New Jersey Court of Errors and Appeals

LESTER M. GERMAN and JACOB GERMAN, *Plaintiffs-Appellees,* *v.* WILLIAM HARRIS, *Defendant-Appellant.*	Action at Law. On Appeal from Supreme Court, Hudson Circuit.

BRIEF FOR PLAINTIFFS-APPELLEES.

This is an appeal from a judgment of $1,200 in favor of the plaintiff Lester M. German against the defendant, no appeal having been taken from the judgment in favor of the plaintiff Jacob German. The judgment was entered in Hudson Circuit on a verdict rendered by a jury.

Statement of Facts.

On the morning of December 18, 1927, plaintiff Lester German was driving his father's Ford car in a northerly direction on Baldwin Avenue, Jersey City. Baldwin Avenue crosses Hoboken Avenue at right angles. Hoboken Avenue is the exit from the Holland Tunnel and runs east and west. This avenue is a one-way street and is confined to cars coming from the Holland Tunnel and going in a westerly direction. At the time in question traffic was not regulated by lights, nor was there any other means of traffic regulation at that point. German approached the intersection at about 3:00 o'clock in morning; he was driving in a northerly direc-

tion and as he reached Hoboken Avenue he slowed up his car, looked to the east (the only direction from which traffic could approach—Case, p. 23), and saw the lights of a car approaching the intersection about 300 feet away (Case, p. 30). The car that he saw was a Flint car, owned and operated by one Fread (one of plaintiffs' witnesses). German blew his horn and proceeded to cross the intersection, still looking to the right and still seeing the car of Fread approaching. As German reached the center of the intersection—he was going at the rate of ten miles an hour—he was struck by the car owned by the defendant Harris and operated by the defendant Schlesinger (Case, p. 38). The force of the collision turned the Ford over several times and threw it up on the sidewalk on Baldwin Avenue and against a building on the northwesterly corner of Baldwin and Hoboken Avenues.

Plaintiff's witness Fread said that he was driving his Flint car westerly on Hoboken Avenue; that the defendant's Cadillac car had followed him through the tunnel from New York and after leaving the tunnel had passed and repassed him several times (Case, p. 48). When Fread was about 300 feet from Baldwin Avenue, he saw plaintiff's Ford nosing out of Baldwin Avenue, going in a northerly direction. At this time the defendant's Cadillac car was about 50 feet behind Fread's car and the headlights of the Cadillac were dim (Case, p. 53). At about this point, the Cadillac car passed the Flint car *"at a terrific rate of speed"* (Case, p. 49). Fread turned his car to the right on signal from the Cadillac to let the Cadillac pass. The Cadillac struck the Ford car about amidship or three-quarters towards the back of the Ford. Fread said the Ford took two or three somersaults before it came to rest and he saw a body fly

through the air for a distance of about 70 feet (Case, p. 50). The Cadillac traveled about 100 feet from the point of contact on to the sidewalk of Hoboken Avenue beyond the northwesterly intersection of Hoboken Avenue and Baldwin Avenue (Case, p. 50).

The defendant-appellant in his brief misstates two points: first, that the Cadillac was illuminated inside. The testimony is that while the Cadillac car was in the tunnel the lights of the tunnel illuminated it so that its occupants could be seen, and not outside of the tunnel or in the vicinity of the accident (Case, p. 53).

Officer Miller (plaintiffs' witness) said that he heard the crash a block and a half away (Case, p. 46), that he reached the scene of the accident and saw the Cadillac on the sidewalk of Hoboken Avenue, 75 or 80 feet west from the intersection of Baldwin and Hoboken Avenues. On being questioned with respect to whether or not the headlights were damaged he said they were damaged but that the headlights were still on the car, that is, that they had not been knocked off. There was no testimony by Officer Miller as to whether the lights of the car were lighted or not (Case, pp. 47, 48).

POINT I.

The Trial Court correctly denied defendant's motion for a nonsuit and directed verdict.

The evidence shows that the plaintiff Lester German, driver of the Ford, slowed down at the intersection of Baldwin and Hoboken Avenues, looked east in the direction from which traffic was moving and saw the headlights of a car 300 feet away, but believed his car would cross the inter-

section ahead of this car. Still looking to the right and still seeing this car, he reached a point at the middle of the intersection, at which point he was struck by another car (not the car whose headlights he had seen) coming from the right. This car he did not see.

The car which struck German was behind the Flint (the car that German saw), when he started across the intersection. It was a Cadillac owned by the defendant Harris, an occupant of the car and driven by the defendant Schlesinger. The headlights of the Cadillac were dim and as German came out from the intersection and was proceeding across the intersection the Flint turned to the right on signal from the Cadillac, which went by the Flint at a "terrific rate of speed" and struck the Ford towards its rear at a point about the middle of the intersection of the two streets (Case, p. 50).

No evidence as to negligence was adduced on behalf of the defendants. Neither one of them appeared in Court, nor did anyone testify for them, except a doctor who had examined the plaintiff and a repairman who had examined the Ford. *The uncontradicted evidence is that the defendant's car was behind another car as the plaintiff came into the intersection and was 350 feet away from the intersection as plaintiff started to cross it;* that when the defendant's car struck plaintiff it was going at a speed described as "a terrific rate of speed" and also estimated at about 50 miles an hour. The physical aspect of the result of the accident demonstrates that the defendants must have been travelling, to put it mildly, at a very rapid rate of speed, as the Cadillac travelled from the middle of the intersection for an estimated distance of 100 feet, or 75 to 80 feet west of the northwesterly corner of Hoboken and Baldwin Avenues

after striking the Ford, and the Ford car was turned over two or three times and thrown from the middle of the intersection to a point north of the house on the northwest corner of Baldwin and Hoboken Avenues.

The appellants cite the case of *Carambas* v. *Bergida,* 103 N. J. L. 313, 314, and the case of *Sharpe* v. *Public Service,* 103 N. J. L. 583, as being decisive of the case at bar. Both of these cases differ in material respects from the case at bar. In the *Carambas* case the plaintiff was at a standstill, 15 feet away from the corner, when he heard the noise of the approaching vehicle, and while there was plenty of light to see, he did not see it. The Court charged in that case that plaintiff was under the duty of using his faculties to understand the dangers to which he was exposed. In the *Public Service* case, plaintiff ran into a trolley car, after nearly crossing its intersection, near its rear end. The plaintiff ran into this car without looking in the direction from which this car approached.

These two cases are clearly different from the case at bar, as in the case at bar the defendant's car was behind another automobile 350 feet away from the intersection as the plaintiff came out on the intersection. The plaintiff saw the foremost car, which was 50 feet ahead of the defendant's car, and believing he had ample opportunity to cross the street in front of that car, proceeded to cross the intersection.

In *Purcell* v. *Pollock* (Errors and Appeals), 143 Atlantic 426, the Court held it was *not contributory negligence* where plaintiffs testified that

> "their car slowed down for the crossing and the driver looked down Watchung Avenue, where he could see for a distance of some 195 feet, as he approached northerly along Broad

Street, and saw nothing of defendant's Buick car; that he started to cross the street going about twelve miles an hour, and in about three seconds after proceeding about 65 feet reached a point some six feet beyond the traffic beacon, something like a cloud came rushing up and crashed into the Ford."

In *Thomas* v. *Metzendorf* (Errors and Appeals), 101 N. J. L. 346, it was held:

"1. The mere fact that the plaintiff, an elderly man, failed to observe the defendant's automobile approaching about 'a block away' when he looked in that direction as he started (in the night time) to cross the street at a proper crosswalk, does not, as a matter of law, render him guilty of contributory negligence when struck near the opposite curb by such automobile, negligently driven in respect to speed and control, and giving no audible signal of its approach."

In *Tischler* v. *Steinholtz* (Errors and Appeals), 99 N. J. L. 148, it was held:

"2. The duty of exercising reasonable care between persons using the highways is mutual, and each person may assume that others traveling on the highway will comply with this obligation. Hence, a pedestrian has a right to assume that the driver of an automobile will exercise proper caution in approaching street crossings. And where a pedestrian when about to cross a highway from the northerly side sees defendants' automobile approaching on the northerly side of the street about two hundred feet away, apparently at a moderate speed, the question whether the pedestrian, in the exercise of reasonable care, should have apprehended that it would reach and strike him before he could pass is one for the determination of the jury."

In *Cottrell* v. *Champion,* 145 Atlantic 322:

"Contributory negligence of automobile driver, in proceeding across street ahead of

automobile approaching intersection from her right at excessive rate of speed, *held* for jury."

In this case, the driver, when she started across the intersection, saw the defendant's car going 40 to 45 miles an hour, at a distance of about 162 feet from her, and in that posture of affairs, the Court held that contributory negligence was a jury question.

In the case at bar, plaintiff blew his horn at the intersection (Case, p. 33), saw a car about 300 feet away, and far enough away to give him a chance to cross (Case, p. 27). He did not see the defendant's car, which was hidden from view behind the car that plaintiff saw, and there is no testimony to indicate whether or not he could have seen it had nothing been in front of it. Surely, the plaintiff is not guilty of contributory negligence as a matter of law in crossing the street under these circumstances, particularly when we add the additional factor that his car was struck in the rear. There was ample room to his rear for the defendant to pass plaintiff's car, and the plaintiff had a right to assume that the defendant would comply with his obligation of exercising reasonable care (*Tischler* v. *Steinholtz, supra*).

POINT II.

The Trial Court correctly refused defendant's second request to charge.

The Trial Court refused defendant's request to charge the jury as follows:

"2. Plaintiff Lester German was under a duty to make reasonable observations for other vehicles, so that even if you find that he looked before crossing the path of the

> Cadillac, if you also conclude that he did not look efficiently and that had he made a reasonable observation he would have seen the Cadillac and avoided the accident, then your verdicts must be in favor of the defendants" (Case, p. 85).

The defendants' request is incorrect in that it casts upon the plaintiff an undue burden because while the plaintiff is supposed to look; while he did look and looked efficiently; the duty is not on him to see everything, no matter at what distance, nor to assume that anyone he might see, no matter at what distance, is liable to run into him.

The Trial Court charged the jury with respect to the plaintiff's contributory negligence as follows:

> "The charge made by the defendant is that he was guilty of contributory negligence. Now you see here the burden rests upon the defendants of establishing that to your satisfaction by a fair preponderance of the evidence. That does not necessarily mean the evidence produced only by the defendants, but it does mean all the evidence in the case. Here you have the driver of another car whose conduct you must consider. He too, was required to exercise reasonable care in the operation, control and management of his car, and such of the traffic rules as would fit his situation must also be considered in weighing his conduct, but it follows that if Lester M. German was negligent, and if he thereby contributed in any degree to the happening of this accident, that would bar a recovery by him against the defendants even if you should at the same time find that the defendants' driver was negligent, too, and even if the defendants' driver was more negligent than Lester German was" (Case, pp. 81-82).

This charge is a fair statement of the rule of contributory negligence governing the case at bar.

The defendants contend that the plaintiff could have seen the defendants' car. He could not have seen the car as he came out into the intersection, as the defendants' car was then behind another intervening car which had not reached the intersection when the accident occurred. The defendants say that the defendants' car was well-lighted, as the wearing apparel of the occupants was visible to the witness Fread. Fread said that he could see the occupants of the car in the Holland Tunnel (Case, p. 53). At the point where Fread saw the occupants of the car he saw them through the illumination in the tunnel and not through any light in or on defendants' car. As a matter of law, cars passing through the Holland Tunnel are required to put all lights out. Much is made of the fact that plaintiff said that he saw the Fread car when he came out of the intersection and kept it in sight when he was crossing, but did not see the defendants' car. This can be easily explained when we remember that the plaintiff was proceeding to the north. The Fread car was approaching him from the east. Had the Fread car proceeded in a straight line, at some point the Fread car would have passed beyond the range of his vision unless plaintiff had turned completely around. The Fread car unquestionably kept within his range of vision for a longer period than usual as it swerved to the right or toward the direction in which plaintiff was proceeding when it let the defendants' car pass. The defendants' car unquestionably was in the back of plaintiff's line of vision from the time it passed the Flint, as the Cadillac car struck the Ford in the rear, and from the time it passed Fread's car to the time of impact was "no length of time" (Case, p. 51). It will be remembered that the testimony not only shows the Ford car was struck to the rear but that it was thrown in a north-

westerly direction (it was traveling in a northerly direction before the accident). No observation, no matter how efficient, would have caused plaintiff to see defendants' car which came at "a terrific rate of speed" from behind an intervening car and to his rear.

It is urged that the Trial Court was correct in denying defendant's motion for nonsuit, direction of verdict, and in refusing the request to charge.

It is respectfully submitted that the judgment should be affirmed.

Respectfully submitted,

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Attorney for and of Counsel
with Plaintiffs-Appellees.