

1986

# Joshua Fisher by and through his general guardian Carla Fisher v. Warren Trapp : Reply Brief

Utah Supreme Court

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C86-0114

IN THE UTAH SUPREME COURT

JOSHUA FISHER, by and through )	)
his general guardian, )	)
CARLA FISHER, )	)
Appellant, )	)
vs. )	Civil No. C86-0114
WARREN TRAPP, )	)
Respondent. )	Category No. 13(b)
)	)
)	)

APPELLANT'S REPLY BRIEF

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POINT I

POST-ACCIDENT FLIGHT IS ADMISSIBLE  
TO SHOW NEGLIGENCE

Evidence of post-accident flight is relevant to show negligence by creating an inference of consciousness of responsibility, an inference of improper lookout, or of recklessness. Appellant's brief, Point I, p.4. Trapp would create six special (and arbitrary) categories into which post-accident flight must fall before it is admissible. These special categories are not found in the Utah Rules of Evidence, nor are they stated in the cases themselves.

For example, post-accident flight was admitted in Brooks v. E.J. Willig Truck Transp. Co., 255 P.2d 802, 807 (Cal. 1953) because it is "evidence of a consciousness of responsibility for an accident," not because there were no other eyewitnesses. It was admitted in Jones v. Strilecki, 231 A.2d 558, 561 (N.J. 1967) to create "an inference of consciousness of lack of care and of liability for the occurrence." No mention was made of a special rule of admissibility to further the purpose of a statutory fund which was the defendant. The other cases cited by Fisher likewise do not artificially limit their holdings to the six special categories asserted by Trapp.

Two of the four cases cited by Trapp to exclude evidence of a hit-and-run are clearly distinguishable. In Barnes v. Gaines, 668 P.2d 1175 (Okla. Ct. App. 1983),

flight from the accident scene was done by means of a separate crime, i.e. stealing the investigating officer's police car. Trapp's subsequent flight did not involve such outrageous behavior. And, in Springer v. Adams, 140 S.E. 390 (Ga. App. 1927), the failure to stop after an accident was pleaded as an act of negligence causing the accident. Because it clearly did not cause the accident, a demurrer to the allegation was properly sustained.

In sum, evidence of Trapp's hit-and-run was relevant and probative. It should have been presented to the jury. Without the evidence, Trapp's testimony stands basically unimpeached; with it, a jury verdict for Fisher is probable.

## POINT II

### THE PROBATIVE VALUE IS NOT SUBSTANTIALLY OUTWEIGHED BY UNFAIR PREJUDICE

The trial court has discretion to weigh relevant evidence against unfair prejudice, and exclude evidence under Rule 403. In this case, however, Trapp has simply failed to identify what unfair prejudice or impermissible inference the evidence may create. The seventeen cases cited by Fisher in favor of admitting hit-and-run evidence do not mention such unfair prejudice, nor do several other recently uncovered cases. See Olofson v. Kilgallon, 291 N.E.2d 600 (Mass. 1973); Peterson v. Henning, 452 N.E.2d 135 (Ill. App. 1983).

Of the four cases cited by Trapp in opposition, only Barnes v. Gaines, supra, weighed probative value against unfair prejudice, in that case the prejudice arising

from the defendant's theft of the investigating officer's police car. Springer v. Adams, supra, was decided on pleading grounds, while Freeman v. Anderson, 651 S.W.2d 450 (Ark. 1983) and Clark v. Mask, 98 S.2d 467 (Miss. 1957) were apparently decided on relevancy grounds.

Utah authority cited by Trapp is not to the contrary. In Reiser v. Lohner, 641 P.2d 93 (Utah 1982) the prejudicial evidence was not relevant to causation or any other issue in the case. And in Pearce v. Wistisen, 701 P.2d 489 (Utah, 1985) the prejudicial evidence had two defects. First, it was remote from the accident, both in time and in place. Second, the evidence revealed to the jury that plaintiff's son had violated religious standards held by plaintiff, and most-likely by the jury as well. In contrast, Trapp's post-accident flight was immediate, both in time and place. Second, it does not introduce an extraneous issue, such as religion, which might unfairly influence a jury.

Before the trial court can use its discretion to weigh relevance against prejudice, the unfair prejudice must be identified. The trial court's remark that hit-and-run evidence would "inflame the jury" merely states a conclusion. (Record at 272-273). Because there is no unfair prejudice to Trapp from hit-and-run evidence, Trapp cannot take refuge in the trial court's Rule 403 discretion.



POINT III

FISHER LAID AN ADEQUATE FOUNDATION  
FOR SHUPE'S TESTIMONY

An expert, like Shupe, must have sufficient knowledge of the essential facts of a case to render an intelligent opinion. Edwards v. Didericksen, 597 P.2d 1328 (Utah 1979). Shupe gained the necessary knowledge by visiting the accident site, measuring it, reading deposition testimony, reviewing the police report and conducting tests. (Record at 321-323, 326, 331, 339-41). An adequate foundation was thereby laid for his opinion as to the cause of the accident. Edwards v. Didericksen, supra.

Shupe's opinion (excluded by the court) as to the cause of the accident was inattentiveness by Trapp. (R. at 334.) Trapp claims that Fisher needed to place in evidence Trapp's position when he first should have seen Fisher. (Respondent's Brief, p.24.) Assuming such an artificial foundation is required, Fisher did place that point into evidence. Shupe testified that Trapp was about 146 feet from the point of impact when Fisher began to cross the street. (R. at 338-339.) Shupe assumed that point to be the place where Trapp first should have seen Fisher.

Trapp objected to Shupe's conclusion that he was inattentive on the ground Shupe did not consider the lighting or passing cars which may have blocked his view. (R. at 332.) The jury was not required to believe Trapp's claim that it was too dark to see Fisher, and that passing cars may have blocked his vision. Likewise, Shupe was not required to

assume the truth of Trapp's claims either, while arriving at his opinion. Shupe's testimony that Trapp's inattention caused the accident was therefore improperly excluded. The subsequent admission of Shupe's testimony on rebuttal weakened the testimony by placing it in an unfair light. Appellant's Brief, Point VII, p.14.

#### CONCLUSION

Evidence that Trapp was a hit-and-run driver is relevant to show a consciousness of guilt, improper lookout, recklessness and to impeach his testimony. While that evidence may "inflame" the jury to draw such permissible inferences, it is not unfairly prejudicial to Trapp. Thus, the trial court did not have the discretion to exclude post-accident flight under Rule 403.

Furthermore, Fisher's expert, Shupe, was wrongfully prevented from telling the jury that Trapp's inattentiveness caused the accident. Shupe's calculations of Trapp's position when Fisher began to cross the street firmly grounded his opinion on the facts of the case. These two errors raise a reasonable likelihood that Fisher would have received a more favorable result had there been no error. This case should be remanded for a new trial.

DATED this 22 day of December, 1986.


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Attorney for Appellant

By: Donald J. Jozanski

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above REPLY  
BRIEF OF THE APPELLANT was mailed, U.S. postage prepaid,  
this 22 day of December, 1986 to all counsel  
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