105.15 LAST CLEAR CHANCE—BURDEN OF PROOF; DEFINITION; FINAL MANDATE.[1]

The (*state number*) issue reads:

"Did the defendant have the last clear chance to avoid the plaintiff's injury or damage?"

You will answer this issue only if you have answered the (*state number*) issue as to the defendant's negligence "Yes" in favor of the plaintiff, and the (*state number*) issue as to the plaintiff's contributory negligence "Yes" in favor of the defendant.[2] Ordinarily such an answer on the contributory negligence issue would be a complete defense. However, there is an exception, called the Last Clear Chance Doctrine, under which the plaintiff's negligence is excused and will not prevent the recovery of damages.

On this (*state number*) issue the burden of proof is on the plaintiff. This means that the plaintiff must prove, by the greater weight of the evidence, the following four things:[3]

<u>First</u>, that the plaintiff negligently placed [himself] [herself] in a position of peril[4] from which [he] [she] could not escape by the exercise of reasonable care.

<u>Second</u>, that the defendant knew, or by the exercise of reasonable care should have discovered,[5] the plaintiff's position of peril and inability to escape from it.

<u>Third</u>, that the defendant had the time and means[6] to avoid [injury] [damage] to the plaintiff and failed to exercise reasonable care to do so;

<u>And Fourth</u>, that the defendant negligently failed to use the available time and means to avoid injury, and that such failure proximately caused the plaintiff's [injury] [damage].

Finally, as to this (*state number*) issue on which the plaintiff has the burden of proof, if you find, by the greater weight of the evidence, that the plaintiff negligently placed [himself] [herself] in a position of peril from which [he] [she] could not escape by the exercise of reasonable care and that the defendant knew, or by the exercise of reasonable care should have discovered, the plaintiff's position of peril and inability to escape from it; and that the defendant had the time and means[4] to avoid [injury] [damage] to the plaintiff and failed to exercise reasonable care to do so; and that such failure proximately caused the plaintiff's [injury] [damage]; then it would be your duty to answer this issue "Yes" in favor of the plaintiff.

If, on the other hand, you fail to find any one or more of these things, then it would be your duty to answer this issue "No" in favor of the defendant.

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1. If this issue of Last Clear Chance is submitted, the last sentence on N.C.P.I.—Civil 104.10 Motor Vehicles Volume should be deleted from that instruction. *See* N.C.P.I.—Civil 104.10 Motor Vehicle Volume, note 3.

2. This sentence will be accurate only when there is a single defendant and no agency issue. In more complex situations the judge must give precise instructions as to what answers to what issues will call for an answer to this issue.

3. *Vancamp v. Burgner*, 328 N.C. 495, 498, 402 S.E.2d 375, 376-77 (1991) (quoting *Clodfelter v. Carroll*, 261 N.C. 630, 634-35, 135 S.E.2d 636, 638-39 (1964)).

4. Although a pedestrian who steps in front of an oncoming vehicle is "obviously in peril before she steps directly in front of a the car," such position of peril "must be helpless or inadvertent" to invoke the doctrine of last clear chance. *Culler v. Hamlett*, 148 N.C. App. 372, 379, 559 S.E.2d 195, 201 (2002) (citation omitted). Last clear chance does not apply "where the injured party is at all times in control of the danger and simply chooses to take the risk." *Patterson v. Worley*, ___ N.C. App. ___, ___ 828 S.E.2d 744, 748 (2019) (quoting *Williams v. Odell*, 90 N.C. App. 699, 704, 370 S.E.2d 62, 66 (1988)).

A pedestrian's contributory negligence places that person in a position of peril if, *immediately preceding the accident*, he or she is unable to escape or avoid injury by the exercise of reasonable care. *Overton v. Purvis*, 154 N.C. App. 543, 549, 573 S.E.2d 219, 224 (2002) (Thomas, J., dissenting), *rev'd*, 586 S.E.2d 265, 357 N.C. 497 (2003) (*reversing for reasons stated in the dissenting opinion of the Court of Appeals*).

5. *See Hofecker v. Casperson*, 168 N.C. App. 341, 349, 607 S.E.2d 664, 669-70 (2005) (Tyson, J., dissenting), *rev'd* 360 N.C. 159, 662 S.E.2d 489 (2005) *(reversed for reasons stated in dissenting opinion of the Court of Appeals*) (summary judgment for the defendant proper on last clear chance issue where plaintiff alleged solely that defendant's "vehicle struck plaintiff while plaintiff was located somewhere in the roadway.

This allegation, standing alone, without a forecast of evidence to show [defendant] failed to maintain a proper lookout or that he could have avoided the accident is insufficient to withstand a motion for summary judgment." (Examples cited in the case include that plaintiff "failed to forecast any evidence [defendant] (1) was driving at a 'greatly excessive speed,' (2) 'had a view of 1,200 to 1,500 feet [or any other significant distance] before the collision,' (3) 'could have moved either to the left or right had he seen' plaintiff and avoided the accident, (4) was preoccupied or distracted prior to the accident; or (5) failed to abide by the rules of the road or traveled in the wrong lane of traffic."). Plaintiff thus "failed to forecast any evidence to show [defendant] was speeding, not paying attention, failed to maintain a proper lookout, or would have reasonably discovered plaintiff's position." *Id.*, 168 N.C. App. at 349, 607 S.E.2d at 670 (citations omitted)).

6. Elaboration will be necessary when lack of means is due to the negligence of the defendant. "If the jury found that a headlight would have enabled the defendant, by due diligence on the part of its servant, to have seen the intestate in time to have stopped the train before reaching him, then the failure to provide one and have it at the front was a continuing negligent omission of duty, the performance of which would have given the defendant the last clear chance to prevent the injury and therefore have made its negligence the proximate cause of it." *Lloyd v. R.R.*, 118 N.C. 1010, 1013, 24 S.E. 805, 806 (1896).