

1949

John D. Marshall v. The Ogden Union Railway and Depot Company : Brief of Respondent

Utah Supreme Court

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7407

In the
Supreme Court of the State of Utah

JOHN D. MARSHALL,
Plaintiff and Appellant,

vs.

THE OGDEN UNION RAILWAY AND
DEPOT COMPANY, a corporation,
Defendant and Respondent.

Case No.
7407

BRIEF OF RESPONDENT

FILED

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STATEMENT OF THE CASE

A. PRELIMINARY STATEMENT

The parties will be referred to as in the court below, plaintiff and defendant. All italics are ours.

The first trial of this case was before the Honorable John A. Hendricks, sitting with a jury, and the trial started July 1, 1948. This trial resulted in a verdict in favor of

the plaintiff and against the defendant awarding the plaintiff \$500.00 special damages and \$8,000.00 general damages (R. 174, 175). Thereafter defendant filed its motion for a new trial setting forth all the statutory grounds (R. 037), which motion was on August 28, 1948, granted by the court (R. 038). A second trial before the Honorable L. Leland Larsen, sitting with a jury, was had beginning February 23, 1949, and resulted in a verdict in favor of the defendant and against the plaintiff "no cause of action" (R. 074). The plaintiff thereafter filed a motion for a new trial, which was denied April 22, 1949 (R. 144).

The plaintiff has assigned as error the court's granting defendant's motion for a new trial following the first trial of the case, and has assigned as error the granting and the refusal of certain instructions at the second trial. It therefore seems advisable, inasmuch as respondent does not agree with the appellant's statement of facts, to make a separate statement of facts as to each trial.

B. STATEMENT OF FACTS (FIRST TRIAL)

All references to the record are to the transcript of the testimony of the first trial unless otherwise indicated.

In granting defendant's motion for a new trial the Honorable John A. Hendricks made and entered the following written order:

"After studying the affidavits and transcribed testimony of the plaintiff, and taking into consideration the emphasis that plaintiff's counsel put on the defendant's (sic) confinement for two weeks in the hospital, the court is of the opinion that the jury

was influenced to the extent that they *undoubtedly allowed excessive special damages*, and also probably *caused to award general damages in excess* of what they would have awarded had they known the facts about his stay in the hospital in May. It is therefore ordered that a new trial be granted."

(R. 038)

The language of the above quoted order does not in itself entirely suggest the harm to the defendant and the injustice perpetrated upon the court and jury alike by the matters therein referred to.

Plaintiff in his complaint sought damages in the sum of \$30,000.00, alleging that since the 19th day of June, 1947 he had been constantly under the care of doctors, and alleged on information and belief that he had been permanently injured (R. 004) The jury was fully advised of plaintiff's claims in the instructions, not only as to the amount demanded but the claimed permanency of plaintiff's injuries and the claimed loss of future earnings on account thereof (See Court's Instruction No. 11, R. 067). The facts disclosed that the accident occurred on the morning of June 19, 1947, at about 9:00 A. M. at the passenger station at Ogden, Utah. Following the accident the plaintiff walked up town in Ogden to see a company doctor and after being hospitalized for two days returned to his home in Oakland, California (R. 15). Upon returning to his home he entered the Southern Pacific Railroad Company's hospital in San Francisco, where he was confined for one week and was an out patient an additional 37 days, or under treatment in San Francisco, a period of 44 days in all, being released about August 3, 1947 (R. 16). He then returned to his em-

ployment as a chair car porter for the Southern Pacific Company and worked continuously until the 21st day of May, 1948, during which time his monthly earnings were greater than they had been prior to the date of the accident. He testified that prior to the accident his earnings were \$218.00 per month plus tips, and after the accident his earnings were \$230.00 a month plus tips (R. 35). The only qualification of the foregoing statement is plaintiff's testimony that after he started back to work the fore part of August and after he had made one round trip to Ogden, he went to the hospital for one heat treatment of one hour (R. 18).

With respect to plaintiff's hospitalization in May, 1948, he testified on direct examination as follows:

Q. Now, have you missed any work since going back to work the second time? (The "second time" refers to the one hour heat treatment he took after having started back to work.)

A. Yes. I missed a couple of weeks here not long ago. I was in the hospital on the 25th of last month.

Q. That would be May 25th?

A. Yes.

Q. How long were you in the hospital on that occasion?

A. Two weeks.

Q. Were you continuously in the hospital during that two weeks?

A. Yes, I was in there for two weeks.

Q. Were you an "out" patient or in there all that time?

A. In the hospital—no—no out patient.

Q. What were you in the hospital for, Mr. Marshall?

A. My injury.

Q. The condition of your back?

A. Yes.

Q. Were you receiving treatments of any kind during that two weeks?

A. Well, I was taking the same treatments.

Q. Those heating-pad treatments?

A. Yes.

Q. You were not, of course, able to work during that two weeks?

A. No, I wasn't.

Q. Now, in addition to that two weeks have you missed any other work?

A. No, I didn't miss any other.

(R. 19)

On cross-examination he testified as follows:

Q. Mr. Marshall, you told Mr. Black that recently you were in the hospital?

A. Yes, sir; I were.

Q. And when was that?

A. On May 25th.

Q. Of this year?

A. Yes, sir.

Q. And what hospital were you in?

A. S. P. Hospital.

Q. Whereabouts?

A. General Hospital, in San Francisco.

Q. And who was the doctor that was attending you at that time?

A. Dr. Merritt.

MR. BLACK: Will you spell that?

A. Dr. M-e-r-r-i-t-t.

Q. I think you told us that you were there continuously during the period of two weeks?

A. Yes.

Q. And you were in bed?

A. I was in bed.

Q. And since that time you have been working on your job?

A. Yes, sir, I have.

Q. That is, the only time you have lost since the time you went back to work in the beginning of August has been these two weeks that you were in the hospital; is that right?

A. That is true.

(R. 23, 24)

We would like to call the court's attention to the fact that this testimony places the plaintiff in hospital confinement and in bed for a period of two weeks within four weeks of the time the trial was held in Ogden July 1, 1948. Following the first trial and in support of defendant's motion for a new trial, defendant's counsel filed his affidavit and that of Dr. Russell J. Merritt, in which it was set forth that the facts were not as testified to by the

plaintiff, but in fact, showed that the plaintiff had entered the Southern Pacific Hospital on May 21, 1948 and was there for a period of six days and during such time was fully ambulatory, up and around the hospital at will, and able to walk without any limp or list (R. 2nd Trial p. 151, 152, 153, 154). The plaintiff filed a so-called counter-affidavit in which he *admitted the fact* that he was only in the hospital from May 21 to May 27, and admitted that he was not "right down in bed," as he had testified, during his hospitalization (R. 2nd Trial p. 155, 156). At the second trial the plaintiff testified under oath on *direct* examination in conformity with the charge made by counsel for the defendant in his affidavit and the affidavit of Dr. Merritt on motion for a new trial, as follows:

Q. Did you report back to the hospital?

A. I did in May, 1948.

Q. Did you remain at the hospital continuously for any period of time in May of 1948?

A. For six days.

Q. You testified at the previous hearing, didn't you, Mr. Marshall?

A. I did.

Q. What did you say at that time about the time you were in the hospital?

A. I said two weeks, but I was mistaken. It seemed like a long time to me. I didn't count the days.

Q. Did you check after the previous hearing to see how long you had actually been in the hospital?

A. I did.

Q. And after checking you discovered it was six days?

A. Six days.

(R. 26, 2nd Trial)

C. STATEMENT OF FACTS (SECOND TRIAL)

We think the statement of facts by appellant with respect to the second trial so far as it goes is not inaccurate; but in order for the court to properly consider the assignments of error made by plaintiff with respect to the second trial we deem it necessary to supplement appellant's statement of facts as we consider it incomplete, particularly with reference to the defendant's evidence.

Defendant's witness LeRoy Miller, who was the tractor operator, testified that he was moving south on the platform pulling one baggage truck with the small gasoline tractor shown in the photograph admitted in evidence and contained in the record at Page 088. There was no load on the baggage truck except one or two trash boxes as Miller's part in servicing the train was to put trash boxes on the various coaches. That as he came up to the point where the plaintiff Marshall was standing he stopped the tractor and asked the plaintiff to step out away from the cars; that Marshall did not move from his position, but said: "Come on boy, you got plenty of room"; that as he said this he made a motion with his hands and Miller then said: "O. K. watch out it might hit you" (R. 106, 109). That when he started up the tractor was only two or three feet from

Marshall (R. 113, 114). That it was customary for porters standing by car steps with the step box down, to pick it up and move over to the middle of the platform when a motor and baggage truck proceeded along the platform by the train (R. 109). That he was watching the plaintiff and endeavoring to pull by him without hitting him with the tractor or the wagon when the left front corner of the wagon caught the right rear corner of the standing truck (R. 110) ; that when this happened the rear end of the truck which was being pulled skidded to the right, the right corner thereof striking the coach. That Marshall could have taken one step and been in between the ends of the cars and in the clear but that he did not do so (R. 113, 118).

The defendant's witness Kenneth Malan, aged 22, testified that he was washing windows on Marshall's car and was working five or six feet south of where plaintiff was standing; that he was using a long-handled brush, to which was attached a $\frac{1}{2}$ inch hose, water passing through the handle of the brush, the hose trailing behind him on the platform (R. 92, 100). That these small tractors when pulling iron-tired baggage trucks along the cement platform make a lot of noise (R. 103, 104), and that he heard the tractor coming down the platform. That the tractor stopped when it was only two or three feet from where the plaintiff Marshall was standing (R. 93, 94). That when Miller stopped the tractor he stepped off and moved the water hose out of the way. Malan also stopped work to help move the hose out of the way so, as he testified, "the tractor would not run over it, because wheels cut the hose and break it" (R. 93). That before Miller started the tractor

up again he heard Miller and plaintiff talking; that he could not remember all of the conversation but saw the plaintiff step back and say something about there being plenty of room (R. 95). That Miller then started up the tractor and the two trucks cornered immediately (R. 93, 94, 95). That the tractor moved only about five feet from the time it started up until the two trucks cornered (R. 99).

Louis Stegge, a carman, was inspecting the train and was on the platform a short distance north of where Marshall was standing when the tractor passed him. He testified that the tractor came to a stop and when it stopped that he, Stegge, was then about two feet behind the back end of the baggage truck, which would place him nine or ten feet behind Miller, who was sitting on the tractor. He also testified that he was about four or five feet behind the truck when it stopped, which would place him about twenty feet from Miller, who was sitting on the tractor (R. 126). That he heard some conversation between the plaintiff Marshall and Miller, the tractor operator, which he did not understand, but he saw the plaintiff "move his hand for him to come on" (R. 123). That Miller then started up the tractor and had moved only four or five feet when the two trucks cornered (R. 124). That the truck being pulled had flat iron tires on the wheels four or five inches in width; that they were smooth and that the platform is smooth; that the tractor pulling a baggage truck with flat iron tires makes "plenty of racket" coming along the cement platform (R. 124). That the usual and customary practice among porters in the long time he has observed them while working around the depot platform at Ogden is to pick up the step

box and step away from the train when tractors and trucks move along the platform in servicing the train (R. 128).

In presenting respondent's brief to the court we are content to limit our argument to the points discussed by appellant.

SUMMARY OF ARGUMENT

I. The trial court exercised a sound and just discretion in granting defendant's motion for a new trial.

(a) The defendant was not guilty of "lack of due diligence" in failing to present the newly discovered evidence at the first trial;

(b) Such evidence was material and of such a nature as might change the outcome of the trial;

(c) Such evidence was not merely impeaching evidence but was substantive evidence upon a material issue in the case.

II. The court committed no prejudicial error in granting defendant's Requested Instruction No. 7 in view of the evidence in the case.

III. The evidence warranted the submission of the issue of the contributory negligence of the plaintiff to the jury.

IV. There was no basis in the pleadings or evidence warranting the submission of the case to the jury on the theory of last clear chance and no error was committed by the court in refusing plaintiff's Requested Instruction No. 3 thereon.

ARGUMENT

Point I

THE TRIAL COURT EXERCISED A SOUND AND JUST DISCRETION IN GRANTING DEFENDANT'S MOTION FOR A NEW TRIAL.

(a) The defendant was not guilty of "lack of due diligence" in failing to present the newly discovered evidence prior to the trial.

It is a fact and the transcript of the proceedings at the first trial so show (R. 103), that on May 15, 1948, Mr. Bronson, counsel for the defendant, was present in the office of Mr. Clifton Hildebrand, an attorney in Oakland, California, and attended the taking of the deposition of one Dr. Lloyd D. Fisher. Dr. Fisher was a witness for the plaintiff and, as disclosed by the record, had examined the plaintiff the preceding December for the purpose of enabling him to testify. The deposition shows that the plaintiff was sent to Dr. Fisher by his Oakland attorneys; that Dr. Fisher did not examine him for the purpose of treating him, did not prescribe for or treat him, but saw him on one occasion on December 20, 1947 (R. 105, 110, 111). The affidavit of Mr. Bronson in support of the motion for a new trial (R. 153, 2nd Trial) set forth the fact that he had, as of May 15, 1948, fully investigated in San Francisco and found that there had been no hospitalization of the plaintiff since August of 1947. The record fully discloses that the plaintiff had not been hospitalized between the first part of August, 1947 and the 21st day of May, 1948—six days after defendant's counsel was in Oakland and San Francisco investigating the

facts of plaintiff's hospitalization. We would like at this point to call the court's attention to the fact that the case was then set for trial at Ogden, Utah, May 26, 1948. The plaintiff having worked continuously from the beginning of August, 1947 until May 15, 1948, the date defendant's counsel investigated the matter of plaintiff's hospitalization, and not having been hospitalized or received any medical treatment during that period of time, we submit that it was not reasonable for counsel to expect that between that date, viz, May 15, 1948, and the date of trial, May 26, 1948, the plaintiff would require hospitalization on account of his alleged injuries. The plaintiff went to the Southern Pacific Hospital in San Francisco complaining of his back six days after Mr. Bronson was in Oakland to take the aforesaid deposition and five days before the case was set for trial. In view of the distance between Salt Lake City and San Francisco, we think that we were diligently trying to properly take care of this lawsuit. We cannot, of course, discuss the merits of the conflicting affidavits filed by counsel for the plaintiff and defendant, plaintiff's counsel stating that he advised Mr. Bronson of the hospitalization of the plaintiff before trial, and defendant's counsel denying this. As plaintiff's counsel in his brief states, "It was within the discretion of the trial court to determine the facts as revealed by the affidavits."

At page 34 of appellant's brief counsel says: "If counsel considered the hospitalization issue to be so vital to his case why didn't he make a telephone call during or before the trial? Why didn't he bring this matter to the attention of the trial court? Why didn't he move for a continuance?

Why should plaintiff be saddled with the onerous burden of a new trial because of opposing counsel's inattention to his case?" The simple answer to this is that while counsel for the defendant was surprised at the plaintiff's testimony that he had been in the hospital flat on his back in bed for a period of two weeks between May 15th—the time counsel was in San Francisco—and July 1, the date of the trial, defendant's counsel did not know and had no reason to suspect that the plaintiff was falsifying about the matter. If we correctly understand plaintiff's counsel, he contends that this was inexcusable gullibility on the part of defendant's counsel; that defendant's counsel should have known or suspected the testimony was false, and should have made such an investigation in San Francisco, California before the close of the trial, which consumed less than two days, as would enable defendant's counsel to either prove the falsity of plaintiff's testimony or move the court for a continuance.

We invite the court's attention to the cases of *Rath v. Bankston*, 281 P. 1081, and *Pico v. Cohn*, 91 Cal. 129, 25 P. 970, cited and discussed by appellant's counsel at page 32 of their brief. These cases are cited in support of what seems to be an argument to the effect that a "litigant at the trial must be prepared to meet and expose perjury then and there." Counsel seems to advance the astounding proposition that perjury is permissible if you can get away with it, that is, if counsel on the other side does not catch you in it then and there, and be prepared to rise up and expose it, and that unless it is exposed at the trial in which it occurs the trial court must permit the verdict to stand even though it was secured or may have been secured by false testimony,

and that neither courts nor jurors nor litigants can find protection from such an injustice by way of a new trial. The cases above referred to and discussed on page 32 of appellant's brief are not only not in point but they do not hold what counsel says in his brief, at page 32, they stand for. In the *Rath* case, which was an action for damages for personal injuries, it had been testified that it was impossible to back a truck and trailer up to a certain curb. The trial was recessed and during the recess the plaintiff conducted an experiment with a truck and trailer similar to those involved in the accident and determined that it was possible to back the truck and trailer to the curb at the point in question. The next day the trial was resumed but the plaintiff *did not put on this contradictory evidence* although she had a full opportunity to do so. It was held that this was not newly discovered evidence entitling the plaintiff to a new trial after an adverse verdict, for the simple reason that the plaintiff had the evidence in her hands before the close of the trial and full opportunity to present it.

In the *Cohn* case, which appellant herein cites for the proposition which appellant himself italicizes as follows: "*A litigant at the trial must be prepared to meet and expose perjury then and there,*" suit was brought by way of collateral attack upon a decree which had been obtained by the prevailing party bribing a witness to perjure himself. The decree had become final following appeal to the Supreme Court of California. The following is what the court said and what it held:

"The trial is his (the litigant's) opportunity for making the truth appear. If, unfortunately, he fails,

being overborne by perjured testimony, and if he likewise *fails to show the injustice that has been done him, on motion for a new trial, and the judgment is affirmed on appeal*, he is without remedy. The wrong in such case, is, of course, a most grievous one, and no doubt the legislature and the courts would be glad to redress it if a rule could be devised that would remedy the evil without producing mischiefs far worse than the evil to be remedied. Endless litigation, in which nothing was ever finally determined, would be worse than occasional miscarriages of justice; and so the rule is that a *final judgment* cannot be annulled merely because it can be shown to have been based on perjured testimony; for, if this could be done once, it could be done again and again, *ad infinitum*."

We submit that these cases relied upon by plaintiff's counsel are not only not inconsistent with the position of the defendant in this case, but support defendant's position.

(b) That the true facts with relation to plaintiff's stay in the hospital as well as the time he was in the hospital was material and of such a nature as would probably change the outcome of the trial cannot be doubted. It was of the utmost importance in this trial to ascertain exactly what the facts were with respect to any hospitalization occurring just before the trial and nearly a year after the accident, during which time plaintiff had never lost a day's time from his work and earned more money per month than before the accident. The importance of learning the true facts was due to the fact that plaintiff was claiming that he was permanently injured and was seeking damages in the sum of \$30,000.00 therefor. The importance to a jury of a plaintiff being compelled to submit to an extensive

hospitalization and medical treatment nearly a year after the accident cannot be overemphasized. Any reasonable man would be much more inclined to believe that the plaintiff's injuries were permanent if nearly a year after the accident he was compelled to enter a hospital where he was confined to his bed undergoing medical treatment, as plaintiff testified to, than if the true facts were made known, viz, that the plaintiff went to the hospital for a checkup a few days before the trial, was in the hospital for a period of six days, and was fully ambulatory during that time. Plaintiff's counsel considered it of great importance and the trial court in his order granting defendant's motion for a new trial stated that he was taking "*into consideration the emphasis that plaintiff's counsel put on the plaintiff's confinement for two weeks in the hospital.*" Whether it was intentional or otherwise is immaterial in a proceeding of this kind; the fact remains that the plaintiff himself falsified on this important matter at the first trial. He admitted he falsified by the so-called counter-affidavit filed in opposition to defendant's motion for a new trial. In his testimony at the second trial, as set forth in the statement of facts herein, he again admitted he falsified on this matter at the first trial. The injury and the injustice to the defendant is the same whether the false testimony was given intentionally or unintentionally. We further submit that the evidence was of such materiality that the trial court in the exercise of its discretion was warranted in assuming that it would probably change the outcome of another trial, and it may be that the fact that the outcome of the new trial was changed is some indication of the materiality of the evidence in question.

(c) The evidence which the defendant offered to show at a new trial, if granted, was not, as is contended by plaintiff's counsel, solely for the purpose of impeaching the plaintiff. It of course would necessarily have the effect of impeaching the plaintiff but it had the other characteristic of substantive evidence on a material matter. At the second trial the very thing defendant's counsel said he would prove, if given a new trial, was proved and it was proved out of the mouth of the plaintiff himself upon his direct examination by his counsel. (See Statement of Facts, *supra*.)

We concede the general rules with relation to motions for new trials cited by counsel, *viz*, that a new trial should not be granted on the grounds of newly discovered evidence if such evidence merely goes to impeach a witness, and that a new trial should not be granted in the exercise of a sound discretion unless there is some reasonable basis for supposing that the newly discovered evidence will change the outcome. But the newly discovered evidence in this case was substantive evidence upon a material point in addition to being impeaching evidence. At the second trial, anticipating counsel for the defendant would be prepared to establish the true facts with relation to the plaintiff's hospitalization, plaintiff's counsel brought out the facts as a part of his main case during his direct examination of the plaintiff. We do not see how he can now contend that the evidence was merely impeaching evidence. We submit that the court under all the circumstances was acting well within its discretion in holding that the defendant's counsel had not been guilty of lack of due diligence; that the evidence

was material and such as would probably alter the outcome of another trial.

It appears from all the evidence in the case that the plaintiff lost a total of 50 days on account of this accident, 44 days immediately following the accident in 1947, and 6 days the latter part of May, 1948. The jury awarded him \$500.00 special damages, which was substantially in excess of what he lost in wages in accordance with the true facts. At the second trial Marshall testified on cross as follows:

Q. And then you were an out patient for an additional time and the total time was 44 days?

A. Yes.

Q. And you didn't draw any money during that time?

A. I did not.

Q. How much would your wages amount to for that period?

A. 44 days. \$350.00

An additional six days time would not bring his lost wages up to as much as \$400.00. In view of the nature of the injury plaintiff actually suffered and the time he lost, the trial court undoubtedly considered that awarding the plaintiff general damages in the sum of \$8,000.00 was excessive and was perhaps greatly influenced by the fact that the jury most likely considered the plaintiff to have rather serious permanent injuries because of their belief that he was in a hospital flat on his back for two weeks nearly a year after the accident. Under the circumstances,

it is easy to believe that the trial judge felt that he could not effect justice in the case by reducing the verdict inasmuch as the entire case was tainted and affected by the false testimony given.

It was a matter largely within the discretion of the trial court as to whether or not he would grant a new trial in this case. It is now for this court simply a question of law as to whether or not the trial court abused that discretion and the burden is upon the appellant in this case to clearly establish that the trial court did abuse its discretion. This court has on several recent occasions had this question before it for review. In the case of *Moser v. Zion's Co-op. Mercantile Inst.*, — Utah —, 197 P. (2) 136, Mr. Justice Wolfe reviewed most of the early Utah cases treating the subject and said:

“It is a matter now too well settled to admit of any serious dispute that the question of granting or denying a motion for new trial is a matter largely within the discretion of the trial court. *White v. Union Pacific Railroad Co.*, 8 Utah 56, 29 P. 1030; *Van Dyke v. Ogden Savings Bank*, 48 Utah 606, 161 P. 50; *Utah State National Bank v. Livingston*, 69 Utah 284, 254 P. 781; *Thompson v. Bown Live Stock Co.*, 74 Utah 1, 276 P. 651; *Jensen v. Logan City*, 89 Utah 347, 57 P. 2d 708. This rule applies whether the motion is based upon insufficiency of the evidence *or upon newly discovered evidence*. See cases above cited and *Valiotis v. Utah-Apex Mining Co.*, 55 Utah 151, 184 P. 802; *Greco v. Gentile*, 88 Utah 255, 53 P. 2d 1155; and *Trimble v. Union Pacific Stages*, 105 Utah 457, 142 P. 2d 674. This court cannot substitute its discretion for that of the trial court. *James v. Robertson*, 39 Utah 414, 117 P. 1068, 2 N. C. C. A. 782. We do not ordinarily

interfere with rulings of the trial court in either granting or denying a motion for new trial, and unless abuse of, or failure to exercise, discretion on the part of the trial judge is quite clearly shown, the ruling of the trial judge will be sustained. *Lehi Irrigation Co. v. Moyle, et al.*, 4 Utah 327, 9 P. 867; *White v. Union Pacific Ry. Co.*, supra; *Utah State Bank v. Livingston*, supra; *Clark v. Los Angeles & S. L. R. Co.*, 73 Utah 486, 275 P. 582; and *Trimble v. Union Pacific Stages*, supra. See also *Harrison v. Sutter St. Ry. Co.*, 116 Cal. 156, 161, 47 P. 1019, 1020."

The Moser case was followed later by *State v. Cooper*, — Utah —, 201 P. (2) 764, without additional discussion of the question.

The latest decision of this court upon the matter is the case of *Dwight L. King, Administrator of the Estate of Wendell O. Jorgensen, Deceased, v. Union Pacific Railroad Company*, decided as recently as December 13, 1949, in which the general principles relating to the granting of new trials was again reviewed by Mr. Justice Wolfe. Any further research or discussion of the law applicable to the question here involved would be superfluous.

POINT II

NO PREJUDICIAL ERROR WAS COMMITTED IN GRANTING DEFENDANT'S REQUESTED INSTRUCTION NO. 7 IN VIEW OF THE EVIDENCE IN THE CASE.

Appellant concedes that defendant's Requested Instruction No. 7 is a correct abstract statement of the law,

but that the giving thereof was not warranted by the evidence in the case. The usual and customary practice, according to the testimony of the witness Louis Stegge, who had for a long time worked on the platform at Ogden, Utah, was for porters to pick up their step box and step over to the center of the platform where they would be in line with the steel posts holding up the umbrella sheds when tractors pulling baggage trucks came moving along the side of the train (R. 120). The tractor operator, LeRoy Miller, who had been operating a tractor on this platform for three and a half years likewise testified that such was the usual custom and practice of chair car porters (R. 109). It does not appear from the evidence that the reason Miller stopped the tractor was because Marshall was standing by the coach, but because he did not want to run over the water hose. However, before he started up he testified that he asked Marshall to step out away from the cars, which in and by itself indicates that it was the usual and customary thing to be done and that Miller expected it of Marshall. Instead of stepping out, Marshall said: "Come on boy, you got plenty of room," and made a motion for Miller to come ahead (R. 106, 109, 123). Miller himself had certain duties to perform in connection with the servicing of the train, viz, to get the trash boxes on the cars, and so he then proceeded to pull forward approximately five feet before the trucks cornered. It is quite obvious that what Miller endeavored to do when he saw that Marshall, even after being requested, was not going to move from his position, was to pull to the left in an effort to give Marshall as much clearance as possible, and it was this action on his part that undoubtedly caused the trucks to corner. Miller testified that

he was watching the plaintiff endeavoring to pull by him without hitting him with the tractor or the wagon at the time the left front corner of the truck caught the right rear corner of the standing truck (R. 110). It is thus apparent that Marshall could have taken three steps forward and been absolutely in the clear or he could have easily stepped on his step box and onto the first step of his coach and likewise have been in the clear.

In view of the testimony with respect to the custom and practice of porters moving out away from the train when tractors and trucks came along, which was something the jury had a right to believe, as well as the fact that it would appear from the physical facts alone that there was some danger in standing between the coach and a moving tractor and trailer, we think the instruction was warranted. Appellant says that the only danger in standing against the car would be in the event that the tractor operator was negligent. The custom and practice did not so indicate nor do the physical facts so indicate. Appellant's statement is not a fair statement for the reason that accidents sometimes happen without negligence on the part of anyone. Nor is it a conclusive answer in this case for the reason that as this is not an Employer's Liability case contributory negligence of the plaintiff is a complete bar to recovery. Plaintiff had worked as a chair car porter for a considerable time and he knew, or he should have known, that there was some danger attendant to his maintaining his standing position against the car and that he would be in an absolutely safe position if he took three steps, which would carry him to the center of the platform. This was not a case where

the tractor was moving and the plaintiff would have to jump for it, as the tractor was standing still and before it was started up he was requested by Miller to move and undoubtedly had plenty of time and full opportunity to do so. If the instruction is carefully read in the light of the foregoing we think it will be made clear that it was properly given. The instruction is a fair and accurate statement of the law—not slanted in defendant's favor in the least, actually amounts to no more than a detailed instruction on contributory negligence, and cannot therefore have been prejudicial in any event for the reason that the contributory negligence of the defendant was an issue which was properly submitted to the jury.

POINT III

THE EVIDENCE WARRANTED THE COURT'S SUBMISSION OF THE ISSUE OF THE CONTRIBUTORY NEGLIGENCE OF THE PLAINTIFF TO THE JURY.

Much of what was said in the argument under Point II has a bearing upon the question of the plaintiff's contributory negligence. In arguing this matter to the court, appellant's counsel again falls into the error of saying: "Furthermore, Marshall was entitled to assume that Miller would operate the jitney and truck in a careful and prudent manner. Marshall was under no obligation to anticipate that Miller would be negligent in operating the vehicle." This may well be true, but in view of the custom and practice of porters moving away from the train when tractors

and trucks are passing, together with what seems to be an inherently dangerous thing, i. e., to stand between a coach and a moving tractor and truck when it is not at all necessary to do so, Marshall should have known that an accident might happen or that he might in some way be injured by standing against the coach, even though Miller was himself not negligent in moving the vehicle. The undisputed testimony was that these gasoline tractors when pulling an iron-tired baggage truck on a cement platform make a lot of racket. The window washer, Kenneth Malan, heard the tractor coming a considerable distance away. Even if the plaintiff's testimony that he never saw the tractor and truck or heard it until it was just even with him, incredible as this seems, is to be believed, it would be sufficient to raise the question of contributory negligence on the part of the plaintiff in not seeing and hearing what he should have seen and heard.

The jury in this case had a right to believe that the tractor stopped two or three feet from where Marshall was standing, as testified to by every witness in the case who saw the accident, excepting the plaintiff himself, and had the further right to believe the testimony that before it was again started up Miller, the tractor operator, asked Marshall to move; that Marshall refused to move and instead said: "Come on boy, you got plenty of room," at the same time motioning Miller to come ahead. There can be no question but there was at least two, and possibly three, places Marshall could have stepped to where he would be absolutely safe—the center of the platform, the car steps, or between the cars—and that he had ample time to do so. There was

ample evidence in the record which, if believed by the jury, entitled them to believe that the plaintiff was guilty of negligence proximately contributing to the accident, which would bar recovery, and they were entitled to an instruction on contributory negligence and the court committed no prejudicial error in giving the same.

POINT IV

THERE WAS NO BASIS IN THE EVIDENCE OR PLEADINGS WARRANTING THE SUBMISSION OF THE CASE TO THE JURY ON THE THEORY OF LAST CLEAR CHANCE AND NO ERROR WAS COMMITTED BY THE COURT IN REFUSING PLAINTIFF'S REQUESTED INSTRUCTION NO. 3 THEREON.

We have no quarrel with plaintiff's statement and definition of the doctrine of last clear chance, or with the cases cited in support thereof. It is not necessary, however, to go back to the case of *Davies v. Mann*, as this court in the case of *Graham v. Johnson*, 109 Utah 346, and on petition for rehearing at 109 Utah 365, has in an opinion by Mr. Justice Wolfe very clearly and in great detail set out the meaning and the manner of the application of this doctrine. Considering this question in the light of any given set of facts, however, it should be borne in mind, as was said in *Thomas v. Sadlier*, 108 Utah 552, 162 P. (2d) 112, that if the situation is such that to reasonable minds there is doubt as to whether the "second party" had time to avoid the accident, the matter should not be submitted to the jury, otherwise there is grave danger of permitting the one really at "fault

to shift the blame for the accident on the other by the accentuation of the other's duty to avoid the effect of the first one's negligence." I have borrowed the foregoing from Mr. Justice Wolfe's opinion on application for rehearing in the *Graham* case, *supra*.

The question then is, *at what point of time* did the duty that Miller, the tractor operator, had to exercise ordinary care devolve upon him under the doctrine of last clear chance? According to plaintiff's position it was at any time that Miller observed the plaintiff standing against the coach where he had no business to be when a moving tractor was approaching along the platform. On this phase of the case plaintiff's counsel admits and contends, as he must, that the plaintiff Marshall had negligently placed himself in a position of danger which he maintained up to the point of the accident. The question now is, what should Miller, the tractor operator, have done to discharge his duty?

There is no evidence whatever in the record that Miller was required to stop or that it would be negligence merely for him to proceed past a porter who failed to step into the clear in violation of the usual and customary practice and procedure under the circumstances. For the purpose of argument, let us concede that Miller had the duty, as plaintiff contends, to exercise reasonable care to avoid striking the plaintiff as he stood against the car and that such duty arose as soon as Miller saw the plaintiff in a position potentially hazardous. Assuming this, there is not one shred of testimony or evidence in the record to indicate that Miller was not exercising ordinary care to avoid striking the plaintiff. We are, of course adopting in this discussion what

seems to us the incredible testimony of the plaintiff that the first time he heard or saw or in any way observed the tractor was when it came past him at a speed faster than he could walk. If there is any basis at all for plaintiff's contention that he was entitled to an instruction on the doctrine of last clear chance, it can only be on account of such testimony. But if we accept plaintiff's testimony in this regard the only thing in the evidence that might indicate the manner in which Miller was driving the tractor that would throw any light on whether or not he was exercising ordinary care to avoid the consequences of the plaintiff's negligence, was the fact that he pulled farther to the left in an effort to clear the plaintiff as much as possible, and that he was pulling out to the left of what otherwise would have been his line of travel in an effort to avoid any possibility of injury to the plaintiff. It was this effort on the part of Miller which resulted in the cornering of the two trucks. It cannot be said that from and after the instant the trucks cornered Miller had a last *clear* chance. The accident occurred at the moment the trucks cornered. As was said in the *Graham* case, *supra*, "The opportunity to avoid the accident must not be a mere possibility, but a *clear* opportunity." From and after the instant the trucks cornered, Miller was powerless to avoid any further consequences.

No jury would have been warranted in finding Miller negligent in the manner he operated the tractor along the platform, assuming again that they believed plaintiff's version of the accident, either because of the speed plaintiff testified to or the fact that Miller did not stop. There was no evidence in the record whatsoever that the speed at which

plaintiff said the tractor was operated, or the failure to stop was negligence; and negligence from the speed and the failure to stop alone cannot in anywise be inferred. At any rate, the speed and the failure to stop was no evidence that Miller was not exercising due care to avoid the possibility of injury to the plaintiff occasioned by his own negligence. Ordinary men—jurymen—are prone to conclude “after the event” that the conduct involved was negligent and to do so merely *because an accident happened*. It is a device that is “worked to death” by personal injury lawyers and trial courts should not, as was said in the *Sadlier* case, *supra*, shift the blame for the accident by submitting the issue of last clear chance, unless there is evidence of negligent conduct shown. And the conclusion that there was a failure to exercise the care that a prudent person should to avoid the consequences of the other party’s negligence, should be uninfluenced by the fact that an accident happened.

The attempt to inject into this case the theory of “last clear chance” is strictly an afterthought on the part of plaintiff’s counsel. Neither the plaintiff nor defendant tried this case upon any such theory. We will concede that if the parties proceed to try a case upon a certain theory that neither side should thereafter complain because it was not pleaded, nor for any other reason, but in this case it was simply a question as to whether plaintiff’s theory as set forth in his complaint and on which he tried it was to be believed, in which case it was liability, or whether the jury was to believe the defendant’s version as to how the accident happened, in which case it was not liability. Let

us look at the complaint. The negligence charged in paragraph IV was as follows:

(a) That defendant failed to keep a proper lookout in operating the tractor;

(b) That defendant operated the tractor at an excessive rate of speed;

(c) That defendant failed to keep the tractor under safe, proper and immediate control.

(R. 002)

The plaintiff went through two trials and never deviated from or enlarged upon the foregoing allegations of negligence. To this day no pleading or anything else can be found in the file indicating that the plaintiff entertained the theory or would urge that he was, on account of his own negligence, in a position of peril and oblivious thereto and the defendant was or should have been aware of the danger and should have, but failed to, exercise ordinary care to avoid the consequences of plaintiff's negligence. But that is the theory that plaintiff's counsel now says the case should have been submitted to the jury on.

The very first indication that plaintiff embraced such theory was when following the trial he submitted the requested instruction here at issue. The case was in such shape when it went to the jury that under the evidence and the instructions they were able to and undoubtedly did fully consider both the plaintiff's and defendant's version as to how the accident happened and returned a verdict accordingly. Plaintiff elected to and did try this case on the theory that the defendant was negligent and that he was free of contributory negligence. The defendant tried it on the theory

that it was not negligent and that the plaintiff was guilty of negligence, and the plaintiff was fully warned by the pleadings that such would be the defense. The plaintiff was not entitled under all the circumstances, without pleadings or warning of any kind, to attempt to "shift the blame for the accident on the defendant by accentuating defendant's duty to avoid the effect of his own neglect." *Thomas v. Sadlier*, supra. We submit that no error was committed in failing to inject the issue of last clear chance into the case under all the circumstances, and if error was committed it was not prejudicial.

CONCLUSION

We respectfully submit that the trial court committed no error and was exercising a sound, judicial discretion in granting defendant's motion for a new trial, and that no prejudicial error was committed in granting defendant's Requested Instructions No. 7 and No. 11, or in refusing plaintiff's Requested Instruction No. 3.

Respectfully submitted,

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