

1959

## Lillian Fox v. Ross N. Taylor : Brief of Respondent

Utah Supreme Court

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Rich & Strong; Attorneys for Defendant and Respondent;

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Case No. 9122

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IN THE SUPREME COURT

of the

STATE OF **FILED**

NOV 25 1959

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Clerk, Supreme Court, Utah

LILLIAN FOX,

*Plaintiff and Appellant,*

— vs. —

ROSS N. TAYLOR,

*Defendant and Respondent.*

\_\_\_\_\_  
BRIEF OF RESPONDENT  
\_\_\_\_\_

RICH & STRONG

*Attorneys for Defendant and  
Respondent.*

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IN THE SUPREME COURT  
of the  
STATE OF UTAH

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LILLIAN FOX,

*Plaintiff and Appellant,*

— vs. —

ROSS N. TAYLOR,

*Defendant and Respondent.*

Case No. 9122

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BRIEF OF RESPONDENT

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STATEMENT OF FACTS

The plaintiff's statement of the facts fails to give the complete picture. Therefore, we make our own statement.

The accident occurred on September 30, 1958, at about 7:45 A.M. at approximately 1028 East 5th South in Salt Lake City, Utah, (R. 21-22, 28). It was undisputed that extending along 5th South Street from 11th East all the way down to 10th East there was a solid island in the center of the street separating eastbound traffic from westbound traffic, (R. 30, 51, 64-65; also diagram, Exhibit

P-4 and photos, D-5, D-6, D-7 and D-8). By reference to the diagram, Exhibit P-4, the curbs on either side of the island were 5 inches high and the width of the island at the approximate point of the accident was 5 or 6 feet. It was further undisputed that at the place where the plaintiff was crossing the street there was no marked pedestrian lane, (R. 29, 51, 65). In his brief counsel refers to two points shown on the diagram, Exhibit P-4, said points being marked as C-1 and C-2. In describing the course of the defendant's vehicle, counsel states that the defendant continued to point C-1 and then on to C-2. In the course of his argument counsel implies that the defendant changed lanes from the point C-1 to the point C-2. This is not true. Nowhere in the defendant's testimony did he testify as to point C-1 or C-2, and nowhere in his testimony did he indicate that he had proceeded for any distance in the outside lane. His testimony was clear that when he made his turn, he proceeded directly into the inside lane for eastbound traffic (R. 111). Points C-1 and C-2 were placed upon the diagram by the defendant's witness, Myer, in connection with his cross-examination. Myer was asked whether there were any other eastbound automobiles in the vicinity, and referred to an eastbound vehicle some distance behind the defendant's Ford car. The point C-1 was to indicate where this unidentified eastbound car was on the road at the time that the defendant's car was at the point indicated on the diagram by C-2, (R. 83-84).

Koneta Court is a small court that intersects 5th South Street from the south only. At the point where it

enters 5th South Street it is no wider than a driveway or approximately 12 feet in width, (R. 65-66, diagram, Exhibit P-4, photos, Exhibit D-5, D-6, D-7, D-8). There was a marked crosswalk across 5th South up at the intersection of 11th East, (R. 29). There were no sidewalks extending out to the south curb line from either side of Koneta Court. By reference to the diagram and the photographs aforementioned, it will be observed that Barbara Place intersects 5th South Street from the north only. By using the scale on the diagram, Barbara Place would be located approximately 15 feet east of Koneta Court. Also, by reference to the diagram and photographs aforementioned it will be observed that Isabella Court intersected 5th South from the south only, and again by reference to the scale on the diagram, this court would be located approximately 80 feet east of Koneta Court and approximately 10 feet east of Barbara Place. As indicated by the photographs and the diagram, it likewise is no wider than a private driveway, (Exhibits P-4, D-5, D-6, D-7, D-8).

The plaintiff was employed as a claims secretary for the American Surety Company, (R. 20). She resided on the south side of 5th South Street just west of Koneta Court, (R. 21). Jacobs, another employee of the American Surety Company, with whom the plaintiff was acquainted, had been picking up plaintiff and taking her to work 5 days a week for several months before the accident. He always called for her about 7:45 A.M. Another employee, Mildred Peters, was in the car with him on these occasions. He always stopped in Barbara Place

headed west, pulling completely off the traveled portion of 5th South Street, (R. 30, 31, 50, 63).

The plaintiff had lived on that street for approximately 9 years and was very familiar with the traffic particularly at 7:45 A.M., (R. 28). As a matter of fact, she testified that she always had to take precautions because it was a busy street, (R. 23). She also testified that it was very heavily traveled at that time of the morning, (R. 28).

Miss Peters testified that she customarily found at that time of the day there was a lot of traffic going both east and west along 5th South Street, (R. 51, 52).

Jacobs testified that there was heavy traffic proceeding both east and west at that time of the morning, eastbound traffic going to the University, and westbound traffic coming into town, (R. 64). Both Peters and Jacobs testified that because of the heavy traffic, they always moved off 5th South Street and parked in the driveway at Barbara Place, (R. 50, 64). Both Peters and Jacobs further testified that on one or two occasions prior to the automobile accident they had discussed the hazard of crossing the street with the plaintiff, and that Jacobs had offered to drive around the block and come back headed east on 5th South Street so as to pick her up on the south side of the street in front of her home and thereby make it unnecessary for her to cross the street in heavy traffic. However, the plaintiff had said that this was not necessary, (R. 52, 53, 54, 66, 67). The plaintiff was, of course, fully aware of the heavy traffic by



reason of having crossed the street for several months before at that time of the day and having lived on the street for nine years. However, in addition she testified that 5th South Street was “a very heavily traveled street,” (R. 28).

The plaintiff testified that she had always crossed the street at this particular time and place. On the morning of the accident she left the front door of her house, walked down the driveway of Koneta Court to the ditch on the south side of the street, and then looked to the west for approaching eastbound traffic, (R. 31, 32). She said that the boulevard was clear except for one car which was down by the Custom Furniture, or about three-quarters of a block away. At that time the car had not reached the curve, and she was not sure whether it would make the curve or go south on 10th East, (R. 32-33). She had no idea as to the make of the car or how fast it was traveling, (R. 33). From the time she made this observation when standing in the ditch on Koneta Court on the south side of the street she then “walked rapidly across the street.” She did not see the automobile again and was not conscious of its approach until the moment of the impact. As a matter of fact, she admitted that after making her observation while at the south curb or ditch line of 5th South Street, she did not look again for eastbound cars as she crossed the street, (R. 34-35).

There was considerable dispute in the evidence as to just where the plaintiff was in the street when she was struck by the car. According to her testimony, she was

just stepping onto the island when the accident occurred, (R. 22); yet, she admitted that the car did not go onto the island to strike her, (R. 36). After the accident, she admitted that she was lying with her feet just onto the island and the rest of her body just south of the island, (R. 36).

Miss Peters testified that she saw Fox come out the front door and start down the front steps of her home, then she turned away to open the right front door, (R. 42), and did not thereafter see the plaintiff until just a split second before the accident occurred, (R. 54). At this time the car was very close to her, and she saw one leg extending out, but wouldn't want to say whether it was on the island or not. She had no opinion as to how far the left side of the car was at the time she observed it from the south edge of the island and had no idea at all as to its speed. She did observe, however, that the plaintiff rolled off the left side of the fender over toward the left of the car, (R. 55, 56). The car itself did not go up onto the island. The plaintiff when she came to rest was about 6 feet from the point of impact. She observed one of the plaintiff's shoes on the line dividing the two lanes for eastbound traffic and also observed the plaintiff's purse about 6 feet southeast of the island, (R. 56, 57, 58).

Jacobs testified that while he was stopped in Barbara Place on the morning of the accident he saw the plaintiff leave her front door, come down to Koneta Court at the south side of 5th South, where she waited momentarily and looked westward down the street, and

then "began to hurry across the street," and was almost to the center island when struck by the automobile, (R. 61). When he first observed the car, it was about 20 feet away from the plaintiff, (R. 62), and its left wheels were approximately one and one-half to two feet south of the island, (R. 63). He said that when she started to cross the street she proceeded in a general northeasterly direction toward his parked car, (R. 68-70). He estimated the speed of the car in the "neighborhood of approximately 30 miles an hour," (R. 70-71), and said that he had observed from previous occasions that that was the speed at which cars at that time of the morning going east on 5th South generally traveled, (R. 74). He further testified that from the time the plaintiff started across the street until the moment of the accident she was hurrying and was still moving at the time of the accident. He said that when she came in contact with the car, she went over the left front fender and off to the left side of the car, and after the accident was lying not more than 8 or 10 feet from the point of impact, (R. 71).

Clifford Myer, an employee of the Utah State Road Commission, was with a survey crew that was working in the area at the time of the accident. He was down by the retaining wall at 10th East and 5th South approximately on the center line of 5th South Street looking east along said 5th South Street. He had been making some shots with another state employee who was in the center of 5th South Street, but up at the 11th East intersection, (R. 76-77). He indicated his position by a little "m" on

the diagram, Exhibit P-4. He testified that between the hours of 7:00 A.M. and 8:00 A.M. 5th South Street was heavily traveled.

While looking east along the center of 5th South Street he heard a screeching sound and then observed the defendant's car and a black object as it rolled off the side of the left front fender. From where he was sighting he testified that the left wheels of the defendant's car were 4-6 feet south of the center island, (R. 77-78). The car was swerving to the right and came to a stop very quickly. It stopped within half the distance of the car, (R. 79). He had casually observed the car before and said it was not going nearly as fast as the traffic coming down the street, (R. 79). Following the accident the plaintiff was lying a foot and a half south of the island, (R. 79).

Wesley C. Larson also testified on behalf of the defendant. He was the member of the survey crew that was in the center of 5th South Street but up at 11th East Street and looking down west toward Myer, (R. 86-87). He heard the brakes and then observed that the plaintiff was between the ornament in the center of the car and the left front fender. The left side of the car at this time was 4 feet south of the center island. The car stopped very fast and did not travel over a car length, (R. 88). Following the accident, the plaintiff was lying about 3 feet south of the island. He went down to the scene and observed the brake marks from the defendant's car which

he estimated to be about 12 feet long from the rear of the car, (R. 89-90).

Sidney LeSieur was another member of the survey crew who testified on behalf of the defendant. He was standing right next to Myer on the line with the center of 5th South Street but down at 10th East, (R. 91-92). He heard the screech of brakes. The only thing that he observed was the position of the plaintiff after the accident and the location of one of her shoes. She was lying approximately 3 feet south of the island with no part of her body on the island. He observed a shoe about 5 or 6 feet southeasterly of the plaintiff, and 11 feet south of the island, or about on the line dividing the two lanes for eastbound traffic. He did observe some skid marks caused by the defendant's car and estimated that they were only 10-12 feet long up to the point where the rear end of the car was after the accident, (R. 92-93). He also said that the particular area where the accident occurred was awfully bad for traffic, and that the members of the survey crew wouldn't dare go out onto the street without a red vest on, (R. 95). He said the only warning signs to indicate any survey crewmen were in the area would be further south on 10th East Street from the point where the defendant had entered 10th East Street. None of the crewmen were in the street in the vicinity where the accident occurred, (R. 94).

Proctor Lescoe, the investigating officer, was also called as a witness for the defense. He arrived on the scene at 7:51 A.M., (R. 97). According to his measure-

ments, the plaintiff's feet were 6 inches from the south edge of the island, and her head 2 feet from the south edge of the island. No part of her body was on the island, (R. 98-99). She was lying approximately 19 feet east of the east edge of Koneta Court. He observed brake marks caused from all four wheels of the defendant's car and measured them to be 17 feet long. The car itself had been moved from the point where it had come to rest and was facing in a northeasterly direction, (R. 99-100). There was no broken glass on the car and no visible damage to it, (R. 101).

Ross Taylor, the defendant, testified that he was attending the University at the time and was on his way to a class which started at the University at 8:00 A.M., (R. 109-110). At the time of the accident he was residing at 851 East 5th South, (R. 109). He had left his home and driven east on 5th South to 10th East where he made a left turn and went north on 10th East to the point where there is an entrance to the 5th South curve. At this point he came to a full stop at the stop sign and waited for several eastbound cars to pass. He then made a turn from his stopped position to go east on 5th South, and in doing so, turned into the inside lane on 5th South, (R. 111). At that time the sun had a tendency to throw a glare on the far right side of his windshield. It did not block his view ahead and he could see clearly in his lane of traffic, (R. 111-112). He was looking straight ahead, (R. 116). He was traveling at a speed of about 25 miles per hour, (R. 112) with the left side of his car possibly 3-4 feet south of the island, (R. 117), when he observed

the plaintiff about 10 feet ahead of the right front fender of his car, (R. 112-113). He immediately applied the brakes and swerved to the right and thought his vehicle may have moved a foot or two to the right before the impact. From the time he first observed the woman until the time of the accident she was running to the north, and at the time of the impact she was possibly 5 or 6 feet south of the island, (R. 112-113). She rolled over the top of the left front fender and over to the left side of the car, but never came back as far as the windshield. He stopped his car within a distance of possibly two car lengths, not more, (R. 113). Either an arm or a leg of the plaintiff was on the island, and the remainder of the body was south of the island, (R. 114). He did not tell the plaintiff that he had not seen her because the sun was in his eyes, (R. 114-115). He thought it was the glare of the sun on the right side of his windshield that prevented him from seeing the plaintiff until she entered the path of his car, (R. 118). He further testified that prior to the time that the accident had occurred he had never known and was not aware of the fact that Koneta Court was even on that street, (R. 121-122). With further reference to the glare of the sun, he stated that as soon as he turned onto 5th South and his car was headed in a southeasterly direction, the sun was off to the southeast and he could see the glare. The glare became more as he made his turn going east but moved to the right of the vehicle, (R. 122), but at no time interfered with his vision directly ahead in the lane of traffic in which he was proceeding, (R. 123).

## STATEMENT OF POINTS

### POINT I.

THE REQUESTED INSTRUCTION ON THE LAST CLEAR CHANCE DOCTRINE WAS PROPERLY REFUSED.

### POINT II.

THE COURT PROPERLY INSTRUCTED THE JURY ON THE PLAINTIFF'S DUTY TO YIELD THE RIGHT OF WAY.

### POINT III.

THE COURT DID NOT BY IMPLICATION OR OTHERWISE ERRONEOUSLY INSTRUCT THE JURY TO THE PLAINTIFF'S PREJUDICE THAT ALL PLAINTIFF DID WAS TO MERELY GLANCE IN THE DIRECTION OF THE APPROACHING VEHICLE.

### POINT IV.

THE COURT DID NOT ERR IN OVERRULING PLAINTIFF'S MOTION FOR A NEW TRIAL.

## ARGUMENT

### POINT I.

THE REQUESTED INSTRUCTION ON THE LAST CLEAR CHANCE DOCTRINE WAS PROPERLY REFUSED.

The plaintiff's requested instruction No. 6 was an attempt to have the court apply the last clear chance doctrine to the case. The theory was that the plaintiff was in a position of danger from which she was unable to free herself, that the defendant either discovered or by exercise of due care should have discovered her peril,



and at that time had a clear opportunity to avoid the accident but failed to avail himself of such opportunity. Under the facts as presented in this case the court properly refused this requested instruction.

The undisputed facts are that the plaintiff stopped at the ditch on the south side of the street, looked to the northwest for approaching eastbound traffic, and then without making any further observations whatsoever, rapidly walked or ran in a diagonal northeasterly direction across the street. She did not see the car and was not conscious of its presence or approach until the moment of the impact. Because of the center island proceeding all the way down the street, the only source from which the plaintiff could anticipate any trouble until she reached the center island was from vehicles proceeding in an easterly direction along 5th South Street. None theless, she wholly failed to make any observations for such vehicles after leaving the ditch on the south side of 5th South Street. It is undisputed that at the time of the accident the defendant's vehicle was in the inside lane for eastbound traffic, which would mean that the plaintiff rapidly walked or ran approximately 20 feet before she would enter the lane in which the defendant's vehicle was traveling. There is no testimony by any witnesses that the defendant was traveling at any excessive rate of speed. His own testimony was approximately 25 miles per hour. The plaintiff's witness, Jacobs, said that the vehicle was traveling approximately 30 miles an hour, but this was what all vehicles traveled from his observations in going east up the highway. The brake marks

and the stopping distance would certainly indicate no speed beyond 25 miles per hour. The defendant testified that although he had clear vision in his own lane of traffic, his view to the right was obscured by the rays of the sun which at that time of the morning would be south and east of his course of travel and shining toward the right side of his car. It is undisputed that the plaintiff was not crossing the street in any marked crosswalk, and the court ruled that she was not crossing the street at an unmarked crosswalk at an intersection. The plaintiff's counsel is evidently satisfied with this ruling of the lower court as no issue is made thereon in connection with his brief on appeal. The defendant, notwithstanding the glare of the sun to the right of his car, observed the plaintiff as soon as she came into the path of his vehicle opposite the right front fender, at which time she was running and his vehicle was only about 10 feet away. He immediately applied his brakes and swerved to the right and thought he may have turned his vehicle 2 feet to the right before the actual impact occurred. The plaintiff continued rapidly walking or running during all of this time.

This court in the case of *Graham v. Johnson*, 109 Utah 346, 166 Pac. (2d) 230, 109 Utah 365, 172 Pac. (2d) 665, in commenting upon the application of the last clear chance doctrine, cites with approval from Chapter 17, Sections 479 and 480 of Volume 2 of Restatement of the Law or Torts, and in the course of its opinion said:

"In the clear chance doctrine the plaintiff's negligence has become in a sense fixed and realizable and on to this state of things defendant approaches on to the negligent plaintiff with and in control of the danger.

\* \* \* \*

*"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."* (Emphasis added.)

The facts in the Graham case were somewhat in dispute, but it was clear that the defendant in that case knew of the presence of the minor on the street as she approached and also knew that the minor was unaware of her approach. Each of these items are wholly lacking in the present case.

We quote from page 358, Chapter 17, Section 480 of the Restatement of the Law of Torts as follows :

"It is not enough that the defendant should see the plaintiff in a position which would be dangerous were the plaintiff not aware of what is going on. The defendant must also realize or have reason to realize that the plaintiff is inattentive and, therefore, is in peril. *The defendant is entitled to assume that the plaintiff is paying*

*or will pay reasonable attention to his surroundings; until he has reason to suspect the contrary, he has no reason to believe that the plaintiff is in any danger. \*\*\*"* (Emphasis added.)

In this case even had the defendant seen the plaintiff when she started to cross the street, he would have had the right to assume that she would keep a lookout and would yield the right of way to his vehicle.

In *Beckstrom v. Williams*, 3 Utah (2d) 210, 282 Pac. (2d) 309, a two and one-half ton tractor was pulling onto the side of the road from a private driveway. The defendant was proceeding south. The plaintiff stopped the heavy tractor before entering the highway to see if it was clear. At this time the defendant's vehicle was approximately 325 feet away. The plaintiff then proceeded with the tractor 5 feet out onto the hard surfaced portion of the road and came to a stop, at which time according to the evidence the defendant's vehicle was still 125 feet away. The defendant had 16 feet of highway to the east of the tractor to avoid the accident. In applying the last clear chance doctrine, the court in that case said that three conditions must exist:

"(A) that plaintiff was in a danger from which he could no longer extricate himself, (B) that defendant knew, or in the exercise of reasonable care should have known, that plaintiff was so endangered, and (C) that defendant thereafter, by exercise of reasonable care, could have avoided injuring the plaintiff."

In discussing the application of the first point, (A), the Supreme Court stated that when the heavy tractor start-

ed out onto the highway into the lane of traffic in which the defendant was proceeding, or at least by the time it stopped in that lane, that the plaintiff then was in a position of peril, and that the defendant's truck was then 125 feet away.

In our own case in considering point (A), the plaintiff was in no position of peril from which she was unable to extricate herself until she started to cross the path of the automobile. Prior thereto she could have stopped, yielded the right of way to the vehicle and entirely avoided the accident. When she entered the path of the car, at most not more than one second would have elapsed until the time of the impact, during which time and at the speed at which the defendant was traveling he was then too close to avoid the accident.

In speaking of the application of point (B) to the facts in the Beckstrom case, the court said that when the defendant was at least 250 feet away, the plaintiff's tractor was onto the hard surface and moving forward across the highway in full view of the defendant. However, it added this important factor:

*"Concededly until the tractor was actually in the lane of traffic, defendant could reasonably expect that it would stop. But when the tractor continued forward, defendant was bound to know that the driver of such a cumbersome machine could not, in the few seconds required for defendant's truck to reach the spot, get out of the way and avoid an accident."* (Emphasis added.)

In this case when the plaintiff entered the lane in

which the defendant's car was traveling, it was then too late for the defendant to avoid the accident. The defendant's vehicle must then have been within approximately 10-25 feet at most of the plaintiff. If the plaintiff could not stop her forward course, it would be wholly unreasonable to anticipate or expect that the driver of a motor vehicle in that short time and distance could have avoided colliding with the plaintiff. All he could possibly do was to attempt to apply the brake and turn to the right. This he did.

In considering the application of point (C), or the question whether the defendant had a clear chance to avoid the collision, the court in the Beckstrom case said:

*"There can be no doubt that it must be a fair and clear opportunity, and not just a bare possibility. The defendant cannot be put into the position of having to make precise calculation and manipulation to avoid the accident, nor must it require exceptional agility or skill. The chance must be such that an average individual using ordinary care would have a real opportunity to perceive the danger to plaintiff, to realize his inability to escape and thereafter to avoid the harm."* (Emphasis added)

The court also cited with approval from *Morby v. Rogers*, 122 Utah 540, 252 Pac. (2d) 231, as follows:

*"There is no doubt but that in order for the question to be properly submitted to a jury, the evidence must be such as would 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 safety measure, or even by reasonable care, the defendant by 'the skin of his teeth' could have avoided the collision."* (Emphasis added.)

In considering the application of point (C) to the facts in the Beckstrom case, the court stated that by the defendant's own testimony his speed was 40 miles per hour; that at such speed his car could have been brought to a stop, including normal reaction time within 126 feet, and that when the plaintiff's tractor first entered the road, the car was then 325 feet away and could therefore have been stopped 200 feet short of the point of impact. It then went on to say that the defendant was not obliged to realize the plaintiff was in inextricable peril at this point, but only after the vehicle had got onto the highway, but then said at that point the defendant's vehicle was 125 feet away and could have stopped including reaction time within 126 feet or could have turned out onto the 16 feet of unobstructed road.

No such facts are present in the instant case. From the time that the plaintiff, while either rapidly walking or running, entered the path of the defendant's vehicle, the defendant's vehicle at most would have been only 10-25 feet away from plaintiff. Traveling at a speed of 25 miles per hour, the defendant would barely have time to react to the situation before the impact occurred. His own testimony is that he did apply the brakes and swerve to the right and that he probably turned 2 feet before the actual impact occurred. Certainly, under these facts it would be wholly impossible to say that the defendant

had a clear opportunity to avoid the accident after the plaintiff rapidly walked or ran into the path of his car. Counsel has indicated that there was nothing in the lane to the right. Therefore, there was nothing to have prevented the plaintiff from stopping prior to the time that she ran into the path of the vehicle. Had she done so, the accident would not have occurred. After she ran into the path of the vehicle, the defendant had no clear opportunity to avoid the accident, and the last clear chance doctrine does not apply.

Counsel in his brief argues that the plaintiff was in peril from the time that she started to cross the street because she was unaware. This is not true, and, as indicated in the Beckstrom case, her peril only commenced when she entered the path or lane in which the defendant's automobile was traveling. At any time prior thereto she could have avoided the accident completely had she been exercising any care whatsoever.

In *Morby v. Rogers*, *supra*, the facts were entirely different to those in the present case. The defendant had first observed the boy on a bicycle traveling in the same direction as the car when the defendant was 300 feet away. At a distance of 200 feet the defendant sounded his horn. The boy on the bicycle at no time gave any indication that he heard the horn. The defendant continued on until within 78 feet of the boy, but actually took no safety measures until within 20 feet of the boy, notwithstanding the fact that at the speed at which he was traveling he could have stopped within 43 feet, or 35 feet short



of striking the boy. The boy in that case for a distance of 300 feet was entirely in the lane of travel in which the automobile was proceeding. The plaintiff in our case was not in the lane of travel of the automobile until just an instant before the impact occurred. Using the stopping distance referred to in the Morby case, traveling at a speed of 25 miles per hour, the defendant, assuming a normal reaction time, would travel  $27\frac{1}{2}$  feet, and it would take an additional 35 feet, or a total stopping distance of  $62\frac{1}{2}$  feet. By no stretch of the imagination can it be argued that the defendant in the instant case had any such distance within which to react after the plaintiff ran into the path of his car.

Counsel for the plaintiff also refers to the case of *Winn v. Read*, 8 Utah 2d 394, 335 Pac. (2d) 627. The facts in that case are wholly dissimilar from those in this case. In that case there was evidence that the plaintiff had driven his horse onto the highway in front of the defendant in the same lane of travel in which the defendant was proceeding for a distance of 30 rods or approximately 495 feet. During all of this time the horse would have been in view of the defendant as it was in his lane of travel. As we have heretofore indicated, the plaintiff in this case was never in the lane of travel of the defendant's vehicle until she suddenly rapidly walked or ran in front of the car, at which time the defendant's car was too close to either stop or otherwise act to avoid the accident.

See *Compton v. Ogden Ry. & Depot Co.*, 120 Utah 453, 235 Pac. (2d) 515. In that case the plaintiff was

walking along the side of a railroad track as a train approached. The court in that case in speaking of the last clear chance doctrine, stated that it only applied:

“\* \* \* 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. The deceased in this case was not under those circumstances of inextricable peril. *The fact is that at any instant up to the time she was actually struck, she could by the exercise of ordinary reasonable care, have apprehended the presence of the train, and by taking one step to the side, have avoided her injury.*” (Emphasis added.)

Exactly the same situation is presented in the instant case. Until the time that the plaintiff crossed in front of the path of the defendant's vehicle, she could, by the exercise of ordinary care, have observed the presence of the automobile and yielded the right of way to it and thereby completely avoided the accident. The court in the Compton case made this further significant statement:

“*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.'" (Emphasis added.)

The plaintiff's negligence in this case continued right up to the point until she rapidly walked or ran into the path of the car, and at this time the defendant had no clear opportunity to avoid any accident.

In the case of *Marcellin v. Osguthorpe*, 9 Utah 2d 1, 336 Pac. (2d) 779, the Utah Supreme Court again had the opportunity to consider the last clear chance doctrine. In that case the court said:

"There is no certainty that he ever actually got into a situation of inextricable peril. Less so is there any certainty that defendant either did, or would be obliged to, so realize in time to save him from injury. There is no reason to assume that the defendant had to apprehend that the plaintiff would not see the Cadillac which was in plain sight on the highway in front of him with the tail lights on; nor that he would continue at a negligent rate of speed; nor that he would fail to guide his car safely between the other two. There actually was room to clear by several feet on either side. On the contrary, defendant could reasonably expect (and undoubtedly hoped) that as plaintiff approached these two cars he would heed the situ-

ation ahead and moderate his speed. He could reasonably continue to so expect as long as there remained opportunity to do so. Plaintiff's argument that defendant should have observed from plaintiff's speeding approach that he was in inextricable peril, and should have dimmed his lights so plaintiff could see the Cadillac and arrest his own negligence to avoid the danger, must presuppose that at any such instant he could have avoided the collision by arresting his own negligence. If plaintiff could do nothing to avert the collision, a fortiori, defendant could do nothing because his action by dimming his lights could only react through the plaintiff. It follows that plaintiff's own negligence was a concurring proximate cause."

In the present case there is no certainty that the plaintiff ever actually got into a situation of inextricable peril. Certainly, it cannot be said that the defendant was obliged to realize that she did in time to save her from injury. He had the right to assume that she would be keeping a proper lookout, even had he seen her, and that she would exercise proper precautions for her own safety, particularly since she was crossing where there was no marked crosswalk and not at an unmarked crosswalk at an intersection. As indicated in the Marcellin case, the extension of the application of the doctrine would require defendant "to assume that plaintiff would continue to be negligent, and based thereon to realize the approaching danger in time to avoid the same." The Utah Supreme Court in the Marcellin case further stated that the last clear chance doctrine "should not be extended beyond such circumstances to obliterate the de-

fense of contributory negligence.” Under the facts in this case, to apply the last clear chance doctrine would completely obliterate the defense of contributory negligence. It would permit a plaintiff to negligently cross a street where there was no marked crosswalk, to fail to keep a proper lookout, to run in front of a car, and then charge the driver with anticipating that she would do all of these things, with anticipating that she would fail to exercise any precaution, and with anticipating that she would run directly in front of his car.

We think the facts in this case are closely akin to those in the case of *Cox v. Thompson*, 123 Utah 81, 254 Pac. (2d) 1047, wherein a pedestrian who was walking east across a poorly lighted highway turned and walked directly into the path of the defendant’s automobile. He was crossing where there was no marked crosswalk and was under the duty to yield the right of way to a vehicle upon the road. As indicated by the court in that case, if the decedent had yielded the right of way, or if he had looked up the road and seen the danger, the accident would not have occurred. The court in that case held that the doctrine of last clear chance did not apply. The defendant first observed the decedent when he walked into the cone of light projecting from the automobile and then had no clear opportunity to avoid the accident. In the present case the defendant observed the plaintiff when she first started to cross the path of his vehicle, but then had no clear opportunity to avoid the accident.

**It is apparent from a review of the foregoing Utah**

cases that the doctrine of last clear chance is never applicable until a plaintiff arrives at a point as to be in peril. In this case the point was reached when the plaintiff started to cross in front of the defendant's vehicle. It is also clear that the doctrine of last clear chance should never be applied to the ordinary case in which the act creating the peril occurs practically simultaneously with the happening of the accident, and in which neither party can be said to have had a last clear chance thereafter to avoid the consequence. If the defendant, with a vehicle traveling 25 miles per hour had a last clear chance to avoid the accident, then certainly it could be said with more force and effect that the plaintiff had the last clear chance to avoid the accident because all she needed to do was make a further observation to know that she had incorrectly appraised the situation, and she could easily have stopped, whereas, it takes some distance within which to stop a moving vehicle. The plaintiff knew that the street was heavily traveled. She knew the danger from previous experience. The sun was not in her eyes. She was not concerned with traffic coming from any direction except that of the defendant's vehicle until she reached the center island. Her negligence under such circumstances in failing to make any further look after leaving the ditch on the south side of the street was not only negligent, but entirely foolhardy.

The case of *Covington v. Carpenter*, 4 Utah 2d 378, 294 Pac. (2d) 788, is in point. In that case a motorcyclist was held guilty of contributory negligence as a matter of law in failing to keep a proper lookout. There, as in

the present case, the plaintiff was not faced with the duty of multiple appraisement as he was proceeding down the street nor with any road hazard of any kind, yet he wholly failed to see the defendant's vehicle as it was backing away from the curb. The court in that case held that the plaintiff's action in failing to watch the only potential hazard upon the road constituted contributory negligence as a matter of law. We feel that in this case the plaintiff's conduct in failing to watch the only potential hazard upon the road was likewise contributory negligence and that there was no room for the application of the last clear chance doctrine.

In *Jones v. Armstrong*, (Mich.) 204 N.W. 702, the court refused to apply the last clear chance doctrine to a pedestrian case where the plaintiff testified that he did not look after he started to cross the street but traveled 40 feet or more without ever looking again. The defendant in that case did not even testify, but the court said that he would have had the right to suppose that the plaintiff would not have been completely oblivious to the approach of the approaching automobile and would have taken some precautions for her own safety. The same situation is true in the present case. Even had the defendant observed the plaintiff when she first started to cross the street, he would have no reason to anticipate that she would continue to run in front of his car and fail to yield the right of way to it.

The plaintiff in this case seeks to charge the defendant with observing the plaintiff's presence when she

left the curb, notwithstanding that his view to the right was obstructed by the glare of the sun, and then to assume that the plaintiff would continue to run into the path of the defendant's car. We submit that the last clear chance doctrine cannot apply in any case where the defendant's view is obstructed by darkness, glare or other condition which prevents him from seeing the plaintiff until she enters the path of his automobile. The defendant in this case was driving in a lawful manner within the speed limit and had no reason to anticipate the presence of any person until the plaintiff was in front of his vehicle, and it was then too late for him to avoid the accident.

See 4 Blashfield Cyclopedia of Automobile Law & Practice, Part 2, Section 2803, page 393 and 394, wherein it is said:

“\* \* \* While a pedestrian may be in a zone of danger as soon as he steps from the sidewalk to the street where vehicles are passing, he is not then necessarily in danger from any particular automobile. Until he reaches a point where he is in a position of peril from the automobile of the defendant and further progresses on his part or other negligent conduct will not increase his danger, his negligence in proceeding forward can only be regarded as a contributing proximate cause of the injury.”

See also 4 Blashfield Cyclopedia of Automobile Law & Practice, Part 2, Section 2804 at page 395:

“For example, a motorist cannot be held liable under the last clear chance doctrine where his view



was obstructed so that he could not see plaintiff until it was too late to avoid injuring him.”

See also 4 Blashfield Cyclopedia of Automobile Law & Practice, Part 2, Section 2806 at page 402:

“However, it is permissible to assume that another will obey the law, and hence recovery under the doctrine may not be based on a failure to anticipate a breach of law, \*\*\*\*”

#### POINT II.

THE COURT PROPERLY INSTRUCTED THE JURY ON THE PLAINTIFF'S DUTY TO YIELD THE RIGHT OF WAY.

The plaintiff complains of instruction 13 (2), (R. 180, 167), which reads as follows:

“(2) A pedestrian who crosses a street at a 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.”

Reference is made to Section 41-6-79 (a) U.C.A. 1953, which is substantially the same as the portion of the instruction to which the objection is made. Section 41-6-80 (a) U.C.A. 1953 then provides that even though a pedestrian may be required to yield the right of way, that a driver shall exercise due care to avoid colliding with any pedestrian upon any roadway. Plaintiff further argues that the portion of the instruction as given is inconsistent with certain other instructions.

In instructions No. 6 and 7 the jury was told in substance that pedestrians and motorists each had the same

rights to the use of public streets. However, even though a pedestrian and a motorist have an equal right to the use of streets, one may nonetheless have the right of way over the other. A pedestrian in a crosswalk has the right of way over a motorist, even though a motorist has the right to use the street. By the same token, a motorist has the right of way over a pedestrian who chooses to cross a street where there is no crosswalk. Had the court failed to give instructions No. 6 and 7, the plaintiff would then have argued that the court led the jury to believe that the plaintiff could not cross a street outside a crosswalk. The plaintiff did have a right to use the street and did have a right to cross a street outside of a crosswalk, but, nonetheless, when she attempted to do so, she was under the necessity of yielding the right of way to vehicles, and it was, therefore, proper for the court to instruct the jury as it did in instruction No. 13 (2).

The appellant claims that the expression: "failed to yield the right of way" without more is an erroneous statement of the law. With this we cannot agree. In the first place, it is the language used in the statute, and in the second place, that instruction in almost identical language has heretofore been approved by this court in the case of *Okuda v. Rose*, 5 Utah 2d 39, 296 Pac. (2d) 287. In that case a jury returned a verdict of no cause of action in a suit in which a pedestrian had been killed. The instruction on contributory negligence to which the appellant objected in that case read as follows:

"You are instructed that the deceased in the exercise of ordinary care, and in order not to be guilty herself of contributory negligence, was governed by the following rules of law at the time and place in question.

\* \* \*

"3. You are instructed that a pedestrian crossing a roadway at any point other than within a marked crosswalk or within an unmarked crosswalk at an intersection should yield the right of way to all vehicles lawfully upon the highway. Therefore, it was the duty of said deceased to yield the right of way to vehicles upon the street if you find that she was crossing or commencing to cross the street under the above circumstances."

In the present case the physical facts definitely prove that the defendant's vehicle was so close as to constitute a hazard and that the plaintiff should have yielded to it. There is no evidence in this case to indicate that the defendant was traveling along the street at a speed greater than 25-30 miles per hour. Considering that from the time the plaintiff left the ditch on the south side of 5th South Street and either rapidly walked or ran in a northerly direction and that her path and that of the vehicle met in the inside lane for eastbound traffic, it goes without saying that the plaintiff should have yielded the right of way to the vehicle. She had to rapidly walk or run to get into the path of the vehicle which was lawfully traveling on the road and at a proper rate of speed. If a pedestrian has to rapidly walk or run into the path of a vehicle which is lawfully proceeding upon the road in order to get into its path, it goes without saying that she failed to yield the right of way to that vehicle.

Complaint is made that the court by its instructions failed to take into consideration the qualifying provision of Section 41-6-80 (a) U.C.A. 1953. This is not so because the court in instruction No. 7 went on to instruct the jury that the driver's duty required him to be vigilant at all times, to keep a lookout for traffic and other conditions reasonably to be anticipated, to keep his vehicle under such control that he could stop quickly and avoid an accident, and then stated that this duty continued even though the defendant had the right of way. This fully covered the situation as presented in Section 41-6-79 (a) U.C.A. 1953 and Section 41-6-80 (a) U.C.A. 1953.

Reference is made to the case of *Coombs v. Perry*, 2 Utah 2d 381, 275 Pac. (2d) 680. That case is not in point because it involved a situation where the plaintiff pedestrian was in a regular marked crosswalk in the middle of an intersection. She was proceeding in the crosswalk in a westerly direction across Washington Boulevard and on reaching the middle of the street, stopped and looked to the north, but saw no southbound vehicles approaching and took a few steps westward when she suddenly became aware of the approach of the defendant's car. In that case a jury verdict was rendered in favor of the plaintiff and the defendant appealed, claiming that the plaintiff had failed to prove negligence on the part of the defendant, and that as a matter of law the plaintiff was guilty of contributory negligence. In considering the cases cited by defense counsel, the court recognized the distinction between cases in which the pedestrian was in a crosswalk

and where the pedestrian was crossing where there was no crosswalk, and said:

“\* \* \* But cases, cited by defendant which involve accidents occurring outside of lawfully designated crosswalks are for that reason distinguishable from the instant one; \*\*\*”

Great emphasis was laid upon the fact that the pedestrian was in a marked crosswalk and “*had the right of way.*” The court further stated that right of way simply meant:

“that if two persons are so proceeding that if they continued their course there would be danger of collision, the disfavored one \*\*\* must give way, and the favored one \*\*\* may proceed; and the favored one \*\*\* may assume that this will be done.”

In the instant case the plaintiff was not in a crosswalk, and the defendant was the favored person. Applying the concept of right of way as defined by the Supreme Court, the facts proved that the plaintiff and the pedestrian continuing in their course not only constituted the danger of a collision but actually precipitated one. The defendant, therefore, had the right of way over the plaintiff. In its opinion in that case the court states that the plaintiff, since she was in a crosswalk and had the right of way, even had she seen the car, would have been entitled to assume that the car would yield the right of way to her. The same situation must apply to the defendant in the instant case—that even had he seen the plaintiff, he could make the same assumption that she would

stop and yield the right of way to him. When she rapidly walked or ran into his path, it was then too late for him to avoid the accident.

This is also the decision of the Utah Supreme Court in the case of *Hess v. Robinson*, 109 Utah 60, 163 Pac. (2d) 510, which is cited with approval in the *Coombs* case, and wherein it was held that even though the plaintiff driving southward toward an intersection was negligent in not seeing an ambulance come into the intersection from the west, that he was entitled to assume that the ambulance would stop for a stop sign and that he was entitled to proceed until it became apparent to him that the ambulance was not going to do so.

In commenting upon the case of *Coombs v. Perry*, the appellant quotes an excerpt to the effect that the plaintiff under the facts as indicated in that case was not obliged to focus her full and undivided attention on any particular car. However, in that case she was in a crosswalk and the court indicates she might have to watch for other pedestrians in the crosswalk and remain aware of the possibility of other traffic. That is not the situation at all as presented in the instant case. The facts in our case are strikingly similar to those in the case of *Sant v. Miller*, 115 Utah 559, 206 Pac. (2d) 719. In that case the plaintiff was crossing a street outside of a crosswalk and was walking in a diagonal southwesterly direction across the street. On reaching a point 8 feet west of the center line, the plaintiff was struck by the defendant's car. The trial court directed a verdict in

favor of the defendant on the ground that the plaintiff was guilty of contributory negligence as a matter of law. This verdict was upheld by the Supreme Court. Furthermore in that case the Supreme Court held that the doctrine of last clear chance did not apply. The court placed emphasis upon the fact that a motorist was not apt to expect pedestrians to be crossing a street at this point, and that in "a moving situation, \*\*\* he might reasonably anticipate a person would stop before moving into the path" of his vehicle. The court also indicated that the plaintiff knew he was leaving a place of safety to travel a hazardous course across the road and was cutting diagonally across the street; that after he crossed the center line, he was not concerned with traffic coming from any direction except the north. The court then said:

*"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.* And especially is this true, when because of darkness and climatic conditions, the opportunity for drivers to clearly discern the presence of individuals on the roadway is greatly restricted. It is not due care for a person to fail to observe what might be approaching danger when there is no necessity to look elsewhere. Appellant was not confronted with a situation which distracted his attention or which precluded him from continuously observing the on-coming traffic and his curiosity to watch the movement of his friends is not sufficient to excuse him for his delict. Reasonable care dictates that while appellant was crossing the west portion of the street, he should have been observant of the movement of this traffic south on the street. He apparently disregarded potential danger for unimportant reasons." (Emphasis added.)

In the instant case the plaintiff knew that 5th South Street, particularly at that time of the morning, was a heavily traveled street. She had encountered difficulty in getting across the street on other occasions because of traffic. In fact, it had been discussed between her and the driver of the car that he would come around and pick her up on her side of the street so as to obviate the necessity of her crossing the street at that point, but she replied it was not necessary. Because of the island in the center of the street, the only direction from which traffic could be anticipated was that traveling east. The plaintiff was aware of the approach of an eastbound car, but, nonetheless, rapidly walked or ran in a diagonal direction across the street without paying any further heed thereto. She was admittedly not crossing the street



in a crosswalk and might therefore anticipate that a motorist would not be likely to be expecting her upon the street at that point. She should have known that the sun might be in the eyes of eastbound motorists, but there was no sun in her eyes and nothing to prevent her from looking to the west or in the only direction from which traffic could be anticipated. She was not in a crosswalk and therefore was not concerned with the presence of other pedestrians that might be in the area. She had crossed that street every day five times a week for several months prior to the accident and therefore was fully familiar with the type of the surface and did not have to look for any obstructions or defects therein. Her sole attention, as indicated in the *Sant* case, should have been directed to the west until she reached the center island and had she done this, it would have become readily apparent to her that she could not safely cross the street, and she could easily have stopped and yielded the right of way to the vehicle as required by law. See also *Covington, v. Carpenter*, *supra*.

Appellant also complains of that portion of instruction No. 13 (3) which states that a pedestrian who crosses a street outside of a marked cross walk or within a marked crosswalk at an intersection is required to exercise more care and caution than in crossing in a pedestrian lane. This is a proper statement of the law, and in the case of *Sant v. Miller* *supra*, the court, as indicated in a part of the quotation previously cited, specifically stated that a greater degree of care was placed upon a

pedestrian who attempts to cross a street at a point outside a crosswalk.

The meaning which the appellant attempts to give to the court's instructions is not only strained but far fetched. The court's instructions clearly indicated that the plaintiff had a right to cross the street, even outside a crosswalk, but further informed the jury that if the plaintiff crossed a street outside a crosswalk, she had to yield the right of way and had to exercise more diligence than if she was crossing in a pedestrian lane. The court specifically instructed the jury on the defendant's duty to keep a proper lookout and travel at a proper speed, and specifically stated that such duty continued even though the defendant had the right of way over the plaintiff. Under these instructions even though the plaintiff failed to yield the right of way to the defendant, it was up to the jury to determine whether such negligence on her part was a proximate cause of the accident, or whether the negligence, if any, on the part of the defendant was the proximate cause of the accident. We do not see how these issues could have been more clearly presented to the jury than they were done in the instant case.

### POINT III.

THE COURT DID NOT BY IMPLICATION OR OTHERWISE ERRONEOUSLY INSTRUCT THE JURY TO THE PLAINTIFF'S PREJUDICE THAT ALL PLAINTIFF DID WAS TO MERELY GLANCE IN THE DIRECTION OF THE APPROACHING TRAFFIC.

On this point the appellant refers to the court's instruction No. 13 (1), (R. 180), which was with reference

to the plaintiff's duty to look and observe whether there were any automobiles in such close proximity as to affect her safety and to continue to keep such a reasonable and prudent lookout as was reasonably necessary for her protection. The instruction then stated that "a mere glance in the direction of the approaching automobile is not sufficient." The appellant claims that by this portion of the instruction the trial judge indicated to the jury that all the plaintiff did was merely glance in the direction of the approaching automobile. The instruction is not susceptible to any such interpretation, but even if it were, the matter was cured by the court's instruction No. 1, (R. 168), in which the court said:

"The court has no opinion, and does not seek to express any in these instructions with respect to what the facts are. It is your sole prerogative to determine the facts from the evidence."

We submit that the instruction contains a correct statement of the law and that certainly a mere glance in the direction of the approaching automobile is not sufficient. The court did not state that the plaintiff made a mere glance, but outlined what type of a lookout the plaintiff had to keep, and, as indicated by this court in the case of *Mingus v. Olsson*, 114 Utah 505, 201 Pac. (2d) 495, a mere glance in the direction of an approaching automobile is not sufficient.

Under the facts in this case the jury could well have found that all the plaintiff did was to take a mere glance. It is doubtful whether she ever saw the defendant's auto-

mobile because the vehicle which she saw had not yet reached the curve, and she could not state whether it was going south on 5th South Street or coming around the curve. This obviously could not have been the defendant's vehicle. Furthermore, she did not see the vehicle long enough to make any estimate as to its speed. Certainly, her estimate as to its distance was erroneous. There was no evidence to indicate that the vehicle was traveling more than 25-30 miles per hour, and it is undisputed that while the plaintiff rapidly walked or ran 20 feet from the curb, she and the vehicle crossed paths. At the trial we felt and still feel that the plaintiff was guilty of contributory negligence as a matter of law by failing to look again to the west for approaching east-bound traffic after leaving the south curb line and in failing to yield the right of way to the vehicle. The type of lookout which she maintained was a matter for the jury to decide under the court's instructions. This was fully covered in the court's instruction, and it was properly indicated that a mere glance would not be sufficient. There was evidence upon which the jury could find that all the plaintiff did was take a quick glance and failed to properly evaluate the situation. This is perfectly evident from the manner in which the accident occurred. The court did not by any stretch of the imagination instruct the jury that all the plaintiff did was take a mere glance, but informed them that if that was all she did do, she failed to keep a proper lookout. The factual question was left to the jury for decision. There could have been no prejudice in any event in view of plaintiff's admission

that she failed to look again as she crossed the street.

#### POINT IV.

THE COURT DID NOT ERR IN OVERRULING PLAINTIFF'S MOTION FOR A NEW TRIAL.

Under this heading and aside from the error theretofore claimed by the appellant in other portions of the brief, the only contention made is that the negligence of the defendant was the sole proximate cause of the accident.

Appellant again refers to the defendant's testimony and indicates that the defendant traveled in the south lane for some distance before turning into the north lane. This confusion on the appellant's part is again due to the markings, C-1 and C-2 as placed upon the diagram. They were placed by the witness, Myers. C-2 indicated the position of the defendant's car according to the witness, Myers, when an unidentified eastbound vehicle was at the point indicated by C-1 on the diagram. No one testified that the defendant's car was ever in the position C-1 as shown on the diagram. The only testimony in the case as bearing on this point is the defendant's testimony that as he made the turn from 10th East onto 5th South Street he proceeded directly into the inside lane and continued in that lane up to the moment of the impact. The glare of the sun to the right of his car interfered with his vision to the right but not with his vision straight ahead, and he saw the plaintiff as soon as she rapidly ran into the path of his car and when she was 10 feet away and on a line with the right front fender. At that time he applied

his brakes and swerved to the right, and had probably traveled 2 feet to the right at the time of the impact. There was also evidence from the witness, Larson, that the impact occurred somewhere between the hood emblem in the center of the car and the left front fender. Bearing all of these points in mind, the plaintiff from the time she entered the path of the defendant's vehicle could not have traveled more than 3-4 feet at most before she was struck by the car. The width of the car would not be more than 6 feet, and the car itself had turned 2 feet to the right at the time that the impact occurred. The defendant under such circumstances when the peril first became apparent to him had no opportunity whatsoever to avoid the accident.

Counsel again makes reference to the case of *Coombs v. Perry*, supra, and attempts to imply that if the defendant had seen the plaintiff at the curb, he should have known that she would throw all caution to the wind and run into the path of his car. This is not the law and is not the statement contained in *Coombs v. Perry*. That case, as we have heretofore noted, involved a pedestrian who was in a crosswalk and for that reason is not in point. Furthermore, the court did not attempt to charge the defendant with any knowledge of danger until the plaintiff had crossed the center line of Washington Boulevard. As we have heretofore seen in this case, the defendant, even had he seen the plaintiff, would not have anticipated any peril or known that the plaintiff would foolhardily run into the path of his car.

Counsel quotes from *Coombs v. Perry* to show that if the plaintiff had seen the defendant's car approaching, she would have the right to assume that the defendant would yield the right of way to her. This is wholly untrue under the facts of this case. In the Coombs case the plaintiff was in a crosswalk, and if she had seen the defendant's car approaching, had the right to assume that the defendant would yield the right of way to her. However, in the present case the plaintiff was not in a crosswalk and would have no right to make any such assumption, but was under the obligation of continuing to keep a lookout in the only direction from which cars were proceeding, to-wit: from the west traveling east. It was then her duty to yield the right of way and not the duty of the defendant to yield the right of way to her. In fact, the language quoted by appellant from the Coombs case would apply to the defendant under the circumstances of this case. Since the defendant had the right of way, even had he seen the plaintiff, he would have been entitled to assume that the plaintiff would have yielded the right of way to him. While the defendant's view to the right and beyond the immediate path of his car was obstructed by the sun, the plaintiff's view was not obstructed at all as she would be looking away from the sun. Had she looked as she continued to cross the street, she would have realized the danger, stopped and yielded the right of way to the defendant, and the accident would never have occurred.

Counsel again makes reference to the case of *Winn v. Read*, *supra*, but, as we have heretofore pointed out,

that case is not in point. If the plaintiff in that case had traveled 30 rods down the road in a direct line of vision and in the same lane of traffic as the defendant before the impact occurred, then, of course, the defendant should have been aware of his presence in that lane during all that period of time. However, in the instant case the plaintiff did not cross into the path of the defendant's car until it was too late for the defendant to do anything to avoid the accident. The questions of the defendant's negligence and the plaintiff's contributory negligence and whether either proximately caused the accident were submitted to the jury under appropriate instructions.

At the time of the trial we felt that the plaintiff was guilty of contributory negligence as a matter of law and made appropriate motions both at the conclusion of the plaintiff's case and of the entire case for a directed verdict. If, as the plaintiff now claims, the defendant's negligence as a matter of law was the sole proximate cause of the accident, it is indeed strange that the plaintiff failed to move for a directed verdict. We feel that there is no merit whatsoever to this contention. Furthermore, if under the facts of this case the defendant's negligence was the sole proximate cause of the accident, it would give license for a pedestrian to cross a dangerous street in face of heavy traffic, not in a crosswalk, throw all caution to the winds, and then state that the defendant had the sole responsibility for avoiding the accident.



## CONCLUSION

This matter was submitted to the jury by appropriate instructions. Under all of the facts and considering the plaintiff's knowledge that it was hazardous to cross the street at this particular time and place and outside of any crosswalk, and considering further the admitted fact that the plaintiff from the time she left the south curb line rapidly walked or ran diagonally across the street in a northeasterly direction without making any further observations to the west, or the only direction from which traffic could be anticipated, it is difficult to see how the jury could have returned any verdict other than the one which it did.

We respectfully submit that the plaintiff had a fair trial and that the judgment should be affirmed.

Respectfully submitted,

RICH & STRONG

*Attorneys for Defendant and  
Respondent.*