Torts--Automobiles--Ohio's Assured Clear Distance Rule

Richard C. Binzley

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same party. Now, a plaintiff must plead both elements of damage in
one action or he will be precluded from recovering on the omitted
element by a plea of res judicata in any subsequent action between the
same parties on the same cause. Where, however, the two actions are
pending simultaneously, failure of the defendant to amend his answer in
the property damage action to allege that the personal injury action is
pending constitutes a waiver of the rule against splitting a cause of
action and will prevent defendant from raising the judgment in the
property damage action as a bar to the personal injury action.

Judging by the confusion over what is and what is not dicta, it would
seem that one of the major weaknesses in giving the syllabus force of law
is that it is easy to glide over the facts of the case without determining
whether the court mistakenly included a "rule" which was not necessary
to a determination of the case. The problems that can arise from over-
emphasizing the syllabus are strikingly illustrated by the nearly twenty
years of confusion that resulted from applying paragraph four of the
Vasu syllabus as law.

ROBERT L. MATIA

TORTS — AUTOMOBILES — OHIO'S ASSURED CLEAR
DISTANCE RULE

Kellerman v J S. Durig Co., 176 Ohio St. 320,
199 N.E.2d 562 (1964)

The assured clear distance rule has developed along several lines
within the various states. Some states have made the rule statutory, and
these have tended toward strict application of the statute thereby barring
recovery to plaintiffs who have collided with unlighted objects ahead. In
most states, however, the rule has been developed by case law. These
jurisdictions generally have allowed a greater scope of inquiry and usually
submit the issue of contributory negligence to the jury under applicable
instructions to apply the rule in the light of the surrounding circum-
stances leading to the accident. But at least two jurisdictions have not
accepted the rule on any basis; each case is decided on its own facts and
circumstances.

26. See note 23, supra.
27. It should be noted that the use of the words "personal injury action" and "property
damage action" in the Shaw syllabus is curious. Is the court saying that this rule only applies
where the property damage action is the first one filed and that the objection could not be
raised in the personal injury action to the trying of the property damage action? If this is in
fact what the court is saying, the better view would seem to be that the waiver rule should
apply regardless of whether the personal injury action or the property damage action is the
first filed.
The Ohio assured clear distance statute has been applied in numerous cases. In those cases involving collisions with discernible static objects the statute has traditionally been strictly construed, i.e., violation of the statute amounts to contributory negligence as a matter of law. Hence, recovery by plaintiffs was barred notwithstanding the nature of defendants’ conduct. However, the subject case of Kellerman v. J. S. Dung Co. has the effect of liberalizing the strict construction of the statute as previously interpreted by the Ohio Supreme Court. In Kellerman, plaintiff’s decedent suffered fatal injuries when he drove his car into the left rear corner of defendant’s large tractor-trailer. The tractor-trailer had been stopped for over an hour on the right side of a heavily traveled highway with the left rear part of the unlighted trailer still on the traveled portion of the road. The incident occurred just after sunset. The common pleas court directed a verdict for defendant, holding that plaintiff’s decedent had violated the assured clear distance statute and was therefore chargeable with contributory negligence as a matter of law. Hence, there could be no recovery. The Ohio Supreme Court, however, reversed and remanded, holding that violation of the assured clear distance statute by

6. The statute reads in part: “No person shall operate a motor vehicle at a speed greater or less than is reasonable or proper and no person shall drive any motor vehicle at a greater speed than will permit him to bring it to a stop within the assured clear distance ahead.” Ohio Rev. Code § 4511.21 (Supp. 1964).
9. 176 Ohio St. 320, 199 N.E.2d 562 (1964).
plaintiff's decedent would not bar recovery should wanton misconduct be found on the part of the defendant.

This interpretation by the supreme court does not overrule prior decisions involving the assured clear distance statute. It does, however, represent a marked departure from the view taken in the controversial case of *Smiley v Arrow Spring Bed Co.* In the *Smiley* case, the plaintiff drove his car into the rear end of defendant's truck which was parked without lights at night on the traveled portion of the road thirty feet beyond the crest of a hill. Plaintiff was also blinded by the lights of an oncoming vehicle at the moment he came over the crest of the hill. In denying plaintiff recovery on the ground he had been contributorily negligent as a matter of law for violating the statute, the court said:

The statute is a safety regulation and imposes upon the operator of a motor vehicle at all times the unqualified obligation to be able to stop his car within the distance that discernible objects may be seen. By force of the statute the motorist may therefore assume nothing that is not assured to him by the range of his vision.

In essence the court said in *Smiley* that a plaintiff motorist in Ohio must anticipate unlawful maneuvers on the part of others in calculating the assured clear distance ahead. If his calculation is wrong and a collision occurs he will be found contributorily negligent as a matter of law. The *Kellerman* decision affirmed this requirement, but also placed a burden of anticipation on the defendant. There, the court said that the defendant must also anticipate the unlawful act of the plaintiff, i.e., of violating the assured clear distance statute. If he fails to so anticipate plaintiff's

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10. "Wanton misconduct is such conduct as manifests a disposition to perversity, and it must be under such surrounding circumstances and existing conditions that the party doing the act or failing to act must be conscious, from his knowledge of such surrounding circumstances and existing conditions, that his conduct will in all probability result in injury." Universal Concrete Pipe Co. v. Bassett, 130 Ohio St. 567, 200 N.E. 843 (1936). See generally Annot., 119 A.L.R. 654 (1939), Annot., 92 A.L.R. 1367 (1934); Annot., 72 A.L.R. 1357 (1931); 6 OHIO JUR. 2d, Automobiles § 226 (1954).

11. Only in Universal Concrete Pipe Co. v. Bassett, 130 Ohio St. 567, 200 N.E. 843 (1936), was the issue of wanton misconduct on the part of defendant raised, and in that case the evidence did not support the charge. This was the only case found in any jurisdiction in which wanton misconduct was raised as a defense to contributory negligence for violation of the assured clear distance rule. However, in Inter-City Trucking Co. v. Daniels, 181 Tenn. 126, 178 S.W.2d 756 (1944), the defendant was deprived of his defense of contributory negligence on the ground that his conduct indicated a gross disregard of the rights of others when he left his truck parked and unlighted in the road. The court labeled this conduct "gross or wanton negligence."

12. 138 Ohio St. 81, 33 N.E.2d 3 (1941). "No statute in Ohio has received a construction more strict and harsh than was applied to this statute by the Supreme Court in *Smiley v Arrow Spring Bed Co.*" Spangenberg, *Developments in the Law of Wanton Misconduct and Nuisance in Relation to the Assured Clear Distance Ahead Rule*, 23 OHIO BAR ASS'N REP. 227 (1950).

13. 138 Ohio St. 81, 88-89, 33 N.E.2d 3, 7 (1941) But see Tyson v. Ford, 228 N.C. 778, 47 S.E.2d 291 (1948)
unlawful act he may be found guilty of wanton misconduct and consequently will lose his defense of contributory negligence.

The majority of jurisdictions in the United States do not require a motorist to anticipate negligence on the part of another motorist. The general view is that motorists have a right to assume that other motorists will exercise reasonable care and caution under the circumstances to avoid collision, and will obey applicable traffic regulations and rules of the road. The position of Ohio is therefore inconsistent in theory with the majority, but the effect of Kellerman in requiring the issue of wanton misconduct to be submitted to the jury where the evidence construed most strongly in favor of the plaintiff shows wanton misconduct acts to liberalize the Ohio rule. This may be evidenced by the fact that prior to Kellerman the Ohio courts in applying the rule strictly had given little consideration to the nature of defendant's conduct and to special conditions and factors of excuse such as rain and fog, or mud on the parked vehicle making it less discernible, or the glare of headlights of oncoming vehicles. Therefore, if the rationale of the Kellerman decision had been applied to the facts in Smiley, it is quite possible that plaintiff's recovery would not have been barred, since in Smiley there appears to have been sufficient evidence for submission of the issue of wanton misconduct.