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State of Utah v. Jack L. Clark : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

THE STATE OF UTAH,

Respondent,

— vs —

JACK L. CLARK,

Appellant.

Case No.
7371

FILED

FEB 25 1935

Clerk, Supreme Court

APPELLANT'S BRIEF

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APPELLANT'S BRIEF

STATEMENT OF FACTS

Appellant was convicted of the crime of involuntary manslaughter, by a verdict of the jury, on April 12, 1949. The complaint arose out of an automobile accident which occurred on December 16, 1948, approximately 11:30 p.m., at or near 2800 South State Street, in Salt Lake County. Prior to the accident the defendant had been operating a 1940 Buick automobile in a northerly direction on State Street. With him were the deceased and two other young people riding in the front seat and five other people riding in the rear seat, making a total of nine people in the automobile. The highway was icy and slippery, but defendant

was operating his car at about the same speed as other cars ahead of him when his car began to slide to the left over across the center line and into the path of a south-bound Packard automobile being operated by Jack R. Price. Before either of the two drivers were able to reduce the speed at which they were traveling the automobiles came together head on, injuring several of the passengers in defendant's automobile and resulting in the death of John Dale Cutler, a passenger in the front seat.

The accident was investigated by the Highway Patrol and South Salt Lake police some time after it had occurred and Jack L. Clark was arrested and charged with the crime of involuntary manslaughter, of which crime he was later convicted. It is from that verdict and the judgment entered thereon that this appeal is taken. Because the principal point raised by this appeal is the question of the sufficiency of the evidence, a more detailed statement as to the testimony of the various witnesses will be given later.

At the conclusion of the State's case, defendant made a motion for dismissal upon the ground that the evidence was insufficient to "establish criminal negligence in the operation of the vehicle by the defendant at the time and place of the accident." (R. 124) This motion was denied by the court; and the defendant thereupon submitted evidence which in many respects agreed with the testimony of the witnesses for the prosecution, but which evidence also more fully explained the reason for defendant's automobile sliding into the opposite lane of traffic.

The court, in its instructions to the jury, submitted to them the question of whether the defendant was guilty of either of two alleged unlawful acts: (1) that the defendant

drove an automobile at a rate of speed greater than was reasonable and prudent under the conditions and having regard to the actual and potential hazards then existing; and (2) that he drove an automobile to the left side of the center of the roadway while overtaking and passing another vehicle proceeding in the same direction at a time when the left-hand side of the highway was not free of oncoming traffic for such a sufficient distance ahead as to permit him to complete the pass and return to the right-hand side of the highway in time to avoid a collision with an automobile proceeding in the opposite direction. (R. 14, 15)

Defendant, in addition to making a motion for dismissal for insufficiency of the evidence, excepted to the court's instructions submitting to the jury either of the foregoing alleged unlawful acts upon the ground that the evidence was insufficient to establish either as an act of "reckless conduct, or conduct evincing a marked disregard for the safety of others." (R. 155, 156) Defendant also excepted to the refusal of the court to give defendant's requested instruction to the effect that "skidding or sliding of an automobile on a slippery highway is not in and of itself evidence of operating an automobile with reckless or wanton disregard for the safety of others." (R. 156) And it is the alleged errors of the trial court in these particulars that form the basis for this appeal.

STATEMENT OF POINTS

Appellant relies upon the following points for a reversal of the verdict and judgment of conviction in the court below:

1. The evidence was insufficient to show that defendant was guilty of "reckless conduct, or conduct evinc-

ing a marked disregard for the safety of others." Particularly, there was insufficient evidence from which the jury could conclude either

- (a) that the defendant drove his automobile at a speed greater than was reasonable and prudent, having regard for the actual and potential hazards then existing; or
- (b) that the defendant drove his automobile to the left of the center of the highway in an attempt to overtake and pass another vehicle proceeding in the same direction.

2. In giving its Instruction No. 7, the court improperly failed to instruct the jurors that they must all agree upon one or both of the alleged acts of wilful or wanton misconduct.

3. The court improperly failed to give defendant's requested Instruction No. 2, to the effect that the mere fact "that an automobile skids or slides while proceeding along a wet or slippery street is no evidence that the party operating said automobile is operating the same at an excessive rate of speed or in a careless or negligent manner."

ARGUMENT

1. THE EVIDENCE IS INSUFFICIENT TO SUSTAIN THE VERDICT.

Six witnesses were called on behalf of the State, to-wit: Jack R. Price (the driver of the other vehicle involved in the accident), Van E. Porter (a photographer who took some pictures at the scene of the accident some time after it occurred), Donald W. Rice (a passenger in defendant's

automobile), and three Highway Patrolmen who participated in investigating the accident (Russell Cederlund, Charles G. Fogle, and Raymond DeVine). In order that a complete picture be obtained of the State's case, the testimony of these witnesses will be summarized.

Jack R. Price testified that he was driving a 1947 Packard sedan automobile belonging to Dr. Ellertson of Murray, Utah, in a southerly direction on State Street in the lane next to the center of the highway; that he had traveled in the same lane most of the way down State Street, except when passing other cars. (R. 46, 47) It was cold and the streets were continually icy—very icy. He had observed that condition earlier in the evening as he drove up State from Murray. (R. 47, 48) There were no cars immediately ahead of him as he traveled south, and as he neared the point where the accident occurred he was traveling about 35 miles an hour. (R. 48) On cross-examination Mr. Price admitted he had told the officers immediately after the accident that he was traveling between 30 and 40 miles an hour; that he could have been going a little faster than 35 or a little slower. (R. 55) During the moments before the accident and up to the time it occurred, he did not change the course of his automobile from one lane of traffic to another. (R. 49) He observed four or five automobiles approaching from the south in a normal fashion, when one of the automobiles came over to the west side of the highway “into my line of traffic, and I would estimate it would be two or three hundred feet down the highway.” (R. 49) At that time, upon suggestion of the prosecuting attorney (and over objection of defense counsel) the witness further stated that he thought the other car was attempting to pass the other cars ahead. (R. 49,

50) However, on cross-examination the witness admitted that he could not tell from the movement of the other car what the driver was attempting to do; that he didn't know how the other car got into the lane in which the witness was traveling. Thereupon the court determined that it had been wrong in overruling defendant's objection to the testimony in this respect and admonished the jury to disregard what the witness said as to "what this witness thought the defendant was trying to do." (R. 57, 58)

At the time the northbound automobile came into the lane occupied by the southbound car, the witness testified that he couldn't tell from that distance whether the other automobile was skidding or not. (R. 57) At that time the cars were between two hundred and three hundred feet apart. From then, until the cars were about 50 feet apart, the witness did nothing to turn into another lane of traffic to avoid an accident, but continued in a straight course down the highway. (R. 59) Immediately prior to the time the car came over into the wrong lane, there was the normal procession of cars going northward and there were no other cars in the immediate vicinity going south. (R. 59, 60) When the other car came within 50 feet of the witness he observed that it was then in the process of skidding. (R. 57) He further admitted that he had more than one and one-half seconds (after allowance for reaction time) in which to change the course of his automobile had he desired to do so after he first saw the other car come into his lane of travel, but that he did nothing to avert the accident. (R. 62)

Donald Rice, who was a passenger in defendant's automobile, testified that he had been with the deceased on

the day of the accident, and that the two of them had met the defendant up town. After they met they went out to the Municipal swimming pool and from there to the Stork Club on South State Street, approximately 34th South. (R. 70, 71) Altogether there were five boys in the crowd. At the Stork Club they met four girls and the group danced and sat around for approximately an hour and a half, during which time two pitchers of beer were consumed—two glasses for each person. (R. 70-72) About 11:15 p.m. the group (nine in all) left the Club and got into the defendant's automobile and started up State Street. The defendant, Helen Johansen, John Dale Cutler (the deceased), and Ruby Aldrich sat in front while the witness and four others occupied the rear seat. (R. 72, 73) They were going to the home of the witness, who lived just east of State Street on Whitlock Ave. (2500 South). (R. 73)

As defendant drove north along State Street, there was nothing unusual about his driving, nor did the car skid at any time until just before the accident. As the car started up from 33rd South (where they had stopped for a traffic light) the wheels spun briefly before getting traction, but otherwise everything was alright. "We was going down State Street normal and everybody talking, and felt the back end start sliding around" and right after that the accident occurred. (R. 74, 75) The witness estimated the speed of defendant's car to be approximately 30 to 35 miles per hour although he did not look at the speedometer. (R. 76) After the accident and before the police arrived defendant's automobile was moved from the position it was in when it first came to rest. (R. 77) The witness further stated that the hood of defendant's automo-

bile was lying right beside the car after the accident, but that it was picked up and moved off the street before the police came to investigate. (R. 78)

On cross-examination Donald Rice re-affirmed that the automobile was traveling northward between thirty and thirty-five miles per hour; that nothing unusual occurred until he felt the back end go around—toward the left—causing the automobile to go over onto the opposite side of the road; that prior to the skidding the car had been traveling in the lane next to the center of the road; (R. 79) that he knew of nothing that could have caused the automobile to skid unless the car struck an icy spot. The road was bare in places and icy in other places. (R. 81, 82)

Van E. Porter, a press photographer, testified that at approximately 12:15 a.m. on the morning of December 17, 1948, he took some photographs of two automobiles at or near 2800 South State Street. (R. 63) Exhibits A and B were taken showing the damaged condition of a Packard automobile; (R. 63) while Exhibits C and D showed the damaged condition of a Buick automobile. (R. 64) He also took a photograph of what appeared to be a motor from the Buick automobile as shown by Exhibit E. (R. 65) On cross-examination he admitted that his purpose in taking the pictures (Exhibits A to E, inclusive) was so that they might be published in connection with a news item on the accident and that his attention was directed particularly to the damaged portions of the cars, his object being to accentuate the damaged areas. (R. 66, 67) He also testified that he had no way of knowing how the two

vehicles or the motor happened to be in the position they were at the time he took the pictures.

Russell Cederlund, a State Highway Patrolman, personally investigated the accident, arriving at the scene shortly after midnight, (R. 91) and made certain measurements as to the location of the vehicles and objects on the road. From his observations he prepared a diagram which was introduced in evidence as Exhibit F. (R. 93) Near the bottom of the diagram, the officer marked an "X" to indicate the "possible point of impact" of the two automobiles. (R. 94) The evidentiary factors considered by him in arriving at this point were the debris, skid marks, gouge marks, and scratches on the highway. (R. 94) However, the officer did not explain that while these evidentiary factors were scattered over a considerable area he was able to pinpoint the point of impact of the automobiles. Obviously the cars came together in such a manner that the entire front portions of both cars collided, along with parts of the sides of each. And whether the officer took the center of the area involved as being the point of impact, or whether his measurements were made from one side or the other of such area is not disclosed by the record. His measurements indicated that the point "X" was 16 feet west of the center of the highway and 12 feet east of the west edge of the hard surface. Twenty-five feet northwesterly from the point "X" was located the Packard automobile, facing in an easterly direction, while 77 feet northerly from the same point, the Buick automobile was found, upright, and facing in a northeasterly direction. The motor was located by the officer off the highway, south and east of the Buick, approximately 75 feet, while the hood was north and west off the highway, a distance

of 177 feet from the Buick automobile. (R. 94, 95) He further testified that the highway was icy in the portion which had been used by the traffic, but that on each side of the icy traveled way was an area of hard packed snow. (R. 98)

The officer then identified Exhibit F as being a statement taken by him and officers DeVine and Fogle from the defendant at the County Hospital approximately one and one-half hours after the accident (R. 100) In this statement the defendant purportedly admitted he had had 6 or 7 beers at the Stork Club, although the officer admitted that at the preliminary hearing he had testified from his independent recollection that the defendant had said 3 or 4 beers when giving the statement. (R. 104, 105) He also testified that both at the scene of the accident and later at the hospital the defendant appeared in all respects to be normal and in complete control of his faculties, except for being upset and nervous. There was nothing irregular about any of his activities or his talking or anything else. (R. 113, 114)

Exhibit F also contains a purported remark by the defendant to the effect that he was about to pass another car when it pulled into the lane in which defendant was driving thereby causing defendant to apply his brakes, which resulted in his car skidding. In explanation of this statement the officer testified that the defendant told him that as the defendant was proceeding in the lane next to the center of the highway, a car to his right (in the center lane for northbound traffic) pulled over in front of the defendant's automobile so that he was required to slow up and that in attempting to do so his car started to skid

and went out of control. (R. 106) State Street at the place where the accident occurred is normally a six lane highway—three lanes for traffic in each direction. Apparently on the evening of the accident, there were at least two lanes being used by traffic in each direction, although the officer was unable to state whether one or two lanes were being used by traffic that evening. (R. 108, 109)

The officer admitted on cross-examination that he did not know how or when the vehicles and the motor and hood arrived at the point where he measured them to be in his investigation. (R. 106, 107) Although the Buick motor was apparently severed from its mountings, those mountings were made of rubber. (R. 114)

Officer Charles Glen Fogle testified that he was with Officer DeVine and that they were the first officers to arrive at the scene of the accident. (R. 117) While he made no measurements (R. 119) he observed the general location of the cars and objects and believed that they were in the position shown by Officer Cederlund. (R. 117) He was further present when Officer Cederlund took the statement from the defendant and he witnessed it. (R. 118, 119)

Officer Raymond DeVine assisted Cederlund in taking the measurements (R. 121) and later was present when defendant's statement was taken, which statement he witnessed. (R. 122)

The foregoing evidence is substantially everything testified to by the witnesses for the State in support of charge of involuntary manslaughter. In fact, the evidence adduced on behalf of the defendant (after the Court had denied

defendant's motion to dismiss) substantially corroborated the testimony of Donald Rice, one of the State's witnesses. But it did go further and disclose where the Buick motor was immediately after the accident and also further explained the reason for defendant's automobile going into a skid and sliding over onto the wrong side of the highway. Since there is no dispute as to such evidence it is also summarized, as follows:

Victor W. Jones, a witness for the defendant, testified that he arrived at the scene of the accident shortly after it occurred and prior to any police officer; that he helped to right the Buick automobile which was lying on its side; and that thereafter he observed the motor lying just east of the center line of the highway. In lifting up the Buick car it was moved to the west so that the car was then just west of the center and the motor was lying just east of the center line of the highway. (R. 127, 128)

Jack L. Clark, the defendant, in addition to corroborating the witness Rice as to the people who were riding in the car; (R. 137) their destination; (R. 137) the speed at which they were traveling; (R. 144) the condition of the road—to the effect that it was bare in spots and icy in spots; (R. 138) and the automobile was proceeding normally in the lane next to the center prior to the time it began to skid (R. 139), also explained the cause of the car skidding onto the wrong side of the road substantially as contained in the written statement taken by Officer Cederlund, but in more detail. He testified that as he stopped for the traffic light at 33rd South he was in the middle of the three lanes for northbound traffic; (R. 138) that as he started up, he waited until the cars to his left

went on ahead and then he moved over into the lane next to the center and proceeded in the line of traffic northward; (R. 139). As they were traveling along—the car ahead being about 50 feet in front of the Buick car, defendant testified that a car in the lane to his right (the middle lane for northbound traffic) proceeded to pull over into the lane in which defendant was traveling and immediately ahead of his car, thereby requiring him to attempt to slow up, in order to keep from striking the other car or at least coming too close to it. Immediately upon his applying the brakes he felt the back end go out and the car skidded to the left into the lane immediately west of the center line of the highway. (R. 140) He saw the other car coming and cramped his wheels to see if he could get out of its way, but was unable to do so and the cars collided. (R. 141).

It therefore appears that there is nothing inconsistent between the testimony of the defendant and that of the State's witnesses, although defendant's evidence is somewhat more explanatory. There is some conflict in the evidence as to whether the street was icy all over or whether there were some bare spots. Rice and the defendant testified that there were bare spots in the road, while Jack R. Price testified that the road was icy all over the traveled portion. Be that as it may, it is defendant's position that the foregoing evidence is insufficient to establish wilful, wanton, or reckless conduct in the manner in which he operated his automobile.

(A) *The evidence is insufficient to prove that defendant drove at an excessive rate of speed.*

The direct and uncontroverted testimony of the state's witnesses is to the effect that defendant was operating his automobile at a speed of from 30-40 miles per hour. Although there is some conflict in the evidence as to how slippery the streets were (some witnesses testifying that the road was bare in spots while others testifying that it was icy all over), there is no dispute that the general road conditions were the same on the east side of the center of the highway as they were on the west side of the center. The evidence is further uncontroverted that the witness, Jack R. Price, was traveling southward immediately to the west of the center of the highway, at a speed of approximately 35 miles per hour—it may have been a little more or a little less. It is also undisputed that prior to defendant's car going into a skid onto the wrong side of the road, it was traveling in a normal fashion in the line of cars proceeding northward along State Street. While the evidence does not disclose the posted speed limit along State Street, the court can take judicial notice of the fact that the prima-facie speed limit for nighttime driving on the highways of the state is 50 miles per hour. Since defendant was traveling no faster than the other cars along the highway on the evening in question, and in view of the further fact that such speed was less than the prima-facie speed limit, there was no evidence to submit to the jury on the question of excessive speed.

When defendant argued this point to the court on the motion for a new trial, it was contended on the part of the state that, notwithstanding the direct, positive and uncontroverted testimony of the witnesses to the effect that defendant was driving in a normal and reasonable fashion with the other cars, nevertheless, the physical evidence was

such as to indicate that defendant was driving at an excessive rate of speed. The so-called physical evidence relied on consisted of the officer's observation that the Packard automobile was found in a position 25 feet north of the "possible point of impact," while the Buick automobile continued to travel northerly for a distance of approximately 77 feet from such point of impact. Assuming the measurements to have accurately placed the automobiles after the point of impact—and before either had been moved—the mere fact that the automobiles upon colliding caused one of them to bounce back a short distance, particularly where the collision occurred on icy streets, is certainly no evidence upon which to sustain a conviction of reckless and wanton misconduct in operating an automobile at an excessive speed.

In the first place, such evidence itself along with other evidence of a similar character is circumstantial and inconclusive and where a conviction of a crime rests upon circumstantial evidence, it has long been determined that such circumstantial evidence must be established with certainty and must exclude every other reasonable hypothesis, except the guilt of a defendant. In the case of *People v. Bearden*, 290 N. Y. 478, 49 N. E. (2d) 785, the defendant was convicted of driving an automobile in a "reckless and culpably negligent manner," whereby two persons were killed. The evidence in support of the conviction was circumstantial and the prosecution argued that the inferences "fairly to be drawn" from the evidence were sufficient to be submitted to the jury. In setting forth the principle of law applicable to circumstantial evidence, the court held:

“Where, as in the present case, the defendant’s conviction rests solely upon circumstantial evidence, we examine the record in the light of the rule that the facts from which the inference of defendant’s guilt is drawn must be established with certainty—they must be inconsistent with his innocence and must exclude to a moral certainty every other reasonable hypothesis.”

In the instant case the trial court failed in any way to instruct the jury as to the law applicable to circumstantial evidence, so that should it now be argued that there was circumstantial evidence sufficient to justify the court in submitting the matter to the jury, the court did not do so upon that theory at all, but upon the theory that the direct evidence of the witnesses was sufficient from which the jury could conclude that defendant drove at an excessive rate of speed.

Other physical factors involved were the location of the Buick motor and the hood at the time the police investigated the accident, the extreme damage done to both of the automobiles in question, and the fact that parts of the automobiles appeared to be scattered over a wide area. This evidence is explained by the State’s own witnesses, who testified that the hood had been moved off the highway before the police arrived, and that the investigation did not take place until some time after the accident, during which time the Buick automobile had been righted and moved and an opportunity given for parts to be scattered about the highway by passing motorists or onlookers. Neither was there an attempt on the part of the State to interpret the physical evidence by expert testimony, nor to reduce the factors to a matter of opinion.

As a matter of fact, the evidence was such that it could not be reduced in any way to a conclusion as to any speed on the part of either the southbound automobile or the automobile being operated by the defendant. The fact that the impact might have caused the southbound car to rebound 25 feet would not establish greater speed on the part of the defendant's automobile because at the time defendant's automobile, including the passengers therein, weighed considerably more than the southbound vehicle. The difference in weight itself would be sufficient to explain the position of the automobiles as found by the police officers.

The courts have long recognized that to base a judgment upon physical evidence is highly dangerous and speculative, and where, as in the present case, such physical evidence is used to argue excessive speed in direct conflict to the testimony of eye witnesses, the courts have refused to permit a judgment to stand based upon such physical evidence.

In the case of *State v. Bast*, 116 Mont. 329, 151 Pac. (2d) 1009, the defendant was charged with the crime of manslaughter arising out of an automobile upset. The physical evidence indicated that the automobile had left the highway and proceeded along a shallow depression for a distance of 268 feet through some low brush, and into a hole, approximately 2 feet in depth, containing large rocks which caused the automobile to be deflected and to side-swipe a tree. The contact with the tree damaged and flattened the right side of the car and embedded the bark on the inside of the right rear door. The highway patrolman who investigated the case testified that from his observa-

tion of the physical facts, it was his opinion that the car must have been traveling from 55-60 miles per hour at the time it left the highway. In reversing a judgment of conviction, the Supreme Court stated:

"The state's only testimony to refute that of the three surviving occupants of the Herman car, to the effect that defendant was driving at the moderate rate of speed of between 30 and 35 miles an hour, was that of the boy Roedel and of the highway patrolman Blake, who, over objection, testified that from his observation of the road and the car after his arrival on the scene, he was led to *believe* that a car would have to be traveling close to fifty miles an hour to cover this ground and cause the damage it did to this car.

"As before stated, Patrolman Blake did not witness the happening of the accident for at the time it occurred he was at his home in Kalispell some 10 or more miles distant and he certainly did not qualify to testify with any degree of accuracy as to the miles per hour the car was traveling some forty or fifty minutes before he came into the picture. Such guesswork, speculation and conjecture cannot be said to rise to the dignity of evidence on which to sustain a conviction of the serious crime here charged. The burden rested upon the state throughout the case and this burden it failed to meet for we are committed to the doctrine that 'a defendant may not be convicted on conjectures, however shrewd, on suspicions, however strong, but only upon evidence which establishes guilt beyond reasonable doubt; that is, upon proof such as to logically compel the conviction that the charge is true.' State v. Riggs, 61 Mont. 25, 201 P. 272, 280."

In *Huber v. Rosing*, 22 Wash. (2d) 110, 154 P. (2d) 609, the action was commenced to recover for injuries resulting from an automobile accident, the plaintiff alleging that the defendant was negligent in the operation of her automobile. The court made a finding of negligence in that appellant's car was operated at a speed in excess of 15 miles an hour (the maximum speed fixed for the zone in which the cars were traveling). While the record contained no direct evidence that the car was traveling in excess of 15 miles per hour, the trial court found that excessive speed was indicated by the "nature of the damages suffered by the cars involved in the accident." As stated by the Supreme Court in its opinion:

"No witness, expert or non-expert, attempted to estimate the speed of appellant's car, basing his testimony upon the damage suffered by the cars as the result of the collision. The trial court, from the evidence referred to only, reached the conclusion which resulted in the finding of excessive speed."

The court indicated that it had in previous cases considered the damages to the vehicles in connection with the determination of the question of speed.

"In the case of *Oyster v. Dye*, 7 Wash. 2d 674, 110 P. (2d) 863, 866, 133 A. L. R. 720, which was a case involving a collision between a passenger automobile and a truck, this court considered the testimony of one who was extremely familiar with automobiles, who had been called as a witness by respondents and had been permitted to testify, over the objection of appellants, as to his opinion concerning the speed of appellant's car prior to the impact, his testimony having been

based upon his examination of photographs of the two cars taken after the collision. This court held that the witness was not qualified to testify as an expert, and that the admission of his testimony was reversible error, the testimony amounting 'to no more than an estimate or guess by a witness not qualified to testify as an expert.' In the course of the opinion we said: 'This court has held that in certain cases the force or violence of a collision between a motor vehicle and a person, another vehicle, or any other object, may be considered in estimating speed. [Citing cases] This, of course, is proper in many instances, as the result of a collision may indicate the speed of a colliding car, and evidence concerning the situation after a collision may always be considered by the trier of the facts, the facts being given such weight as is proper under the circumstances.'

"In the case at bar there was no direct evidence as to the speed of appellant's car, except the testimony of appellant's witnesses above referred to. *The trial court disregarded this testimony and based its finding as to appellant's negligence solely upon the extent and nature of the damage suffered by the cars as the result of the collision. In other words, the extent of the damage was taken as indicative of the force of the impact, and the force of the impact was considered a sufficient basis for a finding that appellant's car had been moving at excessive speed.*" (Italics added.)

So, in the instant case, the trial court apparently allowed the jury to disregard the positive and direct testimony of both the State's witnesses and defendant, to speculate as to the speed of the vehicles based upon the physical damage and their relative positions at the time the officers

arrived to investigate. No one will dispute the fact that the cars came together with a terrific impact. Their combined speeds, according to the testimony of the witnesses, would be approximately 65 to 75 miles per hour. But such combined speed would not indicate excessive speed on the part of either of the vehicles prior to that time.

In the Huber Case, *supra*, the court went on to state:

“In the case of *Proper v. Brenner*, 191 Wash. 540, 71 P. 2d 389, 392, we said: ‘It is often dangerous to arrive at conclusions from mere physical facts. It is, for example, rarely, if ever, safe to attempt to judge the rate of speed from a consideration of the amount of physical damage done; but there are situations where physical facts are controlling.’

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“In 10 *Blashfield, Cyc. of Automobile Law & Practice*, Perm. Ed., p. 349, Sec. 6560, the *Proper* case was cited with approval, the author, concerning that case, saying: ‘To arrive at conclusions from physical facts alone, however, is often dangerous. It has been said to be rarely, if ever, safe to attempt to judge the rate of speed merely from a consideration of the amount of physical damage done.’

“The above text states a sound rule and is certainly applicable to the facts in the case at bar.”

And finally concluded:

“The court’s finding above quoted clearly indicates that the finding of excessive speed was based solely upon the nature and extent of the damages to the two cars which collided. Examination of the statement of facts discloses no evidence concerning the speed of appellant’s car other than that above referred to. While the condition of automobiles af-

ter a collision may properly be considered in estimating the speed of one or more of the cars involved in an accident, we are convinced that the evidence concerning the condition of the two cars in question does not support the court's finding that appellant's car was moving at a speed greater than 15 miles per hour.

"The finding is contrary to all the direct evidence as to the speed of appellant's car. Evidence such as that upon which the trial court based its finding is, at best, in its nature speculative and uncertain, and unless unusually convincing (which the evidence in the case at bar is not) should not be held to outweigh uncontradicted testimony of witnesses who spoke from actual knowledge. The witnesses who testified to the speed of appellant's car were nowise discredited, and two of them, Mr. and Mrs. Chabot, appear to have been entirely disinterested."

thereby determining that the evidence was insufficient to establish negligence, while in the instant case we are concerned with the question of reckless and wanton conduct.

In *Reel v. Spencer*, 187 Va. 530, 47 S. E. (2d) 359, a guest brought an action against the driver of the automobile on the theory that the latter was guilty of "gross negligence." At the time of the accident it was raining and the streets were slippery. The undisputed testimony was that the automobile was being operated at a speed of 15 to 20 miles an hour. The impact pushed the other vehicle sideways about 5 feet and caused considerable damage. In determining that the circumstantial evidence was insufficient to show excessive speed in view of the direct and positive testimony, the court stated:

“Moreover, it is said that the Reel car must have been traveling at an excessive speed because according to Johnson’s testimony the Reel car traversed a distance of some 126 feet while the Johnson car was making its turn, and the force of the impact was so severe as to push the Johnson car sideways about five feet, inflicting considerable damage to it

“Miss Spencer, the plaintiff below, testified that as the Reel car approached the intersection it was ‘not going fast,’ but was being driven ‘in a normal manner.’ Indeed, all of the direct testimony on the subject was to the effect that the Reel car was proceeding at the moderate speed of from fifteen to twenty miles per hour. Not even Johnson testified to the contrary. The fact that the Johnson car was pushed a short distance along the slippery street and considerably damaged by the impact did not necessarily show excessive speed. The same result might have followed had the Reel car been proceeding at a moderate speed.”

Again in the case of *Commonwealth v. Ushka*, 130 Pa. Sup. 600, 198 Atl. 465, where the defendant was prosecuted for the crime of involuntary manslaughter, the court held:

“The only evidence from which it might be inferred that he was otherwise proceeding in a rash or reckless manner at the time of the accident was the relative position and condition of the motor vehicles after the collision. The position of cars after an accident may warrant some inferences. See *Com. v. Fowner*, 97 Pa. Super. 566; *Com. v. Matteo*, supra [197 Atl. 787]. But the physical facts in those cases were much different from the physical facts in the instant case. After appellant’s

Ford car was struck on the left front door by the 1½-ton truck, it went over to the right, hit a telephone pole at the curb, and continued south on Limekiln pike about 78 feet. From the place of the collision it traversed about 130 feet. It did not upset, but stopped in front of the tailor shop on Limekiln pike. The truck swung to the left, turned completely around, and fell over on its right side, which was damaged, at the southwest corner of the intersection. There were skid marks showing the arc made by the truck. From the point of collision to the overturned truck the distance in a straight line was 52 feet.

“Such circumstances alone do not warrant the inference that appellant was driving his car at an excessive rate of speed or in a rash or reckless manner.”

Again in the syllabus to *Knies v. Kraftsow*, 40 Atl. (2d) 122, the following statement is contained:

“Where automobile collision at intersection could have occurred in the manner related by plaintiff, defendant could not invoke to establish contributory negligence of plaintiff the rule of incontrovertible physical facts as to speed of defendant’s automobile or distance from intersection when plaintiff entered intersection based on plaintiff’s estimates of speed and distance and the distance traveled by plaintiff’s automobile before collision, since such physical facts cannot be established by oral testimony of relative speeds and positions of moving objects.”

In *Whiting v. Andrus*, 173 Or. 133, 144 P. (2d) 501, the court although recognizing that under some circum-

stances speed may be inferred from the circumstances of the case, held:

“The collision caused the defendant’s car to bounce backward ‘eight or ten or twelve feet’, and the defendant contends that the jury might have deduced from that fact that the Merrill car was being driven at an excessive rate of speed. Where excessive speed may reasonably be inferred from the facts and circumstances, direct evidence thereof is not required. *Greenslitt v. Three Bros. Baking Co., Or.*, 133 P. (2d) 597. Mr. Merrill’s car was a Studebaker sedan, while the defendant’s was a Ford coupe, and we do not believe that the mere fact that the lighter car bounced backward would justify a jury in finding that the heavier car was being driven at an excessive rate of speed. None of the persons who saw the Merrill car approaching the scene of the accident testified to any facts which would indicate excessive speed, or that there was anything about Merrill’s driving which would indicate recklessness or negligence.”

In *Celner v. Prather*, 301 Ill. App. 224, 22 N. E. (2d) 397, the action was by a guest against the driver of an automobile for injuries suffered when the car struck a concrete culvert, the theory being that the driver was guilty of wilful and wanton misconduct. The court, in reversing a judgment for the plaintiff and remanding the case for a new trial, stated:

“The only thing the evidence discloses is that it struck the concrete abutment with great force and violence. Whether this was the result of the deceased’s wilful and wanton misconduct, or whether it might have resulted from mechanical causes connected with the car, or was the result of de-

ceased's negligence, cannot be determined from the evidence. Appellee urges that the force of the impact of the automobile with the concrete culvert, and on the opposite side of the highway from which the car was traveling, is sufficient evidence to establish wilful and wanton misconduct on the part of the deceased. Proof of a mere possibility is not sufficient. A theory can not be said to be established by circumstantial evidence, unless the facts are of such a nature and so related, as to make it the only conclusion that could reasonably be drawn. It can not be said one fact can be inferred, when the existence of another inconsistent fact can be drawn with equal certainty. From the evidence in this case there is no way to determine if the accident was the result of wilful and wanton misconduct on the part of the deceased, or from some unexpected mechanical cause over which he had no control, or such an accident as might have been the result of ordinary negligence.

See, also, *Piscopo v. Fruciano*, 307 Mich. 433, 12 N. W. (2d) 329.

(B) *The evidence is insufficient to prove that defendant drove his automobile to the left of the center of the highway in an attempt to overtake and pass another vehicle proceeding in the same direction.*

Upon what theory the court submitted to the jury the question of whether defendant was in the act of overtaking and passing another vehicle at the time of the accident cannot be determined from an examination of the record. The only evidence on this point was that of the witness Price, who testified that he "thought" that defendant was attempting to pass the vehicles ahead of him when he

saw defendant's automobile come over on to the wrong side of the highway. Thereafter, the court admonished the jury to disregard any evidence relating to what the witness thought defendant was doing. The witness, Donald Rice, who was a passenger in defendant's car, testified on direct examination by the district attorney that defendant's automobile was proceeding in a normal manner north along State Street when the rear end began skidding to the left and caused the automobile to slide across the center of the highway. Again we maintain that the evidence was insufficient to submit this matter to the jury.

Whether the court may have assumed that merely because the automobile did appear on the wrong side of the road, such fact was sufficient from which the jury could infer that it was attempting to pass other vehicles proceeding in the same direction is not known to the writer of this brief. However, such an inference in the face of direct, positive and uncontradicted testimony as to the cause of defendant's automobile being on the wrong side of the road would not justify the court in submitting the question to the jury. Again we emphasize that if it is to be argued that the verdict of the jury can be sustained upon the basis of circumstantial evidence the court should have instructed the jury as to the weight to be given to such circumstantial evidence and the inferences to be drawn therefrom. As stated in the case of *Luther v. Jones*, 220 Iowa 95, 261 N. W. 817:

“To warrant the jury in returning a verdict for the plaintiff, based upon circumstantial evidence alone, the circumstances relied upon by the plaintiff must be of such a nature and so related to each other that the only conclusion that can be fairly or reas-

onably drawn therefrom is the conclusion indicated by the verdict. It is not sufficient that the circumstances be consistent merely with the plaintiff's theory, for that may be true and yet they may have no tendency to prove the theory. If other conclusions than that contended for may reasonably be drawn from the facts and circumstances in evidence as to the cause of the injury, the evidence does not support the conclusion sought to be drawn from it. *Neal v. Railway Co.*, 129 Iowa, page 5, 105 N. W. 197, 2 L. R. A. (N. S.) 905. See, also, *Kearney v. Town of DeWitt*, 199 Iowa 530, 202 N. W. 253; *Peterson v. Dolan*, 186 Iowa 848, 855, 172 N. W. 950; *Wiederin v. Chicago & N. W. R. Co.*, 212 Iowa 1103, 237 N. W. 344."

From the foregoing it appears that the trial court erred in submitting to the jury the question of whether defendant was operating his automobile at an excessive rate of speed in view of the actual and potential hazards then existing, since there is no evidence that defendant operated his automobile at a speed in excess of 30-40 miles per hour and there is nothing in the record to indicate that such a speed was, in view of all the circumstances and conditions, excessive. Neither should the court have allowed the jury to consider whether the defendant was operating his automobile on the wrong side of the road in an attempt to overtake and pass other vehicles proceeding ahead of him. But the court at all events should have granted defendant's motion for a dismissal on the ground that the evidence was insufficient to submit to the jury.

2. THE COURT FAILED TO INSTRUCT THE JURORS THAT THEY MUST ALL AGREE UPON

ONE OR BOTH OF THE ALLEGED ACTS OF WILFUL OR WANTON MISCONDUCT.

Inasmuch as it was defendant's theory of the case that there was insufficient evidence to go to the jury, particularly on the matter of whether defendant was attempting to pass other vehicles, no request was made for an instruction to the effect that before the jurors could find the defendant guilty, they must unanimously determine that he was guilty of wilful or wanton misconduct as to one or both of the alleged grounds set forth in the court's instructions. The court did not in its Instruction No. 7, or in any other instruction, advise the jurors that they were required to agree upon one or both of such alleged acts of misconduct, so that it left it to the jury to speculate whether defendant may have been guilty of driving at an excessive speed, or operating his automobile upon the wrong side of the road in an attempt to pass other vehicles. In one of the earliest manslaughter cases arising out of an automobile accident in this State, this court made a determination that the trial court should instruct the jury so as to advise them clearly that they must all concur upon the same alleged act of wilful misconduct in order to return a verdict of guilty. In the case of *State v. Johnson*, 76 Utah 84, 287 Pac. 909, the court considers at length the problem, as follows:

"The question presented is as to whether error was committed in submitting to the jury a material issue upon which it is claimed there was insufficient evidence to support it, and, if so, whether the error was prejudicial. If in a civil case where several acts of negligence are charged, each constituting actionable negligence, and the evidence is insufficient as

to one of such acts, but against objections nevertheless is submitted to the jury and a general verdict rendered in favor of the plaintiff, hardly any one would contend that no prejudice resulted on the ground that the evidence was sufficient to sustain the verdict on the other alleged acts. In principle, the matter in hand is not different. The jury here rendered a general verdict of guilty 'as charged in the information.' It thereby found the defendant guilty of an unlawful act not supported or justified by the evidence. Because the unlawful act related to or concerned intoxicating liquors does not call for an abridgement of the general rule that to justify a submission of a material issue to a jury there must be sufficient evidence to support it, nor as to the prejudicial effect against whom it is submitted and a general verdict rendered in favor of his adversary having the burden of proof. The general verdict here is not severable. Letting all the issues as to all of the alleged unlawful acts to the jury gave them to understand that they could render a verdict of guilty on any one or all of them, which was required to be expressed only by a general verdict. *Some of the jurors may have been induced to join in the verdict on one or more of the alleged acts, some on other alleged acts, but on which or on all it is impossible to tell.* That none of the jury was induced to join the verdict because of the submission of the issue as to intoxication is also impossible to tell." (Italics added.)

This fundamental principle was later affirmed in the case of *State v. Rasmussen*, 92 Utah 357, 68 Pac. (2d) 176, although the court there, by a divided opinion, concluded that the instructions were sufficient to advise the jurors that they "must all agree on one or more specifications of what constituted the unlawful driving and that

the jurors cannot combine their conclusions on the different specifications of unlawfulness so as to converge to the final conclusion of unlawful driving likely to cause death." See also *State v. Bleazard*, 103 Utah 13, 133 Pac. (2d) 1000.

The court having failed to instruct the jury properly in this respect, the verdict of the jury cannot be sustained.

3. THE COURT FAILED TO INSTRUCT THE JURY THAT THE MERE FACT AN AUTOMOBILE SKIDS OR SLIDES WHILE PROCEEDING ALONG A WET OR SLIPPERY STREET IS NO EVIDENCE THAT THE PARTY OPERATING THE SAME IS DOING SO AT AN EXCESSIVE RATE OF SPEED.

It has long been established as a principle of law that the skidding of a vehicle upon icy or slippery streets is not itself evidence of reckless misconduct or that the automobile was being operated at an excessive rate of speed. In the case of *Adamian v. Messerlian*, 292 Mass. 275, 198 N. E. 166, the court stated the law applicable to the case after relating the facts and circumstances of the case, as follows:

"There was evidence tending to show these facts: The accident happened about half past eleven o'clock on the night of December 31, 1929. The streets were particularly slippery and icy caused by rain or mist freezing on the ground. The defendant, having driven up the hill on Highland Street, in Worcester, and having reached the top, began descending on the westerly side of the hill. The street was twenty-six feet eight inches wide, and the distance from the top of the hill to the place of the accident was nine hundred and eighty feet; there

were three intersecting streets on each side in that distance. The automobile had no chains on the wheels. The street at this point was thickly settled. There was one other automobile going in the same direction which the defendant passed or tried to pass. Another automobile was coming on an intersecting street, but there is no evidence that it came upon Highland Street. There was evidence that the speed of the defendant's automobile was at the rate of forty-five to fifty miles an hour. . . . There was also evidence that the automobile did not begin to skid until it had gone a considerable distance down the hill, and that the defendant attempted to check his speed by the use of his brakes. There was no collision with any vehicle.

"There was no error in ordering the entry of verdicts in favor of the defendant. The skidding of the automobile in the circumstances disclosed was of itself no evidence of negligence. *Lonergan v. American Railway Express Co.*, 250 Mass. 30, 35, 144 N. E. 756."

In the case of *Zeigler v. Ryan*, 65 S. D. 110, 271 N. W. 767, the court held:

"We consider first the question of whether there is sufficient evidence in the record upon which to submit the question of Kennedy's negligence to the jury. From the facts it appears that the accident was due to the skidding of the automobile as it was regaining its correct position on the highway and attempting to make the turn at the bottom of the hill. The mere fact that an automobile skids on a slippery pavement does not in itself constitute evidence of negligence on the driver's part or render the *res ipsa loquitur* doctrine applicable. *Davis v. Brown*, 92 Cal. App. 20, 267 P. 754; *Linden v.*

Miller, 172 Wis. 20, 177 N. W. 909, 12 A. L. R. 665; Barret v. Caddo Transfer & Warehouse Company, 165 La. 1075, 116 So. 563, 58 A. L. R. 261; Annotation in 58 A. L. R. 264."

See also Bradley v. Thomas M. Madden Co., 333 Ill. App. 153, 76 N. E. (2d) 797; Amerine v. O'Neal, 136 Neb. 642, 287 N. W. 56; Wilson v. Congdon, 179 Wash. 400, 37 Pac. (2d) 892; Wallis v. Nauman, 61 Wyo. 231, 157 Pac. (2d) 285; State v. Biering, 111 Mont. 237, 107 Pac. (2d) 876. Risen v. Consolidated Coach Corp., (Ky) 118 S. W. (2d) 712; Gilbreath v. Blue & Gray Transportation Co., 269 Ky. 787, 108 S. W. (2d) 1002.

In the Amerine Case, *supra*, the court after reciting the following facts, determined the evidence was insufficient to show gross negligence on the part of the defendant:

"Plaintiff had not driven his car to work because some sleet had fallen the night before. Defendant offered to give him a ride home. Part of the ice had been worn off by traffic during the day, but the pavement, as described by plaintiff, was still icy and slippery in spots. Defendant drove without chains, but, other than possibly to slide a little now and then, his car had not skidded up to the time of the accident. In fact, there is no complaint in the briefs about defendant's driving, until the moment preceding the collision.

"As defendant was approaching Forty - Eighth Street, about 20-25 miles an hour, another car, traveling 40 miles an hour in the opposite direction, swung onto defendant's side of the pavement, in an effort to pass traffic. To avoid a head-on collision, defendant turned his car quickly to the right, off

the pavement and onto the dirt shoulder. After traveling about 100 feet, he attempted to swing it back. The pavement was approximately 3 inches higher than the shoulder of the highway. The left rear wheel caught in some manner on the edge of the pavement, causing the car to swing sideways and to skid in front of an automobile approaching from the opposite direction. A collision resulted."

In *Wilson v. Congdon*, *supra*, the court held:

"There is no evidence that appellant's automobile was at any time operated on the wrong side of the highway. That vehicle skidded from its own right-hand side of the highway to the extreme left-hand side of the highway, where it was struck by respondent's automobile.

"The failure of the driver of a motor vehicle to keep to the right side of the highway is excused where, without fault on his part, the machine skids across the center line of the road, but, where skidding results from negligence, the driver is liable. The law of the road requires that automobiles be operated on the right of the center of the highway. While skidding, in itself, is not ordinarily evidence of negligence, where an automobile skids across the center line of the road to the left side thereof and collides with another automobile, the burden is upon the driver upon the wrong side of the highway to justify the violation of the law of the road. *Haines v. Pinney*, 171 Wash. 568, 18 P. (2d) 496; *Dohm v. Cardozo*, 165 Minn. 193, 206 N. W. 377."

In *State v. Biering*, *supra*, the defendant was charged with the crime of reckless driving in that he operated his automobile on to the wrong side of the road. In reversing a conviction, the court held:

“There is no substantial conflict in the evidence on the material facts bearing upon this question. The defendant at the time of the collision was somewhat to the left of the center of the road. He testified that when he saw the driver of the one car attempt to pass the other he slammed on his brakes in an effort to avoid a collision and his car swerved to the left. The driver of the passing car stated that when he got even with the car that he was passing, the defendant’s car was somewhat over to the left of the center and was trying to cut off to the right. The occurrence was a matter to be timed by ‘split’ seconds. Four of the five eye witnesses testified that the defendant was proceeding lawfully on his right side of the road before the driver of the one car attempted to pass the other. But for the purpose of this case, we may assume that the defendant was technically violating the statute prohibiting driving on the wrong side of the road. One essential thing to be proved under this complaint is that the act of the defendant in driving on the wrong side caused the accident.”

The failure of the court to give defendant’s requested instruction resulted in the jury having the opportunity to conclude that the skidding of an automobile was of such serious consequences that it alone would warrant a finding of excessive speed and also reckless or wanton misconduct on the part of the operator of the car. The jury was not properly advised as to the legal effect of such skidding or sliding, so that prejudice resulted to the defendant’s rights, requiring the verdict to be set aside.

CONCLUSION

By way of summary of the arguments contained in this brief, appellant respectfully submits:

1. The evidence is wholly insufficient to sustain the conviction based upon wilful and wanton misconduct on the part of the defendant.

2. There is no evidence justifying the court in submitting to the jury the question whether defendant drove and operated his automobile at an excessive rate of speed.

3. Nor is there any evidence justifying the court in submitting to the jury the question of whether defendant operated his automobile upon the wrong side of the highway in an attempt to overtake and pass other vehicles proceeding in the same direction.

At all events, if this court should determine that there is some circumstantial evidence from which the jury might conclude either that the defendant was operating at an excessive rate of speed, or that he was attempting to overtake and pass other vehicles, then the trial court should have submitted the matter to the jury on that theory, and should have properly instructed them as to the weight and sufficiency of circumstantial evidence in criminal cases.

4. The failure of the court to advise the jury that they should unanimously agree upon one or both of the alleged acts of misconduct was prejudicial to the rights of the defendant.

5. The failure of the court to instruct the jury that the mere fact defendant's automobile skidded was not evidence that it was being operated at an excessive rate of speed and was not of itself wilful or wanton misconduct was also prejudicial to the rights of the defendant.

Respectfully submitted,

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