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Court of Appeals of Ohio, Second District, Montgomery County.
OLGA WILLIAMSON, Administratrix of the Estate of Bruno J. Williamson, Deceased,
Plaintiff-Appellant
v.
DAVID A. GASPER, Defendant-Appellee
Case No. CA 5909.

June 22, 1979.

Konrad Kuczak, Attorney at Law, Suite 707, 111 West First Street, Dayton, Ohio 45402, Attorney for Plaintiff-Appellant.

Joseph B. Miller and Anthony R. Kidd, Attorneys at Law, Suite 100, 367 West Second Street, Dayton, Ohio 45402, Attorneys for Defendant-Appellee.

OPINION

SHERER, P. J. (By Assignment).

*1 This appeal by Olga Williamson, Administratrix of the Estate of Bruno J. Williamson, Deceased, is from a judgment rendered on a jury verdict in favor of Defendant-Appellee, David A. Gasper.

The Complaint alleged that Gasper operated an automobile negligently so as to proximately cause the death of Appellant's Decedent and sought damages.

Briefly, the evidence shows that at the time he met his death decedent, a special police officer licensed by the City of Dayton and in uniform, together with another special police officer, were engaged in directing traffic on South Smithville Road for the purpose of assisting patrons of a bingo game enter upon Smithville Road from Immaculate Conception School and to go both north and south thereon. While so engaged, decedent was struck and killed by an automobile operated southwardly on Smithville. Smithville Road at the School had two southbound lanes of traffic and a storage lane for southbound traffic turning left into the school. Smithville at that point had two northbound lanes.

In Answer to Interrogatories the jury found that Gasper was negligent in that he failed to look ahead and exercise ordinary care while operating his vehicle and that his negligence was a proximate cause of decedent's death.

These Interrogatories were submitted to the jury with respect to decedent's conduct and were answered by the jury.

"(4) Do you find by a preponderance of the evidence that the Decedent, Bruno Williamson, was negligent in his conduct on November 12, 1976?
Answer: Yes.
(5) If your answer to Question No. 4 was yes, did such negligence directly or proximately contribute to the death of Bruno Williamson?
Answer: Yes.
(6) If your answer to Question No. 4 is yes, of what did such negligence consist?
Answer: He did not exercise ordinary care."

The first error assigned is that the trial court committed prejudicial error in failing to compel the appellee to state "what acts of the decedent in the above-captioned matter performed which amounted to contributory negligence, assumption of the risk and/or any other defense which defendant intends to raise at trial".

This assignment of error is directed to the action of the trial court overruling appellant's Motion to Compel Discovery filed on May 25, 1977 which is as follows:

"Now comes the Plaintiff through her counsel, and hereby moves this court for an order requiring the Defendant to state for the record, what acts the decedent in the above-captioned matter performed which amounted to contributory negligence, assumption of the risk and/or any other defense, which the Defendant intends to raise at trial. Plaintiff hereby certifies that an informal demand for such information has been made upon the Defendant, but that Defendant has failed to answer such demand."

Title V, Civil Rules, Rule 26, relating to Discovery, provides, in part:

*2 "Parties may obtain discovery by one or more of the following methods: deposition upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property, for inspection and other purposes, physical and mental examinations; and requests for admissions."

Civ. R. 37, relating to failure to make discovery, sanctions, motion for order compelling discovery, makes it clear that such motion be directed to the failure of a party to answer or respond to requests made in the manner and as to

matters set forth in Civ. R. 26 quoted above.

The Record discloses that appellant did not seek to obtain discovery by the methods set forth in the Civil Rules, 26 to 36 inclusive. Therefore, the trial court properly overruled appellant's Motion to Compel Discovery. See Inner City Wrecking Co. v. Bilsky, 51 Ohio App.2d 220, 367 N.E.2d 1214.

Appellant's second assignment of error is that the trial court erred in overruling plaintiff-appellant's motion for summary judgment.

The motion sought judgment as a matter of law on the issues of defendant-appellee's negligence, plaintiff-appellant's contributory negligence and the issues of plaintiff-appellant's assumption of the risk and proximate cause.

Since the jury, in response to Interrogatories, found defendant-appellee negligent in failing to look ahead and found that such negligence was a proximate cause of the death, no prejudice is shown in the action of the trial court in refusing to grant appellant summary judgment on those issues unless it can be said that, by construing the affidavits, etc. filed in support of and contra the motion for summary judgment most favorably to appellee, reasonable minds could come to but one conclusion therefrom, that is that the decedent was not negligent or, if negligent, such negligence was not a proximate cause of his death.

Appellant argues that appellee did not file opposing affidavits twenty four hours before the date set for hearing. Hearing on appellant's motion was set for July 26, 1977. Appellee filed a motion on that date for an extension of time within which to file a counter memorandum and "evidence". The court granted such motion. This is a matter within the court's discretion. Civ. R. 56(E).

The affidavits submitted by appellant to support the motion for summary judgment are as follows:

Olga Williamson:

Her affidavit recites the following facts: "On the night of November 12, 1976, Bruno Williamson was employed as a special police officer and was in uniform. She saw him in the right of way of Smithville Road in front of Immaculate Conception School in order to direct traffic exiting from the School. When she last saw him he had two red, fusey flares, one in each of his hands as he entered the right of way of Smithville Road. He had a police whistle in his mouth. She heard two audible blasts on the police whistle sometime subsequent to the decedent's entering the right of way. Sometime subsequent to the hearing of the two audible blasts of the police whistle, she heard tires screeching and the sound of an impact. She directed her attention to the area of the sound of the impact where she had last seen Bruno Williamson. He was not at that location but a dented van was there instead. She discovered him some distance ahead of the van and he was dead."

*3 Robert W. McElearney:

He stated that "he was a City Accountant for the City of Dayton and that on November 12, 1976 Bruno Williamson was a licensed Special Police Officer."

Arnold Sparks, Jr.:

His affidavit recites that "on November 12, 1976 Bruno W. Williamson was employed by the Pfauhl Detective Agency to direct and control traffic for ingress and egress from the bingo game at Immaculate Conception Church." His affidavit recites that "he is Director of the Agency".

George H. Buchanan:

His affidavit recites the following: "He was on November 12, 1976 a special police officer employed by the Pfauhl Agency to direct traffic at Immaculate Conception School. When the bingo game 'was letting out' he took a position in the northbound lane of Smithville and that Bruno Williamson moved over into the southbound traffic waving his flare to stop traffic coming southbound on Smithville Road. He glanced north and saw a van traveling south on Smithville Road at a high rate of speed. The van started skidding and hit his partner, knocking him down the street."

Carol Ferrell:

Her affidavit states that "after the bingo game, she was waiting in the left lane of the north driveway of the Church parking lot in her automobile, for the opportunity to exit said parking lot." Affiant further states that "while so waiting, she noticed the white security officer, Bruno J. Williamson, ahead of her automobile and to the left thereof." Affiant further states "that said security officer was just outside the yellow area in the southbound lane of Smithville Road near the centerline." Affiant further states that "she had seen said security officer walking through the parking lot lane with a lighted flare in his hand."

Affiant further states that "the automobile, which had been waiting before her vehicle, advanced into the street and began making a left turn to travel south on Smithville Road and at that same time she noticed a red van traveling south on Smithville Road in the lane next to the centerline. Although she did not hear any squealing of tires, she saw the red van hit the security officer, throwing him up into the air higher than the van and landing him in the northbound lanes."

Affiant further states that "she saw the [Illegible text] only".

Judith D. Young:

Her affidavit states that "after the bingo game that evening, her automobile was the first in line exiting from the parking lot to turn south on Smithville Road. and that, at that time, her two sisters were in the car with her."

Affiant further states that "while waiting to exit, she

pulled up to the street and stopped while the security officer lit his flare and walked out into the street, and that the security officer stopped the traffic coming south on Smithville Road and waved for the traffic coming north to stop. The officer then motioned her to come out of the lot and turn; but that, as she pulled out into the middle of the street and started to make her turn, a van came down through the street, failing to stop and striking the security officer causing said officer's body to fly up on the front of the van, into the air and onto the ground."

*4 Kathy Dunn:

"Now comes the undersigned Affiant, KATHY DUNN, and after being duly cautioned and sworn according to law, deposes and says that she had accompanied her sister to the bingo game at the Immaculate Conception Church on Smithville Road, Dayton, Ohio on the night of Friday, November 12, 1976."

Affiant further states, "while exiting the Church parking lot after the bingo game had let out, they were motioned to by the security officer to turn on to Smithville Road and that said security officer, at that time, held his hand out for the oncoming traffic to stop so that she and her companions could exit in their automobile; that when they attempted to pull onto Smithville Road, an oncoming van failed to stop, despite the security officer's signal to do so, and continued coming, striking the security officer and the front of the car in which she was a passenger. The last thing she remembers about the incident is seeing the security officer's body going into the air and back down on the pavement."

Carolyn Fultz:

Her affidavit states that "she had accompanied her sisters to the bingo game at Immaculate Conception Catholic Church on Smithville Road, Dayton, Ohio on the night of Friday, November 12, 1976."

Affiant further states that "after the bingo game, she was a passenger in her sister's car which was the first in line leaving from the parking lot going southbound on Smithville Road and at that time, the security officer motioned for oncoming traffic to stop and for her sister to come on; that an oncoming van failed to stop, and she saw the security officer flying into the air with glass spattering onto her sister's car. And after the driver of the van hit the security officer, he came to a stop and ran towards the body."

Affiant further states that "the security officer did have a flare in his hand and that she reasonably believed that anyone could have seen the officer and could have stopped in time to avoid hitting him."

Other affidavits were filed by appellant in support of the motion for summary judgment but cannot be considered because they do not contain statements of fact within affiants' personal knowledge.

One affidavit opposing the motion was filed by appellee, that of Jeanie Fickert, which recites:

"Now comes the affiant, Jeanie Fickert, and being first duly cautioned and sworn, states that the following is true and based upon her own personal knowledge.

Affiant states that she has read and reviewed the transcribed testimony attached and that the answers given in the transcribed testimony are presently based upon her own personal knowledge.

Further affiant states that she witnessed the automobile accident wherein Mr. Williamson was killed. Mr. Williamson walked directly in front of the oncoming van and was struck as he entered the van's lane. Mr. Williamson was wearing dark clothes, had no distinctive markings on his clothes and did not have a flare.

*5 Further affiant sayeth naught."

Attached to her affidavit was a transcript of her testimony and that of others taken at the hearing in Municipal Court of a criminal charge against appellee, Gasper.

A consideration of such attachment is unwarranted under Civ. R. 56.

In overruling the plaintiff-appellant's motion for summary judgment, the court stated:

"Having construed the materials submitted both in support of and in opposition to the motion for summary judgment in the light most favorable to the Defendant and giving the Defendant the benefit of every reasonable inference to be drawn from said materials, concludes that the following genuine issues of material facts exist, inter alia:

1. Whether the defendant was negligent--whether the defendant violated the assured clear distance rule, whether the decedent was a discernible object, whether the decedent's conduct constituted a cutting down of the assured clear distance in such a manner in that he suddenly appeared in the defendant's path, etc.

2. The defendant's contributory negligence--was the decedent stationary at the time of the collision with the defendant's car or, rather, in the alternative, was the decedent walking across the defendant's lane of travel when hit--in short, was the decedent exercising ordinary care for his own safety at the time of the collision with the plaintiff's car; was he stationed at his post in a proper place or, as some witnesses have testified and inferred, was he simply running from the curb (or walking in a fast manner) into the path of the defendant's automobile.

3. Whose negligence, if any, was the proximate cause of the collision and the death of the decedent."

Appellant argues that a police officer on duty enforcing the traffic laws cannot be found to be contributorily negligent. There is no merit in such argument. By reason of R.C. [Illegible text], a police officer responding to an emergency is immune from liability. The appellant's decedent was not responding to an emergency. Appellant's decedent was required to exercise ordinary care for his own safety.

We have examined the Record of the proceedings of the trial court with respect to the motion of appellant for

summary judgment and conclude that the court did not err to the prejudice of appellant in overruling the motion.

The third assignment of error is that the trial court committed prejudicial error by granting an ex parte continuance to the appellee forty minutes prior to the close of the court's business on the day immediately preceding the assigned trial date in contravention of local rules of court.

The fourth assignment of error is that the trial court erred in permitting the amendment of appellee's answer by interlineation.

Appellant argues that her case was prejudiced by such continuance in that such continuance caused her considerable expense, the items of which were brought to the trial court's attention by objections to the continuance and such expense was acknowledged by the court and the amount of the allowance thereof was reserved by the court.

*6 Appellant argued to the trial court that she was further prejudiced by the continuance because appellee then served notice of intent to call additional witnesses to establish a standard of care as to proper procedure in directing and controlling traffic, witnesses whose names had not been previously furnished appellant. Appellant argues further that she was prejudiced by the continuance because the court allowed appellee to amend his answer by interlineation all of which had the resultant effect of requiring appellant to commence a game of hunt and seek for the operative facts constituting the alleged defenses of negligence, contributory negligence and assumption of the risk, which had purportedly been limited to the two areas specified by the trial court in the Decision on the Motion for Summary Judgment.

The court, in that Decision, states that the factual issues which constituted appellee's defenses were:

> "Was he (decedent) stationed at his post in a proper place or running from the curb (or walking in a fast manner) into the path of Defendant's automobile."

The acts of the trial court were matters resting within the sound discretion of the trial court. The appellant's right to pursue discovery after the continuance was in no way curtailed by the continuance. The court's decision overruling appellant's objection to the amendment of appellee's answer points out that such amendment merely expands upon or defines the same defense which the defendant had long advocated in the cause. We see no abuse of discretion in the actions of the trial court.

The fifth error assigned is that the court committed prejudicial error by permitting incompetent, prejudicial and irrelevant unsolicited testimony from Mary Ellen Gasper.

When she was called as a witness, counsel for appellant objected because appellee had failed to include her name on the list of his witnesses furnished appellant. The trial court required counsel to appellee to state the substance of her testimony. Counsel advised the court that she would testify to defendant's (her son) condition as to sobriety on the evening of the traffic accident. He states that her testimony would be substantially the same as her husband's, the appellee's father. He stated that she would testify that she saw her son at ten o'clock of the evening of the accident and that his actions, walking and talking were normal. The accident occurred at 10:30 P.M.

The court stated that the test to be applied was whether appellant would be prejudiced, whether her testimony would be a surprise so as to render appellant unable to meet the testimony. The court reasoned that for a long time, at least from the first day of trial, appellant had sought to show that appellee was under the influence of liquor at the time of the collision and that appellant should reasonably have anticipated testimony to indicate the appellee was not under the influence of liquor. The Court then suggested that a recess be taken at which time counsel for appellant could talk to her. The Court states that if she told him something that he was totally and realistically unprepared to rebut, the Court would reconsider its decision to permit her to testify. Counsel for appellant refused such offer.

*7 At page 33, 34, appellant's brief, appellant argues that the specific prejudicial testimony which the appellant feels was totally devastating to appellant's case is as follows on cross-examination by counsel for Plaintiff-Appellant, R. 765, 766, 767:

> "Q. Okay.
> A. We've always taught the boys that no matter what, you take your punishment. If you decide this is punishment, then I do want David to take it.
> Q. You understand we're not talking about punishment in this case?
> A. If you decide that he was wrong and the money is beyond his means that he would have to pay, it would be a form of punishment.
> MR. MILLER: (Counsel for defendant-appellee) Objection.
> THE COURT: Let me see counsel up front please.
> Out of the hearing of the jury: "I'm still going to continue to overrule the objection, but just be careful.
> MR. KUCZAK: (Counsel for plaintiff-appellant) I'just don't think she's being responsive to the question.
> THE COURT: Just remember you've got two weeks, full weeks invested in this trial. I would hate to start over again.
> IN OPEN COURT:
> THE COURT: There's no ruling - there's no objection, therefore there's no ruling. Proceed.
> MR. MILLER: There is an objection to this line.
> THE COURT: The objection to the line was several questions ago, Sir, and it was overruled."

The proceedings on cross-examination by appellant's counsel we have set forth was preceded by the following:

> "Q. You'd like to see him walk out of here without

having to pay a dime on this claim, wouldn't you?
MR. MILLER: Objection
THE COURT: Overruled.
A. That's hard for me to answer.
Q. You mean you don't really care?
A. I did not say that, Sir."

There followed the "Okay" and the volunteered statement of the witness.

The sixth error assigned is that the trial court committed prejudicial error in failing to instruct the jury relative to the issue of punishment when the matter was improperly initiated by defense counsel.

After the defendant's mother had injected the word punishment into the Record as we have noted and after the trial court had admonished counsel at the bench, R. 766, counsel for defendant-appellee, on redirect examination asked the witness this question, R. 768:

"Q. Now, Mr. Kuczak asked you about you using the word punishment when Mr. Kuczak asked you the question, do you recall that question?
A. Yes, sir.
Q. All right now. From anything you know about this case, anything you know about what happened, do you know any reason that your son should be punished?
MR. KUCZAK: Objection.
THE COURT: Mr. Miller, you have to know that that's an improper question. Sustained."

The fifth and sixth assignments of error are well taken. The trial court erred to the prejudice of appellant in (1) failing to sustain objection to the volunteered statements of the witness with respect to "punishment", (2) in failing to note at a later point that there was an objection to such reference and (3) in failing to strike such reference and failing to instruct the jury to ignore such testimony. The continued reference to punishment by counsel for defendant-appellee after the court's admonitions as shown by the Record, 768, is inexcusable.

*8 The seventh assignment of error is that the trial court committed prejudicial error in permitting appellee to offer testimony as to custom and usage when such intention was not indicated in the pleadings of appellee.

The eighth assignment of error is that the trial court committed prejudicial error in permitting testimony by Officer Deal as to a standard of care required of police officers directing traffic.

Appellant cites and relies upon the holdings of the Supreme Court in Palmer v. Humiston, 87 Ohio St. 401, and Ault v. Hall, 119 Ohio St. 422, 164 N.E. 518.

In Palmer, the court held:

"1. The issues of a case are defined by and confined to the pleadings.
2. Plaintiff pleaded that defendant contracted to perform a certain abdominal surgical operation, and as a part of such operation, the surgeon used certain sponges and that there was negligence in the use and failure to remove one of said sponges. The answer admits the contract to perform said surgical operation and admits that 'in the performance of said operation it was necessary that certain sponges be used'.
3. A special custom or usage in any particular trade, business, or profession, to be available to either party, must be specially pleaded.
4. In the absence of any averment in the answer specially pleading a professional usage or custom as to the care and accounting of sponges by a nurse or other attendant, evidence for the purpose of showing such professional usage or custom is incompetent and inadmissible.

At 408, the court stated:

"The defendant, therefore, having admitted the contract to perform the operation and the use of the sponges as necessary thereto, has assumed the full measure of professional responsibility, which is the average care and skill of the profession at the time and in the place of the operation, which must include everything connected with the operation, the use of foreign substances and also the removal of those foreign substances when the operation is finished.
The defendant undertook to excuse himself from that full measure of care and skill personally, by claiming through his counsel that in the performance of such operation it was necessary in careful and skilled surgery to secure the assistance of certain nurses, interns and associate surgeons in and about the hospital, and that included among these was one Miss Kelly, the head nurse, to whom he entrusted the duty of counting the sponges before putting them in the body and upon removing them from the body, and that he relied upon the accuracy of her count, and that if there was any error in her count, he, the surgeon was not responsible."

In Ault v. Hall, 119 Ohio St. 422, 164 N.E. 518, the court held:

*9 "2. In an action for negligence, conformity to custom or usage is a matter proper to be submitted to the jury for its consideration in determining whether or not ordinary care has been exercised.
3. Customary methods or conduct do not furnish a test which is conclusive or controlling on the question of negligence or fix a standard by which negligence is to be gauged, but conformity thereto is a circumstance to be weighed and considered with other circumstances in determining whether or not ordinary care has been exercised.
4. Methods employed in any trade, business or profession, however long continued, cannot avail to establish as safe in law that which is dangerous in fact.
5. Where a surgeon in the course of an abdominal operation uses sponges and fails to remove one of them from the cavity before closing the incision, it is error for the trial

court to instruct the jury that if the custom of counting by nurses was reasonable and defendant followed and relied upon it, the verdict should be in his favor."

The Doctor in Ault had alleged in his Answer that it was custom and usage in the hospital in which the operation was performed that a nurse was responsible for a "sponge count". At the conclusion of the testimony counsel for the Doctor requested and the court charged the following:

"The Court says to you as a matter of law that if under the evidence in this case Dr. Hall had a right to rely upon the count of the sponge nurse who was in the employ of St. Johns Hospital and of surgeons, practicing in this vicinity in the technical routine of an operation of this character are accustomed to rely upon the count of the sponge nurse, the the Court says to you as a matter of law that your verdict herein should be in favor of the Defendant, Dr. Hall."

At 431, the court stated:

"The question is whether such a practice or custom is competent to be shown as a complete defense to the action, and not merely competent to be shown as bearing upon the question of due care."

The Answer of defendant-appellee in this case did not allege the custom and usage applicable to a police officer in the direction and control of traffic.

Before trial, on October 5, 1977, the trial court permitted an amendment of the Answer by interlineation as follows:

"By failing to follow the proper procedures both before, during and while entering Smithville Road in the lane of traffic wherein he was injured and further by failing to ascertain that approaching traffic was either stopped, stopping or aware of his presence before his attempting to enter, positioning himself in front of oncoming traffic or in a place where oncoming traffic could reasonably be anticipated to be, all of which is contrary to accepted practices in the trade in which he was employed and contrary to standards which are taught and accepted by individuals in a like and similar trade."

*10 On October 5, 1977, defendant-appellee filed a notice of intention to call certain police officers to testify as expert witnesses and notice that appellee intended to rely upon the standards of care in the area of traffic control.

On October 24, 1977, the trial court overruled plaintiff-appellant's objection to calling such expert witnesses holding that:

"In an action for negligence, conformity to custom or usage is a proper matter to be submitted to the jury for its consideration in determining whether ordinary care has been exercised."

Prior to permitting Police Officer Deal to testify as an expert in the direction and control of traffic, the trial court conducted a voir dire examination to ascertain just what his testimony as to custom and usage in such area would be.

At R. 964, the court made these statements:

"THE COURT: Well, I have a couple of comments to make. First of all, I think your reliance on what a standard police officer or special police officer would do under the same or similar circumstances goes absolutely to the ultimate issue in the case, or at least one of the ultimate issues in the case. It seems to me, if this testimony is allowable at all, it's allowable under custom and usage, what is generally done in this community. Custom and usage going to the appropriate standard of care. In other words, you throw out the custom and usage to the jury. You let them interpret this with all the other evidence as to whether or not the deceased adhered to a standard of care. But, when he starts testifying as to standards and duties and responsibilities, in my opinion, you're asking him questions on the ultimate issue. And under any stretch of the imagination, even if allowable under custom and usage itself, I don't think it's allowable to that extent."

The Record, 965, indicates that before concluding that appellee could call expert witnesses to testify to custom and usage in the area of traffic control, the trial court considered the Ault case, the case of Thompson v. Ohio Fuel Gas Co., 9 Ohio St.2d 116, 224 N.E.2d 131 and Schwer, Administratrix v. Railroad, 161 Ohio St. 15, 117 N.E.2d 696.

Schwer held:

"(3) Where, in determining whether a defendant exercised that care which an ordinarily and reasonably prudent man would have exercised under the same or similar circumstances, inquiry need only be made into matters within the common knowledge of men of average general information, evidence as to what other persons did under such circumstances should ordinarily be excluded.

(4) Where, in determining whether a defendant exercised that care which an ordinarily and reasonably prudent man would have exercised under the same or similar circumstances, inquiry must be made into a matter not within the common knowledge of men of average general information, the trial court may admit evidence as to what other persons did under such circumstances if, in the exercise of a reasonable discretion, it determines that the helpfulness to the jury of such evidence in making such inquiry will outweigh the disadvantage involved in risking the injection of collateral issues into the case."

*11 In the Gas Co. case, the court held:

"Expert testimony as to the standard of care customarily used by those installing and maintaining underground gas transmission lines is not essential in an action for wrongful death arising out of an explosion which occurred when a county employee engaged in routine maintenance of a ditch adjacent to a township road struck such a line with the blade of a road scraper, where there was evidence warranting a finding that the line was

inadequately marked and only 21 inches below road level."

The first question to be determined in connection with the seventh assignment of error is a narrow one, that is whether the custom and usage employed in directing and controlling traffic by a police officer must be alleged in a pleading, the appellee's Answer.

Under the Rules of Civil Procedure, if such matter involved within the claim of custom or usage could be considered as a matter constituting an avoidance or an affirmative defense, obviously it must, under Civ. R. 8 (C), be pleaded as an affirmative defense. We hold that such material does not constitute an avoidance per se, but is merely evidence on the issue of plaintiff-appellant's contributory negligence which is to be construed by the jury along with all other evidence adduced on the issue of plaintiff-appellant's contributory negligence. See, Perry v. Bronn, 75 Ohio Op. 2d 212.

With respect to the eighth assignment of error, we have noted that in chambers the court on voir dire examination of what Officer Deal would testify to, the court distinguished between standard of care and custom and usage and cautioned counsel for appellee not to have Deal testify as to standard of care by testifying as to what the plaintiff-appellant's decedent was required to do because such testimony went directly to one of the ultimate issues. R. 980. He was cautioned that Deal could testify only to what such officers under like circumstances customarily did.

The Record, 1099 to 1108, shows that Officer Deal's testimony referred repeatedly to what a police officer directing traffic must do. That word was first used at R. 1099. Objection was made. The court said:

"I think he used the word 'must'. I'm going to assume he used the term in the sense of this is what is generally done."

At R. 1104, the court stated:

"He spoke a couple of minutes ago for a couple of minutes in length and talked in terms of must do this and must do that. You better clarify what he means for the Record. If you don't, you're going to get the whole testimony stricken."

Thereupon, the following occurred, counsel for appellee questioning the witness:

"Q. Inspector, when you used the words in your testimony 'must do this or must do that' are you speaking that these are must under the terms of the, under the terms of the customs and usages? Is that what you're speaking of when you say must?"

*12 MR. KUCZAK: Object.

THE COURT: I'll sustain the objection. It's we feel, non responsive. We would strike the remark from the jury's mind and ask you to disregard it completely.

MR. MILLER: Okay, now what I'm saying to you, when you use the word what an officer must do, are you indicating here that these are the customary practices that are performed by traffic officers in the area? Is that what you're saying?

MR. KUCZAK: Objection

THE COURT: Let me see you up front.

The following proceedings were had at the bench out of the hearing of the jury.

THE COURT: I thought you discussed this with him.

MR. MILLER: I did.

THE COURT: He seems to have forgotten.

MR. MILLER: In his mind, it's a difficult separation.

THE COURT: It's one that has to be made.

At R. 1108, Mr. Miller, counsel for appellee, stated to the court:

"I'm not sure what you want from me."

The direct examination of this witness continued to page R. 1209 with numerous bench conferences. Testimony was elicited with respect to custom of traffic officers in the area in a variety of situations, most of which were not related to actions of decedent in this case. The trial court finally approved questions to the witness and his answers thereto over objection which the court had previously condemned.

The net result of the officer's testimony likely was to thoroughly confuse the jury when it undertook to relate the custom and usages of traffic officers to the facts shown by the evidence in this case. The eighth assignment of error was well taken. The trial court erred to the prejudice of appellant in permitting his testimony to go to the jury.

The ninth assignment of error is that the trial court committed prejudicial error in permitting appellee to offer testimony as to custom and usage of traffic police officers ordinarily getting out of the way of a motorist who failed to respond to traffic signals.

The critical issues in this appeal are whether there was contributory negligence in the conduct of plaintiff-appellant's decedent and, if so, whether that negligence contributed to directly and proximately cause the decedent's death. The collision and death occurred in the southbound lane of traffic adjacent to the curb lane.

The evidence shows the following: that at the point of collision there are two southbound lanes of travel designated "A" and "B" and one southbound storage lane, designated "C" for left turns into Immaculate Conception School. There are two northbound lanes of travel at that point designated "D" and "E". There were two special police officers to assist traffic to exit from the school and go either north or south on Smithville Road, one of whom was decedent. There is evidence that at the time the bingo game stopped and traffic lined up to enter Smithville, the officers lighted fuses and entered the street. One officer stopped the traffic in the two northbound lanes and decedent proceeded to a position in the southbound lane

"B" for the purpose of controlling southbound traffic. There is evidence that when decedent took his position in lane "B" facing north he halted traffic in lane "A", the curb lane and that there was no traffic in southbound lane "B". A witness testified that after northbound traffic and southbound traffic in lane "A" was stopped, she was waved out of the school driveway and saw no southbound traffic in lane "B". She stated that as she approached lane "B" to turn left onto Smithville, the defendant-appellee's van suddenly whizzed by her in that lane and struck decedent. A witness called by defendant-appellee testified that decedent proceeded across Smithville from the east and that he stepped right in front of appellee's van and was struck and thrown up into the air. The defendant-appellee testified that he was operating his van south on Smithville in lane "A"; that when he was about halfway between the first intersecting street north of the north driveway of the school and the point of collision, shown by evidence to be about 175 feet north of the point of impact, he began to turn from lane "A" into lane "B". He estimated his speed at 30 to 35 miles per hour. He testified that two moving cars had been ahead of him in lane "A." which appeared to be slowing. He stated that when he got into lane "B" he wondered what was going on over at the school and glanced over for an instant. He testified that when he looked ahead in lane "B" he saw the form or outline of a man in his lane about 25 feet ahead and that he did not see what he was doing. He applied his brake and skidded into decedent. He had testified that it was dark at that point. Other witnesses had testified that street lights were located on both sides of Smithville and that traffic stopped in lanes "A", "D" and "E" had their headlights burning. The witness who testified that decedent stepped into lane "B" right in front of the van, testified that she was in the center lane of northbound traffic and that she saw the matters to which she testified.

*13 Defendant-appellee argues or implies that decedent was negligent in failing to display a flare to warn traffic proceeding south in lane "B".

The jury, in answers to interrogatories, found that decedent was negligent and that his negligence contributed proximately to cause the accident by failing to exercise ordinary care for his safety. Since defendant-appellee admitted looking over eastwardly toward Immaculate Conception School after he had turned from lane "A" into lane "B" and admitted that he then looked ahead in lane "B" and saw decedent standing in lane "B" about 25 feet ahead, he would not have seen a flare in decedent's hand if he had one until he was within 25 feet of decedent. Therefore, the negligence of decedent in failing to display a flare, if it could be said that he did so fail, could not have contributed directly and proximately to cause the collision.

From the facts shown by the evidence and the reasonable inferences which may be drawn therefrom, we conclude that the questions posed to the jury with respect to decedent's negligence are matters within the experience and knowledge of men and women of average general information and that a jury could decide the questions posed without evidence of custom and usage. Schwer, Administratrix v. Railroad, 161 Ohio St. 15, 117 N.E.2d 696, Syllabus 4. The trial court erred to the prejudice of appellant in admitting testimony as to custom and usage. The trial court erred in concluding that the helpfulness of such evidence outweighed the disadvantages of running the risk of injecting collateral issues into the case.

We reiterate what we have said in connection with the eighth assignment of error. The testimony of Officer Deal as to the custom and usage of traffic officers was such as to confuse the jury. The reasons for such conclusion are stated therein.

At R. 1114, Officer Deal testified that it: was customary for traffic control officers to wear illuminated gloves or vests in the night season. Counsel for appellee asked several witnesses to describe the clothing worn and equipment used by the two officers in this case. None mentioned such gloves or vests. It was stipulated that the uniforms worn by such officers were the same as worn by Dayton police officers. Such evidence suggests that neither these officers nor Dayton's traffic officers directing traffic in the night season are in compliance with the stated customs of wearing illuminated gloves or vests. Confusing? Yes.

The tenth assignment of error is that the trial court committed prejudicial error in admitting testimony of Officer Deal as to customs and usages which placed upon a traffic policeman a higher standard of care for his own personal safety then that of an ordinary pedestrian.

Officer Deal testified, R. 1249, that it is customary for a police officer in directing and controlling traffic to assume "that nobody's going to heed your signals".

*14 The Supreme Court, in the case of Trentman v. Cox, 118 Ohio St. 247, 160 N.E. 715, Syllabus 2, held that the failure of a pedestrian to anticipate negligence on the part of the driver of an automobile does not defeat an action for the injury sustained.

It cannot be said that the trial court erred to the prejudice of appellant in permitting Officer Deal to so testify. The Record discloses that such testimony came into the Record during cross-examination of Deal by counsel for plaintiff-appellant as follows:

"Q. And you assume that nobody's going to heed your signals?

A. That's about it.

There is no merit in this assignment of error.

The eleventh assignment of error is that the trial court committed prejudicial error in permitting numerous hypothetical questions to be propounded to Inspector Richard Deal which included assumptions of fact not in evidence.

This assignment of error is well taken for the reasons we have already set forth.

The twelfth assignment of error is that the trial court committed prejudicial error by permitting cumulative testimony as to custom and usage by Inspector Richard Deal.

The assignment of error is well taken for the reasons we have already set forth.

The thirteenth assignment of error is that the trial court committed prejudicial error in permitting defense counsel to argue comparative negligence.

The trial court overruled the objection of appellant's counsel to this statement made by counsel for appellees in final argument:

"But, I'm telling you, Ladies and Gentlemen, on the facts and the law in this case, my client, David Gasper, was not the cause of this accident. And; if he did anything wrong, he certainly didn't do as much wrong as what Mr. Williamson did out on that road."

Such argument constitutes an attempt to implant in the minds of the jurors the doctrine of comparative negligence, a doctrine the Supreme Court of Ohio has rejected.

The trial court erred to the prejudice of appellant in failing to sustain the objection thereto and in failing to caution the jury to disregard the remark.

The fourteenth error assigned is that the trial court committed prejudicial error in instructing the jury with respect to defendant's requested instruction No. 4 concerning pedestrians in a crosswalk.

The trial court, in its general charge to the jury, stated:

"Now, while on his way from the school driveway to the east side of Smithville Road, to the general area in which he was going to regulate or direct traffic, Bruno Williamson occupied the status of a pedestrian.

A pedestrian is a person on foot, a pedestrian crossing a roadway within a municipal corporation at a point other than within a crosswalk, shall yield the right of way to all traffic operating lawfully upon the roadway. (R.C. 4511.48)

*15 Right of way means the right of a vehicle to proceed uninterruptedly in a lawful manner in the direction in which it or he is moving in preference to another vehicle or pedestrian approaching from a different direction into its or his path.

Even if a motorist has the right of way, he must nevertheless use ordinary care to avoid colliding with any pedestrian on the street."

R. C. 4511.48, in part, provides:

"Every pedestrian crossing a roadway within a municipal corporation at any point other than within a marked crosswalk * * * shall yield the right of way to all traffic operating lawfully upon the roadway."

R. C. 4511.50, in part, provides:

"No pedestrian shall cross a roadway within a municipal corporation at a place other than a cross-walk except when crosswalks are an unreasonable distance apart."

R. C. 4511.01(W) defines "pedestrian" as any person afoot.

R. C. 4511.02 provides, in part, "that no person shall fail to comply with any order or direction of any police officer with authority to direct, control, or regulate traffic."

R. C. 4511.12, in part, provides:

"No * * * driver of a vehicle * * * shall disobey the instructions of any traffic control device placed in accordance with Sections 4511.01 to 4511.78, inclusive, and 4511.99 of the Revised Code, unless at the time otherwise directed by a police officer."

R. C. 4511.20 provides, in part:

"No person shall operate a vehicle * * * without due regard for the safety and rights of pedestrians * * * so as to endanger the life * * * of any person while in the lawful use of the * * * highways."

In the case, Dunlap v. Robinson, 100 Ohio App. 229, the Court of Appeals for Delaware County held that:

"Where an employee of the State Highway Department, working as a flagman on a highway repair project, attempts to flag an approaching vehicle to a stop and, in order to perform such duty, steps into the path of the oncoming vehicle while waving a red flag, and is struck and injured by such vehicle when the operator thereof fails to come to a full stop, such operator, in not coming to a full stop in response to the flag waved and held by such flagman, is guilty of negligence as a matter of law."

What the court charged, in effect, is that the decedent, a police officer in the roadway outside a crosswalk for the purpose of directing and controlling traffic, was required to yield the right of way to appellee, to proceed uninterrupted in lane "B", if traveling in a lawful manner, i.e., in the exercise of ordinary care.

*16 But, a motorist traveling upon a roadway in a lawful manner has no right to proceed without interruption in the lane of travel where a police officer in the roadway for the purpose of directing and controlling traffic signals him to stop.

In Warner v. Swank, an unreported case, No. 4471, February 24, 1975, this court held that a police officer who parked his cruiser, alighted therefrom onto the street and proceeded across the street to investigate a burglary in progress, was not a "pedestrian" within the meaning of R.C. 4511.50, relating to pedestrians crossing the street other

than at a crosswalk. This court held that the word "pedestrian" as used therein was applicable to an ordinary pedestrian in the usual and ordinary crossing of an entire street from curb to curb, citing Van Sickle v. Wolper, 61 Ohio App. 366, which held that a person who is standing in the street for the purpose of aiding in the removal of an injured dog therefrom and who is struck by a truck approaching from the rear, cannot be considered, within the purview of Section 6310.34, General Code, as "walking in, upon or along a highway".

In chambers, the trial court and counsel for the parties discussed the court's proposed general charges and counsel for appellant, in objecting to the proposed charge which was later given, called the court's attention to the Dunlap and Warner cases.

There is evidence in this case tending to show that decedent was in lane "B" facing north with a red flare and flashlight attempting to stop traffic in lanes "A" and "B" and that when so doing he was struck and killed by a van operated southwardly in lane "B".

There is also evidence tending to show that he stepped into lane "B" directly in the path of appellee when he was a short distance away.

We have noted that the court charged the jury that "right of way means the right of a vehicle to proceed uninterruptedly in a lawful manner in the direction in which it or he is moving in preference to another vehicle or pedestrian approaching from a different direction into its or his path."

The charge as given did not instruct the jury as to its duty if it found that decedent was in lane "B" giving a stop signal before appellee changed from lane "A" to lane "B" or as appellee approached the point of collision.

Considering the evidence and the law applicable, we conclude that the court's instruction was erroneous and prejudicial to appellant. We further conclude that decedent was not a "pedestrian" at the time he was killed as that term is used in R.C. 4511.48 and as charged by the trial court.

The fifteenth assignment of error is that the trial court committed prejudicial error in overruling appellant's motion for judgment as a matter of law on the issues of contributory negligence and assumption of the risk at the close of all the evidence.

*17 There is no merit in this assignment of error. Two witnesses called by the defense testified that decedent walked into lane "B" right in front of the van, one stating, when it "was right on top of him" and that as he did so he did not look either to the north or to the south.

The sixteenth assignment of error is that the trial court committed prejudicial error in charging on a dual standard of care for the decedent. This claim of error is well taken.

This claim of error is directed to the trial court's instruction as shown by the Record, 1565, 1566, as follows:

> "A pedestrian is not permitted to step into or upon a public street without looking in both directions to see what is approaching.
> One who violates this law is guilty of negligence as a matter of law.
> A pedestrian must use ordinary care in crossing a street.
> Ordinary care is such care as pedestrians of ordinary care and prudence observe in crossing streets and highways to avoid danger and injury to themselves.
> Ordinary care may require that a pedestrian continue to look after entering the road, depending upon the circumstances and the condition of traffic.
> No pedestrian shall suddenly leave a curb or other place of safety and walk or run into the path of a vehicle which is so close as to constitute an immediate hazard.
> Now, once having reached the general area where he was to direct or regulate traffic, should you find that Bruno Williamson reached this area of Smithville Road, you are instructed that Bruno Williamson's duty toward himself is not the same as, and requires a lesser degree of precaution than is required of a pedestrian. However, the duty is still that of ordinary care under the circumstances. Ordinary care being defined as that degree or amount of care which a reasonably prudent person is accustomed to use under the same or similar circumstances."

The issue to which this instruction was directed is that of contributory negligence of decedent. The purpose of such instruction is to guide the jury and enable it to apply the instruction to the evidence adduced applicable to that issue.

The court's instruction that decedent was a "pedestrian" up to the time he arrived in the area of lane "B" was erroneous and prejudicial. The testimony that decedent left the east curb of Smithville and proceeded to that area without looking either north or south, coupled with evidence that a Corvette proceeding north on Smithville and almost struck a black officer in the street had a tendency to make a sort of "Laurel and Hardy" duo of the two officers. Any possible negligence of decedent before he arrived at that area could not have been a proximate cause of the collision. Furthermore, any negligence of the black officer was not pertinent to the alleged contributory negligence of decedent.

The seventeenth assignment of error is that the trial court committed prejudicial error in charging the jury with respect to the assumption of the risk.

*18 The court's instruction on assumption of the risk as shown by the record, 1568, 1569, is as follows:

> "Now, finally, the defendant contends that Bruno Williamson, by his actions on the night in question that I have just discussed with you, assumed the risk of the collision and his own death.

If the plaintiff voluntarily assumed a known risk he cannot recover.

To assume a risk, a person must actually know of the danger or the danger must be sufficiently obvious to permit you to infer he knew of and realized the danger.

In addition, he must have had a conscious opportunity to avoid such danger by the use of ordinary care.

Assumption of the risk is an affirmative defense. Therefore, the burden of proof on this issue is upon the defendant.

If you find that the defendant has established, by a preponderance of the evidence, that the plaintiff actually knew of the danger, or that the danger was sufficiently obvious to permit you to infer that he knew of and realized the danger and that the plaintiff, in this case -- when I say plaintiff', I mean the deceased, Bruno Williamson -- and that Bruno Williamson had a conscious opportunity to avoid such danger by the use of ordinary care, then the plaintiff, Olga Williamson, cannot recover.

However, if the defendant fails to prove any one of these elements, then Bruno Williamson did not assume the risk and you will dismiss this issue from further consideration.

Now, if you find that Bruno Williamson was directing traffic on Smithville Road at the time he was struck, you are instructed that the defense of assumption of the risk does not apply since, as a matter of law, he has not voluntarily undertaken the hazards imposed by his presence in the street.

However, if you find that, at the time he was struck by the defendant's van, Bruno Williamson was walking into the defendant's lane of travel, without looking in either direction, on his way to where he was to direct traffic, then you may consider whether the defense of assumption of the risk applies at all."

We see no prejudicial error in the charge given. This instruction was warranted by evidence from which it could be inferred that decedent stepped in front of appellee's van when it was so close to the point of collision that appellee, in the exercise of ordinary care, could not avoid the collision.

The eighteenth assignment of error is that the trial court committed prejudicial error in accepting a verdict which does not conform to Civ. R. 48 and 49.

Appellant calls attention to this language in Civ. R. 48, "or if the verdict in substance is defective, the jurors must be sent out again for further deliberation".

Civ. R. 49 provides:

*19 '(A) General verdict. A general verdict, by which the jury finds generally in favor of the prevailing party, shall be used.

(B) General verdict accompanied by answer to interrogatories. The court shall submit written interrogatories to the jury, together with appropriate forms for a general verdict, upon request of any party prior to the commencement of argument. Counsel shall submit the proposed interrogatories to the court and to opposing counsel at such time, but the interrogatories shall be submitted to the jury in the form that the court approves. The interrogatories may be directed to one or more determinative issues whether issues of fact or mixed issues of fact and law.

The court shall give such explanations or instruction as may be necessary to enable the jury both to make answers to the interrogatories and to render a general verdict, and the court shall direct the jury both to make written answers and to render a general verdict.

When the general verdict and the answers are consistent, the appropriate judgment upon the verdict and answers shall be entered pursuant to Rule 58. When one or more of the answers is inconsistent with the general verdict, judgment may be entered pursuant to Rule 58 in accordance with the answers, notwithstanding the general verdict, or the court may return the jury for further consideration of its answers and verdict or may order a new trial.

(C) Special verdicts abolished. Special verdicts shall not be used."

The jury answered "yes" to Interrogatory (4) "do you find by a preponderance of the evidence that the decedent, Bruno Williamson, was negligent?" The jury answered "yes" to the Interrogatory (5) "if your answer to question No. 4 was yes, did such negligence directly and proximately contribute to the death of Bruno Williamson?"

Interrogatory (6) was "if your answer to question No. 4 is yes, of what did such negligence consist?" The jury answered: "He did not exercise ordinary care".

The Record discloses that after the jury's verdict and Answers to Interrogatories were returned and read, the jury was polled with respect to its answer to Interrogatory No. 6. Seven of eight jurors answered that the answer thereto was their answer. The Record shows that the jury then asked the court this question: "Would you please debrief the jury as to the legal matters that were addressed during this case?"

Counsel for appellant requested that the court send the jury back for further deliberations because its answer to Interrogatory No. 6 did not state the acts of the decedent which constituted contributory negligence. The trial court stated that the jury's answer to Interrogatory No. 6 was not inconsistent with the verdict and denied the request and accepted the jury's verdict.

After the Dowd-Feder case, Ohio wrestled unsuccessfully with the submission of mixed findings of law and fact to the jury. Dowd-Feder vs. Schreyer, 124 Ohio St. 504; also 10 Ohio Law Abs. 45. The strict rule that a failure to find a factual conclusion is a finding against the party having the burden of proof destroyed the use of special verdicts in Ohio and the same rule, if applied to special interrogatories,

would have equally devastating results.

*20 The failure to find facts rule that provoked the death of the special verdict was never applied to interrogatories. As to interrogatories the rule is that a general verdict will not be set aside unless the answers of the jury are inconsistent and irreconcilable with the verdict. Hogan vs. Finch, 8 Ohio St. 2d 32; 53 Ohio Jurisprudence 2d 336.

Consequently the failure to find facts rule may not be imposed by implication upon the use of interrogatories. This is clear in paragraph three of Civil Rule 49 which requires only that the answers be consistent with the general verdict. If the answer is inconsistent the court may require further deliberations or may order a new trial. If the answer to a question of mixed law and fact, requiring a complicated narrative response similar to a special verdict, is consistent with the general verdict but otherwise incomplete in detail the Civil Rule does not require further deliberations or a new trial.

The philosophy of findings or answers to interrogatories, is governed exclusively by the civil rules which expressly abolished special verdicts in Civ. Rule 49(C) and expressly authorized interrogatories containing mixed findings of law and fact in Civil Rule 49(B) in such form as the trial judge in his discretion approves. Ragone vs. Vitali, 42 Ohio St.2d 161, 327 N.E.2d 645. While a dissent persists as to the form of an interrogatory, as reflected in the minority opinion in Ragone, the submission of mixed questions of law in interrogatories and requiring a narrative special verdict type response instead of a simple yes or no answer, is no longer a debatable question.

In the instant case the response was consistent with the verdict. The question of mixed law and fact was answered and answered determinatively by the jury. The unrealistic hope that the jury could respond factually, accurately and completely to the mixed question was not realized. This is a normal response by a jury. And it is symptomatic of the common law experience in special verdicts -- which were abolished in Ohio.

Use of such questions as: was the defendant negligent and, if so, in what respects, is a last effort to preserve a qualified form of the abolished special verdict. While such form of interrogation is approved by the Supreme Court, the response if consistent but incomplete never destroyed the general verdict as it once did destroy a special verdict. Submission of a mixed interrogatory invites and justifies a mixed answer, and if the answer is consistent it requires approval of the verdict.

The point to be made is that if counsel requests submission of the double question we are discussing, he is not thereafter entitled under the rules to the submission of new and additional questions. After the commencement of argument counsel has no right to submit further interrogatories to the jury. Civil Rule 49(B). After the commencement or argument the only power in this area rests in the discretion of the trial judge. After the verdict is reached, the trial judge will not be reversed for refusing to permit the jury to be subjected to further interrogatories amounting to cross examination by counsel of the jurors.

*21 The waiver rule applies where a party requests an interrogatory in general form, requiring a narrative response. and the answer of the jury is consistent with the general verdict. Under such, circumstances after the verdict is returned such party has no right to the submission of additional questions even though the latter may be more precise or lead to a more complete factual finding.

This conclusion arises not only because the practice and theory of special verdicts have been abolished but also because mixed questions of law and fact are expressly authorized under the civil rules. An answer by the jury that the defendant was negligent because he failed to use ordinary care is not inconsistent or irreconcilable with a general verdict. However artful, inappropriate or disappointing to counsel, such answer is not so "defective and faulty" or of such a "disastrous nature" as to require a reversal. Hogan vs. Finch, 8 Ohio St.2d 31, 222 N.E.2d 633. Consistency, not completeness, is the test for answers to interrogatories. Many mixed questions of law and fact, such as those related to negligence and ordinary care cannot be completely and definitively answered by experts without conclusions of law.

The test under the third paragraph of Civil Rule 49(B) is consistency with the general verdict, not the common law special verdict rule of factual completeness. Where counsel elects to request submission of a complicated and somewhat tricky interrogatory, he cannot complain because the trial judge did not exercise his discretion to save him from the difficulty of the form of his request.

The presence in Civil Rule 39(C) of a common law advisory or special verdict in non-jury cases is apparently an oversight that occurred when the Supreme Court rejected the Committee recommendations and decided to abolish special verdicts. It has no application to this case and is a rarity which few judges will utilize.

The acceptance of the jury's response to the interrogatory was proper and there was no error in the trial court's refusal to submit further questions to the jury after the verdict was received.

We see no error in the action of the trial court in refusing to send the jury back for further deliberation with respect to its request to "debrief it with respect to the legal matters that were addressed during this case". The request did not state a specific question of law but would have required the court to restate every instruction given by the court as to the law.

Assignment of error nineteen is that the trial court

committed prejudicial error in accepting a verdict which was contrary to law in that the answers to Interrogatories 1, 2, and 3 contradicted any finding of contributory negligence.

The jury's answers to such Interrogatories found that defendant-appellee was negligent, that his negligence was a proximate cause of Bruno Williamson's death and that defendant-appellee was negligent in that "he failed to look ahead and exercise ordinary care while operating his vehicle".

*22 The jury must have found that defendant-appellee, in the exercise of ordinary care, should have seen decedent in time to avoid the collision and death.

How then, plaintiff-appellant argues, could the jury find that decedent was negligent and that his negligence contributed as a proximate cause to his own death?

Everyone, including a police officer on duty for the purpose of and in the act of directing and controlling traffic, has the duty to exercise ordinary care for his own safety. There is evidence in this case tending to show that decedent approached and entered southbound traffic lane "B" where his death occurred, looking straight ahead to the west not looking either to the north or south and that he continued to look straight ahead to the west until he was struck and killed. There is also evidence to the effect that he gave no signal to southbound traffic to stop.

Such evidence, if believed, is sufficient to support a jury finding that decedent was negligent and that such negligence contributed as a proximate cause to his death. There is no merit in the nineteenth assignment of error.

Assignment of error twenty is that the trial court committed prejudicial error in failing to return the jury to the jury room to complete an answer to Interrogatory No. 6.

There is no merit in this assignment of error as we have noted in disposing of assignment of error number eighteen.

The twenty-first assignment of error is that the verdict is against the manifest weight of the evidence.

This court, on review, cannot reverse the judgment of the trial court rendered on the jury's verdict because it is supported by competent evidence going to all of the essential elements of the issues of contributory negligence and proximate cause, that evidence being that set forth in our discussion of appellant's assignment of error number nineteen. See C. E. Morris Co. v. Foley Construction Company, 54 Ohio St.2d 279, 376 N.E.2d 578.

There is no merit in appellant's twenty-first assignment of error.

Because the trial court erred to the prejudice of appellant as set forth in assignments of error, 5, 6, 8, 9, 11, 12, 13, 14 and 16, the judgment of the Common Pleas Court will be reversed and the case will be remanded to that court for further proceedings according to law.

CRAMER and ZIEGEL, JJ., concur.

(Judge Paul Sherer, Retired from the Court of Appeals, Second Appellate District, Judge Fred B. Cramer, Retired from the Butler County Common Pleas Court, Judge Donald L. Ziegel, Retired from the Preble County Common Pleas Court, sitting by assignment of the Chief Justice of the Supreme Court of Ohio.)

Not Reported in N.E.2d, 1979 WL 208354 (Ohio App. 2 Dist.)

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