

1953

# Henrietta Smith v. Golden J. Bennett : Brief of Respondents

Utah Supreme Court

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IN THE SUPREME COURT  
of the  
STATE OF UTAH

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HENRIETTA SMITH,  
*Plaintiff and Appellant,*

— vs. —

GOLDEN J. BENNETT,  
*Defendant and Respondent.*

Case No. ....

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~~MEMORANDUM OF AUTHORITIES~~

*Respects Brief*

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FILED  
AUG 10 1953

Clerk, Supreme Court, Utah

STEWART, CANNON & HANSON

By EDWIN B. CANNON

REX J. HANSON

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ERNEST F. BALDWIN, JR.

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# IN THE SUPREME COURT of the STATE OF UTAH

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HENRIETTA SMITH,  
*Plaintiff and Appellant,*

— vs. —

GOLDEN J. BENNETT,  
*Defendant and Respondent.*

Case No. ....

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## STATEMENT OF FACTS

In an action arising out of an auto pedestrian accident which occurred on October 17, 1951, in Salt Lake City, Utah, the District Court Judge, Honorable Joseph G. Jeppson, directed a verdict for the defendant upon the ground that the evidence showed plaintiff guilty of contributory negligence which was a proximate cause of her own injury as a matter of law. The question presented by the appeal is whether the evidence presented sustains this finding.

Briefly the facts are: The plaintiff, Henrietta Smith, at the time of the accident, on October 17, 1951 resided between 8th and 9th West at 937 West 2nd South in Salt Lake City, Utah (R. 61). On the same date she

was employed as a cashier at the Western Co-op. The Western Co-op is located near plaintiff's residence being a short distance west and on the opposite, or north side of the street, within the same block. (See Exhibit B which has been reproduced and included in the brief for the convenience of the court.)

Second South Street in this vicinity is 60 feet wide including the curbs on both sides of the street and is divided into two lanes for traffic on the south, two lanes for traffic on the north, each lane being 10 feet wide, a center strip 4 feet wide and two parking lanes, each 8 feet wide on either side of the street (Exhibit B). There is a driveway immediately adjacent to the Western Co-op, on the east side of the building which leads out into 2nd South Street. Starting where this driveway intersects 2nd South and extending across the street to the south and slightly west is a marked crosswalk. This crosswalk intersects the south side of 2nd South at a point 267 feet from the center of the intersection of 2nd South and 9th West St. It is 792 feet along 2nd South from the center of 9th West Street to the next street east, 8th West Street. (Exhibit B)

There is a street light on the north side of 2nd South immediately adjacent to the driveway next to the Western Co-op. There is a street light on the south side of 2nd South in front of plaintiff's residence (Exhibit B).

At about 6:05 p.m. on the evening of Oct. 17, 1951, plaintiff had finished her day's work at the Western Co-op. She left the store with her employer, Mr. Wright, and another clerk, Mrs. Ostberg. She told Wright goodnight

at the door of the store. Mrs. Ostberg accompanied plaintiff to the driveway immediately east of the Western Co-op where they parted company (R. 63).

According to her testimony, plaintiff then proceeded to the north curb of 2nd South. At that point she looked to the east where she saw a car coming from 8th West, far enough away to allow her to cross (R. 65). She then proceeded to the center of the 2nd South Street keeping within the bounds of the crosswalk, (R. 65, Exhibit B). At this point, she looked west and saw a car approaching between 9th and 10th West almost to 10th West (R. 65). She then walked east up the middle of 2nd South Street to a point 45 feet east of the crosswalk (R. 66). At that point she stopped, looked west, saw no cars approaching from the west (R. 103-121-127). From that point she started to walk to the south toward her home when she was struck (R. 103-127).

One of the police officers who investigated this accident, Harold A. Peterson, Jr., identified the point of impact from scuff marks on the pavement 69 feet east of the eastmost portion of the crosswalk, 14 feet from the south curb line of 2nd South and 13 feet south of the south double lines in the center of the street (R. 11). The defendant's automobile had brush marks on the left front fender and had traveled 3 feet beyond the point of impact. The lights on defendant's automobile were on (R. 16) and the brakes in working order (R. 16). The left side of the car when it came to rest was about on the



dividing lane between the two eastbound lanes of traffic (R. 13, Exhibit B).

Police Officer W. O. Cowden interrogated the defendant, Golden J. Bennett, who told him that he observed plaintiff in the center portion of the street walking in a southerly direction, and that he slowed up and honked his horn; that he saw the pedestrian hesitate, as if she was going to stop, so he took his foot off the brake to proceed ahead; that at about that time she broke and ran toward the south curb; that he immediately applied his brakes, but could not stop before striking plaintiff. Defendant stated he had been traveling about 25 miles per hour, realized the danger about 50 feet from the point of impact, and had slowed his speed to one mile per hour at the point of impact (R. 15).

Frank W. Bonner, an independent eye witness testified that he was driving an automobile west on 2nd South (R. 134) at about 6:10 p.m. when he first observed plaintiff about 75 to 80 feet in front of him (R. 137). At that point plaintiff was just leaving the curb (R. 136). She came out over the curb and proceeded on an angle (R. 150) in a southwest direction (R. 136) (see path traced on Exhibit B) toward the center of the street (R. 150). She appeared to be in a hurry and walked or trotted (R. 137-150). When she reached the center of the street she appeared to hesitate then cut across toward her home on the south side of the street (R. 150, Exhibit B). Plaintiff was struck at a point just south of the line dividing



the two eastbound lanes of traffic, lanes 1 and 2, on the south side of 2nd South (R. 135).

The witness first noticed the lights of defendant's car coming east in the outside lane, lane number one, from a point down 2nd South (R. 135). He noticed the car again at a point just west of the crosswalk (R. 138). (See point marked FB on Exhibit B.) It was dusk and the street lights were on. Defendant's car seemed to have turned a little way into the inside lane, Lane 2, never completely leaving Lane one, and then to turn back into Lane one (R. 142). The witness placed the speed of defendant's car at 20-25 or 30 (R. 147) and stated defendant brought his car to a stop in 3 to 5 feet (R. 140).

Another independent witness, Charles Henry Sweat, testified that at the time of the accident he was driving a car east on 2nd South in the inside lane of travel for east-bound traffic immediately behind defendant's automobile which was traveling in the outside lane (R. 151-52). He testified that he was traveling about 25 miles per hour and slowed his car to 10 or 15 when he saw plaintiff (R. 160) and that the defendant must have done the same as the distance between his car and defendant's remained the same (R. 160).

He first observed Mrs. Smith when she started across the road (R. 156) from the north edge of the road (R. 156). She proceeded in a southeasterly direction toward her home (R. 157). (See path marked "HS" Exhibit B.) She stopped in the middle of the street and then "trotted" into the path of defendant's vehicle (R. 157). The wit-

ness estimated that when plaintiff started to trot across in front of defendant, defendant's car was no further than five feet from her (R. 157).

The defendant testified that he had left work at the Lang Company at 11th West and 2nd South (R. 20) at six o'clock (R. 19). From that point he traveled east on 2nd South in Lane 1 (See Exhibit B) at a speed of 25 miles per hour (R. 21). When he reached the point shown as "B1" on Exhibit B, 50 to 75 feet west of the crosswalk (R. 25-26) in front of the Western Co-op he saw Mrs. Smith approaching the yellow line in the center of the street at the point marked "S" of Exhibit 2. He started to slow the speed of his car at a point 10 to 15 feet west of the crosswalk (R. 26 marked B2 on Exhibit B). At that time, Mrs. Smith was at the corner of the street shown as S2 on Exhibit B (R. 28). As his car crossed the crosswalk (B3 on Exhibit B) Mrs. Smith hesitated in her course (at point S3 on Exhibit B) leading defendant to believe she would yield the right of way (R. 30). He next observed plaintiff when his car was in the position of "B4". Mrs. Smith was still toward the center of the road at position S4 on Exhibit B. When his car reached position "B5" on Exhibit B about 25-30 feet from plaintiff. Plaintiff started to run in front of defendant's car (R. 32). Defendant first applied his brakes at position "B2" and slowed to 20 miles per hour (R. 24). Assuming that Mrs. Smith was going to yield the right of way, he continued to point "B5" at about 20 miles per hour (R. 33). When plaintiff started across in front of his car, point "B5" he applied his brakes severely (R. 32).

The defendant testified that at point "B2" on Exhibit B also marked "BH" he honked his horn to warn plaintiff of the approach of his automobile (R. 35). Before darting in front of his automobile, Mrs. Smith hesitated for a period of 2 or three seconds—plaintiff was struck by the left front fender of his vehicle (R. 39). He stated that at no time did he drive his car into the center lane, or Lane 2 (R. 42). That he had the lights turned on on his vehicle (R. 47). That from the time he left point "B5" he traveled about 25 to 30 feet and Mrs. Smith traveled 13 feet (R. 38).

At the conclusion of the evidence the trial judge directed a verdict in favor of defendant, upon the ground plaintiff was guilty of contributory negligence in failing to keep a lookout for vehicles and in failing to yield the right of way to defendant.

## STATEMENT OF POINTS

### POINT I.

PLAINTIFF WAS GUILTY OF NEGLIGENCE AS MATTER OF LAW.

- a. FAILURE TO KEEP LOOKOUT.
- b. FAILURE TO YIELD RIGHT OF WAY.

### POINT II.

PLAINTIFF'S NEGLIGENCE WAS A PROXIMATE CAUSE OF HER OWN INJURIES AS A MATTER OF LAW.

## ARGUMENT

### POINT I.

PLAINTIFF'S NEGLIGENCE WAS A PROXIMATE CAUSE OF HER OWN INJURIES AS A MATTER OF LAW.

We agree with the authorities cited in appellant's brief to the effect that the question of contributory negligence is for the jury whenever the evidence is such that jurors, acting fairly and reasonably, may say that they are not convinced by a preponderance of the evidence that plaintiff was guilty of negligence which proximately contributed to cause his own injury. *Strickle v. Union Pacific R. Co.*, (Utah) 251 P (2) 867.

However, the evidence in the record establishes that plaintiff was guilty of contributory negligence which approximately caused her own injury with such certainty that reasonable minds could not find to the contrary. Plaintiff was guilty of negligence in the following respects:

#### a. FAILURE TO KEEP LOOKOUT.

The evidence shows that this accident happened at dusk, at 6:10 p.m. in the evening and that it was not yet dark. The street was well lighted and the street lights were on. The street was wide open (Exhibit I & J) and there were no obstructions to plaintiff's vision. The defendant had the lights of his car turned on. Plaintiff was not in a position on the street where she might have expected defendant to stop for her. The defendant's car

had approached a point where the impact occurred from a point some blocks west. There can be no doubt that the car was there to be seen. It is no excuse for plaintiff to say she did not see the vehicle when the vehicle was there. The length of the skid marks and the distance the car traveled after impact show that the defendant was traveling at a low rate of speed. The testimony of the eye witnesses corroborates this. This evidence can lead us to only one conclusion; the plaintiff either did not look for the defendant's vehicle before she crossed into the path of this vehicle, or if she did look, plaintiff failed to heed what she saw.

The Supreme Court of Michigan, *Malone v. Vining*, 313 Michigan 315, 21 N.E. 2d 144 aptley, defined the duty of a pedestrian as follows:

“Under present day traffic conditions a pedestrian, before crossing a street or highway, must (1) make proper observation as to approaching traffic, (2) observe approaching traffic and form a judgment as to its distance away and its speed, (3) continue his observations while crossing the street or highway, and (4) exercise that degree of care and caution which an ordinarily prudent person would exercise under like circumstances.”

The evidence in this case conclusively shows that the plaintiff did not exercise the degree of care required from a reasonably prudent person. It logically and naturally follows that such heedless and inattentive conduct was negligence as a matter of law. Numerous courts including the Utah Supreme Court in similar circumstances have so held.

In *Mingus v. Olsen*, 114 Utah 505, 201 Pac. (2d) 495, a directed verdict was sustained on the grounds of plaintiff's contributory negligence. In concluding that the plaintiff either did not look or did not make sufficient or adequate observation, this court said:

"More convincing than the direct testimony that deceased did not look, is the further evidence that deceased neither said nor did anything to indicate that he was at all aware of the danger presented by defendant's approaching automobile. He seems to have been wholly unaware of its approach. Certainly he did nothing either to warn his wife, nor to rescue either himself or her from their position of peril. On this evidence, it must be said as a matter of law that deceased either failed to look, or having looked, failed to see what he should have seen."

In *Sant v. Miller*, 115 Utah 559, 206 Pac. (2d) 719, plaintiff and his wife were crossing the main street of Logan, Utah, from east to west at a point between intersections. They stopped somewhere over the center of the highway on the west side of the street to allow south-bound traffic to pass. Plaintiff was gazing in a south-westerly direction when defendant's automobile, approaching from the north struck the plaintiff and injured him. Plaintiff's wife had seen the impending danger and had stepped out of the way. Verdict was directed in favor of defendant by the lower court and affirmed on appeal, the court saying:

"Appellant was aware of the fact that he was taking a chance in crossing the street at a place contrary to law. He should also have known that



a driver of a vehicle would not ordinarily anticipate the presence of pedestrians on the street at the time and place of the accident. Knowing that his presence might not be anticipated and knowing that traffic on the west side of the road was approaching from the north and with nothing of importance to distract his attention, it was appellant's duty to watch the traffic he knew was approaching his location.

“\* \* \* Having omitted to continue to watch, he failed to exercise the degree of care required of a pedestrian who leaves a place of safety and places himself in a position of peril. A greater degree of care is necessary upon the part of a pedestrian who undertakes to cross a city street at a prohibited place than is placed on one who uses a marked crosswalk.”

*Tysinger v. Cobble Dairy Products*, (N.C.) 36 S.E. (2d) 267:

“Now, then, as to the alleged contributory negligence of plaintiff's testate, it is sufficient to say that in crossing the highway at a point other than a marked crosswalk at an intersection it was his duty to yield the right of way to all vehicles upon the highway. G.S. Sec. 20-174 (a). The highway was visible according to all the evidence, for at least 300 yards in the direction from which the truck of the defendant was approaching. And in leaving the point where he was talking to the witness Everhardt to go toward his home, he necessarily faced in the direction of the oncoming truck. He must have seen the truck and taken the chance of crossing or, have been inattentive to the duty imposed upon him by law, and started across without looking for vehicles on the highway. In either event, a reading of the evidence leads to the con-



clusion as a matter of law, that his own conduct contributed to his injury and death, unfortunate and regrettable as it may be.”

In *Horton, et al v. Stoll*, (Cal.) 40 Pac. (2d) 603, plaintiff, a twenty-year old girl, was crossing between intersections not in a pedestrian lane. As she came to the further west car track first rail, she hesitated and looked or glanced to the north, but failed to remember what, if anything, she saw. She was under the impression, however, that she had plenty of time to cross the street. After taking a step or so, and while she was still on the car track, she was hit by the left front fender of defendant's car coming from the north. In sustaining a non-suit, the court said:

“We are of the opinion that the facts of this case show affirmatively that plaintiff failed to use due care and that she failed in this respect was the proximate cause of the injury.

“Had she looked she must have seen defendant's car approaching a few feet away, for she had taken only a step or two from her position of safety when she was struck.

“It was plaintiff's duty from the position she was in upon the highway to yield to defendant the right of way.

“The only conclusion that can be reached from the evidence is that plaintiff failed to take the trouble to properly look for automobiles on the side of the street as she crossed, or that she saw the automobile and for some unexplained reason stepped directly in its path. Under either theory she failed to use due care, which precludes her rights of recover.”

In *Reid v. Owens*, 98 Utah 50, 93 Pac. (2d) 680, this court in holding plaintiff guilty of contributory negligence as a matter of law said :

“A case very similar to the instant case is *Andrus v. S. J. Boudreaux & Son*, La. App. 158 So. 679. There the plaintiff was foreman of about twelve men engaged in roadwork, about half of them being on each side of the road, but not on the paved portion, as defendant's truck approached. The paymaster had just pulled up his car across the road from the plaintiff who proceeded to cross the road diagonally to the paymaster's car. The plaintiff testified he did not see defendant's truck, but the court noted a probable inference that he saw it from the fact that he had ‘walked unusually fast, rushed or run.’ But this was immaterial as the court found: ‘The on-coming truck was in full open view of the road and was bound to have been seen by the plaintiff had he looked down the road at the time of starting across.’ The court then held the plaintiff to the knowledge he would have had if he had looked and held: ‘It was his duty to look for his safety before starting across. He must be regarded as having seen the truck whether he looked or not’; and the court approved the holding of the lower court that plaintiff was guilty of contributory negligence as a matter of law. ‘He should not have thus voluntarily, heedlessly, and thoughtlessly left a safe place and exposed himself to an obvious danger by trying to cross the road under the circumstances which attended such a movement.’

“As the court said in *Andrus v. S. J. Boudreaux & Son*, *supra*, he was chargeable with what he would have seen had he looked. He either proceeded without looking or, having seen the ap-

proaching car, he chanced crossing in face of the hazard. The latter would clearly, under the circumstances, have been negligence on his part. The approaching vehicle was at the instant of deceased's entry onto the pavement so near that no prudent person would attempt crossing in front of it. The more reasonable inference is he did not see the car. But had he looked he would have seen it, and he is charged with knowledge of what he would have seen had he the duty to look. We think that he clearly had such duty.

\* \* \*

"The presence of the barriers on the untraveled portion of the highway and of piles of dirt on the side of the pavement, and the presence of workmen, would not justify deceased in assuming that the driver of a vehicle will, because of the presence of these elements, so drive as to avoid striking one who, without looking, darts out into the path of the vehicle. We conclude that under the evidence viewed most favorably to the plaintiffs the deceased was guilty of contributory negligence as a matter of law."

In the recent case of *Cox v. Thompson* (Utah) 254 P. (2) 1047, a wrongful death action, the evidence was that the deceased had started across a poorly lighted highway in Orem, Utah, at night and had traveled more than halfway across the highway, when his wife called to him, whereupon he turned and walked directly into the path of a southbound automobile. The trial court directed the verdict in favor of the defendant on the grounds that the deceased was guilty of contributory negligence as a matter of law. This court upheld the trial courts decision and said:

“On the evidence set forth the trial court correctly found decedent contributorily negligent as a matter of law. From a fair appraisal of the evidence, reasonable men can draw but one inference and that inference points unerringly to the negligence of the decedent. In response from a call from his wife, decedent who was crossing east across a poorly lighted highway, turned and walked directly into the path of defendant’s automobile. Crossing a highway at a point where there was no marked crosswalk, decedent was duty-bound to yield the right of way to the vehicle upon the roadway. See 46-6-79, Utah Code Annotated 1953. This he failed to do. He, in addition apparently failed to look, or having looked failed to see what he should have seen and paid heed to it. He said nothing and did nothing which indicated that he was in any way aware of the danger presented. Decedent was properly found negligent as a matter of law.”

In this case, as in the cases cited, the plaintiff either unaware of the approach of the defendant’s automobile or heedless of her own safety, left her position of comparative safety in the center of the street and walked directly into the path of the defendant’s vehicle. Whether she failed to see the defendant’s vehicle, as she herself testified, or seeing it deliberately crossed in front of the vehicle, in either instance, she was guilty of negligence as a matter of law.

**b. FAILURE TO YIELD RIGHT OF WAY.**

The evidence in this case discloses that the plaintiff may have crossed the highway where this accident occurred in one of two ways. She may have started across the highway within the marked crosswalk and proceeded

to the center of the highway. From that point she turned and walked up the center of the highway 45 feet and then diagonally toward the point of impact, some 69 feet east of the crosswalk at a point apparently between the two lanes of eastbound traffic. The two eye witnesses testified that the plaintiff crossed the highway more or less in a diagonal line from the driveway in front of the Western Co-op to the point of impact. Under either version, plaintiff was not within the crosswalk or did not have a preferred position upon the highway.

Section 46-6-79 Utah Code Annotated 1953 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.”

It is clear that as soon as plaintiff left the center of the highway and proceeded directly into the path of eastbound traffic, she failed in her duty to yield the right of way as provided by law. Her failure to so yield the right of way was clearly negligent and it is readily seen that had she not continued her course, this accident would not have happened.

In *Fearn v. City of Philadelphia*, (Pa.) 182 Atl. 534, the court said:

“When a pedestrian traverses a street between intersections, since he is not crossing at a place where he is expected to be, he must exercise a higher degree of care for his safety; motorists are correspondingly held to a less degree of care.”

See also *Sheldon v. James*, (Cal.) 166 Pac. 8, where the court said:

“A greater degree of care is necessary upon the part of the pedestrian who undertakes to cross a congested highway other than at the established crosswalk and especially so if in the act he does not essay a direct crossing, but pursues a long diagonal route.

“The observation of ordinary care by such a pedestrian is not fully performed by merely looking to the left or right as he steps upon the street. The observance of that care is imperative upon him during all of the time that he is crossing.”

## POINT II.

### PLAINTIFF WAS GUILTY OF NEGLIGENCE AS MATTER OF LAW.

The principal argument of the appellant appears not to be that the plaintiff was not negligent in the manner in which she proceeded across 2nd South Street, but that the trial judge should have submitted the issue of whether or not her negligence was a proximate cause of her injuries to the jury. Is the causal connection between the negligence of the plaintiff and her own injuries so patent as to preclude the submission of that issue to a jury?

In Sec. 6127 of *Blashfield's Cyclopedia of Automobile Law and Practice*, it is stated:

“Although one may be under the duty to look before crossing a city street, if he is injured by an



automobile while crossing and would escape the consequences of his negligence, he must show that, even if he had looked, the accident would still have happened."

If the plaintiff had seen the defendant's vehicle, which was plainly visible, or seeing it had yielded the right of way to that vehicle, the accident of which plaintiff complains certainly would not have happened.

In *Burgess v. Salt Lake City railroad company*, 17 Utah 406, 53 Pac. 1013, plaintiff in crossing Second South between Main and West Temple Streets looked for west-bound street cars, but failed to look for an eastbound car and was injured when he stepped in front of the latter. There was some evidence that at the place of the injury, there were flagstones laid flush with the paving blocks indicating a crossing and also evidence that pedestrians crossed the street at any place between Main and West Temple. The court reversed a judgment in favor of plaintiff and remanded the case for a new trial. In holding that plaintiff was contributorily negligent as a matter of law under the evidence, the court said, starting on page 410 of the Utah Report:

"On the other hand, the evidence shows that the plaintiff incautiously and heedlessly stepped upon the track, where he received the injury. In the hurry of the moment, he attempted to cross the street and track without exercising that care which a man of ordinary prudence ought to exercise under like circumstances. Had he but used his senses it is clear that he could have avoided the accident. This it was his duty to do; and, having failed so to do, he cannot be heard to complain of



any injury that resulted from the failure which was the proximate cause thereof.

“The plaintiff, in crossing the street, was bound to exercise the same degree of care as that which it was incumbent upon the railway company to exercise.

“The car has the right of way in case of meeting a person or vehicles on the track, but each party, in order to avoid accident, is bound to exercise ordinary care, and such reasonable prudence and precaution as the surrounding circumstances may require.”

In *Miller v. Utah Light & Traction Co.*, 96 Utah 369, 86 Pac. (2d) 37, a directed verdict in favor of defendant was affirmed on the grounds that plaintiff was held guilty of contributory negligence as a matter of law in standing in a pedestrian lane, but so close to a passing bus that the overhang of the bus when turning struck her. The court on page 380 of the Utah Report quoted *Kent v. Ogden L. & Tr. Co.*, 50 Utah 328, 167 Pac. 666:

“When, as in this case, there can be no doubt whatever regarding the proximate cause of the accident, nor any doubt that it was wholly within the power of the deceased at any moment before the collision to have averted it by merely moving a foot or two out of the zone of danger, this court cannot shirk its duty in determining the result.  
\* \* \* The deceased’s conduct constituted the proximate cause of the injury.”

In *Trumbley v. Moore*, (Neb.) 39 N. W. (2d) 613, plaintiff was crossing a street between intersections when struck by the defendant’s vehicle. The evidence showed

that the wheels of the vehicle were straddling the center line of the road. A verdict for the plaintiff in the lower court was reversed on appeal. The court said:

“It is true that the left wheels of the Hamer car went over the center line, but there is nothing to indicate that this was the proximate cause of plaintiff’s injury. The proximate cause of the injury was the attempt of plaintiff to cross the street between intersections without looking, or if he did look, in not seeing that which was in plain sight. \* \* \* The evidence reveals nothing which would excuse plaintiff’s failure to see the Hamer car and respect the right of way that it had. A right of way means nothing unless persons obliged to respect it are required to see an approaching favored car that is in plain sight. Plaintiff was negligent in attempting to cross the street between intersections as he did. Negligence on the part of the defendant Hamer is not shown by this record. Under such circumstances plaintiff’s own negligence is the proximate cause of the accident and there is nothing for a jury to determine. The trial court should have directed a verdict for the defendants.”

In *Milligan v. Weare*, (Maine) 28 Atl. (2d) 463, plaintiff sought to recover for personal injuries sustained when defendant’s car driven by his employee knocked him down as he was crossing a highway. The point of the three lane highway at which the accident occurred was an intersection which was marked with stop lights. Since traffic waiting for the lights was blocking the crosswalk, plaintiff walked between cars and into the center lane, which was reserved for left turning, and into

the path of defendant's rapidly approaching automobile. The court held:

“By his own admission the plaintiff without warning walked through a line of cars which, until he emerged, obscured his movements and stepped into the center lane of a main highway in front of a rapidly moving automobile which must have been a plain view but was not seen by him. \* \* \* We are convinced that he either did not look at all to his left or if he did he was so inattentive that he failed to observe the danger which threatened him and take available precautions for his own safety. He gave the driver of the approaching car no time or opportunity to avoid the collision. It was his own negligence which was the proximate cause of his injuries.”

In view of the aforementioned authorities, it is plain that when a person attempts to cross a highway and the evidence taken most favorably in his behalf shows that he heedlessly walked into the path of an oncoming vehicle, he has failed to exercise reasonable care, and that failure is at least a contributing factor in his injuries. That principle can have no greater application than to the case at bar.

While the argument is not made in plaintiff's behalf or raised in the trial court or in her pleadings or otherwise, it is anticipated that the argument may be made or the question raised in this court as to whether the defendant in this case had the last clear chance to avoid the accident, making the question of proximate cause a jury question.

The doctrine of last clear chance has no application to a case where, as here, the defendant's negligence continued up to the event out of which the damage or injury arises. We quote the example given by Justice Wolfe in *Graham v. Johnson*, 109 Utah 346 166 P (2) 230, on page 359 of the Utah Report:

"A defendant is exceeding the lawful restricted speed limit; another driver, the plaintiff, fails to keep a proper lookout and crosses the path of the oncoming car and gets stalled on its path. Both up to that point might be guilty of negligence and neither be able to recover against the other. But if the oncoming driver, realizing the situation of the plaintiff, had a clear opportunity to avoid the accident and failed to utilize it, that counts just as if the plaintiff had not been negligent and the defendant had been."

In the *Mingus vs. Olsen* case, *supra*, where the evidence would sustain a finding that the deceased had proceeded 19 feet from the curb of a street into the street at a speed less than three miles per hour, and the defendant approached the point of impact at a speed of twenty miles per hour, and the defendant could have stopped his car had he seen deceased crossing, Justice Wade in a concurring opinion on page 516 of the Utah Report said:

"In the present case, both defendant and decedent were guilty of the same kind of negligence. Each negligently failed to observe the approach of the other. The negligence of each continued to the time of the accident and either of them could have avoided the accident within

a very short time prior to the impact had he observed the approach of the other. There does not appear to be any good reason why the last clear chance doctrine should allow a recovery under these circumstances."

In the case of *Cox vs. Thompson*, supra, this court said:

"The actors negligent conduct is a legal cause of harm to another (himself) if,

(a) His conduct is a substantial factor in bringing about the harm.

(b) There is no rule of law relieving the actor from liability because of the manner in which his negligence resulted in the harm."

If decedent had yielded the right of way to defendant's automobile or if he had looked up the road and had seen the approaching car and paid heed to the danger which it presented, the accident would not have happened. It is patent that the negligence of the decedent was a substantial factor in bringing about his death.

In this case the plaintiff could have avoided the accident up to the very instant of the impact had she been observing the proper care for her own safety by simply remaining in the center of the street a moment or two longer and allowing the defendant's vehicle to pass.

Moreover the Doctrine of Last Clear Chance could have no application to the evidence of this case since it does not appear that the defendant had a clear

opportunity to avoid the accident after he became aware of the plaintiff's position of peril. In the case of *Cox vs. Thompson*, supra, the court said:

"The last clear chance doctrine is inapplicable in the present instance. In order for the question of last clear chance to be properly submitted to a jury the evidence must be such as would in all probability reasonably support a finding that there was a fair and clear opportunity, in the exercise of reasonable care, to avoid the injury. It would not be sufficient that it appear from hindsight that by some possible measure the defendant by the "skin of his teeth" could have avoided the injury. See *Morby vs. Rogers*, (Utah) 252 P 2d 231."

"This court has adopted as the rule in this state the last clear chance doctrine of Sections 479 and 480 of the Restatement of Torts. See *Compton et al vs. Ogden Union Ry. and Depot Co.*, supra. Section 480 reads:

"A plaintiff who, by the exercise of reasonable vigilance could have observed the danger created by the defendant's negligence in time to 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."

"(See concurring opinion in *Morby vs. Rogers*, supra, wherein Section 480 of the Restatement of Torts is



discussed concerning the apparent need for defendant to be antecedently negligent and the suggestion therein made that it is necessary to frame a rule in the light of defendant's antecedent negligence.)

“Thus the matter was properly withheld from the jury if the evidence, taken in the light most favorable to the plaintiff, would not reasonably and clearly support a finding that (a) defendant knew of decedent's situation of danger, and (b) realized or had reason to realize that plaintiff was inattentive and unlikely to discover his peril in time to avoid harm, and (c) the defendant was thereafter negligent in failing to utilize with reasonable care and competence his then existing ability to avoid harming decedent.”

As was said in *Compton vs. Ogden Union Railway & Depot Co.*, Utah 235 P 2d 515:

“The rule approved by this court where plaintiff is negligently inattentive and has subjected himself to risk of harm as provided in Section 480 is that he can recover from a defendant who knew of his situation and realized or had reason to realize that plaintiff is inattentive, and unlikely to discover his peril in time to avoid harm, and thereafter is negligent in failing to use ordinary care with the means at his disposal to avoid harming him. For the rule to be otherwise, we would again only have the negligence of the plaintiff and defendant concurring together to proximately cause the injury. \* \* \*

“In the principal case in order for plaintiffs to make out a case of last clear chance, it would have been necessary that the defendant know that



decedent was in a position of peril, and in addition have realized or had reason to realize that decedent was inattentive and unlikely to discover her peril in time to avoid the threatened harm, *and defendant must thereafter have failed to exercise reasonable care in connection with its then existing ability to avoid harming decedent.*" (Italics ours.)

Not only must the evidence show that the defendant had an opportunity to avoid the accident after he becomes or has reason to be aware of plaintiff's negligence, but the opportunity must be shown by clear and convincing evidence.

The case of *Graham vs. Johnson*, 166 Pac. (2d) 230, 109 Utah 346, involved the opportunity of a defendant to avoid injury to a thirteen year old boy playing ball in the street. The court said:

" \* \* \* But in the last clear chance doctrine the word 'clear' has significance. In a case such as this when both parties are more or less rapidly changing their positions the evidence must be clear and convincing that the party whom it is claimed could have avoided the accident had a 'clear' chance to do so.

"Construing any reasonable combination of facts on this theory of the case most favorable to Gary, if Darlene was coming at 10 miles an hour down the extreme west side of the street and Donald shouted at Gary setting him off toward the car when he, as must in such case be inferred, was not then in danger, the jury must be instructed that it should be clearly convinced in such case that she was far enough north of

him as to give her a clear chance to avoid the accident. That is to say, she must have had a clear and ample opportunity to sense the danger into which he was coming and clearly have had time after that to apply her brakes and stop the car after she sensed or should reasonably have sensed that he was putting himself into danger. Otherwise there is no room for the application of the last clear chance doctrine. One should not be held liable for failing to avoid the effect of the other's negligence in a situation where it is speculative as to whether he was afforded a clear opportunity to avoid it. In a situation where both parties are on the move the significance of the word 'clear' is most important. Otherwise we may put the onus of avoiding the effect of one's negligence on a party not negligent. That party's negligence only arises when it is definitely established that there was ample time and opportunity to avoid the accident which was not taken advantage of."

In analyzing whether or not the defendant had a clear chance to avoid injury to the plaintiff, after the plaintiff had placed herself in a perilous position and defendant had become aware of her situation and what the defendant did to avoid the accident thereafter, we must analyze the testimony of the defendant himself.

The evidence is that when the defendant reached the point "B1" some 50-75 ft. west of the crosswalk which is still 69 feet west of the point of impact, he first noted the plaintiff in the center of the highway at point "S1." When he was at point "B2", still some 15 feet west of the crosswalk, he honked his horn and

reduced his speed of his automobile from 25 to 20 miles per hour. At that point the plaintiff was still in the center of the highway. Not until the defendant's vehicle had reached a point 25-30 feet from the point of impact did the plaintiff leave the center of the street and start across in front of his vehicle. Up to that point, the defendant had been led to assume by the fact that plaintiff had remained in the center of the street that she would yield the right of way to his automobile. When it became apparent that she was not going to yield the right of way, the defendant immediately applied his brakes and reduced his speed to one mile per hour, continuing on only 3 feet beyond the point of impact. Moreover, we need not rely on the defendant's version entirely since it is corroborated by the testimony of the independent witnesses. Both Frank Bonner and Charles Sweet testified that the plaintiff hesitated in the center of the highway. Charles Sweet testified that the defendant's vehicle was only five feet from the plaintiff at the time she crossed in front of the defendant's vehicle. It is apparent from the fact that the defendant had almost entirely stopped his vehicle at the point of impact that he did all that might be reasonable and expected of him to avoid injury to the plaintiff after he became aware of her situation. In fact, analyzing the defendant's testimony it is apparent that not only was he not negligent after he became aware of plaintiff's position of peril, but that he was not negligent in any respect at any time. There is no evidence that he was traveling at a high or unreasonable rate of speed. There is no

evidence that he failed to see the plaintiff on the highway. He undertook to warn the plaintiff of the approach of his automobile by honking his horn. He continually watched the plaintiff on the highway. He was led by her actions to believe that she was not going to yield the right of way. He did everything that might be reasonably expected to avoid hitting her. It is submitted therefore that not only does the evidence fail to show that the defendant failed to exercise reasonable care after he discovered the plaintiff in a position of peril by reason of her own negligence, but that there is no evidence that he at any time was guilty of negligence.

## CONCLUSION

The trial judge in an action brought to recover damages by reason of the negligence of another should not take the issue of contributory negligence from the jury if there is a reasonable basis upon which reasonable minds might conclude that they are not convinced by preponderance of the evidence that plaintiff was guilty of contributory negligence or that such negligence proximately caused the injury for which the plaintiff is seeking to recover. The evidence in this case, taken in the light most favorable to the plaintiff, leaves no reasonable doubt that the plaintiff was guilty of contributory negligence and that such negligence proximately contributed to her own injury.

The evidence shows that, even though the plaintiff with very little inconvenience to herself could not have proceeded directly across the street within the confines

of a marked crosswalk, in which event she would have preference over vehicles using said highway. Plaintiff chose to leave the comparative safety of the crosswalk and to cross the highway at a point where vehicles had the preferred status and she was required to yield the right of way under section 41-6-79, Utah Code Annotated 1953.

The evidence further shows that the plaintiff had every opportunity to observe the approach of the defendant's automobile and that she either failed to observe the automobile or, observing it, was heedless of the danger involved and crossed directly in front of the automobile. Except for her failure to observe and yield the right of way to the defendant's automobile, this accident would not have happened. Her conduct was an integral part of the casual factors giving rise to her own injuries which were a proximate and natural result of such conduct.

The defendant had no reason to believe that the plaintiff would cross in front of his vehicle, but on the contrary, had a right to assume and indeed was led to believe by the plaintiff's own conduct, in hesitating in the center of the highway, that the plaintiff would yield the right of way to his vehicle. When it became apparent to him that the plaintiff did not intend to so yield the right of way, he applied his brakes and took all reasonable precaution to avoid the accident so successfully that had the plaintiff been three feet further east on the highway, his efforts would have been successful.

It is therefore respectfully submitted that the court did not err in directing a verdict against the plaintiff, but that the status of the evidence directed that he do so.

Respectfully submitted,

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