

1986

Joshua Fisher, Carla Fisher v. Warren Trapp : Brief of Respondent

Utah Supreme Court

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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.

Civil No. C86-0114

860359-CA
860114

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Clerk, Supreme Court, Utah

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CARLA FISHER,)

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STATEMENT OF THE ISSUE

Did the trial court commit reversible error in refusing to admit evidence of the respondent's post-accident flight under the facts of the instant case?

Did the trial court commit reversible error in relation to the opinion testimony of appellant's expert, Val Shupe?

DETERMINATIVE AUTHORITIES

Utah Rules of Evidence, 103, 401, 402, and 403, and 705 will determine the outcome of this appeal. Due to the length of these provisions, the text of each is set out in Appendix A of this brief.

STATEMENT OF THE CASE

Appellant Fisher and respondent Trapp were involved in an auto-pedestrian accident in Salt Lake City on June 3, 1982, at approximately 9:15 p.m. Fisher brought action against Trapp alleging that the accident was the result of Trapp's negligent driving. The case was tried before a jury. The jury returned a verdict of "no cause of action" in favor of Trapp.

During an in-camera hearing before trial, Trapp acknowledged that he had failed to stop at the scene of the accident. Following the collision, Trapp continued northbound on Redwood Road in Salt Lake City for some distance. Trapp then turned around and returned to the accident site. Upon returning to the scene, Trapp observed an adult rendering aid and assistance to Fisher.

Trapp left the scene a second time only to return again.

Upon his return, Trapp spoke with a police officer, but did not immediately identify himself as the driver of the car. After speaking with the officer, Trapp drove home.

Within 30 minutes of the accident, Trapp telephoned the police and identified himself as the driver of the car. (Record at 270)

Before trial Trapp made a motion in limine to exclude evidence that he failed to stop at the scene of the collision. (Record at 271) At the hearing on the motion, Fisher denied that his injuries were aggravated in any way by Trapp's failure to stop. (Record at 272) Rather, Fisher contended that such evidence was admissible to create an inference of consciousness of guilt. (Record at 272) The trial court granted Trapp's motion to exclude the evidence. The trial judge ruled that the prejudicial effect of the evidence outweighed any probative value the evidence of flight might have. (Record at 273)

At trial, both Trapp and Patrick Fisher, appellant's 12-year old brother, testified how the accident occurred. (Record at 282-286 and 309-318) Appellant was unable to testify since he has no conscious recollection of the accident. (Record at 303) The investigating officer and experts for both parties testified on the circumstances and cause of the accident. (Record at 368, 69, 392 and 427)

The following facts surrounding the collision were established without serious dispute at trial:

1. At approximately 9:15 p.m. on June 3, 1982, Trapp

was driving north in the east lane of Redwood Road near 400 North in Salt Lake City. (Record at 282)

2. The evening was dark and the headlights on Trapp's vehicle were lighted on low beam. Traffic on the highway was heavy. (Record at 282)

3. Just prior to the collision, Trapp's automobile was traveling at approximately 38 to 40 miles per hour in a 45 mile per hour traffic zone. (Record at 283, 298, 315 and 366)

4. As Trapp neared 430 North on Redwood Road, Fisher and his brother Patrick were standing along the west shoulder of Redwood Road, waiting for traffic to clear so they could cross the street. (Record at 309-310)

5. As Fisher darted across the west lane of Redwood Road, his brother saw the Trapp vehicle and yelled to Fisher. (Record at 310, 315)

6. Fisher was nine years old at the time of his accident with Trapp. (Record at 303)

7. There was no crosswalk at the point where Fisher attempted to cross Redwood Road. (Record at 306, 367)

8. Fisher collided with the left front fender of the Trapp vehicle and fell backwards or "kind of sideways", landing approximately one foot from where he was standing when he struck the automobile. (Record at 287, 296, 310, 316-318, 345, 413-416)

A physical examination of the Trapp automobile revealed no damage to the front grill, headlights, hood, or windshield. The only physical evidence of the collision was a smudge of dirt

off of the left side of the vehicle. (Record at 269) Experts for both parties agreed at trial that Fisher collided with the left side of the Trapp automobile near the front wheel area. (Record at 345, 348, 413-416)

Pursuant to the trial court's order, no evidence of Trapp's post-collision conduct was introduced at trial. The trial jury returned a verdict in favor of respondent Trapp. Appellant's motion for a new trial was denied, and appellant appeals. (Record at 242)

SUMMARY OF ARGUMENTS

The trial court did not commit reversible error in either excluding evidence of respondent's post-collision conduct or in limiting the testimony of appellant's expert, Val Shupe.

ARGUMENT

POINT I.

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION
IN EXCLUDING EVIDENCE OF RESPONDENT'S
POST-COLLISION CONDUCT.

A. The Determination of Evidentiary Matters is Properly
Left to the Sound Discretion of the Trial Court.

Rule 403 of the Utah Rules of Evidence grants trial courts considerable discretion in determining whether evidence, although relevant, should be excluded on grounds of prejudice, confusion, or waste of time. This court in Terry v. Zions Co-op Merchantile Institution, 605 P.2d 314 (Utah 1979), reaffirmed the generally recognized principle that a reviewing court should

generally defer to the trial court's determination of evidentiary matters.

In Terry, the plaintiff customer brought a malicious prosecution, false arrest and false imprisonment action against the defendant merchant arising from an alleged shoplifting incident. At trial, the defendant wished to introduce evidence of the plaintiff's prior conviction and its surrounding facts as affecting the issue of damages. The trial court excluded the introduction of the evidence, finding that the proffered evidence would have misled and prejudiced the jury.

In holding that the trial judge committed no error in balancing the probative value of the evidence against its prejudicial effect, the court stated, "When the trial judge weighs the matter and makes the determination, his ruling should be looked upon with indulgence and not disturbed unless it clearly appears that he abused his discretion." Id. at 323 (emphasis added).

The broad discretion granted to trial courts under the Utah Rules of Evidence to determine the relevancy, materiality, or prejudicial nature of evidence is shown in Reiser v. Lohner, 641 P.2d 93 (Utah 1982); and Martin v. Safeway Stores, Inc., 565 P.2d 1139 (Utah 1977).

In Reiser, the plaintiff sought recovery for personal injuries sustained as a result of the defendant doctor's alleged negligent medical treatment. The defendant doctor had failed to perform two medical tests on the plaintiff's mother while plaintiff was in utero. Plaintiff was born with severe brain damage

and was later diagnosed as suffering from cerebral palsy and spastic quadraplegia, all of which was indisputably not caused by the defendant's failure to administer the two medical procedures on plaintiff's mother. Prior to trial, defendant made a motion in limine to exclude evidence that the medical procedures had not been taken until just prior to the plaintiff's birth. The trial court granted the motion.

On appeal, this court refused to reverse the trial court's evidentiary ruling, stating:

The trial judge was within the bounds of his authority when he excluded the tests (or lack of) pertaining to Rh sensitivity. It is undisputed that Rh sensitivity was not the cause of the child's injury, and any evidence as to the diagnosis of such sensitivity therefore appears to be without relevance. When this is coupled with the potential prejudicial effect such evidence might have upon the jury, the trial judge was well within his discretion to exclude it. Reiser, 641 P.2d at 97 (emphasis added)

In Martin, the plaintiff sought recovery for personal injuries from a fall on a sidewalk leading from the defendant's grocery store in Midvale. The plaintiff sought to offer an exhibit showing the weather conditions at the Salt Lake Airport at the time of the accident. The trial court sustained an objection to the exhibit on the grounds that the exhibit was immaterial to prove the weather conditions at the scene of the accident.

In sustaining the trial court's evidentiary ruling, this court cited the predecessor to Rule 403, Utah Rules of Evidence and stated:

The law is clear that in matters of determining materiality the trial court

should be accorded a large measure of discretion and should only be reversed if this discretion is abused. The weather report . . . had very little, if any, probative value and it could have created a substantial risk of confusing the issues. The judge did not abuse his discretion in excluding it. Martin, 565 P.2d at 1141.

In view of the clear statements of this court in Terry, Reiser, and Martin, and the underlying principle of Rule 403 of the Utah Rules of Evidence, the balancing of probative value against prejudicial effect must necessarily rest within the sound discretion of the trial court. Since this court has heretofore granted broad discretion to the trial courts of this state in making evidentiary rulings, the trial judge's exclusion of evidence of Trapp's post-collision conduct should not be disturbed absent evidence of clear abuse of discretion or manifest error. Brigham Young University v. Lillywhite, 118 F.2d 836 (10th Cir. 1941), cert. denied 314 U.S. 638 (1941); State v. Pierre, 572 P.2d 1338 (Utah 1977), cert. denied 439 U.S. 882 (1978); and State v. Gibson, 565 P.2d 783 (Utah 1977).

B. The Prejudicial Effect of Evidence of Respondent's Post-Collision Conduct Substantially Outweighs the Probative Value of Such Evidence in the Instant Action.

Rule 403 of the Utah Rules of Evidence sets forth the applicable standard for the exclusion of relevant evidence on the grounds of prejudice:

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.

This court in Terry v. Zions Co-op Mercantile Institution, 605 P.2d at 323, n. 31, stated:

Evidence is unfairly prejudicial . . . if it has the tendency to influence the outcome of the trial by improper means, or if it appeals to the jury's sympathies, or arouses its sense of horror, provokes its instincts to punish or otherwise causes a jury to base its decision on something other than the established proposition of the case. (quoting Lease America Corp. v. Insurance Co. of North America, 88 Wis.2d 395, 276 N.W.2d 767, 770 (1979)).

The trial court in the instant case noted that evidence of flight may be relevant under certain circumstances. (Record at 272) However, the court held that under the facts of this case, the limited probative value of evidence of Trapp's post-collision conduct was outweighed by the tendency of the evidence to "inflame the jury." (Record at 272-273) The tendency of evidence of post-accident flight to unfairly prejudice jurors is well recognized:

[I]n many situations, the inference of consciousness of guilt of the particular crime is so uncertain and ambiguous and the evidence so prejudicial that one is forced to wonder whether the evidence is not directed to punishing the "wicked" generally rather than resolving the issue of guilt of the offense charged.

* * *

In addition, the potential for prejudice for flight evidence should be weighed against its probative value. Critical scrutiny is called for in each particular case. McCormick on Evidence §271, (Lawyers 3d Ed. 1984) (emphasis added).

Appellant asserts that evidence of Trapp's post-collision

conduct raises several inferences, any of which would be helpful to the jury in the determination of the instant action. Although the relevancy of a piece of evidence proffered is crucial, the probative value of the evidence, standing alone, does not determine its admissibility. Terry, 605 P.2d at 322. The excluded evidence in the instant case is, at best, only tangentially relevant, due its tendency to allow the jury to speculate on facts unsupported in the record. The trial court did not err in prohibiting such potentially prejudicial evidence. Other courts have likewise noted that facts which support only conjectural inferences have little, if any, probative value. Since facts supporting only conjectural inferences have such limited probative value, at least one jurisdiction has held them to be per se inadmissible. Moe v. Avions Marcel Dassault-Breguet Aviation, 727 F.2d 917 (10th Cir. 1984), (applying Colorado law); and Dolan v. Mitchell, 179 Colo. 359, 502 P.2d 72 (1972).

This court in Pearce v. Wistisen, 701 P.2d 489 (Utah 1985), recognized that trial courts have less discretion in admitting evidence where the evidence is shown to support only conjectural inferences which have little probative value, or where there is no evidence that the fact has any causal connection with the plaintiff's injury. Id. at 491-492.

The plaintiff in Pearce brought a wrongful death action against the joint owners of a motor boat after his son drowned in Utah Lake. The plaintiff's teenage son went on a waterskiing trip with several other teenagers on the afternoon of June 1, 1979.

Plaintiff's son and several others had returned to their homes early that morning from a high school graduation party in a nearby canyon. In the late afternoon, a brisk breeze came up, causing the water to become choppy. Despite the poor conditions, plaintiff's son entered the water to ski all the way back to the harbor. As he waited in the water, the ski rope became entangled in the propeller, stalling the engine. Unable to dislodge the rope, plaintiff's son struck out to swim for the west shore of the lake. The boy never made it.

In a motion in limine heard before trial, counsel for plaintiff requested the court to exclude any evidence that there had been drinking at the canyon party the night before the accident. The motion was made on the grounds that such evidence would be irrelevant in establishing proximate cause, and that the prejudicial effect of such evidence would outweigh its probative value. Counsel for defendant proffered evidence that plaintiff's son had helped sponsor the party, had bought the liquor, and had very little sleep before leaving the canyon at 6:00 a.m. Counsel for defendant further argued that the jurors should be allowed to draw their own inferences from this evidence as to the deceased's prior state of physical exhaustion. Plaintiff's motion in limine to exclude the evidence was denied. The trial court entered a verdict of no cause of action, and plaintiff appealed.

After noting the potential prejudicial effect of the admitted evidence and the limited probative value such facts would have in establishing the deceased's state of physical exhaustion, this court remanded the case to the trial court and noted:

If evidence has some probative value, but has a tendency to unduly prejudice or confuse the issues or to mislead the jury, the trial court must balance the probative value against those countervailing factors to determine whether the evidence should be admitted. "Precedent . . . is of little value in reviewing such cases We simply determine whether, on the facts of the particular case, the trial court's ruling was within the reasonable or permissible range." Id. at 492-493 (quoting Carlson v. Piper Aircraft Corp., 57 Or.App. 695, 646 P.2d 43, 46-47 (1982)) (emphasis added).

As illustrated by Pearce and Reiser, trial courts should restrict the admissibility of potentially prejudicial evidence that supports only conjectural inferences or which is undisputably not a contributing factor to the accident. See also Ratterree v. Bartlett, 707 P.2d 1063 (Kan. 1985) (trial court excluded evidence concerning the smell of alcohol on defendant's breath in a personal injury action arising out of an automobile accident. Held: Since the excluded evidence was not a contributing factor in the accident, the trial court correctly ruled the evidence of the smell of alcohol on defendant's breath would be more prejudicial than probative).

Although appellant cites several cases which hold evidence of post-accident flight admissible under certain circumstances, other courts have held such evidence to be inadmissible. See Freeman v. Anderson, 279 Ark. 282, 651 S.W.2d 450 (1983); Spencer v. Adams, 37 Ga.Ct.App. 344, 140 S.E. 390 (1927); Clark v. Mask, 232 Miss. 65, 98 So.2d 467 (1957); and Barnes v. Gaines, 668 P.2d 1175 (Okla.Ct.App. 1983).

As this court stated in Pearce, case precedent is of little value in reviewing a trial court's determination of whether evidence is unfairly prejudicial. Pearce, 701 P.2d at 492. A trial court's ruling under Rule 403 of the Utah Rules of Evidence is most often a fact intensive decision that should not be applied blindly to cases involving different facts and circumstances. Flight from the scene of a tragedy may be quite as consistent with innocence as with negligence. One, who, despite due care, kills or injures another, may through ignorance of the law or through panic flee from the scene of his act, and yet be perfectly innocent. It would be a dangerous rule which would permit the jury to consider flight as evidence of negligence in every case. See People v. Cismadija, 167 Mich. 210, 132 N.W. 489 (1911). The equivocal nature of respondent's flight under the circumstances of this case should be of particular concern to this court.

The cases cited by appellant for the proposition that evidence of post-accident flight is admissible are clearly distinguishable on their facts. First, the trial of the instant action demonstrated that there is little, if any, dispute how the accident occurred. Trapp admitted that he did not see Fisher until the moment of impact. (Record at 285) It was undisputed at trial that the point of impact was on the side of the Trapp vehicle. (Record at 296, 310, 345, 369, 371, and 413-416) The only dispute in the instant action was on the part of the experts on whether Trapp had sufficient time to see Fisher and to take

evasive action to avoid the collision. (Record at 334-338, and 390-392)

In Petroleum Carrier Corp. v. Snyder, 161 F.2d 323 (5th Cir. 1947), cited by appellant, there were serious disputes on whether the defendant was speeding prior to the moment of impact, whether the defendant was on the wrong side of the road, whether the plaintiff was on the wrong side of the road, and whether the defendant had failed to dim his lights as required by state law. Shaddy v. Daley, 58 Idaho 536, 76 P.2d 279 (1938), is similarly distinguishable. In Shaddy, there were a serious factual disputes on whether the defendant's truck had its headlights lighted, whether the defendant's truck struck the decedent on the highway, and whether the defendant was speeding at the moment of impact. Other cases cited by appellant involving serious factual disputes include Harrington v. Sharff, 305 F.2d 333 (2nd Cir. 1962), and State v. Ford, 109 Conn. 490, 146 A. 828 (1929).

Second, unlike the instant case, where eyewitnesses to the accident were able to testify as to how the accident occurred, several of the cases cited by appellant involve factual situations where there were no eyewitnesses to the accident. As a result, in those cases there was little, if any, way to determine how the accident occurred. In the instant case, the jury was able to hear testimony both from Fisher's brother, Patrick, and from Trapp on how the accident occurred.

Since the trial jury in the instant case heard direct testimony on the facts and circumstances of the accident, the jury

did not need to consider the possible inferences that Fisher attempted to raise through the introduction of evidence of Trapp's post-collision conduct. Such conjectural inferences could have confused the jury and distracted them from deciding the case on the direct testimony of the two eyewitnesses to the accident. Cases cited by appellant where no eyewitnesses were available to testify how the accident occurred include: Brooks v. E. J. Willig Truck Transportation Co., 40 Cal.2d 669, 455 P.2d 802 (1953); State v. Ford, 109 Conn. 490, 146 A. 828 (1929); Busbee v. Quarrier, 172 So.2d 17 (Fla.Ct.App. 1965); Waycot v. Northeast Ins. Co., 465 A.2d 854 (Maine 1983); Johnson v. Austin, 406 Mich. 420, 280 N.W.2d 9 (1979); and Jones v. Strelecki, 49 N.J. 513, 231 A.2d 558 (1967).

Third, several of the cases cited by appellant are distinguishable from the instant case, since the evidence of flight was admissible to impeach the credibility of defendants who denied involvement in the accidents giving rise to those cases. See Dean v. Cole, 217 F.Supp. 280 (E.D. S.C. 1963); Greenwood v. Bailey, 184 So. 289 (Ala.Ct.App. 1938); Grzys v. Connecticut Co., 123 Conn. 605, 198 A. 259 (1938); Busbee v. Quarrier, 172 So.2d 17 (Fla.Ct.App. 1965); and Vuillemot v. August J. Claverie & Co., 125 So. 168 (La. 1929).

In the instant case, respondent Trapp voluntarily telephoned the police within 30 minutes of the accident to advise them that he had been involved in the accident with appellant Fisher. Furthermore, at trial, Trapp unequivocally testified that

he was the driver of the vehicle involved in the accident giving rise to this case. Under such circumstances, evidence of Trapp's post-collision conduct has little, if any, probative value.

Fourth, as several of the cases cited by appellant suggest evidence of post-accident flight may have probative value where there is an allegation that the plaintiff is entitled to punitive damages as a result of the defendant's gross negligence or where the plaintiff's injuries were aggravated due to the defendant's failure to stop and render assistance. See Brooks v. E. J. Willig Truck Transportation Co., 40 Cal.2d 669, 455 P.2d 802 (1953); Langenstein v. Reynaud, 13 La.App. 272, 127 So. 764 (1930); Richards v. Office Products Co., 55 Ohio App.2d 143, 380 N.E.2d 725 (1977); and Hallman v. Cushman, 196 S.C. 402, 13 S.E.2d 498 (1941). These cases are clearly distinguishable from the instant case, since Fisher's complaint against Trapp did not allege that the accident was due to any gross negligence on the part of Trapp nor does Fisher contend that his injuries were aggravated due to Trapp's failure to immediately stop and render aid at the accident scene.

Fifth, unlike in Johnson v. Austin, 406 Mich. 420, 280 N.W.2d 9 (1979), and Jones v. Strelecki, 49 N.J. 513, 231 A.2d 558 (1967), cited by appellant, the instant case does not involve the special public policy concerns emanating from an unidentified motorist act. It is clear that the public policy considerations underlying under such acts favor compensation. Since the flight of the unidentified motorist may result in the plaintiff losing

the evidence necessary to establish his claim under such an act, courts are more willing to allow inferences to be drawn from the driver's flight to allow injured parties to recover, who without the inference would most likely be unable to recover. The public policy concerns present in Johnson and Jones are not present in the instant case. Although some evidence has been lost due to Fisher's inability to testify at trial, ample evidence on how the accident occurred was presented at trial.

In sum, the cases cited by Fisher demonstrate the probative value of evidence of flight under certain limited circumstances: 1) where there are serious fact disputes surrounding the accident; 2) where there are no eyewitnesses to the accident; 3) where the defendant denies involvement in the accident; 4) where the plaintiff's injuries are aggravated by the flight; and 5) where special statutory based public policy concerns favor a finding of negligence. The instant action does not fall within any of the above-cited categories. Under the circumstances of this case, the prejudicial effect of admitting evidence of Trapp's post-collision conduct clearly outweighs the probative value of such evidence.

POINT II.

EVEN IF THE TRIAL COURT ERRED IN EXCLUDING
EVIDENCE OF RESPONDENT'S POST-COLLISION
CONDUCT, SUCH ERROR WAS HARMLESS AND DOES
NOT WARRANT REMAND.

Rule 103 of the Utah Rules of Evidence provides that prejudicial error will not occur unless the excluded evidence affects

a substantial right of the aggrieved party. In determining whether a substantial right of the appellant has been affected by the exclusion of evidence of Trapp's post-collision conduct, this court should consider the whole record. This court should not find an abuse of discretion on the part of the trial court unless this court, after reviewing the whole record, is left with a definite and firm conviction that the trial court erred in its ruling. Peter Pan Seafoods, Inc. v. Stepanoff, 650 P.2d 375 (Alaska 1982). The test for determining whether the alleged error on the part of the trial court is prejudicial to the appellant is whether, upon a review of the record, it sufficiently appears that the rights of the appellant have been injuriously affected by the error, or that he has suffered a miscarriage of justice. See 5 Am.Jur.2d Appeal & Error §783 (1962).

In Gull Laboratories, Inc. v. Lewis A. Roser Co., 589 P.2d 756, 759 (Utah 1978), this court established that "a jury verdict will only be upset where the error committed was so substantial and prejudicial that there is a reasonable likelihood that the result would have been different in the absence of such error." Although appellant asserts that the exclusion of evidence of Trapp's post-collision conduct affected his substantial rights, the better-reasoned authorities find that the exclusion of evidence with only slight or conjectural value does not constitute reversible error. See 5 Am.Jur.2d Appeal & Error §802 (1962).

As previously stated herein, the evidence of Trapp's post-collision conduct supported only conjectural inferences of

negligence. Such inferences have little, if any, probative value. See Pearce v. Wistisen, 701 P.2d 489 (Utah 1985); and Dolan v. Mitchell, 179 Colo. 359, 502 P.2d 72 (Colo. 1972). Since the excluded evidence in the instant case had such little probative value, it is impossible to conclude that there is "a reasonable likelihood that the result would have been different" had such evidence been admitted at trial. Absent such a showing, this court should hold that the trial court's ruling did not result in a miscarriage of justice or the denial of any substantial right of the appellant.

POINT III.

THE TRIAL COURT DID NOT COMMIT PREJUDICIAL
ERROR IN RELATION TO THE TESTIMONY OF
APPELLANT'S EXPERT, VAL SHUPE.

A. The Determination of Matters of Foundation is Properly Left to the Sound Discretion of the Trial Court.

While the Utah Rules of Evidence permit opinion testimony on an ultimate issue, it is clear that not all opinions are admissible. The opinion testimony of lay and expert witnesses requires that the witness' opinion have a basis in fact. This court in Utah Dept. of Transportation v. Jones, 694 P.2d 1031, 1036 (Utah 1984), stated:

Admission of any type of testimony requires the laying of proper foundation to qualify the witness to give the particular testimony sought to be elicited. (Emphasis added).

Despite the liberality accorded to expert testimony under the Utah Rules of Evidence, a foundation must still be laid for

expert opinion testimony no matter what technique of presentation is employed. As a result, expert opinion testimony should be excluded if its factual foundation is inadequate. See 31 Am.Jur.2d Expert & Opinion Evidence §36 (1967); and 11 Moore's Federal Practice §705.10, note 1 (1985).

This court in Day v. Lorenzo Smith & Son, Inc., 17 Utah 2d 221, 408 P.2d 186 (1965), recognized that a foundation must still be laid for expert opinion testimony. In Day, the plaintiff brought action seeking recovery for personal injuries sustained in an automobile collision. The crucial factual question was which vehicle was in the wrong lane at the time of the accident. Defendant called a Utah Highway Patrolman with 24 years experience of accident investigation to testify as to the point of impact.

The investigating officer was at the scene investigating another accident when the instant collision occurred. However, his back was to the highway and he did not see the actual impact. The officer did observe the movements of the vehicles immediately afterwards. The officer also examined and measured the skid marks and debris left by the vehicles following their collision. The officer's qualification as an expert in accident investigations was not challenged at trial. However, when the defendant attempted to elicit the officer's opinion as to the point of impact, the plaintiff objected on the grounds of lack of foundation. The objection was overruled and the officer was allowed to give his opinion as to the point of the impact.

On appeal, this court held the trial court's admission of

the officer's testimony to be prejudicial error. In reaching that decision, the court stated:

[W]e believe the proper rule to be that a trial judge, in his discretion, may permit a qualified expert (in this case an experienced Highway Patrolman) to give his opinion as to the point of collision when a proper foundation for the opinion has been laid.

* * *

[W]e hold that it was error to permit [the Highway Patrolman's] testimony as to the point of impact because his opinion was not supported by sufficient facts and, what meager facts he did testify to were not connected up or related to his opinion. They were inadequate to support his conclusion. Day, 408 P.2d at 187, 189. (Emphasis in original).

Similarly, in Edwards v. Didericksen, 597 P.2d 1328 (Utah 1979), this court held that an adequate foundation must be laid before an expert's opinion is admitted into evidence. The action in Edwards arose out of a two-car automobile collision. At trial, the plaintiff presented the testimony of the investigating officer. The officer testified to his expertise in accident investigation and to what he saw and did in the course of his investigation. He testified to the length and location of skid marks, the speed of the automobiles, the point of impact, and various other facts and inferences. At the conclusion of the officer's direct examination, the following took place:

Q [By plaintiff's attorney] . . .
From the information that you have, your independent investigation, talking with the witnesses, observing the situation, have you reached an opinion, have you formed an opinion as to what the cause of this accident was?

A Yes.

Q And would you give us that opinion?

A Mr. Christian: I object to that, your honor.

The Court: Sustained. Id. at 1329.

On appeal, the plaintiff argued that the officer's opinion had been erroneously excluded by the trial court. In sustaining the lower court's exclusion of the expert's opinion, this court noted the requirement that adequate foundation be laid before an expert's opinion is admitted into evidence:

The admissibility of accident reconstruction evidence depends in large measure upon the foundation laid. The expertise of the witness, his degree of familiarity with the necessary facts, and the logical nexus between his opinion and the facts adduced must be established. When such a foundation is laid, Rule 56 of the Utah Rules of Evidence [predecessor to the current Rule 703] makes an expert's opinion admissible, even though it embraces an ultimate issue. Id. at 1331.

See also Kallas v. Kallas, 614 P.2d 641, 644-645 (Utah 1980)

(courts should establish whether sufficient foundation has been laid for an expert to render expert opinion testimony).

Other courts have likewise held that an expert's opinion must be based upon sufficient foundation in order to be admissible. In Kingsbury v. Hickey, 56 Or.App. 492, 642 P.2d 339 (1982), the plaintiff's accident reconstruction expert testified that he had examined one of the damaged vehicles, visited the scene of the accident, took measurements of the damage sustained by one of the vehicles, and examined undamaged vehicles similar to

those involved in the accident. The witness' qualifications as an expert in mechanical engineering were not challenged. The trial court, upon appropriate objection by the defendant, excluded the expert's opinion as to the speed of the vehicles and the point of impact.

In affirming the trial court's exclusion of the evidence offered by the expert accident reconstructionist, the Oregon Court of Appeals noted:

An expert's opinion is admissible only if based on facts in evidence or on facts within the personal knowledge of the expert. Expert evidence offered with sufficient foundation is too speculative and therefore not admissible.

* * *

The burden of proving a proper foundation for an expert opinion is on the proponent of the evidence When the factual foundation is lacking or unreliable, the evidence should be excluded. The trial judge was entitled to conclude that the witness' estimate of the speed of the vehicles upon which his evidence on their point of impact depended lacked a reliable factual foundation and was speculative. Kingsbury, 642 P.2d at 341-342 (citations omitted).

As with other evidentiary matters, the determination of adequate foundation is solely within the discretion of the trial court. Tjas v. Proctor, 591 P.2d 438 (Utah 1979). In citing the general rule of deference to be accorded to trial court decisions on evidentiary matters, this court in Terry v. Zions Co-op Mercantile Institution, 605 P.2d 314, 322-323 (Utah 1979), stated:

It is generally conceded the trial court is more competent, in the exercise of this discretion, to judge the exigencies of a

particular case and, therefore, when exercised within normal limits, the discretion should not be disturbed. The general rule followed by this court is the judgment of the trial court will not be reversed unless it is shown that the discretion exercised therein has been abused.

In sum, this court should be reluctant to interfere with the lower court's ruling in the instant matter unless there is evidence that the trial court's discretion has been manifestly abused to the prejudice of the complaining party.

B. Appellant Initially Failed to Lay Adequate Foundation at Trial for the Opinion of His Expert.

On the first day of trial appellant called and certified Val Shupe as an accident reconstruction expert. (Record at 320-321) No objection was raised as to Mr. Shupe's qualifications. Shupe also testified about the examinations and calculations which he made in preparation for his testimony at trial. (Record at 322-327) When Fisher attempted to elicit Shupe's opinion as to the cause of the accident, respondent timely objected on the grounds of lack of foundation for said opinion. Out of the hearing of the jury, Shupe offered the following opinion:

Q (By Mr. Hansen) What's the cause of the accident in your opinion, Mr. Shupe?

A My opinion, my opinion as far as what the cause of the accident, the speed was too fast for the conditions surrounding it.

Q Any other cause?

A Yes, sir. I feel he was not totally aware of what -- of the circumstances in

front of him for the distance that he was away from the pedestrian. (Record at 334)

The trial court then carefully examined the factual underpinnings of Mr. Shupe's opinion, and concluded that there was insufficient foundation for Mr. Shupe to base that opinion. (Record at 328-334) Although, the court excluded Shupe's opinion as to the cause of the accident, the court allowed Shupe to testify on how far back Trapp was from the point of impact when Fisher began crossing the road. (Record at 338-339)

In excluding Shupe's opinion as to the cause of the accident, the trial court correctly determined that Shupe's opinion was not sufficiently grounded in the relevant facts of the case. Under Rule 705 of the Utah Rules of Evidence, the trial court has discretion in requiring the prior disclosure of the facts or data which underly an expert's opinion testimony.

During the proffer of testimony outside of the jury's presence, it was clear that counsel for appellant had not established sufficient foundation for the admission of his expert's opinion. Notwithstanding appellant's presentation of evidence on where Trapp was when appellant entered the roadway, appellant failed to ask the essential foundational question, the answer to which might have resulted in Shupe's opinion being admitted, "Where was Trapp when he could have perceived Fisher and taken evasive action?" Until such a question was asked and answered, there was no foundation for any testimony regarding Trapp's alleged negligence in failing to perceive Fisher in the roadway and in failing to take appropriate evasive action. Fisher

was further unable to point to any physical evidence (e.g., skid marks) as to Trapp's actual perception of Fisher in the highway. Physical evidence was lacking on several other key factors, such as the location of other cars which might have obstructed Trapp's opportunity to perceive Fisher in the roadway and the angle of the headlight beam of Trapp's vehicle. Without taking such factors into consideration, the trial court correctly ruled that Fisher failed to lay adequate foundation for Shupe's opinion.

It is important to note that the essence of Shupe's opinion, i.e., the few factual bases upon which the opinion was based, was presented to the jury. Mr. Shupe's testimony was excluded only to preclude the drawing of a conclusion from the admitted evidence. The following testimony by Mr. Shupe demonstrates that the essence of his excluded opinion was before the jury:

Q (By Mr. Hansen) Before we recess, I'm not sure that you gave us the manner in which you computed how long it would take this young boy to run out to the point of impact. Did you do that?

A Yes, sir.

Q And that time was what, around?

A From the time for him to run into the road?

Q Yes.

A Approximately 2.5 seconds.

Q Now, assuming that that's how long it took? Then can you calculate from that how far back the Trapp vehicle, the defendant's car was at the time the boy started to run?

A Yes. Traveling at 40 miles per hour, he would be traveling at 58.68 feet per second. That would place him back approximately 146 feet from the point of impact at the time the boy started to run into the road.

Q Now, is there any way from those calculations to determine whether or not he, in fact, saw the boy when he first started out; that is, started across.

A Well, he would have to have, as we talked about, he would have to have perception and a reaction, and that perception and reaction would take up so many feet. And in this particular case, it would take up 86 feet. But there was no evidence that I found or anything through investigation to indicate that he made any evasive action whatsoever. And also from reading from his deposition, he never saw the boy until the boy hit the car, struck the car, indicating he made no evasive action whatsoever.
(Record at 338-339)

C. Any Error Which Might Have Been Committed by the Trial Court's Exclusion of Shupe's Opinion was Cured by the Subsequent Admission of the Very Same Opinion During Later Testimony.

On the second day of trial, Fisher called his expert accident reconstructionist back to the stand to testify. Shupe testified that following his initial testimony in the matter, he had acquired additional information with respect to the accident. He testified that he had returned to the scene of the accident with appellant and appellant's family to get additional information as to the position of Trapp's vehicle at the time Fisher entered the road. Shupe then opined that Trapp was 201 feet away from the point of impact when Fisher entered the road. The record then reveals:

Q Based on that new information and based on all the depositions and interrogatories that you read and your investigation of this accident, do you have an opinion as to the cause of this accident?

A Yes, sir, I do.

Q And what is that opinion?

A My opinion is that the gentleman was proceeding too fast for the conditions and that he had improper lookout of the situation. (Record at 427) (Emphasis added)

Courts have consistently held that the improper exclusion of competent testimony constitutes harmless error where essentially the same evidence is established later by the same witness, other witnesses, or by other means. See P. A. Sorensen Co. v. Denver & Rio Grand Railroad Co., 49 Utah 548, 164 P. 1020 (1917); Millsap v. Williamson, 294 Ala. 634, 320 So.2d 649 (1975); Bailey v. Leonard, 625 P.2d 849 (Alaska 1981); State v. Caldwell, 117 Ariz. 464, 573 P.2d 864 (1977); In Re Ching's Estate, 46 Hawaii 127, 376 P.2d 125 (1962); and Duran v. Mueller, 79 Nev. 453, 386 P.2d 733 (Nev. 1963).

Careful scrutiny of the entire record in this case reveals that the subsequent testimony by appellant's expert, Val Shupe, was as broad and comprehensive as that initially excluded by the trial court. Furthermore, the essence of Shupe's opinion was never excluded at any time from the jury. The jury was equally competent to draw the desired inferences and conclusions from the underlying facts which were admitted into evidence without objection. Since the underlying facts were presented to the jury and the subsequent questioning of Shupe gave testimony which had the effect of

answering the question to which the previous objection had been sustained, any error committed by the trial court in limiting the testimony of Val Shupe was harmless error.

CONCLUSION

There is no dispute in this case that Trapp's post-collision conduct did not contribute to Fisher's injuries. At most, the excluded evidence was to create an inference of negligence on the part of Trapp. In excluding evidence with little, if any, probative value, the trial court did not abuse the broad discretion given to it under the Utah Rules of Evidence. As a result, the trial court's ruling on the exclusion of such evidence cannot be said to have affected any substantial right of the appellant.

Similarly, the trial court's action in requiring Fisher to lay sufficient foundation before admitting the opinion of his expert as to the cause of the accident in question is clearly recognized and permitted under the Utah Rules of Evidence. The trial court was correct in finding that the appellant had not met its burden of proving a proper foundation for the opinion which it attempted to elicit from its expert. Assuming arguendo that the trial court erred in its ruling in relation to the testimony of Val Shupe, it is clear that the initial exclusion of the expert's ultimate conclusion was rendered harmless since the essence of Mr. Shupe's conclusion was allowed into evidence and Shupe's conclusion was later admitted into evidence, without objection.

Therefore, respondent respectfully requests that this court affirm the evidentiary rulings of the trial court in this matter.

Dated this 3 day of Oct, 1986.

STRONG & HANNI

By Henry E. Heath
Henry E. Heath
Attorneys for Respondent

MAILING CERTIFICATE

I hereby certify that two true and correct copy of the foregoing Brief of Respondent was mailed, first class postage pre-paid, this 3 day of Oct, 1986, to the following:

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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 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.

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.