

1953

Mary J. Howard v. Ringsby Truck Lines, Inc. and Horace Byington : Brief of Respondents

Utah Supreme Court

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IN THE SUPREME COURT

of the

STATE OF UTAH

MARY J. HOWARD,

Plaintiff and Appellant,

vs.

RINGSBY TRUCK LINES, INC., a
Corporation, and HORACE BY-
INGTON,

Defendants and Respondents.

BRIEF OF RESPONDENTS

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FILE

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Clerk, Supreme Court

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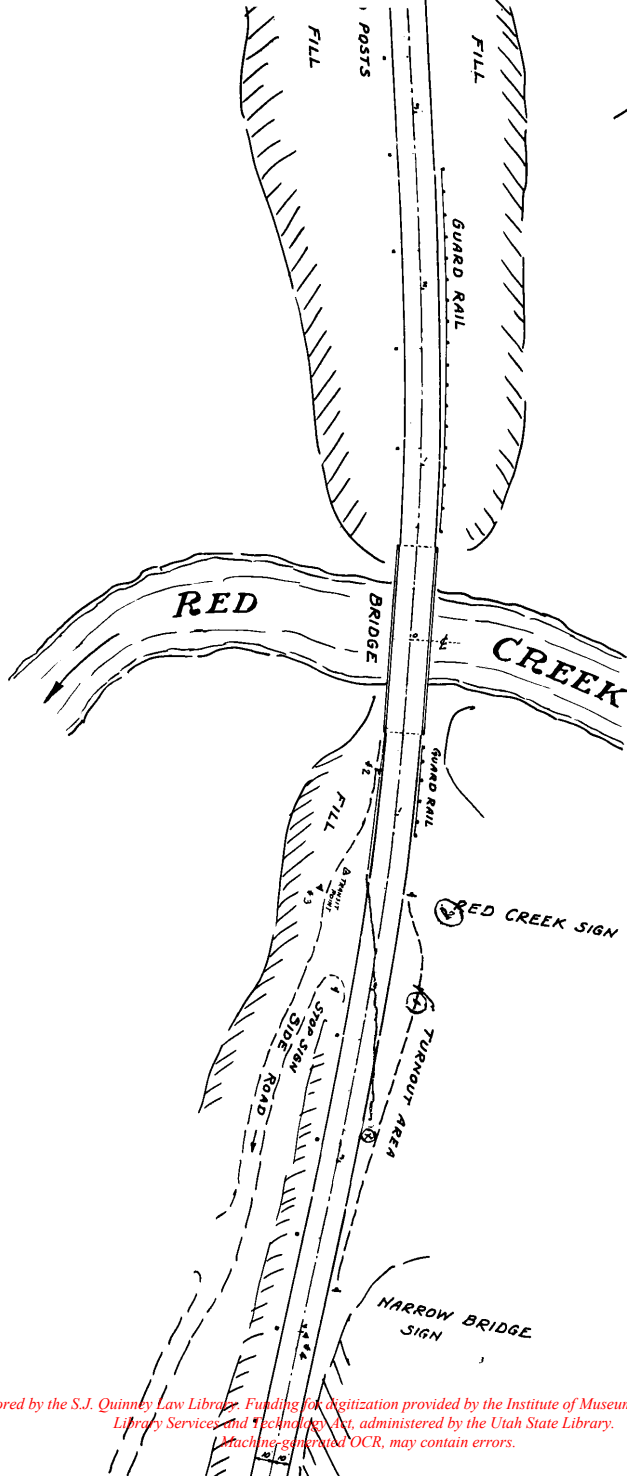
STATEMENT OF THE CASE

This action arose out of an automobile accident which occurred on October 19, 1951 in the vicinity of the bridge over Red Creek on U. S. Highway 40, about 22 miles west of Duchesne, Utah. On that date Francis A. Howard, accompanied by his son, Allen Howard, was driving a Willys Pickup truck in an easterly direction along said highway. As the pickup truck crossed the bridge over Red Creek, it struck the side of the bridge, continued on up the highway 80 to 100 feet, and then suddenly veered over onto the wrong side of the highway and in front of the defendant's truck, which had been approaching said point from the opposite direction.

The defendant's truck collided with the Jeep at a point on defendant's side of the highway near the north edge of the same. Francis A. Howard and Allen Howard died as a result of injuries sustained in the collision. This action is brought by Mary J. Howard, the wife of Francis A. Howard and mother of Allen Howard to recover damages by reason of their death. At the conclusion of the plaintiff's evidence, the trial judge directed a verdict in favor of the defendant upon the ground that plaintiff had failed to make out a prima facie case. It is undisputed that there was no evidence of negligence on the part of the defendant before the pickup truck collided with the side of the bridge and then came over onto the defendant's side of the highway. The sole issue presented by the appellant's brief is; Was the plaintiff entitled, under the evidence, to have the case considered by the jury upon the theory that the defendant had the "last clear chance" to avoid the accident? We will confine our statement of facts and argument to that issue.

STATEMENT OF FACTS

The highway in the vicinity of the accident runs in a generally northwest and southeast direction. (Exhibits 1 Reproduced herein for the convenience of the court and 19). Red Creek bridge is located near the bottom of a gully or ravine through which Red Creek flows (Exhibit 1 and 19). The road approaching the bridge from the northwest is down hill at a grade of from 7.3% to 3.6% in the vicinity of the bridge. The road approaching the bridge from the southeast is down hill at a grade of approximately 6%. Near the southeast end of the bridge,



a dirt road intersects the highway on the south side (Exhibit 1 and 19). Directly across the highway from this dirt road is a wide turn out area (Exhibit 1). The oiled surface of the highway is 22 feet wide (R. 35). The bridge is somewhat narrower and is 20.4 feet wide (R. 35). We have printed two views of the scene, taken some months after the accident to acquaint the court with the general scene. (See Exhibits 8A & 11.)

On the south side of the bridge near the southeast end were fresh scuff marks which appeared to have been made by the tire of the Jeep scraping along the sides of the bridge (Exhibits 2, 3 and 4) (R. 31). Leading off the southeast end of the bridge on the south shoulder of the road, tire marks extended for a distance of about 75 to 90 feet where they veered off to the north side of the highway (Exhibit 1, R. 35-36). A line made by some liquid extended down the south side of the highway for a distance of 100 feet where it suddenly turned across the highway (R. 91-95). (See also Exhibits 2, 3, 6 & 7 printed here for the convenience of the court.) The point of impact was some 225 feet from the marks on the southeast side of the bridge (R. 32), near the north edge of the traveled or oil surface of the highway (R. 26).

The defendant's truck was loaded with explosives and was traveling northeast toward Salt Lake City. As it approached the scene of the accident, it was traveling 45 miles per hour (R. 41). After the impact, it came to rest 25 feet off the north side of the highway 135 feet from the point of impact (R. 24 & 25), in the turn out area on the north side of the highway.

The record is silent as to why the Jeep went out of control and hit the south side of the bridge. There is no evidence of the speed at which the Jeep was traveling as it approached the bridge, unless we can infer that it was going at a high rate of speed from the fact that it apparently went out of control, struck the bridge and then cut over on the wrong side of the highway. Nor was there any evidence of what would have been a reasonable speed or the speed limit on the highway.

The only eye witness to the accident was the driver of defendant's vehicle, Horace Byington, who was not called to testify. The driver told the patrolman, Glen Wing, in substance that he observed the Jeep hit the south side of the bridge and then continue on down the highway (R. 29). He was supposed to have told Brady Howard that it looked like the Jeep hit the corner of the bridge and then went out of control and had cut cross-wise across the highway and that he did not see it any more until he felt the impact (R. 115).

Dr. Harris, an expert called by plaintiff, testified that defendant's vehicle could have been brought to a stop after the brakes had been applied sufficiently to lay down skid marks in 130 feet (R. 148); That the time it would take an ordinary driver to apply his brakes after he realized the danger would be $\frac{3}{4}$ of the second, reaction time, during which time the defendant's truck, at a speed of 45 miles per hour, would have traveled an additional 50 feet, for a total of 180 feet (R. 150). Continuing on, the doctor testified (R. 150):

"Q. Of course, Doctor, in a situation, assuming,



EXHIBIT 8-A. LOOKING SOUTH-EAST.



EXHIBIT 11. LOOKING NORTH WEST.



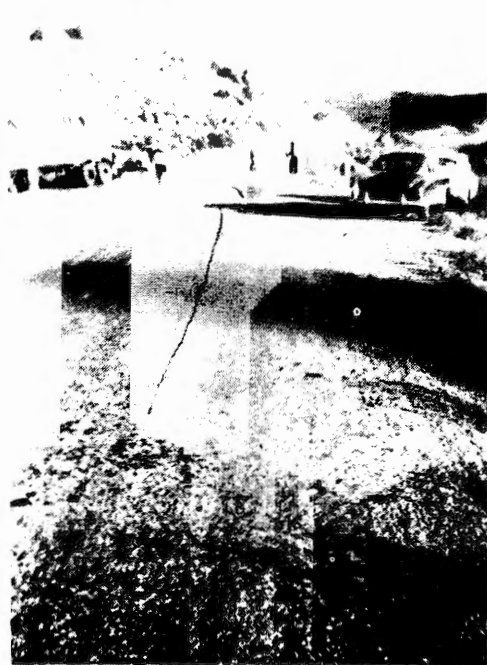
**Exhibit 2. Shows mark on
Bridge.**



**Exhibit 3. Shows tire marks on
shoulder of highway and
across highway.**



**Exhibit 6. Shows marks leading
across**



**Exhibit 7. Shows marks leading
across highway.**

Doctor, that the driver of this truck is coming down that grade and sees ahead of him going east, he is traveling west, sees ahead of him a jeep truck or a vehicle hit a bridge and go out of control and travel along the shoulder of the highway for some distance before it suddenly cut over to his side of the road, in addition to reaction time wouldn't you also have perception time? In other words, wouldn't that person first have to see the emergency which would take him the reaction time that was there and then form a judgment as to what he was going to do about it? Wouldn't you have that in there, too?

A. You mean to take time for him to make up his mind just what he wanted to do?

Q. Yes. In other words, he would have his reaction time; it would take him the reaction time to see the thing and realize what was happening and then you would also have a little more time for him to judge or perceive what he was going to do about it?

A. He might need time to do that, yes.

Q. And if you have a judgment time it might be two or three seconds?

A. Well, he might not apply the brakes at all, which might be many seconds.

Q. In other words, if he had a large load of explosives and he sees the vehicle coming and isn't sure which way it finally might go it might take him two or three seconds to decide what to do about it?

A. It would take time. It might take him two or three seconds.

Q. In other words you have what you would call judgment time?

A. I would call it judgment time."

STATEMENT OF POINTS

POINT NO. I.

THE DOCTRINE OF LAST CLEAR CHANCE DOES NOT APPLY TO A SITUATION WHERE THE OTHER PARTY'S NEGLIGENCE OR CONDUCT CONTINUES UP TO THE POINT OF IMPACT.

POINT NO. II.

THE DOCTRINE OF LAST CLEAR CHANCE REQUIRED A CLEAR OPPORTUNITY TO AVOID THE ACCIDENT.

POINT NO. III.

DEFENDANTS DID NOT HAVE A LAST CLEAR CHANCE TO AVOID THE ACCIDENT.

POINT NO. IV.

THERE IS NO SHOWING OF ANY NEGLIGENCE ON THE PART OF THE DEFENDANT.

ARGUMENT

POINT NO. I.

THE DOCTRINE OF LAST CLEAR CHANCE DOES NOT APPLY TO A SITUATION WHERE THE OTHER PARTY'S NEGLIGENCE OR CONDUCT CONTINUES UP TO THE POINT OF IMPACT.

The Doctrine of Last Clear Chance is only applicable to a situation where the plaintiff's or injured person's negligence has subjected himself to a risk of harm from which he is unable to extricate himself by the exercise of reasonable diligence and care. The Doctrine does not apply to a situation where the defendant's negligence or

conduct, which is a proximate cause of the accident, continues up to the point of impact. The first requirement of the Doctrine is whether, as stated by the restatement of the Law of Torts Vol. 2, Sec. 479, Page 1253:

“a. The plaintiff is unable to avoid it by the exercise of reasonable vigilance and care and,”

In the case of *Watkins v. Utah Poultry and Farmers Co-op*, (Utah) 251 P 2d 663, where the court's failure to instruct on last clear chance where plaintiff's car was driven onto the wrong side of the highway was discussed, the court said on Page 668:

“Under the facts, there are just two possible situations to which the above request could reasonably be considered to apply. The first would be under the assumption that the plaintiff was keeping on his own side of the road. That circumstance is adequately covered by other instructions advising the jury of the defendant's duty to travel on its own side of the road and that failure to do so would be negligence, which, coupled with proximate cause, would permit plaintiff to recover. The other would be under the assumption that the plaintiff came over onto the wrong side of the road, and the plaintiff wanted the court to tell the jury that even though he crossed over onto the wrong side of the highway, he could nevertheless recover if the defendant saw or should have seen him and thereafter in the exercise of reasonable care he had a ‘clear chance’ to avoid the collision. This contention is answered by the analysis of ‘last clear chance’ as contained in the case of *Compton v. Ogden Union Railway and Depot Company*, where we approved the doctrine as set forth in sections 479 and 480 of the Restatement

of Torts. In the instant case, the plaintiff's negligence would not have come to rest, and defendant's driver could not possibly have been aware that plaintiff was inattentive; so at best, even under plaintiff's theory and taking his interpretation of the evidence, we would have had the concurring negligence of the plaintiff and defendant resulting in the collision, under which circumstances there could be no recovery."

In *Compton v. Ogden Union Ry. & Depot Company*, (Utah) 235 P 2d 515 on Page 518, the court said:

"We have never held that a mere continuance of the same inattentive negligence created a situation of inextricable peril. When the injured person's negligence has not come to rest, as it had in the above cases, so that by the exercise of reasonable care she would have been able to avoid the peril at any time up to the moment of injury, the injury is then the result of the concurring negligence of the plaintiff and the defendant. The one was just as much the proximate cause as the other. *Ryan v. Union Pac. R.R. Co.*, 46 Utah 530, 151 P. 71. Harper on Torts, Sec. 139, Page 306, considers the situation of the negligent defendant and the negligent plaintiff where the defendant is unaware of plaintiff's peril and states: "* * * It follows, thus, that the doctrine of last clear chance does not include cases in which a plaintiff has the physical and mental ability to avoid the risk up to the moment of the harm. His "continuing" negligence, as it is sometimes called, continues to insulate the defendant's negligence, and the ordinary rule of contributory negligence governs the case.' "

The evidence in this case shows that Francis A. Howard, beginning at a point 80-100 feet from the point

where he had collided with the bridge and 145-125 feet from the point of impact, left the shoulder of the south side of the highway and drove his jeep diagonally across the highway into the path of the defendant's vehicle. There can be no question that this conduct, either negligent or otherwise, was the proximate cause of his own and his son's injury. At any time, up to almost the very instant of impact, he could have avoided the collision by remaining on his own proper side of the highway. We are presented with a very fluid situation in which the position of the two automobiles was changing very rapidly from moment to moment. The deceased's conduct never came to rest until the very instant of impact and, since it continued up to that point, the doctrine of last clear chance has no application to the facts of this case.

POINT NO. II.

THE DOCTRINE OF LAST CLEAR CHANCE REQUIRED A CLEAR OPPORTUNITY TO AVOID THE ACCIDENT.

Before the doctrine of last clear chance can be invoked, it must appear that the defendant had a fair and a clear opportunity to avoid the injury. In the recent case of *Cox v. Thompson*, (Utah) 254 P 2d 1047, this 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 hind-

sight that by some possible measure the defendant by the 'skin of his teeth' could have avoided the injury. See *Morby v. Rogers*, (Utah) 252 P 2d 231.

"This court has adopted as a rule in this state the last clear chance doctrine of Sections 479 and 480 of the Restatement of Torts. See *Compton et al v. 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.' "

* * * *

"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 realized or had reason to realize that plaintiff was knew of decedent's situation of danger, and (b) 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 v. 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 v. 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.

"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."

POINT NO. III.

DEFENDANTS DID NOT HAVE A LAST CLEAR CHANCE TO AVOID THE ACCIDENT.

Appellant's argument that the defendant driver could have avoided the accident is pure speculation and is not based on any facts which are supported by the evidence in this case, or any presumption of law, which may apply. In making certain mathematical calculations which appear in their brief they admittedly, without any basis, ask the court to assume that the vehicle driven by Francis Howard was traveling at a speed of 45 miles per hour at the time it struck the bridge abutment. There is no direct evidence of the speed at which the vehicle was traveling, nor is there any evidence of what would have been a reasonable speed limit in this area, if we presume that

the Jeep was being driven at a reasonable speed. An inference that the Jeep was traveling at a high rate of speed may be drawn from the fact that Francis A. Howard had so little control of his vehicle that he permitted the same to first strike the side of the bridge and then veered on over onto the wrong side of the road. In the face of such evidence, the presumption that he was exercising due care disappears from this case, for as was said in *Cox v. Thompson*, supra:

“If the presumption that a person in a place of danger exercises due care for his own safety applies in this case, it will be extinguished if the evidence properly sustains the finding that the decedent was contributorily negligent as a matter of law.”

Of course, if the Jeep were being driven at a high and excessive rate of speed, there can be no question that the Jeep would cover the distance between the point where it cut across the road and the point of impact so quickly that the defendant would have no opportunity to avoid striking the Jeep.

Even if we presume that the vehicle driven by Francis A. Howard was traveling at a reasonable speed, such a presumption does not support an assumption that he was traveling at a rate of 45 miles per hour, the assumption on which all of the defendant's mathematical computations are based. Since the collision occurred on an open road in an area outside any municipality or town, it would ordinarily be governed by the State's speed limit of 60 miles per hour, which is defined by statutes as *prima facie* reasonable. If we are to engage in unwarranted as-

sumptions and speculation, it is as reasonable to assume that the Jeep was traveling at a speed of 60 miles per hour, or any other speed, as it is to assume that the Jeep was traveling 45 miles per hour; and it is submitted that we cannot arbitrarily, in the absence of any evidence, make any assumptions which are not warranted by the evidence and then use the assumed facts as a basis for certain mathematical calculations in arriving at a decision in this matter.

The vehicle driven by Francis A. Howard and that of the defendant were approaching each other from opposite directions. The rate at which the distance of which the two vehicles was closing would be the combined rate of speed of the two vehicles. To illustrate; if the vehicles were both traveling 45 miles per hour, the distance between them would be reduced at the rate of 90 miles per hour, or 132 feet per second. If one were traveling 60 and the other 45, the distance between them would be reduced at the rate of 159 feet per second. The evidence shows that the two vehicles were at the most only 125-150 feet apart at the time the Jeep cut from its side of the road over onto the path of the defendant's vehicle. At the rate the distance was closing between the two automobiles, if the Jeep was traveling at any speed at all, there was available to the defendant only a second or two in which he might have stopped his automobile or otherwise acted to avoid the collision.

Not only are the mathematical computations cited by the appellant based on assumptions which were not warranted by the evidence, but they also ignore the fact

that the Jeep remained on its own side of the highway for a distance of from 80-100 feet after crossing the bridge, and prior to coming diagonally across the highway to the point of impact. The driver of the defendant's car would have been entitled to assume that Francis A. Howard would remain on his own side of the highway until it became apparent that he would not do so. At least, it cannot be reasonably said that he had a duty to make a violent application of his brakes, or take any other drastic action to avoid a collision, until such conduct became apparent. Therefore, it is misleading to say that the defendant driver had the time that it would have taken the Jeep pickup to travel 225 feet at whatever speed it was traveling, in which to determine and execute a course of action. The time would be that time it would require the Jeep to travel 120-145 feet. Returning again to the table and illustrations cited by the appellant, it would only require the Jeep moving at a speed of 45 miles per hour less than two seconds to travel 120 feet at 45 miles per hour, and about 2.2 seconds to travel 145 feet. At 60 miles per hour, this distance would have been covered in less than 2 seconds. This means that the defendant barely had sufficient time to appraise the situation, and does not give him time to apply the brakes and bring his vehicle to a stop.

In terms of distance, the defendant's truck, traveling at the same speed as the assumed speed of the Jeep, that is 45 miles per hour, would be the same distance from the point of impact as the Jeep, 145-120 feet, which under the evidence would not give him the 180 feet which it was

testified it would require for him to bring his vehicle to a stop.

Nor should the court overlook the testimony of Dr. Harris to the effect that in a situation such as faced the defendant driver in this case, the defendant would need two or three seconds in which to appraise the situation and to determine upon a cause of action in addition to what is termed reaction time. This is not the simple situation in which a driver suddenly finds an obstacle in his path. In such a situation, the driver may be able to react immediately. In this case the defendant driver had to first determine the course the other vehicle would take before he himself could decide what to do about it. What may have appeared to have been the wisest course had the Jeep remained on its own side of the highway may not so have appeared when the Jeep cut over onto the wrong side of the highway. While there may be a question in some situations as to whether a driver would require any time to appraise the situation, judgment time, there can be no such question here.

To state the proposition differently, the defendant driver in this case could not have been expected to act to prevent the collision until such time as it became apparent to him what course the Jeep was going to take and until it came over onto his side of the road. Even under the assumptions engaged in by the plaintiff, the defendant had no clear opportunity to avoid the collision. The plain and simple fact is that we have two vehicles approaching each other from opposite directions on a two-lane highway. The driver of one of the vehicles for some

unknown reason suddenly lost control of his automobile and turned directly into the path of the other on-coming vehicle. This action and this alone was the proximate cause of the collision.

The last clear chance is an opportunity which is available to the defendant, and in order to judge that opportunity, we must place ourselves in the position of defendant driver as he came downhill on that fateful day of October 19, 1951, toward the Red Creek bridge. As he approached the bridge, the pickup truck, driven by Francis A. Howard, approached the bridge from the opposite direction. In the absence of evidence to the contrary, we may assume that there was nothing about the way in which the pickup truck was driven to put the defendant driver on notice of any pending disaster. The pickup truck reached the bridge first and upon crossing the same, struck the side of the bridge, but continued off the bridge and on up the highway on its own side of the road for a period of 80-100 feet. The defendant driver, and we must keep in mind that he was handling a truck loaded with explosives which required the utmost of care on his part for his own safety and the safety of others on the highway, was entitled to assume that the pickup truck would remain on its own side and was not required to make a violent application of brakes, thereby endangering himself and Francis and Allen Howard; that is, if he had time to apply his brakes, which appears extremely doubtful. As the pickup truck cut diagonally across the highway, the defendant was faced with a number of questions and decisions. Would the driver

of the pickup truck turn back into his own side of the highway? Would he pass in front of the defendant's truck and off the highway? Should he turn his truck to the left and onto the wrong side of the highway, and if he did, would the pickup truck cut back to that side of the highway? Should he apply his brakes and attempt to stop his vehicle? Should he turn to the right and attempt to avoid the pickup?

All of these questions and his course of conduct had to be resolved within the time it took the pickup truck to travel from the point where it first crossed over onto the north side of the road to the point of impact. And, it is apparent at that point, there was nothing the defendant driver could have done to avoid the accident.

Looking back at the accident, and having the advantage of knowing what course the Jeep did pursue to the point of impact, it is easy for us now to theorize that the defendant driver may have done something which he did not do to avoid the accident. Whether such course of conduct would have avoided the accident still remains in the field of speculation. There is no evidence in this case that the defendant driver had had any opportunity to avoid the accident after he became aware of the position of peril which Francis A. Howard and Allen Howard had been placed in by the conduct of Francis A. Howard. It is not for us now to engage in certain unwarranted assumptions to make it appear that the defendant by hindsight could have avoided the collision, nor is it proper to place upon the defendant the burden of showing from the evidence that he could not have avoided the collision,

when it does not appear from any evidence in the case, no matter how we construe it, that he could have avoided the collision.

POINT NO. IV.

THERE IS NO SHOWING OF ANY NEGLIGENCE ON THE PART OF THE DEFENDANT.

Much of the brief of the appellant is devoted to his discussion of the duty of the defendant to turn his automobile to the right, stop his automobile, or otherwise act to avoid the collision. It is not contended that if the defendant driver had had a clear opportunity to have avoided this accident by any reasonable course of conduct that he should be excused from his failure to do so. The plain and simple fact is that the evidence fails to disclose anything which the defendant might have done in the time that he had to act which would have avoided the accident. The physical evidence shows that the defendant did not deliberately or heedlessly drive his vehicle into that driven by Francis A. Howard. On the contrary, the evidence shows that even within the limited time available, he had attempted to avoid the collision with the Howard vehicle.

The point of impact between the two vehicles was near the north edge of the oiled portion of the highway (R. 26). The right wheels of the defendant's vehicle left the oiled portion of the highway at about the point of impact and traveled along the north shoulder of the highway, the entire vehicle eventually passing off the oiled surface and coming to rest about 25 feet off the highway (R. 25). This indicates that the driver had already

turned his vehicle to the right at the time of the impact. It is also the evidence that the defendant's vehicle was brought to a stop within a distance of 135 feet, (R. 25) and left marks on the north shoulder indicating the application of brakes. Applying the formula that it would take a total of 180 feet, including reaction time, to stop the defendant's vehicle and 130 feet after the application of brakes, it would appear that the defendant had already determined to apply his brakes, and applied them at about the point of impact. Of course, after leaving the highway, defendant's vehicle did pass over some boulders which may have had some effect in slowing the vehicle. But, the evidence does indicate that the defendant driver was doing his best within the time available to avoid the accident by applying his brakes and turning to the right.

Of course, it may be that if the defendant had determined on some other course of action, he may have avoided the accident. This is entirely speculative, but even should we determine that such is the case, the defendant would not necessarily be negligent for not taking such a course of action. A person suddenly confronted with unexpected danger is only expected to use such means for avoiding that danger as would appeal to a person of ordinary prudence in a similar situation. As long as he acts as a reasonable and prudent person, he is not obligated to choose that particular course of action which would have avoided the accident. We must remember that looking back at an accident, it may be possible to outline a course of conduct which it may appear would have avoided the accident. But, the person who is

confronted with the danger at the time of the accident does not have the opportunity for calm reflective thinking upon the subject. He must determine some course of action instantaneously. Moreover, in looking back at the accident, we have the advantage of seeing what the other driver actually did, whereas the person confronted with the situation must predict the other driver's actions. The appellant now argues that had the defendant driver driven the truck 5 or 6 feet to the left, he could have avoided the accident. There is no showing that the defendant had sufficient time to make such a maneuver in the first place. In the second place, the pickup truck was coming toward his truck from the left side of the vehicle and it only appears reasonable that he should move to the right, rather than to the left in order to escape the collision. In the third place, the defendant driver could not anticipate that Francis A. Howard would not return to his own side of the highway, but may have expected him to do so. Of course, if Francis A. Howard had returned to his own side of the highway, then the defendant, had he turned to the left, would have made the accident a certainty.

In the case of *Morrison v. Perry*, 104 Utah 130, the defendant observed another vehicle approaching his vehicle on the wrong side of the highway at a distance of about 225 feet. Both vehicles were approaching each other at a speed of 35-40 miles per hour. The defendant turned his vehicle to the left, in order to avoid the collision; at about the same time, the plaintiff returned to his own side of the road. The two cars collided head-on on

the plaintiff's side of the road.

In its opinion the court quoted with approval *McPhee v. Lavin*, 183 (Calif.) 264-191 P 23, as follows:

"One suddenly confronted with an unexpected danger may use such means for avoiding the danger as would appeal to a person of ordinary prudence in a like situation without being held to strict accountability as to whether the course chosen is the most judicious or not."

As stated by Blashfield in *Cyclopedia of Automobile Law and Practice*, Vol. 1 Part 2, Page 553:

"When two alternatives are presented to a traveler on a highway as means of escape from a collision, either of which might fairly be chosen by a reasonably prudent person, the law will not hold him guilty of negligence in taking either, even though he does not make the wiser choice, especially where there is only time for instinctive action, since he is not bound to use an infallible judgment as to the course to pursue to avoid a collision, but only to exercise that degree of care which an ordinary prudent person would have taken."

The evidence in this case fails to disclose that the driver of the defendant's truck failed to do anything in the limited time available which might reasonably have been expected of him to avoid the collision in this case. In fact, the evidence discloses that he did everything within his power to avoid the collision.

CONCLUSION

The sole proximate cause of the accident out of which this action arose was that the Jeep driven by Francis A. Howard for some unexplained reason collided with the

side of the bridge and then cut over onto the wrong side of the highway into the path of defendant's vehicle. The whole sequence of the accident occurred over the matter of a very few seconds. After striking the bridge, the Jeep continued on down the shoulder on its proper side of the highway for eighty to a hundred feet where it cut across the highway 145 to 125 feet where the impact occurred. From the time the Jeep hit the bridge until the Jeep cut across the highway, the defendant driver was entitled to assume the Jeep would remain on its proper side of the road. He could not have been expected to anticipate that it would suddenly cut over onto the wrong side of the highway, and until it did so, could not frame a course of conduct upon that premise.

Viewing the facts upon any theory, there is no showing that the defendant driver had a clear opportunity to avoid the collision. The defendant driver turned his vehicle to the right and brought his vehicle, which had been traveling at 45 miles per hour, to a stop within 135 feet from the point of impact, indicating that he did everything within his power and which might reasonably be expected of him to avoid the collision.

Appellant in his brief theorizes on what the defendant may have failed to do to avoid the accident. His argument is based on speculation and conjecture, assumes facts which are not in the evidence, and eliminates other facts which are in the evidence and must be taken into account.

Perhaps the best summation is that given by the Trial Judge in directing a verdict in favor of defendant:

"THE COURT: Ladies and gentlemen of the jury, the attorneys for the defendants in this case have made a motion at the end of the plaintiff's case for a dismissal and they make the motion that there has been no showing that the truck driver was guilty of any act of negligence upon his part. And we do have in this State a doctrine of what is known as the last clear chance. In other words, as I explained to you the other day, if the plaintiff himself, like Mr. Howard, is guilty of contributory negligence he cannot recover. Of course that doesn't apply to the boy who was riding with him as a guest because he isn't chargeable with Mr. Howard, Sr.'s negligence, but in order to hold the defendants in this case the plaintiff has the burden of proof of showing that Mr. Byington did something, or failed to do something, that a reasonably prudent man would have or would not have done, and I think the evidence is quite clear that under the circumstances here this thing happened so fast and under such conditions that Mr. Byington didn't have any opportunity to do anything different than what he did do and that he didn't fail to do something that a reasonably prudent man could have done.

"Now these are unfortunate things and, of course, these obligations come to you and they come to me, but I have seen fit that at this stage of the proceeding I ought not to waste your time or the time of these litigants in further proceeding with this case because I am satisfied that the plaintiff, unfortunate as this situation is and tragic as it is, has not made in law what would amount to a responsibility on the part of Mr. Byington.

"Of course, Mr. Byington being the driver of

the truck, he is the one we look to see what he should have done or didn't do and the Ringsby people they would only be liable if Mr. Byington is liable. So far as Ringsby is concerned we only impute the negligence of Mr. Byington, if any, to them and I am satisfied that there is not here in the law sufficient to submit to you for your deliberation and for that reason I have decided that I am required as a part of my duty to grant this motion that the defendants have made and, that being the case, the motion is granted and your services won't be further needed in this matter and I want to thank you for your attention here and you will be excused until you are called again in another case. The court will be in recess."

Respectfully submitted,

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