

1960

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

Utah Supreme Court

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Moreton, Christensen & Christenson; Attorneys for Respondents;

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IN THE SUPREME COURT  
of the  
STATE OF UTAH

LAVON BELNAP DUNCAN, Ad-  
ministratrix 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 AC-  
CIDENT & INDEMNITY COM-  
PANY,

*Defendants and Respondents.*

FILED

APR 1 - 1960

Clerk, Supreme Court, Utah

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BRIEF OF RESPONDENTS

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Salt Lake City, Utah

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CIDENT & INDEMNITY COM-  
PANY,

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Case No. 9173

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BRIEF OF RESPONDENTS

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THE FACTS

In this brief we shall adopt the same terminology as employed in appellant's brief in referring to the parties.

We do not believe that the statement of facts set forth in plaintiff's brief, fully reflects the material facts, and we therefore deem it necessary to enlarge upon it. Deceased Marion Duncan sustained fatal injuries as a result of an automobile collision which occurred about 7:30 A.M. on August 27, 1958 (R. 128, 138, 172-174). The

accident occurred in Main Street, approximately in front of Duncan's home. (R. 138, 203-205). The point of the accident was approximately midway between Main Street's intersections with 13th South Street and Cleveland Avenue. (R. 134-135, 146). There was no pedestrian crosswalk at the point where the accident occurred, nor in the near vicinity thereof. (R. 134, 146). In fact, the nearest cross-walks were at the intersections above named. (R. 146).

On plaintiff's case in chief, she offered absolutely no evidence as to how the accident occurred. The only testimony of any kind offered by the plaintiff on her case in chief, which in any way even suggested any negligence on the part of defendant Hecker, was the testimony of the witness Lorin Kelly, as to a fragment of a conversation which he heard between his wife and the defendant Hecker. Kelly testified that he heard Hecker tell his wife "I didn't see him." (R. 130, 133). On cross-examination Kelly admitted that his wife had told him that Hecker had said that he (decedent) walked right into the side of the car. He also admitted that his wife had testified on deposition that Hecker had said decedent "ran" into the side of his car. (R. 134).

Upon this scrap of evidence alone, plaintiff relies for a recovery against the defendants. There was no evidence in the record whatsoever that deceased was ever in a position where he could or should have been observed by Hecker, in time to avoid a collision. At the conclusion of plaintiff's case, defendants moved for a directed verdict, which motion was denied without prejudice. (R. 168).



Defendants then offered the testimony of defendant Hecker, who was the only surviving eye witness to the accident, and whose testimony describing the accident is found on pages 172 to 176 of the record. Hecker's testimony may be summarized as follows:

On the morning of the accident, he had left his home at approximately 7:15 A.M. in a car furnished to him both for personal and business use by his employer. (R. 154, 160, 172). At the place of the accident, and for some distance prior thereto, he was proceeding northerly along Main Street at a speed of 25 to 30 miles per hour. (R. 172, 173). He was traveling in the right hand lane for north bound traffic. (R. 172). At the place where the accident occurred, Main Street was a four lane highway, two lanes for north bound traffic and two lanes for south bound traffic. (R. 172). Hecker described the accident as follows:

“A. Well, as near as I can fix it in my mind, as I was going north on Main Street there was a car directly in front of me in the same lane of traffic that I was traveling, there was another car on my left going in the same direction slightly ahead of me, and just traveling along under our normal speed in going to work. And all at once why there was a car on my left started to slow down, and I immediately noted that so I started to slow too, and at the same time I noticed the lights flash from the car directly in head of me so I started to apply my brakes, and as I got closer why I had to apply my brakes harder because the car directly in front of me had almost come to a stop, and at the time that I almost got stopped, that is I was

sliding my wheels at the time this man came right over the front of the car on my left.

"Q. When you say 'this man' —

"A. Mr. Duncan is known.

"Q. All right.

"A. Came over the fender of this other car.

"Q. When you say the 'came over the fender' can you describe a little bit what you mean by that expression?

"A. Well, I can hardly explain it in this way, I seen the man just as he came off the fender of the car, and that is the first time that I had seen him.

"Q. Was he crawling or climbing?

"A. No, he was just coming at me from off the other car. I couldn't tell whether — I just glimpsed at him as he came off of that car, and by that time he struck. I didn't have no time to determine whether he had been running or what."

Decedent's head struck the windshield on the extreme left side. (Ex. D-9, R. 154, 175). Hecker stopped within a few feet. (R. 176, 212). When got out of his car, the injured man was lying near the left rear corner of the car. (R. 176). Both the car which had been traveling at Hecker's left, and the car which had been preceding him, left the scene of the accident, and the respective drivers never identified themselves. (R. 177).

Hecker's version of the accident is corroborated by certain circumstantial evidence. It was stipulated that the deceased had a broken shin bone and a gouge mark in the front part of his right leg 14½ inches above the heel, and that there was a scuff or brush mark on the

sole of the right shoe. (R. 169, 170, 193, Ex. 2). This strongly suggests an impact on decedent's lower right leg. However, neither Hecker nor any of the innumerable policemen who examined the Hecker automobile discovered any damage to it, except the shattered windshield. (R. 213-214, 230-231). Careful investigation and examination of the front of the car and bumper, failed to reveal any dents, broken glass, or any blood, bits of flesh, or clothing, or any other indicia of impact. (R. 158, 212-214, 230-231). It may fairly be inferred, therefore, that the injury to the lower leg was sustained in some manner, other than by collision with the Hecker car.

The glasses of deceased were found intact about ten feet in front of the Hecker automobile, and were subsequently returned to plaintiff by the police. (R. 147, 150, 179, 180). This also strongly suggests that deceased was struck, and his glasses knocked off before his head came into collision with the Hecker automobile. It should also be observed that immediately after the accident Hecker started a search for witnesses. (R. 178-179). This is not what a guilty individual would do.

By way of rebuttal testimony, plaintiff attempted to show that there were no other cars moving along with the Hecker automobile. Plaintiff also attempted to destroy Hecker's testimony by proof of statements made by him at the time of the accident, which differed in some details from his testimony at trial. However, since the verdict was in defendants' favor all conflicts in evidence must be resolved in their favor.

Plaintiff also offered as rebuttal testimony, the testi-

mony of investigating police officers as to skid marks, etc., which testimony was offered for the purpose of attempting to prove speed on the part of Hecker. (R. 209). This testimony was properly rejected by the court, upon objection of defendants, since plaintiff had claimed speed as a ground of negligence against defendants, and any evidence with respect thereto should have been presented as part of plaintiff's case in chief. (R. 33).

In summary, the only evidence as to how the accident happened is the testimony of Hecker himself. This testimony exonerates defendants from any liability, since it shows that deceased was first struck by another vehicle and was then thrown into collision with the Hecker automobile, and that nothing that Hecker could have done could have avoided the second collision, after the danger thereof became apparent. As heretofore noted, the testimony of Hecker is supported by circumstantial evidence.

If the testimony of Hecker is rejected, and found to be unworthy of belief, there is *NO* evidence before the court as to how the accident happened, and therefore no evidence on which a claim of negligence against defendants could be based. The most that could be said for plaintiff's evidence would be that there would be evidence to show that at the time of the accident, there were no cars proceeding northerly in front of or at the side of Hecker's automobile. If that be believed, it not only fails to make a case of negligence against Hecker, but makes a clear case of contributory negligence against the deceased. Certainly if the Hecker car was approaching with no other vehicles in front of it or at its side, to obstruct

deceased's view of it, deceased was clearly guilty of negligence in walking or running into it. If the deceased was not struck by another car before collision with the Hecker car, the physical evidence shows without dispute, that the collision would have resulted from his running into the side of Hecker's car, since the only damage to it, was that created by the collision of deceased's head with the windshield. Such damage could hardly have resulted from a frontal collision.

It should also be noted here that plaintiff's own testimony shows without dispute that deceased had very poor vision when not aided by glasses. (R. 148). Another very reasonable and plausible explanation of this accident was that deceased may have lost his glasses as he ran across the street, and not being able to see well, he may, as a result of such impaired vision, have run into the pathway of the Hecker car, when it was so close that a collision could not be avoided.

Plaintiff is on the horns of this dilemma: Either the accident occurred as Hecker testified, in which event there would be no negligence on his part, since plaintiff was not seen in sufficient time to avoid a collision, because of the view being obstructed by other vehicles; or else the cause of the accident is left to pure speculation and conjecture. In either event, plaintiff cannot recover.

## POINTS TO BE ARGUED

### POINT I

**THERE WAS NO EVIDENCE OF NEGLIGENCE ON THE PART OF DEFENDANTS, AND FOR WANT OF SUCH EVIDENCE THE COURT SHOULD HAVE DIRECTED A VERDICT IN THEIR FAVOR.**

## POINT II

IF DECEASED WAS NOT GUILTY OF CONTRIBUTORY NEGLIGENCE AS A MATTER OF LAW, THERE WAS AT LEAST AN ABUNDANCE OF EVIDENCE TO SUPPORT A JURY FINDING OF THAT FACT.

## POINT III

THE EVIDENCE RECEIVED BY THE COURT ON CROSS-EXAMINATION OF LORIN KELLY OVER PLAINTIFF'S OBJECTION, WAS ADMISSIBLE AND WAS PROPERLY RECEIVED.

## POINT IV

PLAINTIFF WAS NOT ENTITLED TO AN INSTRUCTION ON LAST CLEAR CHANCE. THE INSTRUCTION GIVEN BY THE COURT ON THAT DOCTRINE WAS IN PRINCIPLE AND WAS MORE THAN PLAINTIFF WAS ENTITLED TO RECEIVE.

## POINT V

THE COURT DID NOT ERR IN REJECTING PLAINTIFF'S PROFFERED EVIDENCE OF SKID MARKS ON REBUTTAL.

## POINT VI

THERE WAS NO EVIDENCE THAT DEFENDANT HECKER WAS ACTING WITHIN THE SCOPE OF HIS EMPLOYMENT WITH THE CORPORATE DEFENDANT AT THE TIME OF THE ACCIDENT. EVEN IF THERE WAS SUCH EVIDENCE, IT WOULD BE IMMATERIAL ON APPEAL, SINCE THE JURY FOUND NO LIABILITY ON THE PART OF HECKER.

## POINT VII

THE COURT'S INSTRUCTIONS REGARDING THE CREDIBILITY OF WITNESSES WERE ADEQUATE.

## POINT VIII

THE APPEAL AS AGAINST HARTFORD ACCIDENT & INDEMNITY COMPANY, NOT HAVING BEEN ARGUED OR BRIEFED, IS WAIVED.

## ARGUMENT

Defendants having prevailed in the court below, they are entitled to have the evidence surveyed in the light most favorable to them. *Morey v. Rodberg*, 7 Ut. 2d 299, 323 P2d 717; *Hadley v. Wood*, (Ut.), 345 P2d 197.

Viewed, in this light, the evidence compels the affirmation of the judgment below.

## POINT I

THERE WAS NO EVIDENCE OF NEGLIGENCE ON THE PART OF DEFENDANTS, AND FOR WANT OF SUCH EVIDENCE THE COURT SHOULD HAVE DIRECTED A VERDICT IN THEIR FAVOR.

As we have noted in our statement of facts, the only testimony in the record as to how the accident occurred is the testimony of the defendant Hecker, himself. That testimony completely exonerates the defendants from any negligence. If that testimony is rejected as unworthy of belief there is no evidence left in the record upon which the jury could make a finding as to how the accident occurred. The plaintiff had the burden of proving negligence on the part of defendants and wholly failed to produce any evidence to prove a *prima facie* case. Her attempted destruction of the testimony of Hecker does not in any wise tend to establish a set of facts upon which she can recover. On this state of the record there is nothing on which to base a finding of negligence and the trial court should have directed a verdict in favor of defendants.

As stated in 5A Am. Jur. 523, *Automobiles and Highway Traffic*, Sec. 450:

“—Generally, it has been held that the owner or driver of an automobile is not liable for injuries to a pedestrian received when such pedestrian collided with the side of the automobile, either upon the ground that the driver is not guilty of negligence or upon the ground that the injured pedestrian was guilty of contributory negligence.”

If the court finds that we are correct in this point, it is unnecessary to consider any other points, and judgment for the defendants should be affirmed.

## POINT II

IF DECEASED WAS NOT GUILTY OF CONTRIBUTORY NEGLIGENCE AS A MATTER OF LAW, THERE WAS AT LEAST AN ABUNDANCE OF EVIDENCE TO SUPPORT A JURY FINDING OF THAT FACT.

We answer here plaintiff's points 2, 3, and 4.

A. UNDER WELL ESTABLISHED UTAH LAW, DECEASED WAS GUILTY OF CONTRIBUTORY NEGLIGENCE AS A MATTER OF LAW.

Sec. 57-7-143, U.C.A., 1953, provides, insofar as material here, as follows:

“(a). Every pedestrian crossing a roadway at any point other than within a marked crosswalk or within an unmarked crosswalk at an intersection shall yield the right-of-way to all vehicles upon the roadway.”

The evidence in this case shows without dispute that at the point where the accident occurred there was no pedestrian crosswalk. It was approximately half way between two well defined intersections. Clearly, deceased was not in a cross-walk; and if the accident happened in any way other than testified by Hecker, he (deceased,) must have violated the foregoing statute, and by reason



thereof, he was guilty of negligence as a matter of law. The general rule in this regard is set forth in 38 Am. Jur., pages 877 and 878, Negligence, Sec. 196, as follows:

“The general rule is that the violation by the plaintiff of a statute or ordinance prohibiting acts which endangered him constitutes a defense in an action for negligence, or at any rate, constitutes a prima facie case of contributory negligence which will preclude a recovery by the plaintiff unless rebutted, provided the prohibition of the statute or ordinance is intended to apply for the benefit of the defendant in the situation wherein the plaintiff was injured, and the violation of the law is a proximate cause of the injury. One who has violated a safety statute laying down a rule of conduct cannot be heard to say that he exercised ordinary care or could not have anticipated injury from its violation, unless compliance with the statute was impossible under the circumstances or would have subjected him to other imminent and apparent dangers. A causal violation of a statute puts the offender in the class of those who fail to obey legal rules for conduct, when he seeks to recover for the negligence of another.”

That rule has been consistently followed by this Court in a long line of decisions dating from earliest times:

Smith v. Mine & Smelter Supply Co., (Utah), 88 Pac. 683.

Jensen v. Utah Light & Ry. Co., (Utah), 132 Pac. 8.

Newton v. Oregon Short Line R. Co., (Utah), 134 Pac. 567.

Shortino v. Salt Lake & U. R. Co., (Utah), 174 Pac. 860.

Skerl v. Willow Creek Coal Co., (Utah), 69 Pac. (2d) 502.

Graham v. Johnson, (Utah), 166 Pac. (2d) 230.

North v. Cartwright, (Utah), 229 Pac. (2d) 871.

Hayden v. Cederlund, (Ut.), 263 P2d 796.

The rule has been applied frequently in situations like the one here, where a pedestrian has undertaken to cross a busy street in violation of the foregoing statute. In fact, a long line of decisions starting with *Reid v. Owens*, 98 Ut. 50, 93 P2d 680, have held the pedestrian guilty of contributory negligence as a matter of law.

In *Mingus v. Olsson*, (Utah), 201 Pac. (2d) 495, involving a pedestrian who was assumed to be in a cross-walk, the court said:

“There can be no doubt that a pedestrian who undertakes to cross a busy street of a large city, without first observing for vehicular traffic is guilty of contributory negligence. And this is true, even though he may be crossing in a cross-walk, and have the right of way. \* \* \* The rights of pedestrians to the use of the public streets are the same as those of a motorist — neither greater nor less. Hence, the same general duties devolve upon them. \* \* \* Of course we do not mean to imply that a mere glance in the direction of the approaching automobile would suffice. The duty to look has inherent in it the duty to see what there is there to be seen, and to pay heed to it.”

In *Sant v. Miller*, 115 Utah 559, 206 Pac. (2d) 719, a pedestrian attempting to cross a street not in a pedestrian cross-walk, and crossing in a diagonal fashion,

(as was deceased here), was held guilty of contributory negligence as a matter of law.

In *Cox v. Thompson*, (Utah), 254 Pac. (2d) 1047, this court said:

“Contributory negligence becomes a question of law when from the facts reasonable men can draw but one inference and that inference points unerringly to the negligence of decedent as contributory to his death. \* \* \*

\* \* \*

“\* \* \* Crossing a highway at a point where there was no marked crosswalk, decedent was duty bound to yield the right of way to a vehicle upon the roadway. See 41-6-79, Utah Code Annotated, 1953. This he failed to do. He, in addition, apparently failed to look, or having looked failed to see what he should have seen and paid heed to it. He said nothing and did nothing which indicated he was in any way aware of the danger presented. Decedent was properly found negligent as a matter of law. See *Mingus v. Olsson*, supra.”

In *Smith vs. Bennett*, (Utah), 265 Pac. (2d) 401, this court said:

“Plaintiff’s failure to see and yield the right of way to defendant’s automobile only a few feet away in a position of immediate danger constitutes contributory negligence which caused her injuries. . . .

“\* \* \* In the instant case there was but one demand upon plaintiff’s attention. There is no room for reasonable difference of opinion as to where her attention should have been concentrated; it was incumbent upon her to observe the condition of approaching traffic. That she failed to use due care in doing so is manifest from the evidence.”

See also *Gittens vs. Lundberg*, (Utah), 284 Pac. (2d) 1115, and *Fox v. Taylor*, (Utah), No. 9122 (not yet reported).

B. THE EVIDENCE ADEQUATELY SUPPORTS, IF IT DOES NOT COMPEL, A FINDING OF CONTRIBUTORY NEGLIGENCE.

Even if it cannot be said as a matter of law that deceased was guilty of contributory negligence, the evidence certainly amply justifies a finding to that effect. The language of this court in the recent case of *Holmes v. Heiderbrecht*, (Utah), 348 P. (2d) 565, is singularly appropriate here:

“From the facts shown it appears likely that the defendant was close enough to the plaintiff when she walked into the path of his automobile that reasonable care for her own safety would have dictated that she stop and permit him to pass. The question whether she used the care which an ordinary, reasonable person would have done for her own safety in that regard was submitted to the jury. A consideration of all of the instructions together as they must be, indicates that the issues, both of the defendant’s negligence and the plaintiff’s contributory negligence, were fully and fairly presented to the jury and in such a manner that no confusion would result therefrom.”

C. THE PRESUMPTION OF DUE CARE UPON THE PART OF A PERSON KILLED IN AN ACCIDENT HAS NO APPLICATION HERE.

Plaintiff seeks to take refuge in the familiar presumption that a person killed in an accident is presumed to be in the exercise of due care for his own safety,

*in the absence of evidence to the contrary.* Plaintiff overlooks completely the qualification of the rule. It is well settled that this presumption has no application where there is testimony as to the facts leading up to the accident and as to the conditions surrounding the accident. In *Ryan vs. Union Pacific R. Co.*, (Utah), 151 Pac. 71, this court laid down the rule as follows:

*"In the absence of evidence there is a presumption that the deceased used due care, and, for his protection did all that reasonably was required of him. \* \* \* When, however, facts and circumstances are proven to show just what the deceased did, or failed to do, then his care, or the want of it, is to be determined, not on the presumption, but upon the facts and circumstances proven. That is, whenever the facts or circumstances are shown concerning which the presumption is indulged, the presumption ceases and the controversy is to be decided by the weight of the evidence adduced."* (Emphasis ours.)

The rule has been consistently followed. See *Perrin v. Union Pac. R. Co.*, (Utah), 201 Pac. 405.

In *Clark v. Los Angeles & Salt Lake R. Co.*, (Utah), 275 Pac. 582, this court said:

*"The presumption that the deceased, in the absence or independently of evidence, used due care and did all that prudence required, is but an application of the general rule of law that all persons charged with negligence are, in the absence of evidence, presumed to have exercised due care, and that the burden is cast on him who asserts negligence to establish it by a preponderance of the evidence. The presumption applies, not only to a person since deceased, but*

to a plaintiff and to a defendant as well, when charged with negligence. *When evidence or facts and circumstances were adduced* respecting the charged negligence of the deceased, *the plaintiff*, in determining the ultimate fact of such negligence or the want of it, *has no more right to have the presumption considered as of evidentiary force or effect* and to have it cast on the scales and weighed and considered in connection with proven facts and circumstances bearing on the question than had the defendant when evidence was adduced respecting its charged negligence to have the presumption as to it cast on the scales and considered as of evidentiary force and effect.” (Emphasis ours.)

In *Mingus v. Olsson*, (Utah), 201 Pac. (2d) 495, this court said:

“Plaintiff relies on an asserted presumption that deceased was, at the time of his injury, in the exercise of due care for his own safety. It is true that in certain death cases, there is a presumption that decedent was in the exercise of due care for his own safety. But *there is no room for such a presumption where, as here, there was positive evidence not only as to the fatal accident itself, but to the conduct of decedent leading up to the fatal accident.* Such a presumption must give way to the positive evidence adduced.” (Emphasis ours).

To the same effect see *King v. Denver & Rio Grande Western R. Co.*, (Utah), 211 Pac. (2d) 833.

In the case of *Compton vs. Ogden Union Railway Depot Company*, (Utah), 235 Pac. (2d) 515, cited and relied upon by the plaintiff, this court said:

“The presumption is applicable where there is no evidence as to the care used, or perhaps where the evidence comes from an adverse witness who may be subject to disbelief by the jury, or where there is sufficient uncertainty in the evidence as to cast doubt on the testimony. *It has no application where, as here, the deceased is observed during the period prior to and at the time she is fatally injured and the witness is available and testified.* \* \* \*

“It seems inescapable that the deceased was guilty of contributory negligence. It was her duty to look and listen for trains before going on the tracks. She had a clear view of the tracks to the north, well before she got far enough west to be in the path of the train. Under the evidence the engine was there to be seen. If decedent had looked at any time, either as she started, or as she pursued a course parallel to, but dangerously near the tracks, she must necessarily have seen the train approaching. She was, therefore, either negligent in failing to look or in failing to heed the train if she saw it.” (Emphasis ours.)

See also *Tuttle vs. Pacific Intermountain Express Co.*, (Utah), 242 Pac. (2d) 764, and *Cox v. Thompson*, (Utah), 254 Pac. (2d) 1047.

In *Mecham v. Allen*, (Utah), 262 Pac. (2d) 285, this court said:

“From the basic fact that a human being was accidentally killed a presumption arises which requires the trier of the facts to assume the presumed facts, that decedent used due care for his own safety, in the absence of a prima facie showing to the contrary, but in this kind of a presumption upon the making of such showing, the pre-

sumption disappears from and becomes wholly inoperative in the case, and the trial from then on should proceed exactly the same as though no presumption ever existed, or had any effect on the case."

See also the language of the Supreme Court of Pennsylvania in the case of *Rank v. Metropolitan Edison Co.*, 370 Pa. 107, 97 A2d 198, where the court said:

"The material facts in this case are undisputed and duly explain the happening. The presumption that a person who has lost his life exercised due care is not applicable where the plaintiff's own testimony clearly established the decedent's negligence. *Weldon, Adm'x vs. Pittsburgh Railway Company*, 352 Pa. 103, 41 A2d 856; *Simmonds v. Penn Fruit Company*, 354 Pa. 154, 47 A2d 231. The instinct of self preservation upon which the presumption is founded, was conspicuously absent here. The decedent's unfortunate death was caused by his own unjustifiable conduct."

It should also be pointed out, that even in cases where the presumption is available, it does no more than relieve the deceased of contributory negligence, and does not give rise to an inference of negligence on the part of the defendant, which still must be proved by positive evidence. In 16 Am. Jur., pages 207-8, the rule is stated as follows:

"Negligence on the part of the person injured and killed is ordinarily not presumed; he is presumed, on the contrary, to have exercised due care for his own safety at the time of his injury. This presumption is indulged, however, only to relieve a plaintiff from an inference of



negligence and not to supply evidence of the negligence of a defendant. Moreover, the circumstances surrounding the mishap may be such as to rebut the presumption of due care and even to raise a presumption of contributory negligence on the part of the person killed.”

In the court’s instruction No. 14 (R. 89), the jury was advised that deceased was presumed to be in the exercise of due care for his own safety, unless it was “persuaded from a preponderance of the evidence” that he was guilty of contributory negligence. Under the evidence adduced, the instruction was considerably more than plaintiff was entitled to have, and she is in no position to complain. The error, if any, was in her favor.

### POINT III

THE EVIDENCE RECEIVED BY THE COURT ON CROSS-EXAMINATION OF LORIN KELLY OVER PLAINTIFF’S OBJECTION, WAS ADMISSIBLE AND WAS PROPERLY RECEIVED.

We answer here, plaintiff’s Point I.

It is interesting to note that plaintiff cites no authority in support of her contention that the court erred in permitting the witness Kelly, to answer, over objection, questions propounded to him on cross-examination. Had plaintiff’s counsel made an examination of the law, we do not believe that this point would now be urged by plaintiff.

On direct examination of the witness Kelly, plaintiff developed evidence as to a fragment of a conversation overheard by the witness between the defendant Hecker and Kelly’s wife. The only portion heard by the witness

was that Hecker said to his wife "I didn't even see him." We assumed that this evidence was offered against Hecker as an extra judicial admission against interest. However, plaintiff having opened the door, defendant was entitled to develop by cross examination the entire conversation. The rule is stated in 20 Am. Jur. 463 and 464, Evidence, Sec. 551, as follows:

"If a statement is admissible in evidence as an admission or declaration, it is admissible as an entirety, including parts that are unfavorable, as well as those that are favorable to the party offering it in evidence. In the event a statement admitted in evidence constitutes part of a conversation or correspondence, the opponent is entitled to have placed in evidence *all* that was said or written by or to the declarant in the course of such conversation or correspondence, provided the other statements have some bearing upon, or connection with, the admission or declaration in evidence and are not excluded by a rule of law *other than the hearsay rule.*" (Emphasis ours.)

See also 58 Am. Jur. 350, Witnesses, Sec. 629, as follows:

"Of course, it is error for the trial court to refuse to permit the cross-examination of a witness to extend to all matters germane to the direct examination for such a cross-examination is a matter of absolute right and is not a mere privilege; but under the majority American rule a witness may not be asked any question on cross-examination which does not tend to rebut, impeach, modify, or explain any of his testimony."

Also at page 351, Sec. 630, it is said:

"The rule should be *liberally construed* so as to permit on cross examination *any* question which reasonably tends to *explain*, contradict, or discredit any testimony given by the witness in chief, or to test his accuracy, memory, veracity, character, or credibility." (Emphasis ours.)

And at page 353, Sec. 635, it is further said:

"Where some part of a conversation is introduced in evidence during the examination in chief, the whole of the conversation referring to the same subject matter may be adduced on the cross-examination."

See also page 360, Sec. 641, where it is said:

"When a subject is opened by the direct examination, the cross-examining counsel may go fully into the details thereof, and is not confined to the particular part of it embodied within the questions asked on direct examination."

The rule is stated thus in VII Wigmore on Evidence 523, § 2113:

"For the reasons already sufficiently examined. . . the opponent, against whom part of an utterance has been put in, may, in his turn, complement it by putting in the remainder, in order to secure for the tribunal a complete understanding of the total tenor and effect of the utterance. . . . But there is and could be no difference of opinion as to the *opponent's right*, if a part only has been put in, himself to *put in the remainder*. . .

"This right of the opponent to put in the remainder is universally conceded, for every kind of utterance without distinction; and the only question can be as to the scope and limits of the right." (Sic.)

The same author at page 529, Sec. 2115 says :

“The general phrasing of the principle, then, is that when any part of an oral statement has been put in evidence by one party, the opponent may afterwards (on cross-examination or re-examination) put in the remainder of what was said *on the same subject at the same time*. . . .

“Its most common application is to conversations in general, including the admission of an opponent and to inconsistent statements of a witness used in impeachment; here it may be noted that a conversation in a party’s presence is in effect merely one form of an admission, because statements in a party’s presence are usually equivalent to admissions by him.”

See also Vol. IV, § 1059 at p. 24.

The reasons for the rule are clearly and succinctly explained in 3 Jones Commentaries on Evidence, 1957, § 1063, as follows :

“Broad statements repeatedly occur in everyday speech which, taken by themselves, have a much wider, and sometimes a wholly different, meaning than when considered in connection with the entire conversation in which they occur or with precedent or subsequent qualifications made by the speaker. It would obviously be unfair in such instances to isolate, as alone admissible, those portions of a conversation most damaging to the speaker. Hence it is the well-settled rule that the whole of a declaration or statement containing an admission should be received together. This rule is stated, in the language of Mr. Justice Field, thus: ‘Every admission upon which a party relies is to be taken as an entirety of the fact which makes for his side, with the qualifications which

limit, modify, or destroy its effect on the other side.' This is now a settled principle which has passed, by its universality, into an axiom of the law. Best lays down the rule as follows:

“ ‘Where part of a statement is used as self-harming evidence against a party, he has a right to have the whole of it laid before the jury who may then consider and attach what weight they see fit to any self-serving statements it contains.’ ”

It would be manifestly unfair to permit plaintiff to develop evidence as to a fragment of a conversation, and then to take refuge in the hearsay rule in an attempt to prevent the triers of the facts from learning the full conversation. The law, as above set forth, clearly does not countenance such practice. Plaintiff having introduced the subject, defendant was entitled to show by cross-examination of the same witness the full conversation, and the hearsay objection is not available to plaintiff to prevent the facts from being proven.

#### POINT IV

PLAINTIFF WAS NOT ENTITLED TO AN INSTRUCTION ON LAST CLEAR CHANCE. THE INSTRUCTION GIVEN BY THE COURT ON THAT DOCTRINE WAS CORRECT IN PRINCIPLE AND WAS MORE THAN PLAINTIFF WAS ENTITLED TO RECEIVE.

We here answer plaintiff's Point V.

A. THERE WAS NO EVIDENCE TO WARRANT THE GIVING OF AN INSTRUCTION ON LAST CLEAR CHANCE.

A complete answer to plaintiff's contention is found in the recent case of *Fox vs. Taylor*, #9122, recently decided by this court, but not yet reported. In that case, a plaintiff attempting to cross a busy street at a place

other than in a cross-walk was struck by defendant's automobile. From a verdict and judgment in favor of the defendant, plaintiff appealed, claiming, among other things, that she was entitled to an instruction on last clear chance. This court, speaking through Justice Crockett, unanimously held:

"The cases where that doctrine is applicable fall into two distinct categories. See Sec. 479 and 480, Restatement of Torts. The first we here consider relates to situations where both the defendant and the plaintiff are guilty of continuing negligence, and where the plaintiff could, by exercising due care, avoid the peril at any time up to the moment of injury. In such case the injury is the result of the concurring negligence of both the plaintiff and the defendant. Under those facts the defendant can be held responsible only if he *actually knows* of the plaintiff's situation of peril in time to have the 'last clear chance' to avoid the harm, and fails to do so. Ibid; see Sec. 480, Restatement of Torts; see concurring opinion, Wade, J., *Mingus v. Olsson*, 114 Utah, 505, 511, 201 P. 2d 495. Otherwise the negligence of one would be just as much the proximate cause of the injury as the other's. The facts here do not fall within the above pattern because there is no evidence that the defendant actually knew of plaintiff's situation until too late to avoid striking her.

"The plaintiff insists, however, that the doctrine of last clear chance is applicable and the defendant should be held liable even if he did not actually know of her peril because in the exercise of due care he *should have* observed and avoided striking her. The contention involves consideration of the other facet of the doctrine of last

clear chance. Where the defendant does not actually know of the plaintiff's situation of peril, the doctrine can only properly be applied where the plaintiff has gotten into a position of inextricable peril. An illustration of this is where a person has caught his foot in a railroad switch, or is in some other similar predicament, so that he is thereafter unable to avert the injury. In such a situation, the plaintiff's negligence has come to rest and it is not at the time of the impact an active concurring proximate cause of the injury. In such circumstances the defendant may be held responsible if he either knows or in the exercise of reasonable care *should know* of the plaintiff's helpless situation in time to avoid the injury and fails to do so. *Ibid*; see Sec. 479, Restatement of Torts. This is so because the defendant's later negligence, after the plaintiff's negligence has come to rest, is deemed to be the sole proximate cause of the injury.

"In regard to the application of this principle, the plaintiff here is faced with a dilemma; she was either in inextricable peril or she was not. If she was not in inextricable peril, then at any instant up to the time she got into such predicament, by the exercise of reasonable care, she could have observed the oncoming car and have avoided being hit. On the other hand, she could only have gotten into inextricable peril by getting into the path of the defendant's car, and her peril could be considered inextricable only if the defendant was then too close to avoid striking her. Thus, by the very description of the situation, he did not have the 'last clear chance' to avoid the injury. As the phrase indicates, it must be a fair and clear opportunity and not a mere possibility that the collision could have been avoided.

*Morby v. Rogers*, 122 Utah 540, 252 P. 2d 231. It is our conclusion that the trial court was correct in refusing to submit the case upon the doctrine of last clear chance."

The foregoing language of this court appears to be fully applicable to the facts in the case at bar.

Another recent case wherein this court held that a pedestrian crossing out of the cross-walk was not entitled to an instruction on last clear chance, was *Cox v. Thompson*, 254 Pac. 2d 1047. This court there said, at page 1052:

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

\* \* \*

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



B. IF PLAINTIFF WAS ENTITLED TO AN INSTRUCTION ON LAST CLEAR CHANCE, THE INSTRUCTION GIVEN BY THE COURT ADEQUATELY AND ACCURATELY ADVISED THE JURY CONCERNING IT.

The record in this case is completely devoid of any evidence that defendant had a fair and clear opportunity to avoid the accident after plaintiff's position of peril was apparent, or should have been apparent to Hecker in the exercise of reasonable care. However, if it be considered that plaintiff was entitled to such an instruction, it does not appear that there was any error in the instruction given by the court. The instruction requested by plaintiff was substantially the language of Sec. 480 of the A.L.I. Restatement of Torts. The language of the instruction given by the court was taken substantially verbatim from J.I.F.U., Sec. 17.20. After a careful comparison of the two instructions, we are unable to detect any material differences between them.

It appears that the gist of plaintiff's objection to the court's instruction, is that set forth in paragraph 2 thereof, which reads as follows:

"2. That he was, by reason of inattention or lack of proper alertness ,totally unaware of the peril that threatened him."

We believe that this condition is implicit in the (b) paragraph of plaintiff's requested instruction providing "that the plaintiff was inattentive, and therefore unlikely to discover his peril in time to avoid the harm." That inattention or lack of alertness is an essential element, and in fact the very basis of the doctrine under

the situation envisioned in Sec. 480 of the Restatement, is made absolutely clear by the comment following that section in the Restatement. It is there said:

“This section states the rule under which a plaintiff, who could have made timely discovery of his peril *if he had been on the alert*, can recover *notwithstanding his negligent inattention*. In such a situation, the defendant has no reason to believe that he has the exclusive power to prevent the harm unless he not only knows of the plaintiff’s situation but realizes or has reason to realize that *the plaintiff does not know the peril of his situation* and is, therefore, in a danger from which only the defendant’s careful action can protect him.

“\* \* \* The defendant must also realize or have reason to realize *that the plaintiff is inattentive* and, therefore, is in peril. \* \* \* Therefore, the defendant is liable only if he realizes or has reason to realize *that the plaintiff is inattentive* and consequently in peril.” (Emphasis ours.)

The trial court should not be criticized, much less held in error, for choosing the language of an instruction carefully drafted by a committee of recognized experts after mature consideration and deliberation, in preference to the language of an instruction prepared by an advocate in the heat of battle. It is to be noted also, that in the plaintiff’s request she cited in support thereof J.I.F.U., Sec. 17.20. She therefore apparently recognized and represented to the Court that the language of her request was essentially the same as the J.I.F.U. form. Certainly, if there was error in the language of the court’s charge, plaintiff is chargeable with having lead

the court into it, by virtue of having cited the J.I.F.U. form in support of plaintiff's own request.

#### POINT V

THE COURT DID NOT ERR IN REJECTING PLAINTIFF'S PROFFERED EVIDENCE OF SKID MARKS ON REBUTTAL.

We answer here plaintiff's Point VI.

It appears from the pretrial order, that one of the grounds of negligence on which plaintiff intended to rely for a recovery against defendants, was excessive speed on the part of the defendant Hecker. This being so, under familiar principles of law, plaintiff should have offered on her case in chief any evidence which she had to support such a claim. No such evidence was offered. In fact, plaintiff was scrupulous to keep such evidence out of the record on her case in chief, and interposed objections when counsel for the defendant undertook to introduce that subject on cross-examination of defendant Hecker as part of plaintiff's case in chief.

Only after defendant had rested, did plaintiff come forward and offer to prove the length of the skid marks left by the Hecker automobile as a basis for showing Hecker's speed immediately prior to the accident. Plaintiff made no attempt to show that the need for this testimony could not have been anticipated, and in view of her claim at pretrial, could not well have made such a showing. Neither did plaintiff undertake to show that Officer Begent was not available as a witness at the

time her case in chief was presented. Her only excuse for the belated offer of this testimony was that it tended to rebut the testimony of Hecker from which it was developed incidentally on his examination, that he was traveling about 25 to 30 miles an hour.

A wide discretion is vested in the trial court in determining what evidence is admissible by way of rebuttal, and that discretion will not be interfered with by the appellate court in the absence of a clear showing of abuse. The considerations which should guide the trial court in exercising this discretion and the rules with respect thereto, are set forth in 53 Am. Jur. commencing at page 101, Trial, commencing with Sec. 115 as follows:

“While the trial court is vested with wide discretion in permitting departures from the usual order of proof when circumstances of the case require, the general rule is that the party who has the burden of proof — he who holds the affirmative and who would be defeated if no evidence were offered on either side — is entitled to open the evidence; *he should then introduce all his evidence in chief*, and after his adversary has introduced all his evidence in chief, *the former should be confined to rebuttal evidence*. Generally speaking, on rebuttal he can give only such evidence in reply as tends to answer new matter introduced by his adversary.

“If every party had a right to introduce evidence at any time, at his own election, without reference to the stage of the trial in which it is offered, the proceedings of the court would often be embarrassed, the purposes of justice be obstructed, and the parties themselves be surprised

by evidence destructive of their rights, which they could not have foreseen or in any manner have guarded against. Although the rule regarding the order of evidence should be followed as far as practicable, it is not inflexible; the order of the evidence is necessarily governed by the trial judge. \* \* \* Nevertheless, *it is the duty of the parties to introduce their evidence in proper order, and if they fail to do so it is discretionary with the court* whether the evidence shall be admitted. \* \* \*

“\* \* \* Whether there shall be a departure from the usual order of proof is a matter addressed to the sound discretion of the trial court, and an appellate court will interfere only where there is an abuse of discretion, as where the effect is to countenance or aid trickery or unfairness on the part of counsel.” (Emphasis ours.)

§ 120. “After the parties have introduced their evidence in chief they are as a general rule confined to rebuttal evidence that is, evidence which answers or disputes that given by the opposite party — evidence in denial of some *affirmative* case or fact which the adverse party has attempted to prove, — except as the trial court may in its discretion permit a party to introduce evidence which could have been given as part of the testimony in chief. *One cannot, except in the discretion of the trial court, introduce as a part of his rebuttal testimony relative to new and independent facts competent as a part of his testimony in chief.* \* \* \*” (Emphasis ours.)

§ 121. “As a general rule the party upon which the affirmative of an issue devolves *is bound to give all his evidence in support of the issue in the first instance, and will not be per-*

*mitted to hold back part of his evidence confirmatory of his case and then offer it on rebuttal.* Rebuttal testimony offered by the plaintiff should rebut the testimony brought out by the defendant *and should consist of nothing which could have been offered in chief.* \* \* \* Nor, as a general rule will the discretion of the trial court in refusing to permit evidence in chief to be introduced in rebuttal be interfered with, and in some jurisdictions the appellate courts will not review this discretion. \* \* \*” (Emphasis ours.)

Manifestly, there was no abuse of discretion on the part of the trial court when his ruling is viewed in light of the above principles. Plaintiff had every opportunity to present the proffered evidence on her case in chief. Obviously that was the proper place for it. It would be most unfair to a defendant to permit the plaintiff to hold back part of his evidence in chief in the guise of rebuttal evidence, simply because it had the incidental effect of rebutting some item of defendant's proof. Evidence with respect to speed was a part of plaintiff's case in chief, and should have been offered at that time. The court did not abuse its discretion in refusing to receive the proffered evidence at the end of the trial.

Plaintiff also seeks to justify the belated offer on the grounds that the proffered evidence would help to establish a last clear chance situation, since it would show the distance deceased was from defendant Hecker, when first observed. However, the undisputed testimony of Hecker shows that brakes were initially applied because other cars moving in the same traffic pattern were slowing down, and decedent was not yet in sight.

Nor would such evidence show where deceased was when first observed, what he was doing, or how he came into collision with the Hecker car. Counsel for plaintiff expressly stated that the evidence was offered to prove speed. No other purpose was suggested. The objection to it was properly sustained.

#### POINT VI

THERE WAS NO EVIDENCE THAT DEFENDANT HECKER WAS ACTING WITHIN THE SCOPE OF HIS EMPLOYMENT WITH THE CORPORATE DEFENDANT AT THE TIME OF THE ACCIDENT. EVEN IF THERE WAS SUCH EVIDENCE, IT WOULD BE IMMATERIAL ON APPEAL, SINCE THE JURY FOUND NO LIABILITY ON THE PART OF HECKER.

We answer here plaintiff's POINT VII.

In view of the fact that the jury found either non-negligence on the part of the defendant Hecker, or contributory negligence on the part of deceased, or both, even if there was any error of the trial court in determining the issue of scope of employment, such error would be wholly immaterial on this appeal, since plaintiff cannot have been prejudiced thereby. However, there was no error in that regard.

At the time of the accident defendant Hecker was operating an automobile owned by his employer and used by him both for business purposes and for his personal pleasure. At the time of the accident, Hecker was on his way from his home to his employer's office, preparatory to starting his day's work. He had no

errands or missions of any type to perform for his employer between his home and the office. He would have no duties to perform for his employer until he arrived at the office. The mere fact that his automobile was furnished by his employer, and that the cost of operation was borne by his employer, did not mean that he was in the scope of his employment at the time of the accident. On the contrary, under familiar principles of agency law, well established by innumerable decisions of this court, he was not in the scope of his employment at the time the accident occurred. The rule is stated in the Restatement of the Law of Agency, Sec. 238, as follows:

“Except as stated in §§ 212-214, a master is liable for harm caused by the use of instrumentalities entrusted by him to a servant only if they are used within the scope of employment.”

Under Comment *b* thereunder, it is said:

“The mere fact that the master habitually allows the servant to use the instrumentality, or even that the master maintains the instrumentality entirely for the use of the servant, does not of itself subject the master to liability. The master is liable only when the instrumentality is being used by the servant for the purpose of advancing the employer’s business or interests, as distinguished from the private affairs of the servant. Thus, a master who purchases an automobile for the convenience of his servants is not subject to liability when a servant is using it for his own purposes; nor is he liable if a group of servants, with his permission use it for private purposes. \* \* \*”

To the same effect see 35 Am. Jur., Master and Servant, Sec. 580.



In a long line of industrial cases, Utah has adhered to this rule. See *Greer v. Ind. Comm. of Utah*, (Utah), 279 Pac. 900; *Fidelity & Casualty Co. v. Ind. Comm.*, (Utah), 8 Pac. (2d) 617; *Roberts v. Industrial Comm.*, (Utah), 47 Pac. (2d) 1052; *Vitagraph, Inc. v. Ind. Comm.* (Utah), 85 Pac. (2d) 601; *Goodyear Tire & Rubber Co. v. Ind. Comm.*, (Utah), 110 Pac. (2d) 334; *London Guarantee & Accident Co. v. Frazee*, (Utah), 185 Pac. (2d) 284, and *Wilson v. Industrial Comm.*, (Utah), 207 Pac. (2d) 1116.

Although the foregoing cases were decided under the Workman's Compensation Act, there appears no reason why the same rule would not apply where an injured party seeks to apply the doctrine of respondeat superior. As said by the Supreme Court of Oklahoma in the case of *Ellis & Lewis, Inc. v. Trimble*, 67 Pac. (2d) 244, decided under analogous circumstances:

“The cases above cited are workmen's compensation cases. But there can be no difference in legal principle on this account: It would be absurd to say, in applying liberally the workmen's compensation laws, that one engaged in rendering such services was an independent contractor and was not entitled to the benefits of the law for his own injuries; and, on the other hand to say, in similar circumstances, that he was a servant or agent of the one for whom he was rendering services, and could serve as a conduit to carry responsibility for his acts to the one for whom he was rendering services, and thereby enable a third person to be benefited for his injuries.”

The issue was submitted to the jury, which was more than plaintiff was entitled to receive. Even if there were error, it would be immaterial and non-prejudicial in view of the jury's findings on the issues of negligence and contributory negligence.

#### POINT VII

THE COURT'S INSTRUCTIONS REGARDING THE CREDIBILITY OF WITNESSES WERE ADEQUATE.

We here answer plaintiff's POINT VIII.

Plaintiff complains that the court failed to give her requested instructions numbered 16 and 17, to the effect that a witness may be impeached by evidence of inconsistent statements made on other occasions. While the court did not deal specifically with the effect of prior inconsistent statements, the court gave the jury a general and complete instruction regarding the credibility of witnesses in its Instruction No. 26. After advising the jury of various matters which might be considered by the jurors in determining the credibility of the witnesses, the court advised them that they might also consider any fact or circumstance in evidence "which in the judgment of the jury affects the credibility of any witness." The jury was further advised that if they believed that any witness had wilfully testified falsely on any material matter, then the whole of his testimony might be disregarded unless such testimony was corroborated by other credible evidence.

Although the court did not specifically refer to prior inconsistent statements, it would be a naive jury indeed,

which would fail to understand that prior inconsistent statements of a material nature, not satisfactorily explained, would affect the credibility of the witness. Although the requests presented by the plaintiff might properly have been given, the refusal of the court to give them does not constitute error, where the jury was advised by another instruction concerning the credibility of witnesses.

In 53 Am. Jur., Trial, page 557, it is said:

“The jury are properly directed as to the tests of credibility by an instruction that the credibility of the witnesses is a question exclusively for the jury, and that they have a right to determine from the appearance of the witnesses on the stand, their manner of testifying, their apparent intelligence or lack thereof, their youth, and from all the surrounding circumstances appearing on the trial, which witnesses are to be deemed worthy of credit.”

And at page 579 of the same text, it is further said:

“And the refusal of a request is not error where the matter is covered by the court’s general charge, or where not applicable.”

The Utah rule appears to be in accord with this view. In the case of *Black v. Rocky Mountain Bell Tel. Co.*, (Utah), 73 Pac. 514, this court said:

“The following instruction was also given: ‘You are further instructed that you are the sole judges of the facts in this case and the credibility of the witnesses. You have a right to determine from the appearance of the witnesses on the stand, their manner of testifying, their apparent candor

and frankness, or lack of it, their apparent intelligence, and from all the other surrounding circumstances appearing on the trial, which witnesses are the more worthy of credit, and give credit accordingly. You are not bound to take the testimony of any witness as absolutely true, and you should not do so if you are satisfied from all the facts and circumstances proved on the trial that such witness is mistaken in the matter testified by him, or that for any other reason his testimony is untrue or unreliable.' The appellant contends that the terms 'or that for any other reason his testimony is untrue or unreliable,' as used in this instruction, were error. While we do not think that those terms were as clear of ambiguity as is desirable in instructions, yet when read in connection with the preceding language, and in view of the evidence, we do not think they were such as could affect the result, and were not, therefore, reversible error."

No litigant is entitled to demand that any instruction of the court be given in the language framed by the litigant or his counsel. All that any litigant can demand is that the jury be instructed in substance as to the matters before them for consideration. The language of the court's instruction in this case, sufficiently advised the jury concerning these matters, and plaintiff has been unable to demonstrate any prejudice. There was no prejudicial error in the court's refusal to charge in the language of plaintiff's request.

#### POINT VIII

THE APPEAL AS AGAINST HARTFORD ACCIDENT & INDEMNITY COMPANY, NOT HAVING BEEN ARGUED OR BRIEFED, IS WAIVED.

Plaintiff's notice of appeal indicated that plaintiff appealed from the summary judgment entered in favor of the defendant Hartford Accident & Indemnity Company, and against plaintiff on the second cause of action. However, that point has neither been cited nor argued in plaintiff's brief. Under familiar principles of appellate practice, it is therefore deemed waived. 3 Am. Jur., Appeal and Error, page 366; *Falkner v. Smith*, 77 Utah 410, 296 Pac. 776; *Sandall v. Sandall*, 57 Utah 150, 193 Pac. 1093; *Smith vs. Carbon County*, 90 Utah 560, 63 P. (2d) 259.

### CONCLUSION

We believe that our argument can be no better summarized than by quoting from the recent opinion of this court in the case of *Joseph v. W. H. Groves Latter-day Saints Hospital*, 348 P. 2d 935, where this court said:

“What the parties are entitled to and the law seeks to afford is an opportunity for one claiming a grievance which would justify legal redress to present it to a court or jury and to have a fair trial. When this is done, and the verdict and judgment are entered, all presumptions are in favor of their validity. The burden is upon the appellant not only to show that there was error, but that it was prejudicial to the extent that there is reasonable likelihood that in its absence there would have been a different result. We find no such error here.”

We believe that a perusal of the record will convince the court, that there was no evidence of negligence on the part of the defendants; that the plaintiff's own

evidence established contributory negligence on the part of the deceased; that there was no error in law occurring at the trial prejudicial to the rights of plaintiff; that plaintiff had a fair trial, and should abide the result. The judgment below should be affirmed.

Respectfully submitted,

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