

1951

Gertrude Gibbs, Lynn P. Gibbs and Gaye Gibbs Smith v. Blue Cab, Inc. : Brief of Respondent

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/uofu_sc1



Part of the [Law Commons](#)

Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errors.

Skeen, Thurman & Worsley; John H. Snow; Attorneys for Defendant and Respondent;

Recommended Citation

Brief of Respondent, *Gibbs v. Blue Cab, Inc.*, No. 7710 (Utah Supreme Court, 1951).
https://digitalcommons.law.byu.edu/uofu_sc1/1549

This Brief of Respondent is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs (pre-1965) by an authorized administrator of BYU Law Digital Commons. For more information, please contact hunterlawlibrary@byu.edu.

**In the Supreme Court
of the State of Utah**

GERTRUDE GIBBS, LYNN P.
GIBBS and GAYE GIBBS SMITH,
Plaintiffs and Appellants,

— vs. —

BLUE CAB, INC., a corporation,
Defendant and Respondent.

BRIEF OF RESPONDENT

Appeal from the Second Judicial District Court
of the State of Utah

Honorable Charles G. Cowley, Judge

FILED

JAN 7 1952

SKEN, THURMAN & WORSLEY
and JOHN H. SNOW

Clerk, Supreme Court, Utah

*Attorneys for Defendant and
Respondent.*

TABLE OF CONTENTS

	Page
STATEMENT OF FACTS	3
STATEMENT OF POINTS	9
ARGUMENT	9
POINT I. The presumption that decedent acted with due care cannot stand where the evidence, and the inferences drawn therefrom, show that due care was not exercised	9
POINT II. The trial court ruled correctly, as a matter of law, that F. Parley Gibbs, the deceased, was guilty of negligence which contributed to his death	17
POINT III. The ruling of the trial court should be affirmed, even if the grounds assigned by the trial court are inadequate, where, as here, it appears from the entire record that a verdict for the defendant would have been required in any event	25
CONCLUSION	28

CASES AND AUTHORITIES CITED

Barker v. Savas, 52 Utah 262, 172 P. 672	12
Bullock v. Luke, 98 P. (2d) 350	18,23
Compton v. Ogden Union Ry. & Depot Co., 235 P. (2d) 515....	13
Conklin v. Walsh, 193 P. (2d) 437	18,23
Davis v. D. & R. G. W. R. R. Co., 45 Utah 1, 142 P. 705.....	12,13,17
Gren v. Norton, 213 P. (2d) 356	14,18,23
Hickok v. Skinner, 190 P. (2d) 514	18,23
Lewis v. Western Ry. Co., 40 Utah 483, 123 P. 97	12
Lowder v. Holley, 233 P. (2d) 350	21
Martin v. Sheffield, 112 Utah 478, 189 P. (2d) 127	24
Mingus v. Olsson, 201 P. (2d) 495	13,20
Perrin v. Union Pacific R. R. Co., 59 Utah 1.....	12
Spackman v. Carson, 216 P. (2d) 640	24
Sullivan v. Beneficial Life Ins. Co., 91 Utah 405, 64 P. (2d) 351	25
5 Corpus Juris Secundum 1334, Appeal & Error, Sec. 1849.....	25

In the Supreme Court of the State of Utah

GERTRUDE GIBBS, LYNN P.
GIBBS and GAYE GIBBS SMITH,

Plaintiffs and Appellants,

— vs. —

BLUE CAB, INC., a corporation,

Defendant and Respondent.

Civil No. 7710

BRIEF OF RESPONDENT

STATEMENT OF FACTS

Although the Statement of Facts in appellants' brief is, in general, accurate, we believe it is insufficient in detail to enable the Court to understand fully the circumstances surrounding the accident out of which this case arose. Therefore, we have prepared our own statement of facts.

The intersection where the accident occurred is located in a residential area in the city of Ogden. 23rd Street is a through street running east and west and is fully paved with a black top surface (Tr. 29). It is 55 feet wide from curb to curb, as is Jefferson Avenue, which intersects it at a right angle (stipulated diagram). West of the intersection, 23rd Street has a slight downward slope, but the slope is so slight that it is still possible to stand in the center of the Jefferson Avenue intersection and see the shoes of a man standing at the intersection of 23rd Street and Adams Avenue, which is one city block to the west (Tr. 87). A person approaching 23rd Street on Jefferson Avenue from the north is required to stop at the stop sign which is near the north curb line of 23rd Street. Either at that point or at a point ten steps to the north, such a person can see to the west as far as Adams Avenue, or a distance of one block, without difficulty (Tr. 87). The trees which are shown in the stipulated diagram on the north side of 23rd Street between the curb and the sidewalk are either so small or so widely spaced that visibility of a person on Jefferson Avenue approaching the intersection is not impaired by them (Exhibits C and D), and particularly, the headlights of an approaching car on 23rd Street would be clearly visible (Tr. 87). The intersection is lighted by an ordinary street light in the northeast corner, but there is no other illumination on the intersection.

The accident happened on November 24, 1948, at about 6:40 A.M., which was about 45 minutes before sunrise (Tr. 68). The respondent's agent, Ronald D. Mullen, was driving respondent's taxicab easterly on 23rd Street en route to pick up a passenger at a point east of Jefferson Avenue, and was driving at a speed of 20 to 25 miles per hour. It was dark, the street was wet, and it was raining. The windshield wipers of the cab were operating, and the headlights were on bright (Tr. 55). The butterfly window on the driver's side was open (Tr. 64) to allow air to enter the cab to prevent fogging. No other automobile traffic was on the road. As Mullen reached the intersection, he "was observing the full view out of" his windshield, and his headlights diffused out at an angle, so that he could observe things on either side of the cab (Tr. 61). The first and only thing he saw was the front wheel of a bicycle in the diffused angle of the left front headlight. He never saw the man on the bicycle prior to impact. Although the Ogden City ordinance in effect at the time required it (Tr. 74), the bicycle had no light on it (Tr. 57).

Mullen cramped the wheel of the cab to the right, so that he was going in a southeasterly direction (Tr. 62), and the bicycle wheel was turned so that it was going in a south by southeast direction. The cab struck the bicycle a glancing blow on the front mud guard (Tr. 55-58). Mullen stopped the cab quickly, and says

that he did so within 10 to 15 feet (Tr. 55), although the position of the cab as indicated on the stipulated diagram is at the southeast corner of the intersection at the curb. Mullen got out of the cab and for the first time saw the man, F. Parley Gibbs, who had apparently been riding the bicycle (Tr. 55). Gibbs, the deceased, picked up the bicycle with Mullen's assistance, and they carried it to the front of the cab where the bicycle was inspected for damage in the light from the cab's headlights. The deceased insisted that he was "all right" and said that the bicycle was "damaged a little bit" (Tr. 55). Apparently no further conversation was had between Mullen and the deceased. At least, Mullen did not testify to any further conversation, nor did the witness, Tyler (Tr. 50), who appeared on the scene just as he heard a voice say, "I am all right."

The deceased pushed or carried his bicycle to the north, back up Jefferson Avenue where he lived, and Mullen continued on his way for a half a block where he picked up his fare, the witness O'Neill.

Although there is no evidence on this point, it has been assumed by both sides to the case that the deceased, after placing his bicycle against the side of his house, walked or ran from that point south to 24th Street, a distance of one and one-third blocks, and then turned west to Washington Boulevard, a distance of two blocks,

where he got a bus on the corner of Washington Boulevard and 24th Street (Tr. 23). The deceased sat in his seat in such a position as to give the appearance of being ill, and subsequent examination revealed that he had died.

In the meantime, Mullen, after delivering his passenger to his destination, realized he had forgotten to obtain the name of the man on the bicycle, and that he would need to know the name to make his accident report. He then drove back to the area of the accident and noticed a bicycle leaning against the house, but, inasmuch as the hour was early and there were no lights on in the house, he decided to return to the house later in the day to obtain the information (Tr. 58). When he did so, he discovered that the deceased had passed away as indicated.

Thereafter this action was instituted by the heirs of the deceased against the cab company and Mullen. However, Mullen was never served with summons, and the action proceeded to trial as against the cab company only. Trial was had on appellants' second amended complaint and respondent's answer. The complaint alleged negligence in general terms, and the answer pleaded a defense of contributory negligence in general terms with the specific allegation that the deceased had violated the Ogden ordinance by failure to have a light, lamp or lantern connected to his bicycle. Upon trial, it developed that there were no eye witnesses to the

accident, except the witness Mullen, and so the evidence in the record concerning the details of the accident comes from Mullen and from the inferences drawn from the physical evidence available.

At the conclusion of the evidence, the trial court granted a motion by respondent for a directed verdict. The trial court, at the request of appellants, made an inspection of the accident scene and reported his findings beginning at (Tr. 87). His decision was announced as being based upon the fact that the deceased had an opportunity to see, and could have seen, for an entire block as the car approached, and that his failure to see was negligence, which would concur with negligence of the automobile driver (Tr. 87, 88). Appellants have appealed from the judgment entered upon the directed verdict (T. 018).

After the notice of appeal was served and filed, counsel for both sides joined in the preparation of the stipulated diagram, which has been made a part of this record. The diagram was prepared in an effort to assist the Court in visualizing the accident scene, and to overcome some of the confusion which exists in the record because of the fact that the case was tried with the use of a blackboard to which witnesses referred, but which renders their testimony meaningless unless the blackboard is available for examination. The diagram was prepared from notes of counsel, and appears to be accurate except that the stop sign protect-

ing 23rd Street from traffic from the north is shown on the diagram to have been north of the sidewalk, whereas the photographs (Exhibits C and D) reveal that it was located between the sidewalk and the curb line, thus making the stop sign closer to 23rd Street than it is indicated on the diagram.

STATEMENTS OF POINTS

I. THE PRESUMPTION THAT DECEDENT ACTED WITH DUE CARE CANNOT STAND WHERE THE EVIDENCE, AND THE INFERENCES DRAWN THEREFROM, SHOW THAT DUE CARE WAS NOT EXERCISED.

II. THE TRIAL COURT RULED CORRECTLY, AS A MATTER OF LAW, THAT F. PARLEY GIBBS, THE DECEASED, WAS GUILTY OF NEGLIGENCE WHICH CONTRIBUTED TO HIS DEATH.

III. THE RULING OF THE TRIAL COURT SHOULD BE AFFIRMED, EVEN IF THE GROUNDS ASSIGNED BY THE TRIAL COURT ARE INADEQUATE, WHERE, AS HERE, IT APPEARS FROM THE ENTIRE RECORD THAT A VERDICT FOR THE DEFENDANT WOULD HAVE BEEN REQUIRED IN ANY EVENT.

ARGUMENT

I. THE PRESUMPTION THAT DECEDENT ACTED WITH DUE CARE CANNOT STAND WHERE THE EVIDENCE, AND THE INFERENCES DRAWN THEREFROM, SHOW THAT DUE CARE WAS NOT EXERCISED.

The respondent agrees that there is a recognized principle of law to the effect that deceased is presumed to have exercised due care for his own safety. But, it is our position that this presumption has no application

where there is evidence from which it can be determined how the accident happened and where circumstances exist which point inescapably to the conclusion that due care could not have been exercised. As we shall point out, this accident would not have happened had due care been exercised by the decedent, and therefore, his lack of due care will be shown to have been one of the concurring causes of the accident, if not the sole proximate cause.

First, let it be clear that we do not agree with the statement of fact in appellants' brief to the effect that there is no evidence in the record as to whether decedent was riding his bicycle, pushing it, or merely standing in the intersection. Any claim by appellants that the decedent was not riding his bicycle is pure afterthought, since their entire case was presented to the lower court on the basis that the decedent was riding his bicycle. No mention is made of this subject in appellants' complaint, or first amended complaint, but in their second amended complaint, in paragraph 3, appears the allegation that decedent was crossing the street "*upon his bicycle*" (emphasis added). Further, in plaintiffs' opening statement to the jury (Tr. 2), it was asserted that plaintiffs would show that decedent "left home on his bicycle to report for work."

While it may be said that these are mere assertions, it is logical to suppose that the bicycle was used to ride to work, as it apparently had been in the past. Further,

this theory finds support in the evidence in a particular apparently overlooked by appellants: as detailed in our statement of facts, the front wheel of the bicycle was first seen within the edge of the beam of light cast by the cab's left front headlight. The cab was immediately swerved so that its course was changed by 40° to the southeast. If the bicycle had been standing still, or moving at a "walking" rate of speed of 3 or 4 miles per hour, the cab would not have struck the bicycle, because the path of the cab, after the swerve, would have been to the south of the bicycle. The bicycle had to be moving at a "riding" speed of 10 to 15 miles per hour in order to move from the north or left side of the path of travel of the cab into the area of impact after the swerve of the cab. The logical inference to be drawn from these physical facts, and from the fact that a man on the way to work on a downhill street, would be riding, not pushing the bicycle or standing still with it, is that the decedent was riding his bicycle at the time of the collision. Further evidence leading irresistibly to this conclusion is found in the fact that while the impact on the bicycle was at the front mud guard, the large bicycle seat was "practically torn off" (Tr. 77), indicating that the seat was bearing weight at the time of impact on the front of the bicycle.

Thus, there is evidence from which can be gleaned a course of conduct by the deceased prior to impact. This evidence, when coupled with the evidence of the

respondent's driver, and applied to the physical facts relating to the intersection, provides ample proof of what happened. In such circumstances, the presumption of due care by the deceased collapses. As was said by this Court in *Perrin v. Union Pacific R. R. Co.*, 59 Utah 1, the presumption "is applicable only in the absence of evidence as to just how the accident happened. There was no eye witness. It is only in such cases that litigants are entitled to an instruction" on the presumption.

An examination of the cases cited by appellants in support of their claim of this presumption reveals that the presumption is allowed in cases where there is no evidence of any kind as to what happened. Typical are the cases of *Lewis v. Western Ry. Co.*, 40 Utah 483, 123 P. 97, (where the dismembered body of the deceased was found strewn by the defendant's track, and no one saw the accident); *Davis v. D. & R. G. W. R. R. Co.*, 45 Utah 1, 142 P. 705, (where a witness saw decedent walk toward the railroad track, but didnt see what happened until after impact, and therefore, could not say if decedent looked up the track or, if he had looked, whether he could have seen the train); *Barker v. Savas*, 52 Utah 262, 172 P. 672, (where the body of a six year old boy was found near his tricycle at the side of the road. However, there was affirmative evidence that decedent was not negligent, but was riding his tricycle

where he should have been. There were no eye witnesses to the accident, and there were admissions from the defendant driver to be considered by the court).

In those cases cited by appellants in which the presumption is discussed, but discarded as inapplicable to the facts of the case, there are many statements of abstract principles of law approving the presumption. Among these cases are *Mingus v. Olsson*, (Utah, 1949), 201 P. (2d) 495, and *Compton v. Ogden Union Ry. & Depot Co.*, (Utah, 1951), 235 P. (2d) 515, in each of which the Court stated that the presumption could not apply because of the existence of evidence as to the conduct of the decedent prior to the impact. From these statements, it is clear that the principle announced in the *Perrin* case, *supra*, is still the law in this state, and the presumption is not indulged except in the absence of evidence as to how the accident happened. The question of whether or not the presumption of due care should apply is a question to be decided upon the facts of each case.

The presumption discussed herein is not as broad as is indicated by some of the excerpts from cases quoted in appellants' brief. For example, appellants quote verbatim a jury instruction from the case of *Davis v. R. R. Co.*, *supra*, which they claim this Court held "proper." The instruction stated that the presumption was that the deceased "looked and listened" for the train. The Supreme Court stated, at pages 9 and 10 of

45 Utah, that this instruction came from an earlier case and that just because it was approved once does not mean it should be used as a model. The instruction was faulty, the Court said, as being argumentative when it stated that the deceased was presumed to have "looked and listened." This is so, said the Court, because while "the court may inform the jury that, in the absence of evidence to the contrary, a person exposed to danger is presumed to have exercised due care for his safety," yet "there is no presumption that he did a particular thing."

One of the more recent expressions on this question by the Utah Supreme Court is found in the case of *Gren v. Norton*, (1949), 213 P. (2d) 356. In that case, the deceased drove his vehicle into the path of the defendant's truck, which was coming from the deceased's right on a through highway. It was undisputed that the deceased had an opportunity for an unobstructed view of the road to his right for several hundred feet, and while some witnesses gave testimony indicating that the deceased had not looked in that direction until just before impact, there was other evidence which indicated that it could not be determined with certainty whether the deceased had or had not turned his head sufficiently far to the north to observe the approach of the defendant's truck. The contention was made that, at the most, the deceased was guilty of an error in judgment in estimating that he could cross the highway safely, and

that in addition, he was entitled to a presumption that he used due care for his own safety. This Court, speaking through Justice Latimer, answered these contentions in the following language:

“The physical evidence and deceased’s acts and conduct were such that any presumption of due care has been destroyed. One look to the north at any time after deceased cleared the east lanes would have apprised a reasonably careful driver that the movement across the west lanes would not be made in safety.”

It is our contention that the same statement can be made in answer to appellants’ argument in this case. One look to the right by the deceased, F. Parley Gibbs, would have apprised him that he could not cross 23rd Street in safety, and from all the evidence available in the record, it is clear that the presumption of due care, if it ever existed in this case, has been destroyed.

From the foregoing cases, we urge that Utah law on the presumption of due care is as follows:

(a) a person in a place of danger is presumed to have exercised due care for his safety, if there is no evidence as to how the accident happened.

(b) the presumption does not extend to a presumption that he did or did not do any particular act.

(c) that where there is uncontradicted testimony showing how the accident happened, and where that testimony, together with the physical facts available

and the logical inferences to be drawn from the testimony and physical facts, all point irresistibly to the conclusion that the accident would not have happened had the deceased used due care, the presumption is inapplicable and cannot be considered in deciding the issue.

Applying these principles to the facts of the instant case, it is at once apparent that the presumption of due care cannot be relied upon to decide this case. If the deceased had looked to his right, at or north of the stop sign, it is undisputed that he could have seen the cab for at least one city block. If he was riding his bicycle, or if he was pushing it, he still had ample opportunity to obey the law, and either wait at the stop sign, or yield the right of way to a vehicle on a through street. Had he done so, no accident could have happened. It is not likely that he would have consciously proceeded into the intersection in the path of the cab, and it is therefore the only logical conclusion that he did not look to the right and never saw the cab. However, whether he looked, and paid no heed, or whether he failed to look at all, the result is the same. He was negligent in either particular, and he cannot be said to have exercised due care. Added to these factors is the additional omission by the deceased in failing to have a light or lamp upon his bicycle, although required to do so by law.

In those cases discussed by appellants where a deceased entered upon a railroad track and was killed, the Court has applied the presumption because a conflict existed as to whether or not the deceased, had he looked, could have seen the train. Thus, it became a fact question as to whether his failure to look could have contributed to the accident. See *Davis v. R. R. Co.*, supra. In the case at bar, no such conflict exists, because it is clear and certain, from this record, that the deceased, had he looked, could have seen the cab, or, at least, its headlights. The trial court so found after his inspection (Tr. 87). The only way the deceased could have failed to know about the cab was if he failed to look. Therefore, reasonable minds cannot differ on the statement that he could not have exercised due care.

In view of the foregoing, we submit that the presumption of due care, if it ever existed under the facts of this case, has been effectively overcome and is not a factor to be considered, in the light of the evidence and inferences to be drawn therefrom.

II. THE TRIAL COURT RULED CORRECTLY, AS A MATTER OF LAW, THAT F. PARLEY GIBBS, THE DECEASED, WAS GUILTY OF NEGLIGENCE WHICH CONTRIBUTED TO HIS DEATH.

The appellants have discussed this phase of the case under their Points numbered II and III. Their approach is nothing more or less than an attempt to urge the Court to overrule a long line of decisions which hold in substance that where a person enters a through highway in the face of oncoming traffic, and

either fails to keep a lookout for such traffic, or, looking, fails to heed what he sees, and his failure in either regard contributes to the accident, he will be held to have been guilty of contributory negligence as a matter of law.

There are many cases decided by this Court which are based upon these fundamental principles, and among them are the following: *Bullock v. Luke*, 98 P. (2d) 350; *Conklin v. Walsh*, 193 P. (2d) 437; *Hickok v. Skinner*, 190 P. (2d) 514; *Gren v. Norton*, *supra*.

Only one of these cases, namely, the *Hickok* case, is cited in appellants' brief. We submit that these decisions correctly state the law, and even if the Court should desire to re-examine the principles announced in these cases, the facts in the case at bar do not justify such a re-examination.

The principles announced in these and related cases indicate clearly that appellants were not entitled to go to the jury in this case, even when the evidence is viewed in the light most favorable to them. Gibbs approached a through highway apparently as he had done on many previous occasions. The intersection is but a few doors from his home, and it is logical to assume that he was familiar with it. Perhaps it was this familiarity which led to his disregard of the fundamental rules of safety and the traffic laws of this state. In any event, it is undisputed that for at least ten steps

before he reached the stop sign, which is a few feet north of the curb line, he had an unobstructed view of the street to his right, for at least the distance of one city block. No other traffic was on the road, and nothing in the record indicates that any condition existed which would confuse him or justify his inability to see the headlights of the approaching cab. As a practical matter, he could have seen the headlights of the cab for a distance of more than one city block, and the headlights would have been clearly visible to him at any point in which the cab might have been had he looked for it. This would be the fact, whether he was riding his bicycle or walking along pushing it, or standing still at the entrance to the intersection. As previously indicated, however, the logical inference is that he was riding the bicycle.

If he stopped at the stop sign and then proceeded into the street in the path of the oncoming taxicab, he was guilty of negligence in entering 23rd Street at a time when another vehicle was approaching so close as to constitute an immediate hazard. He was guilty of this negligence whether he failed to look for the taxicab, or whether he looked and failed to heed what he saw.

If the deceased did not stop at the intersection, but proceeded blindly into it, he was equally guilty of negligence in failing to keep a proper lookout and also in failing to stop at the entrance to a through

highway. In addition to these failures, he compounded his negligence by operating a bicycle on the streets of Ogden at a time prior to 30 minutes before sunrise without having a lamp on the front of the bicycle, as required by the ordinances of the city of Ogden.

In addition to those omissions, it is quite clear that the deceased could have avoided the accident at any time, had he exercised ordinary care, either by stepping off the bicycle, or by turning the wheel, or by braking to a stop in the distance of more than $27\frac{1}{2}$ feet which he had to traverse in order to reach the area of impact, as indicated on the stipulated diagram. So far as can be determined, he did none of these things, and took no action to avoid the accident, unless it can be said that the position of the front wheel of the bicycle as the respondent's driver turned the wheels of the cab, indicates that Gibbs had made an effort to turn the bicycle from a due south course to his left in order to avoid the area of impact.

No assertion is made by appellants, and indeed, none could be made, that Gibbs did not have a duty of due care as he approached the intersection. He was governed by the same rules as a motorist, and this is so whether he was riding his bicycle or was pushing it. As was said by this Court in the case of *Mingus v. Olsson*, *supra*,

“the rights of pedestrians to the use of the public streets are the same as those of motorists—neither greater nor less. Hence, a pedestrian crossing a public street * * *, although he may have the right of way over vehicular traffic, nonetheless has the duty to observe for such traffic.”

In view of this principle of law, we assert that Gibbs had the same duty of care as would be required of a motorist who entered 23rd Street from Jefferson Avenue on the morning in question. This being so, his conduct must be judged in the same manner as this Court has judged the conduct of drivers who have been involved in intersection collisions in the cases previously cited in this portion of our argument.

An examination of the cited cases makes it abundantly clear that no person can enter an intersection such as the one involved in this case without observing conditions to his left and to his right and thereafter paying heed to what his observation reveals. This is a fundamental doctrine that has been recognized by the courts in steadily increasing numbers since the advent of the automobile. Our examination does not reveal that the Supreme Court of Utah has varied from these principles down to the time of the writing of this brief. Appellants seem to argue to the contrary, and take comfort from a number of decisions, the latest of which is the case of *Lowder v. Holley*, (1951), 233 P. (2d) 350. The *Lowder* case does not represent any

principle different from that for which we contend. It was a case in which the trial judge was the trier of the fact, and the Supreme Court, in its opinion, simply says that there was evidence upon which the trial court could have found that the plaintiff was justified in assuming that the defendant would exercise ordinary care. Under the facts of the case, says the Court, plaintiff's failure to see the truck would in no way have contributed to the accident. What this holding means, as we view the matter, is simply this: that the plaintiff in the Lowder case might have been negligent, but he was not necessarily contributorily negligent, since his negligence could not have contributed to the accident, and the negligence of the driver of the opposing car was the sole and proximate cause of the accident. The facts in the Lowder case differ greatly from the facts in this case, and the Lowder decision is therefore not controlling here. In the Lowder case, the evidence was clear, and the Court found, that the driver of the defendant's truck was speeding, which, of course, would have affected the appearance of the situation at the time the plaintiff in that case was required to look for oncoming traffic. Further, Lowder looked for traffic and saw none. His view of the road was not complete. In the case at bar, the evidence is uncontradicted that the defendant's taxicab was proceeding at a safe speed and within both the letter and spirit of the speed ordinances. The view of the road available to the deceased was complete and unobstructed. The only evidence in the record as to

speed is that of the respondent's driver, which is that he was travelling 20 to 25 miles per hour. The distance within which he stopped the taxicab on the wet street bears out this testimony. As an additional indication of its accuracy, we have the fact that so far as is determined by the record, the deceased made no accusation, started no argument, and made no protestations of innocence in the seconds immediately following the accident. It is logical to assume that had the deceased been of the opinion that the taxicab was going at an excessive speed and that that belief caused confusion in his mind, he would have made some accusation to that effect. It is equally logical, of course, that respondent's driver would have been careful to omit such an accusation from his recital of the facts, but there is the testimony of the disinterested witness Tyler, who appeared on the scene in time to hear the deceased say, "I am all right," and who did not testify concerning any further conversation. Had there been any further conversation, particularly of an argumentative nature, Tyler no doubt would have recalled it.

The Lowder decision represents no new doctrine, in view of its facts, and a careful reading of the opinion convinces us that the Court, by that decision, did not overrule, either expressly or by implication, the well-considered and established decisions found in the cases of *Bullock v. Luke*, *Hickok v. Skinner*, *Conklin v. Walsh* and *Gren v. Norton*, *supra*.

The other cases cited by appellants in support of the "doctrine" of the Lowder case likewise bear no resemblance to the case at bar. In the case of *Spackman v. Carson*, (Utah, 1950), 216 P. (2d) 640, the Court said, at page 642, "This case stands strictly on its own facts". The Court then goes on to say that the case is a close one, and it is clear from the opinion that the case was not without difficulty. In each of the other cases cited by appellants, and particularly in the case of *Martin v. Sheffield*, 112 Utah 478, 189 P. (2d) 127, there were conflicts in the evidence which could only be resolved by jury consideration. No such conflict appears in our case.

It is true that only in a clear case should a verdict be directed against a plaintiff upon the ground of contributory negligence. What is usually meant by "a clear case" is a case in which the minds of reasonable men could not differ on the facts presented. There is no possibility in this case that the minds of reasonable men could differ as to the cause, or at least the contributing cause, of this accident. Had Gibbs not entered the intersection into the path of the respondent's taxicab, this accident would not have occurred. As has been demonstrated, his entrance into the intersection under the circumstances prevailing at the time, could only have been the result of negligence. His negligence, therefore, started an unbroken chain of events which led to the impact, and even if it be said that the respondent's driver was negligent, there can

be no doubt that Gibbs' negligence acted in concert with, and concurred with, the negligence of the cab driver to bring about this accident. Under such circumstances, we assert it would have been error for the trial court to deny respondent's motion for a directed verdict, and the ruling of the trial court in granting the motion should therefore be affirmed.

III. THE RULING OF THE TRIAL COURT SHOULD BE AFFIRMED, EVEN IF THE GROUNDS ASSIGNED BY THE TRIAL COURT ARE INADEQUATE, WHERE, AS HERE, IT APPEARS FROM THE ENTIRE RECORD THAT A VERDICT FOR THE DEFENDANT WOULD HAVE BEEN REQUIRED IN ANY EVENT.

The trial court, in announcing the reason for his decision, stated that he believed that Gibbs was negligent in the particulars hereinbefore discussed, and that the negligence of Gibbs concurred with the negligence of the cab driver. For the purposes of the motion, the trial court apparently assumed that the taxicab driver was negligent, and the additional negligence on the part of Gibbs in operating a bicycle without a light was apparently not considered.

It is a familiar principle of law that if a trial court, in directing a verdict, commits error upon the basis of the announced grounds for his decision, the error is harmless if the record of the trial is such that a verdict for the defendant would be required in any event. *Sullivan v. Beneficial Life Ins. Co.*, 91 Utah 405, 64 P. (2d) 351; 5 C.J.S., Appeal and Error, Sec.

1849, page 1334, and cases cited therein. Therefore, if this Court should feel some doubt as to the correctness of the ruling of the trial court, as viewed in the light of the reasons assigned at the time the motion for directed verdict was granted, nevertheless the ruling of the trial court should be sustained, if upon the whole record it appears that a verdict for the defendant would have been required in any event.

In addition to the specifications of active negligence on the part of Gibbs, which have been discussed in some detail herein, we find the additional negligent omission of a light on the front of the bicycle. We assert that a failure to have a light, as required by the ordinance, is negligence *per se*. The purpose of the ordinance is to protect people on the thoroughfares of the city of Ogden, and to protect people with bicycles during the nighttime hours. A light is required in order that the presence of the bicycle will be revealed to the motoring public, as well as to the walking public. It is clear that if Gibbs had had a light on the front of the bicycle, there would have been some indication of the presence of the bicycle in the darkness outside the scope of the headlights of the taxicab. Obviously, the illumination from the streetlight on the northeast corner was insufficient to reveal the presence of an unlighted bicycle in the care of a man wearing dark clothing on a dark, misty and rainy morning. The cab driver was observing the things and objects revealed

by his lights. This is evidenced by the fact that he reacted instantaneously when the front wheel of the bicycle appeared in the cone of light cast out by his left headlight. Reasonable minds cannot differ on the proposition that Gibbs' failure to have a light on his bicycle was one of the factors which contributed to the happening of this accident.

Although little has been said about it by counsel, we believe it important to urge, in support of our third point of argument, that the appellants have not produced sufficient evidence upon which to charge the respondent's driver with negligence which proximately caused the accident. At best, the evidence on this point is equally balanced, and it is just as logical to assume that the deceased, by his various acts of negligence, created a sudden peril, as it is to assume that the respondent's driver was guilty of negligence which led to the accident. There is no evidence of excessive speed, nor is there evidence of improper lookout. In fact, the evidence in each particular is without contradiction that the speed was not excessive and that the lookout maintained by the driver of the cab was constant and proper, and resulted in a prompt swerving of the wheels, which prevented the deceased from being crushed rather than being merely grazed, as actually occurred.

Therefore, the ruling of the trial court should be sustained, not only upon the grounds which were as-

signed by the trial court at the time the ruling was made, but upon the additional grounds of further acts of negligence on the part of the deceased and the lack of sufficient proof of negligence on the part of the respondent's driver. All of these grounds were asserted by respondent in its motion for a directed verdict (Tr. 86), and when all of the grounds assigned for the motion are considered, it is clear that a verdict for the respondent was required in any event.

CONCLUSION

Although appellants devoted a considerable portion of their brief to a discussion of cases from other jurisdictions bearing upon the points of argument urged by them, we have not felt it necessary to prolong this brief by a discussion of those cases. It is recognized that cases can be obtained from other jurisdictions to support almost any proposition of automobile law, in view of the tremendous number of cases which have been decided by the courts in the last thirty-five years. We are of the opinion that the law in Utah is well settled, and is adequate to serve as a precedent for the case at bar. This Court has had occasion to pass upon the principles of law which are involved in this case, and we think no good purpose would be served by urging a reconsideration of the doctrines previously announced by this Court, if such reconsideration is to be based upon a law of a foreign jurisdiction, some of

which is controlled by legislative enactment and by the peculiar conditions which may have confronted the courts of those states as they decided the cases presented.

The facts in the case at bar are essentially without dispute. The inferences to be drawn from the proven facts are likewise essentially without dispute. The principles of law which have been announced by this Court in recent years should be reaffirmed, especially where, as here, the facts are such that reasonable men could not differ, and would be required to find that the deceased was guilty of negligence in at least one of the many particulars presented in details herein, and that such negligence contributed to the cause of this accident to such an extent that the accident would not have occurred but for that negligence.

The action of the trial court should be sustained and the judgment affirmed.

Respectfully submitted,

SKEEN, THURMAN & WORSLEY
and JOHN H. SNOW

*Attorneys for Defendant and
Respondent.*