

1953

# James H. Beckstrom v. Paul Williams ; Brief of Plaintiff and Appellant

Utah Supreme Court

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Pugsley, Hayes & Rampton; A. U. Miner; Attorneys for Plaintiff and Appellant;

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## Recommended Citation

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**IN THE SUPREME COURT**  
**of the**  
**STATE OF UTAH**

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**JAMES H. BECKSTROM,**

*Plaintiff and Appellant,*

— vs. —

**PAUL WILLIAMS,**

*Defendant and Respondent.*

Case No.  
8027

**FILED**

SEP 3 - 1953

BRIEF OF PLAINTIFF AND APPELLANT

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**PUGSLEY, HAYES & RAMPTON**  
**A. U. MINER,**

*Attorneys for Plaintiff and*  
*Appellant.*

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BRIEF OF PLAINTIFF AND APPELLANT

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This was an action brought by plaintiff against the defendant for damages for personal injuries and for property damage as a result of a collision between a tractor on which plaintiff was riding and the truck driven by the defendant on August 3, 1951 near the Benjamin Crossroads in Benjamin, Utah County, Utah. The defendant, Paul Williams, filed a counterclaim for damages to his motor vehicle and for personal injuries. The case was tried to a jury commencing on February 16, 1953 and concluding on February 17, 1953, with the Hon. R. L. Tuckett, Judge, presiding. The jury returned

verdicts of no cause of action on plaintiff's complaint and also on defendant's counterclaim. The appeal is taken by the plaintiff from the verdict of the jury no cause of action on plaintiff's complaint.

### STATEMENT OF FACT

The accident out of which this action arose occurred on August 3, 1951 at about 4:30 P.M. on a highway known as state road No. 228 which runs north and south in Benjamin, Utah County, Utah. The point of the accident was just north of the point known as Benjamin Crossroads. The hard surface portion of the highway in the vicinity of where the accident occurred ranges from 21 to 22 feet wide so that it would be from 10½ to 11 feet each side of the center of the highway (R. 186). At the point where the accident occurred there is a private lane leading from the home of Arch Beckstrom, a brother of the plaintiff, which said driveway as it comes from the yard of the Beckstrom home crosses over a culvert. The driveway at that point is approximately 25 feet wide, the culvert extending some distance beyond the 25 foot width of the private driveway (R. 186). The tractor on which the plaintiff was sitting at the time the collision occurred was a John Deere Model A tractor, having a weight of 5, 046 lbs. (R. 177). The tractor has an overall length of 11½ feet; the driver's seat was at the extreme rear, between the rear wheels, it being 11 feet from the rear of the driver's seat to the front of the tractor and 9 feet from the front of the seat to the front of the tractor front wheel. The rear wheels were 5 feet in diameter. From the steering wheel to the front of the

tractor hood is 7 feet 6 in. (R. 49-50).

At the time the collision occurred there was a heavy growth of weeds, willows and trees along the fence line and barrow pit on the west side of the road and particularly extending along said side of the road north from the driveway.

Just prior to the accident the plaintiff Beckstrom had gone into the yard of the Arch Beckstrom home and hooked a side-delivery rake onto the tractor. He then proceeded to pull said side-delivery rake with said tractor out of the driveway of the Beckstrom yard and onto the highway, his intention being to turn north after he got onto the highway. After he passed his brother's house, which is near the fence line, he stopped and checked his equipment. He then started out again and was just creeping along, barely moving, as he started out of the driveway and onto the highway. He could not see down the highway until he had got outside and beyond the fence line on account of the high weeds and trees that were along the fence line and ditch bank (R. 50). Plaintiff stated that as he was crossing over the culvert which is at the fence line, he was practically to a stop; that he was just creeping along at not more than 1 mile to  $1\frac{1}{2}$  miles per hour (R. 50-51). There is no evidence whatsoever in the entire record that the plaintiff was at any time prior to the collision, nor at the time of the collision, travelling more than  $1\frac{1}{2}$  miles per hour. His testimony as to that speed is the only evidence in the record concerning the speed of the tractor. As soon as the plaintiff got far enough beyond the fence

line where he could see, he looked up and down the road. He could not see anything coming from the south, but he could see the truck coming from the north toward him, at a speed which he estimated to be around 45 or 50 miles per hour (R. 51-52). At the time he could first look down the highway and could first see the defendant's truck approaching from the north, the plaintiff in his position sitting on the tractor seat and leaning forward would have been about 10 feet beyond the fence line (R. 51), and the front wheel of plaintiff's tractor was almost to the west edge of the hard surfaced portion of the highway (R. 51). At that time the plaintiff estimated that the defendant's truck was about 300 to 325 feet north of him (R. 51). The plaintiff's own words as to what he did immediately when he saw the defendant's truck coming at a distance of about 325 feet were as follows:

"I shut off the gas and throwed it into neutral and it kind of — there is a little swale down through there and it kind of coasted down, and I jumped up and shut off the gas and throwed it into neutral and pulled on the brake. I pulled on the hand clutch, it serves as sort of a brake on the tractor, and it came to rest with the front wheels just out on the highway." (R. 52).

He further stated that he applied the foot brake and the hand brake and stood with his foot on the foot brake to hold the tractor at a complete stop (R. 74-75).

Plaintiff stated that at the time the tractor came to rest the front wheels were about 5 feet out onto the hard surface of the highway, which would place them about 5 feet west of the center line of the highway (R. 52).

He stated that by the time the tractor was brought to a stop in the position indicated, the defendant's truck was approximately 125 feet from the tractor. When asked what he then did, he stated:

“Well, I was practically helpless, I held the brake on and I was wondering all the time why — I was expecting this truck to either stop or make a turn because he had room enough to get out around me. I was standing there on the platform, I didn't have any time to back up and put it in any other gears, I just stood there wondering why he didn't make an effort of some kind to make a turn or stop.” (R. 53).

The truck of the defendant continued on and struck the tractor of the plaintiff broadside, the truck hitting the tractor between the front and back wheels. The impact knocked the two and a half ton tractor about 30 or 40 feet south straight along the edge of the highway, the two vehicles being stuck together as they came to a stop (R. 54). The tractor tire marks as it was pushed along the edge of the highway sideways went straight south (R. 98). There were no tire marks at all except those made by the tractor as it was pushed sideways (R. 98), and there were no tire marks at all north of the point of impact (R. 98).

There was testimony that at the time the defendant's truck passed the Bingham home about between 450 and 600 feet north of the point of collision, the truck was travelling between 40 and 60 miles per hour (R. 104). The testimony of both James R. Bingham and Alpheus Bingham was that from the road in front of their home,

approximately 450 to 600 feet north of the accident, they could look down the road and clearly see the vehicles where they had collided and that the vision was good (R. 104-105, 111). They stated that the back wheels of the tractor as it came to rest after the collision were just off the highway, and that the marks from the tractor wheels went straight south along the edge of the highway (R. 105). The defendant stated that he first noticed the tractor when he was about 65 feet from the point of impact (R. 152). When he first noticed the tractor, he did not just notice the front wheels emerging from behind the bushes or brush, but noticed the whole tractor (R. 161). The defendant said when he first saw the tractor when he came down the highway, it was about 2 or 3 feet west of the oiled portion of the west side of the highway, travelling east (R. 150), and he believed the tractor moved 5 or 6 feet from the time he saw it until the time of the impact (R. 162). He estimated his speed at the time of the impact was about 40 miles per hour (R. 148). He stated he was able to apply his brakes before the accident and did apply them and felt them take hold (R. 151), but the evidence is undisputed that there was no physical evidence on the highway of any brake marks from the defendant's truck. Exhibits A, B, C and D are photographs taken of the scene of the accident and the vicinity thereof. Exhibit A is a photograph of the highway looking from north to south and showing the driveway from which the plaintiff's tractor entered the highway. Said driveway is indicated by an automobile standing on the culvert and across the fence line of the drive-

way. The telephone pole which is shown in the picture north of the driveway is 100 feet north of the point of impact (R. 87). Exhibit B is a photograph taken from the extreme north edge of the driveway and shows the road looking from the driveway at the fence line as one looks north. Exhibit C is a photograph taken looking north along the highway from a point south of the driveway. Exhibit D is a photograph taken from the point on the highway where the plaintiff Beckstrom believed the defendant's truck was when he first saw it. This picture also shows the position of the tractor on the highway at the time when Beckstrom first saw the defendant's truck approaching (R. 91).

Plaintiff requested that the court submit to the jury instructions embodying the doctrine of the last clear chance. The court refused to submit such instructions to the jury or to permit the jury to consider such doctrine.

## STATEMENT OF POINTS

### POINT ONE

THE COURT ERRED IN FAILING AND REFUSING TO INSTRUCT THE JURY ON THE DOCTRINE OF LAST CLEAR CHANCE, AND IN FAILING AND REFUSING TO GIVE TO THE JURY PLAINTIFF'S REQUESTED INSTRUCTIONS NOS. 10, 13, 14 EMBODYING THE LAW AS IT RELATES TO THE DOCTRINE OF LAST CLEAR CHANCE.

### POINT TWO

THE COURT ERRED IN FAILING AND REFUSING TO GIVE TO THE JURY PLAINTIFF'S REQUESTED INSTRUCTION NO. 11 AS REGARDS THE DUTY OF A PERSON MOVING A TRACTOR ONTO THE HIGHWAY.

### POINT THREE

THE COURT ERRED IN REFUSING TO PERMIT THE PLAINTIFF TO INTRODUCE THE EVIDENCE BY THE WITNESS KENNETH J. TANNER AS TO THE STATEMENT MADE BY THE PLAINTIFF IN THE PRESENCE OF SAID TANNER IMMEDIATELY FOLLOWING THE COLLISION, WITH REGARD TO THE MANNER IN WHICH THE ACCIDENT OCCURRED AND FOR THE PURPOSE OF SHOWING THAT SUCH STATEMENT WAS CONSISTENT WITH THE TESTIMONY OF THE PLAINTIFF AND INCONSISTENT WITH THE IMPEACHING TESTIMONY OF OFFICER BEARDALL.

### ARGUMENT

#### POINT ONE

THE COURT ERRED IN FAILING AND REFUSING TO INSTRUCT THE JURY ON THE DOCTRINE OF LAST CLEAR CHANCE, AND IN FAILING AND REFUSING TO GIVE TO THE JURY PLAINTIFF'S REQUESTED INSTRUCTIONS NOS. 10, 13, 14 EMBODYING THE LAW AS IT RELATES TO THE DOCTRINE OF LAST CLEAR CHANCE.

It is our position that the evidence in this case clearly brings the matter within the doctrine of last clear chance and that the plaintiff was entitled to have the case submitted to the jury under his theory and to have the jury consider the evidence under instructions with regard to the doctrine of last clear chance. We do not believe it necessary to discuss in detail the numerous cases involving consideration of the doctrine of last clear chance by the Utah courts, because each case involving the application or non-application of such doctrine stands peculiarly on its own set of facts. The only thing that need be considered is as to what rules are applicable, as related to the doctrine of last clear

chance under the decisions of this court, and to then apply such rules to the facts and evidence presented in this case.

One of the later cases decided by the Supreme Court of the State of Utah and wherein the Court sets forth the rules and requisites necessary to bring the case within the Doctrine of Last Clear Chance, is the case of *Compton v. Ogden Union Railway & Depot Co.*, 235 Pac. (2d) 515. In that case, as in numerous other cases (See *Andersen v. Bingham & Garfield Ry. Co.*, 214 Pac. (2d) 607; *Holmgren v. Union Pacific Railroad Co.*, 198 Pac. (2d) 459; *Morby v. Rogers*, 252 Pac. (2d) 231) our Supreme Court has stated that the case law in Utah gives approval to the rule promulgated by the American Law Institute Restatement of Torts, Volume II, Sections 479 and 480, as being the law of this State. Section 479 of the Restatement of Torts reads as follows:

"A plaintiff who has negligently subjected himself to a risk of harm from the defendant's subsequent negligence may recover for harm caused thereby, if immediately preceding the harm, (a) the plaintiff is unable to avoid it by the exercise of reasonable vigilance and care and (b) the defendant (i) knows of the plaintiff's situation and realizes the helpless peril involved therein; or (ii) knows of the plaintiff's situation and has reason to realize the peril involved therein, or (iii) *would have discovered the plaintiff's situation and thus had reason to realize the plaintiff's helpless peril had he exercised the vigilance which it was his duty to the plaintiff to exercise*, and (c) thereafter is negligent in failing to utilize with reasonable care and competence his then

existing ability to avoid harming the plaintiff."

In referring to the above quoted Section as adopted and approved by the Case Law of Utah, our Supreme Court in the Compton case, *supra*, stated:

"That section deals with situations where the plaintiff is unable to avoid the consequences of her own negligence or what is often referred to as 'inextricable peril', and by reason thereof, the defendant alone has the last clear chance to avert an injury to the plaintiff. Where the plaintiff is thus in a position of inextricable peril the defendant is liable either (1) if the defendant knows the plaintiff's situation and realizes or has reason to realize her helpless peril, or (2) in the case where a duty exists toward the plaintiff, if in the exercise of reasonable vigilance the defendant should have discovered the plaintiff's helpless situation in time to avoid injury. But this is so only if the plaintiff's negligence has come to rest and plaintiff is thereafter unable by the exercise of reasonable vigilance and care to avoid the injury herself."

Let us then for a moment consider the case here before the court in the light of said Section 479 as said Section has been interpreted by this Court. There, of course, can be no question but that plaintiff is entitled to have the case submitted to the jury under plaintiff's theory of the case, with instructions embodying the Doctrine of Last Clear Chance, if under the evidence as construed most favorably to the plaintiff the jury might reasonably find the facts to be such as to permit the application of that doctrine to the case.

In order to emphasize the applicability of the

doctrine of last clear chance to this case, we shall apply step by step the testimony and evidence presented to the tests laid down in Section 479 of the Restatement of Torts above referred to.

1. The first part of the Rule assumes that the plaintiff had himself negligently subjected himself to a risk of harm from the defendant's subsequent negligence. From the verdict rendered by the jury in returning verdicts of "no cause of action" both upon the plaintiff's complaint and upon defendant's counterclaim, it appears definite that the jury considered the plaintiff was guilty of some negligence.

2. The next test as defined by said Section as construed by this Court, is that the plaintiff's negligence has come to rest and the plaintiff is thereafter unable to avoid harm to himself by the exercise of reasonable vigilance and care. The plaintiff testified that as he drove his tractor out from the driveway and inched it toward the highway at not to exceed one and one-half miles per hour, as soon as he got out far enough so he could see, he saw the defendant's truck coming from the north, about 325 feet away, and he immediately put on the brakes and shut off the gas by shutting down the lever and then grabbed the hand brake and pulled it back and stood up on the foot brake to hold the tractor from going further forward; that by the time this could be done the defendant's truck had reached a point 125 feet away from him and was bearing down upon him at a speed in excess of 40 miles per hour; that there was no time to change gears or back up, and in standing with

his foot on the foot brake to hold the tractor from going forward, he was practically helpless (R. 52, 53, 74, 75). During the interval from the time the defendant's truck was 125 feet or more from the point of impact until the time of impact the plaintiff's tractor was at a standstill at a point with the front wheel approximately 5 feet onto the concrete, which would place the wheel approximately 5 feet west of the center line of the highway. Certainly under the conditions indicated, with the plaintiff, a man of 65 years of age, sitting upon a heavy, unmaneuverable tractor, the conclusion is inescapable that plaintiff was in a position of "inextricable peril" from which he could not save himself within the period of time available to him.

This Court has set forth the next test under two alternatives, so that if either is applicable, then the case comes within the Last Clear Chance Doctrine. These two alternatives are:

(a) The defendant knows the plaintiff's situation and realizes or has reason to realize his helpless peril, or

(b) In the case where a duty exists toward the plaintiff, in the exercise of reasonable vigilance the defendant should have discovered the plaintiff's helpless situation in time to avoid injury.

The evidence which the jury could have found to be true in this case was sufficient to have brought the matter under either or both of said alternatives. We will consider these alternatives separately as follows:

1. *The defendant knows the plaintiff's situation and*

*realizes or has reason to realize his helpless peril.*

The defendant's own testimony brings the case within the first alternative. The defendant testified that when he first saw the tractor on which plaintiff was riding that the front wheel of the tractor was two or three feet west of the oil portion of the west side of the highway, traveling east (R. 150); that at the time of the impact the tractor was two or three feet west of the center of the highway, and that the tractor moved five or six feet from the time he first saw it until the time of impact (R. 158, 162); that at least one-half of the highway plus at least two or three feet was unobstructed so that he could have driven around front of the tractor and no other cars were coming from the south (R. 159). The only evidence in the record as to the speed the tractor was traveling was from one to one and one-half miles per hour. As a matter of fact, if the tractor did travel from a point two or three feet west of the oiled portion of the highway to a point two or three feet west of the center line of the highway from the time the defendant saw it until the time of the impact, then, since the one-half of the highway is approximately 10 feet wide, the tractor travelled approximately 10 feet from the time the defendant says he first saw it until the time of the impact, according to his own testimony (R. 150, 158). At the greatest speed it was testified it was traveling, namely, one and one-half miles per hour the tractor would move 2.19 feet per second. If the tractor travelled only 6 feet from the time defendant saw it until the impact, it would have taken in excess of 2 and one-half

seconds to go that distance and during the same period of time at the minimum speed which anyone stated defendant was traveling, namely 40 miles per hour, defendant would have travelled a distance of 146 feet. Hence, his own figures place him not 65 feet away from the plaintiff at the time he first saw the plaintiff's tractor, but at least 146 feet away. Of course, if the tractor actually travelled 10 feet from the time defendant first saw it, as his testimony would warrant believing, then his distance away from plaintiff would be correspondingly increased. At the distance, however, of 146 feet, defendant had ample time to stop his vehicle or sufficiently slow it down or turn out around the tractor so as to avoid the impact and the injury to the plaintiff. There is no question that the defendant not only had reason to realize plaintiff's peril, but in fact knew of plaintiff's peril because he states that the instant he saw the tractor he knew it was not going to stop (R. 151).

2. *In the case where a duty exists toward the plaintiff, in the exercise of reasonable vigilance the defendant should have discovered the plaintiff's helpless situation in time to avoid injury.*

Certainly no one can look at the evidence and deny that this case comes within the second alternative, namely, that the defendant would have discovered the plaintiff's situation and thus had reason to realize plaintiff's helpless peril, had he exercised reasonable care and vigilance. In this connection we call attention to the fact that, as properly instructed by the court, the defendant had a duty to use due care and diligence in keeping

a lookout and to actually look for and see all objects and things reasonably within the range of his vision and which might constitute a hazard; and further, that it was his duty to maintain such control over his automobile that he would be able to stop or turn to avoid a collision with any other vehicle upon the highway reasonably within the range of his vision. Under the testimony of the plaintiff, he could see the defendant's truck at a distance of 325 feet, from his seat 11 feet back of the front of the tractor. If this testimony were believed by the jury, then it is an incontrovertible fact that the defendant could, if he had been looking and keeping a proper lookout, have seen the plaintiff and plaintiff's tractor at least 325 feet prior to the time of the collision, and had he exercised reasonable care and kept his vehicle under proper control, he could have stopped long before his vehicle collided with the tractor. The Bingham boys testified that the vision was clear from a point between 450 and 600 feet north of the point of impact as one looked south down the highway. Calling attention to the photograph, Exhibit A., and the fact that the telephone pole to the north of the driveway is 100 feet north of the point of impact, such exhibit shows clearly that a person who chose to look could clearly see a vehicle standing on the culvert at the fence line even before it entered the highway or the shoulder of the highway, from a point considerably farther than 100 feet from the point of impact. Of course, in determining whether the last clear chance doctrine is applicable, we have a right to assume that the jury would believe the evidence of

the plaintiff and any other evidence in the light most favorable to the plaintiff. Bearing that in mind, there can be no question but that the jury could have found (and we think they could not properly have found otherwise) that if the defendant had exercised reasonable care in keeping a proper lookout, and if he had chose to look and see what was before him down the highway, he could have seen the plaintiff's tractor as it slowly moved out toward the highway, at a point when defendant was at least 325 feet north of the point of the impact; and at the time plaintiff's tractor came to a stop, when defendant was at least 125 feet away from said tractor, if the defendant had chose to look and observe and see what was there to see, he had plenty of time to stop or otherwise control his automobile so as to avoid the collision. We therefore submit that there can be no question whatsoever that this alternative portion of the rule is met.

The final test as set forth in Section 479 of the Restatement of Torts, as interpreted by this court, is as to whether or not, the evidence having met the previous test above enumerated, the defendant was negligent in failing to utilize with reasonable care and competence his then existing ability to avoid harming the plaintiff. This, of course, was a question for the jury, and the very fact that the jury found against the defendant on his counterclaim shows that the jury concluded that the defendant was in fact negligent, and from the evidence before them the jury might very well have found that the defendant, by the exercise of reasonable care, would have discovered plaintiff's perilous situation, and that

after he should have discovered such perilous situation, by the exercise of reasonable care and diligence he could have avoided injury to the plaintiff.

We suggest it should be apparent that, assuming a belief of plaintiff's evidence, and the other evidence in the case as most favorably construed toward the plaintiff, no case could ever be found which more clearly falls within the doctrine of last clear chance, as enunciated by said Section 479 of the Restatement of Torts, and as applied by this court in the Compton and other cases hereinabove cited. We call attention to the fact that the doctrine of last clear chance is more often applicable in situations where the vehicle being operated by the plaintiff is a slow moving vehicle, as was the situation in this case. See *Morby v. Rogers* above cited.

A second application of the doctrine of last clear chance is as set forth in Section 480 of the Restatement of Torts. It will be observed that Section 479 covers generally a situation where the plaintiff has placed himself in a position of peril from which he cannot extricate himself and where the defendant either knows, or by the exercise of reasonable prudence and care, should have known, of the plaintiff's peril, and thereafter if he had known of said peril could, by the exercise of reasonable care, have prevented harm to the plaintiff, but the defendant failed to exercise the care necessary to prevent such harm; whereas, section 480 refers generally to a situation where the defendant in fact knew of plaintiff's situation and realized or had reason to realize that plaintiff was inattentive and, therefore, unlikely to dis-

cover his peril in time to avoid harm, and that defendant is thereafter negligent in failing to utilize with reasonable care his ability to avoid injury. Said Section 480 reads as follows:

"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."

While it is our contention that the case falls squarely and clearly under Section 479 so that the doctrine of last clear chance should have been submitted to the jury under that section, we submit that in the light of plaintiff's testimony and other evidence in the case, it was a matter for the jury to determine as to whether or not the doctrine of last clear chance applied under Section 480 hereinabove quoted, and that the evidence, if the jury sought to believe it, would even bring the case under the last mentioned section. As hereinabove previously set forth, from the defendant's own testimony the jury could conclude that he saw the plaintiff and knew of the plaintiff's perilous situation when he was a distance of 146 feet from the plaintiff. Defendant himself says he was 65 feet from the plaintiff when he knew of plaintiff's perilous situation, but the other testi-

mony with regard to speed and distances place him at least 146 feet from the plaintiff at that time. As indicated, he further stated that at such time he knew plaintiff's tractor was not going to stop. If the testimony of Officer Beardall were to be believed, then the jury might have concluded that the plaintiff was in fact looking back and away from the road and toward the west as he came onto the highway and immediately prior to the time of the accident, so that if the defendant actually saw plaintiff as he says he did, and assuming the distances as above indicated, then defendant certainly realized or had reason to realize that plaintiff was inattentive and therefore unlikely to discover his peril in time to avoid the harm. Assuming a belief of the testimony as above indicated, the jury surely could have found that the defendant knew, or in the language of the court in the Compton case "had reason to know" of plaintiff's peril. Defendant saw that there was no car coming from the opposite direction. It then became a question for the jury to determine whether or not, under those conditions, defendant had a clear chance to avoid injury to the plaintiff and negligently failed to do so.

The instructions requested by the plaintiff relating to the doctrine of last clear chance, and particularly the instructions numbered 13 and 14 (R. 23 & 24) were based upon the wording of Sections 479 and 480 of the Restatement of Torts, as interpreted and approved by this Court in the Compton and other cases. Plaintiff's counsel endeavored therein to set forth in as clear language as possible a fair statement of that doctrine as so

interpreted.

While as indicated above, we do not feel it necessary to discuss at length the factual situations in numerous cases, in addition to the cases already hereinabove cited, we call the attention of the Court to the Utah cases of *Graham v. Johnson*, 166 Pac. (2d) 230, wherein this court stated that in a proper case a verdict should be directed for the plaintiff under the doctrine of last clear chance, and in the re-hearing of that case, which is reported at 172 Pac. (2d) 665, the Court stated that:

“The last clear chance duty is to do what a prudent person would have done to avoid the accident had he had the opportunity, whatever that would be, after he did or should have appreciated the other’s peril or approaching peril.”

We submit that on the evidence, this case fell clearly and unequivocally within the provisions of said Section 479 of the Restatement of Torts, so that instructions should have been given on the doctrine of last clear chance. We submit also that it fell sufficiently within the provisions of Section 480, so as to warrant giving an instruction on last clear chance on the theory of that Section. We urge that the Court erred in failing to instruct the jury on the doctrine of last clear chance, as requested by the plaintiff, and that such error was material and substantial.

## POINT TWO

THE COURT ERRED IN FAILING AND REFUSING TO  
GIVE TO THE JURY PLAINTIFF’S REQUESTED INSTRU-  
TION NO. 11 AS REGARDS THE DUTY OF A PERSON

## MOVING A TRACTOR ONTO THE HIGHWAY.

Plaintiff submitted to the Court and requested that it give to the jury his requested instruction No. 11 which reads as follows:

“The duty imposed upon the plaintiff in moving his tractor out of the yard and driveway and onto the highway was to exercise that degree of care which an ordinarily prudent person would exercise under similar circumstances. If he did exercise such care, then there would be no negligence on his part in connection therewith.”

The court refused to give such instruction. The court did, however, give its instruction No. 12, which reads as follows:

“You are instructed that a driver about to enter a highway from a private road or driveway shall yield the right of way to vehicles approaching on said highway, and such driver must use reasonable and ordinary care to avoid a collision with a vehicle proceeding on said highway.”

We submit that having given instruction No. 12 — which instruction would place a great burden upon one entering the highway to watch for and yield the right of way to approaching vehicles, and greatly emphasized the duties and obligations of the plaintiff entering the highway from a private road, — that under such circumstances plaintiff was entitled to have also given to the jury the balancing instruction as set forth in plaintiff's proposed instruction No. 11. This instruction simply sets forth the ordinary rule of negligence, but applies such ordinary rule to the facts and circumstances as

were present in this case and before the jury for its consideration.

We submit that in fairness to the plaintiff and so as not to over-burden the case with instructions in favor of defendant and against plaintiff, the plaintiff was entitled to have given to the jury his Instruction No. 11, which we submit everyone must admit is a fair statement of the law.

### POINT THREE

THE COURT ERRED IN REFUSING TO PERMIT THE PLAINTIFF TO INTRODUCE THE EVIDENCE BY THE WITNESS KENNETH J. TANNER AS TO THE STATEMENT MADE BY THE PLAINTIFF IN THE PRESENCE OF SAID TANNER IMMEDIATELY FOLLOWING THE COLLISION, WITH REGARD TO THE MANNER IN WHICH THE ACCIDENT OCCURRED AND FOR THE PURPOSE OF SHOWING THAT SUCH STATEMENT WAS CONSISTENT WITH THE TESTIMONY OF THE PLAINTIFF AND INCONSISTENT WITH THE IMPEACHING TESTIMONY OF OFFICER BEARDALL.

The plaintiff testified that the accident occurred in the manner as hereinabove previously set forth. Officer Beardall testified that in the X-ray room of the Payson Hospital, the plaintiff told him that the accident happened in a different manner, and that he never did see the defendant's truck prior to the collision, and that he, the plaintiff, was looking back to the west at the time of the collision.

The plaintiff's testimony having thus been impeached, the plaintiff offered to prove by the witness Tanner, who was the X-ray technician, that at a time contemporaneous with the time when Beardall testified

the inconsistent statement was made, that the plaintiff had in fact made a statement to him, Tanner, as to the manner in which the accident occurred, which statement was entirely consistent with the testimony of the plaintiff. The Court refused to permit the witness Tanner to testify with regard to that inconsistent statement.

While we must admit that there is not a uniformity of agreement among the court as to the admissibility of such evidence to rebut impeaching testimony, nevertheless the rule is recognized in many jurisdictions and by respectable authority. The rule is recognized in Utah by this court, although the court states that it should be applied with extreme caution. (See *Silva v. Packard*, 10 Utah 78, 37 Pac. 86; *State v. Carrington*, 15 Utah 480, 50 Pac. 526; *Ewing v. Keith*, 16 Utah 312, 52 Pac. 4; *Peterson v. Richards*, 73 Utah 59, 272 Pac. 229.

Where the rule is recognized, such testimony is permitted if it is made reasonably soon after the event and at a time prior to litigation, and at a time when there was little likelihood that the party making the statement would have reason to fabricate a story. All of these conditions, of course, applied as regards the statement, concerning which the plaintiff sought to have testimony introduced. In addition thereto, we suggest that no more favorable situation could ever arise for invoking exception to the rule against self-serving statements than was present in this case. We say this by reason of the fact that the statement which we sought to prove was made to Mr. Tanner at a time very close to the time of the alleged statement made to Officer

Beardall, and, furthermore, the statement allegedly made to Officer Beardall was, according to him, made in the presence of the said Mr. Tanner. Certainly it would seem highly improbable that the plaintiff would make a statement one minute to Mr. Tanner concerning the manner in which the accident happened, and in the next minute make another statement to Officer Beardall, but in the presence of the same Mr. Tanner, to the effect that the accident occurred in an entirely different manner. Under these circumstances, we submit it was error on the part of the court to refuse to permit the witness Tanner to testify as to the statement made by the plaintiff with regard to the manner in which the accident occurred.

We respectfully call the attention of the court to the annotation appearing in 140 A.L.R., commencing at page 21.

### CONCLUSION

We urge that the Court erred in the manners as hereinabove set forth and that the verdict of the jury and the judgment entered thereon should be reversed and set aside and the case remanded to the district court for a new trial.

Respectfully submitted,

PUGSLEY, HAYES & RAMPTON  
A. U. MINER,  
*Attorneys for Plaintiff and  
Appellant.*