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Negligence—Last Clear Chance—Inextricable Position Requirement in New Mexico—Burnham v. Yellow Checker Cab, Inc., 391 P.2d 413 (N.M. 1964)

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NEGLIGENCE—LAST CLEAR CHANCE—INEXTRICABLE POSITION REQUIREMENT IN NEW MEXICO*—The doctrine of last clear chance is operative in New Mexico when it appears that: (1) the plaintiff was negligent, (2) the plaintiff as a result of his negligence was in a position of peril from which he could not escape by the exercise of ordinary care, (3) the defendant knew or should have known of the plaintiff's peril, and (4) the defendant had a clear chance to avoid the injury by the exercise of ordinary care, and he failed to do so.1

When is the second requirement, that the plaintiff be in an inex- tricable position of peril, satisfied for the purpose of invoking the doctrine of last clear chance? The inextricable position requirement is satisfied when the plaintiff is in a position of peril and either (1) "physically unable" to avoid injury or (2) "totally unaware" of the impending peril.2 The "physically unable" plaintiff may invoke last clear chance if the defendant saw or should have seen the plaintiff, realized or should have realized his peril, and had a clear chance to avoid the accident.3 The "totally unaware" plaintiff, however, can invoke the doctrine only if the defendant actually saw the plaintiff.4 The purpose of this comment is to discuss the situation where a "totally unaware" plaintiff seeks to invoke the doctrine, but the defendant denies that he actually saw the plaintiff.

In Burnham v. Yellow Checker Cab, Inc.,5 the plaintiff-pedestrian was crossing to the west side of a well-lighted street.6 The plaintiff was negligent per se7 in attempting to cross at a place other than the crosswalk. Before stepping from the curb, the plaintiff looked to the south and saw the lights of a car a block or a block and a half away; the plaintiff then walked to a place near the center of the street and

3. Ibid.
4. Ibid.
5. Ibid.
6. Ibid. A test was made and there was sufficient light for reading a newspaper at the scene of the accident.
stopped. The plaintiff testified that at this point she was distracted by a car on the west side of the street. The defendant's taxicab was proceeding north and struck the plaintiff at a point some two or three feet east of the center line in the northbound lane of traffic.

The taxicab driver testified that he was looking ahead all the time and that his view was unobstructed, but that he did not actually see the plaintiff until he applied his brakes in an attempt to avoid the accident.

The trial court denied the plaintiff's request for an instruction on the doctrine of last clear chance, and entered judgment upon a verdict for the defendant. The New Mexico Supreme Court, held, Reversed and Remanded, stating that the failure to instruct the jury concerning last clear chance was erroneous. The supreme court reasoned that the requirement of inextricable position was met by the plaintiff's total unawareness of her peril, and that the defendant's denial that he actually saw the plaintiff in time to avoid the accident was not conclusive. The court applied the general rule which states that when there is evidence from which the jury could reasonably infer that the defendant actually saw the plaintiff, the determination of that issue must be left to the jury.

8. Ibid. Mrs. Burnham either stopped in the north-bound lane of traffic and did not move or she stopped between the yellow divider lines and then stepped back into the north-bound lane. This is not clear from the testimony.
9. 391 P.2d at 414.
10. Ibid.
11. 391 P.2d at 415.
12. Ibid.
13. Ibid.
14. Ibid.


'The courts have held repeatedly that it is a question of fact for the jury to determine from all the circumstances presented by the evidence whether the defendant actually knew of the plaintiff's peril; and that notwithstanding there may be a total absence of any positive testimony that the defendant actually knew of plaintiff's danger, and even though the defendant definitely denies seeing the plaintiff at all, the doctrine of last clear chance may be invoked and applied where the facts and circumstances are such as would justify the jury in finding that despite the defendant's denial of knowledge or the absence of direct testimony on the subject, he was actually aware of plaintiff's danger in time to
Merrill v. Stringer, the leading New Mexico decision on last clear chance, cannot be distinguished from Burnham on the facts or the law. In Merrill, the plaintiff-pedestrian was crossing to the north side of an east-west thoroughfare. She was running in a northwesterly direction, outside the crosswalk, and apparently was oblivious to the west bound traffic. The defendant was traveling west in the lane next to the center of the street. The plaintiff either ran or walked into his path and was seriously injured. The defendant denied seeing the plaintiff at any time prior to impact. However, the street was well lighted, and others in the area saw the plaintiff and realized her peril. The defendant's motion for directed verdict was granted. The New Mexico Supreme Court reversed, stating that the circumstances demanded that the issue of whether the defendant actually saw the plaintiff must be submitted to the jury. The court reasoned that the inextricable position requirement was satisfied by the plaintiff's unawareness; if there had been an actual seeing by the defendant, the last clear chance doctrine would apply. This holding clearly represents previous New Mexico case law and was recognized as controlling in Burnham.

Looking only at Merrill and Burnham, it would appear that New Mexico case law is well settled on the question of whether the inextricable position requirement can be satisfied by a "totally unaware" plaintiff in the face of a denial by the defendant of having actually seen the plaintiff. However, some confusion was created in this area by the decision in Bryan v. Phillips. In Bryan, the plaintiff was attempting to cross an intersection. Because there were puddles of mud and water on the street, the plaintiff took an erratic course outside the crosswalk. She was in the defendant's lane of traffic at the time she was struck by the defendant's car. The defendant was driving about twenty to twenty-five miles per hour and stated that she had not seen the plaintiff prior to the accident. At the time of the ac-


16. ibid.
17. ibid.
18. See cases cited in note 1 supra.
19. 70 N.M. 1, 369 P.2d 37 (1962).
incident, dusk had fallen and the streetlights were not on, but visibility was good.

No witnesses saw the plaintiff prior to impact. At trial, the judge refused to instruct the jury on the doctrine of last clear chance and rendered judgment upon a verdict for the defendant. The New Mexico Supreme Court affirmed, stating that the plaintiff had not shown that she was in an inextricable position at the time the defendant's car struck her, and the trial court, therefore, was correct in refusing to submit the last clear chance issue to the jury.

The Bryan opinion failed to distinguish the two factual situations, "physical inability" and "total unawareness," that satisfy the inextricable position requirement:

The evidence fails to support the contention that appellant [plaintiff] was in a position of peril from which she could not have extricated herself at any time by the exercise of ordinary care for her own safety while crossing the intersection. There is no evidence that her negligence had terminated or culminated in a perilous position from which there was no escape, or that by the use of ordinary care she could not have seen appellees' car.

This language indicates that if by the use of ordinary care, a plaintiff could have become aware of his peril, he would not be entitled to the relief offered by the last clear chance doctrine. Other language in the Bryan case refutes this interpretation:

The doctrine cannot be invoked where there is concurrent negligence such as where the injured party's negligence continues up to the very moment of injury. The exception to this is when the defendant actually knows of plaintiff's danger, has reason to know that plaintiff cannot save himself, has a last clear chance to avoid the injury by exercise of care and fails to do so. [Emphasis added.]

20. Ibid.
21. Ibid.
22. Id. at 5-6, 369 P.2d at 40.
23. Id. at 5, 369 P.2d at 39. This language is also misleading. The authorities cited in Bryan for this proposition limit the exception to situations where concurrent negligence consisted of negligent inattentiveness. Restatement, Torts, § 480, at 1257-58 (1934):

A plaintiff who, by exercise of reasonable vigilance could have observed the danger created by the defendant's negligence in time to have avoided harm therefrom, may recover if, but only if, the defendant

(a) knew of the plaintiff's situation, and
(b) realized or had reason to realize that the plaintiff was inattentive
The basis for the Bryan decision was the determination that the plaintiff was physically able to remove herself from her perilous position; and, therefore, was not in an inextricable position. Apparently, the court did not consider the total unawareness aspect of the inextricable position requirement. The exception that the last clear chance doctrine applies when the plaintiff has been totally unaware does not arise unless the defendant actually saw the plaintiff in time to have avoided the accident. The plaintiff in Bryan did not contend on appeal that the defendant actually saw the plaintiff at any time prior to impact. When one realizes that the Bryan opinion was not dealing with a total unawareness situation, the apparent confusing language of the opinion is clarified.

What would have been the result in Bryan if the total unawareness aspect of the inextricable position requirement had been considered? It is important that the defendant’s denial of actual seeing is not conclusive and need not be conceded. In Bryan, there was no dispute that the plaintiff was totally unaware of the impending peril. Therefore, if the plaintiff had not conceded that the defendant was unaware of the plaintiff’s presence, the court would have been presented with the question of whether the circumstances were such that the question of actual seeing required a determination by the jury.

What circumstances should be considered in determining whether a jury question has been raised? It is clear from Merrill and Burnham that a denial of actual seeing by the defendant is not conclusive, even when uncontradicted by direct evidence. Circumstan-

and therefore unlikely to discover his peril in time to avoid harm, and

(c) thereafter is negligent in failing to utilize with reasonable care and competence his then existing ability to avoid harming the plaintiff.

24. Chief Justice Compton was not confronted with that aspect of last clear chance involving the inattentive plaintiff coupled with an actual seeing by the defendant. The plaintiff did not contend on appeal that there had been an actual seeing. In fact, the plaintiff conceded that there was no actual seeing by the defendant prior to impact. Brief for Appellant, p. 11, Bryan v. Phillips, 70 N.M. 1, 369 P.2d 37 (1962):

The Defendant testified that she did not see any pedestrians (TR 158-159). There was no evidence introduced to controvert this fact. Therefore, it must be concluded that Defendant did not know of Plaintiff's presence and therefore could not have known of her peril. The question still remains of whether Defendant should have known of Plaintiff's peril.

25. Ibid.

tial evidence may be considered by the jury in determining the question of actual seeing.\textsuperscript{27} In \textit{Burnham}, the court considered the lighting conditions, the fact that other witnesses saw the plaintiff, and the testimony that the defendant was looking straight ahead, and decided that these facts were sufficient to require a jury determination.\textsuperscript{28}

In the California case of \textit{Hoy v. Tornich},\textsuperscript{29} cited with approval in \textit{Merrill}, the defendant contended that because the direct evidence showed that the defendant did not see the plaintiff, the doctrine of last clear chance was inapplicable. The court held otherwise, saying: “If the defendant in this case was looking straight ahead, as he testified that he was, he \textit{must have seen the plaintiff}.\textsuperscript{30}

In \textit{Bryan}, the defendant was looking straight ahead and could see over 100 feet. She was driving slowly, and had better than normal vision. While this evidence would apparently be enough to require submission of the “actual seeing” issue to the jury under the rule laid down in \textit{Hoy}, it is clear that a trial court will more easily be persuaded to submit the issue to the jury if the plaintiff can show that other witnesses did in fact see him. These “other witnesses,” of course, were present in \textit{Merrill}, but not in \textit{Bryan}. There was a reasonable question, however, and the argument should have been made in \textit{Bryan} that the circumstantial evidence required a submission to the jury on the question of whether the defendant actually saw the plaintiff prior to the impact.

It is important to note that anytime the circumstances indicate that the defendant \textit{should} have seen the plaintiff, as in \textit{Merrill} and \textit{Burnham}, the question of whether he actually saw the plaintiff must be determined by a jury regardless of the defendant’s denial.

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\textsuperscript{27} Ibid.
\textsuperscript{28} \textit{Burnham v. Yellow Checker Cab, Inc.}, 391 P.2d 413 (N.M. 1964).
\textsuperscript{29} 199 Cal. 545, 250 Pac. 565 (1926).
\textsuperscript{30} 250 Pac. at 569. (Emphasis added.)