

1952

# Norma D. Cox v. Cyril P. Thompson : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT  
OF THE STATE OF UTAH

**FILED**

AUG 29 1952

NORMA D. COX, ADMINISTRATRIX OF THE  
ESTATE OF JACKSON BLAINE COX,

DECEASED, )  
Clerk, Supreme Court, Utah )

Plaintiff and Appellant, )

-VS.- )

CIVIL NO. 7796

CYRIL P. THOMPSON, )

Defendant and Respondent. )

BRIEF OF APPELLANT

BRANT H. WALL,  
JAY ELMER BANKS,  
Attorneys for Plaintiff  
and Appellant.

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IN THE SUPREME COURT  
OF THE STATE OF UTAH

NORMA D. COX, Administratrix of  
the Estate of Jackson Blaine Cox,  
deceased,

Plaintiff and Appellant,

-VS.-

CYRIL P. THOMPSON,

Defendant and Respondent.

NO. 7796 CIVIL

BRIEF OF APPELLANT

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

Honorable Wm. Stanley Dunford, Judge

STATEMENT OF FACTS

This action arose out of a collision between  
an automobile driven by the defendant and one  
Jackson Blaine Cox, deceased, a pedestrian.

The collision occurred at approximately  
1:30 A. M. on January 21, 1951, as defendant  
was driving southerly at 35 to 40 miles per  
hour (T.R. 179) on the west side of U. S. Highway

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91, in the city of Orem, Utah, and in the vicinity of the City Hall and the Crown Cafe (T.R. 15, Stipulated Diagram). At that place, the highway runs in a northerly and southerly direction, and is intersected to the south and on the east side only by Center Street (Stipulated Diagram). It is hard surfaced and has a total width of 96 feet from curb to curb. There are two sets of double lines in the center of the highway, each set being approximately one foot in width and separated by three or four feet, thereby forming a center zone. To the west of the center zone there are three lanes marked for traffic, the inside and middle lanes each being twelve feet in width and the outside lane forty-nine feet in width and extending to the curb (Stipulated Diagram).

The collision occurred at a point between the City Hall and the Crown Cafe which, according to the markings of the Stipulated Diagram, would be from fifty to one hundred feet north of the corner of Center Street (Stipulated Diagram). There was no marked crosswalk, extended crosswalk, pedestrian tunnel, or overhead pedestrian crossing at or near the place of collision, the nearest being eight blocks north, and there was no

traffic control present (T.R. 139, 162, Stipulated Diagram). The highway was straight, level, and dry, and lights were located on the Crown Cafe, Post Office, City Hall, and the north corner of Center Street which caused the highway to be well lighted in the vicinity (T.R. 13, 81, 51, 117, 180, 203, Stipulated Diagram).

Just prior to the collision, the decedent departed on foot from the Crown Cafe on the west side of the highway for his home which was located to the east, and had proceeded across the street to a point six or seven feet east of the most easterly center line, when he reversed his direction and began to walk in a westerly direction across the highway (T.R. 12, 108, Stipulated Diagram).

The evidence is in dispute as to the exact place of the collision on the highway. There is testimony which would tend to establish that it occurred in the inside lane (lane 1), to the west of the center zone and near the line separating lanes 1 and 2 (T.R. 12, 53, 54, 55 108, 109, 231, 233, Stipulated Diagram), and there is also evidence which might tend to establish that it occurred in the middle lane (lane 2), west of the center zone (T.R. 255, 261, 262, 294).

Following the accident, marks were found on the



highway which were identified as being caused by the swerving of defendant's automobile. These marks commenced in lane 2, and extended in a sharp curve to the southeast across lane 1 to the center zone (T.R. 158, Stipulated Diagram). The body of the decedent came to rest on the west side of the highway and south of the swerve marks, the exact location of which is not clear from the evidence. Certain testimony would place the location of decedent's body 50 feet north of the corner of Center Street and on the line separating lanes 1 and 2 to the west of the center zone (T.R. 147, Stipulated Diagram), while other testimony would indicate that it came to rest near the center of the highway and at a point close to a projected north line of Center Street (T.R. 42, 73, 91, Stipulated Diagram). Two small pieces of chrome were found after the collision near the east line of lane 2 and near the swerve marks, which were identified by one witness as being from the right front headlight of defendant's automobile (Blue X's Stipulated Diagram, T.R. 153).

Jackson Blaine Cox died as a result of the collision, and left surviving him his widow and three minor children. His widow, Norma D. Cox, as Administratrix of

his estate, brought this action against the defendant to recover damages for his wrongful death. The case was tried before a jury, and the trial court directed a verdict for defendant and against plaintiff upon the ground that deceased was contributorily negligent as a matter of law in failing to keep a proper lookout and in failing to heed the approach of defendant's car, and the trial court further ruled that the Last Clear Chance doctrine, not being available in this case, the negligence of deceased proximately contributed to produce his death as a matter of law, and that therefore, as a matter of law, the plaintiff could not recover (T.R. 334).

### STATEMENT OF POINTS

I. THE TRIAL COURT ERRED IN DIRECTING A VERDICT AGAINST PLAINTIFF UPON THE GROUND THAT DECEASED WAS CONTRIBUTORILY NEGLIGENT AS A MATTER OF LAW, IN THAT DECEASED WAS PRESUMED TO HAVE BEEN ACTING WITH DUE CARE, AND SAID PRESUMPTION WAS NOT OVERCOME.

II. THE TRIAL COURT ERRED IN DIRECTING A VERDICT AGAINST PLAINTIFF UPON THE GROUND THAT DECEASED WAS CONTRIBUTORILY NEGLIGENT AS A MATTER OF LAW, IN THAT CONTRIBUTORY NEGLIGENCE WAS A QUESTION OF FACT FOR THE JURY.

III. THE TRIAL COURT ERRED IN DIRECTING A VERDICT

AGAINST THE PLAINTIFF UPON THE GROUND THAT DECEASED WAS CONTRIBUTORILY NEGLIGENT AS A MATTER OF LAW, AS THE QUESTION OF WHETHER OR NO DECEASED'S CONTRIBUTORY NEGLIGENCE, IF ANY, PROXIMATELY CONTRIBUTED TO HIS DEATH WAS AN ISSUE OF FACT FOR THE JURY.

IV. THE TRIAL COURT ERRED IN GRANTING RESPONDENTS MOTION FOR A DIRECTED VERDICT AND IN REFUSING TO SUBMIT THE APPELLANT'S CASE TO THE JURY ON THE THEORY OF LAST CLEAR CHANCE.

#### ARGUMENT

I. THE TRIAL COURT ERRED IN DIRECTING A VERDICT AGAINST PLAINTIFF UPON THE GROUND THAT DECEASED WAS CONTRIBUTORILY NEGLIGENT AS A MATTER OF LAW, IN THAT DECEASED WAS PRESUMED TO HAVE BEEN ACTING WITH DUE CARE, AND SAID PRESUMPTION WAS NOT OVERCOME.

The testimony fails to disclose with absolute certainty whether the deceased was walking, running or standing at the time of the impact, or whether he was looking and keeping a proper lookout for defendant's automobile, or the exact location on the highway where the impact occurred. The plaintiff, Norma D. Cox, testified that she only observed

decedent commence to walk toward the west side of the highway from a point six or seven feet east of the center zone, and that as she then turned to get into a parked automobile she heard the collision (T.R. 14). Alma Ferre, testified that he was standing in front of the Crown Cafe at the time of the accident, and that he watched the decedent walking toward the west side of the highway, but did not observe him closely for one or two seconds just prior to the impact (T.R. 53), however, he did witness the collision and testified that the decedent was struck while in lane 1, near the line which separated lanes 1 and 2 (Stipulated Diagram, T.R. 53, 54, 55).

Another witness, Ruth Ferre, testified that she saw the decedent turn around in the highway when six or seven feet east of the center zone, and commence to walk west, but did not observe him again until she saw him "flying through the air" (T.R. 108, 109).

Leon Wimber, a friend of the defendant, who was riding in the front seat of defendant's car at the time of the accident, testified that he first observed the decedent as a "dark shadow", which stepped from the left side of the car which was "in the east of us, directly into our lights, from the side" (T.R. 231). Further

testimony of this witness was to the effect that "when I first saw the man, he was to the left of the front of the car, and as we swerved, it brought the right fender over to where he was at, and he hit right about where the light and the hood come in contact there,"...(T.R. 233); that he did not believe the car had crossed into lane 1 at the time of the collision (T.R. 233). Such testimony, would tend to corroborate the testimony of Alma Ferre, supra, with regard to the point of impact being in lane 1, and even though this witness observed the decedent moving westerly, there is nothing to refute the possibility that decedent was then and there rightfully proceeding across lane 1 toward the line separating lanes 1 and 2 (Stipulated Diagram).

Karl Smith, also a passenger in defendant's automobile, testified that he first observed the decedent while the automobile was swerving to the southeast (T.R. 255, 261), and that the decedent was "standing" at a distance of 15 feet in front and about even with the center of the automobile which was swerving to the southeast (T.R. 255, 262). This witness did not observe whether the decedent was looking in any particular direction.

The defendant, Cyril P. Thompson, testified that he first observed the deceased as a "silhouette" to the left of the automobile (T.R. 290), and "as I stated, he stepped into the light, when I seen him, and he was stepping, and I swerved, and I glanced away from him to see if there were any other cars or anything coming, and I didn't see him again." (T.R. 293). Upon further cross examination of defendant, he testified as follows: (T.R. 295)

"Q. Now you didn't observe whether or not he was looking at you, did you ?

"A. I didn't observe that, no. I didn't have time. All I seen was him step in front of us, and that silhouette, and I swerved."

Defendant further testified that the decedant could have been as far as 19 steps (57 feet) or more in front of the automobile and to the left, at the time he was first observed (T.R. 292, 293).

In view of the testimony of the foregoing witnesses, regarding the conduct of the decedent, and the authorities hereinafter cited, it is plaintiff's contention that the presumption of due care, to which the decedent was entitled was not overcome, and to hold that the deceased was contributorily negligent as a matter of law, was error. The following cases are hereinafter cited in support of this contention:



In the recent case of *Mingus v. Ollson*, (Utah-1949), 201 Pac. 2nd 495, a pedestrian was struck and killed while crossing a highway in an extended cross walk. In this case the court ruled that the presumption of due care was overcome by the undisputed testimony of decedent's wife that that the decedent failed to look in any direction before stepping into the street. The concurring opinion states:

"Of course, if there was a complete absence of evidence as to whether he took any precautions to avoid the accident, then the law creates a presumption that he took reasonable precautions for his own safety and that he was injured in spite of such precautions.

"But here there was evidence from which the jury could reasonably find that he took no precaution for his own safety, and on the production of such evidence the presumption disappears from the case and the question must be determined from the evidence. Of course the facts upon which the presumption is based are still in evidence and if they have a logical tendency to prove that the decedent used reasonable care for his own safety, they may be considered in determining the question."

In the case of *Davis v. Denver and Rio Grande Western Railway Co.*, 45 Utah 17, 142 Pac. 705, the deceased was hit by defendant's train and there were no witnesses who testified regarding the facts surrounding the accident. In this case, the court gave the following instruction which, on appeal, was sustained as being proper:

"There is a presumption of law that every man exercises due care for his own safety when

in a place of danger and that deceased did so at the time and place when and where he met death, so that plaintiff was not required to prove affirmatively that deceased looked and listened for the train, the presumption being that he did so, and burden on defendant to prove otherwise, which was bound to establish that fact by a preponderance of the evidence."

In the recent case of Compton et al v. Ogden Union Ry. and Depot Company, (Utah-1951), 235 Pac. 2nd 515, the decedent was struck and killed by defendant's engine in its yard. At the conclusion of plaintiff's case the trial court entered a judgment of dismissal. At the time of the accident, the decedent was walking with a companion who accounted for all of her movements immediately prior to, and at the time she was struck.

The court in its opinion said that there is a strong presumption based on the instinct of self-preservation that the deceased was exercising due care for her own safety and which may take the place of evidence sufficient to make findings on, in the absence of other evidence. It then goes on to say:

"The presumption is applicable where there is no evidence as to care used, or perhaps where the evidence comes from an adverse witness who may be subject to disbelief by the jury, or where there is sufficient uncertainty in the evidence as to cast doubt on the testimony." (underlining ours).



Co., 37 Utah 431, 108 Pac. 638, an action was brought against defendant to recover for the wrongful death of decedent who was struck and killed by defendant's engine while crossing defendant's tracks with a team and wagon. The court there stated:

"It is a presumption of law that every man exercise due care for his own safety when in a place of danger, and the presumption is that deceased did so when he approached the crossing."

In the case of Clark et al v. Union Pacific Ry Co., 70 Utah 29, 257 Pac. 1050, the plaintiff brought an action to recover for wrongful death resulting from a collision at a railway crossing. There was a conflict in the testimony regarding the warnings given by defendant. However, it was established that the visibility was poor, and a fireman testified that he observed the decedent some 125 feet from the crossing and anticipated that he would stop for the train, but when he failed to do so he was struck and killed. There the court states:

"The burden of proving contributory negligence, of course, was on the defendant. In absence of evidence, there is a presumption that the deceased looked and listened, and did all that prudence and due care required..."

"The question thus is, does the record conclusively show that deceased failed to look and listen, and that by looking and listening he could have discovered the approach of the

train in time to have stopped and let it pass."

The court considering the evidence in the light most favorable to the plaintiffs, found the question of contributory negligence to be for the jury and remanded for rehearing.

The most recent pronouncement of this point, which we have found, is set forth in the case of Tuttle v. Pacific Intermountain Express, (Utah-1952), 242 Pac. 2nd 764. In this case, the decedent was struck and killed while driving in his automobile upon a public highway. The evidence was conflicting as to whether or not the decedent had unexpectedly turned left in front of defendant's truck while both were traveling south, or whether defendant's machine crossed the center of the highway and collided with decedent's automobile traveling north. All of the eye witnesses testified that the collision occurred when decedent attempted to make a U-turn in front of defendant's tractor trailer. In the concurring opinion of Justice Crockett he says:

"The jury's verdict for the plaintiff plainly shows that they did not believe the deceased was going southward, but on the contrary their finding was that he was coming toward the north. Under those circumstances, there is no evidence whatsoever regarding his conduct just preceding his death. Therefore, the plaintiff is entitled to the presumption that he used due care

for his own safety, and upon that presumption the jury could base their refusal to find him guilty of contributory negligence."

In the case at bar, none of the witnesses saw whether decedent was keeping a lookout, and certainly the evidence is highly controversial as to the point of impact.

The cases are numerous in other jurisdictions dealing with this point, some of the most prominent of which are the following California decisions:

In a wrongful death case entitled *Blackmore v. Brennan*, 43 Cal. App. (2d) 280, 110 Pac. 2nd 723, where a motorist was struck and killed in an open intersection, the court there said:

"In the absence of evidence overcoming the presumption it should prevail.....In other words the jury was told in effect that it must determine whether sufficient evidence had been adduced to overcome that presumption."

In the case of *Rios v. Bennett*, 88 Cal. App. (2d) 919, 200 Pac. 2nd 73, the decedent was killed at night time while walking across the street diagonally out of the pedestrian lane. A witness testified that the deceased walked into the path of defendant's automobile which the witness had seen 70 to 75 feet away. There the court held:

"A presumption existed that a pedestrian struck...  
by an automobile used ordinary care for his own

safety and that in doing so he looked before he stepped out into the street."

The case of *Duehren v. Stewart*, 39 Cal. App. 201, 102 Pac. 2nd 784, is one where a pedestrian was struck and killed while crossing a highway in a crosswalk at an intersection at 8:00 P. M. Evidence was introduced that the decedent didn't turn his head or look. The lower court instructed the jury regarding presumption of due care, and on appeal the court stated:

"It has been repeatedly held that disputable presumptions are evidence in a case..., and such presumption may be controverted by other evidence. ...It has also been repeatedly held that it is a question for the jury to determine whether the presumption has been overcome by evidence offered in contradiction thereof...Respondents produced no evidence to determine what observations Mr. Duehren made just before he attempted to cross the street. Appellant offered no evidence as to whether the deceased looked prior to the time he stepped off the curb. Respondents were therefore entitled to the presumption above mentioned as their own evidence was reconcilable with it, and such presumption remained as evidence in the case until dispelled by evidence offered in contradiction thereof."

In the case of *Greenslitt v. Three Brothers Banking Company*, 170 Ore. 345, 133 Pac. 2nd 597, the decedent was struck by defendant's automobile as he ran across the highway in a diagonal direction. There the court held:

"The evidence tending to show negligence on his part is not of such conclusive character as to overcome such presumption as a matter of law. The issue of contributory negligence was properly submitted to the jury."

In the case of *Wiswell v. Shinnars*, 47 Cal. App.

(2d) 156, 117 Pac. 2d 677, a pedestrian was struck and killed while in the process of crossing a highway, and there was evidence to the effect that he was not in a crosswalk at the time of the accident. The court there said:

"In urging that the direct evidence furnished by an eye witness in this case dissipated the presumptions established by law, respondents fail to appreciate the limitations upon the power of the trial court when directing a verdict as such limitations are laid down in *Estate of Flood* and *Estate of Lances*, supra. Under the familiar rules there enunciated, when there is a showing on behalf of the plaintiff of certain facts as in the instant case, certain physical facts such as skid marks and their relation to the point of collision and the point at which the driver first applied his brakes; the speed of the automobile; the failure of the driver to sound his horn or otherwise give warning; the unobstructed view of deceased on the part of the driver for some considerable distance; the clearness of the weather and the dryness of the street, together with the presumptions relied upon; and when on the other hand, evidence both direct and circumstantial favorable to their cause, is introduced by defendants, the latter evidence must be eliminated from consideration by the court for the purpose of ruling upon a motion for a directed verdict.

"We therefore conclude that appellant was entitled to the benefit of the presumptions here claimed until dispelled by evidence opposed to



them, and that it was for the jury to determine whether the presumptions had been overcome by evidence offered in contradiction thereof, and which last-named evidence the court was not permitted to consider in ruling upon the motion for a directed verdict.

"Cases cited by respondents in support of their claim that the presumption is destroyed by evidence in contradiction thereof are all cases where appeals were taken from final judgments, in the rendition of which the court or jury was entitled to pass upon the weight of all the evidence submitted and to judge of the credibility of witnesses. Such power is not within the province of a court in ruling upon motion for non-suit or directed verdict."

From the cases cited where the presumption of due care has been an element dealt with, it should be noted that the courts have consistently allowed the question of contributory negligence to be submitted to the jury. In the case at bar, a reasonable man could find from the evidence that the deceased used due care by stopping in lane 1 to allow passage of defendant's vehicle, which he could legally and reasonably assume would continue in the lane of traffic which it occupied, rather than into his lane. Also, under many of the cases cited actual eye-witnesses have testified regarding the conduct of the deceased party which, if proven true, would establish contributory negligence, however, even under such circumstances the court has entertained the presumption of due

care and allowed the jury to determine whether the evidence has been sufficient to overcome it. In the case at bar, the evidence is totally lacking as to whether the deceased was keeping a proper lookout, and it would be a pure conjecture to say that he failed to look and see or that he continued to walk into the path of defendant's car oblivious to the circumstances then and there existing. It is for these reasons that we respectfully submit that the court erred in directing a verdict for the defendant and against the plaintiff.

II. THE TRIAL COURT ERRED IN DIRECTING A VERDICT AGAINST PLAINTIFF UPON THE GROUND THAT DECEASED WAS CONTRIBUTORILY NEGLIGENT AS A MATTER OF LAW, IN THAT CONTRIBUTORY NEGLIGENCE WAS A QUESTION OF FACT FOR THE JURY.

In treating this point, we should first recognize the respective rights of the parties at the time the collision occurred. 57 -7-143, Utah Code Annotated, 1943, subsection (a) provides:

"Every pedestrian crossing a roadway at any point other than within a marked crosswalk or within an unmarked crosswalk at an intersection shall yield the right-of-way to all vehicles upon the roadway."

With respect to the law applicable under the

facts in question, it is stated in *Mingus v. Ollson*, 201 Pac. 2nd 495, (Utah-1949), where the court there said:

"The rights of pedestrians to the use of public streets are the same as those of motorists...neither greater nor less."

(See also Am. Jur. Vol 5, page 615, Section 201; *Blashfield*, *Cyclopedia of Automobile Law*, Vol. 2, Sections 1241, 1242, 1243).

The rule applies irrespective of what portion of the road or street the pedestrian may walk upon. Assuming that defendant was driving in lane 2 (Stipulated Diagram), as the evidence would tend to establish, all that was required of the decedent under the circumstances was that he yield to the defendant the right of way to the lane in which defendant was driving, provided however, that the defendant's automobile was then so near decedent as to make a crossing of the lane hazardous. Certainly the decedent was not required to yield to the defendant the full 96 foot highway or even half of same. He could rightfully assume that the defendant would not deviate from the lane in which he was traveling, particularly when, as from the evidence (T.R. 295), there was no necessity for doing so. Therefore, taking the interpretation of the evidence



most favorable to the plaintiff, it is contended by appellant that decedent had proceeded westerly across the highway into lane 1 (Stipulated Diagram), to a point near the east line of lane 2, and was there struck by the defendant's swerving automobile. This contention is supported by the following testimony:

Alma Ferre, the only eyewitness from a stationary position, testified that he saw the actual point of impact and placed same as being in lane 1 near the east line of lane 2 (T.R. 53, 54, 55). The testimony of defendant's witnesses, Karl Smith and Leon Wimber, referred to in point I (supra), would at best present a question of fact for the jury as to the exact point of impact and the conduct of decedent. To further support such a contention appellant refers to the time element involved. The testimony most favorable to the plaintiff would indicate that the decedent, if walking, was proceeding at 4.1 feet per second (T.R. 122, 123). To reach the east line of lane 2 (Stipulated Diagram), he would have walked a total distance of approximately 24 feet from the point where he reversed his direction, thus requiring approximately 5.9 seconds to do so.

The testimony of the plaintiff, to the effect that she observed the decedent turn around and start back and that she had just turned to get into a parked automobile when the collision occurred (T.R. 14), would tend to corroborate the testimony of Mr. Ferre placing the collision in lane 1. Also, the evidence on the part of the defendant's witnesses establishes the following:

The decedent was first observed by the occupants of the car to the front and left of the vehicle (T.R. 231, 233, 255, 261, 262, 293, 294); the swerve was sharp and to the southeast (T.R. 145, 195, 233, 255, 261, 293, 294); the defendant, upon first observing the decedent, swerved to the south east and looked away and never saw him again (T.R. 125); neither the defendant nor the passengers in his car saw whether the decedent was keeping a lookout. This testimony, in the light of the testimony of plaintiff's witnesses would definitely present a question of fact for the jury as to the issue of contributory negligence.

Appellant further contends that the evidence regarding the location of the pieces of chrome on the highway (T.R. 153), and the disputed testimony of the witnesses as to the location of the decedent's body

following the collision, is by no means of sufficient quality or significance to justify a ruling by the trial court of contributory negligence as a matter of law. In this connection, it must be considered that when two opposing bodies meet at an unknown angle, there can be no hard and fast rule of physics governing the direction a piece of chrome or body may fall or be deflected, and certainly such circumstances would not justify or require that the trial court take judicial knowledge that such objects would fall at a specific point on the highway. The unknown elements regarding the angle at which decedent was struck, his movements immediately prior to and at the time of impact, are too numerous to say definitely that the metal or decedent's body would fall at a given point. It is suggested by appellant, that it is logical to assume that the pieces of chrome may have been flipped by decedent's clothing, kicked and moved by people in the highway after the collision, ricocheted from defendant's automobile, or even possibly flipped by the wheels of the investigating officers vehicle which he drove down the center of the highway to investigate the accident. To assume that the impact occurred at a

was crossing the highway at a point where there was no pedestrian lane, much the same as the case at bar, when she was struck by an oncoming car. The court there said:

"However, the evidence was in conflict as to how plaintiff acted in relation to the surrounding circumstances, the direction she was going at the time, as to where she was hit, the location of the Hood car, and other matters. We cannot say therefore, that the conduct of plaintiff constituted negligence as a matter of law, particularly when viewing it from the standpoint of plaintiff and her witnesses. No error was committed in denying the motion for directed verdict."

In the case of *Hunter v. Michaelis* (Utah-1948), 198 Pac. 2nd 514, a pedestrian was struck while crossing a highway in California in the nighttime. Although the Utah Supreme Court applied California substantive law in deciding this case, it nevertheless held that there was no contributory negligence as a matter of law for the pedestrians failure to see.

In the case of *Martin v. Sheffield*, 112 Utah 478, 189 Pac. 2nd 127, where testimony was introduced to show that plaintiff did not look upon entering the intersection, the unanimous court held that the question of contributory negligence was a jury problem.

In the recent case of Spackman v. Carson (Utah-1950), 216 Pac. 2nd 640, where a motorcyclist struck a truck which pulled onto the highway in front of him, the court there said:

"Under the circumstances we are convinced that the issues of whether the plaintiff was negligent in failing to keep a more diligent lookout ahead was properly submitted to the jury.....Unless all reasonable minds must say that a party did not use due care under a particular set of circumstances, it is a question for the jury."

The case at bar appears to be stronger than many of the cases cited as several inferences regarding outlook or due care might reasonably have been drawn by the jury from all the evidence. The evidence might well sustain a finding by a jury that the decedent did look and see, and as a reasonable man, misjudged the danger or that he looked and upon seeing defendant's car swerving easterly toward him, jumped westerly into lane 2 in an effort to avoid the collision and was, notwithstanding such efforts, struck and killed by defendant's machine, or that he looked and saw, and was in lane 1 at the time he was struck.

The rule of law announced in the Compton case (Supra), has been reaffirmed in the recent case of

of Tuttle v. Pacific Intermountain Express Co. (Utah 1952), 242 Pac. 2nd 764, (Supra), where the trial court denied a motion for a directed verdict and allowed the issue of contributory negligence to be submitted to the jury, notwithstanding the testimony of six eye witnesses, who's testimony, if believed, would establish contributory negligence on the part of decedent.

The Supreme Court of Utah there said:

"If the evidence is such that it would be unreasonable for anyone to believe therefrom that the Tuttle car was traveling in a northerly direction before the collision and not in a southerly direction as appellants claim, then it is clear that decedent was guilty of contributory negligence as a matter of law. But if the evidence will reasonably sustain a finding that decedent was traveling toward the north on the east side of the highway and that as they were about to pass each other while traveling in oposite directions the tractor-trailer went out of control and skidded over onto the east side of the highway and into the side of the Tuttle car, there is no showing of negligence on the part of the decedent and there is a strong case of negligence on the part of the driver of the tractor-trailer and it was proper to submit that question to the jury."

In the very recent case of Poulsen v. Manness et al (Utah-1952), 241 Pac. 2nd 152, the plaintiff and defendant collided in an intersection. The court there said:



"The facts in this case are very similar to those in the case of Lowder v. Holley (Utah-1951). 233 Pac. 2nd 350, recently decided by this court. In that case, as in the instant case, there was evidence that the plaintiff had stopped and looked in both directions before proceeding into the intersection and that the driver of the other car was going at a high rate of speed and did not see plaintiff's car which was already in the intersection until almost upon it. In the Lowder v. Holley case, as in the instant case, there was evidence of visual obstructions at the intersection which the fact finder had to consider. WE THERE HELD THAT THE QUESTIONS OF NEGLIGENCE OR CONTRIBUTORY NEGLIGENCE WERE QUESTIONS OF FACT TO BE DETERMINED BY THE FACT FINDER. THAT CASE IS CONTROLLING HERE AND THE COURT DID NOT ERR IN SUBMITTING THESE QUESTIONS TO THE JURY." (Caps ours).

In the concurring opinion of Chief Justice Wolfe in the Poulsen case, he stated:

"IN CASES CONCERNING TRAFFIC WHERE THE SITUATION IS IN FLUX AND DEDUCTIONS DEPEND ON THE BASES ASSUMED, WHICH MAY BE A CHOICE AMONG PERMUTATIONS AND COMBINATIONS OF FACTORS, THE TRIAL COURT, UNLESS ONLY ONE COMBINATION OF FACTORS UNDER ANY REASONABLE VIEW OF THE EVIDENCE IS PERMISSIBLE, SHOULD NOT FIND NEGLIGENCE AS A MATTER OF LAW." (Caps ours).

It appears that the rule announced in the foregoing cases has been adopted in our sister states of California, Colorado, Idaho, Kansas, Montana, New Mexico, Oregon, and Washington.

In the case of Lawrence v. Kansas City Power and Light Co., et al, 167 Kan. 45, 204 Pac. 2nd

752, the plaintiff and defendant collided in an

open intersection and the trial court directed a verdict for defendant upon the ground of contributory negligence as a matter of law. The Supreme Court of Kansas stated:

"Before a court can rule as a matter of law that negligence has been established, the evidence should be so clear that reasonable minds could have but one opinion, namely: that the party was negligent."

In the case of *Martin v. Harrison*, 182 Ore. 121, 186 Pac. 2nd 534, a pedestrian was killed while crossing a highway, not at a crosswalk. The Supreme Court of Oregon there said:

"Contributory negligence becomes a question of law only when from the facts reasonable men can draw only one inference and that inference points unerringly to negligence of plaintiff contributing to the injury, and in other cases the question of contributory negligence is one of fact for the jury. If a pedestrian crossing a street fails to look or looks straight ahead without glancing to either side...he is guilty of contributory negligence as a matter of law, but if he looks but does not see approaching automobiles, or seeing one, erroneously misjudges its speed or distance, or for some other reason assumes he could avoid injury to himself the question of contributory negligence is for the jury."

In the case of *Rios v. Bennett*, (*Supra*), a pedestrian was killed while crossing a public highway at night. There was no evidence of whether



the pedestrian looked before proceeding into the highway. The California Court stated:

"Whether a mistake in judgment by a pedestrian when crossing a street, as to speed and danger of approaching vehicles, constitutes contributory negligence is a question for the jury. As there was no evidence whether the pedestrian looked or not a presumption existed that he used ordinary care for his own safety and that in doing so he looked before he stepped out into the street."

In the case of *Wiswell v. Shinnors*, (Supra), where a pedestrian was struck while crossing a highway, the court there concludes:

"On the record presented to us herein, we feel that the question whether decedent's behavior and conduct, that is to say, whether he looked and either did not see the approaching automobile, or saw it and misjudged either its speed or distance, constituted contributory negligence under the particular circumstances then existing, was one of fact, as was also the question of whether decedent's conduct measured up to the requirements of that of a reasonable man in complying with the afore-said Vehicle Code provision. The question of contributory negligence is always one of fact for the jury to decide under proper instructions, except in those cases in which, judged in the light of common knowledge and experience, there is a standard of prudence to which all persons similarly situated must conform. It is only in these last-named cases that failure to adhere to that common standard is as a matter of law contributory negligence. Where different conclusions may reasonably be drawn by different minds from the same evidence, the de-

decision must be left to the triers of fact. Therefore, under the facts and circumstances here present, the questions of the negligence of the defendant and the contributory negligence of the deceased, as well as the important question of proximate cause, were all for the jury to determine in the light of all the facts, circumstances and presumptions presented by the evidence.

"It should be understood that throughout this opinion we have followed the rule applicable to cases where the appeal is taken from a judgment following a directed verdict or nonsuit, which rule requires that evidence, and presumptions as a species of evidence, shall be taken by the appellate tribunal in the light most favorable to the losing party in the court below. We are therefore expressing no opinion as to the weight of the evidence or its truth or falsity."

Other cases of interest where the facts and circumstances involved are akin to the case at bar, and where the issue of contributory negligence or negligence has been held to be a question of fact are: *Prentis v. Johnston*, 119 Colo. 370, 203 Pac. 2nd 733; *Stickel v. San Diego Electric Co. et al*, 32 Cal. 2d 157, 195 Pac. 2nd 416; *Schoen v. Schroeder*, 53 N.M. 1, 200 Pac. 2nd 1021; *Flynn v. Helena Cab and Bus Co.*, 94 Mont. 204, 21 Pac. 2nd 1105 and *Maier et al v. Minidoka County Motor Co., et al*, 61 Ida. 642, 105 Pac. 2nd 1076.

It is respectfully urged by appellant, that by

virtue of the authorities hereinabove cited and the facts and circumstances of the case at bar, the trial court committed error in granting defendant's motion for a directed verdict.

III. THE TRIAL COURT ERRED IN DIRECTING A VERDICT AGAINST PLAINTIFF UPON THE GROUND THAT DECEASED ~~WAS~~ CONTRIBUTORILY NEGLIGENT AS A MATTER OF LAW, AS THE QUESTION OF WHETHER OR NO DECEASED'S CONTRIBUTORY NEGLIGENCE, IF ANY, PROXIMATELY CONTRIBUTED TO HIS DEATH WAS AN ISSUE OF FACT FOR THE JURY.

The issue of proximate cause has been submitted to the jury in a great number of cases similar to the one at bar. Appellant contends that, in view of the facts and circumstances the proximate cause of the death of Jackson Blaine Cox was a question of fact to be submitted to the jury and that it was error for the trial court to grant defendant's motion for a directed verdict.

In the case of Hess v. Robinson, 109 Utah 60, 163 Pac. 2nd 510, plaintiff was traveling on an arterial highway and collided with defendant who ran a stop sign. The trial court directed a ver-

dict that both were negligent as a matter of law, but left to the jury the issue of proximate cause. The court held that even if the plaintiff had seen defendant's car he would have been unable to avoid the accident by the time he had ascertained that the defendant would not stop at the stop sign.

In the case of *Hickock v. Skinner*, 113 Utah 1, 190 Pac. 2nd 514, the dissenting opinion, speaking of the *Hess v. Robinson* case, said in part:

"Although this court divided on the question of whether or not plaintiff was guilty of contributory negligence as a matter of law, we agreed unanimously that the question of proximate cause was one for the jury."

In the case of *Wright v. Maynard*, (Utah-1951), 235 Pac. 2nd 916, the Utah Supreme Court affirmed the rule laid down in the case of *Nikoloeropoulos v. Ramsey*, 61 Utah 465, 214 Pac. 2nd 304, to the effect that it is negligence as a matter of law for a person to drive an automobile upon a traveled public highway, used by vehicles and pedestrians, at such a rate of speed that said automobile cannot be stopped within the distance at which the operator of said car is able to see objects on the highway in front of him, and in so affirming said rule, held

that the question of proximate cause was a question for the jury.

A Nevada case, *Styris v. Folk*, 146 Pac. 2nd 782, where a pedestrian was struck by a motor vehicle while crossing a street in violation of a city ordinance stated in part:

"There is no difference in principal as to the effect of negligence whether arising by violation of an ordinance, or by ordinary negligence. In either instance, whether it is the remote or proximate cause of an accident, is a question of fact in each particular case....Although, as to the former, the negligence is presumed as a matter of law, yet whether it is the proximate cause of an accident is always a matter of fact....!Negligence per se and proximate cause are two separate and distinct issues. While one is presumed as a matter of law, the other must nevertheless, be proved as a matter of fact. Although appellant crossed the street between intersections, in violation of an ordinance, he cannot be held as a matter of law to have reasonably apprehended that in so doing injury would result. Even to a pedestrian, thus crossing, a motorist owes the duty of exercising ordinary care. It is true that such ordinance gives to a motorist the right of way between intersections. However, that right is not absolute but preferential only, and the motorist is not absolved from his duty of exercising ordinary care for the safety of pedestrians, rightfully or wrongfully on the highway between such intersections. Whether the cab driver in the instant case exercised such care was a question of fact for the jury.' "

The case of *Genola v. Barrett*, 14, Cal. (2)



217, 93 Pac. 2nd 109, involved an accident where a pedestrian was struck while crossing a street in violation of an ordinance. The Supreme Court of California there stated:

"Not only did the trial court hold in the case at bar, as a matter of law, that plaintiff was contributorily negligent, but that her negligence, was, per se, the proximate cause of her injury. Here, plaintiff was standing in the street, according to one eye-witness, about ten or twelve seconds. She then stepped back, at which time the car was not within an approximate eighty-foot range of vision of the witness. When defendant failed to see what was plainly visible, failed to slacken her speed, and failed to swerve her car a few inches to avoid striking plaintiff who had yielded the right of way, it cannot be said that, as a matter of law, the negligence of plaintiff was the proximate cause of her injury."

Additional cases which have held that the particular case should go to the jury on the issue of proximate cause are: Baker v. Western Casualty & Surety Co., 164 Kan. 376, 190 Pac. 2nd 850; Atkins v. Morton, 164 Kan. 626, 191 Pac. 2nd 909; Lawrence v. Kansas Power & Light Co. et al, 167 Kan. 45, 204 Pac. 2nd 752; Amos v. Remington Arms Co., 117 Colo. 399, 188 Pac. 2nd 896; Douglas v. Hoff, 82 Cal. App. (2d) 82, 185 Pac. 2nd 607; Maier et al v. Minidoka County Motor Co., (Supra);

Briggs v. United Fruit & Produce Inc., 11 Wash. (2d) 466, 119 Pac. 2nd 687; Hart v. Farris, 218 Cal. 69, 21 Pac. 2nd 432 and Pollard v. Wittman, 28 Wash. (2d) 367, 183 Pac. 2nd 175. Each of the foregoing cases have involved accidents on the highway between vehicles or a vehicle and a pedestrian, and in many of such cases the facts and circumstances have been no stronger than in the case at bar.

It is respectfully urged by appellant that the evidence of the case at bar should have been submitted to the jury on the issue of proximate cause as the jury might reasonably have found that in view of the lack of attention of the driver of the automobile to the road ahead and the abundance of light in the vicinity where the collision occurred, the contributory negligence of the decedent, if any, was not a contributing factor in the accident.

IV. THE TRIAL COURT ERRED IN GRANTING RESPONDENT'S MOTION FOR A DIRECTED VERDICT AND IN REFUSING TO SUBMIT THE APPELLANT'S CASE TO

## THE JURY ON THE THEORY OF LAST CLEAR CHANCE.

In discussing Point IV Appellant is not unmindful of the recent cases of *Graham v. Johnson*, 109 Utah 346, 166 Pac. 2nd 230; *Van Wagoner et al v. Union Pac. R. Co.*, (Utah 1947); 186 Pac. 2nd 293; *Hickok v. Skinner*, (Utah 1948), 190 Pac. 2nd 514; *Holmgren v. Union Pac. R. Co.* (Utah 1948), 198 Pac. 2nd 459; *Anderson v. Bingham & Garfield Ry. Co.*, (Utah 1950), 214 Pac. 2nd 607; and *Compton v. Ogden Union Ry. & Depot Co.*, *supra*, wherein this Court has discussed the rule of last clear chance.

In the *Graham Case*, *supra*, this Court recognised the doctrine announced by the American Law Institute, *Restatement of Torts*, Vol. II, Ch. 17 Sec. 480 and reaffirmed its adherence to same in the *Compton Case*, *supra*. In the *Compton Case* this Court, speaking through Justice Crockett, stated:

"A plaintiff who, by the exercise of reasonable vigilance could have avoided harm therefrom, may recover if, but only if, the defendant (a) knew of the plaintiff's situation, and (b) realized or had reason to realize that the plaintiff was inattentive and therefore unlikely to discover his peril in time to avoid the harm, and (c) thereafter is negligent in failing to utilize with reasonable care and competence his then existing ability to avoid harming the plaintiff.



"It will be noted these sub-paragraphs are in the conjunctive and must all exist together before that Section is applicable."

The Compton Case, being the most recent case in this State, apparently consolidates the single points heretofore ruled on by this Court where the doctrine of last clear chance was considered. It is interesting to note that most cases in this State have involved railroads and automobiles or individuals, and automobile and automobile, rather than auto-pedestrian accidents.

It is agreed that the principles should be the same when the doctrine is invoked, but it appears to us that in applying the principles to the facts, that in the auto-pedestrian cases, one must bear in mind that in our lives today the automobile has become a dangerous instrumentality due to its speed, increased numbers on our highways and its maneuverability. The automobile has an increasing radius of operation per second, depending upon its speed and other physical factors while the pedestrian's radius of operation per second is more or less constant and small.

It is easy to reconcile the railroad cases if one realizes that the railroad tracks are stationary;

hence an approaching train can only proceed in one direction, and it is common knowledge that its operator can avoid an impending collision only by reducing its speed, stopping or giving an audible warning. The automobile can avoid an impending collision by reducing its speed, stopping, increasing its speed, turning right or left, or by giving an audible signal.

With these thoughts in mind and at the expense and danger of repeating ourselves, it is found necessary to invite the Court's attention to the evidence most favorable to the Appellant in support of our contention that the trial court erred in not submitting the question of last clear chance to the jury.

It is our contention that if Mr. Cox could be found guilty of contributory negligence as a matter of law, which we deny, of of fact, then and in that event, the elements of the conscious last clear chance doctrine as set forth by Justice Crockett in the Compton Case, *supra*, were present; and the trial court should have submitted the same to the jury for their determination.

At the outset we invite the Court's attention to the testimony of the defendant which shows him to be

a very inexperienced driver of one year's experience, and to the fact that at the time he testified he had the benefit of ten month's additional driving experience from the time of the accident (T.R. 272, 280, 281, 283, 292, 293, 295, 298, and 299).

(a) Defendant knew of the decedent's situation:

The defendant testified that his dim lights in head of him were illuminating the side of the road, and he could see well enough; that the dim light cast a light out diagonally from the car and that you could see a lighter spot in front of you; that is, sort of oblong; and then the light was cast off from the direct beam in front. He stated that when he first saw Mr. Cox that he appeared as a dark silhouette to his left as he stepped into the light from the side, facing west; that he could see the full length of him. He could not specify as to how much of the highway he could see, but he could see the full height of the man; that he saw him step into the land he was traveling with his legs apart, and he walked across in front of the car (T. R. 271, 272, 288, 290, 291, and 295).

(b) The defendant realized or had reason to realize that Mr. Cox was inattentive and therefore unlikely to discover his peril in time to avoid the harm:

It is reasonable that the jury would have found from the testimony and evidence that the deceased, after reach the most easterly point on the highway (T. R. 12, 53, and 108), turned and walked southwesterly towards the Ferre Car at the rate of 4.1 feet per second, at such an angle as to place his back partially toward the defendant's vehicle. He proceeded southwesterly from the most easterly point reached on the highway (T. R. 24) to the only point of impact placed on the stipulated diagram by an eye witness, Mr. Ferre (T. R. 54), which appears on said diagram on the west side of lane number one as a pencil point close to the swere marks and the pieces of chrome and identified by an "F". Projecting the decedent's line of travel into lane number two, coupled with the defendant's testimony as to what he saw and did, makes it apparent that a jury could reasonably find that the defendant realized or had reason to realize that Mr. Cox was inattentive and therefore unlikely to discover his peril in time

to avoid harm.

In the Restatement of Torts, Section 480,  
supra, comment "B", it is asserted:

"However, it is not necessary that the circumstances be such as to convince the defendant that the plaintiff is inattentive and, therefore, in danger. It is enough that the circumstances are such as to indicate a reasonable chance that this is the case. Even such a chance that the plaintiff will not discover his peril is enough to require the defendant to make a reasonable effort to avoid injuring him. Therefore, if there is anything in the demeanor or conduct of the plaintiff which to a reasonable man in the defendant's position would indicate that the plaintiff is inattentive, and therefore, will or may not discover the approach of the train, the engineer must take such steps as a reasonable man would think necessary under the circumstances."

Even if we were to consider only that portion of the defendant's testimony to the effect that Mr. Cox walked unhesitatingly into his lane of travel, this testimony in itself should be sufficient to convince a jury that the driver was aware of the decedent's inattentiveness and unawareness of his peril. Under no circumstances would an alert and attentive pedestrian commit such an act.

In the Graham Case, supra, this Court speaking through Justice Wolfe, stated:

"Section 480 deals with the situation where the plaintiff was inattentive but had the

ability, had he been alert, to avoid the oncoming danger to which the defendant was subjecting him. But in both cases the liability of the defendant arose because he failed to take the opportunity which he alone had time to avoid doing the plaintiff harm even though the plaintiff was negligent in getting himself in a position where he was helpless or because he was so inattentive that he was not alert to the approaching danger over which defendant had control."

We submit, therefore, that the testimony demonstrates that this element of the doctrine of last clear chance is present.

(c) That the defendant thereafter was negligent in failing to utilize with reasonable care and competence his then existing ability to avoid harming Mr. Cox:

It is necessary in considering this point to review the defendant's testimony together with that of his friendly witness, Wimber.

It appears that the position of the car in lane number two is important. The defendant testified as to the position of his car therein immediately prior to the accident. He testified that when he looked to his left he could just see the lefthand line of the lane he was traveling in going along past the window, and he figured there must be two or



three feet down ~~between~~ the car and the line (T. R. 270 and 289). The width of the car was seven to eight feet (T. R. 174).

Projecting the line of travel of Mr. Cox into and across lane number two, it could reasonable be found that the point of impact could have occurred at any one of three points.

The first possible point of impact could have been just west of the dividing line of lane number one and two. Wimber, who was seated on the right side of the front seat of the defendant's car, testified: that he saw the decedent step from the side into the car's lights; that he saw a person move from the east to the west onto the lane of traffic in which the car was traveling (T. R. 231)

He further testified:

"Q. And will you describe that to the best of your ability? State where it was and---

"A. When I first saw the man, he was to the left of the front of the car, and as we swerved, it brought the right fender over to where he was at, and he hit right about where the light and the hood come in contact there, and rolled up over the right fender, partly on the hood, off ~~the~~ of the fender down to the side, immediately in front of myself (T. R. 236)

The second possible point of impact could have been in the center of the lane (six feet). Wimber again testified:

"Q. And how far did he get into your lane of traffic, the last you saw him there?

"A. Half way across, approximately. (T. R. 231)"

The third point of impact could have occurred approximately eleven feet to the west of the line dividing lanes one and two.

Wimber also testified:

"Q. Can you state when the car was swerved with respect to when you saw the man?

"A. Well, it was just a split second after we saw him, after I saw him.....(T. R. 236)

"Q. Now how far ahead of the car was he when you first noticed him?

"A. I thought at the time perhaps 15 feet.

"Q. Did you feel any swerving of the car after you saw him?

"A. I think there was.

"Q. Was that swerving immediately after the time that you first saw him, or did the car travel a little bit before you felt the swerve of the car?

"A. It could have travelled a short distance.

"Q. Now how far across the width of the car did you observe him, the westernmost portion that he got?

"Q. After you had seen him, for the first time?

"A. Well he hit on the right hand part of the car (T. R. 248)"

The defendant testified that Mr. Cox might have been as far away as 59 feet and could have been farther away than that when he first saw him (T. R. 292 and 293).

It would be reasonable from the testimony to find that the point of impact could have been at any point along the decedents projected line of travel in lane two. The maximum distance Mr. Cox could have traveled, at the rate of 4.1 feet per second, into lane two would have required approximately 2.73 seconds elapsed time after he had entered said lane. At 35 miles per hour the car would have been 139 feet away from Mr. Cox when he entered lane two. Adding the distance the deceased traveled after he appeared as a silhouette from the left of the car as he entered the car's light zone and prior to his crossing into lane two, would place the car farther away from decedent at the time he was first seen by defendant. At 35 miles per hour the defendant could have stopped his car in approximately 97 feet from the point he saw the danger (38 feet

reaction distance and 59 feet braking distance).

If the point of impact was determined to be in the middle of lane two, it would have required 1.46 seconds for Mr. Cox to reach said point after crossing the line into lane two. This would place the automobile 75 feet away from him when he entered said lane. A jury could again find that the deceased travelled an additional distance from the time defendant first saw him enter the car's light zone as a silhouette, thereby placing the vehicle farther away from Mr. Cox when the danger was first perceived by the defendant.

It is again reasonable to place the point of impact at or near the line separating lanes one and two. If such were the finding, then it is reasonable to infer that the sounding of a horn by defendant, which was not done, would have given Mr. Cox the opportunity to stop and allow the car to continue its course, or to step back out of the way of the oncoming vehicle.

It is evident that if the point of impact occurred at either of the above referred to extremes, there was a last clear chance for the defendant to avoid the injury or death of Mr. Cox.

that after the defendant perceived the decedent, the defendant, through excitement or otherwise, negligently swerved into Mr. Cox, and that had the defendant continued in a straight line or swerved to the right, he would not have struck Mr. Cox.

Therefore, it is respectfully urged by Appellant that the evidence of the case at bar should have been submitted to the jury on the issue of last clear chance as the jury might have reasonably found that the elements set forth in Section 480 of the Restatement of Torts and adopted by this Court were present.

### CONCLUSION

In conclusion, it appears desirable to point out that if the testimony most favorable to the Appellant is considered, together with the reasonable inferences that can be drawn from it, the facts of this case are such as to definitely fall within the province of the jury to determine, and that a directed verdict based upon these facts by the trial court constituted an invasion of such province.

From the evidence and reasonable inferences based thereon, the jury could find on the one hand that the decedent was not contributorily negligent, or, if he

was, that said negligence did not proximately contribute to his death; and, on the other hand, the jury could find if he was contributorily negligent that the defendant had a last clear chance to avoid the accident.

The thesis behind the presumption of due care and the rule of last clear chance, based as they are upon human experience and a humanitarian policy, is designed to protect against the same set of circumstances that are extant in this case. And the careless action on the part of the defendant, which the trial court termed as gross negligence, we feel bordered upon a wanton, reckless and criminal act. These doctrines were propounded to insure to the injured parties their fundamental right to a jury determination of the facts and issues involved.

Appellant sincerely submits that the trial court erred in each of the rulings specified under the points herein presented and argued.

Respectfully submitted,

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