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# Torts -- Contributory Negligence -- Last Clear Chance

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solely upon whether the action in which the order is entered is equitable or legal in nature. The court itself admits that "the incongruity of taking [appellate] jurisdiction from a stay in a law type and denying jurisdiction in an equity type proceeding springs from the persistence of outmoded procedural differentiations."<sup>19</sup>

ALVIN S. SHERMAN

### TORTS—CONTRIBUTORY NEGLIGENCE— LAST CLEAR CHANCE

Plaintiff brought an action for the wrongful death of her husband as a result of a head-on collision between the autos driven by the defendant and the deceased. The collision occurred as the defendant approached the deceased while the latter's auto was swerving from side to side on the highway. *Held*, defendant was faced with an emergency situation and the doctrine of last clear chance was not applicable. *Burdette v. Phillips*, 76 So.2d 805 (Fla. 1954).

Under the prevailing Florida law contributory negligence is a bar to recovery.<sup>1</sup> However, the doctrine of the last clear chance mitigates the harshness of this common law ruling, by allowing a negligent plaintiff to recover from a negligent defendant,<sup>2</sup> where the latter by exercising little care could prevent or avoid injuring the plaintiff, who by his own negligence has placed himself in a position of peril.<sup>3</sup> The doctrine of last clear chance is an extension of the rule of contributory negligence and is not an exception to it.<sup>4</sup> The contributory negligence of the injured party will not defeat recovery if the defendant, by exercising ordinary care, might have avoided the consequences of the injured person's negligence.<sup>5</sup> When a case arises where the facts are not in dispute and are absolutely conclusive, the

19. *Baltimore Contractors, Inc. v. Bodinger*, ——— U.S. ———, 75 S. Ct. 249, 254 (1955).

1. The doctrine of contributory negligence is not modified by statute in Florida, and is a complete defense in an action for damages for personal injuries based on negligence. *General Outdoor Advertising Co. v. Frost*, 76 F.2d 127, 128 (5th Cir. 1935); *Cornell v. First National Bank*, 121 Fla. 192, 163 So. 482 (1935); *Florida Southern Ry. v. Herst*, 30 Fla. 1, 11 So. 506 (1892).

2. *Consumer's Lumber and Veneer Co. v. Atlantic Coast Line Ry.*, 117 F.2d 329 (5th Cir. 1943); *Lindsay v. Thomas*, 12 Fla. 293, 174 So. 418 (1937).

3. *White v. Hughes*, 139 Fla. 54, 190 So. 446 (1939). *Dunn Bus Service v. McKinley*, 130 Fla. 778, 128 So. 865 (1937); *Merchant's Transportation v. Daniels*, 109 Fla. 496, 502, 149 So. 401 (1933).

4. *Merchant's Transportation v. Daniels*, 109 Fla. 496, 502, 149 So. 401 (1933) "It [the doctrine] does not permit one to recover in spite of his contributory negligence, but merely operates to relieve the negligence of a plaintiff . . . which otherwise would be regarded as contributory, from its character as such."

5. *A.B.C. Truck Lines v. Kenemer*, 247 Ala. 543, 25 So.2d 511 (1946); *Gardner v. Union Oil Co. of California*, 216 Cal. 197, 13 P.2d 915 (1932); *Baker v. Reid*, 57 A.2d 103 (Del. 1948); *Nagel v. Britthauer*, 230 Iowa 207, 298 N.W. 852 (1941); *Harrison v. Eastern Michigan Motor Bus Co.*, 257 Mich. 329, 241 N.W. 131 (1932); *Schaaf v. Coen*, 131 Ohio St. 279, 2 N.E. 2d 605 (1936).

application of the doctrine of the last clear chance is for the court to determine.<sup>6</sup> On the other hand, it is well settled<sup>7</sup> that the question of negligence as the proximate cause of the injury is for jury determination where the minds of reasonable men may differ.<sup>8</sup>

The Florida Supreme Court in the case of *Ward v. City Fuel Co.*,<sup>9</sup> established the necessity of the defendant's appreciation of the situation before the last clear chance doctrine could be applied. It is upon the appreciation of the situation that the case under note revolves. The majority looked to, and considered only, the act immediately preceding the impact; namely, the deceased's swerving back into his own lane of traffic. Considered from that point of view an emergency situation was indeed created and the directed verdict justifiable. The majority was in error when the case is considered from the point of view of the dissenting justices. These justices followed the well-established approach to such problems of proximate cause; namely, that legal or proximate cause is always dependant upon *all* the facts of a particular case. The dissent stated that a jury should decide on these facts; any other conclusion would allow the defendant "to shield himself behind an emergency created by his own negligence."<sup>10</sup>

In directing the verdict the court completely ignored the defendant's duty to the plaintiff's decedent. It is accepted law in this country that if a plaintiff is helpless, then the defendant's duty to the plaintiff begins when he saw, or should have realized, the plaintiff's position of peril.<sup>11</sup> It follows then that all the facts of the situation should be reviewed by a jury to ascertain if the defendant was or was not negligent in failing to discover the deceased's peril as he was required to do by law. Witnesses in the defendant's auto testified that they saw the deceased swerving. A jury might have found, after reviewing the entire factual situation that the defendant did breach his duty in not stopping or turning off the highway into a parking lot, which evidence indicated was available and inviting.

The opinion of the court does much to confuse the approach to proximate cause and the application of the doctrine of the last clear chance. This decision departs from the established rule that proximate cause should be considered in the light of *all* the facts, as opposed to a single event

6. *Wright v. Los Angeles Ry. Corporation*, 14 Cal. 2d 168, 93 P.2d 135 (1939); *Wheeler v. Buerkle*, 14 Cal. App.2d 368, 58 P.2d 230 (1936); *Shultes v. Halpin*, 205 P.2d 1201 (Cal. 1949); *Delsman v. Bertolle*, 200 Wash. 380, 93 P.2d 371 (1939).

7. Where the evidence is conflicting or inconclusive in an action based on the last clear chance or humanitarian doctrines, the question as to whether or not the defendant could have avoided injury to the plaintiff by the exercise of reasonable care and diligence, notwithstanding the latter's contributory negligence, is for the jury. 65 C.J.S. *Negligence*, § 263 (1950).

8. *Letton v. Kitchen*, 166 Ga. 121, 142 S.E. 658 (1928). *Brown v. Atlantic Coast Line Ry.*, 79 Ga. App. 56, 52 S.E. 2d 660 (1949).

9. 147 Fla. 320, 2 So.2d 586 (1941).

10. Florida's Last Clear Chance Doctrine, *Steinhardt and Simon*, 7 MIAMI L.Q. p. 446 (1953).

11. *Wells v. Shepard*, 135 Ark. 466, 205 S.W. 806 (1918).

immediately preceding an injury, and the court by so doing, usurped the power of the jury to decide in such cases who was or was not at fault. If this decision is followed to any extent, Florida will have the rather dubious honor of being the only state allowing a negligent defendant to shield himself behind an emergency created by his own negligence.<sup>12</sup>

FRANK J. GREENE

## TORTS—DAMAGES—SURVIVAL STATUTES

The plaintiff, suing under the Wrongful Death Act<sup>1</sup> for the negligent death of his wife, alleged as damages the loss of his wife's future earnings. The trial judge disallowed this item of damages on the theory that the husband had no legal right to the wife's earnings. The plaintiff then instituted this action, as administrator, under the Florida Survival Statute,<sup>2</sup> attempting to recover for the estate the pecuniary loss through impairment of earning power the deceased could have recovered had she lived. *Held*, there can be no recovery for prospective damage to the estate under the Florida Survival Statute. *Ellis v. Brown*, 77 So.2d 845 (Fla. 1955).

At common law a person damaged by the negligent death of another could maintain no action against the wrongdoer.<sup>3</sup> In 1846, England passed a remedial statute under which specified beneficiaries could recover from a person whose "wrongful act, neglect, or default" caused the death of another.<sup>4</sup> Most of the so-called wrongful death acts enacted in this country are patterned after the English statute and use similar language in fixing the grounds upon which such damages may be recovered.<sup>5</sup> Predominantly,

12. *Lanier v. Johnson*, 186 Va. 191, 42 S.E.2d 319; *Saunders v. Temple*, 154 Va.714, 153 S.E. 691 (1930).

1. FLA. STAT. §§ 768.01-.02 (1953) "Whenever the death of any person in this State shall be caused by the wrongful act, negligence, carelessness or default of any individual . . . and is such as would, if the death had not ensued, have entitled the party injured thereby to maintain an action. . . . and to recover damages in respect thereof, then, and in every such case the person . . . who would have been liable in damages if death had not ensued . . . shall be liable in damages notwithstanding the death of the person injured. . . . Every action shall be brought by and in the name of the widow or husband . . . and in every such action the jury shall give such damages as the party or parties entitled to sue may have sustained by reason of the death of the party killed."

2. FLA. STAT. § 45.11 (1953). "All actions for personal injuries shall die with the person, to-wit: Assault and battery, slander, false imprisonment, and malicious prosecution; all other actions shall and may be maintained in the name of the representatives of the deceased."

3. *Chamberlain v. Florida Power Co.* 144 Fla. 719, 198 So. 486 (1940); *Wilkie v. Roberts*, 91 Fla. 1064, 109 So. 225 (1926); *Mock v. Evans Light and Ice Co.*, 88 Fla. 113, 101 So. 203 (1924); *Marianna & B. Ry. v. May*, 83 Fla. 524, 91 So. 553 (1922); *Nolan v. Moore*, 81 Fla. 594, 88 So. 601 (1921).

4. Lord Campbell's Act, 1846, 9 & 10 Vict. c. 93.

5. *Bowden v. Jacksonville Electric Co.*, 51 Fla. 1952, 41 So. 400 (1906); *Florida C. & P. Ry. v. Foxworth*, 41 Fla. 1, 25 So. 338 (1899); *Raisor v. Chicago & A. Ry.*, 215 Ill. 47, 74 N.E. 69 (1905); *Chicago v. Major*, 18 Ill. 349, 68 Am. Dec. 553 (1857); *Kelliher v. New York C. & H. R.R.*, 212 N.Y. 207, 105 N.E. 824 (1914); *Alfson v. Bush Co.*, 182 N.Y. 193, 75 N.E. 230 (1905).