1951

Conrad H. Morby v. Walter Lawrence Rogers : Brief of Respondent

Utah Supreme Court

Ralph A. Sheffield; Dean W. Sheffield; Attorneys for Respondent;

7698

CASE NO. 7698

IN THE SUPREME COURT
of the
STATE OF UTAH

CONRAD H. MORBY,
Respondent,

-vs.-

WALTER LAWRENCE ROGERS,
Defendant and Appellant,

MRS. WALTER LAWRENCE ROGERS,
Defendant.

RESPONDENT'S BRIEF

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IN THE SUPREME COURT OF THE STATE OF UTAH

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CONRAD H. [illegible],

Respondent,

vs.

WALTER LAWRENCE HOGGES,

Appellant.

Case No. 7098

APPELLANT'S STATEMENT

Plaintiff commenced this action to recover damages for the death of his son who was killed when struck by an automobile driven by the Appellant, on April, 29, 1950, near 5140 South 13th East, in Salt Lake County, Utah.

The verdict and judgment below was rendered in favor of the plaintiff, and under well established principles, all conflicts in the evidence must be resolved in favor of the plaintiff and all inferences from the facts both oral testimony and physical facts must be drawn in favor of the plaintiff's case. In reciting the facts in his brief, the defendant has lost sight of this rule, and has recited certain of the evidence favorable to himself, totally disregarding contrary testimony and contrary physical facts, and the inferences to be drawn therefrom,

and has entirely omitted mention of other material facts adverse to his case. Accordingly, since appellant questions the sufficiency of the evidence, it will be necessary for the respondent to point out somewhat in detail additional facts and inferences therefrom, and instances wherein defendant's statement of facts is in error.

As indicated by the appellant's brief, there were no eye witnesses to the accident itself, except appellant and his wife. Accordingly, since each was a vitally interested adverse witness, their testimony was open to careful and serious scrutiny by the jury. The jury was entitled to believe or disbelieve any or all testimony which these witnesses gave, and to construct any parts of it into a logical whole which it and the physical facts would justify.

It was necessary, in order that plaintiff be able to present a case, that the defendant himself be called to testify on behalf of the plaintiff. This afforded appellant's counsel the opportunity of cross examining his own client, and by adroit questioning many of the discrepancies in his story, and the damaging effects thereof appeared obviated and his sham belief, this however, did not

have the effect of calling away from the jury the evidence he had previously given, and the manner in which he sought to hedge on his damaging admissions, could only have impressed the jury that he was willing to adopt as his testimony anything which he thought bolstered his position. Discrepancies in appellant's testimony and [illegible] that of his wife will be considered and illustrated hereinafter. What we seek to point up at this time is that the mere fact that defendant and his wife were the only two witnesses to the accident does not have the [illegible] effect of rendering true everything which they might say about the accident in their own behalf. Like

[illegible] (Tr. 1[illegible],

jury on [illegible]

ADDITIONAL STATEMENT OF FACTS

The evidence reveals that Gary Norby was an ordinary good normal healthy obedient boy of thirteen years at the time he was killed. He was acting as substitute "newsboy" in place of Bruce Robison on the day he was killed. He was helpful to his parents, and helped with the chores, and had arranged to work on a farm during the summer. Plans were, that he would take over the paper route as his own when school let out that year. On the day in question he had delivered all his papers except the one to the Brickeons at the time he was struck by the defendant's

automobile. (Tr. 161, 162, 163, 197, 198)

As to the collision itself, the record discloses the following things occurred.

Royal Stocking, was approaching the scene of the accident from the north, proceeding south at the time the collision occurred. (Tr. 187). He was riding in a pickup truck with two other persons. As they came over the brow of the hill to the north of the scene of the accident he saw "an object come up above the vision, the vision of the road, like you could see out over this desk or something, something above the desk". As they got closer he identified this object as Gary Norby and his bike then lying in the middle of the road. (Tr. 187, 188) From this the jury could find that Gary was thrown in the air by the impact of the Roger's machine, yet appellant in his brief states at page 6 and other places, that the boy and the bicycle were tipped over, as though this were the fact which the jury was bound to find, which, of course, it was not. Further support of the theory that he was thrown into the air by the impact is found in Dr. Bernson's testimony, where he describes the severity of the damage to Gary's brain, as determined by the autopsy (Tr. 13 in particular), and under cross examination he gave it as his opinion that it would have taken more than a mere fall from

a bicycle to cause such an injury (Tr. 17,19). No further interrogation on redirect examination in response to questioning: (Tr. 22)

> Q. To clarify the situation of that amount of force of impact, did I understand you to say that by the mere falling or slight pushing such an injury could not be sustained from a fall from a bicycle, that it would entail considerable force?
>
> A. I said I did not believe, and that's a personal thing, because freak accidents can occur, but I do not believe that such a fall, assuming the velocity of the head from a fall five feet, would produce the extent of damage that was present in this patient.
>
> Q. It would take considerable force to cause it?
>
> A. Yes, that would be my opinion.

Further evidence that the boy was not "just tipped over" as appellant states, is to be found in the graphic evidence of the boy's cuff and belt, damaged as they are (Ex. G and H), and the testimony that they were in good condition prior to the collision. (Tr. 199, 200) So we find that the statement that "the bicycle and the boy were tipped over" is not the fact, and is not what the jury found to be the fact.

At page 5 of his brief appellant states that there is nothing to show the bridge leading into the lane from either direction unless a careful observation is made. This was Rogers' testimony only. Plaintiff's exhibit A illustrates what the [illegible] situation was at the time

the accident occurred with respect to the bridge and the farm lane. It is not obscure as appellant seems to indicate.

At pages 6 and 7, appellant relates as fact what is Rogers' testimony only, of what occurred. The jury was at liberty to believe Rogers story of the collision or disbelieve it as they so chose. However, in addition to the discrepancy pointed out above, many others appear which fly directly in the face of the facts of the case. Consider the phrase "the boy cut sharply in front of the car, the front wheel came in contact with the right front bumper of the automobile", at the bottom of page 6 of Appellant's brief, as an example. There was no damage to the front part of the bicycle of any kind, and Duane Johnson, the owner of the bicycle stated that there were no dents in the back fender of the bike when he turned it over to Gary to carry the paper route, but that when he got it back there were two dents which he pointed out, and which can be seen on the bicycle itself (Ex. F) and in the picture thereof (Ex. G). The two dents were both on the rear mudguard. Duane examined the bicycle carefully, and stated that except for these two dents the bicycle was in every respect the same as when he let Gary take it, and that the dents on the bike was just the same

as when he let Cary take it. (Tr. 174). Officer Erlenbach, the investigating officer, saw the damage to the rear mudguard, and that some paint on the rear mudguard at the site of the lower dent was the same color as the paint on the defendant's automobile, (Tr. 115) and that the damage to the mudguard was the only damage on the bicycle. Although the officer was unable to discover this paint, at the time of trial, it was also brought out that the Deseret News "carrier bags" tied across the rear of the bicycle had been moved back and forth several times and might well have obliterated it. (Tr. 145) Surely from this evidence and particularly the physical facts, the jury was justified in disregarding Rogers' statement that the boy turned sharply in front of him and his right front part of the bumper struck the front wheel of the bicycle. From this evidence the jury could find that Cary had crossed the hard surfaced street except for the last two feet on the west, and that the defendant had come across the street behind him and struck him from the rear, thus logically accounting for the damage to the bicycle.

Continuing however, with the statement of "facts". On page 7, appellant states that Rogers swung his car to the left and "at that" he was almost to the edge of the canal [illegible] Rogers applied his brakes

"a little" but he did not want to "run over" the boy so he pulled his car quickly to the left. Officer Erlenbach testified as did other witnesses, that the tracks of the automobile went straight into the canal. (Tr. 108, 110) The officer further indicated that there was no indication that brakes had been applied or an abrupt turn made and that the tracks from back on the highway went straight into the canal. (Tr. 109, Map)

Rogers stated variously that he was going 30 miles per hour before the accident (Tr. 77), 25 miles per hour (Tr. 50) and 20 miles per hour (Tr. 30). Also, that he slowed down to 15 miles per hour at the time he went in the canal (Tr. 34) and 10 miles per hour when he hit Gary (Tr. 109). His obvious eagerness to free his story from any implications of negligence is readily apparent.

Rogers stated that the car didn't tip into the canal, but that it dropped in, (Tr. 33) all of which is consistent with excessive speed and lack of control; and that the canal is six feet deep and that his car in it made a snug fit. (Tr. 33) He also conceded that the banks sloped only a little (Tr. 73).

Shigki Uchio, who operates the farm land on both sides of the road at the point of the collision, characterized the canal as being [illegible] and a flat bottom (Tr.

While Rogers stated the boy was lying toward the west side of the highway about three feet from the left edge, Glen Haynes (Tr. 238) and Royal Stocking (Tr. 241) indicated that the boy was lying practically in the middle of the street; these last named witnesses had a good opportunity to see where Gary's body lay, as they came down the road in the truck from the north.

By the officer's testimony, Rogers' automobile traveled 42 feet from the point of impact which Rogers pointed out, before coming to rest in the canal. (Map, Tr. 106), and the rear of the car was 27 feet 8 inches north of the north edge of the bridge (Tr. 105, Map). Rogers sought to explain how his vehicle came to be so far beyond the scene of the accident by testifying that he drove the car while it was in the canal, thinking he could drive it out. (Tr. 68) There was a cement culvert jutting out in the canal immediately ahead of the automobile, which was visible from the car.(Tr. 157, 158). Of this situation the officer testified (Tr. 111): "I can't say whether the car was moved or not. At that time it seemed physically impossible for the car to be moved with that much water in the creek".

The general tenor of the defendant's testimony is well illustrated by the following excerpt from the Transcript

of testimony, commencing at page 53; whereupon questioning by his counsel the following transpired:

> Q. Did he change his course of travel at the time you honked the horn and moved over to the west side of the highway?
>
> A. He moved over a little bit from the east shoulder.
>
> Q. Well, which way did he move?
>
> A. Moved to the left a little.
>
> Q. As you honked your horn, he moved in towards the center of the road?
>
> A. A little bit, yes.
>
> Q. Now, Mr. Rogers, I want you to think a little bit about that. You remember you talked to me about this yesterday. I came out to your house, and you told me all about this accident. As you honked your horn, did he move toward the center of the road, the direction in which you were going to pass him?
>
> A. No, he just kept going straight.

Many, many other such instances might be cited from Rogers' testimony, as well as that of his wife. At this point however, we merely point out briefly some of those wherein Mr. Rogers' testimony conflicts with the facts as they actually exist. At R. 205, she testified that her husband made an abrupt turn, which as we have shown is contrary to the physical facts. At R. 264,5,6, she testified that the boy made an abrupt turn in front of the auto, and that the car struck the front wheel of the

bicycle, again contrary to the physical facts.

Other inconsistencies will be noted hereinafter in connection with specific arguments.

STATEMENT OF POINTS

1. There was ample evidence to justify submission of Defendant's negligence to the jury, and to sustain the jury's verdict.

2. The giving of instructions 3, 8, 9, and 10, was not error for the reason that the evidence sustains the giving of each.

3. Whether decedent was or was not guilty of contributory negligence; and if he was, whether such negligence was the proximate cause of the collision, was a question for the jury.

4. There was no error in the admission of evidence as contended by Appellant.

5. It was not error for the court to refuse defendant's requested instruction number 1, for the reasons that (a) it was an erroneous instruction as to the law, and (b) the substance of this requested instruction was given by the trial court in instructions No. 11 and 12.

6. Appellant failed to properly except to the giving of instructions No. 11 and 12, and is therefore not entitled to raise the question as to their propriety in this court on appeal.

7. The only error in instruction No. 11 was that which was favorable to the appellant, and therefore, he is not entitled to complain of the giving of said instruction.

8. The protion of instruction No. 12, excepted to by the appellant is a correct statement of the law as applied to children.

9. It was no error [illegible] trial court to instruct [illegible] was not error for the

that the jury could consider the age of Gary Horby in deciding whether or not he was negligent.

10. The trial court in instruction No. 12 erred in instructing the jury in a manner which corrected any possible errors in instructions 11 and 12, so far as Appellant's case is concerned, in that he instructed that Gary Horby was negligent as a matter of law, if he failed to comply with the requirements set out in instructions No. 11 and 12.

11. There was sufficient evidence to justify the submission of the case to the jury on the theory of last clear chance, and the trial court correctly submitted the case on that theory.

12. Appellant is not entitled to have the merits of instruction No. 14, relating to last clear chance reviewed, having failed to except to the substance of that instruction in the lower court.

13. Instruction No. 14 contains a correct statement of the law of last clear chance as applied to the facts of this case.

ARGUMENT

POINT 1: There was ample evidence to justify submission of Defendant's negligence to the jury, and to sustain the jury's verdict.

It is suggested by the appellant that there is nothing in the record either by word of mouth or physical facts that suggests this appellant was in any wise negligent. Let us then examine the record to see what the evidence, the physical facts and the inferences favorable to the plaintiff reveal.

Defendant testified he was traveling north at 20, 25, or 30 miles per hour [illegible] prior to the accident,

depending upon which, if any, of the stories of his speed is believed. (Tr. 30,50,77) He saw the boy riding a bicycle and honked at him while 200 feet behind him. The boy gave no sign of having heard the horn. (Ex.) He doesn't think the boy heard it. (Tr. 78) When he was 78 feet back he knew there was going to be an accident. (Tr. 103, 104) He continued until he was twenty feet from the boy and then sounded his horn again. (Ex. E, Tr. 77) He is sure the boy heard the horn. (Tr. 94) His reason for being sure the boy heard it was that he has a loud horn. (Tr. 95) He concedes that if the horn wasn't sounded the boy wouldn't have heard it. (. 96) He changed his mind over night during the trial as to whether the boy heard the horn or not. (Tr. 95) He did or didn't apply his brakes, depending upon which testimony he gave, is used. (Tr. 30,90) He swung quickly to the left to keep from riding over the boy and went into the canal (Tr. 30), while traveling 12 miles per hour (Tr. 109) or 15 miles per hour (Tr. 34) again depending upon which story is looked to. The boy in the meantime "just tipped over when the car came into contact with the front wheel of the bike". Id. at .

Let us now look at the physical facts and other

defendant's story. First, as to the general situation. This accident occurred at a level place at the bottom of a long gradual hill from the south, and to the north another hill was immediately ahead of the defendant. It was a bright sunny clear day, and the road was dry and relatively free from traffic.

The boy was thrown into the air by the force of the collision (Tr. 137) He suffered a severe blow, which would not likely occur if he had been merely tipped over. (Tr. 13,16,19) His belt was scuffed and his coat was badly scuffed and worn clear through as a result of Gary's having been thrown along the road surface on his back. (Ex. C,K, Tr. 199,200) These things clearly indicate that he was not "just tipped over", but was struck with great force. By Rogers' story the boy was struck at a point 2 feet east from the west side of the hard surfaced part of the road, and about opposite the middle of the bridge but must have been by the time of collision leading into the lane. (Tr. 101) He came to rest in the middle of the street, and at the north end of the bridge (Tr. 191), again indicating he was thrown with considerable force.

The canal is about six feet deep. (Tr. 33) The banks are steep. (Tr. 156) They slope only slightly (Tr. 73). The automobile, with all four wheels on the canal, it dropped in.

(Tr. 33) It was a deep canal with steep sides and a level bottom. (Tr. 156) Defendant's automobile came to rest right side up in the bottom of the canal facing north, and parallel to the road. (Tr. 149).

From these foregoing facts the jury could clearly have determined that the defendant was negligent, as illustrated as follows:

The jury was justified in believing that the boy wouldn't have been thrown into the air by a car traveling at 10 or 15 miles per hour, and dashed to the ground with such force as to cause these injuries to him, and to skid along the pavement to the extent that his belt was scuffed and his jacket worn completely through. The jury was justified in determining from the physical facts surrounding the car in the canal, that it was impossible for an automobile to drop into a six foot deep canal with steep sides and a flat bottom at a speed of 10 or 15 miles per hour, but that it would be absolutely necessary to have a high rate of speed for such an event to occur. It is a demonstrable fact that as soon as any wheel of the vehicle dropped into the canal, the car must necessarily begin to tip in that direction and turn on its side, unless the car was going at a sufficiently high rate of speed to overcome the pull of gravity, and that in order to get

all the wheels in the air so that the automobile could drop into the canal as it did, it would require an extremely high rate of speed.

Defendant claims to have swerved abruptly farther to the left to avoid running over the boy. The physical facts show exactly to the contrary, that the tracks went straight into the canal without any sharp swerve or turn, and also, that the boy came to rest in the middle of the road, so no turn would have been necessary in order to avoid running over him. From the fact that he did not need to make such a turn as he said, and the fact that he did not make any such sudden turn as he contends (which was, of course, intended to explain why he couldn't keep from going in the canal) the jury clearly would be justified in concluding that, in fact, defendant was traveling at such a high rate of speed that he couldn't control his automobile; or that, if he was traveling at a lesser speed, he did not have his automobile under proper control when he struck the boy and immediately prior thereto.

In spite of appellant's constant repetition on the stand and in his brief that the boy suddenly turned in front of him with the front wheel of his bicycle, the physical facts loudly controvert such statements. The immutable facts still remain that the damage to the bicycle

was on the rear mud guard only; that it is at the right height and clearly indicates that it was struck from the rear by the front bumper and fender of the car, at the site of the rear dent, which buckled the mudguard and thus accounting for the other dent in the fender. If this be true, then the jury might well have found that the boy was hit much further up the road than where appellant said he was struck, and on his own side of the street; or that the boy had negotiated the turn and when struck was across the street so far as the portion upon which the defendant should have been traveling was concerned; and that he was run into from the rear by a defendant who knew at least 78 feet back that there was going to be an accident; but did nothing to avoid it. Thus, it becomes apparent that the jury could have determined that either the defendant was traveling too fast and did not have his car under control, or that he couldn't or didn't control his car, or that he failed to see the boy who had crossed the road, and for this reason struck him; or that he tried to outrun the boy and pass in front of him and miscalculated; or that he allowed his automobile to wander to the wrong side of the road and struck the boy; or that knowing at least 78 feet back that an accident was going to happen, and when he could have avoided it, he failed to do so.

Since we know conclusively that defendant did not swerve to the left sharply, as he asked the jury to believe, because his tracks indicate to the contrary, the jury surely could have concluded that at the speed testified to by the defendant he would not have gone into the canal, if he had been in control of the vehicle, and that he could not have gone in the canal at the speed he testified to in any event. It also follows, that the jury was justified in concluding that he did not travel at a slow rate of speed, and did not have the car under control; that he struck the bicyclist from the rear, after that bicyclist had crossed the highway, and to do so defendant had to follow the bicycle across the street. The jury could also conclude, despite defendant's protestations to the contrary, that he failed to keep an adequate lookout for the boy.

It is also clear from the facts, that defendant knew there was going to be an accident 78 feet before it happened yet he failed to apply his brakes (Tr. 80), that by applying his brakes he could have avoided the accident, and that he was negligent in failing to do so. Clearly this is so where, as here, at the speed he claims to have been traveling he could have easily stopped his automobile in ample time to have avoided striking the decedent. An additional

factor present here, is that defendant could have avoided the collision by merely keeping on the proper side of the road, since by his story he had to cross onto the wrong half of the roadway and almost beyond that in order to hit the boy who was already across the portion reserved for north bound traffic. This will appear more fully hereinafter when appellant's contention that deceased was negligent is considered.

It should also again be noted that the point of impact was fixed by the defendant only. It is submitted that the jury may well have disregarded this testimony and concluded that defendant hit Gary from the rear somewhere near the point defendant fixed at 78 feet, and while Gary was on the east side of the highway; that the speed at which defendant was traveling and the course defendant's automobile took thereafter caused Gary to fly into the air and into the middle of the street as he unquestionably did. This theory finds support in Mrs. Rogers testimony that before Rogers made the turn Gary was ahead of them on the east side of the road and about in front of her as she sat on the right side of the car. (Tr. 212) This also would be consistent with the necessity of turning to the left to avoid running over Gary after he was struck, as Rogers testified, but not much further back and

gradual as the map and evidence shows. (Tr. 107, 108, 110, Map).

In support of respondent's contention that there was sufficient evidence to justify submission of the question of appellant's negligence to the jury, the following cases are quoted and cited:

In the case of Standard Oil Co. v. Flint, 108 Vt. 157, 183 A. 336, it was contended that the trial court should have directed a verdict in favor of the defendant because there was no evidence tending to show negligence on the part of the defendant. The negligence charged was that of excessive speed and failure to keep the car under control. The court said:

> "* * * Reasonable control requires that the speed shall be reasonable under the circumstances. The test of control is the ability to stop quickly and easily, and when this result is not accomplished, an inference is warranted that the car was running too fast, or that a proper effort to control was not made."

and, as stated in Hawkins v. Burton, 225 Iowa 707, 281 N. W. 342:

> "The jury was not bound to take the testimony of the defendant Burton as an absolute verity. It was warranted in considering not only the verbal testimony but all the facts and circumstances surrounding the accident.
>
> "These quotations from Blashfield's Cyclopedia of Automobile Law and Practice, Permanent Edition,

Vol. 10, Sec. 6560, give what we regard as a sound statement of the law on this subject:

"'Although the evidence may be entirely circumstantial as to the rate of speed at which an automobile was operated, it may be sufficient to support a reasonable conclusion reached by the jury on the issue of negligence. Circumstances connected with an accident may be sufficient to overcome direct evidence as to the speed of a motor vehicle . . .

"'Thus evidence as to the force of the impact of a collision, or as to the distance which an automobile causing an injury overshot the point of the accident before being brought to a standstill, is of significance, and may be by itself or in connection with other circumstances of sufficient force to warrant a jury in finding negligence as to speed.'"

In the case of Vanderlippe v. Midwest Studios Inc., (Neb.) 289 N.W. 341, the appellant complained that the trial court erred in submitting to the jury the issue of excessive speed based on the contention that no witness other than appellant himself testified directly as to the speed of his car. Said the court:

"This position necessarily involves the contention that speed cannot be proved except by direct testimony. With this contention we cannot agree. 'It is not essential to establish the negligence of a motorist who has injured a traveler in the operation of his machine, that eye witnesses of the accident be produced. Circumstantial evidence may constitute adequate proof of negligence' 10 Blashfield, Cyclopedia of Automobile Law and Practice, Perm. Ed. p. 152, 157, Sec. 6555. No further citation of authority is required to support our conclusion that speed, like any other act of negligence, may be proved by circumstances, the conclusions to be drawn from the circumstances being for the jury."

For otherpronouncements to like effect see: Davidson v. Vast, 233 Iowa 534, 10 N. W. 2d 12; Sawhill v. Cas. Reciprocal Exchange, 152 Kan. 735, 107 P.2d 770; Davis v. Browne, 20 Wash. 2d 219, 147 P.2d 263; National Automobile Ins. Co. v. Cunningham, 41 Cal. App. 2d 828, 107 P.2d 643; and Lorah v. Ringhart, (Pa.) 89 A. 967.

It is appropriate at this juncture to again point out, that counsel in his brief seems to indicate that because there were only two eye witnesses to the collision, that everything they testified to must not only be taken as true, but that there is no other evidence as to what occurred. To the contrary, the fact that they are the only witnesses, and both vitally interested witnesses, affords good reason for the jury to hold their testimony up to even closer scrutiny than they might ordinarily, and to carefully compare that testimony to see where it is at variance with other testimony and the physical facts and permissible inferences. The jury was not bound to accept the testimony of either witness en toto. The jury could disbelieve any or all of the testimony which these two parties gave. Both witnesses, contradicted the plain physical facts by their testimony. Both were contradicted in various respects by the testimony of other disinterested witnesses, as to circumstances immediately surrounding the

collision. Mrs. Rogers sought to create the impression that she had never been on a witness stand before, but when confronted, confessed that she had been on other occasions (Tr. 225). This latter point though it may be minor, illustrates the tenor of her whole testimony, and when taken with the other contradictions between her testimony and the physical facts and the testimony of other witnesses, serves to point up why the jury, who saw and heard her and her husband, and heard their story from their own lips, and observed their demeanor on the witness stand chose to disregard or discount their testimony as they saw fit.

It is submitted that the physical facts and testimony and the favorable inferences to be drawn therefrom offer evidence to justify submission of the case to the jury and to justify, and in fact necessitate the rendering of the verdict favorable to the respondent.

POINT 2: The giving of instructions 3, 8, 9, and 10 was not error for the reason that the evidence sustains the giving of each.

Appellant's claim as to the giving of these instructions, is not that there is error as to the substance of the instructions, but, that under the evidence they should not have been given. Instruction No. 3, of course, was

nothing more than a proper and concise analysis of plaintiff's case. As indicated in the preceding point, there is sufficient evidence to justify the giving of each of the instructions.

It is submitted that there is nothing prejudicial in the manner of giving these instructions, and that each was amply justified and authorized under the evidence.

POINT 3: Whether decedent was or was not guilty of contributory negligence; and if he was, whether such negligence was a proximate cause of the collision was a question for the jury.

Appellant continues to repeat such statements as "the evidence is without dispute that the deceased made a sudden turn out of the lane of traffic in which he was proceeding and into another lane, and that he did so without signal and without making any observation", apparently under the belief that if he continues to repeat such statements often enough, they will become the fact, which he can convince this court that the jury was bound to believe. Such is not the case, as has heretofore been pointed out. That jury did not make a sudden turn is evidenced by the fact that he was struck from the rear, possibly after he had crossed the highway. In other words, whatever turn he made had already been accomplished when he got hit, not that he just turned in front of the defendant suddenly.

Defendant stated that the car only moved 5 feet from the time the boy made the sudden turn until the impact. (Tr. 56) He also informs us that he was going three times as fast as the boy. (Tr. 51) Still he would have the jury, and now this court, believe that the boy swerved sharply in front of him, when the clear physical evidence is that the boy was hit from the rear, all of which makes defendant's story physically impossible.

Defendant established the point of impact as 2 feet east of the west side of the hard surfaced road and just east of the bridge, which means, if defendant's story is believed, that the boy had to proceed all the way across the road to this point and turn north again, to be struck in the rear, while defendant traveled 5 feet, from the time Gary started to turn; and this, although defendant was traveling three times as fast as Gary. This again illustrates the ludicrousness of defendant's position that Gary suddenly turned in front of him. Appellant's story and that of his wife also, who joined in it, was so discredited by the other witnesses and the physical facts, that the jury was clearly justified in concluding that it was anything but a fair analysis of the collision, and in disregarding or discounting all or parts of it.

The plain fact is, that if we accept defendant's statement as to where the accident occurred, together with the physical facts as the jury was entitled to find them, Gary had crossed the road sufficiently ahead of the defendant, so that no accident could have happened had Rogers either kept to the right side of the road; kept his car under control; or used his brakes after he started to follow Gary across the highway.

Appellant seeks to inject into the case negligence predicated upon the alleged failure of Gary to give a signal before turning, or failing to observe before turning. Again, it must be remembered that the only testimony that Gary did not signal, or that he did not observe before turning, comes from defendant and his wife who were partisan witnesses against the plaintiff. If Section 57-7-133, U. C. A. 1943, as amended, L. 49, C. 65, Sec. 1, page 172, applies to bicycle riders in the particulars set forth by the appellant, then Garywould only be required to signal under the following circumstances quoting from that statute:

> (1) "No person shall turn a vehicle at an intersection . . . or turn. . . to enter a private road or driveway or otherwise turn a vehicle from a direct course or move right or left upon a roadway unless and until such movement can be made with reasonable safety."

"No person shall turn any vehicle without giving an appropriate signal in the manner hereinafter provided in the event any other traffic may be affected by such movement."

If the defendant Rogers was traveling at the tremendous speed which the jury could justifiably find from the evidence, then it may well be that he was far enough back when Gary began his turn, that Rogers should have been aware of the turn from seeing it, and that Gary could make the turn with reasonable safety, and had the right to conclude that no other traffic would be affected by his turn. This is but one possibility; another is that even though Gary may not have signaled, still Rogers was far enough back from the point where Gary made his turn, that he was aware of the turn in sufficient time to have avoided the collision and that his negligence was the proximate cause of the collision, and not any failure to signal on the part of Gary. Either of these possibilities finds credence in the testimony that Gary had crossed the highway, at least the part of it on which Rogers was entitled to travel, and was struck from the rear, after he had completed his turn.

We again point out however, that the only testimony that Gary did not signal, that Gary turned when it wasn't safe to do so, or that he did not observe before turning,

comes from the defendant and his wife. From the biased nature of their testimony and the discrepancies in it, and the physical facts to the contrary, the jury was well justified in disbelieving their testimony that no signal was given, and no observations made by Gary, or that Gary suddenly turned when it wasn't safe to do so.

We have heretofore indicated that the point of impact was pointed out by the defendant only, and the evidence could legitimately be construed by the jury to show that Gary was struck from the rear by the defendant while he, Gary, was on the east side of the road, in which case, no negligence could be attributed to him.

Against the highly partisan evidence of the defendant's is the presumption that Gary was exercising due care for his own safety, which alone is sufficient to raise an issue of fact on this score.

In Greenslit v. Three Bros. Baking Co., (Or.) 133 P. 2d 597, the court said:

> "It is presumed that decedent exercised due care to avoid injury. The evidence tending to show negligence on his part is not of such conclusive character as to overcome such presumption as a matter of law. The issue of contributory negligence was properly submitted to the jury . . ."

In Davidson v. Vast, (Iowa), 10 N.W. 2d 12, both drivers were alone and no other person saw the collision,

and plaintiff's decedent was killed. On the testimony of the defendant, it was contended that decedent was guilty of contributory negligence as a matter of law. The jury was instructed that it was to be inferred that the decedent was in the exercise of ordinary care. It was contended on appeal, that defendant's testimony as to decedent's conduct rendered the no eye witness rule inapplicable and also any inference of due care was completely negatived by the evidence. The court held that the instruction was proper, and that the question of contributory negligence was for the jury.

In Barker v. Savas, 52 Utah 262, 172 P. 672, this court held that a child who was struck by a truck was entitled to the presumption that he was in the exercise of due care.

In Peitz v. Hubbard (Cal.) 138 P.2d 315, an 18 year old bicyclist was struck at an intersection and rendered unconscious and couldn't remember what lookout she had made. The court held that she was entitled to the presumption that she was exercising ordinary care for her own safety, and that where there is other evidence to the contrary, the presumption raises a conflict in the evidence which must be settled by the jury.

A presumption that the decedent was using due car for

ds safety is clearly a salutary rule under circumstances such as these where the only evidence to the contrary comes from the defendant himself and his highly partisan wife. If the jury is entitled to disbelieve their testimony, and clearly here they had every reason to scrutinize it carefully, then necessarily the presumption that decedent was using due care for his safety is entitled to consideration, and based thereon, the jury could find either that Gary gave appropriate signals, or that he had completed his turn sufficiently ahead that no traffic would be affected and at a time when the turn could be executed with reasonable safety; or that he was struck from the rear while still proceeding north on the east side of the road.

The court could not properly have ruled as a matter of law under these facts and circumstances that the decedent was guilty of negligence which proximately contributed to the collision. The issue of contributory negligence on the part of the decedent was clearly one for the jury. The cases cited by the appellant in support of his contention that Gary was negligent as a matter of law are clearly inapplicable under the facts of this case. In Graham v. Johnson, 109 Utah 346, 166 P.2d 230, was a case where there was no question but that the boy was

playing in the street, and at page 235 of the Pacific Reports, we are informed that: "It has also been conceded that the boys were negligent in that they were in violation of the ordinance against playing in the street. . ." In this case it certainly is not conceded that Gary was negligent in any particulars whatsoever. The point decided in Graham v. Johnson, was that of last clear chance, which was decided favorably to the plaintiff. The case is further distinguishable in that it may well be that where a statute by its very nature purports to apply to children, and is concerning a matter of safety which they can understand, that is, the hazard is an obvious one, and the child is old enough to comprehend it, then it may be that the court can say as a matter of law that such conduct, when examined in the light of the child's understanding, is negligence. Again, such is not the case here. Sagor v. Joseph Burnett Company, 190 A. 258, was a case where the claimed negligence of the plaintiff was established. Again, that is not the case here. The only evidence that Gary Morby was negligent was that of the defendant and his wife, both of whom illustrated that they were unworthy of belief. The physical facts warrant the finding that decedent was not negligent, and the presumption prevails that he was not negligent, but was exercising due care for his own safety.

In Brown v. Daley, 173 N.E. 545, the case was submitted to the jury as to whether the children were negligent. The case of Spackman v. Carson, Utah, 213 P.2d 640, involved an adult, but nonetheless, the duty of looking referred to therein, of course, is transmitted into active negligence only by turning when it is not reasonably safe, or failing to signal when traffic may be affected by his movement without signaling. If Gary had crossed the highway before he was struck by the defendant, under such circumstances as we have indicated, which the jury could justifiably find from the evidence, or if he was struck from the rear while proceeding north in the east lane, then failure to look has nothing to do with the collision, so far as Gary was concerned. The presumption of due care, of course, also carries with it the presumption that he did look, if he made or was making a turn.

POINT 4: There was no error in the admission of evidence as contended by Appellant.

We submit that there is no merit to the contention made by the appellant that the trial court erred in the matter here under complaint. The record reveals that the trial court was following the evidence very carefully, and when the question was challenged, he immediately asked the witness if he had been instructed, in order that the

matter could be cleared up right at that time if there existed any discrepancy.

Defendant's counsel on cross-examination fully explored this same question with the officer, and elicited from the officer the same information as divulged on direct examination. In addition, the same matter was fully explored on both direct and cross examination of Mr. Rogers, the defendant.

The matter was fully understood by the trial court, and the questioning was at all times within proper bounds. As suggested by counsel for appellant in his brief, this argument is hypertechnical. It is submitted that there was no prejudicial error shown under this point.

POINT 5: It was not error for the court to refuse the defendant's requested instruction No. 1, for the reason that (a) it was an erroneous instruction as to the law, and (b) the substance of this instruction was given by the trial court in instructions No. 11 and 12.

(a) The instruction requested by the defendant was erroneous, and an instruction erroneous in part need not be given. Evans v. O.S.L.R. Co., 37 U. 431, 108 P. 638; Jensen v. D. & R. G. R. Co., 44 U. 100, 138 P. 1185; Berg v. Otis Elevator Co., 64 Utah 318, 231 P. 832; Morris v. Pitmater (Or.) 210 P.2d 104; Knight v. Pang, (Wash.) 261 P [illegible] was erroneous in

the following respects:

1. By this instruction the defendant sought to eliminate the question of last clear chance from the case completely, which under the fact of the case would not have been justified, as will more fully be brought out in considering defendant's objections to instruction No. 14.

2. By this requested instruction defendant sought to impose upon the decedent a burden which the statute does not impose. The particular language of the request was:

> "Under the laws of this state, it is the duty of anyone using the highways before making any turn or changing from one lane to another to indicate his intention so to do by giving visible signals."

The law imposes no such burden upon users of the highway, but only: (U.C.A. 1943, Sec. 57-7-133, as amended)

> "No person shall turn any vehicle without giving an appropriate signal . . . in the event any other traffic may be affected by such movement."

The next sentence of the request is equally erroneous in that it also seeks to impose a duty of absolute care upon users of the highway and the statute imposes no such burden. That sentence of the request reads:

> "It is further his duty not to make such a turn unless he can do so with safety . . ."

The statute requires only reasonable safety.

3. While defendant states in his requested instructio[n] No. 1 that the laws of this state require one to make

bservations in order to ascertain whether or not he can urn in safety, the statute referred to in support of his on appeal makes no reference to the observations that eed be made. If as defendant argues, this is inherent in he statute and it is apparent that observations must be ade, because the observations are an inherent part of etermining reasonable safety and determining whether other raffic is to be affected, then it is difficult to see why his need be pointed out further to the jury, who as ersons of ordinary intelligence can see that in order to etermine whether a turn can be made with reasonable safety nd whether other traffic may be affected, observations ust be made. Note, however, that while defendant uses reasonable safety" and "if other traffic may be affected", n his brief in arguing the propriety of giving this nstruction, he used neither, at any time in the instruction e framed.

4. While appellant appears to make much of the lements included in his requested instruction, and argues hat they should all be set forth at all times, he failed o keep this inmind in framing his requested instruction, o that the last part of his request fails to correspond ith the first part, for while in the first part of the nstruction he divides his [illegible] on the part of

Cary into three categories, in the latter part of the instruction he says:

> "Consequently, if you find Cary Morby either failed to give a signal of his intention to turn into the farm lane on the west side of the highway or failed to make observations as to whether or not such a turn could be made with safety, and thereby contributed in any degree to the accident, then I instruct you as a matter of law that the defendants are not liable and your verdict must be in favor of the defendants, no cause of action."

Thus, he eliminates from the latter part of the instruction "turning when it cannot be done in safety," and in view of his present contention, has made his own instruction erroneous. Again in this paragraph he failed to set out the requirement of the statute that it be "reasonable safety" and "if other traffic may be affected", or something similar thereto.

5. The duty to make observations in any event is a passive state of negligence at best. A person who fails to make observations before turning but who doesn't in fact turn, surely does not commit an act of negligence which defeats his recovery, yet by the latter part of defendant's request, he injects this note into the instruction.

6. The requested instruction is erroneous also in that it sought to limit the jury to a sudden turn without signalling when under the evidence the jury was warranted

in concluding that the boy was struck before he turned.

7. What appellant sought to do by this instruction, was to give the jury the impression that any turn was a violation of the law unless there was a signal, and that no turn could be made unless that could be done with absolute safety. He sought to eliminate "reasonableness" of making the turn as qualifying the making of the turn "in safety", and whether "other traffic might be affected". If successful he might then successfully counteracted the inferences of negligence and the physical facts and circumstantial evidence as well as the defendant's own admissions, by arguing to the jury that the turn couldn't have been made by Gary with safety because he was struck, and that the failure to give a signal was negligence regardless of where defendant was on the road. The request would have had the effect of telling the jury that regardless of the speed of the defendant's vehicle, Gary couldn't make a turn without signalling and couldn't make a turn in absolute safety in this case because he was hit, and that therefore Gary was guilty of negligence as a practical matter, and as a matter of law, which, of course, would have been erroneous.

8. The statute, since it does not lay down an absolut rule, leaves room for the application of the common law

presumption as to incapacity of infants between seven and fourteen as to contributory negligence, and allows the jury to consider the age and ability of the individual child in determining the standards "reasonable safety" and "in the event other traffic may be affected", as applied to the contributory negligence of a child, as will be more fully considered at point 9 of this brief, yet the requested instruction eliminates this entirely.

(b) Finally, and conclusive on the question of whether the request should have been given, is the fact that in instructions No. 11 and 12, as given by the court the substance of the instruction sought by the appellant was given, and in a manner even more favorable to the appellant than his request.

That instructions number 11 and 12 state in substance the rule contended for by Appellant in his requested instruction is illustrated by the fact that nowhere in either of those instructions does the court lay down the correct requirements as to turning as set forth in the statute, but rather, eliminates "reasonable" from the turn in "reasonable safety", and eliminates the "if other traffic may be affected" from the situation requiring a signal before turning.

In instruction No. 11 the court instructed that:

"It is the duty of any adult person using the highways of this state to give a visible signal of his intention to turn from a straight line or from one lane of traffic into another before making said turn or changing from one lane to another, and it is his duty not to make such turn unless he can do so with safety, and he has a duty to look and see whether or not such a turn or change of lane can be made with safety."

In each instance in instruction 12, the reference is back to the turn described in instruction No. 11. The jury was thus adequately instructed as to the elements contained in the statute. However, the court did not stop there, but went on to say that if Cary turned without giving a signal or failed to signal in sufficient time to give an overtaking motorist sufficient warning, then the verdict must be for the defendant. Embodied within this statement are the essentials of negligence set forth in the statute, however, stated more favorably than they should have been since they are stated as absolute, whereas the statute does not so state.

It is submitted that there was no error in refusing to give defendant's requested instruction No. 1.

POINT 6: Appellant failed to properly except to the giving of instructions No. 11 and 12, and is therefore not entitled to raise the question as to their propriety in this court on appeal.

It is a well established principle that in order to object on appeal to the giving of an instruction in the

trial court, proper exception must first have been made in the trial court. If no objection has been raised, then the right of review is foreclosed. Rule 51 U.R.C.P. provides:

> "No party may assign as error the giving or the failure to give an instruction unless he objects thereto, stating distinctly the matter to which he objects and the grounds of his objection; provided, however, the appellate court in its discretion and in the interests of justice may waive this requirement."

The notes following this rule give a hint as to the application of the rule with respect to when such claimed errors may be reviewed where the assignment of an objection to an instruction has not been made. The applicable portion is herewith quoted:

> "The rule further provides that the Supreme Court may, in its discretion, review alleged error of the trial court, in the giving or failing to give an instruction, even though no objection is made as required. This authorizes the Supreme Court, in exceptional instances, to review allegations assigned by the appellant although he has technically failed to make his objections timely. However, this provision is not to be construed as obviating the necessity of making objections at the time of trial to the giving or failure to give any instruction." (Emphasis added)

We submit that this is not a case which demands that the court go out of its way to protect the defendant from his failure to make timely exceptions. The defendant failed completely to except to the giving of instruction No. 11, and excepted to instruction No. 12 only as to the first

sentence thereof, "on the ground that it was not a correct statement of the law of this State because the law is that one of thirteen years is required to use the same standard of care that an adult person is required to use, the only difference being that in determining the matter of duty with respect to a person of thirteen years is whether or not they are capable of realizing the * * * danger of their position upon the highway." The objections now raised on appeal as to instructions 11 and 12 have nothing whatever to do with the exception taken to sentence number one of Instruction No. 12.

Cases under the Federal Rules of Procedure have laid down the rule under the Federal Rule from which the Utah Rule No. 51 was taken, that the purpose of it is to insure the trial judge is informed of possible errors and to give him an opportunity to correct them, and where counsel fails to except below, they may not raise the question on appeal. See Hower v. Roberts, 165 F. 2d 726; Blair v. Cullom, 168 F. 2d 622; Fritz v. Penna. R. Co. 185 F.2d 31; Garland v. Lane Wells Co., 185 F. 2d 857; Boston Ins. Co. v. Fisher, 185 F.2d 977; and Palmer v. Miller, 145 F.2d 926.

In Utah, the rule has always prevailed that exceptions to instructions must point out the part excepted to. If

not, unless the whole instruction is bad, exception is unavailing. Farnsworth v. U. P. Coal Co., 32 U. 112, 89 P. 74; McLaughlin v. Chief Con. M. Co., 62 U. 532, 220 P. 726; and where no exception is taken to an instruction, it constitutes the law of the case. Murdoch v. Farrell, 49 U. 314, 163 P. 1102, and it cannot be reviewed by the Supreme Court, Morgan v. Child, Cole & Co., 61 U. 448, 213 P. 177.

It is submitted that the defendant is not entitled to have reviewed the errors he alleges exist in instructions No. 11 and 12.

POINT 7: The only error in instruction No. 11 was that which was favorable to the appellant, and therefor, he is not entitled to complain of the giving of said instruction.

Although we contend that appellant is not entitled to have the question reviewed, we nontheless point out to the court that Instruction No. 11, was taken from defendant's requested instruction No. 1, and embodies the same errors as did that requested instruction. The jury was instructed without qualification that it was "the duty of any adult person using the highways to give a visible signal of his intention to turn from a straight line" and that he cannot make such a turn unless he can do so "with safety". Thus the court eliminated from the consideration the variable factors

which make the degree of care and duty one of less than absolute perfection, and imposed a higher duty than the statute imposes.

POINT 8: The portion of Instruction No. 12 excepted to by the defendant is a correct statement of the law of this state as applied to children.

The portion of instruction 12, excepted to by the defendant in his exceptions to the instructions in the trial court is the following:

> "You are further instructed that under the laws of this state a boy of thirteen years of age is not held up to the standard of care and caution of an adult person and is not required to exercise that degree of care and caution which an adult person is required to use. However, he is assumed to have the same consciousness of danger and the same judgment in avoiding it as an ordinary reasonably prudent boy of thirteen years of age would have."

In the case of Kyne v. Southern Pacific Co., 41 U. 368, 126 P. 311, involving a 10 year old girl who was struck by a train as she stepped on the tracks, this Supreme Court said:

> ". . . Her conduct in that regard is to be measured by that of the ordinary child of her age, intelligence, and experience."

and in Balle v. Smith, 81 U. 179,17 P.2d 224, this Supreme Court said:

> ". . . The degree of care required of her is not such as is required of an adult person but must be determined by a consideration of the care that an ordinary child of her age, intelligence, and

experience would be expected to use."

In Cesas v. Oregon Short Line R. Co., 33 U. 156, 93 P. 274, the court said:

> "The degree of care required of a child must be graduated to its age, capacity, and experience, and must be measured by what might ordinarily be expected from a child of like age, capacity and experience under similar conditions. . ."

It is therefore apparent, that the portion of the instruction excepted to by the defendant at the trial, was a proper statement of the general law as to infants. Defendant having failed to point out any further error in the instruction at the appropriate time in the trial below, is not entitled to be heard in this court to raise other objections thereto.

POINT 9: It was not error for the trial court to instruct that the jury could consider the age of Gary Morb in deciding whether or not he was negligent.

This appears to be the objection which appellant has to instructions 11 and 12, although, as pointed out he failed timely to except to instruction 11 at all, and only to paragraph 1 of instruction No. 12, which is a correct statement of the general law applicable to minors.

The statute claimed by appellant to be applicable, Sec. 57-7-133, U.C.A. 1943, as amended, does not make an absolute standard of care for adults as the defendant

contends at page 29 in his argument under instructions No. 11 and 12, but rather sets a standard of care which is less than absolute, as has heretofore been pointed out, even for adults.

A very excellent discussion of the point raised by the appellant is contained in the case of Locklin v. Fisher, 36 N.Y.S. 2d 162, wherein the plaintiff, a boy of 12 years of age who coasted out of a private driveway on a bicycle without stopping sued for personal injuries sustained when he collided with a car driven by the defendant. A New York statute provided that the driver of a vehicle emerging from an alley or driveway must stop such vehicle immediately before entering the intersecting roadway and thereafter shall enter the roadway with care. The court instructed the jury as to this statute, and continued:

> ". . . The evidence is undisputed that the boy did not stop his bicycle before entering the main highway. If you find that that violation of this statute contributed in any way to this accident, then again your verdict must be one of no cause of action."

On appeal the plaintiff contended that this instruction was erroneous. The appellate court agreed and reversed the case. The case contains a very excellent discussion of the problem involved, as follows:

"An infant is not guilty of contributory negligence if he has exercised the degree of care which may reasonably be expected from a child of like age, intelligence and experience (citations).

"A minor, in the absence of evidence to the contrary is universally considered to be lacking in judgment. His normal condition is one of recognized incompetency. It is a matter of common knowledge that an infant not only lacks the adult's knowledge of the probable consequences of his acts or omissions but is wanting in capacity to make effective use of such knowledge as he has. A danger may be concealed by the obscurity of intelligence due to immaturity as well as by its own inherent obscurity. It is for these reasons that the law recognises that indulgence must be shown the infant in appraising the character of his conduct. Manifestly the adult test of the reasonable prudent man cannot be applied in disregard of the actor's youth and inexperience. The fact that a child is sui juris does not mean that its conduct is measured according to the adult standard. The law is not so unreasonable as to exact from an infant the same degree of care and prudence in the presence of danger as it exacts from an adult.

"In the instant case the trial judge told the jury that plaintiff violated subdivison 11 of section 81 of the Vehicle and Traffic Law and that if such violation contributed to the accident he was guilty of contributory negligence as a matter of law. As to the effect of violating the statute the trial justice placed this child in the category of an adult. This statement in the charge is entirely inconsistent with what the court previously said about the standard of care required of an infant. The failure to comply with the statute presupposes that the person sought to be charged with its violation is capable of understanding its provisions. Evidently the court in charging as it did had in mind the legal fiction that everyone is presumed to know the law. Although this is often repeated as an axiom a presumption so variant from the truth cannot be recognized by the law.

We think it was a question of fact for the jury

and not a question of law for the court to say whether or not plaintiff, having in mind his age, intelligence and experience had sufficient mental and physical capacity to be able to comply with the statute. To hold the statute applicable to minors who have not reached the age of understanding or to those mentally unable to comprehend its requirements is carrying the law of negligence to a point which is unreasonable and is establishing a doctrine abhorrent to all principles of equity and justice."

In Fightmaster v. Wade, 31 Ohio App. 273, 167 N.E. 407, a minor 13 years of age, was struck as he ran or walked diagonally toward the curb after having jumped from the rear end of an ice truck. The court charged the jury:

"I charge you that Section 6310-36 of the General Code of Ohio, which was the law at the time this accident happened, reads as follows: 'Pedestrains shall not step into or upon a public road or highway without looking in both directions to see what is approaching'.

"I further charge you that Section 680-102, of the municipal ordinances of the city of Cincinnati which was in force and effect at the time this accident happened, reads as follows: 'Pedestrians shall not cross streets or highways except at regularly designated crossings, and then at right angles only'".

"I charge you that a violation of a municipal ordinance of the city of Cincinnati or of a state statute of the state of Ohio, passed for the protection of the public, is negligence per se."

The court on appeal, in a well reasoned opinion reversed the trial court stating:

"To say that every child that acts otherwise than as a reasonable and prudent person shall do so at his peril seems on the face of it to declare against

the dictates of common sense, reason, and humanity. To so hold would be to require from a 13 year old child, and from a 3 year old child as well, the exercise of the same measure of care required from a mature man of average and reasonable prudence. Such a rule of law would be harsh, unjust, and unworkable, and would set aside the humane and salutary rule laid down in the line of cases beginning with Rolling-Mill Co. Corrigan supra,(46 Ohio St. 283, 20 N. W. 466)

"It is intimated that, regardless of the rule in Schell v. DuBois, it is contributory negligence as a matter of law for a boy 13 years old to do any of the things prohibited, or to fail to do any of the things required, by either the statute or the ordinance above referred to. We do not agree with this proposition. We think that reasonable men might well differ as to whether a boy 13 years old, of ordinary care and prudence, should have the intelligence, experience, and discretion to govern his actions at all times in conformity to the standard of care required by the statute and the ordinances above referred to. (citations)

"While the trial court properly permitted the defendant to plead the ordinance and put it in evidence, we hold that it was error to charge the jury that violation of the ordinance, or of the statute, would constitute negligence per se. We hold the law to be that it was for the jury in this case to determine as a question of fact, whether violation of the ordinance or of the statute by the plaintiff would constitute negligence—his age, education, experience and intelligence considered (citations)."

For other similar pronouncements see the following:

Macchi v. Lyon Van & Storage Co., 38 Cal. App. 422, 102 P. 2d 422; McNamara v. Cohen, 55 N.Y.S. 2d 600; Wheaton v. Conkle, 57 Ohio App. 373, 14 N.E. 2d 363; Alabama Power Co. v. Bowers, (Ala.) 39 So. 2d 402; Jones v. Barnett, 125 Wash. 639, 217 P. 62; Lehman v. Patterson

8 Ky. 360, 182 S.W. 2d 897.

The Supreme Court of this State, has, in the case of Nelson v. Arrowhead Freight Lines, 99 Utah 129, 104 P.2d 225, indicated its preference for the salutary rule contended for by the respondent. In that case five young people were riding in a single seat automobile. The court observed that Section 57-7-50, R.S.U. 1933, which was violated was "intended to promote safety on the highways, and to charge all persons riding in cars with some responsibility for safe driving, at least to the extent of not interferring with the driver's vision or his operation and control of the vehicle." The court also announced the principle that "children of tender years (under seven) are so far undeveloped as to be relieved of the charge of negligence; and during another period of their infancy (seven to fourteen) there is a rebuttable presumption against their capacity to understand and avoid danger; and that in the later years of infancy there is rebuttable presumption that they are chargeable with the same degree of care as are adults." In the case however, both of the minors for whose deaths recovery was sought were over the age of fourteen, and thus would come within the rebuttable presumption that they were chargeable with the same degree of care as adults. They were 20 and 16 years of age.

Accordingly, the court held that failure to give an instruction on the degree of care required by minors was not prejudicial where the jury was told that they must "determine from all the facts and circumstances shown to exist at the time of the collision whether either of the occupants . . . was guilty of negligence in becoming a passenger along with the driver and other occupants therein". Said the court:

> "Those facts and circumstances included the fact of age of the deceased, physical and mental development, general past experiences, and all matters which would have been before them had the requested instruction been given. We do not hold that the requested instruction was improper not that it might not have been better to give it. What we do hold is that in view of the record and the instructions, given, the failure of the court to give the requested instruction is not reversible error."

It is clear from the discussion in the opinion and the concurring opinion of Mr. Justice Wolfe, that had the minors been under the age of fourteen, the court would have ruled otherwise on the question of prejudicial error.

If the rule contended for by the appellant is adopted, then it would require the overruling of the well established common law principle that children are not held up to the same standard of care as adults, and this both as to the rebuttable presumption between ages 7 and 14, and the

conclusive presumption in case of children under 7. We do not think that such a harsh result is justified.

It is submitted that the better reasoned cases are those taking the more liberal view contended for by the respondent, and that the weight of authority among the courts which have specifically considered this problem favors the view propounded by the respondent.

POINT 10: The trial court in Instruction No. 12 erred in instructing the jury in a manner which corrected any possible errors in instructions 11 and 12 so far as Appellant's case is concerned, in that he instructed that Gary Morby was negligent as a matter of law if he failed to comply with the requirements set out in instructions No. 11 and 12.

This point is best illustrated by setting forth the part of instruction No. 12, verbatim, to which we have reference with emphasis added to the offending portion. Beginning with the second paragraph, the instruction reads:

> "You are further instructed that as a matter of law it would be negligence for an adult person to make a turn as set forth above without indicating by a proper signal his intention so to do, and it would be negligence as a matter of law for a thirteen year-old boy to make such a turn without giving a signal of his intention so to do if you find that a reasonably prudent person of the age of thirteen years would know and appreciate the danger of trying to make such a turn without signalling; and if you should find by a preponderance of the evidence that Gary Morby did negligently turn from the direct line in which he was travelling or did turn from one lane of the traffic into another without first giving a signal of his intention so to do for such a period

of time as would give an overtaking motorist sufficient warning to avoid a collision, then your verdict must be in favor of the defendant and against the plaintiff for no cause of action."

By the underscored language, the jury was told that if they found that Gary offended in the ways set out therein, that he was guilty of negligence as a matter of law. No opportunity was given the jury in view of that portion of the instruction, to weigh Gary's conduct against that of a "reasonably prudent person of the age of thirteen" or even that of an adult, to determine whether his conduct measured up to that standard or whether it fell below that standard. The court took away from the jury any consideration of this question. The court in effect ruled that a boy of thirteen would be negligent as a matter of law under the circumstances deliniated in the instruction, because he ruled that Gary was negligent as a matter of law if he offended in the ways set out in the instruction. Thus, whether, as contended by Appellant Gary Morby should have been held up to the standard of care of an adult, or whether he was only to be held to the standard of care of a child of thirteen years, as we believe to be the case, is really immaterial when in the final analysis the court instructed that if the boy didn't signal, or give a signal for a sufficient time to warn

overtaking motorists, he was guilty of negligence which would defeat plaintiff's right of recovery. Under the issue framed, Gary's negligence was assumed by the court, fo the jury, if Gary failed to comply with the requirements set out in the underlined portion of the instruction.

Thus, the issue presented to the jury for their determination was whether they believed from the record that Gary turned without signalling or whether he failed to signal sufficiently far ahead to warn overtaking motorists. It is submitted, that while in instructing as he did the trial court committed an error, that the error was favorable to the appellant, since he got an instruction stronger and more favorable than he was entitled to, in that he got an instruction that Gary was guilty of negligence as a matter of law equally with an adult under the same circumstances, which is what he now contends for, but which we say under the authorities cited at point 9, was erroneous.

One further error in this instruction which is highly favorable to the appellant, and detrimental to the respondent is to be found in the fact that by the instruction as given the court eliminated the question of proximate cause. Respondent contends that it was necessary and proper at all events to instruct to the effect that

if you find these circumstances to exist, and if you find THAT THEY CONTRIBUTED IN WHOLE OR IN PART TO THE ACCIDENT, then your verdict must be in favor of the defendant and against the plaintiff for no cause of action. Under the instruction, the jury is informed that if Gary failed to comply with the requirements set forth therein he was guilty of negligence as a matter of law, and under the instruction the jury could not have found for the plaintiff even if failure of Gary to comply with the requirements set out had nothing to do with the collision from the standpoint of proximate cause.

It is true, that the court did include in the instruction a phrase to the effect that "the law does not permit an injured person or his representatives to recover when the person injured has by his own negligence contributed to the injury". This phrase however is only explanatory of the result which the court previously had instructed the jury must follow, and did not inform the jury that they should determine whether or not the negligence of the deceased contributed to the injury.

It is submitted that this ground, that is, that the trial court instructed that Gary was guilty of negligence as a matter of law, if he failed to meet the requirements set out in this instruction, and failure to instruct that

the jury should determine the question of proximate cause, if they found that Gary failed to meet the requirements set out, constituted an instruction so favorable to the appellant, that the case was submitted to the jury under his theory, and even more favorably than his theory would have entitled him, and therefore he could not in any event be prejudiced by the instructions of which he here complains. Respondent contends that the only errors in the instructions were those favorable to the defendant, and that the judgment should thus be affirmed.

POINT II: There was sufficient evidence to justify the submission of the case to the jury on the theory of last clear chance, and the trial court correctly submitted the case on that theory.

In spite of the theorizing which the appellant does in his brief as to why there is no evidence to sustain the submission of the case on the theory of last clear chance, the fact remains, and no amount of rewording will serve to eliminate it, that the defendant told the officer that he knew there was danger of an accident at 78 feet, and knew that an accident was going to happen. Appellant wants to concede that perhaps something happened to give the defendant some apprehension of danger. This, however, is not the fact. The fact is that he told the officer that he knew there was going to be an accident at 78 feet back,

despite the efforts of defendant's counsel to neturalize this statement, the defendant when asked this question: (Tr. 93)

> Q. Now, the question that this seventy-eight feet is opposite and which Mr. Jensen mentioned here is "Distance danger of accident first noticed, seventy-eight feet." Now, that's the point he was asking about, is it not?

answered in the affirmative:

> A. Yes.

The only reason appellant would have for knowing an accident was going to happen at seventy eight feet is because the situation was clear to him at that time that the boy was turning, that the boy hadn't heard the horn (if it was sounded) and that the boy did not know of defendant's presence. Defendant did not however give a signal on his horn at 78 feet which might well have been the very thing which would have apprized the decedent of his peril, but elected to wait until he was within 20 feet of the boy before he gave a signal (if he gave one). That these two events were not simultaneous is evidenced in Rogers' own testimony that he did not sound his horn and turn until after he had passed the 78 feet point. (Tr. 77, Ex. E). Respondent is entitled on this point to consider the slowest speed at which Rogers said he was travelling, that of 20 miles per hour, which would have

given appellant ample time to have brought his vehicle to a complete stop in 78 feet. Even a complete stop would not have been necessary. If Gary had crossed the roadway except for two feet as Rogers and his wife testified, then slowing down and continuing on the proper side of the highway would have been sufficient. Rogers' however, did not even apply his brakes, and failed to sound his horn by his own testimony, until he was at a point within 20 feet of the boy, whom he knew had no inkling of his approach during the last 200 feet before he ran the boy down. (Tr. 56,77) During all this time from 78 feet on he knew there was going to be an accident. It is absolutely clear from this record, that defendant had the last clear chance to avoid the accident, and that the chance he had was a clear one, which could have been exercised in any one of several respects, as by applying his brakes, keeping to the right, or sounding his horn in time to warn the lad; or by any combination of these things.

We have heretofore paid our respects to the "facts" which appellant here seeks to use to create the impression of a sudden turn by the deceased boy, so it is unnecessary to again detail the conflicting evidence and physical facts. Suffice to say that the jury was not bound to accept these statements and the inferences appellant seeks to draw,

but on the contrary, having rejected these statements and inferences, and having found for the respondent, these statements and the inferences appellant seeks to impose upon this court are neither "facts",nor are they appropriate to consider on this appeal.

This was not a rapidly changing situation of two motor driven vehicles approaching at right angles, nor yet the situation where both vehicles are capable of such fast movement as at a crossing where the accident is unavoidable by the time one or the other discovers the danger thereof. This is the situation of a relatively slow traveling bicycle being overtaken by an automobile traveling in the same direction, also by Rogers and his wife's testimony, traveling at a sufficiently slow rate of speed to be able to avoid the collision, yet traveling somewhat faster than the bicycle. Injected in this case is the fact that the driver of the automobile knows that an accident is going to occur in sufficient time to avoid the same, and known that the bicycle rider is not aware of his position of peril. To argue now that this boy was not in a position of danger when the defendant was able to avoid the accident, is to completely disregard the defendant's statements that at 78 feet he knew there was going to be an immediate threat of an

accident occasioned by a car running into a boy on the road, when the driver admittedly knows there is going to be an accident does not consist of a position of danger to the boy being overtaken, then it is difficult to conceive what could be considered a position of danger or peril to an inattentive decedent. Graham v. Johnson, 109 U. 346, 166 P. 2d 230, supports this proposition. We have no disagreement with the case of Holmgren v. U.P.R.R. Co., 198 P.2d 459, involving a fast moving train and an automobile at a crossing where opportunity for observation by the train crew was limited, and no way of knowing of the danger until the collision was imminent, were the facts. What we say is, that such a fact situation is not presented here where the defendant knew there was going to be an accident in time to have avoided it, had he exercised ordinary care.

Hickock v. Skinner, Utah, 190 P.2d 514, Gren v. Norton, Utah, 213 P.2d 356, and French v. Utah Oil Ref. Co., Utah, 216 P.2d 1002, are cases which on their facts did not call for an application of the doctrine of last clear chance. The facts here do call for such an application, and we contend that it was properly submitted to the jury. Graham v. Johnson, 109 U. 346, 166 P.2d 230, was a case in which this court held the doctrine of last

clear chance to be applicable. The facts of that case were held to be such that a clear opportunity was afforded to avoid the accident on the part of the defendant. The facts of this case present a situation in which a much a much clearer opportunity existed on the part of the defendant had he exercised reasonable care, and the means at his disposal.

Under comment (b) Sec. 480, American Law Institute Restatement of the Law of Torts," is contained the following discussion appropos of the present case:

"However, it is not necessary that the circumstances be such as to convince the defendant the plaintiff is inattentive and, therefore, in danger. It is enough that the circumstances are such as to indicate a reasonable chance that this is the case. Even such a chance that plaintiff will not discover his peril is enough to require the defendant to make a reasonable effort to avoid injuring him. Therefore, if there is anything in the demeanor or conduct of the plaintiff which to a reasonable man in the defendant's position would indicate that the plaintiff is inattentive and, therefore will or may not discover the approach of the train, the engineer must take steps as a reasonable man would think necessary under the circumstances. If the train is at some little distance, the blowing of a whistle would ordinarily be enough, until it is apparent that the whistle is either unheard or disregarded. The situation in which the plaintiff is observed may clearly indicate that his is likely to persist and that the blowing of the whistle will not be effective. If so, the engineer is not entitled to act upon the assumption that the plaintiff will awaken to his danger but may be liable if he does not so reduce the speed of his train as to enable him to stop if necessary."

A way of comparing

defendant's conduct to the above Restatement comment, we quote a part of the statement defendant made to the police, (Ex. E), and certain of defendant's testimony at the trial:

Exhibit E:

"My wife and I were traveling north on 13th East and we sound our horn about 200 ft. behind him as we got a little closer about 20 feet we sounded our horn again the boy never looked around at all to see if we were coming. . ."

At page 78 of the transcript of testimony the defendant was asked and answered the following questions:

Q. Did it occur to you, Mr. Rogers, at any time between the three hundred feet when you firstsay you saw him and the two hundred feet when you said you honked the horn and the 78 feet when you discovered the peril and twenty feet when you honked the horn and began to turn again, did it occur to you at any time that the boy might not have heard you?

A. I don't think he did.

Q. You don't think he heard you?

A. No. If he did, he never—

Q. He didn't react, at any rate.
A. Didn't react.
Q. Didn't readt as if he had heard you?
A. No.

Thus, it was apparent that defendant was aware of the decedent's inattention at least from a point 200 feet back

and continued right up until 20 feet when she says he sounded the horn again. He not only knew of the inattention, but also knew that it continued, as compared to comment (b) above where it is indicated that all that is necessary is that there be something in the party's demeanor or conduct which to a reasonable man would indicate inattentiveness, and that the former may not discover the approach of the latter. Rogers told the officer who investigated that at 78 feet he was aware that there was going to be an accident (Tr. 104). While it is true Rogers attempted to nullify this by relating a set of events which seemed to inquire a contrary conclusion, the fact remains that he told the officer he knew there was going to be an accident, and that he knew and understood the question which the officer asked him in this regard (Tr. 93). We put the statement and the testimony together then, and we find that from 200 feet back of Gary until 20 feet back of him the defendant knew that Gary was not aware of his approach. We also find that at least from a point 78 feet before the accident, the defendant knew there was going to be an accident, and thus knew Gary was in a perilous situation and knew that Gary did not know of the peril. From Rogers' testimony we know that the approach to within 20 feet of Gary was after the 78 feet point. Defendant

then, knowing that the boy was in peril, knowing that the boy did not know he was in peril, did nothing which would avoid the collision, at a time when in the exercise of due care with the means at his disposal he could have avoided it. Instead of avoiding it, he testified he thought he would go around him anyway (Tr. 78).

It is submitted that the facts of this case clearly entitled the plaintiff to have the case submitted to the jury under the theory of last clear chance.

POINT 12: Appellant is not entitled to have the merits of instruction No. 14, relating to last clear chance reviewed, having failed to except to the substance of that instruction in the lower court

Reference is here made to respondent's point 6, wherein it was pointed out that Rule 51, U.R.C.P. requires that the reasons for an exception be clearly set forth, at the time exceptions to instructions are taken, that the portions excepted to be pointed out, along with the reasons, and that an error in giving an instruction cannot be raised on appeal unless it is first excepted to on that ground in the court below.

Defendant's exception to instruction No. 14, at the trial, was as follows: (R. 393)

"The defendant excepts to Instruction No. 14 and the whole thereof and each paragraph separately, on

the ground and for the reason that each paragraph of this Instruction submits to the jury some theory of last clear chance. This exception is taken on the ground and for the reason that under the pleading in this case the issue of last clear chance is not raised; next, that under the evidence in this case there is no evidence present upon which the court can properly submit to this jury any question of last clear chance because the evidence is clear that the negligence of the plaintiff's decedent continued right up to the time that the accident took place and never at any time did said negligence cease nor at any time did said negligence become insulated; and upon the further ground that under the evidence in this case it is clear that the defendant had no opportunity to avoid the accident or rather the defendant had no last clear chance nor is there any jury question present as to whether or not the defendant had a last clear chance to avoid this accident."

Thus, it will be seen that the objections which defendant made to the giving of the instruction were not to the substance of the instruction, but rather to the giving of any instruction on last clear chance. This represents the third instruction which defendant seeks to challenge as to substance in this court where he failed to point out any alleged errors in the substance of those instructions to the lower court. To allow him to raise these alleged errors in this court under these circumstances would, we believe, constitute an emasculation of Rule 51, U.R.C.P. which clearly is not justified under the circumstances, and would be in direct opposition to the intent and purpose of that rule as expressed in that rule and the notes appended thereto.

POINT 13: Instruction No. 14, contains a correct statement of the law of last clear chance as applied to the facts of this case.

Decedent did not know of the presence of the defendant behind him. Rogers indicated that he did not think the boy heard the horn. Although it is true that Rogers changed his mind in this regard overnight during the trial, and decided the boy did hear the horn, it is submitted that the jury was entitled to believe that the boy didn't hear the horn based upon Rogers' testimony and statements to the officer before he changed his mind, and that the jury could properly and justifiably conclude that the defendant came up behind the decedent when decedent was not aware of defendant's presence; that the boy began to turn and turned still unaware of the presence of the defendant; that defendant saw the boy turn and knew he would strike the boy unless he himself did something to avoid the impending collision, but that he did nothing although he had adequate and ample opportunity to transmit his knowledge of the peril of the boy and knowledge that the boy was unaware of his peril, into action, had he reacted as a reasonable prudent man would have acted under similar circumstances. Appellant misconcieves the instruction when he indicates that some part of it instructs upon the theory of a person caught in a frog who cannot extricate himself. Nowhere in the in-

struction is such a theory mentioned or even hinted at. What the instruction says very clearly is that if the decedent never did become aware of his peril or if he became aware of his peril, but at a time when he could not avoid it, then if the other elements are present, plaintiff is entitled to recover. The last paragraph of the instruction was made necessary by the statement made by Rogers that he honked the horn at a point 20 feet behind the boy, whihh, if the jury believed his statement, would indicate that the boy might have become aware of the danger at that time. It thus raised an issue of whether the boy could do anything within that brief space of time to protect himself. By its verdict the jury has indicated that he could not.

This instruction is a correct statement of the law as set forth in Section 480 of the Restatement of the Law of Torts, which has many times been approved by this court. Holmgren v. U.P.R.Co., Utah, 193 P. 2d 450; Anderson v. Bingham & Garfield Ry. Co., Utah, 214 P. 2d 607.

It is submitted that no error exists in the giving of this instruction which would require a reversal of the judgment and verdict.

CONCLUSION

In conclusion, it is submitted that the record clearly reveals negligence on the part of the defendant warranting submission of the case to the jury, and that the evidence sustains the jury's verdict, and should not therefore be disturbed; that no substantial error prejudicial to the defendant has been shown by defendant on this appeal; that all defendant's contentions and arguments on appeal have been fully met and answered; and that the case was fully and fairly tried in the court below and submitted to the jury on theories authorized by the evidence and under appropriate instructions except as to errors pointed out by respondent in his brief which were more favorable to the appellant than he was entitled, and about which he cannot complain. Therefore, we respectfully submit that the verdict of the jury and judgment should be affirmed.

Respectfully submitted,

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