

1953

Jacqueline Ricciuti v. Jack C. Robinson : Brief of Appellant

Utah Supreme Court

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8070

IN THE SUPREME COURT
of the
STATE OF UTAH

JACQUELINE RICCIUTI,
Plaintiff and Respondent,

vs.

JACK C. ROBINSON,
Defendant and Appellant.

NOV 25 1968

Clerk, Supreme Court

Case No.

8070

BRIEF OF APPELLANT

STEWART, CANNON & HANSON,
Attorneys for Appellant.

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IN THE SUPREME COURT
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JACQUELINE RICCIUTI,
Plaintiff and Respondent,

vs.

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Defendant and Appellant.

Case No.

BRIEF OF APPELLANT

STATEMENT OF THE CASE

This action was instituted by Jacqueline Ricciuti, plaintiff and respondent, for damages sustained in an automobile accident which occurred on the 20th day of December, 1952, in a residential section of Ogden, Utah. The plaintiff was riding as a guest passenger in an automobile operated by Jack C. Robinson, the defendant and appellant herein. No other vehicle was involved. The trial of the case in the District Court in and for Weber County resulted in a verdict for the plaintiff and against the defendant.

Appellant will contend herein that the evidence was not sufficient as a matter of law to go to the jury on the issue of "wilful misconduct." Appellant will further contend that the court erred in its instructions to the jury in that an instruction was given relating to simple negligence in this, a guest-pasenger case.

STATEMENT OF FACTS

Mrs. Ricciuti, at the time of this accident, resided at the Ben Lomond Hotel in Ogden, Utah. On the evening of the accident she had no specific plans and had "washed some things out and fell asleep." Before 10:00 o'clock p.m. she had awakened, dressed and gone to the "Combo," which is a tavern a few doors south of the Ben Lomond Hotel on Washington Boulevard in Ogden, Utah. While there, she had a bottle of beer and talked for some time to the bartender. Plaintiff left the "Combo" intending to go to the "Washiki Club." She met Mary Johnson (also a passenger in the Robinson vehicle at the time of the accident) in front of the "Washiki Club" and at the invitation of Miss Johnson, both went to the "Hi-Hat" club in Roy, Utah, accompanied by a gentleman friend of Miss Johnson in his automobile. They arrived at the "Hi-Hat" about 5 minutes past 12:00 midnight. Shortly thereafter, plaintiff was introduced to Mr. Robinson (the defendant) and a Mr. Carnan and a Mr. Toponce. There were no tables at the "Hi-Hat," so the 3 men invited plaintiff and Miss Johnson to accompany them back to Ogden, and they went to the "Double-B" on Wall Avenue and 19th Street in that city. When the group arrived at the "Double-B", Mr. Carnan took Mr. Toponce home

and returned to the cafe. They stayed at the "Double-B" until after 3:00 a.m., whereupon the 2 couples left in Mr. Robinson's automobile and headed for Pineview Dam. Mr. Robinson and Miss Johnson were in the front seat; the plaintiff and Mr. Carnan in the back seat. The weather, when they left the city, was clear, but it commenced to snow lightly at Pineview Dam. The roadway, however, was not slick, merely wet. On the return trip to the city, while the automobile was traveling in the vicinity of 23rd Street and Harrison Boulevard, the defendant dropped a lighted cigarette in the folds of his topcoat and lost control of the automobile, which jumped the curb and traveled for some distance on the parking; then returned to the street. Plaintiff was thrown from the car and rendered temporarily unconscious. Shortly, thereafter, she was taken to the Dee Hospital by ambulance.

The above is a recitation of the facts in brief. Specific testimony relating to the facts will be gone into under the points of argument.

STATEMENT OF POINTS

POINT I. THE COURT ERRED IN NOT DIRECTING A VERDICT FOR THE DEFENDANT AND AGAINST THE PLAINTIFF AT THE CLOSE OF ALL THE EVIDENCE.

POINT II. THE COURT ERRED IN ALLOWING THE INTRODUCTION OF CERTAIN PORTIONS OF LEROY G. BENNETT'S TESTIMONY OVER THE OBJECTION OF COUNSEL.

POINT III. THE COURT ERRED IN ITS INSTRUCTIONS TO THE JURY, AND PARTICULARLY IN THE GIVING OF INSTRUCTION NO. 16.

ARGUMENT

POINT I. THE COURT ERRED IN NOT DIRECTING A VERDICT FOR THE DEFENDANT AND AGAINST THE PLAINTIFF AT THE CLOSE OF ALL THE EVIDENCE.

Plaintiff introduced testimony from three witnesses relating to the facts pertinent to the happening of the accident. Mrs. Riccuiti testified in her own behalf, stating that no alcoholic beverage had been consumed by any of the parties from the time they met until the time of the accident. She noticed nothing unusual about the way the fellows acted, and stated further that they were not under the influence of intoxicants when she met them (R. 18). In view of that testimony, intoxication must, of course, be ruled out as an element in this guest-passenger case.

As to the conduct and acts of the defendant in operating his vehicle, the plaintiff, Mrs. Riccuiti, had this to say: (R. 20)

“Q. How did he drive down the canyon towards Ogden?

A. He was driving very carefully.

.....

Q. Then as I understand it, your first intimation or first knowledge of this accident was when you suddenly felt the car joshling around. Is that right?

A. That's right.

.....

Q. You had no complaint or no concern about the manner in which Mr. Robinson was driving the car before this joshling suddenly

occurred and the accident happened.

A. That's right. I didn't think he was doing anything wrong."

Testifying further, she stated that later that morning at the hospital in the presence of herself and Miss Johnson, the defendant stated that Mary Johnson was asleep in the front seat with her head in his lap, and that he dropped a lighted cigarette in his lap, and lost control of the car (R. 8).

Sergeant LeRoy G. Bennett of the Ogden City Police Force called as a witness on behalf of plaintiff testified that he arrived at the scene of the accident about 4:00 a.m. and at that time, conducted an investigation (R. 34).

Harrison Boulevard in the vicinity of 23rd Street is a residential area. There is a parking between the sidewalk and the street which is planted in grass and has a row of trees along it. Sergeant Bennett determined that the path the vehicle took was visible on the parking, and that the tracks could be seen on the grass under the light snow which had just commenced to fall. Using plaintiff's Exhibit "A" for illustration, he traced the path of the vehicle from the street onto the parking and back onto the street. (Plaintiff's Exhibit "A" is reproduced in this brief for purposes of illustration). He determined that the vehicle left the roadway and jumped the curb in front of resident No. 2335 (Exhibit "A"), crossed the driveway between resident No. 2335 and 2341 and that the right rear fender and bumper struck a tree on the parking in front of residence No. 2341. The car continued on, and the right rear door was torn free from

the vehicle as it struck a tree in front of residence No. 2345. The vehicle continued, and returned to the roadway between residences 2353 and 2359. Mrs. Riccuiti and Mr. Carnan, the passengers in the back seat of the automobile, were thrown from it in front of residence No. 2353, and the positions in which they were found are marked with an X on plaintiff's Exhibit "A". The officer determined that the vehicle had traveled 192 feet on the curbing. When he came upon the scene, the vehicle was parked on the street in front of the driveway separating residences 2359 and 2361. He had been told that the vehicle had been backed up from the point where it had come to rest, and determined that it had been backed up 174 feet. He concluded that the vehicle had traveled a distance of 373 feet from the time it left the roadway until the time it came to rest (R. 34, 35, 36, 37, 38). After describing the path the vehicle took, and pointing out the two trees which had been struck, and the distances involved, Sergeant Bennett was asked by plaintiff's counsel if he had an opinion as to how fast the vehicle was traveling at the time it jumped the curb. Over objection of counsel, the court permitted the officer to state his opinion. He said the vehicle was traveling 60 miles per hour (R. 40). (That the court erred in allowing this conclusion, is the subject of argument under Point II of this Brief.)

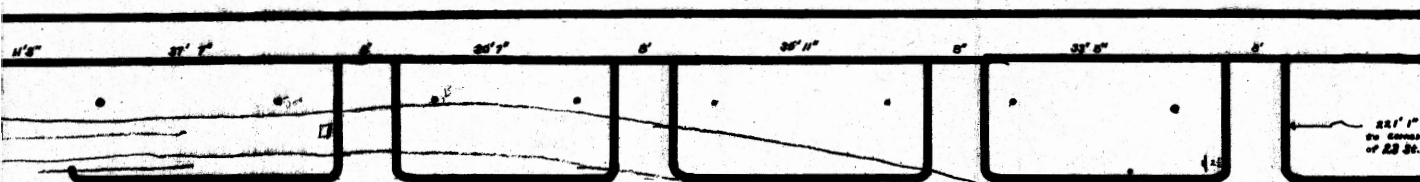
As part of Sergeant Bennett's investigation, he asked the defendant what caused the car to go out of control and on the parking. He testified that defendant told him that Mary Johnson was asleep with her head

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#2345

2341
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2335
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Scale $\frac{1}{8}'' = 1'$
2331
#2331



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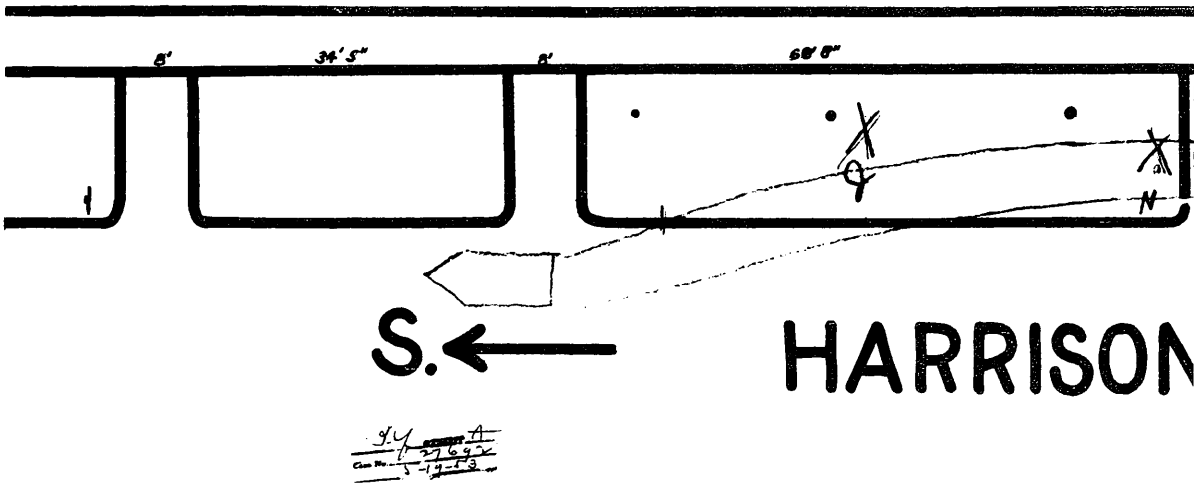
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in his lap, and that he dropped a cigarette in his lap and looked down for it, and the next thing he knew, the car was bumping over the driveway. The officer also stated that the defendant told him that he was traveling 40 miles per hour just before the accident.

Officer Verne B. Lundgren of the Ogden City Police Force also testified on behalf of plaintiff, but his testimony is largely repetitious, and added nothing to that already testified to by Sargeant Bennett.

The above testimony, in substance, is the facts upon which the plaintiff relies to support her claim for damages under the Utah Guest Statute.

Jack C. Robinson, in his own behalf, testified to the following facts in regard to the happening of the accident: (R. 80)

“A. And then what happened as you drove on down onto Harrison Avenue? Just tell the court and jury in your own words and speak loud enough so they can hear you. Just tell them what happened and what you did?

A. I drove on down until I got to Harrison Boulevard and turned south and I got down to, well, just past 23rd and was about the middle of the block, I dropped the cigarette down in the folds of my top coat.

Q. Now, whereabouts did that cigarette lite. If you remember?

A. Right in the middle of my lap.

Q. Did you have a top coat on at that time?

A. Yes.

Q. What did you do when you dropped that cigarette?

A. Tried to pick it up at first and couldn't get hold of it. I brushed at it and sparks flew. I looked down just a second to see where it went and the next thing I hit the curb and it spun the wheel out of my hands.

Q. What did you do after the wheel spun out of your hands? Do you recall what happened then? As near as you can recall?

A. I fought the car back. It was heading back towards the trees. I fought to get back toward the road there. I seen the front door come open and Mary started to slide out. I reached with one hand to hold her and when I got back on the road, I stopped to see how the rest of them was hurt. They were over on the parkway and I backed up to where they were."

He stated that he had a conversation with the officers after the accident, but said that at no time did he say that Mary Johnson was asleep with her head in his lap. As to the speed of the automobile he told the officers he was traveling between 35 and 40 mph. (R. 83).

Mary Johnson, testified that she was sitting next to defendant and that she was at his side when she went to sleep and didn't remember after she fell asleep whether or not her head was on his shoulder (R. 89). She was present at the time Mr. Robinson was interrogated by the officers and, to her knowledge, defendant did not say that she was laying with her head in his lap.

When the evidence as to facts of the accident presented by both sides is examined, they show simply a driver of an automobile dropping a lighted cigarette into

the folds of his clothing, and in his attempt to locate the burning object, losing control of the automobile. Up to that point the vehicle was operated in a careful and prudent manner. There was no apprehension of danger and certainly nothing to be apprehensive about. That fact is uncontroverted. All parties concerned testified that the manner of operation of the vehicle was careful

The only conflict in the testimony was Miss Johnson's position in the front seat. However, whether she was laying with her head in defendant's lap as contended by plaintiff, or whether she was asleep next to defendant, is immaterial, because obviously it had no effect on defendant's manner of operation. And too, he would be equally concerned with dropping a lighted cigarette in the folds of his own clothing or on the clothing of someone else. The only act, then, which can possibly be construed to give rise to liability on the part of defendant, is the dropping of a lighted cigarette, and that act can amount to no more than an act of momentary inadvertence or inattention. That such act on the part of a motor vehicle operator could be construed to be negligence is perhaps true, but it is equally true that such an act cannot be wilful misconduct under the Utah Guest statute as that term is ordinarily understood and defined.

U.C.A., 1953, 49-9-1:

“ . . . Nothing in this section shall be construed as relieving the owner, or driver, or person responsible for the operation of a vehicle from liability for injury to, or death of, such guest proximately resulting from the intoxication or wilful misconduct of such owner, driver or person

responsible for the operation of such vehicle. . . .” In *Stack v. Kearnes*, 221 P. 2d 594, (Utah), this court with apparent approval of the lower court’s instructions defined the term “Wilful misconduct” as follows:

“the intentional doing of an act or intentional omitting or failing to do an act, with knowledge that serious injury is a probably and not merely a possible result, or the intentional doing of an act with wanton and reckless disregard of the possible consequences.”

The authorities are in accord with that definition. See *Blashfield’s Cyclopedia of Automobile Law*, Vol. 4, Sec. 2322.

“Willful misconduct is the intentional doing of something which should not be done, or intentional failure to do something which should be done, in the operation of the automobile, under circumstances tending to disclose the operator’s knowledge, express or implied, that an injury to the guest will be a probable result of such conduct.” See also *60 C.J.S. 1001*.

Clearly an act of momentary inadvertence is not contemplated within the definition of “wilful misconduct” because such an act is not characterized by the *knowledge* that doing the act will result in probable serious injury. In the cases cited below it will be shown that courts in various jurisdictions have dealt with the problem accordingly.

Neyens v. Gehl, 15 N.W. 2d 888, (Iowa)

This action was by a guest against his host for injuries sustained in an automobile accident. There were five passengers in the vehicle. Just before the accident,

the defendant requested plaintiff (who was in the back seat) to light and hand him a cigarette. The cigarette was passed to the girl who was sitting in the front seat and dropped by the defendant driver when handed to him. He momentarily took his eyes from the road while reaching for the cigarette, and the vehicle struck a bridge abutment and overturned. There was a dispute in the evidence as to how fast the vehicle was traveling. The jury could have found that the vehicle was traveling up to 60 mph. The jury returned a verdict in favor of the defendant. Plaintiff moved for a new trial on the ground that the court erred in its ruling certain of plaintiff's evidence and also erred in its instructions. The lower court ruled that the motion of the defendant for a directed verdict should have been granted and, therefore, stated that the other alleged errors need not be considered. Plaintiff appealed.

The court held:

“The court's holding that, if the defendants' motion for directed verdict should have been sustained, any error in the instructions would be without prejudice, was clearly sound. (Citing cases). We are also of the opinion and hold that the court was right in its final determination that defendants' motion for a directed verdict should have been sustained

“In *Harvey v. Clark*, 232 Iowa 729, 732, 6 N.W. 2d 144, we held that failure to see a train in time to avoid colliding with it at a crossing did not constitute recklessness, stating as follows:

““To constitute recklessness under the guest statute, conduct must be more than negligent and must manifest a heedless disregard for or indif-

ference to the consequences or the rights or safety of others. It need not involve moral turpitude nor wanton and willful conduct. (citing cases). We have frequently said that conduct arising from mere inadvertence, thoughtlessness, or error of judgment is not reckless.'

"In the case of *Wilson v. Oxborrow*, 220 Iowa 1135, 265 N.W. 1, we held that a driver, who approached a bridge around a ten degree curve a-straddle the black lines in the center of the pavement at 40 miles per hour, confining his view to the black lines so that he did not see an approaching truck until 75 feet therefrom and thereupon swerved to ther right side-swiping the truck, resulting in fatal injuries to a guest, was not reckless. In the case of *Shenkle v. Mains*, 216 Iowa 1324, 247 N.W. 635, the driver failed to observe an approaching car in time to avoid side-swiping it, resulting in fatal injuries to a guest and we also held that a case of recklessness had not been made out. In *Roberts v. Koons*, 230 Iowa 92, 296 N.W. 811, the driver failed to observe a parked truck while driving through snow flurries, collided with it, resulting in fatal injury to a guest and we held it as recklessness had not been shown. In *Tomasek v. Lynch*, 233 Iowa 662, 10 N.W. 2d 3, a driver failed to recognize a "T" intersection in time to avoid driving into the ditch and we reversed the trial court's refusal to direct a verdict on the ground that recklessness had not been shown.

"In all of the cases above cited there was some inadvertence, thoughtlessness or error in judgment, which would probably support a claim of actionable negligence, but the evidence failed to show heedless disregard for or indifference to the consequences or right or safety of others. So

it is here. We find no decision of this court that seems to be directly analgous. Decisions from other courts, however, definitely support our position."

Ringe v. Holbrook, 149 A. 231, (Conn.)

Plaintiff was riding as a guest in an automobile operated by the defendant, sitting next to the defendant. The automobile was traveling the road at a high speed, but at a speed which the court deemed not excessive under the circumstances. Both plaintiff and defendant testified that while so traveling the presence of a bee was noticed in the front seat. Defendant momentarily took her right hand off the wheel to reach for the bee and at that moment the automobile left the road and struck a fence, causing plaintiff's injuries. The jury returned a verdict for the plaintiff which was set aside by the lower court on motion of the defendant. Plaintiff appealed from that order.

Court held: "The whole evidence shows beyond doubt that the accident was due to the fact that the attention of the defendant was momentarily distracted from the operation of the car because of a not unnatural reaction to the presence of the bee near or on her person. The trial court was right in concluding that the situation could not reasonably be held to disclose a reckless and heedless disregard by the defendant of the rights of the plaintiff, within the terms of our statute restricting the right of recovery by a guest in an automobile."

Bashor v. Bashor et al., 85 U. 2d 732, (Colo.)

The vehicle in this case contained a radio dial which was attached to the steering post. While proceeding

along an oiled highway at a speed of about 45 to 55 mph the defendant withdrew his attention from the road and was engaged in dialing a station on this radio. His attention was directed to dialing the radio for so long a time that his vehicle overtook a slower moving vehicle. When his attention was called to this fact by a passenger, he was unable to bring his car under control and it veered to the left and overturned. This action was brought by a guest in the automobile under the Colorado Guest Statute which provides in substance that a guest may not recover from his host unless the host be guilty of intoxication or "negligence consisting of wilful and wanton disregard of the rights of others." The plaintiff received a verdict below and defendant appeals from the refusal of the trial court to grant his motion for a directed verdict.

Court Held: "We think the evidence clearly is sufficient to support a finding of negligence; but unless the foregoing written statement is evidence of 'a wilful and wanton disregard of the rights of others,' there is no such evidence in the record. The driver was a close friend and relative of the deceased. He was on friendly terms with all the occupants of his car. No protest was made by any one as to the speed or manner in which he was driving. There is no evidence that any one of the passengers felt any apprehension of danger. There is no evidence that defendant willfully withdrew his attention from the road. . . . Out of such a situation we are unable to spell willfulness either of act or omission. Mere unconscious inattention, under the circumstances disclosed here, and up to the moment of the warning by the passenger in the front seat—and nothing more

is shown by the evidence—is not an omission of such character as to justify a finding that one could be guilty of such inattention and at the same time have a natural and normal concern for the safety of others who might be harmed as a result of it. In other words, it is not wanton.” Reversed.

Rowe v. Vander Kolk, ²⁷⁰~~267~~ N.W. 788, (Mich.)

About 9:30 o'clock p.m., while driving within the limits of a city on a highway that was lighted, defendant was attempting to defrost his windshield by placing the palm of his hand upon it when he suddenly came upon a slow moving truck and trailer, which was properly lighted. He did not see the truck until he was within 15 feet of it, and since he was traveling about 40 miles per hour, he was unable to avoid a collision although he applied the brakes at once. Plaintiff, who was asleep in the front seat beside the defendant, was injured. The trial court directed a verdict for the defendant on the grounds that there was no evidence of defendant's gross negligence or wanton or wilful misconduct and therefore recovery was barred under the provisions of the guest statute. This was affirmed by the Supreme Court.

At the close of all the evidence, and after both sides had rested, the defendant moved the court to direct a verdict for the defendant and against the plaintiff (R. p. 100) on the grounds and for the reasons that the plaintiff had not sustained her burden of proving that the defendant was guilty of wilful misconduct. What she may have succeeded in proving was that defendant was guilty of an act of momentary inadvertence which might be negligent, but did not amount to wilful misconduct.

Nothing more is shown. In view of that fact and the authorities cited above, it is clear that the lower court should have granted the defendant's motion for a directed verdict.

POINT II. THE COURT ERRED IN ALLOWING THE INTRODUCTION OF CERTAIN PORTIONS OF LEROY G. BENNETT'S TESTIMONY OVER THE OBJECTION OF COUNSEL.

LeRoy Bennett, police officer in Ogden, Utah, investigated this accident. The objectionable portion of his testimony is set forth below.

"Q. Sergeant Bennett, can you give us some opinion as to the speed the car might have been traveling under the circumstances?

MR. HANSON: If your honor please, we also object to that as calling for a conclusion. I don't think the sergeant could tell that.

THE COURT: I'll overrule the objection. You can determine from your cross examination. You may answer.

A. Do you want my opinion, or do you want what I was told?

Q. Your opinion?

THE COURT: Your opinion.

Q. Now, Sergeant Bennett —.

THE COURT: (Interposing) Now, just a moment. You asked him for an opinion.

A. My opinion would be that the car was traveling around 60 miles per hour.

In his testimony, he gave a detailed outline of the physical facts which he found. This testimony is sum-

marized under Point I of this argument and will not be repeated here. It will suffice to say that the jury was adequately informed of the path of the vehicle, the distance involved, the objects struck, the weather conditions, the nature of the ground over which the vehicle travelled and the results of his interrogation. The conclusion he gave as to the speed of the vehicle was clearly unwarranted. From what appears in the record the jury was as capable as the officer in determining the speed of this vehicle under the circumstances of this case and the opinion given was an unwarranted invasion of the province of the jury.

It is true, of course, as general principle of law that opinion evidence is allowed by experts in matters which are technical and where the opinion will aid the jury in its determination of the ultimate question. And, the courts generally allow law enforcement officers to state their opinion as to the speed of vehicles based on the brake marks found at the scene of an accident. There is authority for allowing this type of opinion evidence. 23 ALR 2d 112. But it is clear that the factors used in determining speed from brake marks remain relatively constant and the average law enforcement officer is able to familiarize himself with existing studies of road surfaces and braking distances without having any special training in this field. It must be borne in mind however, that these studies used by enforcement officers are based on factors such as road surfaces, reaction time in the average individual, and coefficient of friction in different weather conditions which remain relatively constant and

are compiled by experts in the field.

In the case at bar, the automobile traveled on a parkway lined with trees, planted in lawn and interspersed with driveways into the various residences. It was also found that the automobile had sideswiped two trees and it is not shown whether the vehicle was being braked after it left the parkway and reentered the highway or whether it was rolling free. The surface of the parking was shown to be wet which would, of course, materially reduce the coefficient friction. It is to be noted at this point that the factors in this situation are not constant but are unique to this case.

Furthermore, the officer was not shown to possess any special qualifications in this field other than the fact that he has investigated numerous accidents. No experiments were made with this vehicle by the officer and indeed it would be impossible for him to experiment because the circumstances of this accident could never be duplicated.

In view of the fact that the officer did not possess the qualifications necessary to make this opinion and the further fact that the circumstances under which this accident happened can in no way be related to any accepted study of speeds in relations to brake marks, road surfaces and reaction time, it must therefore be concluded that a proper foundation was not laid for the opinion and it was error to admit it.

That the error was prejudicial is readily seen. The speed at which an automobile is being operated is one of the vital factors which go into the determination of

whether the vehicle is being operated with due regard to the rights of others. An opinion given by a law enforcement officer who would normally be a distinterested witness would be given more weight by the jury than would the testimony of the defendant. In the jury's deliberation on the evidence presented this one element could have been a deciding factor and as has been noted, it is a material factor.

POINT III. THE COURT ERRED IN ITS INSTRUCTIONS TO THE JURY, AND PARTICULARLY IN THE GIVING OF INSTRUCTION NO. 16.

Included among the court's instructions to the jury is Instruction No. 16, which is set forth in full below:

"No. 16

In order to assist you in determining this case, the following definitions and explanations are given:

A) Whenever in my instructions I state that the burden, or the burden of proof, rests upon a certain party to prove a certain allegation made by him, the meaning of such an instruction is this: That unless the truth of that allegation is proved by a preponderance of the evidence, you shall find the same to be not true.

B) The term "preponderance of evidence," means such evidence as, when weighed with that opposed to it, has more convincing force, and from which it results that the greater probability of truth lies therein.

C) The proximate cause of an injury is that cause which in natural and continuous sequence, unbroken by any efficient intervening cause,

produces the injury, and without which the result would not have occurred. It is the efficient cause, the one that necessarily sets in operation the factors that accomplish the injury. It may operate directly or through intermediate agencies or through conditions created by such agencies.

D) Negligence is the doing of some act which a reasonably prudent person would not do, or the failure to do something which a reasonably prudent person would do, actuated by those considerations which ordinarily regulate the conduct of human affairs. It is the failure to use ordinary care in the management of one's property or person.

Negligence is not an absolute term, but a relative one; by this we mean that in deciding whether there was negligence (wilful misconduct)* in this case the conduct in question must be considered in the light of all the surrounding circumstances, as shown by the evidence. This rule rests on the self-evident fact that a reasonably prudent person will react differently to different circumstances. Those circumstances enter into and, in a sense, are a part of the conduct in question. An act negligent under one set of conditions might not be so under another. Therefore, to arrive at a fair standard, we ask: "What conduct might reasonably have been expected of a person of ordinary prudence under the same criterion by which to determine whether or not the evidence before us proves negligence.

E) Inasmuch as the amount of caution used by the ordinarily prudent person varies in direct proportion to the danger known to be involved in his undertaking, it follows that in the exercise of

* The words "wilful misconduct" were entered by interlineation by judge.

ordinary care the amount of caution required will vary in accordance with the nature of the act and the surrounding circumstances. To put the matter in another way, the amount of caution required by the law increases as does the danger that reasonably should be apprehended.

F) "Ordinary care" is that degree of care which a reasonably prudent person would use under the same or similar circumstances. "Ordinary care" implies the exercise of reasonable diligence and such watchfulness, caution and foresight as under all the circumstances of the particular case would be exercised by a reasonably prudent, careful person.

G) The law does not mean that it seeks and recognizes only one proximate cause of an injury, consisting of only one factor, one act, one element of circumstances, or the conduct of only one person. To the contrary, the acts and omissions of two or more persons may work concurrently as the efficient causes of an injury, and in such a case, each of the participating acts or omissions is regarded in law as a proximate cause."

It is at once clear, upon reading the foregoing instruction, that the legal terms therein explained pertain to a simple negligence action, and cannot by any method of legal logic or subtlety of argument have application to the case at bar. The concept of ordinarily negligence and wilful misconduct connote standards of care which differ not only in degree, but also are distinguished by the state of mind or knowledge of the actor. By instructing the jury on the legal definition applicable to the negligent acts of one guilty of a tort, the court entirely ignored the concept of wilful misconduct, and thereby delimited and foreclosed in the minds of the jury the necessary legal

elements of the case.

This instruction was duly excepted to by the defendant (R. p. 103).

And, too, the instant error effects the basic and sole issue in this case; namely, the legal duty owned to plaintiff by defendant. The materiality of that issue is clear. That an erroneous instruction concerning that issue is prejudicial to the defendant, is likewise clear. We are not unmindful of the fact that the trial court in other instructions alluded to the doctrine of wilful misconduct. Whether those instructions correctly state the law need not be determined, because this court has long held the view that instructions which are contradictory or conflicting are prejudicially erroneous if they effect a material issue in the case, and this rule obtains even if the law is correctly stated at one point in the instructions; and the defeat is not cured by an instruction requiring the jury to view the instructions as a whole.

In the early case of *Konold vs. Rio Grande Western Railroad Co.*, 60 Pac. 1021 (Utah), this court adopted the following rule in regard to inconsistent instructions:

“Instructions on a material point in a case which are inconsistent or contradictory should not be given. The giving of such instructions is error and a sufficient ground for reversal because it is impossible, after the verdict, to ascertain which instructions the jury followed or what influence the erroneous instruction had in their deliberation. This has been so uniformly held that citations are unnecessary.”

Jensen v. Utah Ry Co., 270 Pac. 349 (Utah). This was an action for injuries sustained by a child of tender

years against the railroad for the negligence of its train operatives. At the close of evidence, plaintiff requested instructions to the effect that the train operatives had a duty to observe and avoid injuries to persons in the vicinity of the tracks, which instructions were given. Defendant, on the other hand, requested instruction to the effect that the defendant was not required to anticipate the presence of and owed no duty until actual discovery, which instructions were likewise given. The trial below resulted in a verdict for the defendant. The court held in substance that the instructions were conflicting and that a new trial was ordered for this and other reasons.

State v. Hendricks, 259 P. 2d, 452 (Utah). This was a prosecution for involuntary manslaughter. The instructions of the trial court at the close of the evidence tended to shift the burden upon the defendant to show his innocence beyond a reasonable doubt. The court held:

“The fact that elsewhere in the instruction the jury were correctly instructed on the presumption of innocence does not cure the instant error. Although the instructions are to be considered as a whole, where they are in irreconcilable conflict, they could but mislead or confuse the jury.”

The conviction reversed and remanded for a new trial.

CONCLUSION

The facts in this action do not show wilful misconduct on the part of the defendant. The evidence in its entirety, and all the inferences to be gained therefrom, viewed in

a light most favorable to the plaintiff, show a vehicle being operated in a careful and prudent manner up to a point where defendant inadvertently dropped a lighted cigarette. Reasonable minds, under those facts, could reach but on conclusion, and that is that the element of wilful misconduct (The intentional doing of an act, or intentional omission, or failing to do an act, with knowledge that serious injury is a probable, and not merely a possible result; or the intentional doing of an act with wanton and reckless disregard of the possible consequences), is absent from this case. The lower court, therefore, erred in not directing a verdict for the defendant and against the plaintiff pursuant to defendant's motion at the close of all the evidence.

Defendant contends that the only reasonable decision of this factual situation necessitates a reversal of the trial court, with instructions to enter a verdict for the defendant and against the plaintiff, no cause of action. However, in the event the court disagrees with the reasoning herein contained under Point I of this brief, defendant urges the court to grant a new trial in this matter on the grounds that the trial court committed prejudicial error in instructing the jury on the law applicable to the evidence. Under the instructions, the jury was at liberty to find that the duty owed to the plaintiff by the defendant was to avoid acts of simple negligence, and this clearly was prejudicial error justifying the granting of a new trial.

Respectfully submitted,

STEWART, CANNON & HANSON,
Attorneys for Appellant.