

1960

Lavon Belnap Duncan v. Western Refrigeration Co. et al : Brief of Appellant

Utah Supreme Court

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Original

IN THE SUPREME COURT OF THE
STATE OF UTAH

LAVON BELNAP DUNCAN,
Administratrix of the Estate of
Marion W. Duncan, Deceased,

Plaintiff and Appellant,

vs.

WESTERN REFRIGERATION CO.,
dba UTAH ICE & STORAGE
COMPANY, and NORTON F.
HECKER, and HARTFORD ACCIDENT
& INDEMNITY COMPANY,

Defendants and Respondents.

FILED

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Clerk, Supreme Court, Utah

Case No.

9173

APPELLANT'S BRIEF

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UTAH ICE & STORAGE COMPANY, and :
MORTON F. HECKER, and HARTFORD :
ACCIDENT & INDEMNITY COMPANY, :

Defendants and Respondents. :

BRIEF OF APPELLANT

STATEMENT OF FACTS

Throughout this brief the Appellant will be referred to as the Plaintiff and the Respondents will be referred to as Defendants.

I

The uncontested facts are as follows:

Marion W. Duncan, 47, husband of the plaintiff, and father of her five minor sons, ages three to fifteen years, died from injuries received when he was struck by an automobile owned by the defendant, Western Refrigeration Company, doing business as, and hereinafter re-

ferred to as Utah Ice & Storage Company, which vehicle was being then driven by the defendant, Norton F. Hecker. Death resulted about three hours after the fatal accident, which occurred at approximately 7:30 A.M. on August 27, 1958. The deceased did not regain consciousness. The weather was dry and clear.

A statement stipulated to and read into the record on the part of Mrs. Darlene P. Officer (R. 220-223) established that prior to the collision Mr. Duncan had left a panel truck, being driven by Mrs. Officer and parked facing North at the East curb of Main Street opposite the Duncan home at 1490 South Main, Salt Lake City. Mr. Duncan crossed Main Street to the West for the purpose of obtaining a pillow to sit on in the panel truck enroute to Ogden. Mrs. Officer saw him run from the center stripes toward the West curb and take a pillow from a pick-up truck parked at the West curb. She thereafter was looking North and did not observe him again until after the collision which she estimates took place about one minute after she last observed him. She did not see the collision, nor did anyone else except the defendant, Norton F. Hecker.

The most probable inference was that Mr. Duncan was returning across the street at the time he was struck. There was no marked cross-walk at the point of crossing.

II

The contested facts are as follows:

A. Plaintiff introduced testimony that Lorin C. Kelly heard part of a conversation between his wife and Norton Hecker, prior to the arrival of the police, where in Mr. Hecker said that he didn't even see Mr. Duncan (R. 130).

B. Defendant introduced testimony that the defendant, Norton Hecker was traveling North about three car lengths behind a car in the outside lane of traffic, and about one-half car length to the rear of a car traveling North in the inside lane to his left (R. 172-173). These three cars had continued the same relative positions at least since passing Seventeenth South Street (R. 189) and were traveling between twenty-five and thirty miles per hour as they approached the area of 1400 South (R. 173); that because the other two cars

began to slow down he also started to slow and because the car in front of him had almost come to a stop he had to apply his brakes harder; that while he was sliding his wheels and had almost come to a stop, Mr. Duncan came right over and off of the fender of the car on his left, having been either hit or hurled, and struck face first into his windshield (R. 174, 175, 187); that he didn't have time to determine whether Mr. Duncan had been running or what (R. 174); that he never saw Mr. Duncan with his feet on the ground (R. 182); that a pillow came flying through the air just ahead of Mr. Duncan, but that he didn't at any time see the pillow in Mr. Duncan's hand (R. 175, 182); that either the car on his left or the car ahead of him caused their brakes to squeal, probably even before his started and he barely missed colliding with the car ahead of him which had stopped (R. 183); that both of the other cars came to a stop in the same relative positions except that the rear bumper of the car ahead in his lane of traffic was only about two feet ahead of his front bumper (R. 180-181); that both of these other cars were there and stopped when he got out of his car, but disappeared or left the

scene while he was back looking at Mr. Duncan's body (R. 177, 181); he denied saying to Mrs. Kelly before the police arrived, "I didn't even see him" (R. 178).

On cross-examination Norton Hecker admitted telling Officer Begent at the scene that the man he struck came from in front of a truck traveling on his left and ran into the side of his car (R. 185); he did not recall saying in Richard Duncan's presence after talking to Officer Begent that a truck turned out to avoid Mr. Duncan and that he looked up and there Mr. Duncan was and he walked into the car (R. 186); he denied saying in Mrs. Officer's presence after talking to Officer Begent that the sun appeared to be in Mr. Duncan's eyes (R. 187); he admitted telling Officer Begent later in the day at his office, "I remember that the man was waving a pillow that he had in his hand." (R. 185); he admitted telling Officer Begent later in the day at his office that Mr. Duncan was hit or hurled into his windshield by a light colored sedan on his left (R. 187); he admitted telling Officers McGarry and Lyman at the Police Station on the evening of the accident that the car on his left came to

to a near stop after the impact and then turned to the right in front of his car (R. 188); he told how Officer Regent in his presence ran a brake test on his car at the scene of the accident coming to a dead stop from a speed of thirty miles per hour (R. 188).

On rebuttal Norton Hecker acknowledged that he never told the investigating officers about the car that preceded him in his lane of traffic which stopped, requiring him to stop (R. 225-226); he was unable to describe either of the other automobiles (R. 188-190); he testified that he did not sound his horn or turn out to avoid the accident (R. 230).

C. By way of further impeachment the plaintiff introduced evidence on rebuttal as follows:

Mrs. P. J. McKenna, an elderly lady, was watering her lawn with her back to the street at the time of the accident. She heard, but did not see the accident and upon turning around saw only one car, Mr. Hecker's (R. 195-197); Richard Duncan, 15 year old son of Marion Duncan, deceased, standing in the hall of the Duncan home on the West side of Main Street heard the screech

the open front door, saw no cars travel to the North as he approached the door, saw only the defendant's car and none other stopped or moving in the East traffic lanes on the road near his father's body (R. 202-204), that the defendant's car and his father's body were South of the Duncan doorway (R. 208), and that Mr. Hecker had come to the door after the ambulance had left and said the truck in front of him had swerved and he looked up and Mr. Duncan just walked into his car (R. 205) Officer Mickey Begent was limited by the court in what he could testify to on rebuttal, but was permitted to testify that he examined the area of the accident and found only one set of brakemarks and that these led to the defendant's automobile (R. 210), and also that he took measurements of the brakemarks (R. 211), (the court did not permit him to tell the length of the brakemarks) (R. 209); Darlene P. Officer said that Mr. Hecker in her presence said that the sun appeared to be in Mr. Duncan's eyes (R. 223), and that, although she did not see the accident, she was sitting as driver of a parked panel truck at the East curb, that she was looking North when she heard the brakes and impact and that from that

moment no car proceeded North from the point of impact and that as she directed her attention from the North around to the point of impact no car or cars other than that of the defendant came into her vision, this, notwithstanding the fact that like Richard Duncan she saw the pillow (hat) rolling North from the point of impact, and that Mr. Hecker was still sitting in his car when she got out of the panel truck and went around to look at Mr. Duncan's body (R. 221-222).

STATEMENT OF POINTS

POINT I

THE COURT ERRED IN PERMITTING THE WITNESS, LORIN KELLY, TO INSERT HEARSAY EVIDENCE INTO THE RECORD OVER THE OBJECTION OF THE PLAINTIFF.

POINT II

THE COURT ERRED IN INSTRUCTING THE JURY WITH RESPECT TO CONTRIBUTORY NEGLIGENCE AND IN REFUSING TO INSTRUCT THE JURY THAT THERE WAS NO EVIDENCE OF CONTRIBUTORY NEGLIGENCE IN THE RECORD.

POINT III

THE COURT ERRED IN INSTRUCTING THE JURY AS TO THE SOLE NEGLIGENCE OF THE PLAINTIFF BEING THE POSSIBLE CAUSE OF THE INJURIES.

POINT IV

THE COURT ERRED IN REFUSING TO GRANT PLAINTIFF'S

MOTION THAT THE JURY BE DIRECTED AS A MATTER OF LAW THAT THEY COULD NOT FIND CONTRIBUTORY NEGLIGENCE AGAINST MARION W. DUNCAN.

POINT V

THE COURT ERRED IN INSTRUCTING THE JURY AS TO THE LAW OF LAST CLEAR CHANCE APPLICABLE TO THIS CASE, AND IN REFUSING TO GIVE THE INSTRUCTION ON LAST CLEAR CHANCE SUBMITTED BY THE PLAINTIFF.

POINT VI

THE COURT ERRED IN REFUSING TO PERMIT THE PLAINTIFF TO INTRODUCE EVIDENCE ON THE LENGTH OF SKID MARKS IN REBUTTAL AND IN FURTHER REFUSING TO PERMIT THE PLAINTIFF TO REOPEN ITS CASE IN ORDER TO INTRODUCE SAID EVIDENCE.

POINT VII

THE COURT ERRED IN REFUSING TO RULE AS A MATTER OF LAW THAT NORTON F. HECKER, WAS ACTING WITHIN THE SCOPE OF HIS EMPLOYMENT AT THE TIME OF THE ACCIDENT.

POINT VIII

THE COURT ERRED IN REFUSING TO INSTRUCT THE JURY AS TO THE EFFECT OF PRIOR INCONSISTENT STATEMENTS GIVEN BY A PARTY TO THE ACTION.

ARGUMENT

POINT I

THE COURT ERRED IN PERMITTING THE WITNESS, LORIN KELLY TO INSERT HEARSAY EVIDENCE INTO THE RECORD OVER THE OBJECTION OF THE PLAINTIFF.

The witness, Lorin Kelly, testified on behalf of the plaintiff that he arrived at the scene immediately after the fatal accident (R. 129) together with his wife

(R. 128). He testified that while ministering to the needs of the stricken pedestrian he overheard a conversation between his wife and the driver of the death car, the defendant, Norton F. Hecker (R. 130). That in reply to his wife's question as to how the accident happened he heard Mr. Hecker reply "I didn't even see him" (R. 130). That he then moved away from where his wife and Mr. Hecker were standing and that he heard no further conversation between (R. 130).

Upon cross-examination by defense counsel, Mr.

Kelly was questioned as follows: (R. 133-134)

Q. Now, Mr. Kelly, as I understand it, while you were standing alongside the body of this injured man attempting to determine what you might be able to do to assist him, your wife was moving about and was engaged in a conversation with Mr. Hecker, is that right?

A. Yes, sir.

Q. And you overheard a part of that conversation?

A. Yes, sir.

Q. You did not hear it all?

A. No, sir.

Q. The only portion you heard was Mr. Hecker saying something in substance, "I didn't even see him?"

Q. Your wife told you, didn't she, he said something like, "I didn't even see him, he ran into the side of my car?"

MR. CHILD: I object, your Honor. It calls for a hearsay answer to a hearsay question.

THE COURT: Objection overruled.

THE WITNESS: Will you restate the question please?

Q. (By Mr. Christensen) Did your wife tell you subsequently that Mr. Hecker said, "I didn't even see him. He ran into the side of my car"?

A. She said he said he walked into the side of his car.

The objection raised by plaintiff's counsel was proper and should have been sustained by the court. Defense counsel failing to get the precise answer he wanted posed the objectionable question a third time (R. 134) by continuing as follows:

Q. You were present when your wife's deposition was taken, weren't you?

A. Yes, sir.

Q. And did you hear her testimony?

A. Yes, sir: I did.

Q. And at that time she stated that he ran into the car, didn't she?

A. I believe she did.

expressed a willingness to let such hearsay evidence in, and to object further would but emphasize the undesirable testimony in the minds of the jury.

It should be noted that there is no real evidence whatsoever in the entire record of what the deceased was doing at the time of the accident complained of.

The objectionable questions and the answers thereto merely put into the record and before the jury what Mr. Kelly heard Mrs. Kelly say that Mr. Hecker had said. It is difficult to conceive of a more unreliable and improper evidence, but the jury being unsophisticated could not be expected to realize that this was not evidence in fact of what Mr. Hecker did or did not see, or of what Mr. Duncan did or did not do.

Mr. Hecker, one of the defendants, did not elect to testify that he saw or said what Mr. Kelly was forced to testify that he heard Mrs. Kelly say that Mr. Hecker had said he had seen.

What Mr. Kelly heard Mrs. Kelly say that Mr. Hecker told her is certainly not substantive evidence in light of the fact that Mr. Hecker testified that the pedestrian "came off the fender of the car" on his left

and that he ". . didn't have no time to determine whether he had been running or what" (R. 174). On cross-examination he further stated that he at no time saw the deceased with his feet on the ground (R. 182), but that he was hurled by the car on defendant's left into defendant's windshield (R. 187).

The objectionable questions complained of and the answers compelled thereby could not in any way impeach the testimony of Mr. Kelly as to what he heard the defendant, Norton Hecker, say nor did they produce substantive evidence of what Mr. Hecker or Mr. Duncan, the deceased, did or did not do. They did, however, serve to mislead the jury to the prejudice of the plaintiff.

POINT II

THE COURT ERRED IN INSTRUCTING THE JURY WITH RESPECT TO CONTRIBUTORY NEGLIGENCE AND IN REFUSING TO INSTRUCT THE JURY THAT THERE WAS NO EVIDENCE OF CONTRIBUTORY NEGLIGENCE IN THE RECORD.

POINT III

THE COURT ERRED IN INSTRUCTING THE JURY AS TO THE SOLE NEGLIGENCE OF THE PLAINTIFF BEING THE POSSIBLE CAUSE OF THE INJURIES.

POINT IV

THE COURT ERRED IN REFUSING TO GRANT PLAINTIFF'S MOTION THAT THE JURY BE DIRECTED AS A MATTER OF LAW THAT THEY COULD NOT FIND CONTRIBUTORY NEGLIGENCE AGAINST

Points II, III and IV will be joined herein for the purpose of argument. Since no evidence of contributory negligence was offered against the plaintiff, this case should have been submitted to the jury solely on the question of the negligence of the defendants.

Having submitted to the court 17 requested instructions, the plaintiff herein submitted to the court two additional requested instructions numbered 18 and 19, during the plaintiff's presentation of rebuttal evidence and during the recess preceding the second day of trial herein. Said additional instructions were directed to the subject of instructing the jury that as a matter of law, no evidence had been introduced to show negligence on the part of the decedent and thereupon requiring the jury to determine the case based only upon whether or not they found the defendant, or in the case of the requested instruction number 19, both of the defendants negligent (R. 35-34).

Again, upon resting, the plaintiff moved the court in chambers and before the reporter for an order taking the subject of contributory negligence away from the jury and submitting the case to the jury only upon the negligence of the defendants. The court denied this

motion (R. 229).

Although plaintiff submitted its original requested instructions on the basis that the defendant would be expected to offer evidence of contributory negligence on the part of the plaintiff, such evidence was not forthcoming and it was therefore error to submit the question of contributory negligence to the jury. In 8 of its 30 instructions to the jury, the court treated the subject of contributory negligence. In instructions number 11 and 14 requested by the plaintiff, the subject of contributory negligence was referred to but would not have been prejudicially so had plaintiff's later request or motion been granted. Instructions 6, 7 and 8 treated the subject of contributory negligence in general form. However, the plaintiff cites as prejudicial error instructions number 15, 16 and 19 (R. 90, 91 & 93) submitted to the jury on the subject of plaintiff's negligence notwithstanding the fact that the entire record was void of any evidence to support such instructions.

Plaintiff calls the attention of the court to the case of *Kolp v. Stevens*, 186 NE 821, where the court said:

"where plaintiff's evidence did not show

contributory negligence, issue of contributory negligence was strictly affirmative defense, and where no affirmative proof was offered on defense, charge thereon was erroneous."

Also, the court is directed to the Oklahoma case of *Overstreet v. Bush* (1953) 256 Pac. 2nd 416. In this wrongful death action, a verdict was made by the jury in favor of the defendants. The plaintiff moved for a new trial, which motion was granted and upheld on appeal, the Supreme Court of Oklahoma saying:

"It is elementary that instructions must be confined to the issues raised in the pleadings, and supported by evidence; if otherwise, any instructions so given are erroneous and constitute error, and granting a new trial by trial judge under such circumstances is not error."

Our own Utah court in the case of *Smith v. Ogden and Northwestern Railway Co.*, 33 Utah 129, 93 Pac. 185, has stated the Utah law as follows:

"Where there is a plea of contributory negligence, but there is no evidence on which to predicate a charge of contributory negligence, such a charge should not be given . . . The court should not submit that issue to the jury any more than any other issue on which there is no evidence."

See also the 1947 Utah case of *Pollari v. Salt Lake City*, 111 Utah 25, wherein our court again reaffirms and states

the law to be as found in *Smith v. Ogden and Northwestern*

Railway Company cited above.

The defendant, Norton F. Hecker, was the only living eyewitness to the accident. The plaintiff, Marion W. Duncan, was killed in the accident having never regained consciousness. Under these circumstances the plaintiff was entitled to the well known legal presumption that the deceased exercised due care in his own behalf at the point where the duty was incumbent upon him. See *Lewis vs. D. & R. G. Railway Co.*, 40 Utah 483, 123 Pac. 97; *Compton vs. Ogden Union Railway & Depot Co.* 235 Pac. 2nd 515; and *Tuttle vs. P.I.R.*, 121 Utah 420, 242 Pac. 2nd 764.

Where no positive evident or prima facie case showing negligence on the part of the deceased if offered the presumption will stand and the matter of whether or not the deceased was negligent will be withheld from the jury. In the recent case of *Mecham vs. Allen*, 1 Utah 2nd 79, 262 Pac. 2nd 285, Justice Wade speaking for the Utah Court said:

"If the court concludes that no prima facie showing of the non-existence of the presumed facts has been made should direct the jury to assume the existence of the presumed facts"

or if such facts are determinative of the whole case, he should direct a verdict in accordance therewith."

In the instant case circumstantial evidence would give rise to the inference that the deceased was crossing Main Street not in a cross-walk. Under these circumstances the law imposed upon him the duty to yield the right of way to vehicular traffic. In the absence of actual evidence that he neglected the duty to so yield, the deceased was entitled to the legal presumption that he exercised due care, or in this case yielded the right of way. The record is void of evidence to the contrary.

The defendant, Norton Hecker, elected to testify that he knew nothing of what the plaintiff did or did not do. The case should, therefore, have been submitted to the jury solely on the question of whether or not the defendants were negligent.

POINT V

THE COURT ERRED IN INSTRUCTING THE JURY AS TO THE LAW OF LAST CLEAR CHANCE APPLICABLE TO THIS CASE, AND IN REFUSING TO GIVE THE INSTRUCTION ON LAST CLEAR CHANCE SUBMITTED BY THE PLAINTIFF.

In the event the court felt the defendants met their burden of offering evidence of contributory negligence on the part of the deceased plaintiff, sufficient

to extinguish the presumption of due care to which plaintiff was entitled, plaintiff's requested an instruction (R. 48) on the doctrine of Last Clear Chance. Plaintiff's said requested instruction correctly stated the Utah law, but the trial court endorsed thereon "given as modified and corrected" (R. 48). The trial court then abandoned the plaintiff's requested instruction and submitted the question of last clear chance to the jury on an instruction (R. 95) which was lifted substantially verbatim from JIFU 17.20. The instruction given by the court, although taken from JIFU does not correctly state the Utah law applicable in this case and presented an impossible situation to the plaintiff.

Plaintiff introduced evidence into the record that the defendant, Norton Hecker, had said that the sun appeared to be in the decedent's eyes (R. 223), and also that he saw the decedent waving a pillow in his hand (R. 185). From the reference to the pillow the jury would be justified in finding that the decedent had belatedly become aware of the peril threatening him and was excitedly trying to attract the attention of the driver of the death car. Therefore, the second element of the objectionable instruction, being contrary to the

Utah law, destroyed any opportunity of the plaintiff to convince the jury of last clear chance.

When, we ask, in a case such as this where the plaintiff was killed in the accident and the defendant remains the only eyewitness thereto, can the plaintiff prove by a preponderance of the evidence that he was "totally unaware of the peril that threatened him" (R. 95) ?

In support of plaintiff's requested instruction number 13, the Utah law is as follows: In the case of *Graham vs. Johnson*, 109 Utah 346, 166 Pac. 2nd 230, the Utah court married itself to sections 479 and 480 of the Restatement of Torts as being the law of the State of Utah on the doctrine of last clear chance. Again, in 1951 the Utah Supreme Court in the case of *Compton vs. Ogden Union Railway*, 235 Pac. 2nd 515, Justice Crockett giving the opinion said:

"In determining the applicability of the doctrine of last clear chance, this court has given approval to the rules promulgated in the American Law Institute Restatement of Torts, volume 2, sections 479 and 480, as being the law of this State. *Holmgren vs. U.P.R.R. Co.* 198 Pac. 2nd 479; *Anderson vs. Bingham & Garfield R.R. Co.*, 214 Pac. 2nd 607 . . . We herein reaffirm our adherence to the rules announced by the American Law Institute Restatement of Torts, volume 2, sections 479 and 480 . . . "

Again in 1953 in the case of Cox v. Thompson, 123 Utah 31 at page 90, Justice Wolf speaking for the court said:

"This court has adopted as the rule in this State the last clear chance doctrine of Sections 479 and 480 of the Restatement of Torts."

With reference to Section 480 of the Restatement, Justice Wolf then set forth the three paragraphs (a), (b) and (c) appearing in plaintiff's requested instruction. In the Utah case of Morby v. Rogers, 252 Pac. 2nd 231, 122 Utah 540, (cited by JIPU as authority for the suggested instruction) the Utah court specifically reaffirmed its allegiance to sections 479 and 480 of the Restatement of Torts and therein again specifically enumerated, with reference to section 480, items (a), (b) and (c) of plaintiff's requested instruction. There is no language in that case supporting the instruction given by the court to the jury herein. Finally, in 1955 the Utah Supreme Court, in the case of Beckstrom v. Williams, 3 Utah 2nd 210 at page 214, speaking through Justice Crockett said:

"Both of the facets of the doctrine of last clear chance referred to above are set out in sections 479 and 480 of the Restatement of Torts and have recently been expressly

approved by this court as correct statements of law."

It was therefore error for the court to refuse to grant plaintiff's requested instruction (R. 48) in submitting the question of last clear chance to the jury and to erroneously select in preference thereto the unjustified instruction submitted, to the prejudice of the plaintiff.

POINT VI

THE COURT ERRED IN REFUSING TO PERMIT THE PLAINTIFF TO INTRODUCE EVIDENCE OF THE LENGTH OF SKID MARKS IN REBUTTAL AND IN FURTHER REFUSING TO PERMIT THE PLAINTIFF TO REOPEN ITS CASE IN ORDER TO INTRODUCE SAID EVIDENCE.

Although there was no evidence of speed offered in the plaintiff's case in chief, on defense presentation Norton Hecker testified that he was going about 25 m.p.h. (R. 173), that two cars other than his own were involved in the accident (R. 173, 180, 181); and that the other car or cars also "spuealed" their brakes in order to stop (R. 183), but left the scene while he was out looking at the stricken pedestrian (R. 181, 182). On cross-examination the defendant further stated that his car was going 30 m.p.h. at the time of the brake test by Officer Regent in his presence (R. 188).

police officer as a witness and attempted to secure evidence of the length of skidmarks left in the accident and also in the brake tests given, and absence of skidmarks other than those of the defendant's (R. 209).

Upon the objection of defense the trial court refused to allow the witness to testify with reference to brakemarks (R. 209) or speed (R. 209), but limited the testimony of this witness as regards brakemarks to show the absence of any, other than the defendant's (R. 210).

In the conference of court and counsel out of hearing of the jury (R. 210), the court agreed to permit only evidence of lack of skidmarks other than those of defendant's. Defense counsel then said "But that is the end of it, he can go no further", to which the court replied, "Yes, that is right."

Where the defendant himself thus introduced the subject of speed into the trial, it was proper rebuttal for the plaintiff to put in evidence on the subject. The defendant on cross examination having testified that at the time of the brake test his car was traveling 30 mph, the plaintiff was then able to show that the length of the marks laid down in the test was shorter than the length of the marks actually laid down in the

accident. Evidence of speed in excess of 30 m.p.h. was not available to plaintiff without defendant's said statement. (See Am. Jur. Trial, Sec. 121, p. 108)

Such evidence of length of brakemarks would have been also of great assistance, if not essential, for the jury to apply the doctrine of last clear chance, in determining how far away the defendant was from the point of impact when he noticed the danger, thus giving rise to the opportunity to avoid. Since the plaintiff is not required to anticipate that the defendant will prove contributory negligence, he need not bring out the essential elements of the doctrine of last clear chance until rebuttal. See 53 Am. Jur. Trial, Sec. 118, p. 105

Being thus denied the opportunity of developing the above evidence on rebuttal, the plaintiff moved to reopen to introduce said evidence (R. 227).

Although the record is void of any testimony as to the length of defendant's brakemarks the court commented that "he (Officer Begent) testified as to the length of the brakemarks" (R. 228). As to this fact the court was mistaken.

The court then denied plaintiff's motion to reopen (P. 228). Thus, although Officer Begent appeared for the purpose of being recalled and though defendant would in no way have been surprised by such factual testimony consisting only of two measurements, the jury was denied this testimony to the prejudice of the plaintiff and the interests of justice were not served.

" . . . it is within the sound discretion of the trial court in the furtherance of the interests of justice after the parties have rested to permit either party to reopen . . .

" . . . although it has been said that the court should not reopen a case except for good reasons and on proper showing, it is not, on the other hand, justified in closing the case until all the evidence, offered in good faith and necessary to the ends of justice, has been heard."

(53 Am. Jur. Trial, Sec. 123, p. 109)

Having committed the error of preventing the plaintiff from presenting the proffered testimony on rebuttal, it was thus an abuse of discretion for the court to refuse the plaintiff's motion to reopen, and to further submit the question of last clear chance to the jury without affording them this available and valuable evidence.

POINT VII

OF LAW THAT NORTON F. HECKER, WAS ACTING WITHIN THE SCOPE OF HIS EMPLOYMENT AT THE TIME OF THE ACCIDENT.

The plaintiff requested an instruction to this effect (R. 44) and also moved the court for such an order at the conclusion of the evidence (R. 229).

The defendant, Norton Hecker, called as witness for the plaintiff testified that Utah Ice & Storage Company was owner of the car, that he worked for them, that he was traveling to work at the time of the accident, that he had driven the car since it was new, that the car since its purchase had at all times been in his custody and care except during office hours when other employees would use it to go to the bank or post office providing he wasn't using it, that he had full use of the car for business and pleasure and to travel to and from work, that all of the cars operating expenses were paid by the owner, including repairs and maintenance, that the owner took full expense deduction for the car for income tax purposes, that he was a salaried employee expected to devote all necessary time to the owner of the car, that his position was District Manager and as such, his duties were discretionary and ministerial, that he would deliberate on company problems while traveling to work, that the

owner expected him to operate the car in a safe condition and that it was his purpose to be the first to work to open the office (R. 153-156). At the outset of the trial it was stipulated that agency existed and the only question with reference thereto remained that of scope of employment.

In 57 C.J.S., p. 309 we read:

"Generally an employee going to and from his place of employment is not acting within the scope of his employment. This rule is, however, subject to exceptions, and an employee may be regarded as acting within the scope of his employment while going to, or returning from, his place of work where the employee's compensation covers the time involved in going or returning, or the employer furnishes the transportation, or there are circumstances disclosing that the interests of the master are being served or that the master controls, or has the right to control, the conduct of the servant."

See also *Breland vs. Traylor Mfg. Co.* (Calif.)

126 Pac. 2nd 455 and *Hantke vs. Harris Ice Machine Works* (Oregon), 54 Pac. 2nd 293.

The uncontroverted evidence shows that at the time of the accident, Norton Hecker, was transporting the District Manager and the Company car to the office of the company for its benefit and at its expense.

The evidence in the record conclusively showed

that as a matter of law the act complained of was done by the agent of Utah Ice & Storage Company, while acting within the scope of his employment, and upon this fact reasonable minds could not have differed.

The jury should have been spared this area of potential disagreement.

POINT VIII

THE COURT ERRED IN REFUSING TO INSTRUCT THE JURY AS TO THE EFFECT OF PRIOR INCONSISTENT STATEMENTS GIVEN BY A PARTY TO THE ACTION.

On plaintiff's requested instructions numbered 16 and 17 regarding prior inconsistent statements, the Court endorsed the words, "Given in substance" (R. 51,52). However, nowhere in the Court's instructions is the substance of the requested instructions given.

The court's instruction number 26 (R. 103) is the only one that even remotely touches upon the subject and it would lead the jury, if they believed Norton Hecker had testified falsely, to think that they must either accept his testimony or disregard the whole of it.

In this case the plaintiff on her case in chief relied upon a statement of Norton Hecker's made at the scene of the accident, to the effect that he had not

In addition to this reliance for negligence as set forth in the statement of facts herein, the plaintiff by way of impeachment offered voluminous evidence of Mr. Hecker's shifting statements made prior to trial inconsistent with his testimony. The further evidence to the effect that no other cars were involved in the accident (R. 225,226,188,190,197,204,210,221) must have convinced any reasonable person that Mr. Hecker was not telling the truth in his testimony, but without the requested instructions, the jury was left without standards by which to sift and appraise Mr. Hecker's testimony and the prior statements attributed to him.

The jury, having not been instructed that prior inconsistent statements by a party could be considered as evidence in support of any given point for the opposition, may have concluded that there was no evidence in favor of the plaintiff on the subject of negligence of the defendants. This is particularly so by reason of the court's refusal to permit the plaintiff, in reopening or on rebuttal, to put in evidence of speed.

See JIFU 3.9, 3.10; Black vs. Rocky Mountain Bell Tel. Co., 26 Utah 451; Rose vs. Otis (Colorado)

Co. (Calif.) 297 Pac. 2nd 125; Comacho vs. Escobedo
(Calif.) 313 Pac. 2nd 28.

CONCLUSION

By reason of the several and collective errors
above cited, justice can only be served in this case by
granting a new trial herein.

Respectfully submitted,

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Served to
of this brief on Ray R.
Christman, Attorney for
Respondent, this 24th
day of February, 1960.

James M. Child