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Last Clear Chance in Colorado

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LAST CLEAR CHANCE IN COLORADO

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What does the phrase *last clear chance* mean as defined by Colorado law? If this phrase leads one to believe that there is a separate and distinct right available against a negligent person who had the last clear chance to avoid an injury, then it is a misnomer. There is not under Colorado law a separate right of recovery based on last clear chance. There is only one right of recovery available where last clear chance is involved, and that right is based on simple negligence alone. The phrase *last clear chance* comes into the picture only as a description of the facts of the case.

The Colorado courts for the last fifteen years have very pointedly shown that a person shall at all times exercise a reasonable degree of care toward others. The rule has been clearly laid down that a person may not escape liability for a negligent act created by himself where that act was a breach of a duty owing the plaintiff, and where the act was the legal proximate cause of the plaintiff's injury.

The rule as set out above may be traced through Colorado decisions starting with *Independent Lumber Co. v. Leatherwood.*[1] In this case the plaintiff stopped at a stop sign, looked to his left and saw a truck some 400 to 475 feet away. He then put his car in gear and proceeded to make a left turn on to the street toward the approaching truck. When the plaintiff had completed about one half of his turn, the defendant struck him, causing bodily injury and damage to his car. The court in holding for the plaintiff said:[2]

> Clearly plaintiff bases his right of recovery on injuries negligently inflicted on him by defendant. A failure to exercise ordinary care for another's safety which operates as the proximate cause of injury to the latter, is the legal theory on which recovery is permitted in negligence cases.

Here the court, without quibbling, pointed out that the plaintiff's right of recovery was predicated on the negligence theory alone, and that *the last clear chance rule applies for purpose of determining the legal proximate cause of the injury.* The court went on to say:[3]

> The rule of last clear chance is one to be applied for the analysis or resolution of an extended fact situation into at least two fact situations, one of which includes the acts and omissions of the plaintiff that create the condition under which an injury occurs and this

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[1] 102 Colo. 460, 79 P. 2d 1052 (1938).
[2] *Supra,* note 1 at 462.
[3] *Id.* at 463.

> becomes merely a remote cause of it; the other including the acts and omissions of the parties subsequent to the creation of the situation, from which the proximate cause of the injury is to be asceertained.

The last clear chance rule is a method applied to analyze, resolve, or describe a factual situation—a method by which the acts of the plaintiff and the defendant can both be better explained. The factual situation described by the rule requires that the plaintiff must be in a position of impending peril created by his own negligence, and it is required that the defendant could or should have discovered plaintiff's position.

In the above case the plaintiff was admittedly negligent by not allowing the defendant truck driver the right of way as required by city ordinance. He did not see the truck from the time it was 400 feet away until he was hit. An analysis of plaintiff's position shows that he was in a situation of inextricable peril created by his negligent act.

The defendant admitted that he was driving approximately 25 mlies per hour, and that he had an unobstructed view ahead of him. Evidence was presented proving that the defendant had ample time once the plaintiff had pulled into the street to stop his truck and avoid the injury. The defendant, therefore, could have discovered the plaintiff's position if he had used reasonable care in keeping a proper lookout. If the reasonably prudent man test is used, it must be found that the defendant was negligent and in breach of a duty owing the plaintiff. The defendant could have foreseen that his failure to keep a proper lookout for the plaintiff, where in fact he was in the position to do so, was negligent. The defendant could have discovered the plaintiff's impending peril, and it was his independent and unbroken negligent act that was the proximate cause of the plaintiff's injury.

Must Prove Just As Any Other Fact

In any cause of action the plaintiff bears the burden of proving the facts of the case. *Last clear chance* is a factual situation that must be proved the same as any other fact. *Dwinelle* v. *Union Pacific R.R.*,[4] brings out this point. The plaintiff in this case had been driving parallel to the railroad. His view of the tracks was obstructed by a frosted windshield and by the bed of the truck which blocked the side window of the cab. Because of plaintiff's obstructed view, he at no time saw the approaching railroad car; therefore, he had put himself in a position of inextricable peril. The defendant was driving at normal speed and had given the proper signal for highway crossings. Evidence was offered that the defendant had seen the plaintiff before he had started on to the tracks; and that he did not attempt to stop the railroad car

[4] 104 Colo. 545, 92 P. 2d 741 (1939).

until he had actually seen the defendant start on to the tracks. By that time it was too late to avoid the collision. Evidence also was presented showing that there was a split second possibility that the defendant could have avoided the injury. This evidence, however, was not sufficient to sustain plaintiff's burden of proof. The court in holding for the defendant said, "the doctrine of last clear chance applies only where plaintiff's negligence is admitted, and he (plaintiff) has the burden of proving it (i.e. last clear chance) as any other fact."

As to this particular case the court said:

> it must be admitted that if the impending peril in which the parties found themselves was due entirely to the negligence of Perry and Dwinelle (drivers of truck) and yet was discovered by Finn (driver of railroad car), or, in the exercise of reasonable care, ought to have been discovered by him in time to avert the accident, the doctrine applies and the cause should have gone to the jury as against the company.

Once the plaintiff has sustained this burden of proof, then it is the duty of the jury to consider all of the facts presented, and from these facts determine the legal proximate cause of the injury.[5] The Supreme Court in *Denver Tramway Corp.* v. *Perisho*[6] overruled the defendant's contention that the trial court erred in its instruction to the jury relative to the last clear chance rule. The defendant claimed that the rule could not be applied in this case because in fact the plaintiff's negligence was continuously active up to the time of the injury. Therefore, since the plaintiff was contributorily negligent, the last clear chance rule was not available. The court held that the rule was applicable only when the defendant and plaintiff were both negligent. And where there was evidence that both parties had been negligent, then it was proper for such facts to be presented to the jury for their consideration. Evidence of contributory negligence does not preclude the use of the last clear chance rule; instead such evidence becomes a part of the facts to be presented along with all other facts for the jury's determination.

COLORADO FOLLOWS RESTATEMENT

The Colorado courts have found that Section 479 of the *Restatement of Torts* properly describes the last clear chance rule.[7] A quick breakdown of that section reveals that the right of recovery under the rule is based on negligence, with the limitation that the rule is not applicable unless there is a specific factual situation

[5] Denver Tramway Corp. v. Perisho, 105 Colo. 280 (1939); Lambrecht v. Archibald, 119 Colo. 356 (1949); Woods v. Siegrist, 112 Colo. 257 (1944).

[6] *Supra.*

[7] Independent Lumber Co. v. Leatherwood, *Supra,* note 1; Lambrecht v. Archibald, *Supra,* note 5; Woods v. Siegrist, *Supra,* note 5; Pueblo Transportation Co. v. Moylan, 121 Colo. ...., 1950-51 CBA Advance Sheet 184 (No. 9).

in evidence.[8] *The Restatement, therefore, is in accord with the Colorado rule. It allows recovery based on negligence alone, and it makes the use of the rule available only when a specific factual situation is present.*

The last clear chance rule in Colorado has been made simple and useful. The rule provides a means of presenting a complicated factual situation in a simple manner. We see from the Colorado decisions that the last clear chance rule is a factual situation that must be proved the same as all other facts, a factual situation that must go along with all other facts to the jury for their determination. A person seeking recovery under the rule does not have a separate and distinct cause of action; instead he has a cause of action based on negligence alone.

FEDERAL TORT CLAIMS ACT DIGEST

TIMOTHY WOOLSTON*

By passing the Federal Tort Claims Act [1] in 1946, the United States has, with certain exceptions to be noted later, consented to waive her immunity from suits founded in tort. To appreciate the full significance of the Tort Claims Act, an understanding of what has gone before is essential.

Prior to 1887, the private relief bills presented to Congress were the sole means by which a person could satisfy a tort claim against the United States. The time consuming work resulting from the consideration of all of these private bills finally prompted Congress to pass the Tucker Act [2] in 1887. The Tucker Act was directed at this congestion in Congress and it did alleviate some of the distress by extending the jurisdiction of the district courts to include claims for less than $10,000 where such claims were founded upon the Constitution, a Federal statute, an executive regulation, or a contract to which the United States was a party. Because ordinarily, simple tortious conduct is infrequently based upon a statute or regulation, the Tucker Act did nothing to rid Congress of the hundreds of claims that were based upon the simple torts of government agents.

[8] Section 479 *Restatement of Torts:* A plaintiff who has negligently subjected himself to a risk of harm from the defendant's subsequent negligence may recover for harm caused thereby if, immediately preceding the harm, (a) the defendant (i) knows of the plaintiff's situation and realizes the helpless peril involved therein; or (ii) knows of the plaintiff's situation and had reason to realize the peril involved therein; or (iii) would have discovered the plaintiff's situation and thus had reason to realize the plaintiff's helpless peril had he exercised the vigilance which it was his duty to the plaintiff to exercise . . .

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[1] 62 Stat. 992, 28 U.S.C. secs. 1346 (b), 1402 (b), 2401 (b), 2402, 2411, 2412 (b), 2671-2680 (1950). All section references are to Title 28 U.S.C. unless otherwise indicated.

[2] Sec. 1346 (a) (2).