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Gary Wood v. Darrell L. Taylor : Brief of Appellant

Utah Supreme Court

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JUN 6 - 1958

Clerk, Supreme Court, Utah

In the Supreme Court of the State of Utah

UNIVERSITY UTAH

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GARY WOOD,

Plaintiff and Respondent,

vs.

DARRELL L. TAYLOR,

Defendant and Appellant.

Case

No. 8818

APPELLANT'S BRIEF

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In the Supreme Court of the State of Utah

GARY WOOD,

Plaintiff and Respondent,

vs.

DARRELL L. TAYLOR,

Defendant and Appellant.

} Case
No. 8818

APPELLANT'S BRIEF

PRELIMINARY STATEMENT

This is an appeal from a verdict and judgment of the Second Judicial District Court arising out of an accident that happened on November 3, 1956 approximately one mile north of Paris, Idaho on U. S. Highway 89. The plaintiff was a non-paying guest passenger in the car of the defendant. The court denied a motion for a new trial and this appeal is taken from the denial of said motion.

STATEMENT OF FACTS

The accident from which this action arises occurred about four o'clock p.m. on November 3, 1956. Defendant and plaintiff had been acquainted for some time prior to the date of the accident, but had not seen each other for a considerable period of time. They met in Montpelier, Idaho by accident at about noon on the day of the accident. After some conversation they decided to go for a ride in defendant's automobile, upon which certain mechanical work had just been completed at the Bear River Motor Garage. After riding around for a short time in Montpelier they drove east on Highway 30 North to Border, Wyoming. The road between Montpelier and Border is rather winding and somewhat mountainous and is generally a more difficult road to drive than U. S. Highway 89 traveling south from Montpelier upon which the accident occurred. Plaintiff traveled at a speed between 50 and 55 miles per hour en route to Border and returning to Montpelier from Border.

When plaintiff and defendant returned to Montpelier they stopped and picked up Miss Karen Wright, a girl friend of defendant, and started out for another ride in a Southerly direction on U. S. Highway 89. After they had left Montpelier and traveled a short distance defendant increased the speed of the automobile to approximately 70 miles per hour. Plaintiff made no protest at this speed nor to the manner in which defendant was driving. The passenger, Karen Wright, protested but stated that she had made a protest not because she was concerned about defendant's driving, but because she just did not like to go fast. At the town of Ovid, which is approxi-

mately five miles from Montpelier, defendant allowed the right wheels of the automobile to go slightly onto the gravel shoulder in the course of negotiating a 90 degree curve in the town. However, at that point there is a broad level gravel area at the outside of the curve with no obstructions. The parties then proceeded on south on Highway 89 toward Paris, Idaho at about the same speed of 70 miles per hour.

During the entire afternoon the weather was clear and visibility was good. At the point where the accident occurred, about one mile north of Paris, Idaho, the highway is paved, generally level and straight. The road surface is about 19 feet in width with generally level gravel shoulders of approximately 6 to 8 feet in width. The speed limit at the point of accident was 60 miles per hour. Traffic was light. Commencing at a point just south of the point where the impact took place there is a double yellow no-passing line on the highway and about one quarter of a mile to the south there is the crest of a knoll which obstructs vision beyond that point to the south. The only person who actually saw the accident occur is the passenger, Karen Wright. Her testimony, supported generally by the other evidence adduced is that a farm tractor pulled onto the highway from a side road leading into the highway from a field to the defendant's right or to the west of the highway. The tractor proceeded onto the highway making a wide turn to go south, in the course of the turn crossing over the center line onto the northbound portion of the highway. The large hay wagon followed the path of the tractor and thus in the course of entering the highway the tractor and hay wagon generally obstructed both lanes of travel on the highway. Defendant apparently observed the hay wagon as it was

obstructing the highway and in some position astraddle the center line of the highway attempted to pass to the right of the tractor and wagon. He failed to do so and collided with the right rear corner and right side of the hay wagon and with the right rear wheel of the tractor. After the collision the car went off into the barrow pit and rolled over.

Plaintiff was thrown from the automobile into a barbwire fence and the injury and damage to his leg resulted. Defendant was pinned under the car and was rendered unconscious. Plaintiff has no clear recollection of the accident itself. Defendant has no recollection of any events prior to the return of plaintiff and defendant to Montpelier. Both at the time when Karen Wright observed the hay wagon and tractor prior to the collision and at the time of collision the hay wagon was straddling the center line or was protruding to the east of the center line and was effectively obstructing both lanes of travel on the highway.

Other than the protest by Karen Wright on the basis described above and the incident at the turn in Ovid, plaintiff and Karen Wright conceded that defendant's driving was alright, that they were not concerned and that he seemed to be operating his automobile in a prudent and efficient manner. There had been no other unusual incidents from the time the parties left Montpelier to the time when the accident occurred.

At the point where the collision occurred, the right wheels of defendant's automobile were about one foot off of the oil on the west shoulder of the road. The left wheels were on the paved portion of the highway. The terrain was such that the level of the fields to the west of the highway was

below the level of the highway and the farm tractor and hay wagon came up a slight rise in the entry road as they entered onto the highway. The barrow pit at the side of the road to the west into which defendant's automobile rolled after the collision was also below the level of the surface of the highway.

STATEMENT OF POINTS

POINT I

THE EVIDENCE IS WHOLLY INSUFFICIENT TO SUPPORT THE VERDICT AND JUDGMENT.

POINT II

THE COURT ERRED IN NOT GRANTING A MIS-TRIAL BECAUSE OF PREJUDICIAL STATEMENTS MADE BY COUNSEL IN HIS OPENING STATEMENT.

POINT III

THE COURT ERRED IN NOT GRANTING DEFENDANT'S MOTION TO DISMISS AT END OF PLAINTIFF'S CASE, MOTION FOR DIRECTED VERDICT, AND MOTION FOR A NEW TRIAL.

POINT IV

THE COURT ERRED IN NOT NAMING THE VETERANS' ADMINISTRATION A PARTY PLAINTIFF AS THE VETERANS' ADMINISTRATION WAS A REAL PARTY IN INTEREST.

POINT V

ERROR IN LAW TO ALLOW IN EVIDENCE ASSIGNMENT OF A PERSONAL INJURY TO THE VETERANS' ADMINISTRATION AND TO ALLOW EVIDENCE RELATING TO A HOSPITAL BILL AT THE VETERANS' ADMINISTRATION HOSPITAL.

POINT VI

THE DAMAGES ARE EXCESSIVE AND WERE INFLUENCED BY THE TRIAL COURT'S INSTRUCTIONS TO THE JURY AND PREJUDICED BY THE ERRONEOUS SUBMISSION OF THE VETERANS' ADMINISTRATION HOSPITAL BILL.

POINT VII

THE TRIAL COURT ERRED IN ADMITTING THE TESTIMONY OF ALVIN W. FOLGER AND DENYING DEFENDANT'S MOTION TO STRIKE THIS TESTIMONY.

POINT VIII

THE COURT ERRED IN FAILING TO GIVE DEFENDANT'S REQUESTED INSTRUCTIONS AND IN IMPROPERLY INSTRUCTING THE JURY.

ARGUMENT

POINT I

THE EVIDENCE IS WHOLLY INSUFFICIENT TO SUPPORT THE VERDICT AND JUDGMENT.

Inasmuch as plaintiff was a non-paying guest passenger in the automobile of defendant, the plaintiff was obligated to meet the requirements of Section 49-1001, Idaho Code, which reads as follows:

“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 death or loss, in case of accident, unless such accident shall have been intentional on the part of said owner or operator or caused by his intoxication or his reckless disregard of the rights of others.”

The complaint of the plaintiff contains no allegation, and there was no proof that the accident was intentional or caused by the intoxication of the host and therefore the only portion of the statute that concerns us here is whether or not the conduct of the defendant amounted to “reckless disregard of the rights of others.”

The Idaho Supreme Court has defined the term “reckless disregard for the rights of others” on many occasions. In the case of *Foberg v. Harrison*, 71 Ida. 11, 225 Pac. 2d 69, (1950), the court stated as follows:

“The term ‘reckless disregard’ as used in said section (49-1001, Idaho Code supra) means an act or conduct destitute of heed or concern for consequences; espe-

cially foolishly heedless of danger, headlong rash; wanton disregard, or conscious indifference to consequences.”

In a later case, *Mason v. Mootz*, 73 Idaho 461, 253 P. 2d 240, 243 (1953), the Idaho Supreme Court stated as follows in referring to the foregoing statement:

“This implies a *consciousness* of danger and a *willingness* to assume the risk, or an indifference to consequences.” (Emphasis supplied.)

Also see the following cases:

Hudson v. Decker, Utah, 317 P. 2d 594, 1957;
Grant v. Clarke, Idaho, 305 P. 2d 752, 1956;
Wilson v. Bacon, Idaho, 304 P. 2d 908, 1956;
Turner v. Purdum, 77 Idaho 130, 289 P. 2d 608, 1955.

The case of *Mason v. Mootz*, *supra*, further states at page 243 as follows:

“In a guest case the burden is on the plaintiff to prove that the accident was caused by conduct on the part of the defendant amounting to reckless disregard as so defined. Proof of ordinary negligence will not suffice.” (Many cases cited therein.)

There is absolutely no evidence from the facts in this case that the defendant showed a reckless disregard for the safety of others or that he was conscious of any danger and was willing to assume the risk with an indifference to the consequences. The facts in this case are that the plaintiff, defendant and Karen Wright were out for a ride on a straight, dry, lightly traveled arterial highway in the afternoon of November 3, 1956. A tractor pulling a large hay wagon entered the highway and

was going at a very slow speed when the defendant's car struck it on the right rear side. The defendant does not remember the details of the accident (R. 220).

The plaintiff does not remember what happened prior to the accident and thereafter as he was looking for some sun glasses and did not see the tractor and large hay wagon in the highway (R. 131, 132).

The plaintiff and defendant had taken a drive to Border, Wyoming prior to the accident and nothing was unusual about the way the car was driven between Montpelier, Idaho, and Border, Wyoming (R. 126). The plaintiff further stated that he at no time made any objections to the way in which the defendant was driving the car from the time they left Montpelier to the scene of the accident (R. 155, 156).

Miss Karen Wright's testimony places the large hay wagon at an angle and across the center line and certainly she is the only person who saw the tractor and hay wagon prior to the accident. Her testimony (R. 118) is to the effect that the tractor and hay wagon had to make a wide swing on the highway and was not going straight down the road on its own side at the time of the accident.

Further the testimony is that the blacktopped surface is 19 feet wide (R. 46) and the hay wagon and load of hay was 10 feet 2 inches (R. 59) so it follows that part of the obstruction on the highway was over the center line, and that both lanes of the highway were at least partially obstructed at this time.

It is obvious that the defendant under these circumstances

did what he thought best at the time he was confronted with the obstacle in his path, and made reasonable efforts under the circumstances to avoid a collision. The plaintiff cannot recover from this defendant unless he can prove the proximate cause of the accident was defendant's heedless and reckless disregard for the lives of others. This he has failed to do. Mere negligence of the defendant is not sufficient to recover damages.

A recent Idaho case that has an analagous situation to the case at hand is *Turner v. Purdum*, *supra*.

In the *Turner* case Purdum was driving a Hudson automobile and Turner, the plaintiff, was riding with him. They were traveling at about 45-50 miles per hour. It was windy, with some dust and occasionally a sprinkle of rain and was dark.

Turner was resting in the front seat with Purdum and remembers nothing of the accident.

One Malden Dye, at the same time, was driving a farm tractor in the same direction as Purdum and was towing a two-way, two-row potato digger. The tractor was equipped with a white light, 4½ inches in diameter, fastened under the seat of the tractor. The light illuminated the digger and road to the rear. Purdum saw the white light about one-half mile away and did not see it again until he was within 25-30 feet of the digger and it was too late then to do anything. The Hudson crashed into the digger and Turner was injured.

(The testimony in the present case is that the appellant was not going faster than 70 miles per hour and the condition of the road and the terrain are stated above.)

The court said in the Turner case as follows:

“Appellant fails to point out any act or acts of negligence or combination of such acts by respondent Purdum which appellant considers as constituting reckless disregard. The evidence does not disclose that respondent Purdum was driving at a rate of speed which could constitute more than ordinary negligence under the circumstances. His failure to see the potato digger in time to avoid the accident could not be more than ordinary negligence. There is nothing in the record to indicate that respondent Purdom was or should have been conscious of danger and to indicate a willingness on his part to assume the risk, or an indifference to consequences.”

It is to be noted that exactly the same elements of possible negligence exist in the Turner case as in the instant case. These are: (a) speed which may be excessive or unsafe under the conditions then and there existing and (b) improper lookout or momentary inattention. There is absolutely no evidence of any other wrongful or negligent acts on the part of defendant. Further, defendant was confronted with a more difficult situation by reason of the wide turn of the tractor and hay wagon and the resulting obstruction of both sides of the highway, than was Purdum.

The state of New Mexico has exactly the same guest statute as Idaho and the court of New Mexico in a recent case, *Smith v. Meadows*, N.M., 242 P. 2d 1006, (1952) held that speed itself does not justify a conclusion that the accident was caused by defendant's heedless and reckless disregard for others.

The facts in the Smith case, *supra*, were that the plaintiff

was riding as a guest in the defendant's car when it collided with the car of a third person, Gomez. Gomez had parked his car on the side of the road, without lights, due to the fact the motor was heating up. The testimony is to the effect that the defendant was traveling between 70 and 80 miles per hour at night.

The court on page 1011 states the very purpose of the guest statute is to prevent recovery by a guest of damages resulting from the negligence of a driver and allows recovery only in case the driver's acts were intentional or in heedless disregard of the rights of others.

The facts in the instant case at most would support a finding only of simple negligence as to the elements of speed and lookout, and consequently the plaintiff has failed to meet the burden imposed upon him by statute. The evidence does not show a reckless disregard for the lives of others. The defendant's conduct was such that he did all he could to avoid the tractor that was obstructing the highway and certainly this does not warrant a finding of reckless disregard for others. A careful distinction should be drawn between negligence of a driver and heedless and reckless disregard on the part of a driver for the rights and safety of others.

The difference between reckless misconduct and negligence is well stated in *Wilson v. Bacon*, supra, p. 909, as follows:

"Reckless misconduct differs from negligence in several important particulars. It differs from that form of negligence which consists in mere inadvertence, incompetence, unskillfulness or a failure to take precautions to enable the actor adequately to cope with a

possible or probable future emergency in that reckless misconduct requires a conscious choice of a course of action either with knowledge of the serious danger to others involved in it or with knowledge of facts which would disclose this danger to any reasonable man. It differs not only from the above-mentioned form of negligence, but also from that negligence which consists in intentionally doing an act with knowledge that it contains a risk of harm to others, in that the actor to be reckless must recognize that his conduct involves a risk substantially greater in amount than that which is necessary to make his conduct negligent. The difference between reckless misconduct and conduct involving only such a quantum of risk as is necessary to make it negligent is a difference in the degree of the risk, *but this difference of degree is so marked as to amount substantially to a difference in kind.*" 2 Restatement of the Law, Torts, § 500g." (Emphasis supplied.)

The *Turner v. Purdum* case is directly in point and should be followed in this case. The evidence does not show a consciousness of danger and a willingness to assume the risk, or an indifference to consequences. Clearly this must be found before the defendant can be guilty of reckless disregard.

Momentary inattention will not support a recovery in a guest case. The state of Connecticut has the same guest statute as does New Mexico, and it has been consistently held that conduct arising from momentary thoughtlessness, inadvertence, or from error of judgment does not indicate a reckless disregard of the rights of others.

See:

Silver v. Silver, 108 Conn. 371, 376, 143 A. 240, 65 A.L.R. 943;

Coner v. Chittenden, 116 Conn. 78, 82, 163 A. 472;

Bashor v. Bashor, 103 Colo. 232, 85 P. 732, 120 A.L.R. 1507.

In the case of Winn v. Ferguson, Calif., 282 P. 2d 515, at page 516, the court states:

“ . . . A finding of wilful misconduct cannot be predicated upon mere inadvertence or even gross negligence.”

Our own Supreme Court in the case of Hudson v. Decker, supra, p. 596, in holding the evidence insufficient to support a contention of “reckless disregard” in construing the Idaho guest statute stated:

“To permit a jury to infer from the mere fact that defendant’s car left the road under the circumstances disclosed, (car left the road on a curve) that the defendant was driving with knowledge of danger and with conscious indifference to consequences, would be to invite them to infer, not merely negligence, but ‘reckless disregard of the rights of others,’ from the mere fact that an accident happened and someone was thereby injured. To so hold would, in effect, cast the burden of showing freedom from ‘reckless disregard’ upon the defendant.”

In summary as to this point the defendant’s speed will not sustain a finding of “heedless and reckless disregard of the rights of others” nor will the mere monetary inattention or improper lookout of the defendant justify such a finding based on the law cited herein.

POINT II

THE COURT ERRED IN NOT GRANTING A MISTRIAL BECAUSE OF PREJUDICIAL STATEMENTS MADE BY COUNSEL IN HIS OPENING STATEMENT.

A supplemental transcript of the arguments for a mistrial on the basis of the statements made by counsel is submitted to the court for its consideration.

Counsel for plaintiff said during his opening statement that the plaintiff and defendant had stopped and purchased a sixpack carton of beer. A proper objection was made and argument was then heard (S. R. 1). Counsel for defendant set forth the reasons for said motion and they are found on page three of the supplemental record.

Defendant contends that it was clearly error and as such the trial judge should have granted a mistrial. The jury had heard the statement and the defendant's position was prejudiced by such statement and said objection was raised at the time of trial (S.R. 5). The admonition of the trial judge (S.R. 7) does not and did not correct the prejudicial effect of said statement.

In the case of McCarthy vs. Spring Valley Coal Company, 232 Ill. 473, 83 N.E. 957, (1908), where the attorney for the plaintiff interjected the fact that the plaintiff had a wife and five children the court said:

"The statement to the jury that the appellant had a wife and five children was manifestly improper. Its only object could have been to enhance the damages by getting before the jury, in this improper and unprofessional manner, facts calculated to arouse the

sympathy which counsel know could not in any legitimate way be brought to their attention. To admit evidence of such fact is error . . . The fact once lodged in the minds of the jury could not be erased by an instruction and appellee by this statement secured the benefit of the fact to the same extent as if he had introduced evidence to prove it . . . It is impossible to tell the effect on the verdict of the impression wrongfully conveyed to the jury's mind by the improper conduct of counsel."

A good statement of the general law is found in American Jurisprudence, Vol. 53, page 358, Section 456, reference to inadmissible evidence. It is generally held that statements by counsel that certain evidence will be introduced are not improper if made in good faith and with reasonable ground to believe the evidence is admissible, even though the intended proof referred to is afterwards excluded. However, in the absence of good faith, or where prejudice is clearly produced, whether as a result of accident, inadvertence, or misconception, the rule is to the contrary.

In Vol. 39, American Jurisprudence, page 71, Section 53, New Trial, we find the following statement:

"Misconduct of counsel for one party, if of such a nature as to influence a verdict in favor of that party, or to prevent the adverse party from having a fair trial is, if proper and timely objection thereto is made, grounds for a new trial. Such objectionable conduct may consist in improper remarks, comments, or arguments, willfully and intentionally offering inadmissible evidence or propounding improper questions to witnesses, making uncalled for abuse of witnesses, and other such acts of misconduct calculated to influence or prejudice the jury. Where there is any misconduct on the part

of counsel for the prevailing party which appears to have been liable, even though not intended to have a pernicious effect upon legal proceedings, or a prevailing influence on the jury, there is reason for treating the trial as a mis-trial and directing that the judgment be set aside."

Based upon the foregoing, the trial court should have granted defendant's motion for a mis-trial as it is absolutely impossible to determine whether or not the jury considered such improper statement of counsel, and the statement was of such a nature that reasonable minds could only conclude it would have a prejudicial effect upon the jury.

POINT III

THE COURT ERRED IN NOT GRANTING DEFENDANT'S MOTION TO DISMISS AT END OF PLAINTIFF'S CASE, MOTION FOR DIRECTED VERDICT, AND MOTION FOR A NEW TRIAL.

Counsel for defendant made a motion to dismiss the plaintiff's Complaint (R. 217) and the grounds are set forth in the record. It was error for the court not to grant this motion based on the evidence that had been adduced.

The law as to the points argued is set forth in other sections of the brief.

Defendant's counsel renewed its motion again at the close of all the evidence (R. 226-227) and said motion was denied by the court. It was error for the court to let this matter go to the jury and not direct a verdict for the defendant.

A motion for a new trial was argued and the court denied said motion. Based on the law as stated above with reference to the remarks of counsel in his opening statement, the evidence, the admissibility of testimony in error, and other errors treated in this brief, this motion should have been granted.

POINT IV

THE COURT ERRED IN NOT NAMING THE VETERANS' ADMINISTRATION A PARTY PLAINTIFF AS THE VETERANS' ADMINISTRATION WAS A REAL PARTY IN INTEREST.

Rule 17(a) of the Utah Rules of Civil Procedure provides that "Every action shall be prosecuted in the name of the real party in interest."

Counsel for defendant argued this matter to the Court (R. 122) and the Court stated that it would take the matter under advisement. Counsel for defendant (R. 217) made a motion that the Veterans' Administration be made a real party in interest based on the testimony of Mr. Monson. The court denied said motion.

Based on the cross examination of Mr. Monson it is perfectly obvious that the Veterans' Administration is a real party in interest. They admit (R. 213) that a bill would not be sent to the plaintiff except for this lawsuit and they would not expect to be paid. They further state their only interest is that they will participate in the judgment if the plaintiff recovers. The services were rendered gratuitously to the plaintiff and he had no obligation to pay.

If the court is going to allow the Veterans' Administration to participate in the proceeds from a judgment for plaintiff then the Veterans' Administration must be named as a party plaintiff as they are a real party in interest.

It is stated in 39 American Jurisprudence, page 872, Section 17, at follows:

" . . . The term 'real party in interest' as used in such practice provisions, in terms which indicate that he must be the person to be benefited by, or entitled to receive the benefit of, the suit."

Certainly the Veterans' Administration was in a position whereby it would benefit by the judgment if favorable to plaintiff but would have no interest whatsoever if plaintiff failed to receive a judgment. Hence they should have been made a part plaintiff. The jury was entitled to have this submitted to them in a proper manner.

POINT V

ERROR IN LAW TO ALLOW IN EVIDENCE ASSIGNMENT OF A PERSONAL INJURY TO THE VETERANS' ADMINISTRATION AND TO ALLOW EVIDENCE RELATING TO A HOSPITAL BILL AT THE VETERANS' ADMINISTRATION HOSPITAL.

It is a well settled rule that in the absence of a statute to the contrary a cause of action to recover for personal injuries is not assignable.

The court erred in allowing Exhibit "G" in evidence, which is the bill in the amount of \$3,300.75 for treatment of plaintiff

at the Veterans' Administration Hospital in Salt Lake City, Utah. The Court further erred in allowing testimony and evidence relating to any charge for such treatment.

The evidence is clear (R. 215) that an assignment was executed by the plaintiff on the fifth day of September, 1957 (Exhibit H) and that another assignment was made on the tenth day of December, 1957 (Exhibit I). The testimony of William S. Monson (R. 218 et seq.) related solely to the treatment of plaintiff at the Veterans' Administration Hospital in Salt Lake City, Utah and the charges therefor.

A recent annotation holding that a personal injury claim is not assignable unless statutory authorization exists is found in 40 A.L.R. 2d 501. Many cases are cited therein establishing the rule as stated above. These cases are from jurisdictions all over the United States. There is a Utah case directly on this point in *In re Behm's Estate*, 213 P. 2d 657, which follows the said rule. This case distinguishes between the assignment of a cause of action for personal injury and the assignment of the proceeds of a judgment rendered in such a case. At pages 662-663 the court states as follows:

"In the first cited case, the injured person assigned to a hospital a share of any proceeds he should acquire from any settlement or judgment to be paid by the tort-feasor. The court recognized that under the law of the state of New York the cause of action was non-assignable, but held that the assignment of a share of the proceeds was enforceable in equity."

"To rule that I cannot assign the cause of action, but that I can transfer 100 per cent of its proceeds sounds anomalous. It is tantamount to saying that I can transfer the substance but retain the shell; that

I can give you the right to the recovery, but I must hold the right to recover. However, repeated precedents of many years' standing tell us this is the law."

The evidence is clear that the plaintiff owed the Veterans' Administration nothing until such time as he secured a judgment against defendant and that then by virtue of the assignment which he gratuitously executed several months after the conclusion of his treatment at the Veterans' Administration Hospital (R. 143), he had an obligation to pay them from the proceeds of the judgment. Thus the hospital bill and the assignment were completely irrelevant and immaterial as to this case and were not properly an item of damages to be considered by the jury.

The court further erred in instruction number seven by informing the jury that if the plaintiff should recover a judgment he would be obligated to pay to the Veterans' Administration the sum of \$3,300.75 from the proceeds thereof.

POINT VI

THE DAMAGES ARE EXCESSIVE AND WERE INFLUENCED BY THE TRIAL COURT'S INSTRUCTIONS TO THE JURY AND PREJUDICED BY THE ERRONEOUS SUBMISSION OF THE VETERANS' ADMINISTRATION HOSPITAL BILL.

The damages awarded the plaintiff are excessive and were materially affected by the court's error in instructing the jury with reference to the hospital bill of the Veterans' Administration.

The defendant sets forth the following grounds as error in admitting the testimony of Mr. Monson and the Veterans' Administration records (R. 214-215):

1. The charge results only from illegal, improper and invalid assignment of a personal injury action in tort;

2. It is not a proper item of damages, either special or general;

3. It results from a voluntary assignment executed in September of 1957, after the services of the Veterans Administration Hospital to plaintiff had been completed;

4. The services were rendered gratuitously, and the Veterans Administration has no right to recover except on the basis of the previously-mentioned assignment, which, if valid, is an assignment only of any recovery which plaintiff might secure in this action. Otherwise, plaintiff has no obligation to pay;

5. The bill has not been paid, nor is it payable except from proceeds from any judgment which plaintiff might secure in this action.

6. There was no evidence that the charges were reasonable.

In further support of the defendant's position, cites 40 A.L.R. 2nd, 500, and particularly the portions in Section 2 on page 501, and Section 3 on page 502; and In Re Behm's Estate, 213 Pacific 2nd 657.)

It is perfectly obvious that the verdict was influenced by the admission of this evidence and the jury should not have

been instructed as to the claim of the Veterans Administration Hospital. The damages were not properly submitted to the jury and as such the verdict is excessive. The defendant's position was prejudiced thereby.

Although the case should not have been submitted to the jury, when it was submitted the Veterans Administration Hospital bill had no place in the considerations of the jury. It is only reasonable to conclude that the amount awarded to plaintiff was materially affected by this evidence and the instructions thereon, and very likely to an extent greater than the amount of the bill itself.

POINT VII

THE TRIAL COURT ERRED IN ADMITTING THE TESTIMONY OF ALVIN W. FOLGER AND DENYING DEFENDANT'S MOTION TO STRIKE THIS TESTIMONY.

The plaintiff called as a witness one Alvin W. Folger to testify as an expert witness as to stopping distances, reaction time, etc. The record fails to disclose any brake marks whatsoever and further there is no testimony as to the surface of the highway except that it was blacktop.

Officer Folger testified (R. 165) as to the necessary elements of determining the stopping distance of an automobile. The hypothetical question put to the officer (R. 169) does not state the facts in the case as there was no testimony that the driver observed the danger, there were no brake or skid marks present before the impact, it does not appear at what

distance from the tractor and hay wagon the defendant was when he observed them, and the other necessary elements for the conclusions of the witness were not established by the evidence in the case.

Counsel objected all the way through the officer's testimony and made a motion to strike (R. 171) said testimony as it did not relate to the facts in their entirety, contained improper conclusions, was a mere guess by the witness and was confusing to the jury. A further objection was made on the basis that the officer was not a qualified expert. The court should not have allowed the testimony and after it was admitted it should have been stricken.

POINT VIII

THE COURT ERRED IN FAILING TO GIVE DEFENDANT'S REQUESTED INSTRUCTIONS AND IN IMPROPERLY INSTRUCTING THE JURY.

The court erred in not granting defendant's requested instruction number one. This instruction was to the effect that the evidence does not support a finding that defendant operated his vehicle in a manner to constitute reckless disregard of the rights of others.

Defendant's instruction number two was to the effect that the plaintiff assumed the risk as to the manner in which defendant was operating the car. The facts clearly disclose that this should have been given as the plaintiff at no time protested to the defendant about his driving (R. 161).

Instruction number six as requested should have been given as it explains the difference between reckless misconduct and negligence.

2 Restatement of the Law of Torts, Section 500 g.

Defendant's requested instruction number 10 should have been given as it stated that more than one act of simple negligence on the part of a driver will not be combined to render the driver guilty of reckless disregard of the rights of others.

Turner v. Purdum, supra.

Counsel for defendant took exceptions to the instructions as given by the Court on page 245 and subsequent pages and by reference thereto these exceptions are incorporated in this brief. The defendant feels that said exceptions are with merit and respectfully asks the court to review said exceptions and their contents.

CONCLUSION

We believe that the court erred in submitting this case to the jury, that plaintiff failed as a matter of law to meet the burden of proving reckless disregard on the part of defendant and that there was thus no legitimate question of fact to be decided by the jury.

Further, that the court should have granted to defendant a dismissal with prejudice at the close of plaintiff's case and should have directed a verdict in favor of defendant at the conclusion of all of the evidence.

We further believe, without prejudice to the foregoing, that defendant is entitled to a new trial if this court should concur with the trial court with respect to the foregoing contentions. We base this contention upon the other errors assigned in defendant and appellant's brief which were prejudicial to defendant and which made it impossible for defendant to have a fair trial by the jury or to have a verdict rendered based on proper evidence, argument and instructions as to the law.

We, therefore, respectfully submit that the judgment of the lower court should be reversed and judgment awarded to defendant dismissing plaintiff's complaint with prejudice and granting judgment for no cause of action.

Respectfully submitted,

KIPP AND CHARLIER

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