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Lillian Fox v. Ross N. Taylor : Brief of Appellant

Utah Supreme Court

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Case No. 9122

IN THE SUPREME COURT
of the
STATE OF UTAH

FILED

NOV 10 1969

LILLIAN FOX,

Plaintiff and Appellant,

—vs.—

ROSS N. TAYLOR,

Defendant and Respondent.

Clerk, Supreme Court, Utah

BRIEF OF APPELLANT

Appeal from the District Court of the Third Judicial
District in and for Salt Lake County

HONORABLE ALDON J. ANDERSON, *Judge*

GUSTIN, RICHARDS & MATTSSON
Attorneys for Plaintiff and Appellant

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LILLIAN FOX,

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—VS.—

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BRIEF OF APPELLANT

STATEMENT OF FACTS

This is a personal injury action. A jury trial resulted in a verdict in favor of the defendant (R. 189). A motion for new trial (R. 190) was overruled and denied (R. 191), and this appeal follows.

On September 30, 1958, at about 7:45 A.M., the plaintiff, a pedestrian, was struck by an automobile driven by the defendant. The accident occurred just as plaintiff was stepping on the island in the center of Fifth South between Tenth and Eleventh East in Salt Lake City (R.

22). The island separates the two lanes for east bound traffic from the two lanes for west bound traffic. The defendant was traveling east in the lane closest to the island (R. 118). Plaintiff was on her way from the south side of Fifth South to the north side of the west bound traffic lane to reach an automobile which was waiting for her at the entrance of Barbara Place to take her to her place of employment. The area is shown by the diagram, Exhibit P 4, which is drawn to scale, and by the photographs P 5, 6, 7 and 8.

Plaintiff, upon leaving her home on the west side of Koneta Court, walked northerly to the south curb of Fifth South (R. 32) where she observed defendant's automobile to the west near the Custom Furniture Store at approximately three-fourths of a block away (R. 23-24). The Custom Furniture Store is on the west side of Tenth East, which street connects with the highway upon which the accident occurred. The defendant had traveled north on Tenth East to the vicinity of point 1 on the diagram where he stopped for east bound traffic (R. 122), then made a reverse right-hand turn onto the south lane of the roadway (R. 83) where he continued southeasterly to the point C 1 on the diagram (R. 84). Thereafter the defendant turned onto the north lane for east bound traffic and continued until the point of impact.

There is an unobstructed view to the east and southeast from the point where the defendant made the right-hand turn from Tenth East, from which point there is a gradual curve to the east and an uphill slope to the point

of the accident. When defendant made the right-hand turn he was approximately 460 feet west of Koneta Court. Plaintiff having seen defendant's automobile three-fourths of a block away proceeded toward her destination.

Plaintiff was struck on her left buttock (R. 23) by the left front fender of defendant's automobile (R. 117), suffering crippling and painful injuries, including compound comminuted fractures of the left tibia and fibula (R. 38-39, 45). Plaintiff was observed by the defendant, immediately after the accident, to be laying "across the island" (R. 112), "she was huddled up, I think with one arm on the island and the remainder of her body possibly one leg on the island, and the remainder of her body on the curb of the island" (R. 115).

The width of the roadway at the point of impact for east bound traffic is close to 31 feet. Defendant, according to his testimony, was traveling from 3 to 4 feet from the curb of the island (R. 117) upon which plaintiff was stepping. There were no automobiles to the right of defendant at the time of the accident (R. 117-118). The defendant admitted that there was no reason why he could not have turned to the right and onto the south lane of the east bound traffic if he had seen the plaintiff 50 feet away (R. 118). He did not see plaintiff until he was 10 feet away from her, and when asked why he did not see her sooner stated: "I think the glare on the windshield might have obscured my vision of her," but he said that the glare did not obstruct his view of his lane of traffic (R. 118). He testified that he was traveling be-

tween 20 and 25 miles an hour in second gear at the time of the collision (R. 119).

The defendant, a radio operator for Utah Highway Patrol, was on his way to the University of Utah to attend an eight o'clock class. His work shift as radio operator was from eleven at night to seven in the morning. On the morning in question it took the defendant 45 minutes from the time he left the Capitol Building to arrive at the scene of the accident, during which interval he drove to his home in the east 800 block on Fifth South, had a shower and breakfast (R. 120). He disclaimed being tired, weary or unobserving (R. 120).

STATEMENT OF POINTS RELIED UPON

POINT I.

THE REQUESTED INSTRUCTION ON THE LAST CLEAR CHANCE DOCTRINE SHOULD HAVE BEEN GIVEN.

POINT II.

THE COURT ERRONEOUSLY INSTRUCTED THE JURY ON PLAINTIFF'S DUTY TO YIELD THE RIGHT-OF-WAY.

POINT III.

BY IMPLICATION THE COURT ERRONEOUSLY INSTRUCTED THE JURY TO PLAINTIFF'S PREJUDICE THAT ALL SHE DID WAS TO MERELY GLANCE IN THE DIRECTION OF THE APPROACHING VEHICLE.

POINT IV.

THE COURT ERRED IN OVERRULING PLAINTIFF'S MOTION FOR NEW TRIAL.

ARGUMENT

POINT I.

THE REQUESTED INSTRUCTION ON THE LAST CLEAR CHANCE DOCTRINE SHOULD HAVE BEEN GIVEN.

The requested instruction (R. 139-140) is in the form suggested by instruction number 17.21 of J.I.F.U. The refusal of the court to give the requested instruction was excepted to (R. 128). It is appreciated that before the trial Judge can be said to be in error for his refusal to give the instruction it must appear from the evidence, viewed in a light most favorable to the plaintiff, that certain conditions exist. Among the conditions are that the defendant, by exercising due care, would have discovered the plaintiff in a helpless position of danger, and then, by exercising due care, should have realized the danger to the plaintiff, and that he then had a clear opportunity to avoid the accident by the exercise of ordinary care and with his then existing ability.

In *Winn v. Read*, 8 Utah 2d 394, 335 P.2d 627, the plaintiff and defendant were traveling north on the highway, the plaintiff on a horse and defendant in his automobile. The trial court found that as the parties moved northward in the same direction the plaintiff caused his horse to move from the right-hand side of the road to the left-hand side, had straightened out and then proceeded parallel to the road for 30 rods when the accident occurred. The finding that the horseman had traveled for 30 rods on the left-hand side of the road was not supported

by the evidence, but nevertheless this Court stated:

“If, as a matter of fact, the horseman, though on the wrong side of the road, did travel for 30 rods, *or any substantial distance*, on the left-hand side of the road, then *the defendant should have observed him and should have avoided running into him*. If he failed so to do, he was guilty of negligence that was the sole proximate cause of the collision.” (Emphasis added.)

In the instant case the defendant should have observed the plaintiff crossing the roadway and should have avoided running into her, even though, as a pedestrian, she might have been improperly crossing the roadway. The quotation taken from the *Winn* case is premised upon the supposition that the plaintiff traveled a “substantial distance” on the wrong side of the road. Here we have the plaintiff in the direct line of defendant’s vision from the time she left the south curb of Fifth South until she was struck at the south curb of the island in the center of the street. As in the *Winn* case, the defendant should have observed plaintiff and should have avoided running into her.

The defendant stated affirmatively that he did not see the plaintiff until she was 10 feet away, until too late for him to act. The defendant did not turn to the right where there was ample room, unobstructed by any traffic, to pass her. A strikingly similar situation existed in *Beckstrom v. Williams* (1955), 3 Utah 2d 210, 282 P.2d 309, where the trial court refused plaintiff’s request to submit the case to the jury on the theory of the last clear

chance. This Court held the refusal to have been erroneous and remanded the case with directions to grant a new trial.

Also, as in the *Beckstrom* case, the plaintiff was in danger from defendant's oncoming vehicle from which she could not extricate herself as soon as she moved into the lane of traffic then being traveled by defendant. In the *Beckstrom* case the plaintiff had driven a 2½ ton tractor from a private driveway into the path of defendant's approaching vehicle that he saw about 325 feet away approaching at a high rate of speed. The defendant continued forward without reducing his speed or changing directions, striking the tractor broadside and causing the injuries complained of. As to the rule governing the giving of the requested instruction on the last clear chance doctrine the Court said:

“In the present case the trial judge was bound under this rule of law to give the requested instruction on last clear chance only if it appears that reasonable men might conclude from the evidence most favorable to plaintiff that three conditions existed — (A) that plaintiff was in a danger from which he could no longer extricate himself, (B) that defendant knew, or in the exercise of reasonable care should have known, that plaintiff was so endangered, and (C) that defendant thereafter, by exercise of reasonable care, could have avoided injuring the plaintiff.”

Under proposition (A) the Court indicated various situations apparent to “reasonable minds” which pointed to the danger from which the plaintiff could not extri-

cate himself, among which was the proposition "that jumping to either side presented plaintiff no assurance of safety." In the instant case the plaintiff was confronted by the same dilemma, i.e., in standing still, retreating or going forward. The danger would persist no matter which course the plaintiff took. The happening of the accident demonstrated that her forward movement toward the safety of the island was disastrous. We submit that the requirement of condition (A) is apparent.

Under condition (B) it was reasoned that when the tractor continued forward defendant was bound to know that the driver of the cumbersome machine could not, in the few seconds required for defendant's vehicle to reach the spot, get out of the way and avoid an accident. The same reasoning would apply in this case. The plaintiff was moving forward across the highway in full view of defendant. Her forward movement implies that she was unaware of the close proximity of defendant's vehicle. The defendant, in the exercise of due care, should have known that plaintiff was not aware of the danger. Being unaware of the danger plaintiff was helpless to do anything in time to avoid the accident. The evidence most favorable to plaintiff *tends* to show that defendant on the other hand had ample opportunity to know of plaintiff's helplessness had he been properly attentive. The condition is satisfied under the rule of the *Beckstrom* case if the evidence *tends* to show that the defendant, in the exercise of reasonable care, should have known that plaintiff is endangered, leaving the ultimate fact to the jury under the proper instruction.

Certainly the driver of an automobile should be aware of the frustrations that he occasions in others under the circumstances that we have here. The jury could have reasonably believed that the defendant saw, or should have seen, the plaintiff when he was in the south lane at point C 1, or when he thereafter turned into the north lane, the lane nearest to the island. Point C 1 is approximately 220 feet from the point of impact. At some place between C 1 and the point of impact the defendant made, or in the exercise of due care should have made, an observation to the front and to the rear to determine if he could safely move from one lane to the other. He was either unobserving or else he deliberately calculated the risk of driving between plaintiff and the island. It could reasonably be said that defendant should have seen the plaintiff, whether he was in the north or south lane, within ample distance to permit him to stop his vehicle.

In *Morby v. Rogers*, 122 Utah 540, 252 P.2d 231, and based upon figures from a publication by Utah State Highway Patrol, the stopping distance for a vehicle going 25 miles per hour, including reaction time, was determined to be 62.5 feet. The defendant testified that if he had seen the plaintiff 50 feet away he could have turned to the right (R. 118).

Unlike the situation in *Compton v. Ogden Union Ry. & Depot Co.*, 120 Utah 453, 235 P.2d 515, the plaintiff was unable "up to the moment of injury" to avoid the peril. Miss Fox could not "at any instant up to the time she

was actually struck * * * by taking one step to the side, have avoided her injury." In the *Compton* case the train could only follow the course by which it was guided by the rails—the plaintiff had a choice but not the engineer. The solution of the predicament in the instant case was with the defendant, the driver of the automobile, who, in the exercise of reasonable care, should have known that plaintiff was in danger from which she could no longer extricate herself, and who, by his own statement, could have avoided the accident if he had seen her but 50 feet away. It would be of the gravest public concern to condone the conduct of the defendant, who admits that on a clear day and on an unobstructed highway he could not see an object moving within his line of vision 50 feet away and yet continued to move forward. The situation in the instant case is even more shocking because plaintiff had crossed the entire south portion of the two-lane roadway clear to the left side of defendant's car when she was struck by the left front fender while defendant was traveling at a speed not in excess, so he claims, of 25 miles per hour. Furthermore, defendant was free to utilize the entire 20 foot lane for traffic at his right — the lane in which he should have continued traveling from the outset.

In rationalizing proposition (C), and again looking at the evidence in a light most favorable to the plaintiff on the propriety of the giving of the requested instruction, the Court in the *Beckstrom* case called attention to the fact that the highway was completely free of other traffic; that the tractor came to a halt leaving some

16 feet of hard surface to the east which the defendant could, as he could in the instant case, have “lawfully utilized, turning out the three or four feet necessary to miss the tractor, without any danger to himself or others. Had defendant both braked and turned out for the tractor, the obvious and normal thing to have done, even less chance of mishap would have existed.” The Court concluded:

“It is thus well within the ambit of reason that the jury might believe defendant had ample opportunity to avoid the collision after he should have seen plaintiff’s peril and realized that he was helpless to escape. ***

“Whatever the true facts of the case, the evidence viewed in the light most favorable to the plaintiff could justify reasonable men in concluding that plaintiff was in inextricable peril, that defendant had sufficient reason to realize this fact and that defendant thereafter clearly had opportunity to avoid the collision—the elements necessary for the application of the last clear chance doctrine. Therefore the trial court erred in refusing to comply with its request to submit the case to the jury on that theory.”

We believe the instant case to be distinguishable from the recent case of *Marcellin v. Osguthorpe* (1959), 9 Utah 2d 1, 336 P.2d 779, which case, although adhering to the expressions of this Court in *Graham v. Johnson*, 109 Utah 346, 166 P.2d 230, and *Beckstrom v. Williams*, supra, on the doctrine of last clear chance, held that under the facts the defendant could do nothing to avert the collision “because his action by dimming his lights could

only react through the plaintiff” and “It would have required unusual perspicacity, if not outright prescience, for the defendant to have presaged that an accident of this character was going to happen on the basis of a quick analysis of the factors involved.” It was held that conjectures to the extent indicated did not satisfy “the requirement of last clear chance because it must exist with at least reasonable certainty.”

In the *Marcellin* case the plaintiff was driving his vehicle west before daylight and sideswiped the rear end of an automobile that was stalled on the right-hand side of the road going west. Defendant going east had stopped on his right-hand side of the road to render assistance to the stalled car. There was ample room between the two cars for plaintiff to travel, but it was contended that defendant had left his headlights on high beam so that plaintiff was unable to see the stalled car until it was too late for him to avoid the collision. The contention was that defendant could have dimmed his lights when he saw plaintiff approaching, thus enabling plaintiff to see the lighted tail lights of the stalled automobile.

In the instant case the setting is entirely different and the defendant, in the exercise of due care, could have seen the plaintiff on the highway in ample time to avoid the collision.

To say that plaintiff was negligent within the last clear chance doctrine is being charitable to the defendant. From all indications defendant actually pursued plaintiff to the curb of the island and knocked her down. Re-

fleeing upon the record, including the photographs and the diagram, it is little wonder that plaintiff, notwithstanding the shock of the impact, asked the defendant within five minutes of the accident: "Why did you hit me? *** you swerved to hit me." (R. 116).

POINT II.

THE COURT ERRONEOUSLY INSTRUCTED THE JURY ON PLAINTIFF'S DUTY TO YIELD THE RIGHT-OF-WAY.

Instruction 13 (R. 180) delineates the rules of law governing plaintiff's conduct "in order not to be guilty herself of contributory negligence." The instruction consists of two pages, which are out of place in the record, the first page being 180 and the second page being 167. The exceptions appear at pages 127-128. Subsection (2) states:

"(2) A pedestrian who crosses a street at a point other than within a marked crosswalk or within an unmarked crosswalk at an intersection *shall yield the right of way to all vehicles upon the roadway.*" (Emphasis added.)

The last paragraph of the instruction (R. 167) would require the jury to render a verdict in favor of the defendant and against the plaintiff, no cause of action, if it found that plaintiff failed to observe subsection (2) and that her failure proximately contributed to the happening of the collision. The instruction ignores the reciprocal duty of the defendant as required by subsection (a) of Section 41-6-80, *U.C.A.* 1953, which reads:

"Notwithstanding the foregoing provisions of this act every driver of a vehicle shall exercise

due care to avoid colliding with any pedestrian upon any roadway and shall give warning by sounding the horn when necessary and shall exercise proper precaution upon observing any child or any incapacitated person upon a roadway.”

The above section follows Section 41-6-79, *U.C.A.* 1953, and qualifies subsection (a) thereof, which reads:

“Every pedestrian crossing a roadway at any point other than within a marked crosswalk or within an unmarked crosswalk at an intersection shall yield the right-of-way to all vehicles upon the roadway.”

The instruction is inconsistent with Instruction 6 (R. 173), which reads:

“The rights of a pedestrian to the use of public streets are the same as those of motorists—neither greater nor less, and the same general duties devolve upon them.”

Subsection (3) of Instruction 13 is inconsistent with subsection (2). Subsection (3) states:

“(3) A pedestrian crossing a roadway at any point other than within a marked crosswalk or within an unmarked crosswalk at an intersection is required to exercise *more care and caution than would be required* in crossing in a pedestrian lane or within an unmarked crosswalk at an intersection.” (Emphasis added.)

The instructions reflect the law of the case from which the jury cannot deviate. By Instruction 7 (R. 174) the jury was told:

“The law imposes upon the driver of any ve-

hicle using a public highway, and upon a pedestrian, the same duty, each to exercise ordinary care to avoid causing an accident from which injury might result. The pedestrian's duty includes exercising ordinary care to avoid placing herself or others in danger. The driver's duty requires him to be vigilant at all times, keeping a lookout for traffic and other conditions reasonably to be anticipated, and to keep the vehicle under such control that, to avoid a collision with any person or with any other object, he can stop as quickly as might be required of him by conditions that would be anticipated by an ordinary, prudent driver in like position.

Each of these duties continues even when one has the right-of-way over the other." (Emphasis added.)

In taking the exceptions the inconsistencies as pointed out above were expressly stated, except that Instruction 7 was not specifically mentioned. It is plain, nevertheless, that the inconsistency of Instruction 7 is inherent in the matters to which attention was specifically called. But be that as it may, the instruction overlooks the realities of the situation as graphically described by this Court in *Coombs v. Perry*, 2 Utah 2d 381, 275 P.2d 680:

"Even if a car is seen approaching, unless it is so positioned as to constitute an immediate hazard to her, she is not necessarily obliged to focus full and undivided attention on that particular car and so calculates her entire conduct as to avoid being struck by it. She need not anticipate that the driver will speed, fail to observe, or to control his car, or fail to afford her the right of way, or otherwise be negligent unless in due care she observes or should observe something to warn

her of such improper conduct. This is not to say that a pedestrian may claim a right-of-way in face of danger. She must of course be watching for automobiles or other vehicles on the street, particularly from the north whence traffic was most likely to come. But due care requires that she also keep a lookout ahead for other pedestrians, possible holes or obstructions in the street, and at least remain aware of the possibility of other traffic, lest she be guilty of failing to use reasonable care for her own safety in regard to other dangers. For these reasons she obviously is not necessarily required, and likely in due care cannot, give her entire attention to any one particular point of hazard. All that is required of her is that she use that degree of care which ordinary and reasonable persons usually observe under such circumstances."

To say that a pedestrian who crosses a street at a point other than within a marked crosswalk or within an unmarked crosswalk at an intersection shall yield the right-of-way to all vehicles upon the roadway, and that if the failure to so yield proximately contributes to the happening of the collision is to overly simplify the rule, and would ordinarily mean that a pedestrian ventures upon a public street at his peril, or that he must flee at the sight of an approaching vehicle regardless of its relative position on the highway. The meaning thus attributed to the instruction is reiterated and given further impetus, if possible, by Instruction 14 (R. 181), which instructs that even though the defendant was driving too fast for existing conditions or even though he failed to keep a proper lookout the plaintiff is barred

from recovery if “she failed to yield the right-of-way to the defendant’s automobile” and such failure was a proximate contributing cause of the accident. We submit that the use of the expression “failed to yield the right-of-way” *without more* is an erroneous statement of conduct upon which to predicate negligence. The jury, if not thoroughly confused by the other and conflicting statements as pointed out, was most certainly uninstructed on the right-of-way rule and the reciprocal duty of the defendant, all to the obvious prejudice of the plaintiff.

POINT III.

BY IMPLICATION THE COURT ERRONEOUSLY INSTRUCTED THE JURY TO PLAINTIFF’S PREJUDICE THAT ALL SHE DID WAS TO MERELY GLANCE IN THE DIRECTION OF THE APPROACHING VEHICLE.

By subparagraph (1) of Instruction 13 (R. 180) the jury was instructed that it was the duty of the plaintiff in undertaking to cross the street 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, and that 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 is reasonably necessary for her own protection. The court then made the gratuitous statement to the effect that such would be true even though a pedestrian is in a pedestrian lane and may have the right-of-way over the motor vehicle. The instruction then states:

“In this connection a mere glance in the direction of the approaching automobile is not sufficient. The duty to look has inherent in it the duty to see what is there to be seen and to pay heed to it.” (Emphasis added.)

The exception to the instruction was that it “would seem to inject into the case the fact that all plaintiff did was merely glance in the direction of the approaching automobile, which the evidence does not justify,” (R. 128). The trial judge was fully aware of the line of demarcation between his prerogative and that of the jury, such is indicated by the expression in Instruction 1 (R. 168):

“The court has no opinion, and does not seek to express any in these instructions with respect to what the facts are. It is your sole prerogative to determine the facts from the evidence.”

The error complained of was invited by defendant’s requested Instruction 9 (R. 150), which cites *Mingus v. Olsson*, 114 Utah 505, 201 P.2d 495, in which case a directed verdict in favor of the defendant was sustained in a wrongful death action. The Court held that the evidence showed that the deceased did not look and neither said nor did anything to indicate that he was at all aware of the danger presented by defendant’s approaching automobile; he did nothing to either warn his wife nor to rescue either himself or her from their position of peril. “On this evidence, it must be said as a matter of law that deceased either failed to look, or having looked, failed to see what he should have seen.” The Court then said:

“The rights of pedestrians to the use of the public streets are the same as those of motorists—neither greater or less. Hence, the same general duties devolve upon them. 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.” (Emphasis added.)

In the case at bar the trial court reviewed the evidence on defendant’s motion for directed verdict and denied the same (R. 124), holding in effect that plaintiff did more than to merely glance in the direction of the approaching automobile, assuming that the expression in the *Mingus* case, italicized above, can be distorted into the positive assertion now claimed for it. Once the court had determined that the evidence, as a matter of law, did not entitle the defendant to a judgment, we submit that the trial court could not, in its instruction, presume to criticize plaintiff’s alleged conduct without giving the appearance of emphasizing what it thought to be the evidence, and thus encroaching upon the prerogative of the jury. Furthermore, the expressions of this Court in *Coombs v. Perry*, *supra*, seem to disavow the refinement that the instruction makes.

Once the trial court determined that the broad as-

pects of due care, or the lack of it, should be passed upon by the jury under a general verdict, then the jury, and not the court, had the sole right to determine the facts and what was reasonable under the circumstances. The expression that "a mere glance," as used in the instruction, bears the connotation that that is all the plaintiff did and the prejudice is obvious.

POINT IV.

THE COURT ERRED IN OVERRULING PLAINTIFF'S MOTION FOR NEW TRIAL.

The motion for new trial (R. 190) was on the following grounds:

- "1. Insufficiency of the evidence to justify the verdict.
2. That the verdict of the jury is against law.
3. Error in law occurring at the trial, including errors in the giving of instructions excepted to and errors in the failure to give requested instructions, the refusal of which was likewise excepted to."

Aside from the errors heretofore pointed out, the trial court, on the motion for new trial, was given the opportunity to determine whether the evidence was sufficient to support the verdict, which involves, for the purpose of our discussion, consideration of defendant's negligence as being the sole proximate cause of the accident.

The undisputed testimony burdens defendant with the duty of exercising due care to avoid colliding with

plaintiff even though she was crossing the roadway other than within a marked crosswalk or within an unmarked crosswalk at an intersection. Plaintiff had traveled the entire width of the south lane for east bound traffic, the lane in which defendant should have been traveling, in the exercise of due care, and from which he turned into the north lane to continue his eastward movement. At the time he turned from the south lane to the north lane he should, in the exercise of due care, have seen the plaintiff. He did not see the plaintiff until she was "10 feet away" and from the time he saw her plaintiff traveled directly in front of him a distance of at least the width of his automobile, and, according to his version, an additional 10 feet in order to reach the point where she was struck by the left front fender of defendant's automobile. The accident was caused by defendant's failure, in the exercise of due care, to have seen the plaintiff sooner than he did, even though she was in plain view.

The testimony of defendant that when he first saw plaintiff she was 10 feet to the right of the front of his car is incredible when one considers that defendant was traveling between 20 and 25 miles per hour and that, within the split second of time that must have elapsed between the moment defendant saw the plaintiff and the moment of the impact, plaintiff traveled the required distance to place her in a position to be struck by the left front fender. Regardless of the apparent improbability of defendant's version of when he first saw the plaintiff, it was obvious that, in the exercise of due care,

he should have seen her sooner. As was said in *Coombs v. Perry*, supra, the defendant must be deemed to have seen her, the Court stating:

“It should be borne in mind that when defendant was such distance away, the plaintiff was in the middle of the street, clearly within the angle of vision of where the defendant should have been looking, and he was obliged to know that her only purpose in being there facing west was to cross the street. The ‘must be deemed to have seen what was there to be seen’ rule also applies to the defendant; so he must be deemed to have seen her. When she stepped forward west of the center line it would be an immediate warning to him that she was continuing to cross and that she claimed her right-of-way. It therefore seems so plain as to be beyond question that from the distances just postulated, as they reasonably could have been found by the jury, the defendant had ample opportunity to not only safely, but conveniently, slow down, turn to his right, or stop if necessary, to afford the plaintiff the right-of-way and avoid striking her.”

The occurrence of the accident cannot be rationalized on any premise other than the defendant’s failure to comply with his continuing duty to keep a proper lookout regardless of plaintiff’s position on the street. As the direct result of defendant’s carelessness the accident happened whether plaintiff saw him or not, and consequently her alleged failure to see did not proximately contribute to the cause of the accident. Again we quote from *Coombs v. Perry*, supra:

“*** that if the plaintiff had looked and seen defendant approaching at a distance of 144 feet or more away, due care would not have required her to do anything other than to proceed forward on the assumption that defendant would afford her the right of way; and that thus her conduct could have been the same, and the accident could have happened just the same, whether she saw him or not; and consequently that her failure to see did not proximately contribute to cause the accident. This would be true without the testimony of the witness Burns hereinabove referred to, but if we consider the additional fact that he said the defendant was not proceeding in the center lane, but in the west lane, and that as he approached the plaintiff in the crosswalk, he swerved to his left and toward her, it is made palpably clear.”

The refinements of proximate cause, the sole proximate cause and what may have proximately contributed to the happening of the collision have been expressed many times by this Court. The application of those rules vary with each set of facts. In *Winn v. Read*, supra, it was said that if the horseman, though on the wrong side of the road, had traveled for any substantial distance, the defendant motorist should have observed him and should have avoided running into him. “If he failed so to do he was guilty of negligence that was the sole proximate cause of the collision.” The simplicity of the statement and the realistic application of the principle merits emphasis.

We submit that the relative position of defendant’s automobile and the position of the plaintiff at the time

of the impact, coupled with defendant's statement that he did not see that which he should have seen under all of the circumstances, compels the finding, by the tests enumerated by this Court, that defendant was responsible for the collision, due solely to his failure to keep a lookout that he was under obligation to keep. The evidence is insufficient to support the verdict in defendant's favor.

CONCLUSION

The jury, in the conscientious performance of its duty to accept without question the instructions of the trial court, was impelled by Instructions 13 and 14 to ignore the conduct of the defendant and to give effect to the erroneous connotation of the expression "to yield the right-of-way." The overly simplified admonition annihilated plaintiff's position as completely as if a verdict had been directed against her. Plaintiff was entitled to have her cause submitted to the jury by clear, unequivocal and correct statements of the law governing the conduct of both parties, free from any expression from which it might be said that the trial court had predetermined any fact, the determination of which it was, nevertheless, leaving to the jury.

The inexcusable conduct of the defendant driver, who admits that he did not see the plaintiff, a pedestrian, on an otherwise unobstructed highway in broad daylight.

until he was 10 feet away from her, should be condemned. The plaintiff is fairly entitled to have a jury, properly instructed, pass upon the opportunity that the defendant had to avoid the accident under the circumstances pointed out above.

The judgment appealed from should be reversed and the cause remanded with such instructions as to this Court may seem proper.

Respectfully submitted,

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