

1988

Joshua Fisher, Carla Fisher v. Warren Trapp : Brief in Opposition to Certiorari

Utah Supreme Court

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BRIEF

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DOCKET NO. 880081

IN THE SUPREME COURT OF THE STATE OF UTAH

JOSHUA FISHER, by and through)	
his general guardian,)	
CARLA FISHER,)	Certiorari No.
)	
Appellant,)	Category No. 13
)	
vs.)	
)	(Court of Appeals
WARREN TRAPP,)	Case No. 860359-CA;
)	Previous Supreme Court
Respondent.)	Case No. C86-0114)

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI
TO THE UTAH SUPREME COURT

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Clerk, Supreme Court, Utah

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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?

COURT OF APPEALS OPINION

The opinion of the Utah Court of Appeals is published at Fisher v. Trapp, 748 P.2d 204 (Utah Ct.App. 1988).

DETERMINATIVE AUTHORITIES

Utah Rules of Evidence, 103, 401, 402, and 403 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, finding no negligence. Appellant's motion for a new trial was denied, and the matter was appealed. The Court of Appeals upheld the trial court verdict and judgment as set forth in the opinion attached to appellant's brief. (Record at 242)

SUMMARY OF ARGUMENTS

There is no inconsistency in the civil and criminal law regarding admitting evidence of "flight" and the trial court did not commit reversible error in excluding evidence of Trapp's post-collision conduct. There is no need for the issuance of a writ of certiorari.

ARGUMENT

POINT I.

THERE IS NO INCONSISTENCY IN THE CIVIL AND CRIMINAL LAW REGARDING ADMITTING EVIDENCE OF "FLIGHT" WHICH JUSTIFIES THE ISSUANCE OF A WRIT OF CERTIORARI.

A. The Decisions in Franklin and Bales are Clearly Distinguishable From This Case.

The main focus of Fisher's petition is that this court has held that evidence of flight is probative in State v. Franklin, 735 P.2d 34 (Utah 1987), and State v. Bales, 675 P.2d 573 (Utah 1983). Fisher alleges that the Court of Appeals' opinion in this case creates a separate rule for civil cases with the appearance of inconsistency between the application of the criminal law and the civil law. It is therefore necessary to review the holdings of these cases to understand the basis for the same and to appreciate the scope of their applicability.

At the outset it is important to understand the justification for admitting flight evidence in both criminal and civil cases. It has been admitted in certain cases where the criminal defendant has denied involvement in the crime, such as in Franklin and Bales, and also in civil personal injury cases arising out of automobile accidents where the defendant denies his involvement in causing the accident.

Under the circumstances of the Franklin case where defendant denied his involvement in the crime, this court held that evidence of flight was probative and cited the Bales decision in support of its holding. Franklin, 735 P.2d at 39. A comparison

of the reasoning of the Court of Appeals in this case and the reasoning of the Bales decision demonstrates that there is no inconsistency in the criminal and civil law of the State of Utah.

The Bales case involved two defendants who were convicted of aggravated burglary. Witnesses had observed them under suspicious circumstances leaving the home of the victim and police were summoned. When accosted, the defendants attempted to flee from the police but were eventually apprehended. The evidence of the attempted flight was admitted with a cautionary instruction. The court criticized the instruction and suggested a more appropriate instruction should have been given. Bales, 675 P.2d at 575.

In discussing the rationale for the admission of such evidence, the court pointed out the important policy considerations applicable by citing extensively from other jurisdictions. The court stated:

State courts differ widely in their attitudes toward flight instructions. For example, Iowa permits an instruction that flight is evidence of guilt under certain circumstances. State v. Barr, Iowa, 259 N.W.2d 841, 842 (1977). At the opposite extreme, South Carolina held a flight instruction to be reversible error and invalidated all flight instructions, no matter what the circumstances. State v. Grant, 275 S.C. 404, 407, 272 S.E.2d 169, 171 (1980). Other states have adopted diversified intermediate positions. See generally 25 A.L.R. 886-909 (1923 & Supp. 1983); 75 Am.Jur.2d Trial §788 (1974).

The opinions of the federal courts have provided the most extensive analysis. The

United States Supreme Court has expressed reservations about evidence of flight: "We have consistently doubted the probative value in criminal trials of evidence that the accused fled the scene of an actual or supposed crime." Wong Sun v. United States, 371 U.S. 471, 483 n. 10, 83 S.Ct. 407, 415 n. 10, 9 L.Ed.2d 441 (1963). Responsive to that concern, the Court of Appeals for the District of Columbia has viewed flight as twice removed from direct evidence of guilt. That court recommended an instruction explaining that flight does not necessarily reflect guilt, that jurors may (but need not) consider flight as one circumstance tending to show feelings of guilt, and that they may (but need not) consider feelings of guilt as evidence tending to show actual guilt. Miller v. United States, 320 F.2d 767, 773 (D.C.Cir. 1963). In a later case, that court stressed that flight instruction should be used sparingly and should be tempered by instructions explaining that many motives may prompt flight, and thus a jury should use caution before inferring guilt from the fact of flight. Austin v. United States, 414 F.2d 1155, 1157 (D.C.Cir. 1969). The instruction given in this case would clearly be error in the District of Columbia because it creates too direct a link between flight and guilt of the crime charged. Bales, 675 P.2d at 574, 575.

Thus, it is clear that trial courts should exercise great caution before admitting evidence of flight. The trial court and the Court of Appeals each properly rejected Fisher's argument that the evidence should be admitted in this case.

B. Since Trapp Admitted His Involvement in the Accident, There Was No Need to Admit the Evidence of His Post-Accident Conduct.

The attention of the court is directed to the recitation of the facts. These facts have been set forth in some detail to demonstrate why the trial court and the Court of Appeals agreed

with Trapp that there was no need to introduce evidence of his post-accident conduct. Trapp does not deny that he was the driver of the car involved in the accident. It is also important to understand that Fisher's older brother witnessed the accident and there was nothing about his testimony that suggested any real conflict in the evidence. Thus, the probative value of introducing the evidence was minimal and was far outweighed by the possible prejudicial effect as set forth below.

POINT II.

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION
IN EXCLUDING EVIDENCE OF TRAPP'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).

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 view of the clear statements of this court in Terry and Reiser, 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.

B. The Prejudicial Effect of Evidence of Trapp'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 juries 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).

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).

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 circum-

stances. 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)

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, and whether 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 (2d 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 III.

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

Rule 103 of the Utah Rules of Evidence provides that pre-
judicial 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.

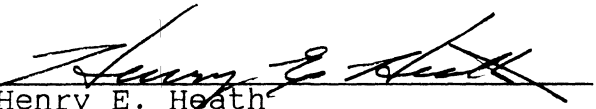
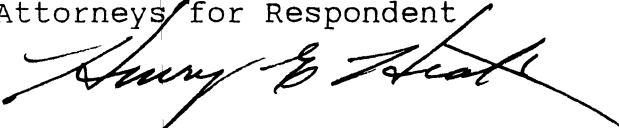
CONCLUSION

The trial court was justified in excluding the evidence of Trapp's post-accident conduct and properly denied Fisher's motion for a new trial. The Court of Appeals was correct in its decision upholding the lower court's ruling and refusing to overturn the jury verdict and judgment entered thereon. This court should deny the petition for certiorari.

Respectfully submitted.

Dated this 24 day of March, 1988.

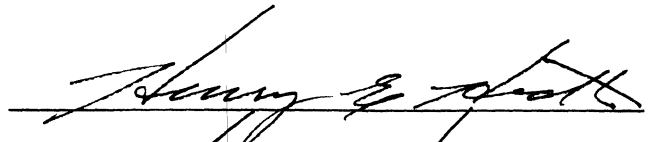
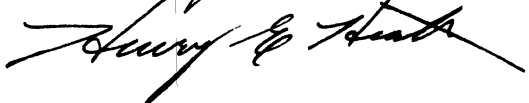
STRONG & HANNI

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MAILING CERTIFICATE

I hereby certify that four true and correct copies of the foregoing Brief in Opposition to Petition for Writ of Certiorari was mailed, first class postage prepaid, this 25 day of March, 1988, 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.