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

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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.[26] 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.[27]

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 overemphasizing the syllabus are strikingly illustrated by the nearly twenty years of confusion that resulted from applying paragraph four of the *Vasu* syllabus as law

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TORTS — AUTOMOBLES — 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,[1] and these have tended toward strict application of the statute thereby barring recovery to plaintiffs who have collided with unlighted objects ahead.[2] In most states, however, the rule has been developed by case law.[3] 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 circumstances leading to the accident.[4] But at least two jurisdictions have not accepted the rule on any basis; each case is decided on its own facts and circumstances.[5]

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[6] has been applied in numerous cases.[7] 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.[8] Hence, recovery by plaintiffs was barred notwithstanding the nature of defendants' conduct. However, the subject case of *Kellerman v. J. S. Durig Co.*[9] 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

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1. *E.g.*, MICH. COMP. LAWS § 257.627 (1948); OHIO REV. CODE § 4511.21 (Supp. 1964); PA. STAT. ANN. tit. 75, § 1002 (1960).

2. Lindquist v. Thierman, 216 Iowa 170, 248 N.W 504 (1933); Notarianni v. Ross, 384 Pa. 63, 119 A.2d 792 (1956). See generally Annot., 97 A.L.R. 546 (1935).

3. *E.g.*, Harrison v. Travelers Mut. Cas. Co., 156 Kan. 492, 134 P.2d 681 (1943); Owen Motor Freight Lines v. Russell's Adm'r, 260 Ky. 795, 86 S.W.2d 708 (1935); Robertson v. Welch, 242 Miss. 110, 134 So. 2d 491 (1961); Waite v. Briggs, 175 Neb. 104, 120 N.W.2d 547 (1963); Burlington Transp. Co. v. Wilson, 61 Nev. 22, 114 P.2d 1094 (1941); Tyson v. Ford, 228 N.C. 778, 47 S.E.2d 251 (1948); Hastings v. Soule, 118 Vt. 105, 100 A.2d 577 (1955).

4. Rozycki v. Yantic Grain & Prod. Co., 99 Conn. 711, 122 Atl. 717 (1923); Kirk v. United Gas Pub. Serv., 185 La. 580, 170 So. 1 (1936); Welch v. Stowell, 121 Vt. 381, 159 A.2d 75 (1960). See 2 HARPER & JAMES, TORTS § 17.2, at 974 n.20 (1956).

5. Marshall v. Sellers, 188 Md. 508, 53 A.2d 5 (1947); Johnson v. Lee Way Motor Freight, 261 S.W.2d 95 (Mo. 1953).

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).

7. *E.g.*, Cox v. Polster, 174 Ohio St. 224, 188 N.E.2d 421 (1963); Whitaker v. Baumgardner, 167 Ohio St. 167, 146 N.E.2d 729 (1957); Smiley v. Arrow Spring Bed Co., 138 Ohio St. 81, 33 N.E.2d 3 (1941); Skinner v. Pennsylvania R.R., 127 Ohio St. 69, 186 N.E. 722 (1933).

8. Buster v. Baltimore & O.R.R. 252 F.2d 173 (6th Cir. 1958); Whitaker v. Baumgardner, 167 Ohio St. 167, 146 N.E.2d 729 (1957); Smiley v. Arrow Spring Bed Co., 138 Ohio St. 81, 33 N.E.2d 3 (1941); Kormos v. Cleveland Retail Credit Men's Co., 131 Ohio St. 471, 3 N.E.2d 427 (1936); Universal Concrete Pipe Co. v. Bassett, 130 Ohio St. 567, 200 N.E. 843 (1936); Gumley v. Cowman, 129 Ohio St. 36, 193 N.E. 627 (1934); Skinner v. Pennsylvania R.R., 127 Ohio St. 69, 186 N.E. 722 (1933). *Accord*, Cox v. Polster, 174 Ohio St. 224, 188 N.E.2d 421 (1963); McFadden v. Elmer C. Breuer Transp. Co., 156 Ohio St. 430, 103 N.E.2d 385 (1952).

9. 176 Ohio St. 320, 199 N.E.2d 562 (1964).

plaintiff's decedent would not bar recovery should wanton misconduct[10] 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.[11] It does, however, represent a marked departure from the view taken in the controversial case of *Smiley v Arrow Spring Bed Co.*[12] 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.[13]

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 251 (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.[14] 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.[15] 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[16] and to special conditions and factors of excuse such as rain and fog,[17] or mud on the parked vehicle making it less discernible,[18] or the glare of headlights of oncoming vehicles.[19] 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

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14. Page v. Mazzei, 213 Cal. 644, 3 P.2d 11 (1931); Kaufman v. Hegeman Transfer & Lighterage Terminal, Inc., 100 Conn. 114, 123 Atl. 116 (1923); Kadlec v. Johnson Constr. Co., 217 Iowa 299, 252 N.W 103 (1933); Weil v. Kreutzer, 134 Ky. 563, 121 S.W 471 (1909); Davis v. Simpson, 138 Me. 137, 23 A.2d 320 (1941); Bell v. Crook, 168 Neb. 685, 97 N.W.2d 352 (1959); Griffeth v. Pound, 357 P.2d 965 (Okla. 1960); Senger v. Vancouver-Portland Bus Co., 209 Ore. 37, 298 P.2d 835 (1956).

15. Arkansas Power & Light Co. v. Crooks, 188 Ark. 513, 67 S.W.2d 193 (1934); Langner v. Caviness, 238 Iowa 774, 28 N.W.2d 421 (1947); Keir v. Trager, 134 Kan. 505, 7 P.2d 49 (1932); Foster v. Curtis, 213 Mass. 79, 99 N.E. 961 (1912); Schmitt v. Emery, 211 Minn. 547, 2 N.W.2d 413 (1942); Barrett v. Alamito Dairy Co., 105 Neb. 658, 191 N.W 550 (1921); Garner v. Pittman, 237 N.C. 328, 75 S.E.2d 111 (1953); Wilson v. Bittner, 129 Ore. 122, 276 Pac. 268 (1929); Inter-City Trucking Co. v. Daniels, 181 Tenn. 126, 178 S.W.2d 756 (1944); Mosso v. E. H. Stanton Co., 75 Wash. 220, 134 Pac. 941 (1913); Burdette v. Henson, 96 W Va. 31, 122 S.E. 356 (1924). Prior to the enactment of the assured clear distance statute in 1929, the Ohio Supreme Court had held that it was not negligence per se to drive a car at such a rate of speed as to be unable to stop within the range of the headlights at night. Instead it was held to be a question for the jury to determine if the driver was negligent, and if so whether his negligence was the proximate cause of the injury. Tresise v. Ashdown, 118 Ohio St. 307, 160 N.E. 898 (1928). *Compare* Marchal v. Frankman, 58 N.E.2d 679 (Ohio Ct. App. 1943), *with* Spreng v. Flaherty, 40 Ohio App. 21, 177 N.E. 528 (1931).

16. *E.g.*, Whitaker v. Baumgardner, 167 Ohio St. 167, 146 N.E.2d 729 (1957); Smiley v. Arrow Spring Bed Co., 138 Ohio St. 81, 33 N.E.2d 3 (1941); Kormos v. Cleveland Retail Credit Men's Co., 131 Ohio St. 471, 3 N.E.2d 427 (1936). *But see* Notarianni v. Ross, 384 Pa. 63, 66, 119 A.2d 792, 794 (1956) (dissenting opinion)

17. Woods v. Brown's Bakery, 171 Ohio St. 383, 171 N.E.2d 496 (1960); Gumley v. Cowman, 129 Ohio St. 36, 193 N.E. 627 (1934); Skinner v. Pennsylvania R.R., 127 Ohio St. 69, 186 N.E. 722 (1933). See also Annot., 42 A.L.R.2d 13 (1955).

18. Kormos v. Cleveland Retail Credit Men's Co., 131 Ohio St. 471, 3 N.E.2d 427 (1936).

19. *Ibid.* See also Annot., 22 A.L.R.2d 292 (1952).