

1960

# Maurice Charles Charvoz v. Wendell L. Cottrell : Brief of Plaintiff and Appellant

Utah Supreme Court

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IN THE SUPREME COURT  
of the  
STATE OF UTAH

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FILED  
NOV 8 - 1960

MAURICE CHARLES CHARVOZ,  
Administrator of the Estate of  
MAURICE BRUCE CARVOZ,  
Deceased,      *Plaintiff and Appellant,*

vs.

WENDELL L. COTTRELL,  
*Defendant and Respondent.*

Clerk, Supreme Court, Utah

No.  
9334

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Brief of Plaintiff and Appellant

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CALVIN L. RAMPTON  
*Attorney for Plaintiff  
and Appellant*

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Brief of Plaintiff and Appellant

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STATEMENT OF FACT

This is a wrongful death case.

Maurice Bruce Carvoz was struck and killed by an automobile driven by the defendant. The collision occurred about 7:00 P.M. on the evening of October 26, 1959, at the intersection of 17th South and 19th East Streets in Salt Lake City. At the time Charvoz was walking south across 17th South in the pedestrian crosswalk paralleling 19th East on the west

side, the defendant was driving east on 17th South in the south traffic lane.

Seventeenth South at this point is a blacktop street 37 feet 2 inches wide. A traffic division line is marked on the road 20 feet 8 inches from the north curb and 16 feet 6 inches from the south curb. The pedestrian lane on the west side of 19th East was 8 feet wide and clearly marked. A street light projects into the street on the southwest corner of the intersection. At the time of the collision the weather was clear, the roads were dry and the evening was fairly dark (R. 4-12). Attached hereto marked Appendix "A" (Ex. P. 1) is a diagram of the intersection with certain pertinent measurements marked there as testified to in the case by Officer Diaz, the investigating officer.

On the evening of the accident Bruce Charvoz was an unmarried man 25 years of age. He resided with his parents and worked with his mother in a business known as the Salt Lake Shirt Shop. During his childhood he had suffered from encephalitis, which had left him with impaired muscular coordination. There is a dispute in the evidence as to whether or not the disease had also affected his mental capacity. However, that dispute is not material to this appeal.

Shortly prior to the accident Bruce had left the Highland Stake Meeting House located on 19th East north of 17th South. He was seen by witnesses D. Ford Crandall and Mrs. Crandall to enter 17th South in the crosswalk (R. 84, 87, 88). He proceeded south until he was struck at a point 26 feet 11 inches from the north curb and 10 feet 3 inches from the south curb. Cottrell at the time was driving his car east on 17th South. Cottrell estimated his speed at from 30 to 35 miles

per hour. His speed was estimated at 42 miles per hour by the investigating officer. However, the question of speed is not one of the points relied upon in this appeal. The defendant testified that he first saw Bruce when the automobile was 60 feet from the point of impact and Bruce was approximately 6 feet from the point of impact. The defendant testified that at the time he first saw Bruce, Bruce was walking at a normal gait as he continued to do with his head down, apparently oblivious of the approach of the automobile (R. 123, 128). The defendant did not sound his horn, nor did he turn his car from a direct path (R. 139). He applied his brakes and laid down skid marks averaging 14 feet in length before the point of impact and 56 feet after impact (Ex. P. 1). Bruce's body was knocked or carried 49 feet 6 inches. He died on the day after the collision as a result of the injuries received.

This case was tried before a jury in the Court of the Third District Judge Aldon J. Anderson. The jury returned a verdict of no cause of action. The plaintiff moved for a new trial in the Court below based upon the errors hereinafter set forth. The motion for new trial was denied.

## STATEMENT OF POINTS RELIED UPON

The plaintiff and appellant relies upon the following points in seeking a reversal of the verdict in the Court below and a new trial of the issues:

### POINT I

THE COURT ERRED IN REFUSING TO GIVE PLAINTIFF'S REQUESTED INSTRUCTION NO. 2 TO THE

EFFECT THAT THE DEFENDANT WAS NEGLIGENT  
AS A MATTER OF LAW.

## POINT II

THE COURT ERRED IN REFUSING TO GIVE PLAINTIFF'S REQUESTED INSTRUCTION NO. 13 TO THE JURY IN REGARD TO THE DOCTRINE OF LAST CLEAR CHANCE.

## ARGUMENT

### POINT I

THE COURT ERRED IN REFUSING TO GIVE PLAINTIFF'S REQUESTED INSTRUCTION NO. 2 TO THE EFFECT THAT THE DEFENDANT WAS NEGLIGENT AS A MATTER OF LAW.

Plaintiff's Requested Instruction No. 2 read as follows:

"You are instructed that the evidence establishes, as a matter of law that the defendant was negligent and that his negligence proximately contributed to the death of the decedent, therefore, you should find the the issues of liability against the defendant and in favor of the plaintiff unless you should also find that the decedent was contributorily negligent and that such negligence on the part of the decedent proximately contributed to his death."

The Court refused to give this instruction.

The plaintiff was entitled to this instruction only if the undisputed evidence established that the defendant was negligent in one or more particulars. A number of grounds of

negligence were relied upon by the plaintiff as set forth in the pretrial order. On some of these grounds the evidence is in dispute. On others, there is no dispute. In fact, they are established by the defendant's own testimony. The plaintiff maintained that the defendant was driving at an excessive speed. As to this issue, the evidence is in conflict. The plaintiff alleged that the defendant was negligent in failing to have his automobile under proper control. Here too, there is a conflict in evidence. It was alleged that the defendant's automobile was not equipped with proper and sufficient brakes. There is little evidence from the plaintiff on this point. The plaintiff alleged that the defendant was negligent in failing to give the decedent a warning of his approach. There is a conflict in the evidence as to whether or not the defendant had sufficient time to do this after actually discovering the presence of the decedent. There is no dispute in the evidence, however, as to the remaining two grounds of negligence relied upon by the plaintiff:

A. The defendant failed to keep a proper lookout and

B. The defendant failed to yield the right of way to the decedent.

Under the defendant's own testimony he first saw Bruce when Bruce was 6 feet from the point of impact and the automobile 60 feet from the point of impact (R. 136). Bruce continued to walk at a set pace until the collision (R. 139). This establishes that Bruce was walking approximately 3 miles per hour which the Court can take judicial notice is a normal gait. Bruce had proceeded 26 feet 11 inches into the intersection when the impact occurred (Ex. P. 1) establishing



that the defendant's car was approximately 270 feet west of the crosswalk when Bruce entered the street. The defendant testified that his lights were burning and were adjusted in accordance with the law under the provisions of Section 41-6-134 Revised Statutes of Utah, 1953 (R. 146). The lights must therefore have been able to pick up anyone in the road at a distance of 100 feet. When the defendant's automobile was 100 feet from the point of impact, Bruce was already more than 16 feet into the street and was almost to the center line. He was walking at a normal gait. The defendant did not see Bruce at this point but saw him only when the automobile was 60 feet from the point of impact. However, at either the time at which the defendant should have seen Bruce or the time he did see Bruce, Bruce was within the crosswalk and was approaching so closely from the opposite half of the roadway as to be in danger under the provisions of Section 41-6-78, Utah Code Annotated, 1953. It was the obligation of the defendant to yield the right of way. The evidence is clear that he did not do it.

The defendant's own witness, Sergeant Pitcher, testified on cross examination that had the defendant seen Bruce at 100 feet and assuming a speed of 30 miles per hour as testified to by the defendant, the defendant could have brought his car to a stop before ever reaching the crosswalk (R. 165).

The defendant tried to excuse his failure to see Bruce earlier by claiming that the corner post of his automobile blocked the view (R. 136). The uncontradicted testimony of the Witness Tipton, an engineer, however, was that the angle of vision of the automobile in question was sufficient so that

at 60 feet from the point of impact the defendant could not only have seen Bruce where he was walking, but could see clear to the curb on the north side of the street and at 100 feet from the point of impact he could see a considerable distance to the north of the curb (R. 170, Ex. P. 11). Under these circumstances, therefore, there can be no jury question but that the failure of the defendant to see Bruce when the defendant was 100 feet from the point of impact was due to no other cause than negligent inattention. Had he seen him at that point, he could have brought his car to a stop before ever reaching the crosswalk. This negligent inattention, therefore, was a proximate contributing cause of the accident. Furthermore, there can be no dispute but that under the Statutes of the State of Utah the right of way belonged to the pedestrian and it was negligence on the part of the motorist who failed to yield it. Such failure to yield obviously was a proximate contributing cause to the accident.

The question of the defendant's negligence, therefore, should not have been left to the jury. The only matters which should have been left to the jury was the question of the contributory negligence of the pedestrian and the question of damages.

The matter of taking the question of negligence from the deliberation of the jury was passed upon by this Court in the case of *Frank v. McCarty*, 188 P.2d 737. Although the matter there concerned was the question of contributory negligence, the principles are the same. The Court stated:

"However, if reasonable minds would not be warranted in reaching any conclusion other than that plaintiffs were guilty of contributory negligence in light

of the plaintiff's own testimony or other undisputed fact, there is no jury question but a question of law for the Court."

Plaintiff therefore represents that the lower Court erred in leaving to the jury the question of defendant's negligence and in refusing to instruct the jury that the defendant was negligent as a matter of law.

## POINT II

THE COURT ERRED IN REFUSING TO GIVE PLAINTIFF'S REQUESTED INSTRUCTION NO. 13 TO THE JURY IN REGARD TO THE DOCTRINE OF LAST CLEAR

Plaintiff does not bear such a heavy burden in regard to Point II as was the case under Point I above. Under Point I we were entitled to the requested instruction if, but only if, the defendant was clearly guilty of negligence either under his own evidence or under the undisputed and incontrovertible evidence in the case. In regard to Point II we were entitled to have the requested instruction given if there was evidence in the record from which the jury could have made an affirmative finding as to each of the conditions giving rise to the doctrine of last clear chance. *Graham v. Johnson*, 166 P.2d 230 at Page 238.

Our requested instruction was copied verbatim from Page 63 and 64 of the Uniform Jury Instructions of Utah. This instruction covers the last clear chance doctrine applicable to the situation where the plaintiff is not in a position of helpless peril but was by reason of inattention or lack of alertness moving into a position of danger without realizing the poten-

tial peril. The instruction sets forth six propositions that must be met by the evidence in order for the jury to apply the doctrine of last clear chance. This case appears to be a classic example for the application of the last clear chance as it applies to a negligently inattentive plaintiff. Let us examine each one of the six conditions to see how the evidence here fits.

The first condition that must be met is that the plaintiff must have been in a position of danger. Certainly this cannot be doubted. The plaintiff was in the roadway in a pedestrian crosswalk moving at a speed which, unless something were done to change the situation, would bring him into direct collision with the automobile.

Secondly, the evidence must establish that the person injured was by reason of inattention or lack of proper alertness totally unaware of the peril that threatened to him. We have only to look at the defendant's own testimony to establish this proposition. He testified that Bruce was walking with his head down paying no attention to the approaching automobile (R. 128).

In the third place we must establish that the defendant actually saw the plaintiff and knew of his perilous position. The defendant's own testimony is that he actually saw the plaintiff and knew of his perilous position when the automobile was 60 feet from the point of impact.

The fourth proposition which we must establish is that the defendant then realized, or by the exercise of due care should have realized, that Bruce was unaware of the danger. Once again we need look only to the defendant's own testimony.

The defendant testified that Bruce was walking at a steady gait, not looking at all at the car but walking directly into the path of it (R. 128). Certainly, the jury could well have found, in fact would almost be forced to find, that the defendant in the exercise of reasonable care should have recognized that Bruce was unaware of the danger.

As a fifth proposition we must establish that at such time there existed an opportunity in the defendant by the exercise of ordinary care to have avoided the collision. The defendant first saw Bruce at a distance of 60 feet. At the speed at which he was going at the time the application of his brakes would not have stopped him before he reached the point of impact. The time that the brakes should have been applied was at a distance of 100 feet, at which time he could have seen Bruce had he been looking. However, when the defendant observed the peril at 60 feet he could have done one of two things to have avoided the accident—he could have sounded his horn, or he could have turned slightly to the right and thus have avoided the collision entirely. He did neither of these things but continued straight ahead (R. 139). When the defendant first saw Bruce, Bruce was not in front of the car, although it was evident that he was going to be there unless he stopped walking. He was, however, at that time some four to six feet left of the automobile. A mere touch of the horn might have brought him up sharply before he ever entered the path of the automobile. Whether or not there was time to sound the horn and time for Bruce to stop was under all the circumstances a jury question. Furthermore, it appears clear that there was an opportunity for the defendant himself to have avoided the accident merely by turning to the right. He, himself,

admitted that there were 10 feet of unobstructed roadway between the point of impact and the curb (R. 140). By turning to the right he could have missed Bruce by 4 feet and yet not have struck the curb.

As a sixth proposition we must prove that the defendant negligently failed to avail himself of the opportunity to avoid the accident. The defendant himself admitted that he neither sounded his horn nor changed direction of the car (R. 139).

Some earlier cases have held that the last clear chance doctrine based upon the negligent inattention theory is not applicable where the injured party is still moving when the peril is discovered by the defendant and also when the collision occurs. This is not the rule in this state, however, nor is it the rule in the majority of jurisdictions elsewhere. In the case of *Graham v. Johnson*, 166 Pac. 2d, 230, the injured person was running westerly out of the roadway at the time he was struck. The court none the less held the doctrine of last clear chance applicable. In the case of *Morby v. Rogers*, 250 Pac. 2d, 231, the injured party was riding a bicycle along the side of the road. Here also the Court held the doctrine to be applicable. In dismissing the fact that the boy on the bicycle was moving at the time of the accident, Judge Wolfe in his concurring opinion stated:

"It was not a case of a rapid change of relative positions of two fast moving vehicles. The cycling boy was riding a comparatively slow-moving vehicle. This circumstance alone may give rise to a situation where it is incumbent on the jury to determine in respect to that vehicle whether the comparatively more rapid one had the clear opportunity to avoid the accident or

mitigate it into a possible minor collision. Certainly the vehicle which comes with the potentiality for substantial damage, as stated by Mr. Justice McDonough, owes a duty toward a lad on a frail vehicle which duty may not be discharged by the application of logic alone."

The situation in this case is remarkably like that in *Morby v. Rogers*, except that here the evidence is much stronger in favor of the giving of a last clear chance instruction. In the *Morby* case the defendant did sound his horn one time. In this case he never did sound it at all. Likewise, in the *Graham v. Johnson* *supra*, the basis of the holding of the Court that the defendant could have avoided the collision was the failure to blow a horn. In the case now before the Court, there was much greater opportunity for the blowing of the horn than there was in the *Graham v. Johnson* case. Here the defendant was aware for 60 feet that Bruce was moving into the path of his vehicle. In the *Johnson* case Darlene Johnson moved only a very few feet between the time the boy started to run from his set position in the street until he was struck.

The facts in this case fall squarely within the provision of Section 480 of the Restatement of Torts. There was clearly evidence from which the jury could have found that the last clear chance doctrine was applicable. It was, therefore, error for the Court to refuse to give this instruction.

## CONCLUSION

Plaintiff submits that the failure of the Court to give the two requested instructions was error which substantially preju-

diced the rights of the plaintiff. The case should be sent back for a new trial.

Respectfully submitted,

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and Appellant*



