1988

joshua Fisher, by and through his general guardian, Carla Fisher v. Warren Trapp : Petition for Writ of Certiorari

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

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

PETITION FOR WRIT OF CERTIORARI TO UTAH COURT OF APPEALS

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QUESTION FOR REVIEW

WAS IT REVERSIBLE ERROR FOR THE TRIAL COURT TO REFUSE TO ADMIT EVIDENCE THAT DEFENDANT DRIVER FLED THE SCENE AFTER STRIKING PLAINTIFF PEDESTRIAN?

REFERENCE TO COURT OF APPEALS OPINION

The opinion of the Court of Appeals is reported at Fisher v. Trapp, 73 Utah Adv. Rpt. 105 (January 7, 1988).

JURISDICTIONAL STATEMENT

The decision being reviewed was entered on January 7, 1988. Appellant's Petition for Rehearing was filed on January 21, 1988; the petition was denied on February 1, 1988.

Jurisdiction in this court is provided by Utah Code Ann. §78-2-2(5) (amended 1986).

DETERMINATIVE AUTHORITY

The Utah authority most nearly determinative is State v. Franklin, 735 P.2d 34 (Utah 1987); State v. Bales, 675 P.2d 573 (Utah 1983); State v. Simpson, 120 Utah 596, 236 P.2d 1077 (1951).

STATEMENT OF THE CASE

1. Nature of the Case.

Fisher, a child pedestrian, was injured when defendant Trapp's vehicle struck him. Fisher brought this action for damages for his injuries. The case was tried to a jury, which found Trapp not negligent. The Court of Appeals affirmed the judgment.

2. Statement of Facts.

Trapp struck Fisher as he crossed Redwood Road on foot. Trapp fled the scene, but returned a few minutes later. He left the scene a second time, but returned shortly afterward. Trapp spoke with a police officer, but failed to admit that he was the driver who hit Fisher. Trapp again left the scene and went home. Later, his wife convinced him to call the police and admit his involvement in the accident.

At an in camera hearing before trial, Trapp admitted the foregoing facts (R. 270). His attorney argued that Fisher should be barred from presenting evidence of Trapp's hit-and-run. The trial court found that the probative value of Trapp's flight was substantially outweighed by possible unfair prejudice.

Fisher was unable to remember anything about the accident because of his injuries (R. 303). Trapp testified that he was paying proper attention to the road, (R. 298, 299). Evidence of Trapp's hit-and-run was not admitted; a jury found no cause of action.

ARGUMENT

POINT I

A WRIT OF CERTIORARI SHOULD ISSUE TO DETERMINE WHETHER THE COURT OF APPEALS DECISION IS INCONSISTENT WITH PRECEDENT SET BY THIS COURT ADMITTING EVIDENCE OF "FLIGHT"

The Court of Appeals admitted that this court "has not addressed whether evidence of flight from the scene of an accident is admissible in a civil action for negligence." (106). However, this court has ruled on the admissibility of flight evidence in recent criminal cases. In State v. Franklin, 735 P.2d 34 (Utah 1987), this court stated, "We have previously ruled that evidence of flight is probative." In State v. Bales, 675 P.2d 573 (Utah 1983), this court noted, ". . .our cases affirm the admissibility of evidence of flight [citations omitted]. . .". This court's decision that evidence of flight is probative and admissible should have been regarded as binding by the Court of Appeals.

Bales found that "clear evidence of contemporaneous flight" is a sufficient factual foundation for admission of flight evidence. Fisher offered clear evidence of contemporaneous flight through Trapp's own admission that he fled the scene immediately following the accident. Under Franklin and Bales, the evidence of Trapp's flight was probative and admissible. The decision of the Court of Appeals was contrary to precedents of this Court admitting flight evidence.

POINT II

CERTIORARI SHOULD ISSUE SO THAT THIS COURT CAN CORRECT THE APPEARANCE OF SEPARATE RULES EVIDENCE BETWEEN CIVIL AND CRIMINAL CASES IN UTAH

The Court of Appeals distinguished Franklin and Bales on the ground that they arose "in the criminal context." However, Utah Rule of Evidence 101 states, "[t]hese rules govern proceedings in the courts of this state. . .". The Advisory Committee Note adds that the Rules of Evidence are "applicable in all instances in the courts of this state." The Rules do not hint that evidence can be admissible in criminal cases, but not in civil cases. Rather, the Rules contemplate a unitary body of evidence.

The Court of Appeals' opinion apparently regards evidence precedents set by this Court in criminal cases as not binding on lower courts in civil cases. If this error is not corrected, great confusion will result. No one will ever know whether a criminal opinion relating to evidence can be used in a civil trial, or vice versa. In short, certiorari should issue to maintain a single body of evidence law in Utah. If certiorari does not issue, evidence law in Utah may become polarized--that is, a body of criminal evidence will develop, and a body of civil evidence will develop. (It is true that the burden of proof differs in criminal and civil cases, but the law of evidence does not change.)

In fairness, the Court of Appeals apparently felt that criminal cases are somehow inherently different from hit-and-run auto accidents. But any claimed distinction between flight evidence in an "action for negligence" and "in the criminal context" completely collapses in those cases where negligence and criminal conduct overlap. Criminal negligence cases involving auto accidents uniformly admit evidence of post-accident flight.

For example, In State v. Pierce, 647 P.2d 847 (Mont. 1982), a hit-and-run drunk driver was convicted of aggravated assault and criminal negligence. The Montana

Supreme Court stated "Flight by the defendant may be considered by the jury as a circumstance tending to prove consciousness of guilt." Id. at 851. Admissibility of flight was upheld even though the defendant admitted causing the accident and even though there were ample witnesses.

Evidence of post-accident flight was also admitted in the following cases: Clay v. State, 128 A.2d 634 (Md. 1957)(prosecution for manslaughter based on gross negligence; defendant admitted he caused the accident); State v. Humbolt, 562 P.2d 123 (Kan. App. 1977)(involuntary manslaughter conviction; admissible to show "consciousness of guilt"); People v. Allen, 14 N.E.2d 397 (Ill. 1938) (manslaughter based on wilfull and wanton negligence; defendant admitted to accident); State v. Achter, 445 S.W.2d 318 (Mo. 1969)(evidence of post-accident flight considered on issue of culpable negligence). Presumably, the same dangers in admitting flight evidence exist in these criminal cases as in civil cases.

The Court of Appeals' opinion contains the seeds of a separate body of evidence law in civil cases. A writ of certiorari should issue to make clear that decisions of this Court on evidence are binding, whether they appear in civil or criminal cases.

POINT III

CERTIORARI SHOULD ISSUE TO DECIDE WHETHER UTAH SHOULD ADOPT A POSITION CONTRARY TO THE VAST MAJORITY OF CIVIL CASES WHICH ADMIT EVIDENCE OF POST-ACCIDENT FLIGHT

The Court of Appeals admitted the admission of hit-and-run evidence is one of first impression in Utah. The Court of Appeals stated that "some other jurisdictions. . .have admitted evidence of flight in civil cases." Actually, courts are nearly unanimous in admitting hit-and-run evidence. State v. Ford, 146 A. 828 (Conn. 1929); Vuillemot v. August J. Calverie & Co., 125 So. 168 (La. 1929); Greenwood 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)(applying Vermont law); 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. 1957) 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); 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); Olofson v. Kilgallon, 291 N.E.2d 600 (Mass. 1973); Peterson v. Henning, 452 N.E.2d 135 (Ill. App. 1983).

When the Court of Appeals rejected the admissibility of flight evidence in civil cases, it adopted what is very much a minority view. The only case cited by the Court of Appeals, Barnes v. Gaines, 668 P.2d 1175 (Okla. App. 1983), involved a driver who stole the investigating officer's car and then fled. The Court of Appeals found this to be "closely analogous" to Fisher's case. In fact, Barnes is the case least analogous on its facts to Fisher's case.

The Court of Appeals attempted to distinguish cases cited by Fisher by creating four special "reasons" to admit flight. These special reasons (lack of eyewitnesses, denial of driver involvement, aggravation of injuries, serious factual disputes), do not appear in any of the cases. Instead, Fisher's cases admit flight evidence to show a defendant's consciousness of responsibility or guilt. Brooks v. Willey Truck Trans. Co., supra., 255 P.2d 801; Grzys v. Connecticut Co., 123 Conn. 605, 198 A. 259 (1938); Shaddy v. Daley, 76 P.2d 279 (Id. 1938); Langenstein v. Raynaud, 13 La. App. 272, 127 So. 764 (1930). They admit

flight to create an inference of failing to keep a proper lookout. Jones v. Strelecki, 49 N.J. 513, 231 A.2d 558 (N.J. 1967); Busbee v. Quarrier, 172 So.2d 17 (Fla. 1965); Vuillemot v. August J. Calverie Co., 125 So. 168 (La. 1929). Finally, they admit post-accident failure to stop to evidence a wilfull, wanton or reckless state of mind at the time of impact. Hallman v. Cushman, 13 S.E.2d 498 (S.C. 1941); Richards v. Office Products Co., 380 N.E.2d 725 (Ohio App. 1977); Dean v. Cole, 217 F.Supp. 280 (E.D.S.C. 1963).

The Court of Appeals made the statement that the cases cited by Fisher did not admit evidence of post-accident flight to show negligence. On the contrary, that is the reason why 19 civil cases have admitted such evidence.

The Court of Appeals committed Utah to a position rejected by the vast majority of courts. A writ of certiorari should issue to ensure that Utah's position on the issue is well considered.

POINT IV

THE COURT OF APPEALS ERRED IN FINDING UNFAIR PREJUDICE FROM FLIGHT EVIDENCE

The trial court found that the probative value of evidence Trapp's hit-and-run was substantially outweighed by unfair prejudice. However, the trial court and the Court of Appeals erred in finding unfair prejudice to Trapp. The only unfair prejudice identified by the Court of Appeals was the danger that Trapp may have had an innocent explanation for flight ("fear or remorse") which the jury might not believe.

No other court has barred flight evidence on the ground that defendant may have an honest or innocent explanation. Instead, it is "for the jury to say, under all the circumstances, whether [defendant] departed because of his consciousness of guilt." State v. Brokaw, 342 N.W.2d 864, 865 (Iowa 1984). In other words, ". . .the existence of explanations--other than consciousness of guilt of the crime charged. . .is relevant to the weight of the evidence of flight, but not to its admissibility." People v. Perry, 499 P.2d 129, 139 (Cal. 1972). See also, Comm. v. Toney, 433 N.E.2d 425 (Mass. 1982).

A writ of certiorari should issue to consider whether the decisions of the trial court and the Court of Appeals improperly invade the province of the jury in weighing flight evidence.

CONCLUSION

The Court of Appeals' opinion would allow evidence of flight if Trapp were being prosecuted for drunk driving, but not when his innocent victim sues him. This rule is unfair to victims of criminal conduct. Also, a trial court trying a drunk driving or criminal negligence case would be hard-pressed to decide whether to apply the auto accident rule of Fisher or the criminal case rule of Franklin and Bales.

The reality is that the same facts that support criminal liability also give rise to civil liability. Why should balancing under Rule 403 of the same facts result in admission in a criminal case, but not in a civil case?

The Court of Appeals found prejudice in the danger that the jury will not believe other reasons the defendant has for fleeing (p. 107). This same danger exists in every criminal case (including Franklin and Bales). Why is the

danger that the jury will discount the defendant's explanation so compelling in a civil case, yet not compelling in a criminal case?

The rule laid down in the Court of Appeals' opinion is arbitrary and unfair to the victim in the civil context. It is contrary to the spirit and letter of prior decisions of the Utah Supreme Court. Thus, a substantial inconsistency in precedent will result if the case is not reviewed by this Court. It creates an appearance of separate bodies of evidence law in criminal and civil cases. A writ of certiorari should be granted.

DATED this 2 day of March, 1988.

ROBERT J. DEBRY & ASSOCIATES
Attorneys for Appellant

BY: /s/ Daniel F. Bertch
DANIEL F. BERTCH

CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the foregoing PETITION FOR WRIT OF CERTIORARI TO UTAH COURT OF APPEALS (Fisher v. Trapp) was mailed, U.S. Mail, postage prepaid, this 2 day of March, 1988, to the following:

Henry Heath
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Sixth Floor, Boston Building
Salt Lake City, UT 84111

APPENDIX

A. Opinion of Court of Appeals, Fisher v. Trapp, 73 Ut. Adv.Rpt. 105 (January 7, 1988).

B. Partial Transcript re: Flight Evidence

APPENDIX A

IN THE UTAH COURT OF APPEALS

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Joshua Fisher, by and through his general guardian, Carla Fisher,	)	
Plaintiff and Appellant,	)	OPINION (For Publication)
v.	)	
Warren Trapp,	)	Case No. 860359-CA
Defendant and Respondent.	)	

Before Judges Greenwood, Bench and Billings.

GREENWOOD, Judge:

Plaintiff, Joshua Fisher (Fisher), initiated this action against defendant, Warren Trapp (Trapp), after a pedestrian-automobile accident. The jury found no cause of action, and Fisher appeals, claiming that the trial judge erred in excluding evidence that defendant fled the scene of the accident. We affirm.

At about 9:15 p.m. on June 3, 1982, Trapp hit Fisher while Trapp was driving north on Redwood Road in Salt Lake City. As Trapp approached 430 North on Redwood Road, Fisher, age nine, and his brother, Patrick Fisher, age twelve, were standing on the west side of the street waiting to cross. Fisher darted across Redwood Road and collided with the left front wheel area of Trapp's vehicle, landing about one foot from where the collision occurred.

Following the collision, Trapp continued northbound, but returned to the accident site within a few minutes and saw an adult aiding Fisher. Trapp again left, returned shortly thereafter, and spoke to a police officer without identifying himself as the driver of the vehicle. Trapp then went to his home, and within thirty minutes of the accident, called the police and identified himself as the driver of the vehicle that had hit Fisher.

At trial, the two eyewitnesses to the accident, Fisher's brother, Patrick, and Trapp, testified. Fisher did not testify because he had no recollection of the accident. Patrick testified that he and Fisher were walking down Redwood Road when Fisher turned to cross the street in the middle of the block. Patrick said Fisher waited for three cars and then started crossing. Patrick saw the Trapp vehicle and yelled at Fisher as he ran into the road. Fisher turned back, looked like he was trying to come back and was then hit by the front left portion of Trapp's car. Patrick ran to his brother, told him to lie still and ran to a house where he was told that an ambulance had been called. Trapp testified that he first knew an accident had occurred when he heard a thump and simultaneously saw Fisher at the left front fender of his car.

Prior to trial, Trapp filed a motion in limine to exclude evidence that he failed to stop at the scene of the accident. Fisher contended the evidence was admissible to create an inference of defendant's consciousness of guilt. The judge excluded the evidence on the ground that its possible prejudicial effect outweighed its probative value.

During the trial, Val Shupe, an accident reconstruction expert, was called as a witness by Fisher to elicit his opinion of the cause of the accident. Trapp's objection to the testimony, based on inadequate foundation, was sustained. Later in the trial, after additional foundation was laid, Shupe was permitted to state his opinion of the cause of the accident.

Fisher claims on appeal that the trial court committed reversible error by: 1) excluding evidence concerning Trapp's flight from the scene of the accident; and 2) excluding Shupe's testimony.

I.

We first consider whether evidence that Trapp left the scene of the accident was properly excluded. The trial court's rulings regarding the admissibility of evidence will not be disturbed unless it clearly appears that the lower court was in error. State v. Gray, 717 P.2d 1313, 1316 (Utah 1986).

According to Utah R. Evid. 401, evidence is relevant if it has "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." However, 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 . . . ." Utah R. Evid. 403.

> Evidence is unfairly prejudicial . . . if it has a 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 instinct to punish or otherwise causes a jury to base its decision on something other than the established propositions of the case.

Terry v. Zions Coop. Mercantile Inst., 605 P.2d 314, 323 n.31 (Utah 1979).

The Utah Supreme Court has not addressed whether evidence of flight from the scene of an accident is admissible in a civil action for negligence.[1] However, some other jurisdictions confronted with the issue have admitted evidence of flight in civil cases. Evidence of flight has been admitted where the plaintiff's injuries were aggravated by the driver's failure to stop and render assistance. Brooks v. Willig Truck Transp. Co., 40 Cal.2d 669, 255 P.2d 802 (1953) (trial court did not err in instructing jury on the duty to stop and use reasonable care to prevent further injury where plaintiff's injuries were aggravated by defendant's failure to stop and render assistance); Hallman v. Cushman, 13 S.E.2d 498, 499-501 (S.C. 1941) (where defendant fled accident and flight may have aggravated plaintiff's injuries, no prejudicial error in instructing jury that flight evidence could be considered on punitive damages issue only after it was proven

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1. The Utah Supreme Court has, however, addressed the admissibility of flight evidence in the criminal context. State v. Franklin, 735 P.2d 34 (Utah 1987); State v. Bales, 675 P.2d 573 (Utah 1983); State v. Simpson, 120 Utah 596, 236 P.2d 1077 (1951). In Franklin, the Court held, in a murder prosecution, that evidence of defendant's flight from custody was not erroneously admitted where the trial judge gave a cautionary instruction warning the jury not to give too much weight to the mere fact of flight without carefully considering the other motives, besides guilt, that may have influenced defendant. In Bales, the Utah Supreme Court stated that it was error to instruct the jury that flight from the scene of a crime constitutes an implied admission of guilt and that a flight instruction "will not be completely free from criticism unless it advises the jury that there may be reasons for flight fully consistent with innocence and that even if consciousness of guilt is inferred from flight it does not necessarily reflect actual guilt of the crime charged." Bales, 675 P.2d at 575. Under the reasoning in these two cases, it appears that, at least in criminal cases, evidence of flight is circumspectly admitted and, if admitted, must be accompanied by specific instructions.

that defendant's vehicle was involved). Other courts have indicated that such evidence is admissible where the driver denied involvement in the accident. Dean v. Cole, 217 F. Supp. 280 (E.D.S.C. 1963) (evidence was sufficient to establish that defendant's automobile proximately caused the pedestrian's death where defendant admitted owning the vehicle involved in the accident but did not recall what he did on the night of the accident); Busbee v. Quarrier, 172 So. 2d 17 (Fla. 1965) (evidence, including evidence that the front grill of defendant's vehicle had been dented and that defendant fled the scene of the accident, supports jury's verdict that driver's negligence proximately caused death of boy who was hit from the rear while riding his bicycle).

In some cases, courts have admitted evidence of flight where there were serious factual disputes in the evidence. Petroleum Carrier Corp. v. Snyder, 161 F.2d 323 (5th Cir. 1947) (where testimony was in dispute as to whether driver left the scene of the accident, instruction on flight proper); Shaddy v. Daley, 58 Idaho 536, 76 P.2d 279, 282 (1938) (where there were disputed facts regarding whether defendant stopped at the accident scene, evidence of flight admissible). In addition, some courts have admitted evidence that defendant fled the scene of the accident where there were no eyewitnesses to the accident. Johnson v. Austin, 406 Mich. 420, 280 N.W.2d 9 (1979) (where circumstances of accident unknown, evidence of flight gives rise to a rebuttable presumption that driver was at fault); Busbee, 172 So. 2d at 17.

None of the cases cited admitted flight evidence for the purpose of proving defendant's alleged negligence, as Fisher attempted, nor do their underlying reasoning support its admission in this case. Trapp's flight from the scene of the accident did not aggravate Fisher's injuries since a neighbor called an ambulance immediately after the accident. In addition, flight evidence was not necessitated by significant factual disputes or the absence of eyewitness testimony. Both Trapp and Patrick Fisher testified regarding the accident and their testimony did not conflict. Finally, evidence that Trapp fled the scene of the accident was not required to demonstrate that Trapp was the driver of the vehicle. Trapp contacted the police within thirty minutes of the accident and admitted that he was the driver of the vehicle that hit Fisher.

Flight evidence has been excluded in other cases which more closely parallel this case. In Freeman v. Anderson, 279 Ark. 282, 651 S.W.2d 450 (1983), flight evidence was found inadmissible as a basis to demonstrate wilful and wanton conduct required for an award of punitive damages. Freeman also reiterated the finding of an earlier case, that "failure of a driver to comply with the law requiring him to give his name, license number, etc. and render assistance to the

operator or persons injured in the other car had no bearing on the cause of the collision, and, therefore, the trial court properly refused to give an instruction on that matter." Id. at 452. Similarly, in Clark v. Mask, 232 Miss. 65, 98 So. 2d 467 (1957), the court found that a presumption or inference of negligence does not arise from defendant's failure to stop at the scene of an accident in contravention of a statutory duty to do so, as the statutory duty applies to non-negligent as well as negligent persons. Lastly, in Barnes v. Gaines, 668 P.2d 1175 (Okla. Ct. App. 1983), the court reviewed the trial court's admission of evidence that defendant stole a police car and fled the scene after an automobile collision. The court found that such evidence was not relevant to issues of negligence or plaintiff's damages

> or any other fact of consequence to the determination of the primary action between the parties. We, therefore, hold that the admission of evidence of the crime of stealing the police car after the accident . . . was error because it substantially affected the right of defendant Gaines to a fair trial on the primary issues before the jury. The probative value of the evidence was substantially outweighed by the danger of unfair prejudice . . . .

Id. at 1179.

We find in this case, as in Barnes, that Trapp's flight from the scene of the accident had little, if any, relevance to Fisher's claim of negligence. In addition, even if the evidence were relevant, its probative value was overwhelmingly outweighed by the danger of unfair prejudice. Trapp's flight could have indicated fear or remorse just as easily as consciousness of guilt. Had the evidence been admitted, it could have confused or misled the jury. When the marginal relevance of the evidence is coupled with the potential prejudicial effect the evidence of flight may have had upon the jury, we believe the trial court acted well within its discretion in excluding the evidence.

II.

Fisher's second claim on appeal is that the trial court erred in excluding Shupe's opinion as to the cause of the accident. During the trial, Fisher's attorney attempted to elicit Shupe's opinion that Trapp was driving too fast and had an improper lookout. Trapp's attorney successfully objected, based on inadequate foundation, claiming that Shupe, an accident reconstruction expert, had not testified as to the

location on the road where Trapp could have seen Fisher and taken steps to avoid the accident. On the second day of trial, Shupe testified that during the recess he had returned to the scene of the accident and asked Patrick Fisher where he and the Trapp vehicle were positioned when he first saw the vehicle. Shupe then stated that Trapp was 201 feet from Fisher when Fisher entered the road. Based on that foundation, the court permitted Shupe to state that, in his opinion, Trapp was proceeding too fast for the conditions and had an improper lookout.

The trial court's determination of adequate foundation is solely within the discretion of the trial court. Tjas v. Proctor, 591 P.2d 438, 440 (Utah 1979); see also Craig Food Indus. v. Weihing, 71 Utah Adv. Rep. 46, 47 (Utah App. 1987). According to Utah R. Evid. 705, "[t]he 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." Further, "[t]he 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." Edwards v. Didericksen, 597 P.2d 1328, 1331 (Utah 1979).

In this case, the trial court sustained Trapp's objection to Shupe's opinion because Shupe did not have the necessary degree of familiarity with the facts. On the second day of trial, when Shupe had acquired the requisite familiarity, the judge allowed the testimony. Based on the facts present in this case, we find no abuse of discretion by the trial judge.

Affirmed.

_____

Pamela T. Greenwood, Judge

WE CONCUR:

_____

Russell W. Bench, Judge

_____

Judith M. Billings, Judge

APPENDIX B

P R O C E E D I N G S

(Proceedings held in chambers.)

THE COURT: We're on the record now.

MR. HEATH: The evidence will show in this case that after the accident occurred that Mr. Trapp, the Defendant in this case, continued to drive North for a distance, and then turned around and came back to the scene of the accident. At that time there was an adult who was there caring for the injured boy.

He then left the area, came back again, talked to a police officer, still did not identify himself as the driver of the car, and then went home and called the police and advised them at that time that he was the driver of the car within approximately 30 minutes of the accident. I'm not sure of the exact time, but that had been the best estimate that we have.

We believe the fact that he may have left the scene of the accident, technically the statute says you have a duty to render assistance if you can and to report an accident. We take the position that, in fact, when he came back and saw that there was an adult there rendering assistance, he's not a paramedic and so forth and has no knowledge of medicine. He couldn't have offered anything else. And the fact he later reported it, that he satisfied the statute.

There was a charge to which he pled no contenda, which was ultimately dismissed.

I don't think--let me represent, Les Richardson, and I talked to Mr. Richardson, I think all the facts that happened after the accident are immaterial to how the accident happened. And I would make a motion and do make a motion at this time that all the witnesses be instructed not to go into anything that would tend to indicate that Mr. Trapp left the scene of the accident for these reasons.

One, it's immaterial. It has nothing to do with how the accident happened.

And two, that it would be highly prejudicial to the jury, when we introduce prejudicial information that would deny him a right to a fair trial.

MR. HANSEN: Do you have any Utah cases on that?

MR. HEATH: I think it goes on the basis of just evidentiary matters that it happened after, and it's not admissible.

MR. HANSEN: I have three cases. They are not Utah cases.

THE COURT: All right.

MR. HANSEN: I don't think anything should be said about the criminal charges. But it's certainly permissible inferences under the hopings of those three cases. They're not terribly recent.

THE COURT: Let me see if I understand. Are you taking the position as I read your Complaint, at least the Complaint alleged that his injuries may have been aggravated or something?

MR. HANSEN: We don't really have any proof of that.

THE COURT: Any evidence?

MR. HANSEN: The time was pretty quick that he got medical attention, and so we do not really claim anything for that.

THE COURT: So you're claiming the fact he didn't stop may have an inference of almost like an admission of guilt?

MR. HANSEN: Right. That's a permissible inference. It's certainly not conclusive, and we shouldn't say anything about the criminal aspect of the thing. But any course of conduct which afterwards explains a prior mental state of mind, certainly would be.

MR. HEATH: I'll submit the matter.

THE COURT: Well, it seems to be something that could inflame the jury a little bit. I have some problems with it. I think if there was some evidence that the injury was aggravated, it clearly would be relevant. But I have a hard time seeing how, how it really bears on anything that occurred after the accident.

MR. HANSEN: Well, Your Honor, our position is that there's two specific acts of negligence on behalf of the Defendant driver.

One, that he was driving too fast for existing circumstances, and second, that he failed to keep a proper look out.

Now, I think his own conduct is--speaks louder than words as to what he was doing. He says in his deposition, answered the questions, he didn't see this boy before the actual time of impact. But I think--I think that we can't--we ought not to be limited to that. If under the theory of these cases that his conduct is something from which a reasonable inference can be drawn to show his state of mind at the time of impact of a feeling of guilt, that he contributed to that accident.

THE COURT: Boy, I don't think so. I think the prejudicial effect of that outweighs the probative value. I think the probative value is very limited. I think I'm going to grant the motion in limine, ask you to tell your witnesses not to talk about those kinds of things.

MR. HEATH: May I mention the way it could come up.

One would be, it's my understanding that Patrick Fisher, the older brother, who was with the victim, was insensed by the fact that the driver didn't stop and