

1986

# Joshua Fisher, Carla Fisher v. Warren Trapp : Brief of Appellant

Utah Supreme Court

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UTAH COURT OF APPEALS  
BRIEF

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DOCKET NO. 860359

IN THE UTAH SUPREME COURT

JOSHUA FISHER, by and through )  
his general guardian, )  
CARLA FISHER, )

Appellant, )

vs. )

WARREN TRAPP, )

Respondent. )

*860359-CA*  
Civil No. C86-0114

Category No. 13(b)

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**FILED**

SEP 5 1986

Clark, Supreme Court, Utah

IN THE UTAH SUPREME COURT

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

### PART ONE:

Was it reversible error for the trial court to refuse to admit evidence that the defendant driver fled the scene of an automobile/pedestrian accident in which he was involved?

### PART TWO:

Did the trial court abuse its discretion by refusing to allow into evidence the plaintiff's expert opinion testimony as to the cause of the accident? If so, was this error cured by the later admission of this testimony?

## DETERMINATIVE AUTHORITIES

### PART ONE:

Utah Rules of Evidence, 103, 401, 402 and 403, will determine the outcome of PART ONE of this appeal. Due to the length of these provisions, the text of each is set out at Appendix A of this brief.

### PART TWO:

Utah Rules of Evidence, 702, 703, 704 and 705 will determine the outcome of PART TWO of this appeal. Due to the length of these provisions, the text of each is set out at Appendix B of this brief.

STATEMENT OF THE CASE

The appellant, Joshua Fisher, (hereafter Fisher), was injured in an auto-pedestrian accident in Salt Lake City, Utah. The defendant, Warren Trapp (hereafter Trapp), was the driver of the vehicle. The case was tried before a jury.

Fisher was unable to testify on his own behalf about the accident. His injuries blocked his memory of what happened. (Record at 303.)

The jury returned a verdict in favor of Trapp. The court denied plaintiff's timely motion for a new trial. (Record at 242.)

PART ONE: POST-ACCIDENT FLIGHT

STATEMENT OF THE FACTS  
RELATING TO POST-ACCIDENT FLIGHT

During an in camera hearing prior to trial, Trapp admitted he was a hit-and-run driver. Specifically, Trapp admitted leaving the accident scene. He eventually returned to the accident site and spoke to a police officer. Trapp still did not identify himself as the driver of the car. Only later did Trapp telephone the police and admit that he hit Fisher. (Record at 270.)

Trapp made a motion in limine to exclude evidence that he was a hit-and-run driver. (Record at 271.) The trial court granted Trapp's motion. The basis of the ruling was that possible prejudice outweighed the probative value of the particular evidence. (Record at 273.)

No evidence of the hit-and-run was introduced at trial. The jury returned a verdict in favor of Trapp.

SUMMARY OF ARGUMENTS

Evidence of flight from the scene of an accident may be an admission of guilt and should have been admitted.

PART ONE: POST-ACCIDENT FLIGHT

POINT I

EVIDENCE OF POST ACCIDENT  
FLIGHT IS PROBATIVE

From early on, Courts have consistently held that evidence of a defendant driver leaving the scene should be admitted. State v. Ford, 146 A. 828 (Conn. 1929); Vuillemot v. August J. Calverie & Co., 125 So. 168 (La. 1929); Greene-wood v. Bailey, 184 So. 285 (Ala. 1938); Shaddy v. Daley, 76 P.2d 279 (Id. 1938); Hallman v. Cushman, 13 S.E.2d 498 (So. Car. 1941); Petroleum Carrier Corporation v. Snyder, 161 F.2d 323 (5th Cir. 1947) (applying Georgia law); Brooks v. E.J. Willey Truck Transportation Co., 255 P.2d 801 (Cal. 1953); Harrington v. Sharff, 305 F.2d 333 (2nd Cir. 1962); Dean v. Cole, 217 F.Supp. 280 (E.D. So. Car. 1963); Busbee v. Quassier, 172 So.2d 17 (Fla. 1965); Gaul v. Noiva, 230 A.2d 591 (Conn. 591); Jones v. Strelecki, 49 N.J. 513, 231 A.2d 558; Richards v. Office Products, 380 N.E.2d 725 (Ohio App. 1977); Johnson v. Austin, 280 N.W.2d 9 (Mich. 1979); Waycott v. Northeast Ins. Co., 465 A.2d 854 (Me. 1983).

Evidence of post accident flight is probative for three separate reasons. First, the failure to stop evidences a defendant's consciousness of responsibility. See, e.g., Brooks v. E.J. Willey Truck Transportation Co., supra.; Grzys v. Connecticut Co., 123 Conn. 605, 198 A. 259 (1938); Shaddy v. Daley, supra.; Langenstein v. Reynaud, 13 La. App. 272, 127 So. 764 (1930). Thus, leaving the scene

PART ONE: POST-ACCIDENT FLIGHT

of the accident constitutes an admission by conduct. See, e.g., Jones v. Strelecki, supra.; Gaul v. Noiva, supra.; Harrington v. Sharff, supra.; Shaddy v. Daley, supra.; Greenwood v. Bailey, supra.; Vuillemot v. August J. Calverie & Co., supra.

Secondly, flight from the scene raises an inference of failing to keep a proper lookout. An observant driver should have known that he struck something and would have stopped. Jones v. Strelecki, supra.; Busbee v. Quasier, supra.; Vuillemot v. August J. Calverie & Co., supra.

Finally, post-accident failure to stop evidences a willful, wanton, or reckless state of mind existing at the time of impact. e.g., Richards v. Office Products Co., supra.; Dean v. Cole, supra.; Hallman v. Cushman, supra.

These inferences would have been valuable to the jury in assessing the credibility of the witnesses and in determining the outcome of this case.

POINT II

ANY POSSIBLE PREJUDICE  
WOULD NOT BE UNFAIR

Evidence of post accident flight would not be unfairly prejudicial. Evidence is unfairly prejudicial only if it has "an undue tendency to suggest decision on an improper basis, commonly but not necessarily an emotional one." (Advisory Committee's Note to Federal Rule 403.)

PART ONE: POST-ACCIDENT FLIGHT

It has been stated that, "unfair prejudice as used in Rule 403 is not to be equated with testimony simply adverse to the opposing party. Virtually all evidence is prejudicial or it isn't material. The prejudice must be unfair." Dollar v. Long Mfg., N.C., Inc., 561 F.2d 613, 618 (5th Cir. 1977). Although the hit-and-run evidence may be adverse to Trapp's case, it would not be unfair under Rule 403.

POINT III

THE PROBATIVE VALUE IS NOT  
SUBSTANTIALLY OUTWEIGHED

Evidence of flight from the scene of an accident is highly probative. See, Point I, above. The Utah Rules of Evidence generally favor admissibility of all relevant evidence. Rules 401 and 402.

However, before evidence is admitted, the court must weigh the probative value against possible "unfair prejudice." Whatever "unfair prejudice" may arise must substantially outweigh the probative value before the evidence is excluded. Rule 403. Roshan v. Fard, 705 F.2d 102, 104-05 (4th Cir. 1983); United States v. Moore, 732 F.2d 983, 989-92 (D.C. Cir. 1984). Any doubt should be resolved in favor of admitting the evidence. See Lilly, Evidence, §13 at 34. Where the probative value of proffered

PART ONE: POST-ACCIDENT FLIGHT

evidence is significant, it is error to exclude it despite possible prejudicial effect. Roshan, supra.; Bowden v. McKenna, 600 F.2d 282 (1st Cir., 1979).

The weight of authority clearly allows for the admission of the evidence of flight. No "unfair prejudice" would arise. See, Point II, above. Therefore, it was an abuse of discretion to fail to admit the evidence of flight.

POINT IV

FISHER'S SUBSTANTIAL RIGHTS WERE AFFECTED

Fisher's substantial rights were denied when the trial court refused to admit the evidence of Mr. Trapp's hit-and-run.

First, without the hit-and-run evidence, Fisher was denied effective ammunition to challenge Trapp's testimony. Fisher could not use the inference of guilt to impeach Trapp's testimony that he was paying attention to the road. (Record at 298-99.) Nor could Fisher rely on the inference to show Trapp's consciousness of responsibility for failing to see Fisher in front of him. (Record at 298.) See generally, 5 Am.Jur. 2d, "Appeal and Error", §802, n.9, 11.

PART TWO: POST-ACCIDENT FLIGHT

Second, Fisher was denied the opportunity to fully and fairly cross-examine the defense witnesses. Due to the order in limine, Fisher could not question either the police investigator or the defense expert as to whether they were aware of the hit-and-run. Fisher could not ask whether they had considered the evidence of flight in reaching their opinions. This denial of full cross-examination was error effecting Fisher's substantial right. See generally, 5 Am.Jur. 2d, "Appeal and Error", §783 n.1 and §809.

Third, Fisher was not allowed to fully explore the opinion of his expert Val Shupe during the critical initial phases of trial. Mr. Shupe made an offer of proof that, in his opinion, Trapp was not keeping a proper lookout and was travelling too fast for existing conditions. (Record at 334.) Fisher was not allowed to present this opinion evidence at that time due to lack of foundation. (Record at 338.) Mr. Shupe was not allowed to rely on the inference of guilt arising from the hit-and-run. Had Mr. Shupe been able to rely on that inference, the trial court could not have questioned the adequacy of the foundation on which his opinion was based. Evidence of the hit-and-run testimony would also have lent credibility to Shupe's testimony when he was finally allowed to give his opinion on cause. (See Point VII herein.)



PART ONE: POST-ACCIDENT FLIGHT

Finally, Fisher could not use the hit-and-run evidence to rehabilitate the testimony of his brother, Patrick. Patrick's testimony indicated that Trapp failed to see Fisher. (Record at 310.) Trapp attempted to impeach Patrick by laying the blame on Fisher. (Record at 312-20.) Fisher was prejudicially denied his opportunity at rehabilitation of Patrick because he could not bring up the hit-and-run. See generally, 5 Am.Jur. 2d, "Appeal and Error", §783 n.1.

CONCLUSION

The evidence of flight from the scene of the accident is relevant under the standard provided in Rule 401. All relevant evidence is admissible under Rule 402. The trial court found the evidence inadmissible under Rule 403. However, the Court abused its discretion by failing to properly weigh the probative value of the evidence against its possible unfair prejudice to the defendant. The plaintiff's substantial rights were affected by not being allowed full cross examination and by not being able to rely on the influence of consciousness of responsibility to reinforce his witnesses testimony. Therefore, this Court should allow Fisher to present the hit-and-run evidence at a new trial.

PART TWO: EXCLUSION OF EXPERT OPINION TESTIMONY

STATEMENT OF FACTS RELATING TO  
THE EXCLUSION OF EXPERT OPINION TESTIMONY

Plaintiff called and certified Val Shupe (hereafter Shupe) as an accident reconstruction expert. (Record at 320-21.) The defense raised no objection to Mr. Shupe's qualifications. However, the defense objected when plaintiff attempted to present Shupe's opinion as to the cause of the accident. (Record at 328.) Shupe's opinion was that Trapp's inattention and excessive speed caused the accident. (Record at 334.) Defense counsel argued that there was insufficient foundation on which to base that opinion. (Record at 328-33.)

Out of the hearing of the jury, plaintiff's expert recited the basis of his opinion: inspection, measurements and photographs of the accident scene, average running speed of a nine-year old child, and review of all pleadings, depositions and police reports of the case. (Id.) The Court agreed with defense counsel and excluded the expert opinion evidence on grounds of lack of foundation. (Record at 334 and 338.) However, the Court allowed Shupe to testify as to how far back Trapp was from the point of impact when Fisher began crossing the road. (Record at 338.)

PART TWO: EXCLUSION OF EXPERT TESTIMONY

Later on in the trial, the Court allowed the defense expert to state his opinion as to the cause of the accident. The defense expert based his opinion on the same foundation that the plaintiff's expert had offered. (Record at 393.) Ultimately, the plaintiff's expert was allowed to state his opinion, but only in rebuttal, and only after supplemental foundation testimony. (Record at 427.)

SUMMARY OF ARGUMENTS

Failure of the trial court to receive plaintiff's expert opinion during plaintiff's case in chief was prejudicial error. The error was not cured by later introduction of the opinion evidence.

POINT V

ADEQUATE FOUNDATION FOR SHUPE'S  
TESTIMONY EXISTED FROM THE BEGINNING

The Utah Rules of Evidence permits an expert to give his opinion on an ultimate issue "without prior disclosure of the underlying facts or date." Utah Rule of Evidence, 705. When a judge requires some foundation, Rule 703 defines what is required. Under Rule 703, the test to be applied is whether the materials the expert relies on "are of a type reasonably relied on by experts in the particular field in forming opinions or inferences.

PART TWO: EXCLUSION OF EXPERT TESTIMONY

The materials Shupe relied on were unquestionably "of a type reasonably relied on by experts in the particular field." As discussed in the "Fact" section, Shupe visited the accident site, measured it, read the depositions, read pleadings, reviewed the police report, took pictures, and conducted his own tests. (Record at 321-23, 326, 331, 339-41.)

The defense expert relied on the same information to reach his opinion. (Record at 381-93.)

POINT VI

WEAKNESSES IN THE FACTUAL  
UNDERPINNINGS GO TO WEIGHT, NOT ADMISSIBILITY

As long as the information the expert relies on is of a type reasonably relied on by experts in the "particular field," the weakness in factual underpinnings go to weight rather than admissibility. Breider v. Sears, Roebuck & Co., 722 F.2d 1134, 1139 (3d Cir. 1983); American National Bank and Trust Co. v. K-Mart Corp., 717 F.2d 394, 400 (7th Cir. 1983); Shurtleff v. Jay Tuft & Co., 622 P.2d 1168, 1173 (Utah 1980). Weaknesses in the factual underpinnings can be explored on cross-examination. Polk v. Ford Motor Co., 529 F.2d 259 (8th Cir. 1976).

PART TWO: EXCLUSION OF EXPERT TESTIMONY

Defendant argued the expert testimony was inadmissible for two reasons: First, that plaintiff's expert seemed unaware of cars traveling in the opposite direction. (Record at 330.) Second, that plaintiff's expert did not know how far plaintiff was from the edge of the pavement when plaintiff began to cross. (Record at 326.)

The defense did not claim that plaintiff's expert was relying on information that was not usually relied on by accident reconstruction experts. The defense only argued that the information was somehow flawed.

Courts consistently allow expert testimony over objections that the facts relied on may not have been exactly like those which existed in the case at issue. Shipp v. General Motors Corp., 750 F.2d 418, 427 (5th Cir. 1985); Martell v. Boardwalk Enterprises, Inc., 748 F.2d 740, 746-47 (2nd Cir. 1984); Brandt v. French, 638 F.2d 209, 212 (10th Cir. 1981). In Kelsay v. Consolidated Rail Corp., 744 F.2d 437 (7th Cir. 1985), the court affirmed the admission of a relatively inexperienced police officer's opinion over objections that he did not make exact measurements. The Kelsay case is precisely on point.

PART TWO: EXCLUSION OF EXPERT TESTIMONY

POINT VII

THE INITIAL EXCLUSION OF  
SHUPE'S OPINION WAS PREJUDICIAL ERROR

It was manifest error to exclude the plaintiff's initial presentation of Shupe's opinion. In Edwards v. Diedericksen, 597 P.2d 1328 (Utah 1979), this court recognized the importance of an expert's opinion on an ultimate issue. The court noted that "exclusion of an opinion as to an ultimate issue invites misunderstanding, confusion in the juror's minds." (Id. at 1330.) Such exclusion requires the jury "to speculate as to what conclusion or conclusions the technical facts logically support" and otherwise deprives the jury of valuable information. (Id.)

An expert's opinion on the ultimate issue is highly relevant. When highly relevant evidence is excluded by manifest error, prejudicial error occurs. Davis v. Neels, 583 F.2d 337, 346 (7th Cir. 1978). Erroneous exclusion of an expert's opinion on an ultimate issue requires reversal. See, e.g., Garrett v. Desa Industries, Inc., 705 F.2d 721 (4th Cir. 1983); Breider v. Sears, Roebuck and Co., supra; American National Bank and Trust Company of Chicago v. K-Mart Corp., supra; In Re Air Crash in Bale, Indonesia, 684 F.2d 1301 (9th Cir. 1982).

PART TWO: EXCLUSION OF EXPERT TESTIMONY

The defense may argue that the later admission cured the error. However, the prejudicial effect may have even been compounded by the later admission of the opinion. The plaintiff carries the burden of proof. He is granted the first chance to prove his case to the jury. Fisher did not get his "first shot" when Shupe's opinion was wrongfully found inadmissible.

The problem only got worse from there. The defense expert was then allowed to give his opinion as to the ultimate cause of the accident. As in Edwards, supra, the jury may have become confused and may have thought plaintiff's expert initially agreed with the defense expert.

In an attempt to supply further foundation for his opinion, plaintiff's expert returned to the scene with Patrick. When called on rebuttal, Patrick testified that he remembered the location of Trapp's car as Fisher started into the street.

This information changed a few facts on which Shupe originally relied in reaching his opinion. However, it did not change that opinion, it reinforced it. The jury did not know this. They may have assumed that Mr. Shupe's opinion was based exclusively on the "convenient memory" of Patrick. This would significantly taint the opinion of Mr. Shupe.

## PART TWO: EXCLUSION OF EXPERT TESTIMONY

Although subsequent admission of evidence may cure the prior error, that is not the case where the testimony admitted is not as broad or comprehensive as that excluded. 5A C.J.S., "Appeal and Error", §1753, n. 79. Johnson v. Malnati, 265 A.2d 394 (N.J. 1970). Nor is the initial error cured where the evidence is subsequently admitted under circumstances where it would likely be ignored, Brown v. Newby, 47 P.2d 1076 (Cal. App. 1935), or where the initial exclusion weakened its value. Gerbig v. Gerbig, 168 P.2d 837 (Mont. 1946); Daggett v. Wolff, 44 S.W.2d 1063 (Tex. 1931).

The basic standard for judging prejudice is whether "there is a reasonable likelihood that a more favorable result would have been obtained by the complaining party in the absence of error." Harris v. Utah Transit Authority, 671 P.2d 217, 222-23. (Utah 1983). That test is clearly met in this case.

## CONCLUSION

The Court's initial exclusion of Shupe's opinion was prejudicial error. Under the circumstances of the case, the initial exclusion was tantamount to total exclusion. The subsequently admitted opinion was given under circumstances where it would likely have been ignored. The



PART TWO: EXCLUSION OF EXPERT TESTIMONY

opinion was not as broad or comprehensive as it would have been had it been admitted during the critical initial phase of trial. Thus, under the circumstances, the initial error was not cured by the later admission of the testimony. A reasonable likelihood exists that a more favorable result would have occurred had the opinion been initially admitted. The case should be remanded for a new trial.

DATED this 2nd day of September, 1986.

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By: 

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above SUBSTITUTE BRIEF OF THE APPELLANT was mailed, U.S. postage prepaid, this 5th day of September, 1986 to all counsel of record as follows:

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APPENDIX A

RULE 103

RULINGS ON EVIDENCE

(a) Effect of erroneous ruling. Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and

(1) Objection. In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context; or

(2) Offer of proof. In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked.

(b) Record of offer and ruling. The court may add any other or further statement which shows the character of the evidence, the form in which it was offered, the objection made, and the ruling thereon. It may direct the making of an offer in question and answer form.

(c) Hearing of jury. In jury cases, proceedings shall be conducted, to the extent practicable, so as to prevent inadmissible evidence from being suggested to the jury by any means, such as making statements or offers of proof or asking questions in the hearing of the jury.

(d) Plain error. Nothing in this rule precludes taking notice of plain errors affecting substantial rights although they were not brought to the attention of the court.

RULE 401

DEFINITION OF "RELEVANT EVIDENCE"

"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

RULE 402

RELEVANT EVIDENCE GENERALLY  
ADMISSIBLE: IRRELEVANT  
EVIDENCE ADMISSIBLE

All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States or the Constitution of the State of Utah, statute, or by these rules, or by other rules applicable in courts of this State. Evidence which is not relevant is not admissible.

RULE 403

EXCLUSION OF RELEVANT  
EVIDENCE ON GROUNDS OF PREJUDICE,  
PREJUDICE, CONFUSION, OR WASTE OF TIME

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

## APPENDIX B

### RULE 702

#### TESTIMONY BY EXPERTS

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

### RULE 703

#### BASES OF OPINION TESTIMONY BY EXPERTS

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

### RULE 704

#### OPINION ON ULTIMATE ISSUE

Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.

### RULE 705

#### DISCLOSURE OF FACTS OR DATA UNDERLYING EXPERT OPINION

The expert may testify in terms of opinion or inference and give his reasons therefor without prior disclosure of the underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination.