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Warren Stack v. Edwin J. Kearnes : Brief of Appellant

Utah Supreme Court

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**IN THE SUPREME COURT OF THE
STATE OF UTAH**

WARREN STACK,

Respondent,

—VS—

EDWIN J. KEARNES,

Appellant.

} Case No.
7387

APPELLANT'S BRIEF

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IN THE SUPREME COURT OF THE STATE OF UTAH

WARREN STACK,

Respondent,

—vs—

EDWIN J. KEARNES,

Appellant.

} Case No.
7387

APPELLANT'S BRIEF

STATEMENT OF THE CASE

This appeal is taken by the defendant Edwin J. Kearnes from a verdict and judgment against him. The suit arose out of an automobile accident which occurred in the early morning hours of October 12, 1947. The plaintiff was riding in a car being operated by the defendant when the car overturned as it attempted to negotiate a curve on Holladay Boulevard at 45th South.

A trial was originally had before the Honorable J. Allan Crockett and a unanimous verdict rendered by the jury in favor of the defendant (appellant) and against the plaintiff. (R. 93). Thereafter a new trial was granted plaintiff which resulted in a divided verdict (six-two) in favor

of the plaintiff, the jury assessing plaintiff's damages in the sum of \$1859.34. (R. 106).

Because a detailed statement of the evidence will be given in connection with appellant's argument, a further recitation of the facts at this point will serve no purpose.

STATEMENT OF ERRORS

The sole question presented for review is the error of the trial court in granting plaintiff and respondent a new trial after the jury had returned a unanimous verdict of no cause of action.

ARGUMENT

PLAINTIFF'S MOTION FOR A NEW TRIAL SHOULD NOT HAVE BEEN GRANTED

Plaintiff's motion for a new trial following the verdict of no cause of action was based on the following grounds: (R. 341).

- “1. Insufficiency of the evidence to justify the verdict.
2. That the verdict is against the law.
3. Errors in law occurring at the trial and excepted to by the plaintiff.
4. That there has been such a plain disregard by the jury of the instructions of the Court and the evidence in the case as to satisfy the Court that the Verdict was rendered through a misapprehension of such instructions or under the influence of passion and prejudice.”

In granting the motion the court stated that it was not

basing its decision on any one ground but making its ruling without specifying a reason so that on appeal plaintiff might argue any ground in support of the court's action. However, no argument was ever made by plaintiff that the trial court had committed any error which plaintiff had excepted to. Nor does the record show any action on the part of the trial court that might be claimed as error which was excepted to by plaintiff.

With respect to ground No. 4, this court has heretofore determined that:

“In order to eliminate speculations as to the basis of the exercise of judicial discretion in granting new trials, the records should show the reasons and make it clear the court is not invading the province of the jury. The trial court should indicate wherein there was a plain disregard by the jury of the instructions of the court or the evidence or what constituted bias or prejudice on the part of the jury.” (Saltas v. Affleck et al, 99 Utah 381, 105 P. 2d 176.)

Again, no reasons were given during the course of plaintiff's argument on motion for a new trial in support of the contention that there had been “such a plain disregard by the jury of the instructions of the Court and the evidence in the case as to satisfy the Court that the Verdict was rendered through a misapprehension of such instructions or under the influence of passion and prejudice,” except that the jury had deliberated only a matter of approximately 15 minutes before arriving at its decision—a fact which itself did not impress the trial court nor should it be of any significance one way or the other. If it could, without anything more, be sufficient grounds to justify a new

trial that the jury did not deliberate as long as one side or the other felt sufficient no case would be settled by a verdict of a jury because the losing party in every event would argue that the jury had not adequately considered the issues and the evidence or it would have reached a verdict favorable to such losing party.

The ground upon which plaintiff relied in his argument to the trial court and which appeared to influence the court in reaching its conclusion was that the evidence was insufficient to justify the verdict and such verdict was therefore contrary to the law. And it is to this proposition that appellant will direct his argument in this brief.

In attacking the action of the lower court in granting plaintiff and respondent a new trial, counsel is not unmindful of the former decisions of this court to the effect that "the question of granting or denying a motion for a new trial is a matter largely within the discretion of the trial court." *Moser v. Zion's Co-op Mercantile Institution*, (1948) Utah, 197 P. 2d 136. See, also, *White v. Union Pacific Railroad Co.*, 8 Ut. 56, 29 P. 1030; *Van Dyke v. Ogden Savings Bank*, 48 Ut. 606, 161 Pac. 50; *Thompson v. Brown Livestock Co.*, 73 Utah 1, 276 P. 651; *Greco v. Gentile*, 88 Utah 255, 53 P. 2d 1155; *Trimble v. Union Pacific Stages*, 105 Ut. 457, 142 P. 2d 674.

However the trial court is not without some limitation in the exercise of its discretion. In the case of *Saltas v. Affleck*, *supra*, the court held:

"The exercise of a judicial discretion must be based upon some facts notwithstanding great latitude is accorded the trial court in such matter. *Klinge v. Southern Pacific Co.*, 89 Utah 284, 57 P. 2d 367, 105 A. L. R. 204."

To the same effect is the ruling of the Arizona Supreme Court in the case of Rathman v. Rumbeck, 54 Ariz. 443, 96 P. 2d 755, where the court reversed the lower court in granting a new trial, stating:

“ . . . the courts’ discretion must be a legal and not a capricious one; . . . it must be warranted by law and guided by established percedent.”

In the case of Clark v. Los Angeles & Salt Lake R. Co., 73 Utah 486, 275 P. 582, the court set out the criterion that if the lower court is of the opinion that the jury “disregarded the *manifest* weight of the evidence” it should authorize a new trial.

Again in Valiotis v. Utah-Apex Mining Co., 55 Utah 151, 184 Pac. 802, in determining whether the trial court had properly exercised its discretion in denying a motion for a new trial, it was held

“This court has repeatedly held that the discretion of the trial court, exercised in granting or refusing to grant a motion for new trial, based on the insufficiency of the evidence to justify the verdict, cannot be interfered with when, upon examination of the evidence as disclosed by the record, it is apparent that there is a substantial conflict of evidence as to material issues of fact in the case relative to which the insufficiency is alleged. In such a case this court must hold as a matter of law that no abuse of discretion is shown. (Cases supra.) We must of necessity, however, in every such case examine the record of the evidence for the purpose of determining whether or not there is a substantial conflict or whether or not, as in the instant case, there is substantial evidence to support the verdict.”

It was further concluded:

“If the evidence, taken as a whole, be reasonably susceptible of opposite conclusions as to the existence or nonexistence of an ultimate fact, depending upon inferences to be drawn therefrom, or the weight to be given to the testimony of this or that witness, or set of witnesses, we must conclusively presume the fact to be such as will support the ruling which we are called upon to review; *but if, after giving due consideration to the fact that the trial judge is better able to weigh conflicting evidence, the evidence be such nevertheless as to impel but one reasonable conclusion, and that as to a fact adverse to the ruling, it would be our duty as an appellate court to so declare, notwithstanding there might be some conflict in the evidence.*” (Italics added.)

In a later case, the court further defined the limits of the trial court’s discretion by stating that the evidence must be substantially conflicting on “the essential matter in dispute.” *Utah State Nat’l Bank v. Livingston*, 69 Utah 284, 254 Pac. 781.

Likewise, courts in other jurisdictions have supported the doctrine that a trial court has a broad discretion in the matter of setting the verdict aside and granting a new trial. But it is an abuse of discretion, stated the Florida Supreme Court in the case of *Scaver v. Stratton*, 133 Fla. 183, 183 So. 335, to grant a new trial where the verdict as rendered finds ample support in the evidence and nothing can be accomplished except to have another jury review the cause. See, also, *Burton v. Spurlock’s Adm’r*, 294 Ky. 336, 171 S. W. (2d) 1012.

In the case of *Sparks v. Long*, 234 Ia. 21, 11 N. W.

(2d) 716, the plaintiff was struck by an automobile when he stepped from behind a string of automobiles while crossing the highway intersection without apparently looking. The jury returned a verdict in favor of the defendant and the trial court granted a new trial. On appeal the defendant argued that a new trial should not have been granted among other reasons because the plaintiff was contributory negligent as a matter of law. Although the Supreme Court failed to agree with defendant's position in this respect, it did agree that the trial court erred in granting plaintiff's motion, stating:

Plaintiff calls our attention to the broad discretionary powers of the trial court in granting a motion for new trial and cites many decisions of this court recognizing this rule. But the discretion which the trial court possesses is a legal discretion—one *that must be exercised upon sound judicial reasoning. It is not unlimited.* Eller v. Paul Revere Ins. Co., 230 Iowa 1255, 300 N. W. 535.

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“Ordinarily this court will hesitate in disturbing a decision of the trial court in granting a motion for new trial when the question is one of discretion. But we have said this ‘is a legal discretion, and must be predicated on the record.’ Copeland v. Junkin, 198 Iowa 530, 199 N. W. 363, 364. We have examined the record in this case with care, and we do not find therein support for the trial court’s ruling.” (*Italics added.*)

The leading case in this state where this court has been called upon to review a ruling of the lower court in granting a new trial is Hirabelli v. Daniels, 44 Utah 88, 138 Pac. 1172. There the plaintiff filed a motion for a new trial upon the following grounds:

“(1) Misconduct of the jury; (2) surprise which ordinary prudence could not have guarded against; (3) newly discovered evidence; (4) insufficiency of the evidence to justify the verdict; (5) that the verdict is against law; (6) errors in law occurring at the trial and excepted to by the plaintiff.”

As stated by the court:

“Nothing was shown to support the first, second, or third grounds. As to the fifth and sixth the bill recites that no objections were made and no exceptions taken to the charge by the plaintiff, nor to the court’s refusal to charge as requested by him. It is conceded by both parties that the new trial was granted on the theory that the damages awarded were inadequate and not in harmony with the evidence.”

In determining that the original verdict should not have been set aside it was held:

“On the record several theories are disclosed to sustain the verdict rendered by the jury. In neither of them can it be said they disregarded or misconceived the instructions or the evidence.”

And in conclusion the court stated that before the trial court should interfere with the verdict of the jury “it should be made to appear that the jury *plainly disregarded or misconceived* the instructions or *the evidence*, or acted under the influence of passion or prejudice; and, since it is affirmatively made to appear that the new trial was not granted on any other ground, it necessarily follows no legal ground whatever existed to justify the granting of a new trial.” (Italics added.)

The principles enunciated in the Hirabelli Case were later affirmed in the case of Chatelain v. Thackeray, 98

Utah 525, 100 P. 2d 191, although in the latter case, the court upheld the order granting a new trial “in the light of the uncontroverted evidence.”

With the foregoing principles of law before us, we proceed to outline the evidence which the trial court determined was insufficient to sustain the verdict of the jury.

Plaintiff's right to recover is founded almost entirely upon his own testimony, which on direct examination (and without regard to matters of impeachment or contradiction established on cross-examination) was to the effect that plaintiff and wife, together with defendant and others had spent the evening of October 11, 1947, at the Ambassador Club in Salt Lake City. (R. p 167) The entire party left the Club approximately 1:30 a. m. on the morning of October 12th and rode up to the home of Mr. and Mrs. Jerry Johnson located on South Temple between 8th and 9th East. (R. 168) Shortly after their arrival at the Johnson home, the plaintiff borrowed a car to take his wife for their baby and take them home. (R. 169) After leaving his wife and child at home the plaintiff returned to the Johnsons and spent approximately fifteen to twenty minutes there. (R. 171) Some of the group had left before the plaintiff returned to the Johnsons and a few left shortly after his return, so that the remaining guests consisted of plaintiff, defendant, Mrs. Kay Bracken, and Miss Jane Potts (later Mrs. Naisbitt). (R. 175) According to plaintiff it was then quite late (approximately a quarter to three) and Mrs. Bracken and Miss Potts wanted to go home so they asked the defendant to drive them home at that time. (R. 176) Mrs. Johnson offered to drive plaintiff home, but he said, “Never mind, I would go with Pat

Kearnes.” (R. 177) Thereupon the four left the Johnsons and went out and got in defendant’s car which was parked in the driveway of the Johnson home between 8th and 9th East on South Temple, about three and one-half blocks from plaintiff’s home. (R. 178) Mrs. Bracken sat in the rear seat and the others sat in front. At that time, plaintiff testified, the defendant asked if it would be alright to take the girls home first since plaintiff and defendant lived close together and defendant could then drop plaintiff off on the way home, to which plaintiff agreed. (R. 179, 180)

From the Johnson home, the party drove east on South Temple, up through Military Way into Fort Douglas, and south through Fort Douglas to the intersection with Fifth South Street, where Mrs. Bracken decided that she did not want to go home because her husband would not be home at that time. She then got into the front seat and sat upon plaintiff’s lap—it being determined that Miss Potts would be taken home first. (R. 181) Defendant, who was operating the automobile, then turned west on Fifth South and proceeded down toward the University Stadium and 13th East, turned left on 13th East and proceeded south to 27th South, then left again finally arriving at 23rd East, south on 23rd East to Holladay and south along Holladay Boulevard to 5900 South, where Miss Potts lived (R. p. 182)

As the car started west on Fifth South, plaintiff described the movement as fast, “he started up and started fast. . . . I don’t know how fast, but he was pretty fast,” at which time Mrs. Bracken made a remark about taking it easy, that she had a baby at home, whereupon plaintiff also commented that he had a little boy, too. (R. 183) Plaintiff further stated that defendant slowed down after the above remarks were made and that nothing else was

wrong about the manner of defendant's driving until the car was proceeding south on 23rd East toward Holladay. There was a dip in the road "and we were going fast again at that time, pretty fast, I don't know just how fast we were going; it was fast, and we took this dip, and sort of momentarily lost control of the car it seemed, and I noticed at that time Jane was nervous" so that plaintiff said to slow down and told Miss Potts not to be nervous. (R. 187) Again defendant slowed down and nothing more happened until after the car had reached the Potts residence. There plaintiff got out and allowed Miss Potts to get out of the car and then got back in. (R. 188)

On the return trip defendant continued along Holladay Boulevard north from the Holladay business intersection. Until the car passed the intersection it was traveling at a moderate rate of speed, but thereafter it continually picked up speed approaching the curve at 45th South, so that in approaching the curve the car was "going over fifty-five miles an hour." Plaintiff stated that he noticed that defendant made no attempt to slow down, approaching that curve; that he observed defendant had his foot on the brake and gas as the car started around the curve; that the car skidded around the whole curve, with the back wheels off the oiled surface—in fact, "we were off it so far we almost hit a pole sticking out . . . onto the shoulder there at 4500 South Street." (R. 195). The defendant lost a little speed so that he was going fifty miles an hour after completing the curve. (R. 197) Defendant was very alarmed and stated that "we are not in that big a hurry to get home, Pat, slow down." Defendant did not answer but "poured it on more" approaching another curve approximately one-fourth of a mile away. The first curve was

to the left while the second curve was to the right. As soon as he came out of the first curve and gained control of the car defendant speeded up again, (R. 199) until the car was traveling about fifty-five or sixty miles per hour. (R. 200) Plaintiff further testified that in going into the second curve defendant did not slow down the car but put on the brake and the gas at the same time, "and the car swerved sideways at that point on the left-hand side of the road clear around the curve"; that the rear of the car narrowly missed some hedges on the left side of the road, then it went out of control and swerved over to the other side of the road, traveled along the shoulder, skidded sideways and hit a street marker, causing the car to turn over. (R. 201)

Some distance back of both the first and second curves (which were not right angle curves) plaintiff testified that there were warning signs indicating the approach to the curves; (R. 204) that it had been raining earlier that evening; (R. 170) and that this was the first and only time in which plaintiff had ridden in an automobile being operated by defendant; (R. 166)

Notwithstanding the foregoing testimony given by plaintiff on direct examination, he admitted in the course of cross examination that approximately one week after the accident happened he had given a written statement in which he stated, in substance and effect, that upon his return to the party after taking his wife home, that he and defendant "decided to take the other two girls home"; (R. 216) that plaintiff went along for the ride because he wanted the fresh air; (R. 217) that he further stated "we came down Fifth South pretty fast, and Kay remarked she had a baby at home, and I said the same, and, later on, at Holladay Boulevard, Pat went over a bump pretty fast;

other than that, he was driving okeh." (Italics added.) Defendant admitted that at the time of giving the written statement he said nothing about the car going out of control, or almost going out of control on Holladay Boulevard. (R. 217)

In connection with the same statement, defendant further admitted saying, "on the way back, all three of us were in the front seat; Pat was in a hurry and was going too fast for the conditions of the road; it had been raining and the streets were somewhat wet, and mud was on the shoulders; *however, I don't think he was breaking any speed limit.*" (Italics added.) (R. 218)

Plaintiff was then cross-examined with respect to his testimony given in a deposition taken after suit had been filed, in which deposition plaintiff admitted making the statement that in negotiating the first curve defendant had been traveling about 50 miles per hour, while on direct examination at the trial he had just testified that they were going over 55 miles per hour. (R. 221)

Again with reference to whether defendant had applied any brakes as the car proceeded around the second curve, plaintiff admitted that in the deposition he had testified:

"Q. You say he wasn't applying his brakes, was he?
A. He accelerated—I don't know what he was trying to do—keep the car right I guess, he wasn't putting on brakes, I don't think, we were in gravel and it would be hard, you see, I don't think we slowed down any."

Plaintiff also admitted in connection with his testimony on said deposition that he had made no statement to

the effect that defendant was "stunt driving" in negotiating the curves, nor that he had skidded sideways around the first curve narrowly missing a pole. (R. 221)

On further cross-examination, plaintiff testified that when they arrived at the Potts' residence on 5900 Holladay Boulevard plaintiff got out of the car to allow Miss Potts to get out and then got back in the car without saying anything to the defendant about the manner of his driving; that the first time anything was said to the defendant about his driving after that was after they had proceeded around the first curve when a statement was made to the effect that defendant should take it easy; that he had just made the remark take it easy and stated he had been in eight accidents before when the car started to round the second curve and left the highway. (R. 222, 223)

From the foregoing admissions made by the plaintiff in the course of cross-examination it was clearly established that his story had changed at least once and in some particulars twice since the accident happened. At first plaintiff had given the statement that he did not think defendant exceeded any speed limit. Later, in his deposition he stated at one point defendant was exceeding the speed limit. But on direct examination at the trial he testified the defendant was exceeding the speed limit several times.

Nor was plaintiff's testimony corroborated by any of the other witnesses with the exception of the incident which occurred on Twenty-Third East when the car went over a "bump" instead of a "dip." Both of the lady passengers were called as witnesses in the case. Mrs. Jane Naisbitt (formerly Jane Potts) testified that she was friendly to both parties in the action, (R. 256) and that at the time

in question she and Mrs. Bracken were riding in the automobile with plaintiff and defendant. She stated that as the car went over a bump on Twenty-Third East, she became uneasy and pushed her feet on the floor board whereupon the plaintiff said "Janey, don't worry; Pat is a good driver," and then said "slow down Pat"; that she had observed nothing irregular about defendant's driving prior to that time and did not even observe whether he slowed up after the comment was made by the plaintiff; and did not know whether defendant even heard the remark; that she was not nervous or upset at any other point and was only momentarily upset at that time because she was aware of the bump in the road. (R. 262, 263) She also testified that the car did not go out of control but continued on down the road. (R. 264) However, as the car went over the bump she turned to look at the speedometer and it appeared to read 80 miles per hour, but because she was looking at the speedometer at an angle she could not state whether it was actually reading 80 miles per hour or not; that although she had driven an automobile for some time, she had no independent opinion with respect to the speed of the car and could not state that the car was traveling at 80 miles per hour when she observed the speedometer; that the only thing that gave her any indication that the car was traveling fast was the way it went over the bump. (R. 264-266)

The other occupant of the car, Mrs. Bracken, testified that she had ridden in the rear seat until the car reached Fifth South and Fort Douglas, at which point she decided to drive out to the home of Betty Toigo (one of the girls who had been at the party) to see if her husband had taken Miss Toigo home, at which time she went up in the front seat and sat between the plaintiff and Mrs. Naisbitt. (R.

281) She further testified that at no time did she observe any irregularity in the manner in which the car was being operated either on the way out to 5900 Holladay Boulevard or on the return until just at the time the automobile commenced to skid in proceeding around the second curve. (R. 281-284) Neither Mrs. Bracken nor Mrs. Naisbitt testified to any irregularity in the driving as the car came down Fifth South from Fort Douglas toward Thirteenth East.

Officer Van Leuween who assisted in the investigation of the accident testified that he and his companion had measured that from where the car left the highway in proceeding around the second curve it traveled 60 feet north along the west side of the highway, and then crossed the road to the east side of the highway a distance of 30 feet and traveled approximately 84 feet along the east side "before he was laid on his side." (R. 249) That in the distance the car traveled 84 feet along the right side of the highway the car was off the shoulder and one wheel was in the ditch. (R. 255)

It is upon the foregoing testimony that the plaintiff relies for recovery in the instant matter. Of course, the statement made by the defendant more nearly coincides with the testimony of Mrs. Bracken and Mrs. Naisbitt except that defendant testified he did not notice any bump as the car proceeded south on Twenty-Third East approaching Holladay Boulevard. (R. 295) Defendant testified that on the evening in question he had offered to take the girls home and the plaintiff had asked to go along for the ride; (R. 291) that after getting in the automobile he proceeded to Betty Toigo's residence near Twenty-Seventh South and Twentieth East where they stopped for a few minutes to see if Miss Toigo had arrived home. Upon leaving there

the automobile proceeded on to Twenty-Third East, south to Holladay Boulevard, and then along Holladay Boulevard to 5900 where Mrs. Naisbitt was let off; that at no time did defendant drive in excess of forty-five miles per hour. (R. 296) Upon the return trip there was nothing irregular in the manner in which the automobile negotiated the first curve, but that in approaching the second curve defendant was confused because of the shrubbery and weeds along the right side of the highway and the street lights on the left, which proceeded straight west along Forty-Fifth South Street, so that he was into the curve before he realized it. (R. 297, 298) As soon as he observed the curve he proceeded to turn but the wheels "seemed to slide or something—the rear wheels went into the mud on the soft shoulders, and I brought the car out of that turn, then we cut across the road to the right; I swung the wheel to the left, and the car went down straight, then into a ditch and hit some obstruction in the ditch, swung sideways to the left, and rolled over." (R. 298)

In the light of the foregoing evidence it does not seem possible that the trial court had any discretion to grant the plaintiff a new trial. The jury had the opportunity of considering all of the evidence; and, under the instructions of the court, had the right to judge the credibility of the witnesses. In the latter connection the court instructed the jury that "you have the right to take into consideration their [witnesses] deportment upon the witness stand, their interest in the result of the suit, the reasonableness of their statements, their apparent frankness or candor, or the want of it, their opportunities to know or understand, and their capacity to remmeber." (R. 85). The jury having deter-

mined the issues in favor of the defendant and against the plaintiff, such verdict should have been sustained.

Indeed, it would appear that the language of the court in the case of *Acosta v. Craik*, 288 N. Y. S. 868, 248 App. Div. 209, is entirely appropriate to the facts in this case. There the court said:

“The conflicting claim of the plaintiff’s and the defendant’s witnesses presented purely issues of fact which were properly submitted to the jury in a clear, comprehensive charge that adequately protected plaintiff’s rights, to which no exceptions whatever were taken by either side. No errors are claimed in the admission or rejection of evidence or in the charge. The jury, after deliberation, returned a verdict in favor of defendant, and the evidence adduced, which the jury evidently accepted as true, supports the jury’s verdict. Accordingly, it was error on the part of the trial court to set aside the verdict and direct a new trial.”

In view of the limitations prescribed by the cases heretofore cited on the power of the trial court to grant a new trial, it would appear that there was an abuse of such discretion in the instant case. In the case of *Sharpensteen v. Sanguinetti*, 33 Ariz. 110, 262 Pac. 609, the court in considering the limitations on the discretion of the trial court to grant a new trial held:

“It is of course the law that granting of a new trial is largely in the discretion of the trial court, and that the reviewing court will not disturb the ruling except for an abuse of that discretion. What is meant by discretion in that connection is a legal discretion, one based upon reason and law. If the showing for a new trial is insufficient both in form

and substance, as the one here appears to be, it may be said that there is no discretion to be exercised. The rule that should guide the trial judge in passing upon a motion for new trial is very well stated in *Sovereign Camp, etc., v. Thiebaud*, 65 Kan. 332, 69 P. 348, as follows:

“ ‘The discretion of district courts in the matter of granting or refusing new trials is 'a legal, not a capricious, one. It must be warranted by law, and guided by established precedent. It may not be exercised simply because the judge might wish the verdict to be otherwise. The test and warrant for its use is, Has the applicant therefor shown a legal reason for its existence?' ”

In the instant case there was no reason in law or in fact for granting the plaintiff a new trial except that the court might have desired the verdict to be other than that which was rendered.

However, appellant also urges that the trial court erred in granting plaintiff and respondent a new trial for the reason that under the evidence there was only one verdict which the jury could reasonably have rendered, and that was a verdict of no cause of action. One of appellant's requested instructions was that the court instruct the jury to return a verdict of no cause of action, which instruction the court refused to give. It has been held that at all events a new trial should not be granted where it appears from the record that the party making the motion did not make a case and there is no reasonable probability that on a new trial he can make a case. See *Schnell v. Northern Pacific Railroad Co.*, 71 N. D. 369, 1 N. W. (2d) 56, where the court held:

“Whether a new trial should be granted rests largely in the sound discretion of the trial court, and an order granting a motion therefor will not be disturbed unless it can be said that there was an abuse of that discretion. *Martin v. Parkins*, 55 N. D. 339, 213 N. W. 764; *State v. McEnroe*, 68 N. D. 615, 283 N. W. 57; and authorities cited in the foregoing cases. But this discretion is a legal discretion to be exercised in the interest of justice, so if it appears on the record that the party making the motion has not made a case and there is no reasonable probability that on a new trial he can make a case, an order granting a new trial will not be sustained. *Kohlman v. Hyland*, 56 N. D. 772, 219 N. W. 228, and authorities cited therein.”

In the case of *Halsan v. Johnson*, 155 Ore. 583, 65 Pac. (2d) 661, the Supreme Court reversed an order granting a new trial stating:

“We have carefully read all the testimony in the case and have given thorough consideration to the alleged errors assigned in the motion for a new trial. Without discussing each one of such alleged errors, it is sufficient to say that it is our conclusion that the jury arrived at the one and only result that could be sustained by the facts in the case. The record does not contain sufficient evidence from which the jury could have found or inferred that the defendant was guilty of any of the acts of negligence charged against her in the complaint. It was incumbent upon plaintiff to prove that defendant was negligent, not upon the latter to prove that she was free from negligence.”

In the case of *Walters v. Federal Life Ins. Co.*, 320 Pa. 588, 184 Atl. 25, it was held:

“It is true we do not as a general thing reverse where

a new trial is granted, but where it is clear, as a matter of law, that the verdict rendered was correct on the proofs submitted, then we do, and ought to reverse, because the court, in awarding the new trial, has committed an error of law.”

In the instant case plaintiff and respondent relied upon three alleged grounds of willful misconduct: (R. 65)

1. That defendant drove the automobile at an excessive rate of speed under the circumstances.
2. That he failed to keep the car under control.
3. That he failed to keep a proper lookout.

The evidence in support of the foregoing allegations did not as a matter of law establish willful misconduct as alleged. Willful misconduct was defined by the court in Instruction No. 7 as follows: (R. 71)

“You are instructed that willful misconduct is the intentional doing of an act or intentionally omitting or failing to do an act, with knowledge that serious injury is a probable and not merely possible result, or the intentional doing of an act with wanton and reckless disregard of the possible consequences. It involves deliberate intentional or wanton conduct in doing or omitting to do an act with knowledge or appreciation that injury is likely to result therefrom.”

The court further stated in Instruction No. 6 that willful misconduct connotes a greater wrong doing than mere negligence or even gross negligence. “It includes a conscious or intentional violation of definite law or rule of conduct, with the knowledge of the peril to be apprehended from such act or failure to act.” This instruction clearly

states the law with reference to what constitutes willful misconduct as defined by the courts of various jurisdictions. For instance, in the case of *Howard v. Howard*, 132 Cal. App. 124, 22 Pac. (2d) 279, the court held:

“Willful misconduct implies at least the intentional doing of something either with a knowledge that serious injury is a *probable* (as distinguished from a possible) result, or the intentional doing of an act with a wanton and reckless disregard of its possible result.”

The court further quoted with approval the following language of the Supreme Court of Massachusetts in the case of *In re Burns*, 218 Mass. 8, 105 N. E. 601:

“To constitute ‘willful misconduct’ there must be actual knowledge, or that which in the law is esteemed to be the equivalent of actual knowledge, of the peril to be apprehended from the failure to act, coupled with a conscious failure to act to the end of averting injury.”

In the light of the foregoing rules, the evidence in this case was not sufficient to sustain a verdict for the plaintiff had one been returned by the jury. The only evidence of excessive speed was that given by the plaintiff himself, who admitted that immediately following the accident he had given a written statement in which he said that he did not believe the defendant was exceeding any speed limit. Again on his deposition prior to the trial the testimony was that defendant was traveling at approximately 50 miles per hour. It was stipulated at the trial that the posted speed limit for night time driving at and near the place where the accident occurred was 50 miles per hour at this time. (R. 334) There was no evidence that due to the condi-

tions of the highway that any lesser speed than the posted speed limit was required. Therefore, defendant was entitled to assume that the operation of his car, even at a speed of 50 miles per hour, was reasonable and prudent.

It has been repeatedly held that speed alone is not sufficient to show willful misconduct under statutes similar to ours. In the case of *Howard v. Howard*, *supra*, the facts reveal that the deceased was riding in an automobile being driven by his brother. It was raining or sprinkling and the pavement was wet. The complaint charged that the defendant having full knowledge of the wet street, together with the fact that there was a curve in the road drove and operated his automobile at a high rate of speed, so that the same skidded sideways and defendant lost control of it. After defining willful misconduct as hereinabove quoted, the court held:

“Applying these rules to the case before us, and conceding that this driver must have known that driving on a wet road might possibly result in injury, it seems clear that the evidence does not justify the belief that he increased his speed with the knowledge or belief or expectation that any serious injury was probable. He had driven a car for six years and this particular car for one year, had driven it in the rain without its skidding, and without doubt he believed he could do this again. If he may be said to have disregarded the possible consequences of his act, such disregard was due to carelessness rather than to wantonness and recklessness, and was undoubtedly based upon his belief that no injury was probable. While he may be said to have been reckless in the sense of being careless, that is only negligence and is not within the statute. But the intentional doing of an act with

a wanton and reckless disregard of its possible consequences implies the doing of such an act either with the intent that harm shall result therefrom or in the attitude of mind of not caring if it does result in injury. No such intent and no such attitude of mind on the part of this appellant here appears. *There is nothing in the evidence to show or even indicate that the appellant in driving as he did, even though the pavement was wet, either had actual knowledge or in law is chargeable with actual knowledge that his course of action constituted a real present peril, and that knowing such peril existed he consciously and intentionally failed to act to avoid the peril and avert an injury.* The only conclusion possible from reading the evidence before us is that while the appellant was in a hurry and desired to proceed as rapidly as he could, he was not even indifferent to results but, on the contrary, had a fixed desire to arrive at his destination in time to attend a dance before it closed. It clearly appears that, although he proved to be mistaken, he thought he could safely drive as he did even though the pavement was wet; that while he intended to drive rather rapidly he neither intended the result that happened nor was indifferent to the same; and that he was far from being in such a frame of mind that he did not care whether or not he injured anyone. While this driver may have been negligent in a greater or less degree, in our opinion, no willful misconduct within the meaning of this statute is disclosed in this evidence.” (Italics ours.)

Again in *Driscoll v. Pagano*, 314 Mass. 459, 48 N. E. (2d) 1, the evidence revealed that defendant was driving an automobile at a speed of 40 to 45 miles per hour on car tracks located in the center of the paved street which was

wet; that there was a sign reading "slippery when wet," and that the guest had noticed the car swaying and wobbling and requested the defendant to slow down; that the defendant was familiar with the road and knew it to be slippery in wet weather; and that the car went out of control when the driver attempted to get off the car tracks, traveling approximately 150 yards from the point where it left the road before coming to rest against a billboard. In determining that speed was not sufficient to constitute "gross negligence" the court held:

"The speed at which the defendant was operating, in the circumstances disclosed, cannot be said to constitute gross negligence. It is true that the road was wet, but apart from the evidence that the body of the automobile was swaying and that there was a 'wobbling,' there is nothing to indicate that up to the time the defendant reached the car tracks he did not at all times have the automobile under control. The same may be said as to the evidence of the cautions that were given at about a quarter of a mile from the scene of the accident. . . . We refer to several cases in each of which it was held that a finding of gross negligence was not warranted. *McKenna v. Smith*, 275 Mass. 149, 175 N. E. 474 (wet and slippery road, speed forty miles an hour, automobile going from side to side and twisting and swerving as it went around the curves; place particularly dangerous, view obstructed; caution as to speed). *Richards v. Donohue*, 285 Mass. 19, 188 N. E. 389 (speed fifty to fifty-five miles an hour, passing automobile on curve, oil surface; disregard of all requests to moderate speed and not to pass another automobile on curve; sharp turn to right to avoid oncoming automobile, loss of control of automobile which

turned around twice and turned over twice). *Adamian v. Messerlian*, 292 Mass. 275, 198 N. E. 166 (speed forty-five to fifty miles an hour descending particularly slippery and icy hill at night; protests as to speed; automobile began to skid, defendant lost control and it continued to skid several hundred feet). *Lynch v. Springfield Safe Deposit & Trust Co.*, 294 Mass 170, 200 N. E. 914 (speed fifty miles an hour at night). *Souza v. Mello*, 304 Mass. 552, 24 N. E. 2d 516 (speed sixty miles an hour at 6 P. M. in October; collision with truck standing on the side of the road). *DeSimone v. Pedonti*, 308 Mass. 373, 32 N. E. 2d 612 (speed about forty-five miles an hour in the evening, defendant urged to slow down or they 'would get killed'; defendant angry and cursing; dirt surfaced road, 'kind of rough'; automobile skidded when it 'did not take' a sharp curve)."

A case, which on the facts is very similar to the one here involved, is *Elowitz v. Miller*, 265 Mich. 551, 251 N. W. 548. There the defendant and three others got in defendant's automobile and proceeded to go for a ride. One of the passengers sat on the lap of another. All three passengers testified at times the defendant drove at an immoderate rate of speed, "particularly when turning corners," and that one of them asked defendant to return to the university campus; that the defendant was told "to slow down and watch his driving." In the course of the drive the automobile came to a short street known as "Cedar Bend Drive." The defendant testified that as they came down the drive "he knew they were approaching a curve, but reached it sooner than he expected; that as soon as he saw it he applied the brakes; and that, had it not been for a spot of ice or gravel at the corner, his 'guess' was that

he would have made the turn in perfect safety, but that 'the car slewed across the road and launched over the curb and hit a tree.' He was himself injured in the collision. He also testified that his brakes were in 'extremely good working order,' and that he had had no trouble in making the many other turns while they were driving; that he at all times felt that he had his car under control; and that he was operating it in a manner that he felt was safe to his passengers and himself. His car was practically new, and he was doubtless anxious to display his skill as a driver and his perfect control over it."

At the conclusion of plaintiff's case, defendant moved for a judgment which was granted and an appeal was taken. The sole question presented was whether the facts established willful and wanton misconduct on the part of defendant in the operation of his automobile. In affirming the judgment of the trial court, it was held:

"This is in accord with our holding as to liability in *Finkler v. Zimmer*, 258 Mich. 336, 241 N. W. 851. To sustain the claims of the plaintiffs it must appear that the defendant had: '(1) Knowledge of a situation requiring the exercise of ordinary care and diligence to avert injury to another; (2) ability to avoid the resulting harm by ordinary care and diligence in the use of means at hand; (3) the omission to use such care and diligence to avert the threatened danger, when to the ordinary mind it must be apparent that the result is likely to prove disastrous to another.' *Willett v. Smith*, 260 Mich. 101, 104, 244 N. W. 246, 247; *McLone v. Bean*, 263 Mich. 113, 115, 248 N. W. 566.

"If we eliminate the testimony of the defendant that ice or gravel caused his car to skid, of which there

is dispute, the proximate cause of the accident was the failure of defendant to see the curve at Wall Street in time to have slowed down to safely make the turn. But, as was said in *Van Blaircum v. Campbell*, 256 Mich. 527, 528, 239 N. W. 865: 'Perhaps he was not as watchful as he should have been. * * * This mere failure or inadvertence or lack of care is, at most, ordinary negligence, so called.' "

See, also, *Bobich v. Rogers*, 258 Mich. 343, 241 N. W. 854, in which case the evidence revealed that the plaintiff told the defendant he was driving too fast, and that as the car approached a curve plaintiff said "Why don't you stop while I get off?" There, the court held:

"Whether a turn of the road can be made with reasonable safety at any particular speed depends, of course, upon the character and condition of the road and the skill of the driver. We cannot draw a line beyond which mere speed in making a turn departs from negligence and becomes willful and wanton misconduct. Conceding that defendant was negligent in making the turn at high speed it would not constitute willful and wanton misconduct. See *Van Blaircum v. Campbell*, 256 Mich. 527, 239 N. W. 865."

. . .

"At the most, plaintiff made out a case of negligence. To recover he was required to go beyond that and establish that he was injured by reason of the willful and wanton misconduct of defendant. The proofs failed to make such a case. The court should have granted a new trial."

To the same effect are the following: *Homes v. Wesler*, 274 Mich. 655, 265 N. W. 492; *Riley v. Walters*, 277 Mich.

620, 270 N. W. 160; *Katz v. Kuppin*, 44 Cal. App. 2d 406, 112 Pac. (2d) 681; *People v. Thompson*, 41 Cal App. 2d Supp. 965, 108 Pac. (2d) 105; *Olson v. Hodges*, Iowa, 19 N. W. (2d) 676; *Gill v. Hayes*, 188 Okla. 434, 108 Pac. (2d) 117; *Clark v. Hasselquist*, 304 Ill. App. 41, 25 N. E. (2d) 900.

In *Russell v. Turner* (Eighth Circuit Court of Appeals), 148 Fed. (2d) 562, the court determined:

“It seems apparent that the sixteen year old driver of the car drove off the road because (1) he was driving too fast, (2) he failed to anticipate that the road ended where it did end, and (3) he failed to observe the end of the road until it was too late to avoid the accident. An inference that just before the accident the car was hurtling through the night, out of control, with its protesting passengers being tossed about, and with an irritated and irresponsible driver, familiar with the road but who did not care what became of himself, his friends, or his father’s car, behind the wheel, is an inference which, in our opinion, does not accord with a common-sense view of the evidence. The plaintiff is, of course, entitled to have the benefit of all favorable inferences which reasonably may be drawn from the evidence. She is not entitled to the benefit of unreasonable inferences. One fairly can believe that the evidence in this case does not show more than the lack of care, skill and judgment which might be expected from an ordinarily imprudent, immature, or inexperienced, but nonreckless, driver of an automobile. In other words, the evidence, viewed in the aspect most favorable to the plaintiff, is not inconsistent with the hypothesis that the plaintiff’s injuries were the result of just ordinary carelessness on the part of James Turner.”

* * *

“The purpose of the Guest Statute was to relieve the owner and operator of an automobile from liability for negligence resulting in injury to a guest. To make a case under the statute, ‘It is not sufficient to show negligence, but the plaintiff must go further than this and show a rash, heedless, disregard of danger that would be apparent to or reasonably anticipated by a person exercising ordinary prudence and caution under existing circumstances.’ Wright v. What Cheer Clay Products Co., 221 Iowa 1292, 1299, 267 N. W. 92, 95. ‘It must appear from the evidence that at the time and place of the accident the driver * * * was proceeding without heed of or concern for consequences, with no care, coupled with a disregard for the safety of his guest. * * * An error in judgment, thoughtlessness, or mere inadvertence do not constitute recklessness within the meaning of the statute.’ Tomasek v. Lynch, 233 Iowa 662, 10 N. W. 2d 3, 7.”

In all of the foregoing cases there was evidence that the plaintiff, or some other guest, had protested the manner in which the automobile was being operated prior to the collision. However, in each case the court determined that such protest did not show sufficient knowledge on the part of the defendant of the potential danger of the manner in which he was operating the vehicle to constitute willful or wanton misconduct. As stated by the Supreme Court of Massachusetts, in the case of Adams v. Doucet, Mass., 55 N. E. (2d) 4:

“ . . . the occupants of the automobile apparently did not think themselves in grave danger. The question before us is one of judgment on the evidence in the particular case. In this case we think

that a finding of gross negligence was not warranted. *Romer v. Kaplan*, Mass., 54 N. E. (2d) 673.”

In *Katz v. Kuppin*, *supra*, it was further held:

“The fact that a guest expresses dissatisfaction with the manner of the operation of an automobile does not ipso facto establish willful misconduct on the part of the driver. Plaintiffs’ contention that defendant became angry on being requested to decelerate her speed is unimportant. It does not justify the inference that she acted with knowledge that under the circumstances it would probably lead to injury to her guest and herself.”

Nor does appellant rely entirely upon the proposition that plaintiff failed to prove that defendant was guilty of willful misconduct. There is evidence in the case that plaintiff and defendant were acting conjointly in taking the two girls home. (R. 216) That notwithstanding defendant had operated the car at excessive speeds on the trip out to 5900 Holladay Boulevard, plaintiff had voluntarily re-entered the car and proceeded to ride home with the defendant without making any cautionary remarks or advising defendant to proceed more cautiously; that although defendant commenced to accelerate the speed of the automobile after leaving Holladay Intersection (approximately one-third of a mile before reaching the first curve), plaintiff made no comment concerning the operation of the car until after defendant had proceeded around the first curve, and that at that time there was only sufficient time to make the statement to defendant to slow down and state that he had been in eight previous accidents when the car proceeded around the second curve and skidded off the hard surface. (R. 222, 223)

Our Supreme Court has heretofore determined that a guest is not without responsibility while riding in an automobile. In the case of *Jackson v. Utah Rapid Transit Co.*, 77 Utah 21, 290 Pac. 970, the court, in discussing a guest's duty, stated:

"If the guest or invitee knows that the driver is incompetent or careless, or unaware of an approaching danger, or is not taking proper precautions to avoid it, it again becomes the duty of the guest or invitee to caution or notify the operator. So, too, if the guest or invitee sees or knows that the operator is operating the automobile at an excessive, unlawful, or dangerous speed, or in violation of traffic rules or regulations, or otherwise is mismanaging or driving the automobile in a careless manner, it again is the duty of the invitee or guest to protest and ask the operator to desist; and if the guest or invitee fails to do so, he may be regarded as having consented to or acquiesced in such violations or negligence of the operator, rendering the guest or invitee himself personally guilty of negligence."

Again in the case of *Maybee v. Maybee*, 79 Utah 585, 11 Pac. (2d) 973, the court held:

"If it was negligence for the defendant to drive at this speed with her vision impaired as it was, and without the aid of glasses, it would follow that, where all these facts are fully known to and appreciated by the plaintiff, and notwithstanding such facts and such knowledge she was willing to be driven in the car, she not only assumed the risk or hazard to her own safety, which resulted from such driving, but, by her acquiescence, was guilty of independent negligence which contributed to the accident. The plaintiff identified herself with

whatever negligence there was on the part of the mother because of her knowledge of all such facts and her approval, consent, and acquiescence in the driving of the car by her mother.”

In *Balle v. Smith*, 81 Utah 179, 17 Pac. (2d) 224, the court stated:

“If a guest sees or discovers the danger in time to warn the operator of the car or the danger is so obvious, or he is in such position that he must have seen it in the exercise of due care, and an accident happens because of his failure to warn the operator of such danger, he may be guilty of negligence which will prevent a recovery.”

We submit that if there was danger of an accident resulting from the manner in which the defendant operated his car north along Holladay Boulevard approaching the first curve, plaintiff should have discovered such danger and warned the defendant in sufficient time for defendant to reduce the speed of the automobile before negotiating the curve. The very fact that no such warning was given, together with the evidence that the other guest in the car observed no irregularity about the operation of the vehicle, is sufficient to establish that there was no willful misconduct on the part of the defendant.

CONCLUSION

In conclusion and by way of summarizing appellant's argument, it is respectfully submitted:

1. That the verdict of the jury should not have been set aside by the trial court for the reason that the evidence was not sufficient in the first instance to submit to the jury, but that as a matter of law, the defendant was entitled to a directed verdict.

2. That even though the court may determine that the case was properly submitted to the jury on the question of defendant's willful misconduct, if any, and the plaintiff's assumption of risk, if any, the verdict as returned by the jury was in accord with the weight of the evidence, and that the trial court should not have granted plaintiff a new trial on the ground that the evidence was insufficient to support the verdict.

Respectfully submitted,

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