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

Utah Supreme Court

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A. W. Sandack; Attorney for Respondent;

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In the Supreme Court of the State of Utah

WARREN STACK,

vs.

EDWIN J. KEARNES,

Respondent,

Appellant.

Case No. 7387

RESPONDENTS' BRIEF

FILED

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A. W. SANDOZ,
Clerk, Supreme Court, Utah
Attorney for Respondent

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Appellant.

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RESPONDENTS' BRIEF

STATEMENT OF THE CASE

Warren Stack, plaintiff and respondent herein, sued Edwin J. Kearnes, defendant and appellant, for personal injuries arising out of an automobile accident October 12, 1947, in which respondent was riding as appellant's guest, when the Kearnes' car overturned around the Casper Cutoff, Holladay Boulevard at 4500 South Street, in Salt Lake County. As a result of the accident the respondent's upper left ear was sloughed off and amputated. (Exhibits A, B, C, N, and O.)

Prior to the trial, the parties stipulated (R-87) if defendant was found liable, the respondent's special damages were \$207.34 hospital bills and \$152.00 loss of wages. The medical testimony (R-231) showed that Dr. Burtis F. Robbins performed 13 plastic surgery operations on the respondent's ear up to the time of the first trial and that respondent had been treated by Dr. Robbins in his office 75 other times, for which the doctor testified his services were reasonably worth \$1,000.00 (R-236). Respondent's special damages were \$1,359.34, he asked for \$25,000.00 general damages. The first trial resulted in a verdict for defendant on December 22, 1948 after the jury had deliberated about 15 minutes (R-40).

Plaintiff moved for a new trial (R-96) on January 15, 1949, on grounds therein stated and the matter was argued to the Court that date and continued for argument on January 22, 1949, after which the trial court granted plaintiff's motion for new trial (R-97).

A second trial resulted in a verdict for the plaintiff in the sum of \$1,359.34 special damages and \$500.00 general damages (R-153), after which defendant moved for a new trial, without argument, and which motion was denied (R-156).

Plaintiff's complaint (R-2) alleged that defendant was guilty of willful misconduct in the operation of his car in that he not only drove at excessive rate of speed, upwards of 60 miles per hour without having his car under control, and that he failed to keep a proper lookout, but that he drove his car recklessly attempting to take the curves on the highway which he well knew to be there, heedless of the consequences, and

that he deliberately took and encouraged taking the risk of an accident, with utter disregard for plaintiff's safety after plaintiff had warned defendant to drive cautiously and after the defendant had almost caused his car to collide with a utility pole rounding an earlier curve, about 1100 feet ahead of the curve on which defendant overturned his car. (Underline supplied).

The gravity of plaintiff's charge and theory was that defendant stunt-drove his car taking the risk of the accident mindful that an accident and personal injury were both possible and probable consequences of his reckless driving and defiant mood.

Because appellant's Brief fails to recite the physical facts and circumstances surrounding the highway and accident it seems proper to expand this statement of facts:

Defendant Kearnes admitted that he was well aware of the Casper Cutoff, (Exhibits D through L), Holladay Boulevard at 4500 South Street, he testified that he had driven over that route since 1943 when he was socially escorting Jane Potts who lived at 5900 Holladay Boulevard. This is the girl who testified as plaintiff's witness as Jane Potts Naisbett (R-303-304). Kearnes admitted familiarity with the curves over the Casper Cutoff, (designated as 1 and 2 in the Record,) after leaving the Holladay business intersection and travelling toward Salt Lake City (R-305). He testified he didn't remember any curve marker signs (R-306) although he had driven the route for over four years at the time of the accident. There were curve marker signs posted before the first and second curves (R-250).

It had been raining on the night of the accident and the shoulders of the road were damp and the surface damp (R-250 and 297). The road and the second curve, around where the accident occurred, was well lighted with street lamps (R-250). The hard surface of the road measured 20 feet across, the overall width of the road and shoulders was 32 feet. The accident happened at about 3:15 A.M. Kearns was driving a 1942 Studebaker car with Idaho license plates (R-245). Kearnes admitted that on the night of the accident he gave the curve signs in the road only "a fleeting glance attention," (R-306). Then on cross-examination, the defendant dropped his guard and exposed the reasons for his recklessness admitting that he was "out of humor" and "quite put out" because his date (Betty Toigo, now defendant's wife), who had been with him earlier in the evening was not at home when he drove by on the trip out to Jane Potts' home after he had gone off the route and stopped to see if she had come home (R-306, 307, 308). He admitted (R-310) he stated on deposition that he parked with the plaintiff and others in the car, and waited for 15 to 20 minutes to see if Betty got home. This was between 2:30 and 3:00 A.M.

Officer Van Leeuwen testified that he arrived 15 minutes after the accident and his investigation showed these facts:

The defendant's car travelled between 34 and 41 feet from the point where it left the hard surface of the highway around the second curve (Exhibit I) over to the soft shoulder and along that shoulder Northwest 60 feet, the car then cut back across the highway 28 feet and crossed over onto the soft shoulder and open field on the side of the road in which the

car was directed prior to the accident and travelled 84 feet Northwest along that open field and across a ditch and finally onto a street marker on Arcadia Lane overturning somewhere in this last movement and taking out a 4 by 4 wooden street marker sign set in cement (R-249) with the car finally laying upon its right side (R-254).

"Exhibit M" admitted in evidence, a general diagram of the highway, shows the first and second curve of this Casper Cutoff separated by about 1100 feet of straight-of-way. The Exhibit, according to the scale of the drawing, shows that Arcadia Lane (Exhibit L) is over 300 feet generally north of the bend in the second curve. Defendant's car ended up (R-254) on Arcadia Lane at the intersection of Holladay Boulevard, some 350 feet from the curve he failed to negotiate.

Mrs. Barnard, a witness for the plaintiff who lives across the street west of where the car finally stopped testified: "They left the road pretty close to that curve (meaning the second curve) and there was a telephone pole which comes up that 34 feet. They missed the telephone pole by approximately 6 inches; you could see the tracks very definitely." She stated, "... shortly after they careened across the road and over ..." (R-270). Mrs. Barnard testified: "There were a lot of tall shrubs, weeds, growing on the side of the road, we thought they rolled over three or four times. Approximately three times, we figured, before they landed on the side in the street in Arcadia Lane." She stated, "that the shrubbery and fernery in this part of the lot was knocked down and was mashed and matted" for a considerable area (R-271).

The Court and jury were asked to believe that all this occurred to the defendant's car, (R-297) while he was traveling at a speed of between 35 and 45 miles per hour.

Plaintiff's testimony was that this occurred while the defendant's speed exceeded 55 to 60 miles per hour (R-200). There is a substantial conflict in how the accident occurred. Defendant insisting that at no time, either on the way out to the Potts home or on the way back to the point of the accident, did the defendant drive in excess of 30 to 45 miles per hour (R-294, 295, 296). However, his former girl friend and the witness who admitted friendliness to both parties, Jane Potts, testified (R-261) that she noted defendant's speedometer register 80 miles per hour at one point on the way to her home as defendant drove over 23rd East and witness Potts corroborated plaintiff's statement at that time that plaintiff asked defendant to slow down. Yet defendant recalled no such speed at 23rd East or no reference by plaintiff to the manner in which he was driving (R-295).

Plaintiff's version of the way the defendant openly took the risk of this accident, appears in the Record at page 195:

Q: Yes, just tell how you drove over here, the manner, what you observed?

A: Well, after leaving the business section of Holladay on the Holladay Boulevard, we continually picked up speed approaching that first curve.

Q: You say the first curve; you are referring to this area here?

A: Yes, sir; just before reaching that curve, we were go-

ing pretty fast; I didn't look at the speedometer, I don't know how fast, but we were going "pretty fast."

Q. When you say "pretty fast," do you have any idea of how fast "pretty fast" is?

A: Well, we were going . . .

Q: Your recollection or knowledge?

A: We were going over 55 miles an hour and, approaching that curve, I became frightened because I noted Mr. Kearnes made no attempt to slow down, approaching that curve. I glanced over; he was . . . had his foot on the brake, his foot on the gas as we started around the curve, and I was . . . well, very frightened, and we were going too fast, and I guess his object to put his foot on the brake was to keep the car in the road and still maintain the most speed he could, and we skidded around that whole curve, while the back wheels off the oiled surface of the road; in fact, we were off it so far we almost hit a pole sticking out into the . . . onto the shoulder there at 4500 South Street.

"Exhibit E" identifies the utility pole on the first curve that plaintiff referred to "as almost hitting."

At page 197, the plaintiff further testified:

Q: About how fast was Mr. Kearnes driving at that time? (Referring to when the car had rounded the first curve and almost collided with the pole.)

A: Well, he lost a little speed around that curve: I would say he was still going fifty miles an hour.

Q: You said that you observed that Mr. Kearnes was both braking his car and accelerating; is that correct? Is that your testimony?

A: Yes, sir.

Q: Around that curve?

A: Yes, sir.

Q: Is there any particular sensation that a person feels or knows when he feels that this is occurring?

A: Yes, it feels like you are, like a car is hugging the road, just like some weight in the back of the car; the wheels are spinning, and seems like it sits down, like felt to me (R-197 and 198).

Plaintiff testified (R-198) that he protested the manner in which Kearnes was driving:

A: Yes, I was very alarmed at the reckless way he was doing, and I was very frightened about it, and I said then in an alarmed tone, I said, "We are not in that big a hurry to get home, Pat, slow down."

Q: What did he do when you made that statement?

A: He laughed it off. (Underline supplied).

Q: Did he answer?

A: In fact, (R-199) he poured it on more on that straight-a-way there. (Underline supplied).

Q: Just a moment, did he answer you?

A: No, he didn't answer.

Q: Did you speak directly to him?

A: Yes.

Q: Then what happened?

A: Well, then, he gained speed on that straight-away again and of course by that time we were almost on the other curve, and we started around the other curve off on the left-hand side.

Plaintiff continued (R-200):

Q: And about how fast was he going as he approached this second curve?

A: Well, he wasn't . . . it was over fifty-five miles an hour.

Q: Did he at any time prior to entering that curve, attempt to brake—put the brake on?

A: Not to slow down, no.

Q: What did he do?

A: He did the same thing, stunt driving; he 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 (R-200). (Underline supplied).

On pages 201, 202 and 203 of the Record, plaintiff concluded his version of the accident.

The defendant Kearnes, while denying that he was guilty of stunt driving around these two curves, confirmed the plain-

tiff's testimony that "after coming out of the first curve he poured the coal on." Kearnes makes this admission on cross examination (R-316).

Q: Mr. Kearnes, if I recall your answer to Mr. Nielson on direct examination, you made this statement, "I accelerated the car after completing the first curve, and I think I was going 45 miles on hour, and, when I hit the second curve, I didn't even apply the brakes;" was that your testimony?

A: If that is what the records show.

Q: Do you recall making that statement?

A: Yes.

On page 318 of the Record, on cross-examination, the defendant testified that he didn't apply the brakes before the second curve, but that this entire accident was caused by the car seeming to slide a little bit when he stepped on the brakes (R-317). This last conflicting version of Mr. Kearnes' explanation of the accident was noted in a statement he made on a deposition of October 9, 1948, and appears more fully in the record, page 316, 317.

Respondent has purposely included the testimony at some length in this Statement of Facts in order to show the basic conflict between the defendant's testimony negating willful misconduct and the plaintiff's explanation of the accident in which he charged stunt driving and willful misconduct and with which the trial court was evidently impressed.

STATEMENT OF POINTS RELIED ON

1. The trial court did not commit error in granting plaintiff's motion for a new trial at the conclusion of the first trial.
2. Both trial courts, on the evidence submitted properly overruled defendant's motions for directed verdict.
3. The plaintiff was not as a matter of law guilty of acquiescence or assumption of the risk of defendant's willful misconduct.

ARGUMENT

GRANTING A MOTION FOR A NEW TRIAL RESTS WITHIN THE DISCRETION OF THE TRIAL JUDGE TO SUCH AN EXTENT THAT AN APPELLATE COURT WILL NOT INTERFERE UNLESS AN ABUSE OF DISCRETION CLEARLY APPEARS.

There is no longer novelty to this well-settled rule of law. The Courts of Utah, California, Arizona, Kansas, Washington and Oklahoma and the overwhelming weight of authority are all in accord.

In the recent case of *Moser vs. Zion's Cooperative Mercantile Institution*, 197 *Pacific 2nd* 136, decided August 29, 1948, this court considered this question. Justice Wolfe stated:

"It is a matter now too well settled to admit of any serious dispute (and appellants do not contend otherwise) that the question of granting or denying a motion for new trial is a matter largely within the discretion of the trial court. *White vs. Union Pacific Railroad Co.*, 8 Utah 56, 29 P. 1030; *Van Dyke vs. Ogden*

Savings Bank, 48 Utah 606, 161 P. 50; Utah State National Bank vs. Livingston, 69 Utah 284, 254 P. 781; Thompson vs. Bown Live Stock Co., 74 Utah 1, 276 P. 651; Jensen vs. Logan City, 89 Utah 347, 57 P. 2d 709. This rule applies whether the motion is based upon insufficiency of the evidence or upon newly discovered evidence. See cases above cited and Valiotis vs. Utah-Apex Mining Co., 55 Utah 151, 184 P. 802; Greco v. Gentile, 88 Utah 255, 53 P. 2d 1155; and Trimble vs. Union Pacific Stages, 105 Utah 457, 142 P. 2d 674. This court cannot substitute its discretion for that of the trial court. James vs. Robertson, 39 Utah 414, 117 P. 1068, 2 N.C.C.A. 782. We do not ordinarily interfere with rulings of the trial court in either granting or denying a motion for new trial, and unless abuse of, or failure to exercise, discretion on the part of the trial judge is quite clearly shown, the ruling of the trial judge will be sustained. Lehi Irrigation Co. vs. Moyle, et al, 4 Utah 327, 9 P. 867; White vs. Union Pacific Ry. Co. supra; Utah State National Bank vs. Livingston, supra; Clark vs. Los Angeles & S. L. R. Co., 73 Utah 486, 275 P. 582; and Trimble vs. Union Pacific Stages, supra. See also Harrison vs. Sutter St. Ry. Co., 116 Cal. 156, 161, 47 P. 1019, 1020.

In *Thompson vs. Bown Livestock Co.*, cited above, our Supreme Court held:

“Such has been the recognized rule in this jurisdiction. The trial court can grant a new trial on conflicting evidence because such a motion invokes a compound of the discretionary and judicial function of the Court.” (Underline supplied).

In *Perrin vs. Union Pacific R. R. Co.*, 201 Pac. 405, our Supreme Court asserted:

“If in the Court’s judgment the jury failed to give

such weight to the testimony as it was entitled to receive, it was no abuse of discretion to grant a new trial. Consideration of the weight of the evidence on motion for a new trial is peculiarly within the province of the trial court (as has also been held by California, where our Code derives.)”

The position of the California Supreme Court on this question is 'thoroughly set out in a recent decision, *Yost vs. Johnson*, (Cal. App. 3rd Dist. Ct. of Appeals) 206 P 2nd 13, decided May 16, 1949:

“Our Supreme Court, in comparable cases, has frequently enunciated the rule governing appellate courts in passing upon such questions. For instance, it said in *Brooks vs. Metropolitan Life Insurance Co.*, 27 Cal. 2d 305, 307, 163 P. 2d 689, 690: ‘In passing upon a motion for a new trial based upon the insufficiency of the evidence, it is the exclusive province of the trial court to judge the credibility of the witnesses, determine the probative force of testimony, and weigh the evidence. *People vs. Sarazzawski*, 27 Cal. 2d, 7, 161 P. 2d 934; *Green vs. Soule*, 145 Cal. 96, 102, 78 P. 337. In considering the sufficiency of the evidence upon such motion the court may draw inferences opposed to those drawn at the trial, *Mercantile Trust Co. vs. Sunset Road Oil Co.*, 176 Cal. 451, 456, 168 P. 1033; and where the only conflicts consist of inferences deduced from uncontradicted probative facts, the court may resolve such conflicts in determining whether the case should be retried. *Cauhape vs. Security Savings Bank*, 118 Cal. 82, 84, 50 P. 310. It is only where it can be said as a matter of law that there is no substantial evidence to support a contrary judgment that an appellate court will reverse the order of the trial court. (Underline supplied.) See *Dempsey vs. Market St. R. R. Co.*, 23 Cal. 2d 110 (113), 142 P. 2d 929.’

"It also stated, in *Williams vs. Field Transportation Co.*, 28 Cal. 2d 696, 698, 171 P. 2d 722, 723: 'An order granting a new trial upon the ground of the insufficiency of the evidence to sustain the judgment will not be disturbed upon appeal, unless there be a clear showing of abuse of discretion. 'All presumptions are in favor of the order and it will be affirmed if it is sustainable on any ground. *Mazzotta vs. Los Angeles Ry. Corporation*, 25 Cal. 2d 165, 169, 153 P. 2d 338, and cases cited. The trial court in considering a motion for new trial is not bound by a conflict in the evidence, and has not abused its discretion when there is any evidence which would support a judgment in favor of the moving party.' (Underline supplied). *Ballard vs. Pacific Greyhound Lines*, 28 Cal. 2d 357, 170 Pac. 2d 465, 467. Even if the evidence is uncontradicted, the trial judge may draw inferences from it contrary to those made by the jury, and it is his duty to resolve such conflicts in determining whether the issues should be retried. Only when, as a matter of law, there is no substantial evidence to support a contrary judgment, may an appellate court reverse an order granting a new trial. *Brooks vs. Metropolitan Life Insurance Co.*, 27 Cal. 2d 305, 163 P. 2d 689; *Mazzotta vs. Los Angeles Ry. Corporation*, *Supra.*"

"In *Hames vs. Rust*, 14 Cal. 2d 119, at page 124, 92 P. 2d 1010, at page 1012, the Supreme Court also asserted: 'When the motion is granted, as here, for insufficiency of the evidence, it is only in rare cases showing abuse of discretion that an appellate court will interfere because the trial judge must weigh all the evidence and determine the just conclusion to be drawn therefrom. *Hanlon Drydock & Shipbuilding Co., vs. Southern Pac. Co.*, 92 Cal. App. 230, 232, 268 P. 385. It cannot be held that a trial court has abused its discretion where there is a conflict in the evidence

or where there is any evidence which would support a judgment in favor of the moving party.” (Underline supplied).

“This court, in the case of Kehler vs. Satterlee, 37 Cal. App. 2d 116, 117, 98 P. 2d 759, 760, where plaintiff’s motion for a new trial was granted, said that an order granting a new trial, when it is predicated upon the insufficiency of the evidence, will not be disturbed upon appeal, except upon a showing of clear and manifest abuse of discretion on the part of the trial court in respect to the granting of the same; that the rule is simple in its application when there is a substantial conflict in the evidence upon the issues to be decided, but that even ‘If there be no conflict, the discretionary power of the trial court still remains, as stated by this court in the case of Otten vs. Spreckels, 24 Cal. App. 251-257, 141 P. 224, 226,’ quoting from the Otten case as follows: ‘Moreover, even in cases where there may not appear to be a conflict in the evidence, and where all the proofs seem to be favorable to the one or the other of the parties litigant, the question as to the probative force or evidentiary value of the testimony, in a proceeding on a motion for a new trial based upon the ground that the evidence is insufficient to justify the verdict, is one whose determination is with the trial court.’ (Underline supplied.)

“In Efinoff vs. Shephard, 77 Cal. App. 2d 818, 176, P. 2d 407, where plaintiff’s motion for a new trial after verdict for defendant was granted and affirmed, the court said that it is a well settled rule of law that a trial court has a wide discretion in granting a new trial on the ground of insufficiency of the evidence; that the trial judge is said to be in the position of a ‘thirteenth juror,’ with full power to weigh the evidence and to reach his own conclusion as to the proba-

tive value thereof. It quoted from *Ogando vs. Carquinez Grammar School District*, 24 Cal. App. 2d 567, 569, 75 P. 2d 641, that it is only in rare instances and on very strong grounds that a reviewing court will set aside an order granting a new trial. Also it said that in considering such a motion it is not only the trial court's province but its duty to scrutinize and weigh the evidence, and if in its opinion the facts upon which the decision of the jury is based are insufficient to justify that decision, or if it believes that the weight of the evidence is against the decision, a new trial should be granted, even though the inferences it may draw are opposed to those drawn by the jury; and if, therefore, on appeal the case shows a reasonable or fairly debatable justification for the trial court's order, or the evidence presents a situation where reasonable minds might differ in their deductions, said order will not be set aside, even though the court of appellate jurisdiction might take a view different from that of the trial court, or believe the evidence would be sufficient to support a judgment in the event a new trial had been denied.

A leading Arizona case, *Huntsman vs. First National Bank of El Paso*, 243 P. 598 holds:

"Whether or not a new trial should be granted for the reason that the verdict is against the weight of the evidence is a question peculiarly within the sound legal discretion of the trial judge, who has the advantage of seeing the witnesses, or hearing their testimony orally delivered, and of observing their demeanor and conduct upon the stand. (Underline supplied). Hence the exercise of sound discretion will not be disturbed on appeal unless clear abuse thereof is apparent."

"It is hardly necessary for an appellate court to say that when a trial is had before a jury their verdict will

not be set aside if there is *any* substantial evidence, or if two different conclusions could reasonably be drawn from the evidence; . . . But the rules governing trial courts in reviewing verdicts because not supported by sufficient evidence are not the same as those governing the appellate court. The Trial Courts may weigh the evidence and if they think injustice has been done, should grant a new trial. It is their duty to supervise the verdict of the jury and grant a new trial if the verdict in the opinion of the court is against the weight of the evidence, or if it is arbitrary and manifestly or clearly wrong, or if it appears to be the result of passion, prejudice or misconduct of the jury. The granting of a new trial on the ground that the verdict is against the weight of the evidence is exclusively within the province of the trial court and the appellate court will only look into the record to see if there is any substantial evidence to support the verdict . . . and unless it is shown that the discretion of the trial court was abused, the appellate court is powerless to interfere."

"If after a full consideration of the case the trial court was satisfied that the verdict was not supported by the evidence and that substantial justice had not been done between the parties, it was its duty, in the exercise of a sound discretion to set the verdict aside."

In Kansas, see *Davis and Central States Fire Insurance Company*, 245 P 1062:

"It has been the unvarying decision of this court to permit no verdict to stand unless both the jury and the court trying the cause, could within the rules prescribed, approve the same. When the judgment of the trial judge tells him the verdict is wrong, whether from mistake, or prejudice or other cause, no duty is more imperative than that of setting it aside and remanding the question at issue to another jury. While the case is before the jury for their consideration, the jury are

the exclusive judges of all questions of fact; but when the matter comes before the Court upon a motion for a new trial, it then becomes the duty of the trial judge to determine whether the verdict is erroneous. He must be controlled by his own judgment, and not by that of the jury. When a trial judge overrules a motion pro forma, and declines to look into the facts or pass upon its sufficiency, he misconceives his duty and commits fatal error. He has no right to 'stand out of the way' and against his judgment overrule such a motion. He must approve or disapprove the verdict. If he approves, he may overrule the motion for a new trial; if he disapproves, he should set it aside and permit another jury to pass upon the facts."

And see also *Myers vs. Wright*, 208 P 2nd 589, decided July 8, 1949, Kansas.

In Washington, see *Griffin vs. Wilson*, 232 Pac. 690:

"If, after fully considering the testimony in the light of the verdict, the trial judge was satisfied that verdict was against the weight of the evidence, and that substantial justice had not been done between the parties, it was his duty to grant a new trial."

Appellant's counsel labors the point that since the trial court, in granting the motion for new trial, stated 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, the Court acted arbitrarily and indicated that it simply disagreed with the jury as to the facts. No record of the colloquy between the trial judge and counsel has been certified in this record, but appellant seems to have improperly quoted the Court's remarks. As respondent recalls the facts, the trial judge orally

granted the motion for new trial and counsel for respondent inquired if the order granting new trial should be prepared on a specific statutory ground, to which the trial judge replied he was not basing his decision on any one ground.

Respondent submits it is what the trial court says in its written order granting new trial, and not what the trial judge says in oral opinion or in colloquy with counsel, which is determinative as to whether reasons are assigned for granting the new trial. See *Baker vs. Mutual Life Insurance Co.*, 201 Pac. 2nd 813, decided January 8, 1949, wherein the Supreme Court of Washington holds:

“We are aware that what is determinative as to whether a reason or reasons have been assigned for the granting of a new trial is not what the trial judge has said in an oral opinion or in a colloquy with counsel, but rather what the Court says in its written order . . .”

“We have held again and again, that on an appeal from such order, our inquiry is limited to the determination of the question of whether the evidence was sufficient to take the case to a jury, and that, unless we can say that the verdict of the jury was a matter of law, the only verdict that could be rendered, the order granting a new trial must be affirmed. The reasons for and against this holding are well stated in the majority opinion and the dissent in *Bond vs. Ovens*, 147 Pac. 2nd 514, and further discussion would avail nothing. The jury clearly could have returned a verdict adverse to the appellant’s.”

Also see *Potts vs. Laos*, 200 P 2nd 505.

Appellant complains that the trial court’s actions in the instant case (his Brief, page 19) granted the new trial arbi-

trarily and only for the reason that the court might have desired the verdict to be other than that which was rendered.

A reading of the *Bond* case cited above, should assist appellant in evaluating the function of the trial court in our system of judicature.

“The real reason why the granting of a new trial by a general order is rarely, if ever, overruled is that the appellate court must ordinarily assume, in the absence of a stated reason, that the order was, or at least may have been, granted in the exercise of the trial court’s inherent power. If the exact ground of the order is stated, the situation may be quite different. For example, in the recent case of *Gavin vs. Everton*, Wash., 144 P 2nd 735, the court set aside a verdict for the defendants in a personal injury case and granted the plaintiff a new trial, upon the sole ground that the evidence in the case showed that the defendants were guilty of negligence as a matter of law. The court could, and did review that order by simply reading the evidence; but, when a court simply grants a new trial without assigning its reasons, or when it says that it does so on the ground that substantial justice has not been done, there may be much more than evidence involved. There may be matters that do not appear in the record at all, matters which, for one reason or another, could not be made to appear.

“The right of a trial judge to set aside a verdict if he believes that substantial justice has not been done is probably as old as the jury system itself. We need not attempt to determine that; for, it is sufficient for our present purpose to point out that the right to trial by jury and the right of the trial judge to set a jury verdict aside and grant a new trial, on the ground that substantial justice has not been done, have existed side by side for centuries in the English courts, and in our state

courts since their creation, and, in fact, in all other systems of judicature founded upon the English common law. The possession of that power makes the office of a trial judge one of peculiar responsibility, dignity, and importance in our system of the administration of justice; for, the appellate courts have no such power. They can set aside a jury verdict and grant a new trial only by pointing out some specific legal error, such as a faulty instruction, an erroneous ruling with respect to the admission or exclusion of evidence, misconduct of counsel, etc. It follows, if the trial judge fails to exercise the power in a proper case that an unjust verdict may result in a judgment that cannot be set aside or in any way disturbed."

Measured by these principles of law, can it be said that the trial court committed reversible error? We submit that it did not.

There is substantial evidence in this Record to support a judgment in favor of the respondent, the moving party below for the new trial. Plaintiff's testimony and evidence on defendant's willful misconduct is not only conflicting, with defendant's explanation of the accident, but as the learned trial judge orally remarked during the argument on the motion, the defendant's negating testimony was impossible to accept. The inherent element of improbability of defendant's own testimony plus the uncontroverted physical facts of the accident impressed the trial court and caused him to set aside the verdict in order to prevent substantial injustice. Previously, in this Brief, under the statement of the case, respondent has shown that defendant Kearnes was familiar with the dangerous curves of the Casper Cutoff and had been familiar with them since 1943; that there were curve marker signs posted before

the curves the night of the accident; that it had been raining on the night of the accident; the shoulders and surface of the road being damp; the curve and road where the accident occurred was well-lighted; the hard surface of the road was narrow measuring 20 feet, the overall width including shoulders 32 feet; that Kearnes paid no attention to any curve signs; these facts are controverted. Plaintiff's explanation of the accident was that the defendant took the risk of this accident by performing as a stunt driver, namely, by driving his car into these curves while he was both accelerating the engine and braking, a peculiar, artful and skillful form of automobile manipulation known to the younger crowd by which a car is made to hug the curve and maintain its speed on the road.

Defendant Kearnes testified that his speed never exceeded 35 to 45 miles per hour. The plaintiff maintained that defendant's speed around the curves was between 55 and 60 miles per hour. The trial court chose to believe the plaintiff's story and it is understandable in the face of defendant's other testimony on speed. Previously in this Brief reference has been made to defendant's denial that he registered 80 miles per hour on the trip out to Jane Potts' house. Witness Potts corroborated the speed of 80 miles per hour and the fact that plaintiff's protest then seemed to bring defendant down to a more reasonable speed. In plain English, it was willful and wanton misconduct for the defendant to perform as a stunt man, accelerating and braking his automobile simultaneously at 55 to 60 miles per hour, around these dangerous County curves, at 3 o'clock in the morning over a wet, slippery and narrow pavement, and especially after the danger had been so obvious to him, having

barely avoided a serious accident 1100 feet back (between 10 to 12 seconds earlier at the speed plaintiff testified he was going) in near missing the utility pole on the first curve. Defendant intended and did negotiate the second curve in the same reckless manner as he did the first, seeing how close he could come to causing an accident. He drove as he did, because by his own admission, he was "out of humor" with his lady escort. The protest of the plaintiff to "slow down Pat, we're not in that big a hurry to get home" was laughed off. Defendant's answer to this protest was more recklessness as he "poured on the coal" and seconds later caused the accident which maimed the plaintiff for life. The physical facts add up to the same conclusion, wilfull misconduct. For argument's sake accept defendant's explanation that he merely failed to negotiate the curve, in that "the car seemed to slide on something on the pavement just before taking the curve" at 35 miles per hour. One would be naive to believe that a 1942 light Studebaker car would travel 34 to 41 feet off the hard surface pavement and over an opposite wet shoulder, then along that shoulder 60 feet, barely missing another telephone pole, skidding back across the highway out of control 28 feet over to the other shoulder of the road and travelling 84 feet out of control mashing down shrubbery and fernery in the open field, rolling over, knocking out a wood and cement street marker and ending up on its side in a street intersection (Arcadia Lane) which was geographically 350 feet away from the bend in the curve where it all began, and that this gyration was caused by simply skidding on the pavement at 35 miles an hour. The manifest weight of this evidence was in favor of the plaintiff and conclusively shows that defendant performed as a stunt man and not as a host.

DEFENDANT WAS NOT ENTITLED TO A DIRECTED VERDICT EITHER FOR FAILURE TO MAKE OUT WILLFUL MISCONDUCT OR PLAINTIFF'S ACQUIESCENCE IN SUCH CONDUCT.

Appellant closes his argument suggesting that even if the trial court exercised its discretion soundly in granting the motion for the new trial, it should have nevertheless directed a verdict in defendant's favor because the evidence failed to prove a case of willful misconduct as a matter of law, and second, that if it did, plaintiff's conduct amounted to assumption of that risk.

Treating the first proposition, respondent submits that if his evidence was substantial enough to set aside a jury verdict against him, it was sufficient to support a judgment in plaintiff's favor and the court did not err in refusing to grant defendant's motion for a directed verdict. This proposition raises a question of law and is the same in nature and substance as the motion for a new trial. The trial court felt that plaintiff's evidence so preponderated against the verdict as to leave no justifiable basis upon which that verdict could stand. The question then simply is, did the plaintiff's evidence, which the trial court chose to believe, justify a finding of willful misconduct?

Appellant's cases in support of his argument can be distinguished from the instant case for the reason that in his cited cases willful misconduct cannot be predicated on speed alone. As suggested many times in this Brief this case is predicated on more than mere speed. Defendant's liability is based upon

speed, plus a known dangerous curve condition, a narrow road, wet surface, a defiant mental attitude, and a stunt driving performance that succeeded in coming close to near accident a few seconds before the accident happened. The following cases are in support of a fact situation similar to the instant case and sustain a finding of willful misconduct.

Herrell vs. Hickock, (Ohio) 197 N. E. 241. Plaintiff was riding as a guest in defendant's car along a road familiar to the defendant on which there were two curves 600 to 700 feet apart. The car was traveling 65 to 70 miles per hour and at the first curve swerved to the left. The plaintiff protested to defendant but he "just laughed" and "drove faster, if anything." Defendant continued to proceed to the second curve where he lost control of the car and it turned over, injuring the plaintiff.

The accident occurred in the state of Michigan and was governed by the Michigan guest statute which required "gross negligence or willful and wanton misconduct" of the operator in order that a guest might recover. The trial court granted a directed verdict for the defendant and the plaintiff appealed. The appellate court reversed the trial court and remanded the case for a new trial stating:

"It seems to us that from the evidence presented it was for the jury to say whether Hickok was or was not guilty of willful and wanton misconduct on the occasion in question. Driving at a speed of 65 to 70 miles an hour, on a road with which he was in all respects familiar, its width, curves, and character . . . his continuing with a laugh, as the evidence tends to show, over the protests of his guests, at an increasing rate of

speed toward a second known curve, his loss of control of his automobile on a dry pavement in the daytime, are all facts and circumstances from which a jury in any court in any state might find the consequent injuries to Miss Herrell to have been proximately caused by the willful and wanton misconduct of Hickok."

In *Chandler vs. Quinlan*, 78 Pac 2nd 235 (California), an action was brought under the California guest statute and particularly the portion thereof requiring a finding of willful misconduct on the part of the defendant in order that he be held liable.

The plaintiff was riding as a guest in the automobile driven by the defendant. The defendant increased his speed gradually until he attained a speed of approximately 60 miles per hour. As they were approaching a curve plaintiff warned defendant to slow down on account of the curve. The defendant said, "O, I guess I can make it." The defendant was again warned to slow down because there was a bad curve ahead to which the defendant again replied that he thought he could make it. The car was proceeding at too rapid speed to negotiate the turn as a result of which it skidded onto the gravel shoulder of the highway causing it to get out of control and strike a ditch as a result of which plaintiff sustained injury. The jury rendered judgment for the plaintiff and the defendant appealed. The appellate court in sustaining the verdict of the jury below stated:

"In the case of *Parsons vs. Fuller*, 66 Pac. 2nd 430, the court also said:

"We believe that the court properly emphasises knowledge or appreciation "that danger is likely to result." To us it seems clear that one who, while driving an

automobile, knowingly flirts with danger and, without necessity or emergency compelling him, "takes a chance" on killing or injuring himself and others who may be so unfortunate as to be riding with him, is guilty of willful misconduct'."

In *Norton vs. Puter*, (*California*) 32 *Pac. 2nd* 172, an action brought by the plaintiff under the California guest statute which limits recovery to cases where the injury sustained by the guest resulted from the "intoxication or willful misconduct" of the operator. The following quotation from the language of the court sets forth the principal facts as well as the ruling of the Court:

"We are of the opinion the facts of this case show that the defendant was guilty of willful misconduct in the manner in which he operated his automobile, which conduct proximately contributed to the accident resulting in the injuries sustained by the plaintiff. The defendant knew the pavement was wet and slippery; his vision was obscured by the falling rain and the water on his windshield; the windshield wiper was not operating; he knew he was approaching a dangerous curve in the highway where he had previously had "one or two pretty close calls" in escaping similar accidents; he had been warned several times by his son to diminish the speed of his car; the machine was running 55 miles an hour, and was swaying from side to side—yet with a full appreciation of these dangerous conditions, the defendant recklessly attempted to drive around the curve without slackening the excessive speed of his machine in violation of Section 113 of the California Vehicle Act (St. 1923, p. 553, Sec. 113, as amended by St. 1931, p. 2120), thereby endangering the 'lives and limbs' of the occupants of his car. It was the exclusive province of the court to determine whether the defendant was guilty of willful misconduct

in recklessly driving his machine at the rate of 55 miles an hour under the circumstances of this case."

In *Sorrell vs. White*, (Vt. 1932) 153 Atl. 329, an action brought under the guest statute of Vermont which provided that the guest could not recover unless the injuries were caused by the 'gross or willful negligence of the operator.' The defendant had invited the plaintiff to ride home with him which invitation she accepted. After proceeding a half mile the speed of the car being then increased to 45 or 50 miles an hour, they came to a sharp curve in the highway. Just before reaching it there was a sign calling attention to the fact that it was dangerous. Defendant was acquainted with the locality. A witness named Waters riding in the front seat with defendant told him to be careful and the plaintiff told him not to go so fast, but the defendant just grinned and maintained the same speed. As the car entered the curve it ran into the drainage ditch at the end of the road and hit a telephone pole. The plaintiff was thrown out and was injured. In affirming the judgment of the court below in favor of the plaintiff the appellate Court stated:

"There may be a willful wrong without a direct design to do harm, and the term 'willful negligence' means a failure to perform a manifest duty in reckless disregard of the consequences as affecting the life or property of another

" . . . the jury were justified in finding that the defendant acted with such reckless disregard of the consequences as affecting the safety of the plaintiff, that he became guilty of willful negligence"

In *Jones vs. Hathaway*, 70 Pac. 2nd 681, in sustaining the verdict of the lower court, the appellate court stated:

With so much in mind, together with the rule that as far as the ultimate fact of willful misconduct itself is concerned, a determination thereof by the trial court based upon substantial evidence in its support is conclusive on appeal, the determination of the question of whether as a matter of law the judgment in the instant case is sustainable becomes one largely of individual judicial opinion. With reference to a decision by this court on the issue which has been here presented, it is concluded that, as a presumably reasonable man, had he exercised due care, defendant must have known, or must have been conscious of and appreciated the fact that to drive the automobile at the place where, and under the atmospheric conditions which were shown to exist, over a wet and slippery pavement, and at the rate of speed at which, according to the findings of fact, he did drive it, was likely to result in injury to plaintiff. To say that the conduct of defendant in thus driving an automobile was wanton or reckless or that it was in disregard of probable consequences thereof, is but to express a patent and unmistakable truth. As far as substantial evidence in support of the judgment is concerned, it would seem at least questionable if nothing more appeared than the fact that, over the protest of plaintiff, defendant drove the automobile at night at the rate of 55 to 60 miles per hour; but when to that fact are added the further conditions that such speed was continued over a wet and slippery pavement . . . through a fog so dense that he could see no farther than 100 feet . . . up to and immediately preceding an "S" curve in an underpass which occurred at the foot of a 'steep downgrade,' it would be contrary to common sense to attribute to any reasonable person a lack of appreciation of the fact that such driving of an automobile was likely to result disastrously."

To the same effect also are *Mescher vs. Brogan*, (Iowa) 272 N. W. 645 and *Pepper vs. Morrill*, 24 Federal 2nd, 320.

Appellant finally urges that even if he be guilty of willful misconduct plaintiff assumed that risk by accepting the invitation to ride with him. This again raises the law question, does plaintiff's own evidence so clearly show that he acquiesced in defendant's willful misconduct as to have required the trial court to direct a verdict for defendant.

Plaintiff's testimony, not previously recited, should now be stated. This trip was the first occasion that plaintiff had ever ridden in a car operated by defendant (R-209). Plaintiff requested to be taken home first, (R-178) but was asked by his host to ride out with him to take the ladies home (R-180). He did this to accommodate the desires of his host and because the host had started the car in that direction anyhow (R-180).

Twice on the trip out to Jane Potts' residence at 5900 Holladay Boulevard, plaintiff had effectively protested the speed in which defendant drove and defendant slowed down (R-183, 184) (R-187, 188). On the return trip the road between the Potts' residence and the first curve is without curves (Exhibit "M") and defendant returned over a different route than he took out (R-296). Plaintiff protested the manner of defendant's driving the moment the danger of accident became apparent to him around the first curve (R-198). The fact that this protest occurred so shortly before the accident (10-12 seconds, figuring speed at 60 miles per hour and 1100 feet) as to make his protest ineffective and impractical, does not amount to a withdrawal of protest or indicate acquiescence or willingness to proceed in the face of apparent danger.

The sudden and reckless performance of the defendant stunt-driving, around these curves, gave plaintiff little oppor-

tunity to protest or to insist on being let off. He barely had the chance to say, "We are not in that big a hurry to get home Pat, slow down!" Defendant just "laughed it off" and poured it on more on that straight-a-way (R-198, 199). A guest does not assume the risk of danger arising from his host's sudden and intentional attempts to flirt with death. See *Wright vs. Sellers*, 78 Pac. 2 209 (Cal. App.)

Respondent is familiar with this Court's recent ruling in *Esernia vs. Overland Moving Co.*, 206 Pac. 2d 621, and *Maybee vs. Maybee*, 11 Pac. 2d 973. These cases are clearly distinguishable. In both cases the plaintiffs were denied recovery against their hosts because the incompetence was clearly apparent to them before accepting the rides, weariness and faulty vision. And this incompetence was continually present and caused near accidents, prior to the accident out of which the suits arose. Also the opportunity to leave was present. In the instant case there was no awareness of any danger at the time the invitation was accepted and no opportunity to leave the car when the danger became apparent after that first curve. Chief Justice Pratt adopts the language of the Restatement of Torts in the *Esernia* case, the sensible explanation here to defendant's claim that plaintiff assumed the risk of this accident:

"On the other hand, if the incompetence is not discovered until the vehicle is on a lonely road in a part of the country with which the plaintiff is unfamiliar, particularly late at night, it may be the part of prudence to remain in the vehicle, unless the driver is so reckless or incompetent that a reasonable man would recognize that there was a great likelihood of an accident . . ."

Under the circumstances and evidence in this case, the Trial Court could not say as a matter of law that the plaintiff assumed the risk of defendant's willful misconduct.

C O N C L U S I O N

It is respectfully urged that the decision of the Trial Court be affirmed.

Respectfully submitted,

A. W. SANDACK

Attorney for Respondent