952 Buick (R. 81), pulled up alongside defendant's automobile. The occupants of this automobile were making a lot of noise, shouting to or at one another and there was a great deal of commotion going on in the car (R. 117, 82). As this automobile passed defendant's automobile an object struck defendant's windshield immediately in front of and about three inches above the steering wheel. The defendant ducked and at the same moment heard a thud, which appeared to come from the rear of the car (R. 94). Thinking that he might have hit something or had dropped a wheel into a hole in the street, the defendant stopped his car to investigate (R. 86). Going back to the point where he heard the thud, the defendant found Mrs. Okuda lying to the side of the road (R. 86). The woman was clothed entirely in black and was lying more or less east and west approximately three feet from the paved portion of the highway.

Mrs. Jerry Rose substantiated her husband's

story asserting as her husband had done that their car was still on the paved portion of the highway at the time she heard the thud. She asserted that the body was lying about four feet from the paved surface out onto the shoulder. There were various articles of clothing lying about, a shoe being three or four feet from the body, a black handbag lying ten to twelve feet to the right and north of the body upon the pavement, another shoe on the paved portion of the highway, and some weeds (herbs) in a bread wrapper lying about (R. 118).

After what seemed five to ten minutes, a boy came along and the defendant sent him to get an ambulance (R. 119). After that a crowd gathered in which the witness, Mrs. Rose, noticed a person of Japanese ancestry. She spoke to this person, and asked him if he knew the deceased, which he denied. Another mysterious circumstance was that she noticed in the cars which gathered after the accident, a gray sedan automobile similar to the one that had passed them immediately before the accident. (R. 122).

The first police officers at the scene were from South Salt Lake. Lawrence J. Vaughan, one of the officers, testified that he was chasing another car north on Main Street when they noticed the accident and turned around and returned to the scene (R. 51). This was about 1:45 A.M. After

testifying to the physical surroundings, he testified he found the body about six feet out from the sidewalk and about forty-five feet from a sign on the side of the road. He further testified that he examined defendant's automobile and found a dent on the rim of the headlight on the right side and some brush marks on the outside of the right hand fender (R. 41). The defendant voluntarily submitted to a blood test and it was found to be .034 of one percent alcoholic content (R. 60).

Two other police officers from South Salt Lake testified substantially in the same manner. The witness Charles Bowden testified that he observed the position of the deceased's body and that no part of her body was at that time any closer to the sidewalk than six feet (R. 73).

The Highway Patrolman, Robert D. Nuttal, arrived at the scene of the accident some time later. When he arrived, the body had already been moved (R. 36). He testified that he observed the marks on the right front fender of the defendant's car, and also observed a mark on the windshield of the defendant's car as if a rock or some other object had struck it (R. 40-45).

The defendant testified that almost a year previously he had had an accident involving the right front fender of his car. After this prior accident,

his car had been repaired, but he had never observed the right front fender in detail and did not know whether the marks on the fender testified to by the police officers were there prior to this night or not (R. 104). The defendant gave the investigating of a statement, which appears in appellant's brief and which is in accord with his testimony herein, to the effect that he was driving along south Main Street south of Twenty-First South when something hit his windshield immediately after a car had passed him. The object chipped his windshield and he pulled to the right and heard another dull sound. Being in doubt as to what had made the sound, he stopped his car and got out to see what the trouble was, when he found the woman and various articles on the road. The woman was injured, and he had instructed the first car that stopped to call the police and ambulance.

The jury was instructed by the court, whose instructions appear on pages 150 to 165, and after deliberating, returned a verdict in the defendant's favor of no cause of action.

This appeal is addressed to the giving of one instruction and the failure to give another, which we will discuss in that order.

STATEMENT OF POINTS

POINT I. THE COURT WAS CORRECT IN GIVING INSTRUCTION NO. 7 PERTAINING TO THE RULES OF LAW GOVERNING PERSONS ON HIGHWAYS.

POINT II. THE COURT DID NOT ERR IN FAILING TO INSTRUCT THE JURY THAT THE DECEDENT WAS PRESUMED TO BE EXERCISING DUE CARE AT THE TIME OF HER DEATH.

ARGUMENT

POINT I. THE COURT WAS CORRECT IN GIVING INSTRUCTION NO. 7 PERTAINING TO THE RULES OF LAW GOVERNING PERSONS ON HIGHWAYS.

The instructions to the jury in this case follow the usual pattern. First the jury is instructed as to the claims and allegations of the parties and the burden of proof. Next the general terms, "negligence," "contributory negligence," and "proximate cause" are defined. Then the jury is instructed as to specific claims of negligence. In this regard, Instruction No. 6 instructed the jury that the defendant in the operation of his automobile was required to operate the same in accordance with the following:

"1. You are instructed that a driver shall not turn a vehicle from the traveled course on a highway unless he first ascertains that such movement can be made with reasonable safety.

"2. You are instructed that a driver of a vehicle upon a highway is required to main-

tain and keep a proper lookout for other vehicles and pedestrians upon the highway, so as to avoid colliding with other persons on the highway or persons standing next to the traveled portion of the same when such person sees, or in the exercise of reasonable care, should observe those persons. In this connection it is no excuse for a driver to say that he did not see, if in the exercise of reasonable care he should have seen.

“3. You are instructed that every driver of an automobile shall operate the same so that he has said automobile under safe, proper, and immediate control, so as to avoid colliding with other vehicles or pedestrians lawfully using the highway.

“4. You are instructed that is is unlawful for the driver of a motor vehicle to operate the same while said driver is under the influence of intoxicating liquor and, in this connection, you are instructed that such driver is under the influence of intoxicating liquor when he has consumed the same to the extent that it appreciably affects his mental or physical faculties in the operation of said automobile.”

Instruction No. 7, which is complained of by the appellants, was as follows:

“Instruction No. 7. You are instructed that the deceased in the exercise of ordinary care, and in order not to be guilty herself of contributory negligence, was governed by the following rules of law at the time and place in question.

“1. You are instructed that it was the

duty of the deceased in undertaking to cross the highway, if you should believe that she was so doing, to keep a reasonable and adequate lookout for automobiles using the street and to use reasonable and ordinary care to keep out of the way of such automobiles. In this connection it was her duty to look and observe whether there were any automobiles in such close proximity as to affect her safety and to continue to keep such a reasonable and prudent lookout as was reasonably necessary for her own protection.

“2. You are instructed that if you find from the evidence that the deceased was crossing the street at the time of the accident, or was commencing to cross the street and continued on, it was her duty to exercise ordinary care to ascertain her surroundings and the vehicles upon the highway at said time and not to remain in a place of danger, or otherwise fail to exercise reasonable and ordinary care for her own safety.

“3. You are instructed that a pedestrian crossing a roadway at any point other than within a marked crosswalk or within an unmarked crosswalk at an intersection should yield the right of way to all vehicles lawfully upon the highway. Therefore, it was the duty of said deceased to yield the right of way to vehicles upon the street if you find that she was crossing or commencing to cross the street under the above circumstances.

“4. You are instructed that it is unlawful for any person to walk upon a roadway where sidewalks are provided adjacent to the highway.

“You are, therefore, instructed that if you find by a preponderance of the evidence that the deceased failed to observe any of the above rules of law respecting her conduct and that her failure proximately contributed to the happening of the collision then and in that event the plaintiffs herein would not be entitled to recover for her death.”

The question is whether this instruction was proper in view of the evidence that the deceased was anywhere from six to somewhat more than fifteen feet on the highway at a point other than within a marked crosswalk or within an unmarked cross walk at an intersection and may have been directly in defendant's lane of traffic. In a case directly on point, *Barry, et al, v. Maddalena, et al*, (Cal.) 146 P. 974, decided in 1944, the facts, as stated in the words of the court, were:

“About 11:30 P.M. on the night of July 30th, 1942, defendant, Clem Maddalena, and his minor son, Clemente, were proceeding northerly in the father's Chevrolet on U. S. Highway 101, with Clemente in the driver's seat. The weather was clear of fog or cloud and the pavement was dry as they approached the city of Santa Marguerita. The concrete highway was divided in the center by a white strip. On each side was a six foot smooth shoulder. They were still in the open country traveling at about forty-five miles per hour when another automobile with glaring headlights, going southerly, passed them. On approaching the southbound vehicle, Clemente lowered the beam of his headlights. Within

less than six seconds after passing the south-bound car, the Chevrolet collided with the deceased. The left fender and lamp struck him, indicating that deceased was east of the highway's center. The collision was the first knowledge defendants had of the presence of any object on the pavement, notwithstanding both of them had been on the lookout just prior to the impact."

The plaintiffs complained that there was no evidence justifying the submission of instructions having to do with contributory negligence. The court said:

"Not only was the finding of Clemente's freedom from negligence justified, but the evidence warranted the implied finding of the contributory negligence of deceased. Whether deceased by his own negligent act caused his collision with the Chevrolet was a question for the jury. If deceased had been walking southward, he was presumptively negligent in violating the rule which requires that a pedestrian on the highway in the open country walk close to the left-hand edge. Vehicle Code, Section 564, St. 1935, p. 188. If he had been northward bound, he should have been on the outside of the westly lane. Ibid. On the other hand, the jury may have determined that the deceased was attempting to cross from the west side to the east side of the highway at a point where there was no crosswalk and without yielding the right of way. Two established facts warranted such determination; (1) His position, when struck, in the easterly lane of the center strip; and (2) Neither defendant saw him. If he did

attempt to cross as the Chevrolet was approaching, he should have yielded the right of way and in failing to do so, he was negligent. Sec. 562, Vehicle Code. Under the circumstances, a finding that such act contributed to the accident is amply justified. It follows that if the jury found that the headlights of the Chevrolet did not comply with the rule requiring that its lighting beams have sufficient intensity to reveal a person at a distance of one hundred feet ahead, Sec. 648, Vehicle Code, St. 1939, p. 1603, still upon other facts, the jury may properly have found that the negligence of deceased justified a denial of recovery."

Speaking specifically of the instructions, the court said:

"The third assignment is that there was no evidence justifying defendants' proposed instructions 11, 12, and 14. No. 11 sets forth the provisions of Section 564, and declares that if deceased violated such provisions, he was negligent as a matter of law, and if such act was a proximate cause of the accident, plaintiff cannot recover. No. 12 recites (1) that the duty of a pedestrian to yield the right of way while crossing a highway at a point other than a crosswalk area may call for a higher degree of care than applied when he crosses at a regular crosswalk; (2) that if the deceased failed to exercise the degree of care of a reasonably prudent person in crossing at a point where he does not have the right of way, he was guilty of negligence as a matter of law; and (3) that if such negligence was a proximate cause of the accident, plaintiffs cannot recover. No. 14 declared

that the degree of care required of deceased was that of a reasonably prudent person under similar circumstances; that a reasonably prudent person would have known that by virtue of the darkness and color of his clothing, it would be difficult for the motorist to observe him there; that therefore a greater degree of care was imposed upon the deceased under the circumstances if such were found to have existed.

“Appellants do not say that the criticized instructions embody erroneous statements of law. Their claims are that there is no evidence justifying 11, and that in attempting to apply the law by 14, the court effectually told the jury that they might find deceased had violated Eection 564, although no witnesses had seen him before the impact.

“In making such claims, appellants are in error. Both 11 and 12 were given because of the proof that deceased, while in the open country and in the easterly lane of the highway, was struck by the left lamp of the Chevrolet, proceeding northerly. No. 12 is a fair attempt to apply Section 564 to the very facts in evidence. Instruction 10 quoted and correctly applied Section 562.

“Such instructions were properly given to aid the jury in the event they should determine from the evidence that the deceased in violation of two code sections was either crossing the highway or walking in defendant’s lane of travel. The fact that there were no living witnesses to the impact was no reason for rejecting the instructions. The physical facts were sufficient to prove that deceased

was about two feet east of the center strip. If he stopped east just after the southbound car passed, Clemente's vision was at that instant dimmed. The circumstances warranted the instructions."

In an Oregon case which appears at 284 P. (2) 1041, wherein a petition for a rehearing was denied at 286 P. (2) 656, the name of the case being *Lemons v. Holland*, a judgment was returned for the death of a pedestrian who was struck by an automobile during the nighttime at a point two feet from the center line of the highway in the motorist's lane of traffic. The Supreme Court reversed the case with directions to enter judgment for the defendant. Quoting from the case which appears at 286 P. (2) 656, the court had this to say about the physical evidence:

"As we originally pointed out, the physical facts in this case demonstrate without any question that the impact occurred at least three feet north of the center line of the highway; the broken glass and radio aerial lay on and to the south of the center line. How this debris got there, no one knows, nor could know, except that it was thrown by and from the rapidly moving vehicle at some moment following the impact. When decedent's body was thrown from contact with the car, it was thrown in a diagonal direction (southerly and westerly) to the south edge of the pavement, although the automobile kept moving in a direct line westerly. It may be that the glass and radio aerial were also so thrown.

Many speculative conjectures might be made as to just what happened and how it happened, with one guess as good as another, but actions for negligence are not determined by mere guess work."

As to whether or not the deceased was guilty of contributory negligence under these circumstances, the court said, still quoting from 286 P. (2) 656:

"However, under the established facts of this case, we are firmly convinced that decedent was guilty of contributory negligence as a matter of law. 16 Am. Jur. 207, Sec. 302, *supra*. There is no evidence whatever respecting the actions of decedent immediately prior to the impact. All that is known is that at the instant of impact, he was perhaps in an upright position on the highway, approximately three feet north of the center line thereon. In the light of the known facts and applicable law of this case, and in the total absence of evidence, direct or circumstantial, to explain or justify decedent's presence on the pavement at the time and place he was struck by the rapidly moving vehicle, if indeed it would be possible to give any reasonable explanation, the conclusion is inescapable that decedent was guilty of contributory negligence. The presumption of due care cannot save him from that finding as, under the known facts and circumstances of this case, that presumption is overcome as a matter of law. On this straight stretch of highway in wide open country where the headlights of approaching automobiles could be seen for long distances, it is inconceivable that a

pedestrian could be hit by one traveling in a straight line on its own side of the road if he exercised even the slightest degree of care for his own safety.”

In a Washington case, *Allen v. Hart*, 201 P. (2) 145, (1948) the facts and holding of the court were

“Claude Eugene Allen died as a result of a collision with an automobile driven by D. E. Hart. A suit by the administratrix of Allen’s estate was commenced under the provisions of our wrongful death statute, Rem. Rev. Stat. Secs. 183 and 183-1. A substantial verdict was returned against Mr. Hart and his wife. From a judgment entered on that verdict, the Harts have appealed.

“The respondents’ theory of the case, supported by disinterested witnesses, was that Mr. Allen was crossing the street at an unmarked crosswalk when he was struck and fatally injured. The appellants testified that Mr. Allen was not in the crosswalk when he was hit. The locus of the collision was the most important single factor of the accident, for upon it depended the vital question of who had the right of way.

“The trial court properly instructed that if Mr. Allen was on a crosswalk, he had the right of way, but refused to give an instruction to the effect that if he was crossing the street at other than the crosswalk, it was his obligation to yield the right of way to all vehicles on the roadway. This denied the appellants’ right to have their theory of the case

presented to the jury and was prejudicial error.

The respondents' only attempted justification of the court's failure to instruct upon the appellants' theory of the case was that (a) Mr. Allen's having died without regaining consciousness following his injury, there was a presumption that he exercised due care for his own safety; (b) all the disinterested testimony was that he was in the crosswalk when he was hit; and (3) the interested testimony of the appellants that Mr. Allen was not in the crosswalk was not sufficient to remove the presumption of due care, which is patently fallacious. There is no presumption of due care in this case, numerous witnesses, interested and disinterested, having testified as to how and where the collision occurred."

The evidence in *Rios v. Bennett*, (Cal.) 200 P. (2) 73, decided in 1948, was that decedent was struck when approximately ten feet from the south curbline of Fifth Street and in the south traffic lane, used by vehicles traveling in an easterly direction. He was thrown in the air by the impact, carried several feet to the east, and died before the ambulance arrived. There was a marked pedestrian crosswalk crossing Fifth Street on the west side of Cabrera Street, but none between Cabrera and Ramona Streets where decedent attempted to cross. The trial court in that case did hold that it was error to give an instruction to the effect that if deceased looked towards defendant's automobile before he

stepped out onto the street and failed to see it, he was guilty of negligence if defendant's automobile was in his immediate vicinity and in plain sight, where there was no evidence that the deceased pedestrian looked or did not look before he stepped out onto the street. However, the court held that the giving of this instruction was not prejudicial and then went on to say :

“The jury was fully instructed as to the duty of decedent while crossing the street. The law placed upon him the continuing duty to exercise ordinary care and to avoid an accident after he left the sidewalk and at all times while crossing the street. (Citations given). The instructions when read as a whole left the question of contributory negligence on the part of the decedent for the determination of the jury as a question of fact. There was substantial evidence that the decedent crossed the street into the south lane of traffic without taking adequate precautions before doing so, and that he either did not look to the west for approaching cars, or if he did so look, he failed to see what was in plain sight, and there was no reason why he could not have paused to let the car pass by and yield the right of way as required by law. The implied finding of the jury that the deceased was guilty of contributory negligence which proximately contributed to his injury and death is amply supported by the evidence. (Citations given). And its finding under all the circumstances of this case is conclusive on appeal.”

In a Montana case cited in appellants' brief, *Garrison v. Trowbridge*, 177 P. (2) 464, the accident occurred at an intersection. The specific instruction objected to was to the effect that, "You are instructed that all traffic, including pedestrians, must, when they approach an intersection of a city street in the City of Great Falls, and Second Avenue North, the same being a through street, stop and look before entering such intersection for the purpose of crossing the avenue." The court held that there was no evidence that the deceased in this case did not stop before entering the intersection and that, therefore, the giving of that instruction was in error.

We do not disagree with the decision in the Montana case, nor the other cases cited in appellants' brief to the effect that instructions must be predicated upon evidence in the case, and in the absence of evidence, instructions should not be given. However, we feel that this is not the situation in the case before the court. The evidence in this case is that the decedent was on the highway at the time she was struck, and that she may have been as far as slightly in excess of fifteen feet and directly in the defendant's lane of traffic, that being the outside lane for southbound cars. This is evidence, and it is sufficient to support a finding that the deceased was guilty of contributory negligence which proxi-

mately caused her own death if believed by the jury. This being the case, the instructions as to the deceased's right to be on the highway were properly given.

POINT II. THE COURT DID NOT ERR IN FAILING TO INSTRUCT THE JURY THAT THE DECEDENT WAS PRESUMED TO BE EXERCISING DUE CARE AT THE TIME OF HER DEATH.

The plaintiffs and appellants' assertion that the deceased was entitled to a presumption that she was exercising due care for her own safety and that the jury should have been so instructed is based on the premise that there was no evidence that the deceased was guilty of any negligence which the jury might reasonably find was a proximate cause of her death. Since the premise upon which it rests is erroneous, as we have already seen, the general proposition itself must also fail. The situation is discussed in the three cases cited in appellants' brief, *Tuttle v. P.I.E.*, 242 P. (2) 764,Utah; *Gibbs v. Blue Cab*, 249 P. (2) 213,Utah.....; and *Mecham v. Allen*, 262 P. (2) 285, 1 Utah (2) 79. It is also discussed in another case, *Cox v. Thompson*, 254 P. (2) 1047,Utah.....

This Court held in *Tuttle v. P.I.E.*, supra, that the presumption was overcome where the jury could reasonably find from the evidence that the decedent

turned his car suddenly and without warning. In that case the Court held:

“Here the jury could reasonably find from the evidence that the decedent was driving his car toward the south and turned his car suddenly and without warning into the course of the tractor-trailor when it was too late to avoid an accident, and in so doing, he did not use care for his own safety. So the presumption was thereby destroyed, and instructing the jury thereon could only confuse, rather than enlighten them, but this was not prejudicial.”

Plaintiffs contended in *Gibbs v. Blue Cab*, supra:

“That the trial court’s conclusion that the deceased was contributorily negligent as a matter of law was erroneous since the presumption that he was using due care for his own safety was not rebutted by the defendant, and (2) that under the facts the question of (a) contributory negligence, and (b) whether deceased’s negligence, if any shown, was a proximate cause of the collision, properly were matters for the jury.”

The action arose out of an intersectional collision between defendant’s taxi cab and a bicycle ridden by plaintiff’s decedent while it was dark. There was no lamp on the bicycle as required by a City Ordinance and a State Statute, and some other evidence of negligence on the deceased’s part. The Court, while holding that the question of wheth-

er or not the deceased was guilty of contributory negligence should have been submitted to the jury, also held that the presumption of due care on the deceased's part had been overcome by the aforementioned evidence of negligence and no longer remained in the case. Justice Wade in a concurring opinion said:

“The presumption that the person injured used due care for his own safety has no bearing on this case. Such presumption merely places on the adversary the burden of going forward with the evidence and making a prima facie case on that issue. It disappears from the case as soon as sufficient evidence is produced from which the fact trier could reasonably find that the deceased failed to use due care, although it is sometimes argued and the language of some decisions seems to indicate that express eye witness testimony of the actions of the favored party at the time in question is necessary in order to overcome such presumptions. Such is not the case where the burden of going forward with the evidence may be overcome by circumstantial evidence, for a prima facie case can be established by circumstantial evidence the same as by direct testimony. This is the Thayerian theory subscribed by Wigmore, and in this kind of a case by Morgan, and adopted by the American Law Institute's Model Code of Evidence, and apparently approved by this Court by a long line of cases.

“From the evidence produced in this case, the jury could reasonably find that, decedent rode his bicycle into an intersection

with a through highway and a stop sign against him during the nighttime, without the statutory or ordinance required lights and without ascertaining that defendant's cab was approaching so nearly as to constitute an immediate hazard until it was too late to avoid the collision, and in so doing, he was guilty of negligence which proximately caused or contributed to causing the accident and his death. Such being the case, the presumption that he used due care for his own safety has no effect on this case."

"There is another reason why this presumption does not affect the result in this case. Here the defendant had the burden of persuading the trier of the facts that decedent was guilty of contributory negligence which proximately caused his death. Such being defendant's burden, he, without the presumption has the burden of not only going forward with the evidence, but also of persuading the trier of decedent's fault. So, since defendant not only has the burden of going forward with the evidence, but of persuading the jury on that question, such presumption would not affect the defendant's burden at all."

The presumption was held to be overcome in *Cox v. Thompson*, supra, by evidence that the decedent, dressed in dark clothes, while walking across a poorly lighted highway at night, walked directly into the path of an automobile being drive by the defendant. The court said:

"If the presumption that a person in a place of danger exercises due care for his own

safety applies in this case, it will be extinguished if the evidence properly sustains the finding that decedant was contributorily negligent as a matter of law.”

Mecham v. Allen, supra, was an action for the death of a motorist and injuries sustained by his wife and children in a collision between motorist’s automobile and a tractor-trailer owned by one defendant and driven by another. It appeared that the left front of the automobile had collided on an incline curve with the left side of the tractor-trailer just behind the cab. There was a conflict in the evidence as to which automobile was on its proper side of the highway at the time of the accident. The court held that under these circumstances, it was error to give an instruction as follows:

“You are instructed that, until the contrary is proven, there is a presumption that the deceased, Thomas Udell Mecham, was exercising due and proper care for the protection of his person and the preservation of his life, at the time of the accident; this presumption arises from the instinct of self-preservation and the disposition of man to avoid personal harm. This presumption is not conclusive but is a matter to be considered by the jury in a connection with all other facts and circumstances in the case in determining whether or not the deceased, Thomas Udell Mecham, was guilty of contributory negligence at the time of the accident.”

Holding that the defendants had made a prima

facie case that decedent's car was on the wrong side of the road at the time of the accident, but not so strong that it would be unreasonable, in view of all the evidence, to find the facts against them, the court went on to say :

“A presumption deals with a rule of law which requires the trier of the facts to assume the existence of one fact or a set of facts (herein called the presumed facts) from the establishment of another fact or set of facts (herein called the basic facts). Unless the basic facts are conclusively shown to exist, that question, if material, should be submitted to the jury.
* * * From the basic fact that a human being was accidentally killed, a presumption arises which requires the trier of the facts to assume the presumed facts, and that decedent used due care for his own safety, in the absence of a prima facie showing to the contrary, but in this kind of a presumption upon the making of such showing, the presumption disappears from and becomes wholly inoperative in the case, and the trial from then on should proceed exactly the same as though no presumption ever existed, or had any effect on the case.

“Such a presumption deals only with the burden of going forward with or the production of evidence. The question of whether a prima facie case has been made is the same here as in all other cases, a question for the court and not the jury to determine. It is established whenever sufficient evidence is produced from which its existence could be reasonably found. Of course, it is immaterial

which party produces such evidence. If the court concludes that a prima facie case has been made, it should submit the question of the existence of the presumed facts to the jury on the evidence without commenting or mentioning to them that there was or is such a presumption. If the court concludes that no prima facie showing of the non-existence of the presumed facts has been made, he should direct the jury to assume the existence of the presumed facts, or if such facts are determinative of the whole case, he should direct a verdict in accordance therewith.

* * * * *

“Since defendants’ evidence was clearly sufficient to make the prima facie case, the decedent was guilty of contributory negligence which proximately caused the accident, the presumption was eliminated from the case, and it was error for the court to instruct the jury on that question. But was it prejudicial? With the presumption eliminated, the defendants still had the burden of persuading the jury that decedent was guilty of contributory negligence which proximately caused the accident. The jury was elsewhere so instructed. Thus defendants not only had the burden of going forward with the evidence, but of persuading the jury on that issue. So in cases where the question of proving contributory negligence is involved, this presumption can never of any aid to the representatives of the deceased, because their opponent without the presumption has the burden of persuading the jury that he was guilty of such negligence, which is a greater burden than and includes the burden of going forward with the evidence.”

So we see that; since the defendant in this type of a case has the burden of proving contributory negligence or of proving facts on which contributory negligence might reasonably be found, which burden is greater than would be imposed upon him by the requirement that he rebut the presumption that the deceased exercised due care; there is a question as to whether or not the jury should ever be instructed in regard to this presumption. The presumption, that the deceased exercised due care for his own safety, appears therefore to be a rule of evidence to guide the court in trying the case. That is, the court assumes that the deceased exercised due care for his own safety until that presumption has been rebutted by a prima facie case to the contrary. If no such prima facie case is made out and the facts conclusively show negligence on the part of the other party, the court would be authorized, relying upon that presumption, to direct the verdict against the other party. If no such prima facie case to the contrary is made out, but there exists a question of whether or not the other party is negligent, the court then, relying on the presumption, might submit the question of the negligence of the other party to the jury at the same time instructing the jury to assume the facts established by the presumption. Where, however, a prima facie case to the contrary is made out, the presumption disappears and the

case is tried as though the presumption never existed. Under these circumstances, the presumption could be of no aid to the representatives of the deceased, since the other party has the burden of proving by a preponderance of the evidence that the deceased did not exercise due care for his own safety, which is a greater degree of proof than is required to rebut the presumption.

In this case, the defendant made out a prima facie case that the deceased was not exercising due care for her own safety, or to state it otherwise, was contributorily negligent, by their evidence that the deceased was on the highway at a point other than a marked crosswalk or an unmarked crosswalk at an intersection and may have been directly in the defendant's lane of traffic at the time she was struck. It was not, therefore, error for the Court to fail to instruct the jury that the deceased was presumed to be exercising due care for her own safety.

CONCLUSION

The jury's verdict in this case may be justified upon a number of assumptions as to what they may have found. There is some evidence, in view of the mysterious circumstances surrounding her death—the fact that she had no reason to be in the place where she died, and the goings on in the gray Buick automobile which may have returned to the scene

of the accident—that the deceased did not meet her death by reason of any act on the part of the defendant. The jury could have reasonably found that the defendant was not guilty of negligence in failing to see the deceased upon the highway at the time and place of the accident, since the area was very poorly lighted, the deceased was dressed in dark clothing, and the defendant's attention had voluntarily been distracted from the road immediately prior to the accident by an object apparently throw by or from the passing gray Buick automobile. The jury could have also found that the decedent was guilty of negligence which was a proximate cause of her own death by reason of her being upon the highway at the time and place of the collision.

There were no eye witnesses to the collision and it is not known what the deceased was doing on the highway at the time of her death. However, the defendant is entitled to the reasonable inferences to be drawn from the fact that she was on the highway. As was said in *Olsen v. Warwood*, 255 P. (2) 725,Utah....., cited in appellants' brief, where the jury was instructed that it should return a verdict in favor of the defendant if it found from the evidence that the plaintiff, after having been discharged from a school bus, ran toward the side of the bus near the right wheels at a time and place when the defendant could not see him, in the

absence of any direct testimony that the plaintiff had done so:

“There is no testimony in the record stating that plaintiff ran or walked into the side of defendant’s bus. Defendant, however, did testify that he brought the bus to a complete stop; that the children, including plaintiff, were permitted to disembark from the right front door in safety; that he observed the plaintiff a good five feet out and away from the bus before the vehicle was put back into motion; that the vehicle proceeded on and away from the plaintiff’s position; and that he observed no child or person close enough to plaintiff to push or throw him under the wheels. This testimony, along with the admitted fact that plaintiff was run over by the right rear wheels of the bus is sufficient to support an inference that plaintiff ran or walked towards the bus after it regained forward motion. No other inference can be drawn from defendant’s testimony stating plaintiff was five feet away from the vehicle, was not thrown or pushed under the vehicle by a third person or object; was not driven into by the vehicle; and yet was run over by the rear wheels of such conveyance. The instruction permitting the jury to make such an inference was not based on non-evidentiary facts, nor did it permit a finding based on surmise, conjecture, or speculation. Such instruction, though not a model one, under the facts before the trial court, did allow a logical and reasonable finding to be made which was based on testimony properly in evidence.”

Instruction No. 7 in this case did not presume

to find any of the facts but only instrcted the jury in a general way on the deceased's right to be on the highway and her duties to use care for her own safety while on the highway, should the jury find that she was either attempting to cross the highway or was walking upon the highway, which are the only reasonable and logical inferences which could be drawn from the fact that she was on the highway at the time she was struck, unless we presume that she was thrown onto the highway or dropped on the highway by some third person or persons, in which event the defendant would not be responsible, and the instruction would not, therefore, be prejudicial.

The presumption that the deceased was using due care for her own safety at the time of the accident was overcome by the evidence in this case from which the jury might reasonably have found that the deceased was guilty of contributory negligence which was a proximate cause of her own death.

Even if we assume that such presumption was still in the case, the jury was otherwise instructed by the Court in Instruction No. 2 that the defendant had the burden of showing the deceased guilty of contributory negligence, and that such negligence was a proximate cause of her death, by a preponderance of the evidence, which duty was greater

than that of merely rebutting the presumption, so that the failure to give the instruction as to the presumption, if error, would not be prejudicial.

It is, therefore, respectfully submitted that the judgment entered upon the verdict of the jury in this case should be affirmed.

Respectfully submitted

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