

1960

# Maurice Charles Charvoz v. Wendell L. Cottrell : Brief of Defendant and Respondent

Utah Supreme Court

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Lawrence L. Summerhays; Attorney for Defendant and Respondent;

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IN THE SUPREME COURT  
of the  
STATE OF UTAH

FILED

NOV 29 1960

MAURICE CHARLES CHARVOZ, Clerk, Supreme Court, Utah  
Administrator of the Estate of  
MAURICE BRUCE CHARVOZ,  
Deceased,

*Plaintiff and Appellant,*

vs.

WENDELL L. COTTRELL,  
*Defendant and Respondent.*

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BRIEF OF DEFENDANT AND RESPONDENT

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*Attorney for Defendant and  
Respondent.*

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MAURICE CHARLES CHARVOZ,  
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vs.

WENDELL L. COTTRELL,

*Defendant and Respondent.*

Case No.  
9334

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BRIEF OF DEFENDANT AND RESPONDENT

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STATEMENT OF FACTS

This is an appeal from a jury verdict in favor of the defendant, Wendell L. Cottrell, and against the plaintiff, and from the Court's subsequent order denying the plaintiff's motion for a new trial. In view of the fact that the plaintiff has failed to include several facts the defendant deems important to his case, we make our own statement of facts.

Plaintiff brought a wrongful death action for the death of Maurice Bruce Charvoz, age 25, arising out of an accident that occurred on October 26, 1959, at about 7:00 p.m. at the intersection of 17th South and 19th East Streets in Salt Lake City, Utah. It was dark at the time of the accident (R. 83, 123).

17th South is a blacktop highway running East and West. 19th East is a blacktop highway running north and south. The intersection is guarded by stop signs facing traffic approaching from the north and south on 19th East (R. 64). 17th South Street is curbed and guttered on both sides. 19th East is curbed and guttered on both sides south of the intersection but only on the west side north of 17th South (R. 126, 127), and silt and gravel were washed from this area, not curbed, into the intersection, and on portions to the west of it, by storms (R. 125, Exh. D-2, D-3).

There were painted crosswalks on all sides of the intersection (R. 65). At the time of the accident the decedent was crossing the intersection from north to south within the painted crosswalk on the west side of the intersection (Exh. A). There was a street light on the southwest corner of the intersection hanging from a utility pole but the intersection was dimly lit (R. 85, 86). 17th South on the west side of the intersection was measured by the investigating officer to be 37'2" wide from curb to curb with a line dividing the highway 20'8" from the north curb and 16'6" from the south curb (R. 70, 71).

There was a car stopped on the north side of the intersection at the stop sign facing directly south (R. 86) with its lights on occupied by witnesses, Ford D. Crandall and his wife (R. 83). On the northeast corner of the intersection was a ten-acre vacant field (R. 125, 131, Exh. D-2).

The weather was clear, the roads dry (Exh. A).

The decedent was walking across the west pedestrian lane from north to south with his head down (R. 88, 128) at the time of the accident. He was dressed in dark clothing (R. 88, 127, 147).

Mr. Cottrell was driving east on 17th South in the south lane of traffic at a speed of 30-35 miles per hour (R. 69, 141, 142) with his lights on low beam (R. 146). He had just come from the Secretary of State's office where he had been in a business meeting (R. 133). When he was about 60-65 feet from Bruce, Mr. Cottrell saw him and immediately applied his brakes (R. 124, 136) and apparently pulled to the right causing his car to veer to the right (R. 129). He did not have time to sound his horn (R. 130, 131). When Mr. Cottrell first saw Bruce, Bruce was about to the line dividing the highway (R. 127). He thereafter took two steps, colliding with the left bumper and headlight rim of the defendant's car (Exh. D-6, D-7). The decedent was thrown up on the fender and carried to about the center of the intersection where he rolled off. Defendant's car traveled over to the west line of the crosswalk on the east side of the intersection (Exh. D-6). The probable point of

impact between the defendant's car and Bruce was measured by the officer to be about 6'3" south of the center dividing line of the highway.

The defendant's vehicle left the following skid marks as measured by Officer Diaz:

Before Impact	Total
R.F. 12'8"	69' 3"
L.F. 14'2"	70' 9"
L.R. 9'8"	66' 4"
R.R. 20'4"	76'11"

The two right wheels skidded through gravel and silt and the left wheels skidded on some silt (R. 127, Exh. D-2, D-3). About two days after the accident occurred the investigating officer made one skid test where the highway was free from silt or gravel. On the basis of the coefficient of friction determined on this test, but using defendant's skid marks through the gravel and silt, he came up with a speed of 42 miles per hour for defendant's car. However, as plaintiff has stated in his brief, the question of speed is not an issue.

Before the investigating officer arrived at the scene of the accident, Bruce Charvoz was taken to the Salt Lake County Hospital. While there, on the night of the accident, he had a conversation with his mother and one of the police officers in which he stated to his mother that he didn't see the defendant's car (R. 116, 117).

## STATEMENT OF POINTS

## POINT I.

THE COURT DID NOT COMMIT PREJUDICIAL ERROR IN REFUSING TO GIVE THE JURY PLAINTIFF'S REQUESTED INSTRUCTION NO. 2 TO THE EFFECT THAT DEFENDANT WAS NEGLIGENT AS A MATTER OF LAW.

## POINT II.

THE COURT DID NOT COMMIT PREJUDICIAL ERROR IN REFUSING TO GIVE TO THE JURY PLAINTIFF'S REQUESTED INSTRUCTION NO. 13 IN REGARDS TO THE DOCTRINE OF LAST CLEAR CHANCE.

## ARGUMENT

## POINT I.

THE COURT DID NOT COMMIT PREJUDICIAL ERROR IN REFUSING TO GIVE THE JURY PLAINTIFF'S REQUESTED INSTRUCTION NO. 2 TO THE EFFECT THAT DEFENDANT WAS NEGLIGENT AS A MATTER OF LAW.

Plaintiff complains of the court's failure to give his requested instruction No. 2 which reads 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 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."

This instruction contains two basic premises: One that defendant was guilty of negligence as a matter of

law and, two, that said negligence was a proximate cause of the accident and decedent's resulting death.

Plaintiff contends that the evidence was undisputed that defendant was guilty of negligence as a matter of law in two respects: (a) That defendant failed to keep a proper lookout and (b) The defendant failed to yield the right of way to the decedent.

Plaintiff's claim of negligence upon the part of the defendant in failing to keep a proper lookout is based upon two theories: (1) That defendant did not see the decedent until he was 60-65 feet from him, and (2) That under Sec. 41-6-134 Sub. (b) U.C.A., 1953, one is required to have lights which will on low beam reveal persons and vehicles at a distance of at least 100 feet ahead and that therefore defendant is negligent if he didn't see decedent at a distance of 100 feet.

The undisputed testimony in this case is that the decedent was dressed in dark clothing and that he was walking across a blacktop street with a dark backdrop on the northeast corner (R. 125, 131, Exh. D-2). It is common knowledge that dark clothing against the background of the dark blacktop street and of the dark northeast corner of the intersection would make it very difficult for the defendant to observe the decedent as he crossed the highway, and particularly so until he came into the proximity of the direct center of the beam of defendant's headlights. For example, in the photograph Exhibit D-2 on file in this case, the clothing of the officer clearly shows this principle. The officer's black boots blend in with the blacktop of the highway so that it is

hard even in the picture to discern where the blacktop ends and his boots begin. The same is true of the officer's dark coat with respect to the dark background on the northeast corner of the intersection. However, the officer's white hat and his light trousers are more easily discernible.

The fact that there was a car stopped at the intersection which the defendant observed and had a duty to watch was also a distracting influence which would require defendant's attention and take part of his concentration at the intersection.

Whether under all of the circumstances surrounding this accident the defendant was guilty of negligence in failing to see the decedent before he did was certainly a jury question and defendant could not be held guilty of negligence as a matter of law in failing to observe him before he actually did. See 2A *Blashfield Cycl. of Automobile Law & Practice*, Sec. 1256 at page 155 in which the rule is stated:

"... that a motorist equipped with statutory headlights does not observe a pedestrian in dark clothing walking in the road ahead of him until the moment before striking him is not necessarily conclusive of the negligence of the motorist; the question of his negligence under the particular circumstances usually being one of fact."

Thus in the case of *Falnes vs. Kaplan*, Fla. 101 So. (2) 377 where a motorist was traveling at a moderate speed and did not discover a pedestrian clothed in a dark blue uniform and walking on the black asphalt

surface of a roadway at midnight until he was but 10 feet from him, the Court held the motorist could not be liable, even under the last clear chance doctrine.

The defendant saw the lights of the vehicle of the witness Crandall before he saw the decedent and he testified that he was looking directly ahead along the roadway. This evidence indicates that he was keeping a proper lookout.

Defendant does not argue with the principle of law set forth in the case of *Frank v. McCarthy*, Utah 1948, 188 P. (2) 737 cited by the plaintiff but does claim that the factual situation existing in plaintiff's case is substantially different than that which existed in the *Frank* case and that reasonable minds would be warranted in reaching the conclusion that Mr. Cottrell was not negligent in the operation of his vehicle.

Sec. 41-6-78 UCA 1953, provides that the driver of a vehicle shall yield the right of way, slowing down or stopping if need be to so yield, to a pedestrian crossing the roadway within a crosswalk when the pedestrian is upon the half of the roadway upon which the vehicle is traveling, or when the pedestrian is approaching so closely from the opposite half of the roadway, as to be in danger, but no pedestrian shall suddenly leave a curb or other place of safety and walk or run into the path of a vehicle which is so close that it is impossible for the driver to yield.

The trial court properly instructed the jury on this provision of the statute and the respective duties of the

pedestrian and driver.

Mr. Cottrell testified that when he first saw the decedent, the decedent was then approaching the center line. At that time he immediately applied his brakes and attempted to stop but he was so close that it was *impossible* for him to do so. If Bruce had been keeping a proper lookout, he would have seen the nearness of the defendant's automobile, stopped short of the center line, or the path of defendant's vehicle, and no accident would have occurred. After the defendant saw him, Bruce moved some six feet or more into the path of the defendant's car leaving his place of safety north of the center line.

In the case of *Coombs v. Perry*, 2 Utah (2d) 381, 275 Pac. (2d) 680, the Court had before it a case very similar to our case. In that case the plaintiff was walking from east to west across Washington Boulevard in Ogden, Utah, within a marked crosswalk, at night, between 26th and 27th Streets when she was struck by a motorist driving south on Washington Boulevard. The plaintiff had crossed to the center of Washington Boulevard and stopped to look to the north for cars from that direction. Seeing none, she proceeded west into the southbound lanes of traffic a few steps when she was struck. The defendant testified that he did not see plaintiff at all, his first warning of the accident being the sound of the impact of defendant's car against plaintiff.

The court in this case, Justice Crockett speaking, stated at Page 390:

“Consistent with his duty of refusing to take questions of fact from juries except in cases free from doubt, the trial court properly submitted the questions as to defendant’s negligence, plaintiff’s contributory negligence, and proximate cause to the jury.”

In discussing the right of way rule, the Court stated:

“The right of way rule simply means this; that if two persons are so proceeding that if they continued their course there would be danger of collision, the disfavored one must give way and the favored one may assume that this will be done. *It is, of course, recognized that the right of way rule would not apply, if when the favored one approached the crossing point, the disfavored one was so close that in due care he could not or should not reasonably be expected to give way.*” (Emphasis ours).

This is the situation that existed at the time Bruce Charvoz started into the eastbound lane of traffic on 17th South Street. At the time Mr. Cottrell first saw Bruce 60-65 feet away, Bruce was on the north side of the center line of the highway and Mr. Cottrell was then so close to the point of crossing that he was unable to stop. In fact, if he had not applied his brakes, it is quite likely that the accident may have been averted because the impact involved only the left front bumper and left headlight of the Cottrell car, and this after Mr. Cottrell had slowed his vehicle after the application of brakes. It seems clear that the vehicle was an immediate hazard to the pedestrian at the time Bruce crossed the center line and perhaps for a few steps to the north thereof.

Under the facts of the case now before this court and this court's decision in the *Coombs v. Perry* and other Utah decisions, it appears clear that the question of the defendant's negligence, as well as the plaintiff's negligence, with regard to lookout and right of way was by the trial judge properly submitted to the jury.

Where the trial judge has passed upon a question and the jury, presumably fair and impartial, has made a finding, while such is not controlling, it is at least entitled to some consideration and should not be wholly ignored on appeal in determining whether reasonable minds might so conclude. In determining on appeal whether the questions of negligence and contributory negligence were properly submitted to the jury, the reviewing court must review the evidence, together with every inference fairly arising therefrom, in the light most favorable to the prevailing party and must consider any lack or failure of any evidence in the same light. (*Coombs v. Perry*, *infra*.)

## POINT II.

THE COURT DID NOT COMMIT PREJUDICIAL ERROR IN REFUSING TO GIVE TO THE JURY PLAINTIFF'S REQUESTED INSTRUCTION NO. 13 IN REGARDS TO THE DOCTRINE OF LAST CLEAR CHANCE.

The plaintiff's requested instruction No. 13 was an attempt to have the court apply the last clear chance doctrine to the case. The theory was that the plaintiff was in a position of danger from which he was unable to free himself, that the defendant either discovered or by exercise of due care should have discovered his peril

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

The undisputed testimony is that the decedent in this case took several steps from a position north of the center line of the highway to the point of impact without looking to the right to ascertain whether any cars were approaching; that he was dressed in dark clothing and that the defendant did not see him until he was within 60-65 feet of the decedent who at that time was north of the center line of the highway. Defendant at that time was traveling about 30 miles per hour. As soon as defendant saw decedent come into the cone of light projecting from his automobile he instinctively applied his brakes but struck defendant with his left front headlamp.

In the case of *Graham v. Johnson*, 109 Utah 346, 166 Pac. (2d) 230, cited by plaintiff in his brief, Justice Wade in his concurring opinion at page 364 in analyzing one version of the facts, stated: "I do not believe that the jury could reasonably find that Gary moved at most more than three or four running steps after the warning was shouted to him before he collided with the car. Coming unexpectedly as this warning shout did, it would take some time after Gary started running before Darlene could discern that he was moving toward the path of her car and apprise her that he was in danger, and it would take further time thereafter for her to start to

try to sound her horn or apply her brakes. *Whatever action she took during that time would be the result of reflex action rather than deliberation and clear thinking. Under such circumstances, the last clear chance doctrine has no application. That doctrine contemplates that after one party has placed himself in a perilous position there is a clear chance on the part of the other party to avoid the accident.*" (Emphasis added.)

So in the present case, Mr. Cottrell, after he discovered the presence of the decedent, had no clear chance to avoid the accident. His action in applying his brakes was reflex action rather than deliberation and clear thinking.

There is some evidence that defendant may have been somewhat closer than 60 feet at the time of his first observation. If defendant was traveling at 30 miles per hour, during the normal reaction time of  $\frac{3}{4}$  seconds, he would have traveled 33 feet. Add this to 14 feet, the longest front skid mark, and we have 47 feet as the approximate distance from impact at which defendant's vehicle was located when he was first able to observe the decedent. The defendant could not at this distance have stopped his vehicle in time to avoid the accident if the decedent continued his pace into the path of defendant's vehicle.

Plaintiff has set out in his brief the six propositions that must be met by the evidence in order for the jury to apply the doctrine of last clear chance. We do not argue with the propositions set forth in the instruction

pertaining to the doctrine as applied to a negligently inattentive plaintiff but do claim that the facts did not exist which would justify the submission of the case to the jury under that doctrine.

Our Supreme Court, in commenting upon the application of the last clear chance doctrine in the case of *Graham v. Johnson, supra.*, in the course of its opinion said:

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

\* \* \*

*“One should not be held liable for failing to avoid the effect of the other’s negligence in a situation where it is speculative as to whether he was afforded a clear opportunity to avoid it. In a situation where both parties are on the move the significance of the word ‘clear’ is most important. Otherwise we may put the onus of avoiding the effect of one’s negligence on a party not negligent. That party’s negligence only arises when it is definitely established that there was ample time and opportunity to avoid the accident which was not taken advantage of.”* (Emphasis added.)

The facts in the Graham case were somewhat in dispute, but it was clear that the defendant in that case knew of the presence of the minor on the street as she approached and also knew that the minor was unaware of her approach. It was also clear that the defendant had plenty of time and a clear opportunity to take action

to avoid the accident. Each of these items is lacking in the present case. The defendant testified that decedent had his head down at the time he first saw him just north of the center line. However, defendant did not know whether the decedent had looked for defendant's car just before, or at any time before defendant saw him, or whether he would look again. Defendant didn't wait to find out. Instead he took immediate action to avoid the accident. He testified as follows:

Q. "As you approached the place where the accident occurred, state what you observed.

A. "Well, as I approached 19th East all of a sudden I saw this object almost in front of my car, and just as quickly as I saw him I threw on my brakes." (Record 124, Line 15).

And again Record 130, Line 30:

Q. "Now, did you make any attempt to sound your horn at that time?"

A. "No, sir, I did not, there wasn't time."

Again on cross examination of Mr. Cottrell, he testified that when he saw Bruce he did the natural reaction and hit his brakes. (Record 140, Line 5 and Record 141, Line 12). Also, Mr. Cottrell thought the decedent would stop. (Record 140, Line 21).

Referring again to *Graham v. Johnson*, at Page 368, we quote from the court's opinion:

"Where the situation is, to reasonable minds, so doubtful as to whether the second party had time to avoid it, the matter should not be given

to the jury; otherwise, we are, as said in the case of *Thomas v. Sadleir*, 108 Utah 552, 162 Pac. (2d) 112, 115, in grave danger of permitting the one really at "... fault to shift the blame for the accident on the other by accentuation of the other's duty to avoid the effect of the first one's negligence."

And the court further goes on to state that the opportunity to avoid the accident must not be a mere possibility but a clear opportunity. And it must appear to the court that the situation was such when the relative positions of the parties were changing with fair rapidity that the element of doubt as to whether one of them had an opportunity to avoid the accident and therefore a duty to do so must not be great. The peril in the present case when the defendant discovered the decedent was too imminent for an application of the last clear chance doctrine. As a matter of fact the decedent could at any time up to the actual instant of impact have avoided the accident by stopping suddenly, and he in fact had the better opportunity to avoid the accident.

The plaintiff relies upon the case of *Morby v. Rogers*, 122 Utah 540, 252 Pac. (2d) 231. However, the facts in that case were entirely different than those in the present case. The defendant had first observed the boy on a bicycle traveling in the same direction as the car when the defendant was 300 feet away. At a distance of 200 feet the defendant sounded his horn. The boy on the bicycle at no time gave any indication that he heard the horn. The defendant continued on until within 78 feet of the boy, but actually took no safety

measures until within 20 feet of the boy, notwithstanding the fact that at the speed at which he was traveling he could have stopped within 43 feet, or 35 feet short of striking the boy. The boy in that case for a distance of 300 feet was entirely in the lane of travel in which the automobile was proceeding. The decedent in our case was not in the lane of travel of the automobile until just an instant before the impact occurred. Using the normal stopping distance, including reaction and braking time at 30 miles per hour, by no stretch of the imagination can it be argued that the defendant in the instant case had any such distance or time as was present in the *Morby* case within which to react after the decedent moved into the path of the defendant's car.

The case of *Compton v. Ogden Ry. & Depot Co.*, 120 Utah 453, 235 Pac. (2d) 515, was one in which the principle which we believe applicable to our case was announced by the court. In that case the plaintiff was walking along the side of a railroad track as a train approached. The court in that case in speaking of the last clear chance doctrine, stated that it only applied:

“\* \* \* only if the plaintiff's negligence has come to rest and plaintiff is thereafter unable by the exercise of reasonable vigilance and care to avoid the injury herself. The deceased in this case was not under those circumstances of inextricable peril. *The fact is that at any instant up to the time she was actually struck, she could by the exercise of ordinary reasonable care, have apprehended the presence of the train, and by taking one step to the side, have avoided her injury.*” (Emphasis added).

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

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

The decedent's negligence in this case continued right up to the point until he walked into the path of

the car, and at this time the defendant had no clear opportunity to avoid the accident.

In the case of *Fox v. Taylor*, 10 Utah (2d) 174, 350 Pac. (2d) 154, the court had occasion to consider the last clear chance doctrine in an accident involving an automobile and a pedestrian which was very similar to the facts in the cases before the court except that the pedestrian was not crossing in a marked crosswalk. We quote from the court's opinion in that case:

"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 see her, because in the exercise of due care he *should have* observed and avoided striking her. This 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. 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.

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 predica-

ment, 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. It is our conclusion that the trial court was correct in refusing to submit the case upon the doctrine of last clear chance."

It is apparent from a review of the foregoing Utah cases that the doctrine of last clear chance is never applicable until a plaintiff arrives at a point as to be in peril. In this case the point was reached when the decedent started to cross in front of the path of defendant's vehicle. It is also clear that the doctrine of last clear chance should never be applied to the ordinary case in which the accident creating the peril occurs practically simultaneously with the happening of the accident and in which neither party can be said to have had a last clear chance thereafter to avoid the consequence. If the defendant with a vehicle traveling 30 miles per hour had a last clear chance to avoid the accident, then certainly it could be said with more force and effect that the decedent had the last clear chance to avoid the accident because all he needed to do was to make an observation before he entered into the east-bound lane of traffic to observe the defendant's vehicle,

at which time decedent could easily have stopped, whereas it takes some distance within which to stop a moving vehicle. We, therefore, submit that the last clear chance doctrine cannot apply in any case where the defendant's view is obstructed by darkness, glare, or other condition which prevents him from seeing the plaintiff until he enters the path of defendant's vehicle and particularly in the case now before this court.

In *4Blashfield Cyclopedia of Automobile Law & Practice*, Part 2, Sec. 2803, page 393 and 394, it is stated:

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

When defendant saw decedent some 6 ft. or more from the point of impact defendant immediately applied his brakes or sent the impulse to his foot to do so. It was after that reaction on the part of the defendant that decedent actually moved into the path of defendant's vehicle. It was only after defendant had acted that decedent moved into a position of peril. The last clear chance doctrine was therefore inapplicable.

## CONCLUSION

The case was properly submitted to the jury on appropriate instructions. The Court did not err in refusing to instruct the jury that defendant was guilty of negligence as a matter of law as requested in plaintiff's Instruction No. 2 and also properly refused to instruct the jury on the doctrine of last clear chance as requested by plaintiff in his Instruction No. 13.

We submit that plaintiff has had a fair trial under appropriate instructions, that the trial Court did not commit error in denying plaintiff's motion for a new trial, and that the jury verdict and judgment entered below should be affirmed.

Respectfully submitted,

LAWRENCE L. SUMMERHAYS

Attorney for Defendant  
and Respondent