SAMUEL B. COOPER, SR., Appellant, *v.* AGRICULTURAL MECHANIC CO. (AGRIMECO), et al., Appellees.

MOTION TO DISMISS APPEAL.

Argued May 24, 1973. Decided June 8, 1973.

1. In appealing from a ruling of a Justice after hearing in chambers, an exception must first be taken to the ruling and an appeal to the Supreme Court en banc then announced.

Appellant had applied to the Justice presiding in chambers for a writ of certiorari, which was denied and the alternative writ quashed after hearing. Exceptions were taken to the ruling of the Justice, but no appeal to the full Court was announced. The case was docketed for hearing by the Supreme Court, and appellees moved to dismiss the appeal on the ground of the failure to have announced such appeal. The *motion* was *granted* and the *appeal* was *dismissed.*

J. Dossen Richards for appellant. *MacDonald M. Perry* for appellees.

MR. JUSTICE HENRIES delivered the opinion of the Court.

This case was inexplicably docketed for hearing by this Court after Mr. Justice Horace, the Justice presiding in chambers, had denied the petition for a writ of certiorari, quashed the alternative writ, and ordered the clerk of this Court to send a mandate to the court below to resume jurisdiction and proceed with the disposition of the injunction suit, out of which these proceedings grew, on its merits. Exceptions were taken to the ruling

of the Justice, but no appeal was announced to the Supreme Court en banc.

When this case was called for hearing, the appellees moved to dismiss these proceedings on the ground that this Court has no jurisdiction over the parties and the subject matter because the appellant, apparently not intending for this case to be heard by this Court, merely excepted to the ruling in order to indicate his dissatisfaction therewith and, hence, did not announce an appeal to this Court en banc. The appellant countered this contention by averring that the taking of exceptions is in effect an announcement of appeal and, therefore, the required steps for appealing from a ruling of the Justice had been met.

According to our Civil Procedure Law "A final decision by a Supreme Court justice in a proceeding in certiorari, mandamus, or prohibition may be appealed to the Supreme Court en banc. The appeal shall be heard and determined immediately, in or out of term time." Rev. Code 1:16.26. Given this right to appeal from a Justice, it is now necessary to determine the requirements necessary for the completion of such an appeal. In doing so, we must reiterate here the principle first enunciated thirty-nine years ago by Mr. Justice Dossen, and relied upon in subsequent cases, that an exception is an objection taken to the decision of a trial court or, as in this case, a Justice in chambers, upon a matter of law, and is notice that the party taking it preserves for the consideration of the appellate court a ruling deemed erroneous. *Phillips* v. *Republic,* 4 LLR 11 (1934); *Richards* v. *Coleman,* 5 LLR 56 (1935); and *Urey* v. *Republic,* 5 LLR 120 (1936). It is settled that an exception to a ruling is not an announcement of appeal as contended by the appellant, but is merely one of the steps necessary to obtaining a review of a ruling.

After taking exceptions to a ruling or decision, the next step is to announce an appeal, as provided in the

Civil Procedure Law. "An appeal shall be taken at the time of rendition of the judgment by oral announcement in open court. Such announcement may be made by the party if he represents himself or by the attorney representing him, or, if such attorney is not present, by a deputy appointed by the court for this purpose." Rev. Code 1:51.6. Aside from this statute, in every other instance where there is a provision for appeal from a court of record, whether it be statutory, as in sections 51.4 and 51.5 of the Civil Procedure Law, *supra,* or by rule of court as found in Rule IV, Part 4, of the Revised Rules of the Supreme Court (1972), there must be an announcement of appeal.

In view of the authorities cited herein, we must hold that in appealing from a ruling of a Justice in chambers, the party appealing must first except to the ruling, and then announce an appeal to the Supreme Court en banc. This has always been the practice in this Court since its inception, and we see no reason for departing from such an established procedure. Ordinarily, one who fails to take an appeal from a ruling or judgment is presumed to be satisfied therewith, and in the absence of an appeal or writ of error (where applicable) no question is presented for review. *Harris* v. *Harris,* 9 LLR 338 (1947). The taking of exceptions without more renders the appeal incomplete, and does not give this Court jurisdiction to hear the appeal. Since the appellant in these proceedings failed to announce an appeal from the Justice's ruling, we are left with no alternative but to grant the motion to dismiss the appeal with costs against the appellant. And it is so ordered.

Appeal dismissed.

PATRICK WREH, for his minor son, ANTHONY WREH, Appellant, *v.* WOLFGANG BOEHME, Appellee.

APPEAL FROM THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, MARYLAND COUNTY.

Argued May 10, 1973. Decided June 8, 1973.

1. Negligence on the part of plaintiff which causes or contributes to an accident in which he sustains injuries will bar his recovery of damages.
2. A motorist is not an insurer of the safety of pedestrians and in the absence of proof of negligence by him in the operation of his vehicle, he is not liable for injuries sustained by a pedestrian.

An eight-year-old boy appears to have broken away from his father in a crowded area during an athletic event and darted out into moving traffic. He was struck by a car operated by the appellee. From all reports, including witnesses and the police, there appears to have been no negligence on the part of the driver. A suit was commenced for damages by virtue of the injuries sustained and a jury returned a verdict for defendant. An appeal was taken from the judgment. The Supreme Court *affirmed* the judgment of the lower court.

Wellington K. Neufville for appellant. *J. Dossen Richards* for appellee.

MR. CHIEF JUSTICE PIERRE delivered the opinion of the Court.

Culled from the record of the trial held in the Circuit Court, Fourth Judicial Circuit, Maryland County, we have obtained a summary of the facts. On May 9, 1970, a car driven by the appellee, who was the defendant in the court below, knocked down and injured the minor son of the appellant, at the time a football game was in

progress at the Catholic Field in Harper. From what we have been able to gather, it appears the eight-year-old child went to the game with his father, and while the game was in progress and spectators thronged the approaches to the field, this little child got away from the protection of the father and attempted to run across the street adjoining the field where the game was being played. An oncoming Volkswagen car driven by the appellee hit the boy and knocked him down, breaking his left femur and inflicting other wounds. It was testified to by the police officers who investigated the accident, that the car skidded 15 feet and 8 inches before hitting the child, and that after the child had been knocked down the driver of the vehicle took him to the hospital for medical care.

According to the findings of the traffic police investigators, the accident could not have been avoided, due to the fact that the boy ran out of a large crowd in an effort to cross the street, without looking to see if there was moving traffic. The accident report sets forth substantially the facts recited.

Several witnesses testified that there did not seem to be any signs of recklessness on the part of the operator of the vehicle when the child was hit. The plaintiff's first witness, John Davies, answered a question put to him.

"Q. How fast was defendant Wolfgang Boehme driving his car, if you know?

"A. He was not on too much speed and if he had been on speed, he would have killed the boy."

The complaint had specifically charged that the accident had occurred due to recklessness in driving and the negligence of the defendant. Negligence on the part of the operator in cases of motor accidents should be proved if it is to be relied upon as the basis for damages. We have taken particular note of the fact that at the crowded scene of the ball game, the police had thought it necessary to have a traffic detail present to control the flow of

traffic. We have also paid special attention to the fact that not a single witness testified to recklessness and negligence on the driver's part, even though this had been charged in the complaint and denied in the answer.

We have also noted the absence of any evidence to establish that the vehicle had been traveling at a rate of speed prohibited within the area of the accident, and especially on an occasion when the observance of such regulation should have been imperative in the interest of all pedestrians. Nor is there any evidence to show the speed limit allowed for this area, and whether such limit had been exceeded, resulting in the accident. On the contrary, the police responsible for traffic were on the scene, and have reported that there was no carelessness shown by the driver in operating the vehicle, and that hitting the child was purely an accident.

Appellee contended in count two of his answer that the child had run into the moving vehicle as a result of his carelessness and inattentiveness, and but for the skill of the operator more serious consequences might have resulted. This count of the answer also alleged that the accident had been occasioned by the contributory negligence of the child, and by his failure to abide by the "safety warning of the police." We have not been able to find in the evidence what the safety warning was that was referred to in this count of the answer. However, issue in the case hinged upon negligence charged by the plaintiff against the defendant, and contributory negligence on the part of the plaintiff alleged by the defendant.

The jury deliberated and returned a verdict in accordance with the judge's charge, not finding for plaintiff. A motion for a new trial was filed and denied and judgment was rendered, from which the plaintiff has appealed.

> "No rule of the common law has been accepted more readily or more widely than the general rule that the

contributory negligence of the plaintiff constitutes a defense for a defendant charged with negligence. It is the doctrine of the common law that for injuries negligently inflicted on one person by another, there can be no recovery of damages for negligence if the injured person by his own negligence or by the negligence of another legally imputable to him, proximately contributed to the injury. No one can charge another in damages for negligently injuring him where his own failure to exercise due and reasonable care was responsible for the occurrence of the injury. Although it may be shown that the defendant did not exercise care, yet no recovery will be allowed against him if it further appears that the injury would have been avoided if the person injured had exercised care on his part. The negligence of the injured person may preclude a recovery by him, although it had no influence on the act of the defendant, or, for that matter, was entirely unknown to him, provided it contributed proximately to cause the injury." 38 AM. JUR., *Negligence,* § 174.

"Much controversy has centered upon the question whether the plaintiff in a negligence action must prove that he himself was free from negligence, or whether the defendant has the burden of showing that the injury was due to the fault of the plaintiff. Many courts stoutly maintain that the burden of proof is on the plaintiff to prove that he or his intestate, as the case may be, was not guilty of contributory negligence. In jurisdictions where this doctrine prevails, the rule is sometimes stated that if wilfulness and wantonness are not charged, the plaintiff must prove he was in the exercise of due care." *Id.,* § 286.

Where a parent was so unmindful of his parental duty to a child of such tender years, as to permit such child to wander into moving traffic unprotected, the parent should take full responsibility for any accidents which result in

hurt to the child. We do not think it would have been just or fair for the jury to have found for the plaintiff, in face of the circumstances and in view of the police report. That care which a person of mature experience would exercise in respect to the danger of a moving vehicle cannot be expected of a child of only eight years. Therefore, where the father of the child had accompanied him to the ball game, one would have expected that the father would have given more protection to his child.

When pedestrians suddenly and without notice appear before moving vehicles, operators are excused from blame where driving rules had not been violated prior to the accident.

Writers have addressed themselves to the issue.

> "The law requires of the operator of an automobile the exercise of reasonable care toward pedestrians; he is not, however, an insurer, and where a pedestrian is standing in a place of safety and apparently sees an approaching automobile, the driver has the right to assume that the pedestrian will remain in the place of safety until the car has passed and will not suddenly step into a place of danger. This assumes that the car is being lawfully operated. The fact that a pedestrian came into the path of the car suddenly and so close that the driver could not stop and avoid striking him will not excuse the driver, where the car was being driven at an unreasonable rate of speed under the circumstances.
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> "A driver of an automobile is not bound to anticipate that a pedestrian may suddenly run from behind a parked automobile into his car, or into the path of it, or do the same in alighting from a car, in the absence of anything to put him on notice that such an event is likely to occur. If he is driving at a reasonable rate of speed, so that he is able to stop immediately or within a reasonable distance, no liability

exists. He must, however, observe whether any person is about a car standing by the roadside, and he must have his car under control. A driver may be put on notice, so that ordinary care requires him to operate his car more slowly and have it under better control, by the fact that he is passing through a busy thoroughfare on which machines are parked and which people are crossing at any point.

"A driver operating at an excessive rate of speed under the circumstances may be guilty of negligence even in striking a pedestrian coming from behind or around a vehicle, or alighting therefrom."

In the circumstances we have no alternative but to affirm the judgment of the trial court. It is so ordered.

Affirmed.