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Leonard J. Hudson v. Floyd W. Decker : Reply Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT

of the

STATE OF UTAH

FILED

JUL 12 1957

LEONARD J. HUDSON,
Plaintiff and Appellant,

Clerk, Supreme Court, Utah

vs.

No. 8655

FLOYD W. DECKER,
Defendant and Respondent.

REPLY BRIEF OF RESPONDENT

CANNON & HANSON

*Attorneys for
Defendant and Respondent*

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IN THE SUPREME COURT
of the
STATE OF UTAH

LEONARD J. HUDSON,
Plaintiff and Appellant,

vs.

FLOYD W. DECKER,
Defendant and Respondent.

No. 8655

REPLY BRIEF OF RESPONDENT

NATURE OF CASE

This is an appeal by the plaintiff and appellant, hereinafter called the Plaintiff, from a directed verdict in favor of the defendant and respondent, hereinafter called the Defendant. The action was brought by the Plaintiff, a guest in the automobile of the Defendant at the time of an automobile accident, under the Idaho Guest Statute, that being

the state in which the accident occurred. Plaintiff proved that the automobile driven by the Defendant down a canyon and around a curve at a moderate rate of speed left the highway and rolled down a dugway on the side of the road. The question is whether or not that evidence was sufficient to raise an issue for the jury under the allegation of plaintiff's complaint that "the defendant drove his said automobile in such an unlawful manner and with such reckless and wanton disregard for the safety of the plaintiff that said automobile overturned and plaintiff was severely injured as hereinafter more particularly alleged" (R. 2).

STATEMENT OF FACTS

There is no substantial dispute between the Plaintiff and the Defendant as to what the evidence shows the facts to be and we would concur in a general way with what the Plaintiff has said those facts are in his brief filed herein. However, it may be helpful to the court for the Defendant to briefly review the background of the accident and point out that evidence which he feels is particularly important. In doing so the Defendant will adopt the same procedure used by the Plaintiff and will refer to the first volume of the record as (R.....) and the second volume of the record as (T.....).

Plaintiff and Defendant, employees of the

United States Air Force Base at Hill Field, Utah, were temporarily assigned to the Larson Air Force Base, Moses Lake, Washington for one month's duty, extending from May 17, 1955 to June 17, 1955. Defendant desired company for the return automobile trip to the parties' residences in Utah and requested Plaintiff to ride with him.

On June 17, 1955 Plaintiff and Defendant, in Defendant's 1950 Plymouth sedan, drove from Moses Lake, Washington to Spokane, Washington where they lodged over-night; and then about five o'clock A.M. on June 18, 1955 commenced driving from Spokane, Washington to the place in Idaho where the accident occurred. Defendant drove and Plaintiff was a non-paying guest passenger (see Plaintiff's complaint, R. 1, 2, 3 and Plaintiff's Brief, pp 2-3). There were a number of other employees in other cars who left Moses Lake, Washington about the same time as the Plaintiff and Defendant, many of them taking different routes.

The witnesses, Harmon W. Cheney and James L. Larsen, and others were following the same route and were apparently behind the Decker vehicle (T. 17-18). Between Idaho and Montana they were some ten minutes behind (T. 18) but caught the Decker vehicle before they got to Missoula, Montana in the forenoon of June 18, 1955 (T. 18). The two vehicles became separated again in Missoula, where

the witnesses remained close to three-quarters of an hour (T. 19). The witnesses were apparently catching the Decker vehicle at the time of the accident as they arrived at the scene of the accident approximately ten minutes after it had occurred (T. 20). They had driven at a speed of around 60 miles per hour between Missoula and this point, just over the Montana-Idaho border on U. S. Highway 93 (T. 20-50).

U. S. Highway 93, which runs between Missoula, Montana and Salmon, Idaho, is straight and level for several miles until just before it reaches the Idaho border coming from the north, where the road enters a group of mountains which are a part of the Rocky Mountain Range (T. 33) and which also constitute the Continental Divide (T. 33) and the border line between Idaho and Montana. The road reaches its highest point at Lost Trail Pass (T. 51) and then starts down a canyon. As the road descends on the Idaho side there are a couple of curves which are not too severe before it reaches the point where this accident occurred (T. 21).

The Defendant, Floyd W. Decker, testified that as he started down from the top of the pass he was traveling between 30 and 40 miles per hour and continued driving at such speed until immediately before the accident (T. 51). As he approached the immediate area where the accident occurred there

were two rather bad curves (T. 52). The witness was going around 30 to 40 miles per hour as he came to the first curve, but by the time he came to the second he had reduced his speed to between 5 and 10 miles per hour (T. 53-54), at which point his automobile left the highway.

The second curve is pictured in Exhibits C, D and E, which pictures were all taken looking down the canyon, the direction in which the Decker vehicle was traveling (T. 16).

The witness Harmon W. Cheney has identified the track shown on Plaintiff's Exhibit D, which is marked with an "x", as the path which was apparently followed by the Decker vehicle in going off the road as it failed to complete the turn. He has made an "x" on Plaintiff's Exhibit C which is the location in which the vehicle which he was driving was parked when they arrived at the scene of the accident. Exhibits F and G are pictures of the Decker vehicle as it came to rest after going off the highway (T. 11).

The Plaintiff, Leonard J. Hudson, testified that as they were traveling down the canyon they had slowed down to pass some trucks, and at the time they passed the trucks he turned around to get a road map from the back seat and that just as he turned around to the front seat again Mr. Decker

said, "Duck", and they went over the bank (T. 164). Immediately after passing the trucks they were traveling at a speed of about 40 miles per hour, but he did not continue to watch the speedometer, and while he knew they had slowed down considerably he did not know exactly what speed they were traveling when the car went over the bank (R. 64-65).

One of the witnesses, James L. Larsen, stated that the shoulder on the edge of the road where the Decker car went off was very narrow and appeared to be fairly soft (T. 44-45). The shoulder in the vicinity of where the car went off was messed up to some extent and there was not more than a foot or two of shoulder (T. 45). And at one time he estimated the width to be six inches (T. 45).

The witness, Harmon W. Cheney, stated that the oiled surface of the highway in the vicinity of the curve was covered with loose sand or fine gravel extending from a point half way to the center line to the edge of the road, and as he drove around this curve at the time he arrived he was definitely aware of the fact that his car was traveling through sand and gravel and could feel it under the wheels of his car (T. 28-29).

The rest of the evidence concerns the damage to the Decker vehicle and the injuries which Plain-

tiff may have sustained and other matters not pertinent to the question of liability.

At the conclusion of the evidence the Defendant moved for a directed verdict in his favor, which was granted by the court. The court in directing its verdict concluded:

“ . . . there is no evidence in this case which has been introduced by the plaintiff, or any evidence at all in the case, which the Court feels justified submitting the case to the jury on the theory that the plaintiff evidenced a reckless disregard for the safety of his guest, in the operation of his vehicle, at the time and in the locality where the accident took place. There may have been negligence on the part of the defendant, but if that negligence did exist it didn't amount to wilful misconduct. The Court feels further that to submit this case to the jury would have permitted the jury to conjecture, by inference and otherwise, to the causation of the accident, which does not appear with any degree of certainty in the record, and therefore the Court feels the motion is well taken.”

STATEMENT OF POINTS

POINT I.

THE COURT DID NOT ERR IN GRANTING DEFENDANT'S MOTION FOR A DIRECTED VERDICT FOR THE REASON THAT THERE WAS NOT SUFFICIENT EVIDENCE TO RAISE A JURY QUESTION ON THE ISSUE OF LIABILITY.

ARGUMENT

POINT I.

THE COURT DID NOT ERR IN GRANTING DEFENDANT'S MOTION FOR A DIRECTED VERDICT FOR THE REASON THAT THERE WAS NOT SUFFICIENT EVIDENCE TO RAISE A JURY QUESTION ON THE ISSUE OF LIABILITY.

We do not disagree with the statement in Plaintiff's Brief to the effect that few things are more devastating to a trial lawyer than a directed verdict. We might suggest, however, that a rule more fundamental and vital to our system of law is the rule that liability should not be imposed upon an individual without fault. Nor would we contend that if the trial judge has serious doubts as to whether a Motion For Directed Verdict is well taken he might submit the case to the jury and then, if he thinks it improper, set aside the verdict as against the weight of the evidence. However, if the trial judge is convinced, prior to the time that the case is submitted to the jury, that if the jury should return a verdict in favor of the plaintiff he would have to set the same aside and enter a judgment, notwithstanding the verdict, in favor of the defendant, then the court would be requiring the jury to perform an act without any meaning or significance, merely in the hope that the jury might agree with him and thus obviate the necessity of his granting the motion.

Nor do we take issue with the Plaintiff's argument to the effect that the court must consider and apply the evidence in the light most favorable to the plaintiff and if, in considering it in that light, the jury might reasonably find the issues in favor of the Plaintiff then the trial court should submit the issues to the jury.

We would further agree that the Plaintiff has correctly stated the definition of Defendant's conduct on which liability must rest in this case, as defined in the Idaho Guest Statute, section 49-1001, which provides:

"No person transported by the owner or operator of a motor vehicle as his guest without payment for such transportation shall have a cause for damages against such owner or operator for injuries, death or loss, in case of accident, unless such accident shall have been intentional on the part of the said owner or operator or caused by his intoxication or his reckless disregard of the rights of others."

The Idaho Supreme Court, in the cases cited in Plaintiff's Brief, *Forberg v. Harrison*, 71 Idaho 11, 225 P. (2d) 69, 71 and *Turner v. Purdum* (Idaho), 289 P. (2d) 608, 611 has further explained the Idaho Statute as follows:

"The term 'reckless disregard' as used in said section means an act or conduct destitute of heed or concern for consequences; especially foolishly heedless of danger, head-

long rash; wanton disregard, or conscious indifference to consequences."

The fundamental question reduces itself to this: Was there sufficient evidence before the court from which the jury might reasonably have found that the Defendant in this case was guilty of wilful misconduct or reckless disregard of the rights of others as that term has been defined by the Idaho Supreme Court? Since there was no evidence of any misconduct on the part of the Defendant, except that the automobile which he was driving at a moderate rate of speed ran off of the highway and turned over, the ultimate question is whether the jury might reasonably draw the inference from this that the Defendant was guilty of the required misconduct.

In approaching this problem we must keep in mind the distinction between an affirmative act, which causes an accident, and the absence of any evidence of any act, which may have caused an accident. It is for this reason that the case of *Hebert v. Allen* (Iowa), 41 N. W. (2d) 240 is not in point. In that case, the defendant, traveling 15 to 20 miles per hour on a straight road on a day which was clear and bright, there being no vehicles in sight and the terrain being flat and there being no unusual condition and no other reason shown, suddenly turned his car from the highway into a telephone pole. It appears that there was no question

in that case as to what caused the accident, the sudden and unexplained turning of the car. The jury was not, therefore, required to infer any course of conduct from the fact that the accident occurred. They are simply presented with the evidence that the driver, without any possible reason for doing so, suddenly turned his car off of a straight road into a telephone pole, and they are asked to determine if that course of conduct in their opinion constitutes "reckless operation of the car". Moreover, there was in that case some evidence that the car was deliberately turned into the telephone pole in an effort to scare passengers who were riding on the right running board of the car and who were pinned between the car and the running board at the time the car passed the telephone pole.

The affirmative act in *Orico v. Williams* (Conn.), 97 A. (2d) 556 was the deliberate backing of an automobile into a tree at a relatively high rate of speed. This case is also distinguishable in that the court in that case is talking about an inference of negligence rather than an inference of recklessness.

The case of *Thompson v. Kost* (Ky.), 194 S. W. (2d) 976 comes the nearest to sustaining Plaintiff's position, where the court held that negligence might be inferred when a car, traveling down a road, with no apparent reason to do so, suddenly

swerved from one side of the road to the other and then over onto the other side of the road and off the road. However, again we are only speaking of negligence and there is again some evidence of other misconduct, the accident occurring at five o'clock A.M. and there being some evidence of drinking.

The Montana court dismissed the problem rather summarily in *Doheny v. Coverdale*, 68 Pac. (2d) 142. In that case the car, which had apparently been traveling on the right side of the road, turned to its left at an angle of approximately 45 degrees and went off the road and headon into a large tree. When the other facts in the case are considered together with the evidence of affirmatively turning from a direct course on the highway, the decision appears to be based partly on a consideration of other evidence. The four parties in the car at the time of the accident, two girls and two fellows, had been out all night and the accident occurred at twenty minutes before five o'clock in the morning.

We agree with the Plaintiff that it is often impossible to show the mental attitude of an individual and the only thing that can be shown is the act, from which the mental attitude may be inferred. But we ask, from what act in this case are we to draw such an inference? The only evidence in this case is that the car, traveling around a curve at a moderate

speed, for some reason went off the highway and rolled down into the canyon. There has been no proof of any circumstances that would show, or tend to show that the Defendant deliberately turned his vehicle off the highway, or that he drove around the curve at too high a rate of speed under the existing circumstances, or that he failed to exercise reasonable control over his car, or that he drove his car when he was not in a fit condition to do so. The facetiousness of Plaintiff's argument is illustrated by the fact that while it is inferred throughout the entire Brief that the Defendant deliberately drove his vehicle off the side of the road, he, himself, is unable to make that inference and begins his argument on page 17 of his Brief:

“Assume, for purpose of discussion only, that Defendant did in fact consciously and intentionally drive his automobile off the embankment in this case.”

As was said in the case of *Hewitt v. General Tire & Rubber Company*, 3 Utah (2d) 354, 284 P. (2d) 471, in which the issue involved was mere negligence and not recklessness,

“It is well settled that mere proof of an injury to plaintiff will not justify a verdict or judgment imposing liability upon the defendant and if the evidence does not show any negligence on the part of the defendant, there can be no recovery, regardless of the fact that plaintiff was not negligent.”

There are a number of explanations, or inferences if you will, as to how this accident may have happened. These may or may not have constituted negligence. Except for the last they surely do not constitute recklessness. The driver's attention may have been diverted to something he saw in the surrounding area or by the activity of his companion who was turning around looking for something in the back seat. Something may have happened to the steering apparatus on his vehicle and he might thereafter have been unable to steer the car properly. Although only traveling at a moderate and reasonable rate of speed, that speed may have been too high a rate of speed for the particular curve in question and may have caused him to go off the side of the road. He may have reasonably gotten over to the side of the road and the shoulder might have crumpled away beneath his car. He may have skidded on the gravel on the road in a manner not reasonably to be anticipated. He may have deliberately driven his car off of the road. This last inference, which is apparently the inference Plaintiff would have us make, or at least permit the jury to make, requires that we find the Defendant, with no malice toward his friend or no other reason, would deliberately risk his own life and expose himself to serious injury.

It should be noted that the Plaintiff in this

case called the Defendant as an adverse witness. At such time he could have, had he chosen to do so, examined the Defendant on such matters as lookout, skidding, his control or lack of control over his vehicle, and other matters which may have explained this accident. His failure to do so can only be attributed to two reasons. Either he was afraid of the answers he might get, that is, that the Defendant had a reasonable explanation for the accident; or he expected the Defendant to assume the burden of proving himself free from fault, the burden which he now attempts to impose upon the Defendant by this appeal, and was disappointed by Defendant's failure to undertake this burden.

It is fundamental, as we have pointed out earlier in this Brief, that until there is evidence of conduct on the part of the Defendant which requires an explanation he should not be required to furnish such explanation. Nor is it proper to infer from the fact that the Defendant proffers no explanation, where none is required, that he could not satisfactorily explain an event were he required to do so.

We have addressed ourselves to this point in the Brief principally to the Plaintiff's failure to prove his case, which seems to presume that the Plaintiff may have been able to do so had he proceeded properly. The Record in this case warrants no such presumption. Viewed in its most logical

light, the evidence simply discloses that the Defendant, in driving his car at a moderate rate of speed down a canyon, lost control of the car on a curve and ran off the side of the road and down an embankment. As said by the trial judge, this may constitute negligence but an analysis of the cases discloses that it is not evidence of recklessness.

In the case of *Hollenbach v. Fairbanks* (Colo.), 287 P. (2d) 53, where a vehicle coming down a grade and around a curve skidded out of control to the wrong side of the road and down an embankment, the court held that the mere occurrence of the accident does not imply negligence and the evidence failed to establish that the driver of the truck acted in wilful and wanton disregard of the rights of others within an automobile guest statute.

In the case of *Hawkins v. L. C. Jones Trucking Company* (Wyo.), 232 Pac. (2d) 1014 the evidence was that the defendant permitted his automobile to skid from the right to the left side of the highway into the path of an approaching truck. The defendant did not remember so doing, and offered no explanation. The evidence was that the defendant may have permitted his automobile to skid over onto the left side of the highway and into the path of an approaching truck. The court held this did not constitute recklessness, and in so doing

quoted from cases which are appropriate here as follows:

"In *Burke v. Cook*, 246 Mass. 518, 141 N.E. 585, 586, the facts considered were these: The action was by a guest to recover from his automobile host for injuries sustained in an accident which happened as follows: the motor car crossed a bridge over the Cape Cod canal going very slowly at a place only a short distance from the scene of the accident. The highway where the accident happened was a straight macadam road where there was clear vision for a long distance ahead. The only other traffic was a vehicle presently to be mentioned. There were no people and no intersecting roadways on this highway. After crossing the bridge the speed of the automobile increased until a team or truck was met or passed; a few seconds before the accident and while the car was 'going fast' as one witness said and others said it was going 35 miles per hour and just as the other vehicle was passed there was a 'thump, thump' noise from the right rear wheel and in a very short time, two or three seconds, the automobile went up in the air; turned over, struck on its top making a mark in the hardened road as of a car sliding on its top for three or four times its length. The record disclosed that 'Just before the accident the car seemed to be steering to the right . . . the defendant turned his wheel to the left, and did it quickly, and (then) the car turned over.' The noise mentioned above indicated that there had been some trouble in the right rear wheel or its tire; after the accident one of the rear tires was found to have a long cut

in it. In sustaining the defendant's exceptions the Court in part said:

“ ‘The defendant by written motion requested the direction of a verdict in his favor for the stated reason that there was no evidence of gross negligence, and excepted to the failure to direct such a verdict. The case was submitted to the jury without any exception to the instructions actually given, and the plaintiff had a verdict.

“ ‘Clearly, if this action can be maintained by proof of what is sometimes called ordinary negligence for the purpose of distinguishing it from gross negligence, there was a jury issue. The rate of speed, the quick turning of the automobile and its overturn, together were sufficient to justify a conclusion founded on the failure to fulfill that duty. But confessedly the plaintiff cannot get on unless the evidence was sufficient to uphold a verdict based on gross negligence . . .

* * *

“ ‘In the opinion of a majority of the court the speed of the car upon a roadway substantially free from traffic without intersecting streets and without obstruction of vision, the passing of another vehicle in the manner described, the act of turning the wheel quickly to the left, and the turning over and sliding of the car as hereinbefore stated, whether considered separately or in conjunction, do not tend to prove such “indifference to present legal duty and utter forgetfulness of legal obligations so far as other persons may be affected” as to constitute “a heedless and palpable violation of legal duty” to

the plaintiff or "a manifestly smaller amount of watchfulness and circumspection" than the circumstances required.'

* * *

"It was held in *Loughran v. Nolan*, 307 Mass. 195, 29 N. E. 2d 737 that: A speed of 30 to 35 miles an hour at which an automobile was being operated on a dark, rainy afternoon on a narrow, winding and slippery road would not, in and of itself, amount to 'gross negligence' which would render driver liable for injuries sustained by automobile guest, and also that in the guest's action against the driver for injuries sustained that the automobile was being operated at the stated speed with road and weather conditions as related above, the skidding of the car over the side of a bridge and dropping into a river the fact that the automobile skidded did not warrant the finding of 'gross negligence' necessary to render the driver liable.

* * *

"In the case at bar Bechtold had driven for 50 miles on his own side of the road and without experiencing any trouble and until confronted with the situation disclosed at the scene of the accident if there was any crossing of the center line of the highway it was done in the last 30 to 40 feet before the impact of the collision and in a mere fraction of a second, at the speed the two vehicles were traveling.

"Taking the case of the plaintiff in the most favorable view thereof as we are obliged to do we find Mr. Long, the driver of the L. C. Jones Trucking Company's truck, stating

in substance that when the jeep was 50 feet in front of him it skidded and was out of control, but not over the center line of the highway; thereupon the driver got it under control for 10, 15 or 20 feet and then it skidded once more and this second time passed across the center line of the highway directly into his traffic lane.

“This description of the accident hardly supplies any evidence that the driver of the jeep, Bechtold, was at fault in skidding into the path of the truck, nor do we find any other evidence in the record from which it could be so inferred . . .”

In the case of *Mason v. Mootz*, 73 Idaho 461, 253 P. (2d) 240 it was held, in an action for the death of one riding as a guest in an automobile that the fact that the vehicle went over an embankment on the side of the highway, apparently in an attempt to avoid hitting horses on the highway, was not sufficient to make a jury question as to whether the accident was caused by the defendant's reckless disregard of the rights of others in operating the automobile. The court said:

“There is no testimony as to the speed at which appellant was driving prior to the accident, except that of Platz, who described it as “medium speed.” This would tend to establish that, as far as speed is concerned, there was an absence of ordinary negligence. The evidence as to the skid marks, their length, the distance travelled after going over the bank, and the gouge in the earth in the

right-of-way where it struck and inferentially bounced to the place where it came to rest, is, of course, evidence of considerable speed. Although the testimony of the defense witnesses would suggest that perhaps a part of the skid marks observed by the deputy sheriff may have been made by the Montague car. In any event, there is nothing in the record to indicate that this car, travelling at 'medium' or moderate speed, operated over the course and in the manner it was operated, would not make the same marks over the same distance and otherwise behave as it did. Taken together with the testimony of Platz, who was close to, and saw the car when it was in motion, the whole evidence would be sufficient to go to the jury if the issue had been ordinary negligence. But, we think it is wholly insufficient to support the claim of reckless disregard under the guest statute. . . ."

Lastly, we have the case referred to in Plaintiff's Brief, *Ricciuti v. Robinson*, 2 Utah (2d) 45, 269 P. (2d) 282, in which the evidence of recklessness was much greater, in our opinion, than in the case at bar, and in which case it was held that the driver of a car, driven at a speed of 60 miles per hour which ran off the road when the driver dropped a cigarette, was not guilty of negligence. In the words of the court the facts were:

"Plaintiff and a girl friend met defendant and his friend at a tavern about midnight, and after making a round of several such places, after eating at one, and at about 3:30 a.m. the defendant drove the party over

a canyon road to a dam and returned to the city. The morning was dark, and although there was no snow on the streets, they were wet and a light snow was falling. Approaching through a residential district where the speed limit was 30 m.p.h., and while the sleeping girl in the front seat had her head in defendant's lap, lighted cigarette fell from the latter's mouth into the folds of his clothing and in attempting to rid himself of it, and while sparks were flying, defendant lost control of his car. It jumped the curb, travelled along the lawned parking 192 feet, jumped several other driveway curbs, sideswiped 2 trees, knocking the rear door off, returned to the highway and travelled another 183 feet before being stopped. There is evidence that defendant at one point on the parking applied his brakes, but there was no evidence of brake marks on the street either before the car jumped the curb or after it returned to the street. . . . Although we believe a proper foundation was not laid for this evidence, for the purposes of this case we may assume the car was travelling at 60 m.p.h. at the time the accident occurred. . . .”

The court reversed a judgment for the plaintiff and held:

“Counsel for plaintiff concedes that the wilful misconduct contemplated under our guest statute is ‘the intentional doing of an act or intentional omitting 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.’”

“Under the facts of this case, a reasonable person could not conclude that defendant intentionally did or failed to do an act that would fall within this definition. These people were friends. There is no fact or combination of facts in the record which showed a wanton or reckless disregard of the consequences, which in this case were a loss of control due solely to the accidental dropping of a lighted cigarette in the defendant’s clothing and the car jumping the curb when defendant tried to dispose of the lighted cigarette. The fact that the girl was asleep with her head in defendant’s lap would seem to negate any reckless disregard by the latter for her well-being. The assumed fact that defendant was travelling 60 m.p.h. in a residential zone was not a fact that would indicate defendant had knowledge or any reason to believe that such speed probably or even possibly would result in a lighted cigarette accidentally falling out of his mouth. Such an event as well could have occurred while travelling 25 m.p.h. in any kind of weather and in any speed zone. It was not the speed, but the dropping of a lighted cigarette that resulted in the loss of control, and this accidental and involuntary circumstances cannot be said to be wilful misconduct under any reasonable theory or basis of fact.

“Cases strikingly similar to the instant case are *Bashor v. Bashor*, 103 Colo. 232, 85

P. 2d 732, 120 A. L. R. 1507, where the driver travelling 45-55 m.p.h., momentarily withdrew his attention from the road while turning a radio dial, *Neyens v. Gehl*, 235 Iowa 115, 15 N. W. 2d 888, where, as here, the driver, travelling at 50-60 m.p.h. sought to retrieve a lighted cigarette he had dropped, and *Rindge v. Holbrook*, 111 Conn. 72, 149 A. 231, where the driver momentarily lost control when a bee flew into the car. All hold that the driver host was not guilty of wilful misconduct towards his guest passenger. . . . ”

CONCLUSION

The evidence in this case shows the plaintiff was injured in an accident which occurred on the highway between Missoula, Montana and Salmon, Idaho. At that time the Plaintiff was admittedly a guest passenger in Defendant's automobile. The Defendant had driven from Moses Lake, Washington and there is not the slightest mention in the Record of his having done so in a reckless, or even a negligent, manner. As he was proceeding down hill and around a curve Defendant's car left the highway and rolled down the side of the bank. Plaintiff did not offer any other evidence showing the manner in which the accident occurred. It does appear from the Record, however, that other witnesses had been able to negotiate the curve at the speed the Defendant was driving. It also appears

that the surface of the road at the point of the curve was covered with sand and gravel.

There seems to be little question that the foregoing does not constitute direct evidence of recklessness as required by the Idaho Guest Statute to impose liability on the Defendant, and the Plaintiff does not so argue in his Brief.

What Plaintiff does ask is that the court permit the jury to infer recklessness from the foregoing evidence. Since there is no evidence of excessive speed or lack of control, the inference he would have us make is that the Defendant deliberately drove his vehicle off the side of the road, thus injuring both himself and his passenger, although the Record does not show any reason why he should so intend.

The net effect of permitting such an inference would be to allow the issue to go to the jury, or in other words to impose upon the Defendant the burden of convincing the jury that he was not guilty of recklessness even though there is no evidence that he was.

All of the witnesses to this accident who testified, including the Defendant, were called as the Plaintiff's witnesses. Presumably Plaintiff brought out all of the evidence which he considered advisable. As was stated by the trial court, he may have proved the Defendant guilty of simple negli-

gence but he did not prove the Defendant to be guilty of recklessness, or even produce sufficient evidence for the case to go to the jury on this issue. Therefore, the directed verdict in Defendant's favor rendered by the trial court in this case should be sustained.

Respectfully submitted,

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