1951

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

Utah Supreme Court

7698

In the Supreme Court

of the State of Utah

CONRAD H. MORBY,

Respondent,

vs.

WALTER LAWRENCE ROGERS,

Appellant

Case No.
7698

APPELLANT'S BRIEF

Appeal from the Third Judicial District Court of the State of Utah, In and For Salt Lake County

A. H. Ellett, *Judge*

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THE CASE

This is an appeal from a judgment entered in the District Court of Salt Lake County, Utah, on March 22, 1951 (R 42) in favor of the plaintiff and against the defendant Walter Lawrence Rogers (appellant here) for the sum of $10,633.45 and costs $79.80. The judgment became final for purposes of appeal when on April 18, 1951, appellant's motion for a judgment notwithstanding the verdict, or in lieu for a new trial filed

March 31, 1951 (R 43) was denied (R 43, 48). Notice of appeal was filed May 15, 1951 (R 49). The appeal is from the judgment and the order refusing a judgment in defendant's favor or a new trial.

The case is one in tort for damages for the death of plaintiff's son Gary Morby, which resulted from a collision between a bicycle ridden by young Morby and an automobile driven by the appellant, on April 29, 1951, near 5140 South 13th East in Salt Lake County, Utah.

There were two defendants at the trial, the appellant and his wife, but at the end of plaintiff's evidence the trial court directed a dismissal in favor of the defendant wife (R 8 and 257). The appeal is by defendant Walter Lawrence Rogers only.

THE FACTS

There were no eye witnesses to this accident, except appellant and his wife (R 181). There was the testimony of other witnesses but none of them saw the happening of the accident.

Thirteenth East Street runs north and south and it is straight for a long distance. From about 56th South straight north on 13th East Street the grade is slightly descending (R 79) and the point of the accident was about at the bottom of the grade. From that

point on going north the grade is slightly ascending (R 94). Thirteenth East Street is a two lane hard surfaced highway and in the vicinity where the accident happened it is approximately 18 feet wide with six feet dirt shoulders on either side. Rogers traveled north on the east side of the highway (R 101). He says a center line was marked on the road but it was somewhat faint. Other witnesses testified there was no such mark. In the vicinity of where the accident took place an irrigation ditch or creek about ten feet wide parallels the highway on the west side (R 157). Practically opposite the point of the accident over this ditch is a wooden bridge leading into a lane going west across some farm land.

There are no cross roads nor any intersection at the point of the accident and there is nothing to show the bridge leading into the lane from either direction, unless a careful observation is made (R 107).

Rogers was 65 years old at the time of the trial and 64 at the time of the accident (R 98). He formerly had operated a street car and driven street motor buses for the traction company and Salt Lake City Lines in Salt Lake City, driving a motor bus for ten or twelve years. He had retired at the age of sixty and at the time of the trial had been retired for five years (R 98). He had operated an automobile twenty-five years.

The Rogers live at about 23rd East and 94th South in Salt Lake County (R 95), some six or seven miles from where the accident took place (R 96). The day of the accident he and Mrs. Rogers, in the automobile he was driving, entered upon 13th East Street from the east and turned north on that street at 94th South Street (R99), and from there continued north to the point of the accident (R 99).

South of the point of the accident Rogers noticed a boy on a bicycle in front of his automobile (R 102) traveling in the same direction as the automobile (R 79-80). At about 200 feet behind the bicycle Rogers honked his horn (R 78). Rogers and the cyclist were both on the right hand side of the road proceeding north (R 79), the boy being on the extreme east side of the hard surface of the highway (R 87). The horn was sounded again when the car was about 20 feet from the boy and at a time when the automobile had started to move over to the left to pass, but neither time did the boy indicate he had heard the horn (R 79-80). Rogers turned to pass him, giving him plenty of room so the car could pass in safety and when the car got "around up a little ways", the boy cut sharply in front of the car, the front wheel came in contact with the right front bumper of the automobile (R 108) and the bicycle and the boy were tipped over (R 81). Before the boy on the bicycle made the turn referred to, he was on the right or east side of the highway and Rogers had gotten on the west side of the middle

line (R 109). Rogers swung his car to the left and "at that" he was almost to the edge of the canal and "in we went" (R 82). 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. Rogers states that when he first honked his horn he estimated the speed of his vehicle at about three times the speed of the bicycle (R 103) and said he was going about twenty miles per hour at the time the accident occurred and at about fifteen at the time he went into the creek (R 86). When the car came to rest it was pointed north and was at the bottom of the creek. Evidently the creek is about the width of the car and the top of the car was about level with the top of the bank of the creek (R 85, 111).

Rogers got out of the car and went to the boy. The boy was lying on his right side astride the bicycle, the bicycle somewhat on top of him (R 88) and he was lying toward the west side of the highway about three feet from the left edge, according to Rogers (R 114). Rogers stated the boy's feet were about three feet from the left edge of the highway and his head extended toward the north and east (R 114, 117). The bicycle was taken to the side of the road and the boy's body was also moved to the side of the highway. Some boy came along later and rode the bicycle away (R 81, 121). The point where the boy made the sudden turn was about opposite the bridge across the creek and apparently the boy had intended turning to cross

the bridge (R 107).

The boy never gave any signal of his intention to turn nor did he look around before he turned (R 147).

The witness Erhenbach, a deputy sheriff at the time of the accident, said he arrived at the scene of the accident, that Rogers told him the approximate point of impact was "about right here"; that point was two feet from the west edge of the tarred portion of the highway. Rogers was asked by this witness how far away he was when he first "noticed there may be an accident" and he was shown a point 78 feet south of the point of impact (R 154).

This witness stated he made some measurements and that the rear end of the car was 27 feet eight inches north of the north edge of the bridge and that it was 42 feet from the place Rogers pointed out as the point of impact. The automobile at that time was in the creek. He also stated there was no indication of brake marks; that Rogers stated to him he tried to swing as far to the left as he could to avoid the accident after the boy pulled over in front of him (R 159, 160). The witness said he saw no evidence of an abrupt turn. The witness further stated that Rogers further told him he had been traveling 30 miles per hour and at the time of the accident was going ten miles per hour. The witness identified some photographs and said the rear mud guard on the bicycle

was bent as shown in the picture; that some paint on the mud guard was the same color as the paint on the automobile (R 168) and that the bent mud guard was the only damage appearing on the bicycle. The bicycle was introduced in evidence by plaintiff and in court this witness could not point out the paint on the bicycle after a thorough examination of a minute or so (R 189-190), although the bicycle had been kept unused since the accident and without alteration (R 213, 227).

Two of the witnesses stated they were in a truck coming from the north and saw Rogers go into the road, pick the boy up and carry him to the side of the road and before he was moved it was their judgment the boy was lying just west of the center of the highway (R 233, 241).

Another witness Mrs. Rogers, for the defense, who had been dismissed as a defendant, testified young Morby gave no signal of his intention to turn, made no observation before he turned and that he made a sudden turn just as the automobile was to pass him and about three feet to the boy's left and that when that happened her husband turned to the left in an attempt to avoid young Morby and that the car then went on into the ditch (R 266, 277). She also testified that until he suddenly turned young Morby was at all times on the east half of the highway (R 264-5-6-).

The Morby boy was thirteen years old on Novem-

ber 4, 1949 (R 253) so that on the day of the accident he was thirteen years six months and twenty-five days old.

There was some evidence from which one could infer that young Morby's clothes were torn and scuffed up by the accident (R 251). The boy had been delivering papers on a paper route that day substituting for another carrier and from the evidence he was the usual bright boy for his age, had ridden bicycles for several years and had ridden in an automobile with his father and mother on many occasions (Evidence of Mr. and Mrs. Morby commencing R 210 and R 249).

This is a brief recapitulation of the evidence.

STATEMENT OF POINTS.

1. Appellant's motion for directed verdict or appellant's motion for a judgment notwithstanding the verdict should have been granted.

(a) The appellant was not negligent.

(b) The plaintiff's decedent was negligent as a matter of law and his negligence was the proximate cause of the accident.

(c) The last clear chance doctrine is not applicable to the facts of this case.

2. The trial court made improper rulings with respect to evidence.

3. The trial court misdirected the jury.

(a) Instructions Nos. 3, 8, 9 and 10 were improper and there was no evidence to support them.

(b) Defendant's request No. 1 should have been given.

(c) Instructions Nos. 11 and 12 were improper.

(d) Instruction No. 14 was improper.

ARGUMENT

Although our statement of points cover several subjects, yet some of them are related, and in the interest of brevity and cohesiveness they can be discussed together in the same portions of this brief, and so we will proceed in that fashion, under headings we think appropriate:

The evidence of negligence (Point la).

There is nothing in this record, either by word of mouth or physical facts that suggests this appellant was in any wise negligent.

The greatest speed at which this automobile ever traveled was thirty miles per hour. The highway was

singularly free from traffic; it was a good, dry road, ample in width, and a bright sunny day was in progress. Neither court nor jury could conclude this speed constituted negligence.

The appellant observed this boy on the highway long before he reached the vicinity of the accident. He observed him constantly during the entire time when he first saw him and the point at which the accident took place. There was no reason for him not to observe him. No other vehicles were on the highway; no cross roads were passed; the road was straight; the weather was good and visibility clear. Appellant had his eye on the boy during all this period. There is no evidence to the contrary.

In passing the bicycle, the evidence is that the appellant moved to the left side of the highway; gave the deceased plenty of room, signalled with his horn of his intention to pass the boy. When in the act of passing and at a time when the decendent had given no indication of any intention to turn or do anything but pursue his peaceful way north on the east side of the highway and without making any observations whatever, the boy suddenly and without any warning whatsoever, turned to the left and into the path the automobile was taking. There is no evidence to the contrary as to the suddenness of the turn and that it was made without signal or warning.

Plaintiff's theory is that both the bicycle and the automobile were traveling in the same direction as he charges in paragraph three of the complaint that both vehicles were proceeding in a northerly direction. It is also his theory that the bicycle was ahead of the automobile as he charges in subparagraph (g) of paragraph 4 of the complaint that the defendants "having observed the deceased on the highway ahead", and also that the automobile overtook the bicycle because the same subparagraph charges that defendants failed to use care in "overtaking the vehicle of deceased who was lawfully using said road."

Now, the evidence is without dispute that the accident took place on the west half or southbound lane of this highway. The boy's body was to the west of the center of the highway, lying in a northeast-southwest direction with his feet to the southwest. The automobile was in the ditch on the west side of the highway. There is nothing in the evidence to show that the boy was travelling anywhere but north on the right side of the road until he turned.

So, if we rely on the evidence and do not go off into some wild theory or into conjecture the only thing left is to conclude that the accident happened as appellant and the other eye witness said it did; i.e. while the automobile was in the act of passing, the boy made a sudden turn into its path.

If one is going to go on the theory that being out in an automobile on a clear day with little traffic is in and of itself a dangerous operation and that one doing so proceeds at his own risk, and is an insurer of the safety of another on a bicycle he is about to pass then negligence exists here. But such is not the law, and necessarily could not be.

Duties on the highway are correlative, and the appellant had the right to assume until the contrary appeared that the boy on the road ahead of him would obey the rules of the road and permit the passing of the bicycle by the automobile; that the boy would remain in his own lane of traffic until some indication of a contrary intention took place and that the boy would not change from one lane and make a turn without giving some indication of his intention so to do, by looking and signalling.

Testing the appellant's conduct in the light of all of these circumstances can lead to but one conclusion—the appellant was in no wise negligent, and the accident was caused by circumstances entirely beyond his control.

The law does not expect superhuman conduct; the test is reasonable care in view of all the circumstances. Hindsight might dictate a different course of conduct, but the difficulty of that is that hindsight does not eliminate the knowledge after acquired that the boy

would and did turn. As the events leading up to this accident unfolded, under the evidence in this case there was nothing that this appellant did or did not do that violated the rule of ordinary care.

True, the appellant did not avoid hitting the boy. The accident happened. But this accident was not the result of anything this appellant did or did not do. He and another witness, his wife, who at the time she testified was not a defendant in this action, both testified the boy made a sudden turn when the automobile was less than twenty feet away (Mrs. Rogers said less than "two car lengths or a little less" R 264-5-6). Twice, in anwer to questions submitted by plaintiff's counsel the appellant stated things "happened pretty fast" (R 89, 132). Rogers said he had about caught up with the boy when the boy started to turn (R 107), that the car was just turning around him when the boy started to turn and the boy was on Rogers' right and the car partially on the left side of the highway at the time of the turn (R 105) and that the car travelled four or five feet from the time the boy started to turn to the time of the collision (R 108). Rogers stated the boy was going right straight ahead until he started to turn (R 87).

Under these circumstances we fail to see any evidence of negligence on the part of the appellant which proximately caused this accident.

The instructions on negligence (Point 3a).

By instruction No. 3 the trial court stated the

charged negligence to be five in number (R 25). They are just a rehash of the pleadings and amount to nothing more than reading plaintiff's complaint, a practice condemned by this court. *Shields vs. Utah Light & Traction Co.,* 105 Pac. 2d 347, 99 Utah 307. There is no evidence to support any of them, except that the appellant did not avoid this accident. And as to that it is not negligence to fail to avoid an accident unless it be in the power of appellant to do so. The instruction was entirely improper and could lead the jury to believe that they should consider those items in deciding whether or not the appellant was negligent. The only thing which could result was confusion and misunderstanding.

Instructions No. 8, 9 and 10 are equally at fault. These and instruction No. 3 in the particulars noted were excepted to (R 289, et seq) with great particularity.

Instruction No. 8 has to do with keeping the car under control; instruction No. 9 has to do with speed; and instruction No. 10 has to do with keeping a lookout. It is the appellant's contention there was no basis in the evidence for a charge to the jury on any of these propositions. The car was under control at all times; there was no evidence of any excessive speed, in fact all the evidence is that it was extremely moderate, and certainly there is no evidence that this appellant at

any time failed to keep a lookout for the cyclist.

The evidence is the speed was reduced and never was excessive, and to say there is evidence that the appellant failed to keep a lookout is to fly in the face of all the evidence, because all of it is that he saw the bicycle at all times and drove off the highway and into a deep canal or creek in an attempt to avoid what the decedent was doing.

These instructions were bad because they had to do with claimed negligence about which there was no evidence. This too has been condemned by this court. *Shields vs. Traction Company, supra.*

Negligence of the deceased (Point 1b).

This particular phase of the case is raised on this appeal in several ways. It is raised by the motion for a directed verdict, by the motion for a judgment notwithstanding the verdict, by the exceptions to the court's instruction No. 12 (R 27) and the refusal of the court to give appellant's request No. 1 (R 37).

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. That this contributed to the accident cannot be gainsaid. A signal would have warned appellant of

the intention to turn and a casual observation would have informed the deceased that he could not turn without grave and imminent peril, and an accident would have been prevented.

This action by the decease contravened Section 57-7-133, Utah code. Under that section no turn nor any movement right or left can be made until such turn or movement can be made with reasonable safety, and no such turn or movement shall be made if other traffic may be affected without a proper signal given for at least 100 feet before the turn.

Section 57-7-148 states:

> "*Every person* riding a bicycle upon a roadway shall be subject to the provisions of this act applicable to the driver of a vehicle except as to special regulations in this act and except as to those provisions of this act which by their nature can have no application."

Now, it is common knowledge that children ride bicycles and particularly children ten years and older. Everyone sees them riding bicycles. More children ride bicycles on the streets and highways than grownups. These are matters of constant observation. The court must conclude that the legislature in enacting Section 57-7-148 with respect to bicycles and persons riding them appreciated this fact, and that it intended that children operating bicycles on the public highways

should be governed by the general provisions of Chapter 7, Title 57, Utah code, being the traffic rules and regulations. When bicycles are being ridden on the highway they are a part and parcel of the traffic operating thereover, and those sections enacted to regulate and control traffic operate on bicycles.

So we assert that Section 57-7-133 applies to children riding bicycles.

In construing other sections of Chapter 7 of Title 57, this court in *North v. Cartwright,* 229 Pacific (2) 871, said:

> "These statutes were promulgated for the protection of the public and to safeguard property, life and limb of persons using the highways from accidents of the type here involved. Violations of these statutes then constitutes negligence in law. This doctrine of the law has been steadfastly adhered to by this court and generally in other courts throughout the United States * * * 'When a standard of duty or care is fixed by law or ordinance, and such law or ordinance has reference to the safety of life, limb or property, then, as a matter of necessity, a violation of such law or ordinance constitutes neligence.' "

It is our contention that 57-7-133 applies to the deceased and that he was bound to obey it, notwithstanding his age being slightly under fourteen. We cite *Graham v. Johnson,* 166 Pacific (2) 230, 109 Utah 346, where a minor, thirteen years old, was injured by

an automobile and this court, in holding him negligent as a matter of law said:

> "We start with not only the assumption but the knowledge that Gary was negligent in playing in the street in violation of Sec. 5321, Revised ordinances, Salt Lake City, 1944, which provides in effect that it shall be unlawful for any person to obstruct any street by playing games thereon, such as the game of ball, or annoy or obstruct free travel of any vehicle."

Section 57-7-133 was designed for the protection of the deceased in riding a bicycle on the highway as well as other traffic thereon, and the results of this accident and his failure to obey the statute graphically illustrates that it was so designed.

This is not any new or novel proposition. Other courts have passed upon the question. We call this court's attention to *Sagor v. Joseph Burnett Company,* 190 Atlantic 258, where the Supreme Court of Connecticut had before it a case involving a boy ten years old riding a bicycle, with a companion on the handlebars, who came into collision with an automobile driven by the defendant. The boy was making a left turn at an intersection and in doing so did not keep to the right of the center of the intersection but cut the intersection. While so doing a collision between the bicycle and the defendant's automobile took place, causing injuries to the boy. The Supreme Court of Connecticut said:

"* * * The trial court referred to the statute (General Statutes, Cu. Supp. 1935, Sec. 636c) 'which provides that when the operator of any vehicle — and that includes a bicycle — is making a left turn at the intersection of two public highways he must at all times keep his vehicle to the right of the center point of the intersection,' and charged that 'a violation of this statute — is negligence in itself. Accordingly, if you should find that the plaintiff did violate this statute then you must conclude that he was negligent in that particular, and if you conclude that he violated that statute or that he was negligent in any other particular and that such violation or such negligence was a substantial factor in producing his own injuries, then you have found that he was guilty of contributory negligence. * * *' Just previously the court had called attention to the age of the plaintiff and had charged that his conduct so far as concerned his claimed negligence was to be measured by that which is reasonably to be expected of children of similar age, judgment and experience. Marfyak v. New England Transportation Co., 120 Conn. 46, 50, 179 A. 9. The plaintiff claims that the same test should be applied in determining whether violation of the statute by him would constitute negligence and assigns error in the failure to so charge specifically in that connection. Reading as a whole the charge as to contributory negligence, we consider it very likely that the jury may have been led thereby to apply the qualifications as to age, judgment and experience to the plaintiff's alleged conduct in violating the statute as well as to his conduct in other respects, and, if so, the plaintiff certainly would have no reason to

complain.

"That aside, however, we find no justification for the application of this qualification to the effect of violation of the statute as negligence per se. Frisbie v. Schinto, 120 Conn. 412, 415, 181 A. 535. Neither the statute nor any of our decisions under it suggest such an exception to its operation. The terms of the statute are clear and precise as to the course to be pursued by a vehicle in turning left in an intersection and which may be expected to be taken by others. Andrew v. White Bus Line Corp., 115 Conn. 464, 466, 161 A. 792; Murphy v. Way, 107 Conn. 633, 637, 141 A. 858. 'It is the duty of the courts to apply it in accord with the intent expressed in the act, without limitation or exception or extension.' Washburn v. LaMay, 116 Conn. 576, 578, 165 A. 791, 792.

"As we stated in Murphy v. Way, supra, 107 Conn. 633, at page 638, 141 A. 858, the purposes of the statute would be subverted if the standards of conduct prescribed by it could be subjected to exceptions based upon the judgment of the individual user of the highway, and this consideration would be conspicuously applicable in the case of such a user whose capacity to exercise judgment was affected by immaturity and inexperience. While the incapacities of youth are to be accorded due weight in matters of intent and criminal responsibility, it is not unreasonable or unfair to hold applicable to all operators of vehicles the rule that he who violates one of these statutory mandates does so at his own risk. Murphy v. Way, supra.

> "Although most of the states regard immaturity in measuring the conduct of children in determining questions of negligence (45 C. J. p. 998), no case has come to our attention in which children have been excepted from the operation of the rule which most states have long applied (45 C. J. 720) that violation of a statutory duty constitutes negligence. On the other hand, they have been denied recovery repeatedly for injuries of which the proximate cause was coasting upon a public way in violation of law. Wright v. Salzberger & Son, 63 Cal. App. 450, 218 P. 785, 63 Cal. App. 450, 218 P. 785", and other cases cited.

In the case of *Brown v. Daley,* 173 N. E. 545, the Supreme Judicial Court of Massachusetts had before it a case involving injuries to two children, five and seven years old, growing out of a coasting accident. The defendant contended the accident took place on a street where coasting was prohibited and the Massachusetts court held that if the accident did take place on that street no recovery could be had for the death of the two children because the negligence of the children would bar recovery. The court, however, held that there was a fact question present as to whether or not the children were actually coasting on the street at the time of the accident and stated that because the jury had heard the evidence and viewed the premises the jury verdict would not be disturbed.

Without specific reference to this statute, Section 57-7-133, this Court, in *Spackman v. Carson,* 216 Paci-

fic (2) 640, states:

> "* * * A person making a turn out of one line across another line of traffic is the one who first knows that he intends to change his direction from that in which it would otherwise be presumed that he intended to continue. Any person traveling in the line of traffic which the direction changer intends to cross can only be apprised of the latter's intention to change direction on signal or upon seeing him start to make the change. It is not as if there were a telephonic system between the brain of the direction changer and those who are to be affected. Therefore, the man who makes the change of direction owes the duty *of looking* before he makes it and of signaling clearly and timely, and of making the change sufficiently slowly so as to give time for other drivers *who may be affected by it* to be alerted and to react to that signal."

This decedent did nothing, under the evidence in this case, except turn. He did not look, he gave no indication of his intention to turn. When the automobile was a short distance behind him and to his side he suddenly turned and continued into that turn until a collision occurred. His negligence continued up to the very time of the accident; his sudden turn without a warning or any observation in the path of onrushing danger brought about this unfortunate accident. There seems to us no question but that that is the case here. The motion for a directed verdict should have been granted and on the motion being presented the court

should have set the verdict aside and entered judgment for the defendant, no cause of action.

The instructions on the negligence of the deceased (Points 3b, 3c).

(i) Appellant's Requested Instruction No. 1.

In the event there may have been a question of fact in the case, appellant submitted his instruction No. 1 to the trial court, which the trial court refused to give.

This request (R 37) incorporates in it the duties of a traveler on the highway who is about to make a turn and actually turns from the lane in which he is riding across another lane of traffic in order to reach a point off the highway. As heretofore pointed out, the evidence in this case is that the decedent while going north on the east side of the highway turned to his left across another lane of the highway and under all the evidence it is apparent that he intended to turn into a farm lane leading from the highway to the west side. This lane crossed a bridge over a creek which was also on the west side of the highway. The instruction calls the attention of the jury to three things which such a traveler must do before making, or while in the act of making, such a turn. They are: (1) That before making the turn he must indicate his intention to do so by giving visible signals; (2) That he cannot

make the turn unless he can do so with safety, and (3) That it is his duty to make observations in order to ascertain whether or not he can make the turn with safety. By the instruction it is left to the jury to determine whether or not Gary Morby failed to do any of the things enumerated and the request was formulated on the theory that if there is jury question as to what Morby did or failed to do yet the jury should be appraised of what he was required to do in making such a turn.

Under the statute, Section 57-7-133, it is perfectly apparent that no turn should be made until it can be made with reasonable safety; that no turn can be made, if other traffic may be affected, without a proper signal given indicating the intention to turn, and it necessarily follows, that observations must be made in order to determine whether or not a turn can be made with safety and that one who makes a turn without making observations cannot comply with the requirements of the statute and, therefore, one who fails to make such observations is guilty of negligence, as a matter of law. It is our contention that even though the court should determine that the question of Morby's negligence was for the jury to decide, yet an instruction informing the jury of the decedent's duty in the language of this instruction, or some instruction in substance like it, should have been given to the jury. Nowhere in any of the court's instructions did the court include all the elements set forth in this request as applied to Gary

Morby, and it is our contention in failing so to do the trial court committed reversible error.

Ordinary common intelligence demands that a person in the position of Gary Morby on this highway and intending to make a turn to the left should do something to protect himself. He must do something to ascertain whether or not the turn can be made with safety and this, of course, requires observations, and in addition he must give a signal of his intention to turn if his turn will affect traffic. If he makes a turn without giving a signal he takes his chances because the requirement of signaling is for his protection as well as others. Under the facts of this case, when this turn was made or about to be made, there can be no question but that other traffic would be and was affected, and seriously affected by the deceased's turn.

Irrespective of the statute, ordinary care would dictate these very things. In the case cited and quoted from above, i. e., *Spackman v. Carson,* supra, this court, without any reference to any statute and in discussing what one should do who is about to change his course on the highway, sets forth all the elements of this statute. Gary Morby was the only one who knew he intended to turn. Gary Morby was the only one who could inform himself as to what the conditions were. Gary Morby was the only one who knew when he intended to turn and in order to protect himself from injury or the loss of his life, ordinary care dictated that he should look

before he changed his course and that he should signal if a turn would affect traffic and further that he should not change his course unless he could negotiate his new route with safety. No person on the highway could possibly determine whether or not he could make a turn in safety or determine whether or not traffic would be affected by his turning or whether or not a signal was required unless he looked to see what other traffic was on the road. Defendant's proposed instruction No. 1 makes the test that if Gary Morby "failed to give a signal" * * * "or failed to make observations as to whether or not a turn could be made with safety", he is guilty of negligence as a matter of law.

The minimum requirements under our statute of any person using the highway under the circumstances in this case would be that he look and signal and if he fails to do either he is guilty of negligence as a matter of law.

Although we contend that a 13 year old boy riding a bicycle on a public highway is bound absolutely by the rules of the road as set forth in our argument commencing at page 17 of this brief, we would like to point out to this court that Gary Morby's judgment as such 13 year old is never involved in this case and cannot be tested by the standard of 13 year old boys of similar capacity *unless he has some basis upon which to form that judgment,* that is, *unless he looks around him on the highway to see what the situation is at the time he*

intends to make a turn; and further we contend that the jury should have been informed that these minimum requirements must be met before they can test whether or not Gary Morby, as a 13 year old boy, acted with due care, and if they find that he failed to meet these minimum requirements he was guilty of negligence as a matter of law.

If there is a question of fact in this case as to what Gary Morby did or did not do, it was reversible error to refuse to give this instruction.

(ii) Instructions No.'s 11 and 12.

Appellant's first objection to instruction No. 12 is that the statute, Section 57-7-133, and its fair construction, does not exempt a 13 year old boy because of his age when he is riding a bicycle on the highway from his failure to abide by the rules of the road set up in that statute. We have already argued that because Gary Morby was on a bicycle, was a user of the highway on such bicycle, that he is bound by the statute. In instructing the jury as the court did in instruction No. 12, that the jury could consider the age of Gary Morby in deciding whether or not he was negligent, the court violated the plain terms of the statute because this statute was meant to cover Gary Morby and set an absolute standard of care for him while he was riding the bicycle on 13th East on the day in question and Gary Morby's conduct should have been tested against that

standard of care without reference to his age.

We believe the foregoing argument in respect to the negligence of Gary Morby and the law applicable thereto which we have set out in our argument is conclusive as to the deceased's negligence in this case, and this is true whether or not this court feels there is a question of fact involved. Notwithstanding the foregoing argument, however, if this court feels that Gary Morby's conduct should be tested by what reasonably prudent boys of his age and capacity would have done and if this court feels that an appropriate instruction in this regard should have been given to the jury, then we submit the following argument which points out the errors in the instruction that the trial court gave to the jury on the trial of this cause.

The trial court sets forth in instruction No. 11 the duties required of an *adult* in making a turn upon a public highway and they are: To give a visible signal of his intention to turn, not to make such turn unless he can do so with safety, and to look and see whether or not such turn or change of lane can be made with safety. Then in instruction No. 12 the trial court states that a boy of 13 years of age is not held to the standards of care and caution of an adult person, and goes on and states that as a matter of law it would be negligence for an adult to make a turn in violation of the duties as set forth above without indicating by a proper signal his intention so to do; but then, when the court instructs

the jury as to the elements and circumstances that they should consider in deciding whether or not a 13 year old boy was guilty of negligence, *the only circumstance* the trial court put before the jury was whether "*a reasonably prudent person of the age of 13 would know and appreciate the danger of trying to make such a turn without signaling.*" Nothing is said about whether or not a 13 year old boy is required to look, nothing is said as to whether or not a 13 year old boy has to make a turn in safety. The entire instruction deals only with the appreciation of danger of *turning without signaling.* Under this instruction the jury could find that Gary Morby did not appreciate the danger of making a turn without signaling and as a consequence was not negligent and did not, therefore, contribute to his own death, and the jury could have so found irrespective of whether or not it would have found Gary Morby, or any other 13 year old boy of like capacity, would have looked and would have refrained from turning because a turn could not be made with reasonable safety. The measuring stick under the instruction is whether or not a 13 year old should have made the turn without giving a signal. We insist that it should have also included whether or not said 13 year old should have looked and should have refrained from making a turn until it could have been made with reasonable safety.

These omissions from the court's instruction No. 12 are doubly apparent when compared with the elements

set forth in instruction No. 11, supra. It is submitted that the jury in comparing these two successive instructions would necessarily conclude that although an adult is held to the duty of looking to see whether or not a turn can be made with safety and not turning unless he can do so with safety, that a boy of 13 years of age is not held to such a duty, *and that such duties are not even matters for the jury to consider.*

Whether a person, adult or child, acts as a reasonably prudent person and whether a person meets the standards of care required by the law should be determined by a consideration of *all* of the circumstances of the transaction. The only difference in the standard of care between an adult and a child, in the absence of an express statute setting the same standard for each, is that the child is only held to the standard of conduct of doing that which other children of the same age and like capacity would have done under like circumstances. As applied to this case, the requirement of looking to determine the situation on the highway and the requirement of turning with safety after having made such an observation, are not eliminated from the case as a matter of law merely because the deceased is a 13 year old boy. These are elements by which the jury should have judged whether or not Gary Morby acted as a reasonably prudent boy of his age and capacity would have acted. The trial court should have so instructed the jury and its failure so to instruct was prejudicial error.

Errors in the admission of evidence (Point 2).

The matter about which we complain here can be found at pages 154, 155 and 156 of the record. It all started out when the witness Erlenbach stated, in answer to a question, that

> "Seventy-eight feet represents the course the vehicle No. 1 traveled according to Mr. Rogers when *I asked him how far away he was when he first noticed there may be an accident,* and that's the point to which he took me and showed me.
>
> From that point I taped it off with a tape."

Some discussion went on between counsel and the witness, and then counsel, after referring to the point of impact, asked

> "* * * about how far south of that point did Mr. Rogers point out to you was the spot *where he first realized there was going to be an accident?*"

An objection was made that the question did not contain the witness's testimony, and the court misunderstood the objection as a reading of the transcript will show. Then there was some further discussion and counsel then asked

> "And pointed out to you the place *where he first realized that an accident was going to occur?*" (R 155)

which was objected to as leading and suggestive, which objection was overruled, and then the next question contained this

> "Will you point to the spot * * * at which Mr. Rogers first told you or told you that he first realized that an accident was going to occur?"

which was objected to that it assumed Rogers told him something. And then at page 156 counsel again offends by going into it again and characterized it as

> "* * * where he (Rogers) told you he first saw, realized that there was going to be an accident."

A further objection is made and the trial court left it up to the witness to say whether or not he had been misquoted and the witness said, "No, that's the question we ask every driver, Judge."

So, the argument might be well made that the witness cleared up the whole thing with a negative and then a positive, exactly opposite to each other, and also that we are being hypertechnical in the extreme. But the scope of the questions, the manner in which counsel changed them from time to time, first from "there may be" to "there was going to be" and then from a question by the witness to the appellant to a flat footed statement by the appellant that he "realized there was going to be an accident," all show the vice of this kind of interrogation.

How much damage these questions did is speculative; it is apparent the trial court was paying no particular attention to what was going on, and it is also apparent that counsel persisted in improper questions and that they gained in their degree of impropriety as he proceeded. But it is clear that the above illustrates one way how not to conduct a lawsuit.

A careful reading of the rest of this witness' testimony will show that counsel continually led the witness (who was perfectly friendly to the plaintiff's cause as indicated by his testimony), that some objections were made and that some were sustained. As a practical proposition, it is poor tactics before a jury to continually made objections that questions are leading or suggestive, but trial courts should be quick to prevent such questions on matters of importance.

It might well be that this court will consider this matter of insufficient moment by itself to necessitate a reversal of this cause, but certainly with the other errors heretofore and hereafter pointed out it indicates how loosely this case was tried by the trial court, and how careless he was of the rights of this appellant.

The evidence on the last clear chance doctrine (Point 1c).

Immediately prior to the occurrence of this accident, the evidence was that the two vehicles were going north on the same side of the road (R 79, 102, 140); that the bicycle was somewhere in the northbound

lane between the middle of that lane and the east edge of the highway. Apparently some incident occurred when the appellant was 78 feet to the rear of the point of impact which gave him some apprehension of danger (R 127-131, 254, 182. The deputy sheriff never question appellant what occurred at this point. Counsel for plaintiff never asked him either; and when appellant's counsel inquired into this matter the appellant testified that at the time the boy was still on the right side of the highway and was going north (R. 140). At that time the appellant was beginning to taper off to the left side of the highway to pass the deceased (R 154, 160 and the map). A fair inference from the facts, and undoubtedly the worst inference which could be drawn against the appellant, would be that at this point, when the appellant was 78 feet back of the point of impact, the boy was changing his position on the highway (R. 87, 105, 106), but the boy had not then started his turn (R. 106, 107). After appellant started out around deceased, the appellant estimated he was approximately 20 feet behind the boy (R 129), and appellant stated he honked the horn of his automobile (R 130), and as he drew alongside of the boy to pass him, he apparently then became aware the boy had not heard the horn of his automobile (R 104, 80). An instant before the collision, when the appellant was not quite abreast of the boy, the deceased suddenly turned across the highway and into the car (R 80, 106-108, 142, 266, and Exhibit E). It was the appellant's esti-

mate that the car moved only 5 feet from the time the by made the sudden turn until the impact (R 108). This point of impact was 2 feet in from the west edge of the hard surface of the highway (Map), and the right front bumper of appellant's automobile came in contact with the front wheel of the bicycle (R 81, 266), and the boy tipped over. The boy's body was lying only a few feet from the point of impact (R 114, Map 181, 189). The appellant in his effort to avoid the boy turned to his extreme left and went into the ditch running along the west side of the highway. The appellant's speed at the outset of this sequence of events was given variously from 20 to 30 miles per hour (R 102, 86, 160) and his speed at the time he went into the ditch was approximately 10 to 15 miles per hour (R 86, 160).

Twice plaintiff's counsel elicited from the appellant that "things happened pretty fast" (R 89) or "were happening pretty fast" (R 132).

At 30 miles per hour the appellant would have traveled 78 feet in 1.77 seconds and at 20 miles per hour he would have traveled this distance in 2.65 seconds. During this entire period of time the relative position of the two vehicles was always changing, the car moving over to the left of the highway to pass, and the boy moving a little to the left and then back to the right on the east side of the highway, and then later, suddenly turning to the left as appellant drew

along side of him. On the evidence most unfavorable to the appellant this entire sequence of events took place within 2.65 seconds and the period of time from the point where the boy suddenly turned until the collision occurred was much shorter, in fact, nearly instantaneous. Appellant stated that his car moved only 5 feet after deceased turned before the collision and the appellant's wife testified that the deceased was 12 to 14 feet away from the car at the time he turned (R 108, 266). These distances could be covered by the respective parties in much less time than a second.

Appellant had a right to rely upon the deceased's acting in a prudent and intelligent manner notwithstanding his age, and appellant had no reason to anticipate the boy would turn without looking or signaling. The evidence is that the appellant gave the boy adequate room as he came along side (R 80). Under these circumstances no reasonable person could find that the appellant at any time had a clear opportunity to avoid the deceased after having discovered or being aware that the deceased was in a position of peril from which he could not extricate himself or of which the deceased was unaware.

In recent decisions of this court the elements of the last clear chance doctrine have been set forth with great clarity and as we understand them the elements of that doctrine are: 1. That one party is in a position of peril of which he is unaware or from which he can-

not extricate himself; 2. That the defendant is aware, not of the other party's existence or presence on the scene, but, of the other party's peril *and* of such party's inability to extricate himself or unawareness of the peril; 3. That such consciousness on the part of the defendant must occur early enough in the sequence of events to afford him a *clear opportunity* to avoid a collision through the exercise of ordinary care. It follows from the foregoing, of course, that if either of the parties has an equal opportunity to avoid the accident that the last clear chance doctrine is inapplicable. The defendant must not only have a *clear* opportunity to avoid the accident but the *last* opportunity. Applying this law to the case at hand, it cannot be said by any reasonable person that the appellant had at any time during this sequence of events, the last clear chance to avoid this collision.

At the time this boy made a sudden turn to the left the interval of time was so short before the collision occurred that it would be impossible for appellant to avoid striking the boy. As we have stated, the distance the two vehicles were then apart could be easily covered in less than a second of time. A situation somewhat similar to this was considered in the case of *Van Dyke v. Atlantic Greyhound Corporation* et al, 10 S. E. (2) 727 which was decided by the Supreme Court of North Carolina in 1940. In the case the court stated the facts to be as follows:

"Plaintiff's intestate, a boy 14 years of age, on the morning of August 25, 1939, was riding a bicycle on the highway near the corporate limits of the City of Henderson, proceeding eastwardly on the Louisburg Road. The day was clear and the road was level and straight. The defendant, the Atlantic Greyhound Corporation, was operating two large buses on the highway, both proceeding in the same direction as plaintiff's intestate. The distance between the buses was testified to be 100 feet, though other witnesses estimated this distance at 100 yards. The evidence tended to fix the speed of the buses at from 25 to 40 miles per hour. Plaintiff's intestate had delivered a paper to a house on the south side of the highway, and had ridden back to the highway.

"As the first or front bus approached plaintiff's intestate, he was riding upon the paved portion of the highway, and when the horn of the bus was sounded he rode off on the shoulder of the highway, which was four and a half feet wide at that point, and was riding three feet from the edge of the pavement. As the second bus, the one following in the rear of the first, approached, plaintiff's intestate suddenly, and without giving any notice of his intention so to do, turned to his left on the paved portion of the road and immediately in front of the bus, where he was struck and killed. There was some evidence that the bus which struck the plaintiff's intestate did not sound the horn until too late, and that just as the boy came on the pavement immediately in front of the bus, a distance estimated at 15 or 20 feet, the driver of the bus

turned sharply to his left to avoid striking the boy, but 'the extreme right front corner' of the bus 'mashed in' the left side of the bicycle, causing the death of plaintiff's intestate. The bus ran off into the ditch on the left of the highway."

And quoted as follows from one of the witnesses:

"'When the boy ran up on the paved portion of the highway in front of the bus (the bus) must have been not more than 15 feet from him. If he had looked to the left at all before he went on the paved highway there was nothing to keep him from seeing the bus.'"

After considering the facts of the case the court stated as follows:

"While the testimony relating to this unfortunate occurrence, taken in the light most favorable for the plaintiff, might tend to show some negligence on the part of defendants, a careful consideration of all the evidence offered by plaintiff leads us to the conclusion that the failure of plaintiff's intestate to exercise due care and precaution for his own safety must be held to constitute the sole proximate cause, or at least a proximate contributing cause, of his injury and death. There was no evidence which would permit an inference other than that the boy, without signal or warning, and apparently without looking or seeing the oncoming bus, turned suddenly in front of the bus at a time when, in spite of the efforts of the driver, it was too late to avoid striking the bicycle. There are no circumstances here which would relieve the plain-

tiff's intestate of the conclusive imputation of contributory negligence. * * *'' (citing cases)

"It will be noted that under our motor vehicle statutes a bicycle is deemed a vehicle, and the rider of a bicycle upon the highway is subject to the applicable provisions of the statutes relating to motor vehicles. Public Laws, 1939, Ch. 275.

"There was no evidence to support plaintiff's plea seeking to invoke the principle of last clear chance. Morris v. Transportation Co., 208 N. C. 807, 182 S. E. 487; Haynes v. Southern R. R. Co., 182 N. C. 679, 110 S. E. 56. There was no evidence that more than a fraction of a second elapsed after plaintiff turned on to the pavement before the collision between the bus and the bicycle occurred. Nor was there evidence that there was anything to indicate to the driver of defendant's bus that plaintiff's intestate was in a position of peril, or that he intended to turn to his left upon the pavement in front of the bus." (Citing cases)

In this case just prior to the boy's making a sudden turn the appellant was angling around him, had honked his horn and the boy was somewhere to his right and forward of him, on the east side of the highway. At this point we submit that the boy was not in a position of peril and as this court so aptly stated in the case of *Holmgren v. Union Pac. R. R. Co.,* 198 Pacific (2) 459, at page 463, in quoting from a California case, the boy must be in a position of peril *not*

approaching one; we quote:

> "It is also significant to note that the 'situation of danger' or 'position of danger,' referred to in the authorities dealing with the last clear chance doctrine, is reached only when a plaintiff, moving toward the path of an on coming train or vehicle, has reached a position 'from which he cannot escape by the exercise or ordinary care.' *In other words, it is not enough, under the last clear chance doctrine, that the plaintiff is merely approaching a position of danger, for until he has reached a position of danger, he has the same opportunity to avoid the accident by the exercise of ordinary care, as has the defendant.* In such cases the ordinary rules of negligence and contributory negligence apply, rather than the exceptional doctrine of last clear chance. It is only in cases in which, after plaintiff reaches a position of danger, defendant has a last clear chance to avoid the accident by the exercise of ordinary care, and plaintiff has no similar chance, that the doctrine is applicable." (The court's italics.)

And the court discusses this qualification further on page 464 by stating that the defendant must have had the *last chance* and also had a *clear chance* to avoid the accident.

Under the facts and circumstances in this case the deceased had an opportunity at any time up to the point at which he made his sudden turn to the left to avoid the collision with appellant's automobile. Under such circumstances the last clear chance doctrine is

not applicable. See *Richardson et al v. Ribosso,* (Calif.) 8 Pacific (2) 226, at page 227, where the court said:

> "The evidence, however, does not bring the case within the rule where the last clear chance doctrine becomes applicable, a rule which limits its application to a case where the person injured is known to be in a place of peril from which he cannot extricate himself by the exercise of ordinary care. * * * The liability is placed upon the party inflicting the injury *only* if immediately before the actual infliction of the injury the injured person was in such a situation as to be unable, by the exercise on his part of reasonable and ordinary care to extricate himself, and *vigilance on his part would not have averted the injury.*" And cases cited. (Italics ours).

If this boy had looked up at any time during this sequence of events, there was nothing to prevent him from seeing the car which was in the act of passing him and the boy's mere looking would have been sufficient to avoid the accident because *all he would have had to do was continue in a direct line to the north instead of turning and no collision would have occurred.* See *Graham v. Johnson,* 166 Pacific (2) 230, at column 2 page 236.

We think it appropriate to call to the court's attention that in three successive decisions of this court involving the last clear chance doctrine in which there were moving vehicles involved, this court has set up a further limitation upon the use of that doctrine. We

refer to *Hickok v. Skinner,* 190 Pacific (2d) 514, at page 517, where the court said:

> "The last clear chance doctrine, relied on by plaintiff, is inapplicable in the present instance. As has been repeatedly announced by this court, this doctrine is of limited application in the case of two moving vehicles."

This matter was further asserted in *Gren v. Norton,* 213 Pacific (2d) 356:

> * * * "It has oft been held by this court that the doctrine is of limited application in cases involving two moving vehicles. The soundness of this rule is apparent when it is appreciated that the doctrine only applies when the defendant has reasonable time and opportunity to avoid the accident. Stated in another way, the plaintiff only escapes the consequences of his own negligence when the defendant has a clear chance to avoid the accident."

French vs. Utah Oil Refining Company, 216 Pacific (2d) 1002 is to the same effect.

In all three of the above cases the situations under consideration were the crossing of an intersection or turning left through approaching traffic. We believe the aforementioned limitation is applicable to a case where one vehicle attempts to pass another and the vehicle being passed is suddenly turned from direct lane of travel across the path of the passing car. In all three of these types of cases the situation changes

so rapidly and the relative positions of the vehicles is so different from time to time that there is no reasonable opportunity for a party to appreciate the peril and to avoid the collision. The policy behind such a limitation of the doctrine of last clear chance has been stated by this court in *Graham v. Johnson,* on rehearing, 172 Pacific (2) 665, 109 Utah 365 as follows:

> * * * "When one party thrusts upon another the onus of avoiding an accident which was due entirely to the fact that the first party is in the fairly rapid process of placing himself in the path of a car driven by the second party, the court, before it permits the jury to determine whether the second party could have avoided the accident, must be reasonably sure that there was time enough for the jury to so find. 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,* Utah, 162 P. 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.' "

This quotation was cited with approval in *Van Wagoner v. Union Pacific R. Co.,* 186 Pacific (2) 293, at bottom of page 301.

We submit that the plaintiff did not prove the most necessary element to invoke the doctrine of last clear chance. We quote:

> * * * "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." Italics ours.

Graham v. Johnson (first decision) 166 Pacific (2) 230, at 237, 238, 109 Utah 346.

The instruction on the last clear chance doctrine (Point 3d).

The argument we have made in the immediate foregoing portion of this brief is pertinent here. We do not think there was any place in the case for instruction No. 14 (R 29) at all, which was excepted to at R 293. Under the evidence there was no question present for the jury to decide, and consequently it was reversible error to give an instruction on the doctrine.

It is also our contention that the instruction itself is bad in substance, and as it was framed and given to the jury it did not appraise the jury of the proper elements of the law with respect to the doctrine of the last clear chance. We rely for reversal on this ground on the following propositions:

1. There is no evidence in the record showing the deceased was unable to extricate himself from a perilous position, until he made his sudden turn, and from that point we concede that neither one of the parties could do anything. The last paragraph of instruction No. 14 should not have been given.

It is apparent from the evidence that up until the time he made his sudden turn Gary Morby could have avoided the collision by looking around, because he then would have seen the appellant about to pass him and could have continued north on the highway in safety. This is not the case of a man who "goes to sleep on a railroad track or gets his foot caught in a frog," and cannot therefor extricate himself or by "alertness avoid the danger," *Graham v. Johnson* (first hearing), *supra,* 166 Pacific (2) 230, at 235, where the court discusses the provisions of section 479 of Restatement of Torts. Rather, this is the situation this court warned was not covered by the doctrine at page 236, column 2, bottom portion, of the above case.

2. The instruction as a whole fails to give due weight to the significance of the requirement that the *jury find* that the appellant have a *last* chance and a *clear opportunity* to avoid the collision after being aware that deceased was in a position of peril; and in this connection the court's statement "then you are instructed that the defendant Walter Lawrence Rogers had the last clear chance to avoid the collision" took

that question from the jury and is in effect a comment on the evidence.

This is a case like *Graham v. Johnson, supra,* where the situation was constantly changing, and we believe the law as to an instruction as therein set out is applicable here.

We quote from the Court's first decision in that case at pages 237 and 238 of 166 Pacific (2):

> * * * "In a case such as this when both parties are more or less rapidly changing their positions the evidence must be clear and convincing that the party whom it is claimed could have avoided the accident had a "clear" chance to do so.
>
> * * * "the jury must be instructed that it should be clearly convinced in such a case that she (defendant) was far enough north of him (plaintiff) as to give her a clear chance to avoid the accident." * * *
>
> * * * "In those intermediate situations such as the supposition under the evidence that Darlene was coming down on the far west side of the street where the court is in doubt as to whether all reasonable minds could conclude one way or the other he should submit the case to the jury *with instructions* that *it should be clearly convinced* that the defendant had a clear chance, viz., ample opportunity or clearly an existing ability at the time she reasonably should have appre-

ciated the plaintiff's danger, to avoid harming him; otherwise it (*the jury*) should find for the defendant.

"From our recitals of the evidence and our exposition of the law, it is apparent that the jury must be given an opportunity to determine what the facts of the case really are, and that it must be armed by instructions from the court in accordance with the law herein laid down to apply the proper law to the fact situation or situations as it finds them." (Italics and words in brackets ours).

3. That the phrase "even though both parties were negligent and even though the negligence of both parties concurred in causing the death of Gary Morby", being the last lines of instruction No. 14, is not a law, and would allow the jury to find a verdict for the plaintiff without their finding that the appellant's failure, if any, to avail himself of his opportunity to avoid the collision was the sole proximate cause of the accident, which is a necessary element for the jury to find before plaintiff can recover.

The law does not permit a recovery where two parties' negligence concur in an injury, and the last clear chance doctrine is no exception to this, because the theory of the doctrine is that defendant's negligence, in failing to avoid the plaintiff, is the sole cause of the accident. We again cite *Graham v. Johnson* (first decision). The Court at page 236 of 166 Pacific (2) after assuming a situation where two parties are

negligent, states:

> * * * "Both up to that point might be guilty of negligence and neither be able to recover against the other. But if the oncoming driver (the defendant), realizing the situation of the plaintiff, had a clear opportunity to avoid the accident and failed to utilize it, that counts just as if the plaintiff had not been negligent, and the defendant had been. An incorrect but rather dramatic day of putting it is that defendant's first negligence and plaintiff's negligence cancel out leaving only defendant's failure to utilize his opportunity to avoid the accident as the negligence. The first and only negligence which is the basis of recovery under the clear chance doctrine is this failure of the defendant to avoid the harm, having the knowledge and ability to do so."

This language here complained of strikes the entire instruction down, and permits a recovery without any *last clear chance.* It takes from the defendant any defense of contributory negligence.

CONCLUSION

If this court determines that Gary Morby at the time of this accident was under the duty of obeying the statutory requirements set forth in Section 57-7-133, this case should be reversed. The court by its instruction No. 12 stated in effect that that statute did not apply to Gary Morby. By its refusal to give appellant's request No. 1, or some similar instruction, the court

held that that statute did not apply to Gary Morby. This is contrary to the law.

If this court holds that the appellant was not negligent or that the decedent's negligence proximately contributed to the accident, then this case should be reversed with instructions to set the judgment aside and enter judgment for the appellant, no cause of action.

We respectfully submit that the trial court tried this case on a theory not tenable under the law and permitted the jury to decide it on a theory not tenable in law.

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