

1958

Julia T. Alvarez v. Paul Paulus and Stover Bedding and Manufacturing Co. : Brief of Appellant

Utah Supreme Court

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W. D. Beatie; Attorney for Appellant;

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UNIVERSITY UTAH

DEC 19 1958

IN THE SUPREME COURT OF THE
LAW LIBRARY
STATE OF UTAH

JULIA T. ALVAREZ,

Plaintiff and Appellant

vs.

PAUL PAULUS and STOVER
BEDDING and MANUFACTURING
COMPANY, a corporation,

Defendants and Respondents.

Case No.

8895

~~FILED~~
APPELLANT'S BRIEF

SEP 26 1958

Clerk, Supreme Court, Utah

W. D. BEATIE
Attorney for
Appellant

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for new trial in said case on the 1st day of May, 1958.

The complaint alleges as follows:

"Plaintiff complains of defendants and for cause of action alleges:

1. That Maria Elena Ontiveros, a minor, who was killed by the defendants as hereinafter alleged on the 15th day of January, 1958, was the minor child of the plaintiff and was a deserted child by the father thereof.

2. That the defendant Paul Paulus is a resident of Salt Lake City, State of Utah, and the defendant Stover Bedding and Manufacturing Company, is a corporation organized and existing under and by virtue of the laws of the State of Utah, having its principal place of business in Salt Lake City, Utah.

3. That on the 15th day of January, 1958 at about the hour of 12:57 p.m., the said defendant Paul Paulus was operating a truck in the course of his employment and as the agent of the defendant Stover Bedding and Manufacturing Company, westerly upon Emeril Avenue at a point just east of 216 Emeril Avenue, Salt Lake City, Utah, and that the defendants so negligently and carelessly managed and operated said truck at said time and place that said truck violently ran against and over mortally injuring and killing Maria Elena Ontiveros,

the minor daughter of said plaintiff, and that by reason of the negligence, carelessness and violence of the defendants aforesaid and as a proximate result thereof the said Maria Elena Ontiveros was struck, run over, mortally injured and killed by said defendants at said time and place.

4. That at the time of the killing and death of said Maria Elena Ontiveros, the minor daughter of plaintiff, she was of the age of 22 months; was unmarried and had no issue; was strong, healthy and robust and was a source of great comfort to the plaintiff. That by reason of the death and killing of said Maria Elena Ontiveros aforesaid, plaintiff has been totally and forever deprived of the society, comfort, protection and services of her said minor daughter, all to her damage in the sum of \$21,000.00. That plaintiff has been required to pay the sum of \$290.00 for the funeral and burial expenses and incidents to the funeral and burial of said deceased daughter and that plaintiff has therefore been damaged in the sum of \$290.00 special damages.

WHEREFORE, plaintiff prays judgment against the defendants for the sum of \$21,000.00 general damages and \$290.00 special damages and all costs incurred herein."

W. D. BEATIE
Attorney for Plaintiff

The answer of the defendants is as follows:

"Come now the defendants and by way of answer to the plaintiff's complaint heretofore filed in the above-entitled action, admit, deny, and allege as follows:

FIRST DEFENSE

The Complaint fails to state a claim against the defendants upon which relief can be granted.

SECOND DEFENSE

The defendants admit the allegations of paragraph 2 of plaintiff's complaint; admit that on the 15th day of January, 1958, at approximately 12:57 P. M. Maria Elena Ontiveros, met her death in a pedestrian-vehicle accident on Emeril Avenue, at a point East of 216 Emeril Avenue in Salt Lake City, Utah; that the vehicle involved in said accident was a truck owned by the Stover Bedding and Manufacturing Company and driven by Paul Paulus, an employee of the defendant, Stover Bedding and Manufacturing Company. The defendants specifically deny that they were careless, negligent, or violent in the operation of the said vehicle, and the defendants deny each and every other allegation contained in plaintiff's complaint not heretofore admitted.

THIRD DEFENSE

The defendants affirmatively allege that the plaintiff was negligent on the 15th day of January, 1958, at the time of said accident which was the approximate hour of 12:57 P. M., in that she failed to use that measure of prudence required by the circumstances in the protection and care of her minor child, Maria Elena Ontiveros, in that she allowed her child of the tender years of 22 months to be unattended on Emeril Avenue, in Salt Lake City, Utah, and plaintiff knowing full well that Emeril Avenue was a thoroughfare frequented by vehicles of all descriptions, including the defendant's truck. That such negligence on the part of the plaintiff was the sole and proximate cause of the injury and death of Maria Elena Ontiveros.

WHEREFORE, defendants pray that plaintiff's complaint be dismissed and that they have their costs incurred herein."

Dated this 17th day of February, 1958.

EMMETT L. BROWN
Attorney for Defendants

The pretrial order of Hon. A. H. Ellett
was as follows:

"The above-entitled matter came regularly before the court for pretrial on March 26, 1958. The parties appeared by counsel as follows:

For the plaintiff, W. D. Beatie.

For the defendants, Emmett Brown.

The following matters are not in dispute, and no proof will be required to establish them at the trial of this lawsuit:

1. Plaintiff is the mother of Maria Elena Ontiveros, a minor child of the age of twenty-two months at the time she died.
2. On the 15th day of January, 1958, Maria Elena Ontiveros lost her life as a result of being run over by a truck driven by Paul Paulus, who was the agent of the Stover Bedding and Manufacturing Company and in the course of his employment at the time.
3. The reasonable cost of funeral expenses necessarily incurred in the burying of Maria Elena Ontiveros was \$188.05.
4. Maria Elena Ontiveros was run over a few minutes before one o'clock in the afternoon of January 15, 1958, and the roads were wet but not icy.

It is the contention of plaintiff

that her child was an illegitimate child and that she lost her life by reason of the following acts of negligence on the part of Paul Paulus:

(a) He backed his truck without keeping a proper lookout for pedestrians along the highway and particularly for Maria Elena Ontiveros.

(b) He backed his truck onto Maria Elena Ontiveros without giving any warning or signal that he was backing the truck.

(c) He failed to yield to Maria Elena Ontiveros the right of way to which she was entitled.

Plaintiff further contends that as a result of the negligence of Paul Paulus, she is entitled to recover from the defendants and each of them the funeral expenses incurred in the burial of her child together with damages in the sum of \$21,000.00.

It is the contention of the defendants and each of them that Paul Paulus was not negligent as claimed by the plaintiff or at all and that the death of the child was the result of an accident. Defendants further contend that the plaintiff was herself negligent in that she allowed a twenty-two month old child to be playing in the street without proper supervision. The defendants further

contend that the plaintiff cannot maintain this action for the reason that she is not the proper person to bring the same.

The court being advised in the matters now finds that there exist the following:

DISPUTED ISSUES OF FACT

1. Was Paul Paulus negligent as claimed by the plaintiff?
2. Was the plaintiff negligent as claimed by the defendants?
3. Was such negligence, if any, a proximate cause of the injuries received by Maria Elena Ontiveros?
4. What is the amount of general damages sustained by Julia T. Alvarez?
5. Was Maria Elena Ontiveros illegitimate?

DISPUTED ISSUES OF LAW

1. Is the plaintiff entitled to bring this action?
2. Is the plaintiff entitled to recover from the defendants?

It is ordered that all pleadings heretofore filed in this action be merged in this pretrial order, and the only issues of law or of fact to be heard

and determined upon the trial here-
of are those set forth herein, ex-
cept that for good cause shown and
to prevent manifest injustice this
order may be subsequently amended.

It is further ordered that this case
be set down for jury trial commenc-
ing Friday, April 11, 1958, at ten
o'clock a. m. "

Dated at Salt Lake City, Utah, this
26th day of March, 1958.

A. H. ELLETT
J u d g e

FACTS

Emeril Avenue where this accident hap-
pened is a private right-of-way which runs
west from First West Street just north of
the Claudann Apartments which is located at
25 North 1st West Street. This right-of-way
is 20 feet wide and 330 feet long and runs
easterly and westerly.

The defendant Stover Bedding and Manu-
facturing Company has a warehouse built in
a "U" shape around the west end of Emeril
Avenue and the north side of the warehouse
is partially adjacent to the right-of-way.

The entrances to the Stover warehouse are on the north and south side of the Emeril Avenue portion of the warehouse and not adjacent to the right-of-way.

Reference hereafter to record designated (R) and to Exhibits (Ex.).

Plaintiff called as a witness the defendant Paul Paulus who testified that he was the driver of the $2\frac{1}{2}$ ton Reo truck in the course of his employment for the defendant Stover Bedding and Manufacturing Company and that he approached Emeril Avenue on the day in question from the north and made a right-hand turn into Emeril Avenue and proceeded westerly about $3/4$ of the way down the Avenue and turned his truck into a driveway on the north side designated as being that area between the houses designated as 226 and 228 Emeril Avenue (Ex. 14) and stopped at point (P-1, Ex. 19) (R-49). That it was his intention to back the truck to the Stover warehouse for loading but that he

could not make the turnaround in the small driveway in order to back the truck up because of two automobiles parked in the south side of Emeril Avenue. (Ex. P-11). He then drove the truck backwards out of Emeril Avenue in an easterly direction to point (P-2), R-50) then to point (P-3) (R-51) and (P-4) (R-52) all shown on (Ex. P-19), where the truck was brought to a stop then facing in an easterly direction. He got out of his truck and walked around it, warned three older children away from the truck who were standing on the south side of Emeril Avenue near the Claudann Apartments. (R-63). He then got in his truck and honked his horn and proceeded to back his truck westerly along Emeril Avenue and claimed at all times to have been watching to the rear of the truck from the rear-view mirrors on the right and

left sides of the cab of the truck. Defendant Paulus never observed the twenty-two month old deceased until he had run over her and she was lying in front of the truck and he then brought his truck to a stop at the point in Emeril Avenue as shown by (Ex. P-4) and Ex. P-5). The point where the body of the child was lying is shown as Point A (Ex. 5).

STATEMENT OF POINTS RELIED ON BY
APPELLANT FOR REVERSAL OF JUDGMENT

THE TRIAL COURT COMMITTED ERROR:

POINT 1

IN REFUSING TO SUBMIT THE THEORY OF APPELLANT OF FAILURE TO YIELD RIGHT-OF-WAY AS NEGLIGENCE WHEN PRETRIAL ORDER SET FORTH THIS MATTER AS ISSUE AND THE GIVING OF INSTRUCTION NO. 7 DIRECTING THAT THERE WAS NO QUESTION OF RIGHT-OF-WAY.

POINT 2

IN SUBMITTING QUESTION OF ACCIDENT AS A DEFENSE TO THE JURY.

POINT 3

IN SUBMITTING THE QUESTION OF

CONTRIBUTORY NEGLIGENCE OF APPELL-
ANT TO THE JURY.

ARGUMENT

POINT 1

IN REFUSING TO SUBMIT THE THEORY OF APPELLANT OF FAILURE TO YIELD RIGHT-OF-WAY AS NEGLIGENCE WHEN PRETRIAL ORDER SET FORTH THIS MATTER AS ISSUE AND THE GIVING OF INSTRUCTION NO. 7 DIRECTING THAT THERE WAS NO QUESTION OF RIGHT-OF-WAY.

The law is well established that each party is entitled to have its full theory presented to the jury by instructions.

Martineau v. Hansen, 47 Utah 549, 155 P.

432; Toone v. J. P. O'Neil Const. Co.,

40 Utah 265, 121 P. 10; Pratt v. Utah Light

& Traction Co., 57 Utah 7, 169 P. 868;

Morgan v. Bingham Stage Lines Co., 75 Utah

87, 283 P. 160; Morrison v. Perry, 104 Utah

151, 140 P. (2d) 772; McDonald v. Union Paci-

fic R. Co. 109 U. 493, 167 P. (2d) 685; Startin

v. Madsen 120 U. 631, 237 P. (2d) 834.

In Pratt v. Utah Light & Traction Co.,
supra, the Court stated:

"Each party to a suit is entitled to have his theory, when there is evidence to sustain it, submitted to the jury and the judgment of the jury on the facts tending to support such theory, assuming always that there is testimony offered to support the same, and this Court has so held in *Hartley v. Salt Lake City*, 41 Utah 121, 124 Pac. 522, where, speaking through Straup, J., it is said:

"There are two parties to a law suit. Each, on a submission of the case to the jury, is entitled to a submission of it on his theory and the law in respect thereof. The defendant's theory as to the cause of the accident is embodied in the proposed requests. There is some evidence as we have shown, to render them applicable to the case. That is not disputed. We think the court's refusal to charge substantially as requested was error. That the ruling was prejudicial and works a reversal of the judgment is self-evident and unavoidable."

In *Beckstrom vs. Williams*, 282 Pac. (2d)

309, J. Crockett stated at page 310:

"The jury having rejected plaintiff's complaint, on appeal, we would ordinarily view the evidence in the light most favorable to the defendant. This is not true, however, in this case where the plaintiff's appeal challenges the trial court's refusal to submit plaintiff's theory of the case to the jury, as was his undoubted right if the evidence would justify reasonable men in following his theory."

Under the testimony of the defendant Paul Paulus, he first proceeded into Emeril Avenue to point P-1 (Ex. 19); then backed his truck easterly toward First West to Point 2, (Ex. 19); then through several manipulations turned the truck around to Point 3 (Ex. 19), and finally came to rest at Point 4, (Ex. 19) at which point he got out of the truck and walked around the same before proceeding to back the truck in a westerly direction into Emeril Avenue. It is to be noted that Point 4, above referred to is completely off the right-of-way of what is called Emeril Avenue, and that the ultimate destination of the truck was past the west end and off the right-of-way of Emeril Avenue and that the defendant Paulus was therefore a trespasser on the right-of-way at the time of the accident. The deceased child had a perfect right as a pedestrian to use the right-of-way and in walking

in an easterly direction she traveled a greater distance from the west end of the porch of 218 Emeril Avenue than the truck traveled from Point 4 to the point of the accident. His failure to yield the right-of-way to the deceased could have been found by the jury to constitute negligence and this negligence, the proximate cause of the death of the deceased. This finding could have been made independently of any statute and if such were the fact, liability of necessity would have been established against the defendants in this case. Depriving the plaintiff of this substantial ground of recovery and a refusal to instruct the jury as requested by plaintiff's instruction No. 7, and the giving of Instruction No. 7, which instruction expressly stated that there was no preference in the use of the right-of-way as between the pedestrian and the truck, resulted in this

case in an injustice and the denial to the plaintiff to that fair trial to which she was entitled under the laws of this State.

POINT 2

IN SUBMITTING QUESTION OF ACCIDENT AS A DEFENSE TO THE JURY.

The pre-trial order of Judge Ellett stated:

"It is the contention of the defendants and each of them that Paul Paulus was not negligent as claimed by the plaintiff or at all and that the death of the child was the result of an accident." (R.10)

The defendants submitted an instruction on accident (R.171) and the court instructed the jury in instruction No. 6, the latter part of which is as follows:

"The law recognizes that there are occasions when the operators of motor vehicles strike and inflict serious bodily injury or death upon pedestrians under circumstances where the driver of such vehicle or the pedestrian or person responsible for the safety of the pedestrian use due care. In such cases, there is no liability in law upon the of the persons involved." (R.182)

It is the contention of appellant that the wording of this latter part of the instruction is in effect the wording of an instruction on what is called accident or unavoidable accident, when the issue, as the jury was instructed was first, the negligence of the defendants, and secondly, the contributory negligence of the plaintiff.

In Hogan vs. Kansas City Pub. Serv. Co. 19 SW (2d) 707, 65 ALR 129. The Court at page 137 of ALR said:

"It will be noticed that the respondent assumes an accident instruction is proper if the evidence permits an inference that the parties (participants or litigants) were innocent of negligence. This is not the law, unless there is something in the record tending to show the casualty resulted from an unknown cause. It is not every true accident case in which the court may instruct on accident. When, as here, the misadventure resulted from known actions of known persons and things the giving of an accident instruction is error by the great weight of recent authority in this State. * * * The word accident in popular acceptation and sometimes in law may denote an occurrence arising without intent or design, or even from the carelessness of man; but in the law of negligence

it simplifies an event resulting in damage or injury proceeding from an unknown cause or from a known cause without human agency or without human fault. 1 C.J. pp 390 et seq; 20 R.C.L. pp 17, et seq. The essential requirement is that the happening be one to which human fault does not contribute.
* * *

At page 138 and in Wise vs. St. Louis Transit, supra,:

'There was no evidence in the case of any accident or misadventure. The issue tendered by the pleadings and by the evidence was simply whether the defendant was negligent or not and the Court was right in not inviting the jury into a field of conjecture and speculation.' "

In the case of Cheshire v. Nall, 219 S. W. (2d) 248.

C. J. Pitts at 254 said:

"The trial court prepared the charges after all the evidence had been heard and it was not required to submit any issues other than those raised by the pleadings and the evidence. The issue of unavoidable accident exists in such a case and should be submitted only where there is evidence that something other than the negligence of at least one of the drivers caused the injuries complained of. In this case the evidence showed conclusively that the collision occurred on a level paved highway at a slight curve with a small incline but nothing to obstruct the view of the drivers. There

was no evidence of any slippery highway or obstruction on the highway or any break in the mechanism of either automobile immediately before the collision or any other intervening cause of the collision. In our opinion the evidence raised no issue of unavoidable accident."

In *Western Union Telegraph Co. v. Henson*,
222 S. W. (2d) 636.

C. J. Pitts at 640 said:

"Appellant attacks the trial court's judgment in its 2nd point of error because it refused to submit to the jury the issue of unavoidable accident. The rule has been well established that such an issue exists only when there is evidence that something other than the negligence of one of the parties caused the injury about which complaint is made."

In *Texas Coca Cola Bottling Co. v. Wemberly*,
108 S. W. (2d) 860.

C. J. Leslie at page 863 said:

"In the case of *Magnolia Coca Cola Co. v. Jordan*, supra, it is said: 'The issue of unavoidable accident is not raised when there is no evidence tending to prove that the injuries resulted from some cause other than the negligence of one of the parties.' *Boyle v. McClure*, 24 S. W. 1080. 'There is no evidence from which it can be reasonably inferred that the injury of Mrs. Jordan was caused by any other than her own

negligence in driving her automobile into a parked automobile or the negligence of the driver in plaintiff's in errors truck striking Mrs. Jordan's automobile. If the jury had answered that the injury was the result of an unavoidable accident its findings would have been supported by nothing stronger than surmise or suspicion."

In *Flanagan v. Chicago City Ry. Co.*, 90 N. E. 688.

J. Vidcus at 689 said:

"Appellant requested an instruction that there was no liability for an unavoidable accident, and that if the jury believed, from the evidence, that, so far as appellant was concerned the accident was unavoidable they should find the defendant not guilty. The court instructed the jury that the burden of proving negligence of the defendant was on the plaintiff; that this must govern the jury in deciding the case and that if by this rule the plaintiff had failed to establish his case it was the duty of the jury to find the defendant not guilty. An unavoidable accident is one necessarily occurring not because of negligence. The requirement of proof of negligence therefore eliminates the hypothesis of unavoidable accident and it was not error to refuse to give the instruction."

In *Arva v. Karshner*, 168 N. E. 237.

C. J. Cushing at 238 said:

"The court further charged the jury as follows: 'At the suggestion of the attorneys for the defendants the court says to you that if you find from the evidence that the death of David Frank Arva was the result of an unavoidable accident that your verdict should be for defendant.' This portion of the charge was erroneous as the allegations of both the petition and answer charged negligence and an unavoidable accident is necessarily an accident occurring not because of negligence and is one that happens without any apparent cause or without any fault attributable to anyone. If the negligence of defendants was proved to have proximately caused the accident and no contributory negligence was shown, plaintiff would be entitled to recover. If plaintiff failed to prove the negligence of defendants proximately caused the injury, plaintiff could not recover. In such cases there is no place for the question of unavoidable accident."

It is respectfully contended that the issues in this case are the negligence of the defendant and the contributory negligence of the plaintiff as submitted to the jury, and any issue of unavoidable accident is therefore eliminated and the giving of the latter portion of this instruction No. 6 is prejudicial error.

Further, the latter portion of this instruction is not the law wherein the court used in the latter part of said instruction:

"where the driver of such vehicle or the pedestrian or person responsible for the safety of the pedestrian use due care"

The defendant Paul Paulus well knew that there was the hazard of children during the entire movement of his truck at this particular location as shown by the following testimony of said defendant Paulus:

"Q All right, mark that P-1 will you? Paulus l. P-1.

"Q Now will you ask Mr. Paulus please what next did you do with the truck and indicate the movement of the same from the point P-2 to some other point at which you brought the truck to a stop.

"A I left the truck. Looked around as there were two cars standing there. And I took my truck. Children were playing here. I told the children to get away because I am coming out. Then I drove slowly this direction.
(R. 49)

"Q Now at the time you started to move the truck, Mr. Paulus, from point P-4 you were interested principally in, and only in the three children

when, which you say, at the south side of Emeril Avenue, were you not?

"A I watched them constantly. (R. 63)

"Q I am going to ask you, Mr. Paulus, if there were not some children as you were driving back out of Emeril Avenue on this day driving easterly, there were not some children at about 225 Emeril Avenue took hold of the rear of your truck and came up to the front at about 216 where the children there dropped off your truck. Isn't that a fact?

"A Children were hanging on the truck like this. "

This court has held in Woodward v.

Spring Canyon Coal Co. 90 Utah, 578, 63

Pac. (2d) 267, wherein C. J. Elias Hansen at page 587 said:

"It is a matter of common knowledge that children are prone to be less mindful of danger than are persons of mature years. For that reason, a greater degree of care is required of a person who drives an automobile in close proximity to children than is required in driving in close proximity to mature persons. Herald v. Smith, Supra; Green v. Higbee, 66 Utah 539, 244 Pac. 906; Blashfield's Cyc. of Automobile Law and Practice (Perm.Ad.) Vol. 2, Sec. 1492, page 519."

It is therefore respectfully contended

that the court made no distinction in this instruction between that degree of care necessary to drive in the neighborhood of mature persons and that greater degree of care which is necessary where the driving is in close proximity to children and the failure of the court to instruct the jury of that greater degree of care necessary for the defendant Paul Paulus to exercise in this particular instance is prejudicial error.

POINT 3

IN SUBMITTING THE QUESTION OF
CONTRIBUTORY NEGLIGENCE OF APPELL-
ANT TO THE JURY.

The principal of law that the burden does not rest upon the plaintiff to show his freedom from negligence but upon defendant to prove contributory negligence unless the plaintiff's testimony tends to so prove it, is well established by the cases. Corbett v. Oregon Short Line Ry. Co. 25 Utah 449, 71 Pac. 1065.

The defendants in this instance did not adduce any testimony other than by cross examination of plaintiff's witnesses, thus the testimony of contributory negligence would have to rely upon statements of plaintiff's witnesses.

The only evidence of the use of Emeril Avenue right-of-way for vehicular traffic is that of the defendant Paul Paulus on direct examination by plaintiff.

"Q How many times prior to January 15, 1958 would you say that you had driven a truck for your employer Stover Bedding into Emeril Avenue and into your employer's warehouse at the west end of Emeril Avenue?

"A Way often.

"Q Well ask him what he means by way often.

"A He drove at least 4, 5, 6 times a week.

"Q For a four-year period?

"A No, for about a year since the factory was erected.

"Q Will you ask him please if he would estimate that he has driven into

Emeril Avenue for his employer
at least 100 times?

"A He thinks that is about right,
yes. " (R. 37)

The plaintiff testified that on the
day of this accident she was doing the family
washing and that there were three of the
children home on that afternoon and that
the three children were on the porch of
plaintiff's residence for the first time
that day when the accident happened; that
while the children were on the porch she ob-
served the truck of the defendant going into
Emeril Avenue and that she again saw the
truck (R.119) going out towards First West
at which time the children were on the porch
and that she was standing in the doorway at
the time; that she then went to the kitchen
to see her washing and when she returned the
accident had happened; that the children had
been on the porch that day not to exceed
three minutes and that there was about a
minute and a half between the time she saw

all three children on the front porch and the time the accident happened. (R.120)

The plaintiff testified on cross examination:

"Q A little bit bigger than the distance between the houses. You have that kind of back yard there. Now, Mrs. Alvarez, you said that the children - let's see, there was the little baby, 22 months old, and how old were the other two kiddies out on the porch?

"A Well, Freddie is six and Lupe is four.

"Q Four and six. Pre-school children, is that right?

"A That's right.

"Q I believe that you said that they, you always had them play just on the porch?

"A Yes.

"Q Don't they ever go off this porch?

"A When I go with them and take care of them.

"Q Just when you walk with them?

"A Yes.

"Q Don't they ever play in the back yard?

"A No. (R.129)

"Q How many times a day did you let them play on the porch?

"A Two times a day.

"Q About two times a day. Do you have any gateway that stops - did you have any gateway to stop Maria from getting off the porch?

"A No I didn't have a gate.

"Q And for how long had you allowed them to go on the porch twice a day?

"A At least two hours, because I -

"Q And did they never go off the porch during those two hour periods twice a day?

"A No.

"Q Never did?

"A No. (R.130)

In the case of Riley v. Rapid Transit Co. 10 Utah 428, 37 Pac. 681.

J. Smith said at page 437:

"The next assignment upon the insufficiency of the evidence is that the plaintiff or his agents in charge of the child were negligent in allowing the child upon the street. The record is entirely and absolutely silent upon the subject of the care of those intrusted with this child.

There is nothing showing, or tending to show, how the child came into the street, and it seems to us that it would be going a long way to hold that it was negligence per se for the parents of a child seven years old to allow him to go upon the public streets. There is nothing to show that they knew anything of his being on the street. The defendant, in operating its street-car line, should operate it in such a way as to protect the lives of children and other people, who have an equal right to the use of the street; and it is guilty of culpable negligence if it fails to exercise ordinary care for the protection of such children, when they themselves, or those in charge of them, have done nothing to unnecessarily expose them to danger."

In the case of *Barker v. Savos, et al*,

52 Utah 262, 172 Pac. 672.

J. Thurman said at page 271:

"We have already shown there was no evidence of contributory negligence on the part of the deceased, and that if such could be attributed to a child of his age and understanding, there being no evidence of his negligence, in view of his death by the accident, the law presumes that he exercised reasonable care for his own safety. This assignment of error is inexplicable. Appellant assumes that deceased came to his death on the road from the blacksmith shop to his home; that plaintiff, having started him on that journey, cannot recover for the injury that may have occurred because in sending a boy

of his age and discretion out on the public highway he was guilty of contributory negligence. This theory and assumption of appellant do not reflect the facts as we read the record. The deceased left the blacksmith shop, after his father had repaired his tricycle, and must have gone straight home as his father directed, for we find him there a few minutes after. He then obtained permission of his mother to follow the boys with the pony down to the cemetery, as we have heretofore shown. She carefully watched him to that point, and saw him turn and start for home. Certainly there is not a scintilla of evidence in the record that any negligence of the plaintiff contributed to the injury complained of. Neither was there any negligence on the part of the mother. If the jury in this case had rendered a special verdict and found against the plaintiff on the grounds of contributory negligence of any of the parties concerned, and the question were presented to this court for review, we would feel it our duty to reverse the cause on that ground alone."

It is contended that the court committed prejudicial error in submitting the theory of contributory negligence of the plaintiff based upon the evidence adduced in this case.

The only evidence of vehicular traffic in the right-of-way is that of the defendant Paul Paulus that he had been in Emeril Avenue

at least 100 times and, over a period of one year, that would average about two times per week. The only testimony here is that the plaintiff on the day of the accident saw the truck drive into Emeril Avenue and back out of Emeril Avenue while the children were still on the porch and we submit that the only logical conclusion for plaintiff to have assumed was that the defendant's truck, when she saw the same back out of Emeril Avenue, had completed its mission.

X The plaintiff certainly could not be guilty of contributory negligence in failing to see any danger which she had no reasonable cause to apprehend or would be deceived by appearances calculated to deceive an ordinary prudent person after defendant's truck had made its exit past the residence of the plaintiff herein.

It is submitted that under the Riley and Barker cases hereinbefore set forth, the

plaintiff, under the circumstances could not be guilty of contributory negligence and that the court committed prejudicial error in submitting the question of contributory negligence of the plaintiff to the jury and denial of plaintiff's motion to dismiss the counterclaim of contributory negligence.

CONCLUSION

It is respectfully submitted that the trial court erred in the matters herein set forth.

Respectfully submitted,

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and Appellant