

1954

# Jacqueline Ricciuti v. Jack C. Robinson : Brief of Respondents

Utah Supreme Court

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Jerome Horowitz; Attorney for Respondent;

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IN THE SUPREME COURT  
OF THE  
STATE OF UTAH

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JACQUELINE RICCIUTI,  
*Plaintiff and Respondent,*

vs.

JACK C. ROBINSON,  
*Defendant and Appellant.*

Case No.  
8070

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RESPONDENT'S BRIEF

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**FILED**  
JAN - 7 1954

Jerome Horowitz,

*Attorney for Respondent*

Clerk, Supreme Court, Utah

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## RESPONDENT'S BRIEF

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### STATEMENT OF FACTS

Appellant's statement of facts is incomplete. The jury could have believed that the following was the factual situation under which the accident occurred:

1. A girl's head in the driver's lap (R. 8, 41, 51, 67).
2. Speed in excess of 60 miles per hour (see below and argument under Point II).
3. Darkness (R. 7).
4. Light snow falling (R. 7, 38, 80).
5. Wet road (R. 20 and appellant's brief p. 3).
6. Residential area (appellant's brief p. 5).

7. Four A. M. (R. 8, 33) after having been up all night (R. 76 to 80).
8. Driver smoking a cigarette while driving under above circumstances (R. 8, 41, 67, 83 and appellant's brief p. 3, 8, 9, 24).

Appellant's attorney may choose to believe the defendant when he said the girl's head was not in his lap. But the jury could have believed not only the plaintiff, but also the two disinterested police officers who all agreed that at the time of the accident and thereafter the defendant unequivocally repeated that the girl's head was in his lap, and the accident occurred when he dropped the cigarette in his lap or on her hair and was afraid it would ignite the girl's hair (R. 8, 41, 51, 76).

Testimony by Sergeant Bennett that the car was traveling more than 60 miles per hour was properly before the jury. This is discussed in connection with the argument under Point II.

As further evidence from which the jury was justified in believing that defendant's speed was much greater than the 35 to 40 miles per hour he claimed to be traveling (R. 83) in the 30 mile per hour speed zone (R. 74) the record contains the following:

After the car left the road the right rear fender was crushed on a tree and the rear bumper was hooked on the tree and twisted backward and torn off its fastenings on the right side (R. 35, 48, 66). Then the car went over a five inch high curb with such momentum that the underside of the car gouged out a large piece of turf before the springs could raise the car up to the new level (R. 35, 36, 47, 71). In going over the

same five inch curb, the rear wheels left the ground and did not come down for a distance of 20 feet forward (R. 36, 48, 49, 72, 73, 74). While the rear end of the car was in the air the right rear door and hinge pillar post were torn off the car by hitting another tree (R. 36, 48, 66).

Furthermore the car traveled approximately 192 feet on the parking and an additional 183 feet after it returned to the road (R. 37, 38) before it could be brought to a stop (R. 85, 86).

## ARGUMENT

POINT I. THE QUESTION OF WILFUL MISCONDUCT WAS PROPERLY BEFORE THE JURY.

### THE LAW OF WILFUL MISCONDUCT

The abstract definition of wilful misconduct quoted from *Stack v. Kearns*, 221 P. 2d 594 (Utah, 1950) at the upper part of page 10 of appellant's brief is certainly correct. However, appellant's attempted application thereof is not in accordance with the decisions.

The precise question before this court is not simply whether defendant was guilty of wilful misconduct. It is rather:

Do the facts so clearly show the absence of wilful misconduct that reasonable minds cannot differ in so concluding.

Examination of a large number of wilful misconduct cases will show that where the surrounding facts indicate a culpable disregard of circumstances which should have made defendant apprehensive of danger *previous* to the emergency which culminated in the accident, the courts

hold that reasonable minds can differ as to whether such disregard amounted to wilful misconduct and the case should go to the jury.

On the other hand where the facts show only momentary inattention or an act of mere carelessness or poor judgment, then the courts hold that there could not be wilful misconduct as a matter of law.

The following cases will illustrate the above statement of the law. They are not intended to be exhaustive, but they are representative.

### ILLUSTRATIVE CASES HOLDING WILFUL MISCONDUCT FOR JURY

Continued excessive speed on narrow road with damp shoulders around curve after previous near mishap and requests to slow down. Also jury could have believed that was making trick high speed turns. *Stack v. Kearns*, 221 P. 2d 594 (Utah, 1950).

Driver fell asleep at wheel before accident and then fell asleep hours later at time of accident. *Esernia v. Overland Moving Co.*, 206 P. 2d 621 (Utah, 1949). From dissenting opinion by Judge Wade. Case decided on other grounds.

Attempting to drive around known dangerous curve at 55 miles per hour in rain with windshield wiper not working, without diminishing speed. Car swaying from side to side. Previous skidding and requests to slow down. *Norton v. Puter*, 32 P. 2d 172 (Cal., 1934).

Driving 40 to 50 miles per hour at night on one of principal streets of Denver with one hand, and with right arm around girl companion, greeting repeated warnings with indifference and laughter,

and kissing girl just before collision. *Schlesinger v. Miller*, 52 P. 2d 402 (Colo., 1935). Statute is worded "wilful and wanton disregard of rights of others."

## ILLUSTRATIVE CASES HOLDING NO WILFUL MISCONDUCT

The cases cited by appellant are used for this section since they are presumably the most favorable to him.

Momentarily took eyes off road to pick up dropped cigarette while driving 50 to 60 miles per hour 100 feet from bridge. No prior misconduct. *Neyens v. Gehl*, 15 N. W. 2d 888 (Iowa, 1944).

Driving at high but not excessive speed. Accident occurred when attention momentarily distracted from driving by presence of bee in car and on wrist. *Rindge v. Holbrook*, 149 A. 231 (Conn., 1930).

Driving at 45 to 55 miles per hour at 2 A.M. and withdrawing attention from road while turning radio dial attached to steering post for period of time. Lost control of car trying to avoid slow moving car on road ahead. Did not notice car ahead until within 50 feet of it. *Bashor v. Bashor*, 85 P. 2d 732 (Colo., 1938). (Strong dissenting opinion.)

Attempting to defrost windshield on lighted highway at night by placing palm of hand on it while traveling about 40 miles per hour. Accident occurred when did not see slow moving truck ahead until within 15 feet of it. *Rowe v. Vander Kolk*, 270 N. W. 788 (Mich., 1936).

## APPLICATION OF THE LAW OF WILFUL MISCONDUCT TO THE FACTS OF THIS CASE

As pointed out in respondent's statement of facts above, there was testimony properly before the jury

from which it could have believed the following to be the factual situation in this case:

In spite of having been up all night, with visibility limited by snow and darkness, and on a wet residential street, defendant drove at more than 60 m.p.h. while he smoked a cigarette and *rested a girls' head in his lap*.

This certainly amounts to a culpable disregard of circumstances which should have made defendant apprehensive of danger *previous* to the emergency which culminated in the accident, so that the question of wilful misconduct was properly for the jury.

## POINT II. SERGEANT BENNETT'S OPINION AS TO SPEED WAS NOT PREJUDICIAL ERROR.

This claimed error is summarized on page 18 of appellant's brief as follows:

"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 relation 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."

It is submitted that the following adequately qualifies Sergeant Bennett:

He had been with the city traffic department for practically 12 years before he investigated this accident (R. 43), had investigated a great many accidents (R. 51), and was thoroughly familiar with the concepts of reaction time, coefficients of friction for different types

of pavement and under different weather conditions, and the use of the approved chart to determine stopping distances at various speeds and road conditions. See particularly pages 43 to 46 of the record where Mr. Hanson cross examined him on these matters. Also note Mr. Hanson's statement (R. 45):

“However, you have had extensive experience in this sort of work, and you may be able to help us a little bit on that.”

On the question of whether the particular circumstances of this case are such that the accepted study of the relationship between speed and stopping distances under various road conditions cannot be used, the record shows the following:

The car traveled approximately 373 feet from the time it left the highway to the time it stopped. Of this distance the first approximately 190 or 192 feet were on the parking, and the remaining approximately 183 feet (174 or 175 plus 9) were back on the highway (R. 37, 38).

Appellant's contention appears to be that the conditions are not susceptible of an expert opinion as to speed because part of the distance traveled was on the wet grass parking, hitting trees, and bouncing over driveways. However, this does not prevent ascertaining from accepted speed and braking distance studies the speed of the car *after* it returned to the road.

The following testimony (R. 52) refers *only* to the 183 feet the car traveled *after* it left the parking and returned to the street.

“BY MR. HOROWITZ:

Q. I would like to ask just one question. Referring to the chart that you have there, at what speed under those conditions would a car have to be traveling in to take 183 feet to stop?

MR. HANSON: You mean the condition of the street.

Q. The conditions of the street at the time.

A. 183 feet.

Q. 183 feet.

A. The nearest I can get to that is 187. Wait a minute. 185, at 65 percent coefficient of friction is exactly 60 miles per hour.

Q. 60 miles per hour. Thank you very much.

A. That is actual braking distance.

Q. That is the figure I want.”

The reason braking distance is the proper figure is because reaction time was taken up while the car was on the parking.

As a proper foundation the following testimony is in the record: The car was in good mechanical condition (R. 84). The defendant applied the brakes as soon as he felt the car going onto the parking (R. 85). He wasn't sure his foot was on the brake all the while he was bouncing around on the parking, but the car stopped bouncing when it got back on the road (R. 85, 86). This was under a road condition of wet high-type asphalt which has a coefficient of friction of 65 per cent (R. 45, 52).

It is difficult to see how appellant can claim that one isolated part of Sergeant Bennett's testimony can be

prejudicial error when the record also contains this other testimony by Sergeant Bennett *not objected to at the trial or claimed to be error on appeal*, concluding from the accepted chart that the vehicle was traveling approximately 60 miles per hour *after* it left the parking and returned to the road, so that the speed must have been in excess of 60 miles per hour when the car first left the road.

### POINT III. THE INSTRUCTIONS WERE CORRECT.

In Instruction No. 5 the jury was instructed that a host is not obligated to his guest to exercise ordinary care, but his only obligation to such guest is to refrain from wilful misconduct.

In Instruction No. 6 the jury was plainly and correctly instructed as to the elements of wilful misconduct. This instruction is based on the case of *Stack v. Kearns*, 221 P. 2d 594 (Utah, 1950), which appellant quotes from at page 10 of his brief as containing a correct definition of wilful misconduct.

The judge reiterated in Instructions Nos. 7 and 8 that if the jury found the defendant was negligent, or even if he intentionally did something that was wrongful, still a case of wilful misconduct would not be established unless his conduct was characterized by the elements of wilfulness previously mentioned (in Instruction No. 6).

Appellant's argument that the instructions were erroneous does not take issue with any of the above instructions, but seems to be centered on Instruction No.

16 which contains definitions of negligence and ordinary care. With respect thereto he declares that:

“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.” (p. 21, 22)

This contention from appellant's brief is not justified as is shown by the above statements concerning Instructions Nos. 5, 6, 7, and 8.

At page 22 of his brief, appellant quietly admits that there were other instructions that “alluded to” the doctrine of wilful misconduct. But then he goes on to say that it isn't necessary to consider whether those other instructions were correct because “this court has long held the view that instructions which are contradictory or conflicting are prejudicially erroneous if they effect a material issue.”

An examination of Instruction No. 16 will show whether or not it contradicts the other instructions and makes negligence rather than wilful misconduct the test of liability. Instruction No. 16 begins with the following statement:

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

The rest of Instruction No. 16 contains definitions and explanations of burden of proof, preponderance of evidence, proximate cause, negligence and ordinary care. The words “wilful misconduct” were inserted to indicate

that it as well as negligence is not an absolute term, but depends upon the surrounding circumstances. Nowhere does this instruction state any test of liability. It simply contains definitions and explanations of various legal terms and concepts used in other parts of the instructions.

Appellant seems to assume that because this is a wilful misconduct case the mere presence of the negligence and ordinary care definitions and explanations makes the instructions contradictory. However, the fallacy of this assumption is readily shown by a consideration of Instructions Nos. 5, 6, 7 and 8 referred to above. In those instructions the jury is plainly informed that negligence and lack of ordinary care cannot constitute wilful misconduct. The words "negligence" and "ordinary care" are legal terms with a particular meaning in the law. Since the jury had been instructed that neither negligence nor lack of ordinary care would be sufficient to find for the plaintiff, it was only proper that they be instructed as to the legal meaning of those terms. And of course the appropriate place for this is in an instruction such as No. 16 which is an omnibus instruction defining various legal terms.

Since the instructions are not contradictory, the cases cited by appellant are not in point and need no refutation.

The instructions to the jury contained a correct definition of wilful misconduct and application thereof to the facts of this case, and were clear and not contradictory.

## CONCLUSION

In the present case the judgment should be affirmed. The question of wilful misconduct was rightly before the jury and was duly determined by it. There was no prejudicial error to overcome the presumption of correctness of the lower court's judgment, or require the plaintiff to undergo the expense and ordeal of a new trial.

Respectfully submitted,

Jerome Horowitz,

*Attorney for Respondent*