

1960

State of Utah v. Joseph Ersol Berchtold : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT
of the
STATE OF UTAH

— FILED

12 1960

THE STATE OF UTAH

Plaintiff and Respondent Supreme Court, Utah

vs.

Case No.
9265

JOSEPH ERSOL BERCHTOLD

Defendant and Appellant

—
BRIEF OF APPELLANT JOSEPH ERSOL BERCHTOLD
—

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IN THE SUPREME COURT of the STATE OF UTAH

THE STATE OF UTAH

Plaintiff and Respondent

vs.

JOSEPH ERSOL BERCHTOLD

Defendant and Appellant

} Case No.
9265

BRIEF OF APPELLANT JOSEPH ERSOL BERCHTOLD

STATEMENT OF FACTS

On April 15th, 1959, one Joseph E. Berchtold and his friend of long standing, Joseph Van Forrest, both of Brigham City, Utah, left Brigham City in the late afternoon for Cache Valley, arriving in Logan at approximately 7 o'clock p.m., (Tr. 412). From Logan they drove around for a while and then drove north in Berchtold's 1959 Chevrolet automobile to Smithfield and then west to Newton where Mr. Forrest had a girl friend by the name of Nora Jean Christensen

(Tr. 413). Mr. Forrest went into her home on arrival and brought her out to the car where she was introduced for the first time to the defendant Berchtold and from there they started east toward Smithfield to pick up a blind date (Tr. 414) for the defendant. As they drove east (Tr. 413) the defendant was driving, the Christensen girl in the center with Mr. Forrest on the right. All were in the front seat. As they went in the direction of Smithfield there is a bridge over the Bear River that must be crossed. It is approximately seven miles east of Newton with the road fairly straight (Tr. 413). As the car proceeded east and was close to the point where the bridge was built across the river (Tr. 414):

. . . Van and Nora Jean was up in the light of the radio looking at his Thiokol badge. They had it in their hand and the light of the radio was the only light in the car other than the dashboard. But they were looking at it and seeing his picture on it, and it was—Nora Jean stated to me that if we didn't hurry that this—I can't remember her name for sure. I think said Rosie or something, would be in bed if we didn't get over there quite fast, and I guess she maybe got kind of bored that we weren't in any hurry. I never felt any hurry in my mind. I was just enjoying the evening and she—

Q. What did you do then at that time?

A. I picked up my speed probably up to forty-five or fifty-five at the most.

Q. And what did you reach at that time by way of change of route or anything?

A. We came to the first corner of the bridge and then down over it to the bridge.

Q. Came down over the bridge?

A. Yeah.

Q. Did you know how fast you were going when you came down over the bridge?

A. No, I don't.

Q. You never looked at the speedometer at that time?

A. No.

Q. What did you do as you came down across the bridge, if you know?

A. Well, as I came down to the bridge, as I hit the bridge I brightened my lights to see which way the road went, out of instinct, and I probably let my foot off the gas out of instinct. As I came to the corner I was a little in doubt as to which way the road went.

Q. Had you been over the road earlier that evening, the same road?

A. Yes, sir.

Q. Was it dark when you came over it?

A. Yes.

Q. Was it dark when you went back?

A. Yes.

Q. Had you ever been over that road before?

A. No.

Q. Those were the only two times in your life; is that correct?

A. Yes, I've been there since.

Q. And then what happened?

A. As I came to the corner I was a little in doubt, like I say.

Q. A little in doubt about what?

A. Which way the road went, other than if—I figured that we were going back straight east when we came to the corner. I didn't know for sure, and so I kind of had it in my mind that the road went on straight, but when I brightened my lights I could see there was a corner.

Q. Go ahead then.

A. As I got to the corner I could see that the road went left, and as I turned I was in the gravel and I could feel my back end going a little sideways on the back end, and I could hear the gravel hitting the back of the car, as the tire hits it up into the splash pan, I could hear that. And I could, you know, I could feel myself going in a skid and I possibly—

Q. Was it a violent skid?

A. No, it wasn't really too bad then.

Q. Well, was that the first feeling of any give of your car up to that point?

A. Yes.

Q. And you say you heard the gravel at that time?

A. Yes.

Q. Then what took place?

A. Well, I turned the wheels, started trying to fight—well, I wasn't really too worried, but I tried to kind of fight it and I was turning the wheel. And then all of a sudden it seemed like I possibly hit my brakes or something and it seemed like I locked it sideways off the road. I could see my lights turn around, and then all of a sudden they flipped in the air. Then I can't remember anything until after I stopped.

Q. Was there any screaming or yelling or warning?

A. No, there wasn't. Nobody said anything. I think they still were down in the radio lights looking at the badge.

Q. Did you feel like at any time up to the point where you—

MR. CALDERWOOD: I object to the form of the question.

MR. MANN: He's the only one that can state it.

MR. CALDERWOOD: I object to what he feels.

Q. —that your car was under control?

MR. CALDERWOOD: Oh, I object to that.

THE COURT: He may answer that.

A. Would you please repeat it?

Q. Did you feel like your car was entirely under control up to the time that you hit the gravel?

A. Definitely.

Q. Did you feel that you were going at an excessive rate of speed up to the time you hit the gravel?

A. No.

This statement of facts leading up to the accident made at the time of trial should be compared with the written statement given to Officer Bair, defendant's Exhibit No. 26, from a hospital bed the following morning. Basically the only difference was the speed where on the Tr. page 415 line 10, it states:

" . . . I picked up my speed probably up to forty-five of fifty-five at the most."

The driving speed claimed (Tr. 414-7) prior to any acceleration was 40-45. However, (Tr. 422-30) the defendant

was asked about the speed stated in Exhibit No. 26, which is as follows:

“Q. Now one question I wanted to ask you. I note that in here, “It looked straight, but as I came down at approximately sixty-five miles an hour.” Did you know how fast you were coming down to this bridge as a fact? Did you check your speedometer?

A. No.

Q. Why did you put that you came down approximately sixty-five miles an hour?

A. I don't . . . I never did have any idea in speed in my mind. I don't remember any time stating any speed other than approximately. I don't know why I put it approximately sixty-five. Maybe it's just because everybody up there, “You were going fast or something, wasn't you?” or something like that.

Q. Had people been telling you that you must have been speeding?

A. Yes.”

Mr. Bair claimed however (Tr. 51) that the defendant said he was going about 70 over the bridge. The defendant (Tr. 424-7) stated:

“Q. Now, you heard Officer Bair say that you told him that you were driving seventy miles an hour when he first talked to you. Do you remember any conversation with Mr. Bair where you told him you were driving seventy miles an hour?

A. No. I says I don't think I could have possibly been going more than seventy miles an hour. I never stated the speed of seventy miles an hour.

Q. What made you say, “I don't think I could possibly have been going at a speed more than seventy

miles an hour"? Had there been other conversations about speed at that time?

A. Well, he'd asked me how fast I was going, and I says I didn't know, and he says, "Well, you must have"—well, no, he didn't say anything. I got the implication that maybe he was meaning I was going quite fast, and I just said, "Well, I don't think I could have been possibly going more than seventy miles an hour."

It should also be compared with Officer Bair's testimony of what the defendant said immediately after the accident at the scene about speed, the curve and loose gravel (Tr. 52, lines 10-20).

Some beer had been purchased at Brigham City in unopened bottles. After the girl got in the car at Newton a bottle was opened up and handed to the defendant (Tr. 425-18) and he stuck it between his legs. When asked by the officer if he would submit to a blood test (Tr. 25) he readily agreed. Officer Bair testified when asked by the District Attorney (Tr. 50-11) that the tests showed the defendant was not intoxicated. No test was introduced by the State so we must conclude it had no evidentiary value.

The bridge and the road, before and after, must be described. The road leading east from Newton is a standard width, oiled surface country road, approximately 22 to 23 feet wide and fairly straight until you come to the vicinity of the bridge. Defendant's Exhibit No. 29 shows this road as you approach the bridge going east. The bridge is lower in elevation and on a straight line with the road from the west. Plaintiff's Exhibits No. 4 and 6 further illustrate the character of the

road and bridge as you get nearer to it and the left turn on the other side can be plainly seen because it is daytime, but would present a different problem at night. Plaintiff's Exhibits No. 7 and 8 show the road, as you come out on the east side of the bridge and you can then see that there is a hard surfaced road that swings to the right as well as one that swings to the left with loose gravel up in the "Y" that is created by the two roads forking away from the one road on the east side of the bridge. Pictures of this loose gravel were avoided by the State when they took their pictures some week or so after the accident, but Mr. Berchtold Sr. (Tr. 351-2) went to the scene of the accident on the morning of April 17th, 1959, with a number of people with cameras and pictures were taken. He had been in Washington, D.C. on an assignment with the Air Force and did not arrive home until late on the evening of the 16th day of April, 1959 (Tr. 355). He searched for marks upon the highway (Tr. 355) and found some marks that are shown in defendant's Exhibit No. 24 (Tr. 356) and there were other sets to the left of them, see defendant's Exhibit No. 25, but none leading off the road to point of accident. Officer Bair said that he and Officer Lee made test skids on April 16th (Tr. 101-28):

"Q. Let me ask you, where did you make these tests?

A. Directly over the marks that were visible on the highway.

Q. Directly over the same marks?

A. Yes, sir."

There are three exhibits of the defendant that show the road as it looked on the morning of April 17th from the east

side looking westerly toward the bridge. One is defendant's Exhibit No. 35, looking in a straight line at the bridge which puts the camera in loose gravel and to the left of the road that goes to Smithfield. Defendant's Exhibit No. 24 which moves the camera to the right, toward the Smithfield road, but still in loose rocks and gravel, and defendant's Exhibit No. 25 which is further east, down the south side of the Smithfield road showing the bridge, the intersection with the road going to the south of the Smithfield road, the gravel and the tire marks of the officer's car. Defendant's Exhibit No. 28 is a picture taken at a little different angle of this same scene. Reversing the camera and looking east from the loose gravel, defendant's Exhibit No. 31, shows three main telephone poles in the background with the one on the left being darker and it is the pole that has been replaced. Defendant's Exhibits No. 30, 32 and 33 are progressive pictures made with the camera being moved east, each successive time, toward the pole that has been replaced.

On the evening in question, the defendant approached the bridge in his car with the other two people beside him. He admitted that he increased his speed just shortly before reaching the bridge upon the suggestion of one of the other passengers (Tr. 52). He does not know the exact speed that he was travelling when he reached the bridge, but felt that everything was under control until he became disturbed on which way the road turned after he started across the bridge (Tr. 52). That he struck some loose gravel at which time he made his turn to the left and found he was in trouble, thought he had straightened it out, but all of a sudden it seemed like he possibly hit his brake and something took hold of it as it

was coming out and in just a moment he was off the road and into the barow pit and the pleasant evening that was being enjoyed several seconds before turned into a tragedy.

At the trial, the State, through Officer Bair, contended that there were certain skid marks upon the highway (Tr. 37-22). That he marked them with a red crayon where they began and ended (Tr. 42-6). He claimed that the two marks were left by the right side wheels of an automobile (Tr. 43-22). He said they were two inches wide almost identical except in length (Tr. 44-3). He said they were eight inches apart (Tr. 44-25). That he returned about noon the following day (Tr. 59-29). That he was alone (Tr. 60-2). That he used a clip board and a 100-foot tape (Tr. 60-16). That he measured both marks (Tr. 62-15). One started twenty inches prior to the other (Tr. 62-32). That the one mark (the right one) had a total length of 57 feet 10 inches before it went off the road (Tr. 62-27). The other mark started 20 inches after and had 77 feet six inches contact with the road before it left the same (Tr. 63-4). He claimed they were eight inches apart (Tr. 63-19). On voir dire (Tr. 66-18) he was asked what leaves the mark or what is the mark composed of that is left on the road and we have:

A. The mark is made of the tire, the heat of the tire against the surface of the road.

Q. And you can get it from slowing the wheel less than free wheeling?

A. Yes, sir.

Q. Or you can get it from a side skid?

A. Yes, sir.

Q. Or you can get it from clear locking of the wheel?

A. Yes, sir.

Officer Bair said he measured the distance from where the tire marks, or first tire, left the road into the barrow pit to the first impact (Tr. 71-29) and it was 80 feet 10 inches to some small trees. From the trees to a telephone pole further east (Tr. 72) it was 53 feet even and from there to where the car came to rest further east it was 69 feet. The width of the road varied from 22 feet 6 inches to 23 feet and was 22 feet 10 inches where the car left the road (Tr. 74). His measurements from the bridge, east, are given (Tr. 76). Straight across the bridge the road is straight 200 ft., it is 332 ft. to the west edge of the road turning right toward Benson and 639 feet to the east side of this road that turns to Benson and 819 ft. would be the measurement along the right side of the road to the pole that was broken on the second impact. He prepared a map, Exhibit No. 14, of a scale of one inch to ten feet. He indicated the route of travel on this exhibit but said Tr. 79-28):

A. The vehicle as it struck the pole changed its course. It went from a right side bank slide into a left.

Q. The left side of the car then being the forward part going sideways?

A. Yes.

Q. With the left side of the car being ahead?

A. At this point here after impact in this area here, the vehicle changed directions."

This is further emphasized (Tr. 87-7):

A. Yes, but, as I say, the car was going sideways leaving gouges in the gravel as it went off. . . ."

On his Exhibit No. 14 he shows the two purported tire marks and says that from where the marks started they were to the left of the right edge of the oiled surface 4 ft. 6 inches (Tr. 84-14).

Officer Bair said that Officer Lee helped him re-check his measurements the afternoon of the day following the accident (Tr. 89). They then attempted to take some measurements of a cord 55 feet long along the purported mark of 57 ft. 10 inches (Tr. 91-94) and claimed that from the middle ordinate of his cord to the tire mark was 4 inches. No measurements of any purported cord of the 77 foot 6 inch tire mark was made even though they were working with a 100-foot tape and why a 55-foot cord was used no one knows. These two lines, or right side tire marks of the vehicle, which, when analyzed have some very peculiar characteristics become the basis of their evidence. They admit the right mark of the two is the right rear wheel and the left one the front. They admit that there is a distance of 10 feet between the front and rear wheel which would mean that if they both commenced to lay down marks at the same instant there would be a distance of 10 feet instead of 20 inches between the beginning of the two marks. In addition to the measurements that were purported to be taken of the tire marks, Officer Bair had a photographer take a picture of them the night of the accident. They were not offered in by the State but were by the defendant, Exhibits No. 22 and 23, and Officer Bair could not identify any tire marks in them. They admit and testify that the first mark began 4 feet 6 inches to the left of the oiled surface (Tr. 84-14) and ran off the oiled

surface in 57 feet 10 inches which would make a triangle with a base of 4 feet 6 inches if the edge of the oiled surface was a continuous straight line. Also they allege that the other tire was 8 inches further left and ran off the road 77 feet 6 inches up the road which would make a triangle with a base of 5 feet 2 inches if the oiled surface was a continuous straight line. However, and this is very important, the edge of the oiled surface was on a curve (see plaintiff's Exhibit No. 14 and defendant's Exhibit No. 36). To show the true base of a triangle Officers Lee and Bair were requested to plat on a large piece of paper on the floor in front of the jury (Tr. 130 to 154), defendant's Exhibit No. 21 and to do so they were asked to draw a straight line along the south side of the road on Exhibit No. 14 going westerly from a point east from where the wheels of the car left the road. This straight line to represent the south edge of the oiled surface, if the road were straight and not on a curve and from that line they then measured to the north to where they had plotted the first mark of the tire on Exhibit No. 14 and they had 12 feet (Tr. 133-7). This was then plotted on defendant's Exhibit No. 21 and the left tire mark was plotted 8 inches to the left and 20 inches up which established a true base of a right triangle. The distances where each tire left the edge of the road was then platted and lines drawn showing the height of one triangle approximately 22 feet greater than the other, all to a scale of one inch equals one foot. It was then demonstrated the physical impossibility of the right front wheel staying 8 inches parallel to the right rear wheel until the right rear wheel left the road and the right front wheel continuing up the road another 22 feet before leaving especially when the right front wheel

is ahead, due to wheel base of 119 inches or approximately 10 feet (Tr. 153-13). Officer Bair admitted (Tr. 153, lines 19-26) that if the car were travelling on a true circle that the front wheel would have to be on the gravel portion of the road when the rear wheel was laying its mark down at the end of his 55-foot cord. With that admission, all of Dr. Wood's testimony, as will be shown later in the argument, was strictly speculative.

In addition, Officer Bair, on the same day that he was supposed to have taken all of the measurements of the purported tire marks, filed his official report with the State of Utah, defendant's Exhibit No. 27, besides other things he said:

"No solid brake marks visible prior to leaving road surface."

Our pictures shown as Exhibits 24, 25, 28 and 36, taken the 17th show the officers tire marks laid down the 16th, but could not pick up any other except the officer's.

Now, to the pleadings, the information charges: (R. 5)

"That on or about the 15th day of April, 1959, at the County of Cache, State of Utah, the said defendant did then and there wilfully and unlawfully drive and operate a motor vehicle in reckless disregard of the safety of others by which one Nora Jean Christensen received injury and whose death ensued within one year as a proximate result of said injury, contrary to the provisions of the Statute of the State aforesaid, in such cases made and provided, and against the peace and dignity of the State of Utah."

To this a demand for a bill of particulars was made (R. 6) and "particularly as to what acts, if any, the defendant is

alleged to have done so as to drive a motor vehicle in a reckless disregard of the safety of others." The bill of particulars, as furnished (R. 9) set out:

"The defendant is alleged to have driven his motor vehicle in excess of seventy miles per hour in the nighttime on a road of such a route, course and condition with respect to width and curvature as existed at and near the time and place of the injury resulting in Nora Jean Christensen's death, and by failing to drive under such conditions and in such a manner as to be able to keep the automobile he was operating under control and upon the traveled portion of the highway."

A motion to quash was filed (R. 10) and argued (Tr. 2, line 5 to page 5, line 20).

STATEMENT OF POINTS

POINT I

THE TRIAL COURT ERRED IN NOT GRANTING DEFENDANT'S MOTION TO QUASH FOR THE REASON THAT THE INFORMATION AS MODIFIED BY THE BILL OF PARTICULARS DOES NOT STATE A CRIMINAL CAUSE OF ACTION AGAINST THE DEFENDANT.

POINT II

THE TRIAL COURT ERRED IN NOT GRANTING THE DEFENDANT'S MOTION FOR DISMISSAL FOR FAILURE TO PROVE A CAUSE OF ACTION OR ERRED IN NOT GRANTING DEFENDANT'S REQUESTED IN-

STRUCTION NO. 1 FOR THE FOLLOWING REASONS TO-WIT:

(a) THAT THE TESTIMONY OF THE OFFICERS WAS CONFLICTING.

(b) THAT PHYSICAL EVIDENCE OF THE OFFICERS PRESENTED AND PARTICULARLY AS TO MEASUREMENTS ALLEGEDLY TAKEN AT THE SCENE OF THE ACCIDENT WERE PHYSICALLY IMPOSSIBLE TO BE AS ALLEGED.

(c) THE TESTIMONY OF DR. WOODS, A PHYSICIST OF THE USU, WAS BASED UPON A FALSE PREMISE, TO-WIT: THAT THE MARKS WERE LAID DOWN WHILE THE CAR OF THE DEFENDANT WAS TRAVELING FREE OF SKIDS OR BRAKES ON THE CIRCUMFERENCE OF A PERFECT CIRCLE FOR A DISTANCE OF A FIFTY FIVE FOOT CORD ON SAID CIRCUMFERENCE.

(d) THAT THE TESTIMONY OF DR. WOODS WAS HIGHLY SPECULATIVE AND CAUSED THE JURY TO BE INFLUENCED AND SPECULATE ON ITS VERDICT.

(e) THAT THERE IS NO TESTIMONY IN THE RECORD THAT THE DEFENDANT EVER EXCEEDED THE SPEED OF 65 MILES PER HOUR IN A POSTED 60 MILE DAY SPEED ZONE AND THEN SUCH SPEED WAS ONLY MOMENTARY. THAT SPEED ALONE OF THIS SLIGHT VARIATION FROM THE POSTED SPEED IS NOT "RECKLESS DISREGARD OF THE SAFETY OF OTHERS."

(f) THAT THE ACCIDENT WAS THE RESULT OF A MOMENTARY INDECISION OF THE DRIVER AFTER

HE REACHED GRAVEL DEPOSITS NEGLIGENTLY LEFT BY HIGHWAY OFFICIALS IN THE "Y" OF FORKING ROADS AS TO WHICH WAY THE ROAD WAS GOING. THAT SAID ACT WAS AT MOST NEGLIGENCE AND NOT HEEDLESS DISREGARD FOR THE SAFETY OF OTHERS.

(g) THAT THERE IS NO EVIDENCE IN THE RECORD OF A HEEDLESS DISREGARD OF THE SAFETY OF OTHERS IN THE DRIVING OF THE DEFENDANT.

(h) THAT THE COURT, AFTER ALLOWING HIGHLY SPECULATIVE EVIDENCE TO BE INTRODUCED TO THE JURY, WAS OBLIGATED TO TAKE SAID CASE FROM THE JURY TO PROHIBIT THEM FROM SPECULATING IN MAKING THEIR DECISION.

POINT III

THAT THE TRIAL COURT ERRED IN FAILING TO GIVE, IN ITS ENTIRETY, DEFENDANT'S INSTRUCTION NO. 10 FOR THE REASON THAT SAID INSTRUCTION IS A TRUE STATEMENT OF THE LAW AND THE JURY SHOULD HAVE BEEN PROPERLY INSTRUCTED UPON IT.

ARGUMENT

POINT I

THE TRIAL COURT ERRED IN NOT GRANTING DEFENDANT'S MOTION TO QUASH FOR THE REASON

THAT THE INFORMATION AS MODIFIED BY THE BILL OF PARTICULARS DOES NOT STATE A CRIMINAL CAUSE OF ACTION AGAINST THE DEFENDANT.

Our Section 41-6-43.10, Utah Code Annotated 1953, as amended reads:

"41-6-43.10 Negligent homicide—Death occurring within one year—Penalty—Revocation of license or privilege to drive.—(a) When the death by any person ensues within 1 year as a proximate result of injury received by the driving of any vehicle in reckless disregard of the safety of others, the person so operating such vehicle shall be guilty of negligent homicide."

In this regard the charge is:

"That on or about the 15th day of April, 1959, at the County of Cache, State of Utah the said defendant did then and there wilfully and unlawfully, drive and operate a motor vehicle in reckless disregard of the safety of others by which one Nora Jean Christensen received injury and whose death ensued within one year as a proximate result of said injury, contrary to the provisions of the Statute of the State aforesaid, in such cases made and provided, and against the peace and dignity of the State of Utah."

And then his bill of particulars is added:

"The defendant is alleged to have driven his motor vehicle in excess of 70 miles per hour in the night time on a road of such a route, course and condition with respect to width and curvature as existed at and near the time and place of the injury, resulting in death to Nora Jean Christensen, and that by failing to drive under such conditions in such a manner as to be able to keep the automobile he was operating under control, and upon the travelled portion of the highway."

He alleges two things, one, that he drove in excess of 70 miles per hour in the night time and the other that he failed to keep his car under control and upon the travelled portion of the highway. He mentioned something about width and curvature, but nothing is set out and you cannot tell from the pleadings, whether the width is one foot or twenty or thirty feet; whether the curvature is based upon a radius of 100, 500, 1000 or 1500 feet. The statute required the individual to be guilty of driving the vehicle in a reckless disregard of the safety of others. It is this recklessness that should have been set out, as was said in *State vs. Adams*, 125 P2d 430, left hand column, near the bottom:

“ . . . Criminal negligence therefore sufficient to satisfy arm (a) of the manslaughter definition means more than mere thoughtlessness or slight carelessness. It means reckless conduct or conduct evincing a marked disregard for the safety of others.”

The bill of particulars did not clarify the issue, it just confused the issue. As a matter of law an increase of up to 70 miles an hour in and of itself is not reckless, disregard of the safety of others. There are no cases exactly in point on this, but we do have other cases where the matter has been gone into, such as the guest statute regarding civil liability. Our guest statute, Section 41-9-1- Utah Code Annotated 1953 reads in part:

“ . . . 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; . . . ”

There have been numerous civil cases tried, particularly in surrounding states, where the guests have sued the owner and

alleged wilfull misconduct of such owner in his driving for the purpose of taking the matter out of the guest statute. In the cases to be cited hereinafter, speed in particular has been quite a factor. I use these cases because wilfull misconduct has been used similarly to the words "reckless, disregard of the safety of others" and in civil cases if speed alone would not take it out of the guest statute, then most surely in a criminal case where intent must be proved or presumed from the acts, then a momentary increase of speed alone should not make a person guilty of the offense.

A very interesting case is *Roberts vs. Brown et al*, California February 7, 1949, 9 P2d 288. In this case the plaintiff claimed that the defendant was driving 60 miles per hour and he requested him to slow down and that he did slow down to 50 miles per hour and rolled the car over and the people were hurt. The court, on page 291, summarized a lot of cases that had been determined in California, and we have:

"(2) From the foregoing summary, it appears that the premise upon which plaintiff bases his claim of wilful misconduct of defendant is the speed at which defendant drove. Excessive speed alone, unattended by circumstances indicating an intention to injure, or a wanton disregard for the safety of, the guest, is insufficient to constitute actionable wilful misconduct. The fact that a motorist in a Cord car raced at 73 miles per hour, in a fog, drove on the left side of the highway near a "slow" sign to pass another speeding car and then returned to the right-hand lane where his Cord collided with a Dodge standing across the highway did not constitute wilful misconduct and judgment for defendant notwithstanding the verdict should have been entered. *McLeod v. Dutton*, 13 Cal. App.

2d, 545, 57 P2d 189. Where a driver proceeded at 60 miles per hour and the road was fifteen feet wide and was bounded by soft shoulders and the guest remonstrated at the defendant's attempt to pass a car, defendant continued laughing at and ignorant of her perils, it did not appear that she knew or should have known that injury was probable. *Hall v. Mazzei*, 14 Cal. App. 2d 48, 57 P2d 948. A driver, 21 years of age, had been driving six years; he proceeded on a wet, slippery pavement at 35 miles per hour; his car, in good condition, did not skid until he turned to avoid an approaching car when it ran off the highway and got out of his control and overturned. He thought he could drive safely but did not believe "that any serious injury was probable." Although he was mistaken and although "he may . . . have disregarded the possible consequences of his act, such disregard was due to carelessness rather than to wantonness and recklessness, and was undoubtedly based upon his belief that no injury was probable." *Howard v. Howard* 132 Cal. App. 124, 22 P2d 279, 281. Another driver neglected to inspect his truck after notice of a defective rear end, and while descending a 6 per cent grade at 20 miles per hour, something suddenly gave way. The truck proceeded with motor compression. He lost control, became frantic, and the truck jumped the bank, overturned and the driver and his guest were both injured. It was held that no wilful misconduct was shown. *Turner vs. Standard Oil*, 134 Cal. App. 622, 25 P2d 988.

"(3) It must be shown that "such acts were done under circumstances disclosing knowledge, express or to be implied, that an injury to a guest will be a probable result." *McLeod v. Dutton*, supra (13 Cal. App. 2d 545, 57 P2d 191). The factors necessary to prove wilful misconduct are (1) that the driver intentionally did something in driving that he should not have done or

(2) that he failed to do what he should have done, under the circumstances express or implied "that an injury to a guest will be a probable result." *Hall v. Mazzei*, supra (14 Cal. App. 2d 48, 57 P2d 950); *Turner v. Standard Oil* supra. For an act to be wilful misconduct, it must be an intentional act with a knowledge, that serious injury is a probable result, or an intentional act with a wanton and reckless disregard of its possible result. *Howard v. Howard*, supra. "Such intent and knowledge of probable injury may not be inferred from the facts in every case showing an act or omission constituting negligence. . . ." *Meek v. Fowler*, 3 Cal. 2d 420 at page 426, 45 P2d 194 at page 197. Where excessive speed appears to be attributable to a lack of care and not to a disregard of the probable consequences, the driver is not guilty of wilful misconduct. *Lennon v. Woodbury*, 3 Cal. App. 2d 595, 40 P2d 292. "The mere failure to perform a statutory duty is not, alone, wilful misconduct. . . . To constitute 'wilful misconduct' there must be actual knowledge . . . of the peril to be apprehended from the failure to act . . . to the end of averting injury." *Wright v. Sellers*, 25 Cal. App. 2d 603, 608, 78 P2d 209, 212.

(7) Therefore, the defendant, though negligent, could not be said to have intended probable injury to his guests. They were congenial friends, enjoying together the harmony of a convivial evening; traveling to a place where they proposed to extend its delights. With no houses to the south; no traffic to reckon with; with a dangerous jog in the curb concealed from view by aeolian deposits; with no lines to guide, no signs or markings to warn of the lurking dangers, the slightest neglect might have resulted in disaster. But while it was a situation that might have required extraordinary care to insure ones own safety, there was nothing to indicate that defendant knew that injury to his guest would probably result from his thus driving along said

approach to said intersection. *Turner v. Standard Oil*, supra. Certainly, a jury's finding that he intended no such mischief or that he did not proceed wantonly is abundantly justified."

There is another case that is practically identical with the facts that we have in this case, but was civil in character and not criminal. As I said before, a criminal case should even be more favorable to my client, than a civil one. This case is *Gill v. Hayes*, 108 P2d 117, Oklahoma, 1940, where they applied the New Mexico law. The facts of this case were: That the plaintiff was a guest in the defendant's car. Plaintiff alleged that the defendant drove the car in the night time upon a curved pavement, 70 miles per hour, in violation of the maximum speed without being able to see curved condition of the road and while the same was damp, wet and slippery, without tires equipped with proper treads or chains and without proper brake adjustments. The car hit the curve, the brakes were applied and it rolled several times. Several other people were in the car, besides the plaintiff and defendant, who were going on a trip. The court said on page 120:

"(2) Nearly all the courts passing upon this identical statute have held that the word "heedlessness" as there used is to be read in connection with "reckless disregard of the rights of others" and that in order to create liability, the acts of the operator causing the accident must be something beyond mere negligence; and something approaching wilful or wanton misconduct.

The only respect in which the attitude of one whose acts are in heedless and reckless disregard of the rights of others is less blameworthy than that of the inten-

tional wrongdoer is that instead of affirmatively wishing to injure another, he is merely willing to do so.

The evidence in this case shows that plaintiff and defendant were friends of some years standing. They had taken a number of automobile trips together, sometimes the one and sometimes the other being "guest rider." There was riding with defendant, besides plaintiff, his wife, his sister and his cousin, all alike his guests.

We would not hesitate to hold that there was evidence sufficient to require submission to the jury were it only a question of defendant's negligence.

(3) Measured by the construction of every other court which has construed the statute we are unwilling to say that the evidence in this case, though sufficient to show negligence in its ordinary sense, was sufficient to show a willingness to inflict injury on plaintiff or any of his other guests.

There is a California case with facts a good deal like ours, which is *Katz v. Kupp*, 112 P2d 681, California 1941. The facts in that case are that plaintiff drove a coupe with two guests at 2 A.M. upon a wide paved boulevard. The weather was clear and dry and the moon bright and he was going in excess of 70 miles per hour. He hit a curve and ran off the road because of speed. The plaintiff claimed the accident was the result of defendant's wilfull misconduct. The court said on page 282, right hand column:

"(6) Wilful misconduct is not to be inferred from the circumstances detailed in this case. Where a motorist had been requested to reduce his speed, raced with another car at a speed exceeding 50 miles per hour on a foggy night, pulled to the wrong side of the road at a speed of 73 miles per hour, intentionally

disregarded the "slow" sign to pass his rival in the race, then collided with a third car crossing the highway, it was held that these facts, standing alone, did not constitute wilful misconduct. Under such circumstances, the record must further show that such acts were done under circumstances disclosing knowledge on the part of defendant that an injury to his guest would be a probable result. *McLeod v. Dutton*, 13 Cal. App. 2d 545, 57 P2d 189. This and kindred authorities establish the law to be that, in the absence of proof of (1) a positive intention to injure his guests, or (2) his wanton disregard for their safety, the fact of his driving at an excessive speed on a dry, wide highway, free of traffic in the early hours of the morning, in the bright moonlight, even though objections were voiced to the rate of his travel, will not establish wilful misconduct. *Newman v. Solt*, 8 Cal. App. 2d 50, 47 P2d 289; *Hall v. Mazzei*, 14 Cal. App. 2d 48, 57 P2d, 948; *Lennon v. Woodbury*, 3 Cal. App. 2d 595, 40 P2d; *Robertson v. Brown*, 37 Cal. App. 2d 189, 99 P2d 288.

(7, 8) Admitting the truth of plaintiff's evidence, as we must (*Marchetti v. Southern Pac. Co.*, 204 Cal. 679, 269 P. 529) they did not establish wilful misconduct on the part of the defendant. The facts are clear and from them only one inference can be drawn. Hence, the issue became one of law to be determined by the trial judge."

While I have used cases involving the guest statute, we do have a Colorado case reported in 1956, *Trujillo vs. People*, 292 P2d 980, that laid down the rule that: The same degree of negligence is required to sustain a charge of manslaughter as is necessary to support the recovery in an action for damages under automobile guest statute, the essential element in each instance being a wanton and wilful disregard of the rights and safety of others.

Consequently, I have to say that the complaint, as set out, when considered with the bill of particulars, did not in and of itself state an offense against the defendant.

POINT II

THE TRIAL COURT ERRED IN NOT GRANTING THE DEFENDANT'S MOTION FOR DISMISSAL FOR FAILURE TO PROVE A CAUSE OF ACTION OR ERRED IN NOT GRANTING DEFENDANT'S REQUESTED INSTRUCTION NO. 1 FOR THE FOLLOWING REASONS TO-WIT:

(a) THAT THE TESTIMONY OF THE OFFICERS WAS CONFLICTING.

(b) THAT PHYSICAL EVIDENCE OF THE OFFICERS PRESENTED AND PARTICULARLY AS TO MEASUREMENTS ALLEGEDLY TAKEN AT THE SCENE OF THE ACCIDENT WERE PHYSICALLY IMPOSSIBLE TO BE AS ALLEGED.

The writer will take up (a) and (b) of Point II first:

Officer Blair stated (Tr. 42-3):

"A. After we walked back to the marks that we observed prior, I went over in my car and picked up a red crayon and the other officers remained there at the marks. I went back over, and to the best of our ability we marked those right at the very end where they appeared to start and where they finished, so that I could find them easier."

"A. The two marks were the marks left by the right side wheels of an automobile." (Tr. 43-22)

"A. Yes, these marks were—they were two inches wide.

Q. They. Now you say "they." How many of them were there?

A. There were two marks. Two marks. They appeared to be almost identical, except in length and—

Q. Almost identical except in length?

A. Yes." (Tr. 44-3)

"A. They were eight inches apart.

Q. Eight inches apart. And could you describe or step to the board and draw it for the jury what you saw, or in other words to give the appearance of these lines?

A. Refer to this as the curve and the south side of the road. This here is the south shoulder as the road proceeds east. These marks that I observed were located to the right side of the road or the south side of the road running parallel to one another." (Tr. 44-25)

"A. The right mark or the south mark, which was twenty inches longer in length and the inside—

Q. Twenty inches longer?

A. I should say it started twenty inches prior to the second mark." (Tr. 62-19)

"A. And the total length of that mark was 57-10. That's where it went off the road, with no further contact with the mark on the road. (Tr. 62-27)

"A. The other mark, as I say, was twenty inches—started twenty inches prior—or after the first mark, was seventy-seven, six total contact with the road. (Tr. 63-4)

"Q. Did you make any measurements with respect

to the mark that was inside or closer to the center of the highway then?

A. It was measured, as I say, at the same time, measurements, this mark run parallel to this one. This one here was used in preference to this one for a particular reason.

Q. Well, we're not interested in the reason. Just tell us what you did.

A. The arc of this one was not figured, only this one, but there were measurements made between to show they were parallel and equal.

Q. There were measurements made where?

A. Measurements of the total length, also in relation to this one. That they were running parallel and the distance between them was the same, eight inches all the way through.

Q. How many of those measurements did you make?

A. The measurements across was periodic. I didn't go ten feet. I'd go probably two steps. Approximately ten feet. And I checked it periodically all the way through to see if it did vary.

Q. Did it vary?

A. No." (Tr. 95-2)

The court's attention is called to the fact that the testimony is taken from the transcript given by Officer Blair on the marks that were supposed to be laid down. In summary, the right one starts first and travels 57 feet 10 inches before it leaves the oiled surface. The other, the left one, starts 20 inches up the road and 8 inches left and goes 77 feet 6 inches up the road before it leaves the oiled road. They are exactly 8 inches apart, according to Officer Blair, and this parallel distance continues

all the way through and the officer determined that both lines made the same kind of curve so he determined the arc of just the right line on the pure assumption that it would make no difference which line they used. On cross examination he was asked:

"Q. You want them to believe that these two lines as they proceeded, proceeded right parallel and they had the same degree of curve, both of them?

A. Yes, sir." (Tr. 129-4)

"Q. Now if I understand you, you only measured the right wheel?

A. For the middle ordinant, yes.

Q. You didn't measure the left?

A. No.

Q. You felt that it was exactly the same because the lines paralleled each other?

A. That's right.

Q. And they continued to parallel until it came right up and run off the cement?

A. Yes, sir." (Tr. 130-5)

It was then that he and Officer Lee were asked to plat on a large piece of paper on the floor in front of the jury, defendant's exhibit No. 21, to a scale of one inch equals one foot.

The officers drew a straight line on a long piece of paper (Tr. 131) which would represent the south edge of an oil strip of road, if the road were in a straight line running east and west. The officers were then requested to step to the board and on their own exhibit No. 14 made by them of the accident

scene, they laid a ruler parallel and along the south edge of the oiled road at the point where their exhibit shows the car wheels leaving the road. The ruler being straight could not follow the curve of the road, but would represent the south side of the road if the road were straight. Then from this straight line they measured left to the beginning marks that they had platted on their Exhibit No. 14 and the distance scaled 12 feet. They were then requested to put the first distance reported 57 feet 10 inches on the larger scale (Tr. 135-28) to a point where it would cross off the edge of the oil. This was the right rear tire and a straight line was drawn and then (Tr. 136-137-138) the four inch ordinate was laid off on a cord of 55 feet of the first part of this line. Next the other purported tire mark was platted on the big scale (Tr. 138-139) and when they platted it starting 20 inches further up the highway and 8 inches left of the first mark, if it remained parallel and the distance was 77 feet 6 inches where it was supposed to leave the oiled surface we found it was utterly impossible for it would put the nose of the car down into the barrow pit (Tr. 139-19). The front wheel is approximately 10 feet in front of the back wheel and if it stayed upon the oiled surface and did not leave the oil for an additional 22 feet, see Exhibit No. 21, then it would be physically impossible for the two tire marks to be parallel. In summary, we could say: The left front tire mark made by the right front tire, if it stays parallel and 8 inches to the rear of the right rear wheel for 57 feet 10 inches as testified by Officer Blair (Tr. 95-13-15) would have to leave the oiled road just a little further up the road. Just a little over eight inches from where the rear tire left the road, or the two marks were not parallel.

Consequently the marks would have to continue to get wider apart with the rear of the car moving further to the right until it goes off the road and the front of the car staying on for approximately 22 more feet.

The officer, after further cross examination, was asked a question about the wheel base of this car, which was actually 119 inches or one inch short of ten feet and then was asked:

“Q. So that the front wheel, as it lays down its mark, is ten feet ahead of the rear wheel, is it not?

A. Approximately.

Q. And if it were right up here uniform and laying down a mark and on the same curve that you have, if there were ten feet on it, and if it were on the same curve right up to the fifty-five feet, it would have to be on the gravel, would it not, at the time the rear one laid the same mark down?

A. That would be difficult to answer. If you're figuring the road as perfectly true, that may be right.

Q. Sure.

A. If the edge of the road is perfectly straight.

Q. But I take it from your statement now that they were laying these marks down and they were traveling, and if those marks were right there when you got up to fifty-five feet, that front of that car has got to be out across the oil on the side, has it not? With ten feet more length?

A. I don't know.” (Tr. 153-16)

I believe the officer at this point was telling the truth when he said “I don't know.” The recordings of the measurements taken show beyond all doubt that there was a grave

error in them some place, and with this error so apparent the court should not have allowed the jury to speculate upon it, and to use these figures as the basis for Dr. Wood's testimony.

POINT II

(c) THE TESTIMONY OF DR. WOODS, A PHYSICIST OF THE USU, WAS BASED UPON A FALSE PREMISE, TO-WIT: THAT THE MARKS WERE LAID DOWN WHILE THE CAR OF THE DEFENDANT WAS TRAVELING FREE OF SKIDS OR BRAKES ON THE CIRCUMFERENCE OF A PERFECT CIRCLE FOR A DISTANCE OF A FIFTY FIVE FOOT CORD ON SAID CIRCUMFERENCE.

(d) THAT THE TESTIMONY OF DR. WOODS WAS HIGHLY SPECULATIVE AND CAUSED THE JURY TO BE INFLUENCED AND SPECULATE ON ITS VERDICT. Both points will be covered in the argument at the same time.

To set this case up for the physicist some groundwork had to be laid and of course it is this 55 foot cord on a purported circle that the officer was trying to work into. On page 182 of the transcript and beginning with line 2, we have:

"Q. Well, you were measuring the outside mark on the theory that I'm going to establish the diameter of a circle, are you not?

A. Yes.

Q. And you're fixing that diameter in regard to the radius of the center of the circle?

A. Yes."

The officer was further interrogated as to whether or not the car had to be travelling this circle, and as to whether or not braking, letting up on the gas, or even slight braking would have an effect. Then on page 183 of the transcript he was asked if he subscribed to the findings of the Traffic Accident Investigation Manual for Police, put out by the Traffic Institute of Northwestern University. Then on page 184, line 23 of the transcript, we have:

MR. MANN: Article five-two-four-fifty, I'm giving you, page 433, and I'm reading in the middle of the article on the left side column of the two-column page: "If brakes are applied even a little the vehicle will slide at a lower speed, because both the curve and the brakes tend to make it slide. If the skidding occurs only when brakes are applied, the estimate of critical speed has little meaning." Do you subscribe to that theory?

A. I wouldn't attempt to argue with the book." Consequently we have this, there are two marks left, both on the right side of the vehicle. The front tire mark is laid down to the left of the rear tire mark. We know nothing about the position of the other two tires. The officer was asked in transcript 189 line 16:

"Q. And can you say that if a car travels down the road and there's a slight mark with the right wheel, it won't show up in a photograph at night, that the left wheel is off the ground?

A. That would still be my assumption, yes.

Q. That's a plain assumption, isn't it?

A. That's my opinion, yes.

Q. Just speculation, isn't it?

A. I wouldn't hardly say it was speculation.

Q. Well—

MR. CALDERWOOD: He asked him the question and got his answer. I object to the repetition.

THE COURT: Go ahead.

Q. You weren't in the car, were you?

A. The car that was damaged?

Q. Yes.

A. No, sir.

Q. You didn't see the accident?

A. I sure didn't.

Q. You just saw some marks after?

A. Yes, sir.

Q. And you want to conclude that the left wheels were off the ground

THE COURT: Off the—

Q. Off the oil.

A. As I say, I do not know. There were no marks visible. Whether they were off or not I don't know.

Q. And they could have been on?

A. It's possible. I don't know. There were no marks to indicate that they were."

Dr. Wood was later brought on as the expert witness, and over defendant's objections and commenced to tell about certain tests on the vehicle at the USU campus. These tests included the turning of the vehicle at a sudden turn laying down some marks upon the highway, and the taking of certain measure-

ments to one of the tire marks laid down under said tests. On page 278 of the transcript, line 22, we have:

“Q. When you speak of a cord of the first and the last, which wheel did you follow to establish that cord?

A. The right front, I believe it was.

Q. Right front?

A. Yes.

Q. Did you follow the right rear wheel?

A. I didn't think that was necessary, because by observation these were parallel, and parallelness can be detected quite accurately.

Q. Which wheel made the biggest arc?

A. Which wheel made the bigger arc?

Q. Yep.

A. I believe it was the right rear.

Q. Made the bigger arc?

A. Yes.

Q. Now, doctor—

A. I don't know. I say I believe it was the—

Q. Now you've been teaching physics all these years and you don't know which wheel makes the bigger arc?

A. The arc that we measured was the one nearest the center of the curve.

Q. You don't know which wheel made it?

A. No.

Q. Well, then was your test effective? You've got two arcs there, haven't you?

A. That's right.

Q. And one is made by the front wheel and one by the back?

A. That's right.

Q. And they have to be in certain positions, don't they?

A. Yes.

Q. And you say you measured the smaller or the larger?

A. We measured the smaller one.

Q. And you say you thought that was the front wheel?

A. I thought so, yes. I didn't check it.

Q. (Drawing on the blackboard) Well, now, this car has wheels in the front and it has wheels on the back, doesn't it? That's your measurement.

A. Yes.

Q. The black wheels run throughout a solid axle, don't they?

A. That's right.

Q. They can't turn?

A. That's right.

Q. The front wheel has to turn?

A. Which is front and which is back?

Q. The car going in that direction (drawing). Now, when that car starts to make a turn, it does it on the

bases where we're going to find the center of that radius in relation to a horizontal line?

A. Yes.

Q. And that's run through the back wheels, isn't it, the solid part?

A. If we're measuring those, yes.

Q. Now when those front wheels turn and we decide to determine the way that car is going, we create a triangle with the use of that car as a base, do we not?

A. This can be done, yes.

Q. Well, that is done, isn't it, in any curve, any driving of that automobile?

A. I don't follow that at all.

Q. Well, if this car starts to turn and comes around in this circle (illustrating on the blackboard), these here are going to go this way, are they not?

A. Yes, I believe they would.

Q. And the front wheel has always got to be to the right of the rear wheels, is that correct, so we get it in the record?

A. Yes, I presume that's correct.

Q. So that all the tests that you made up here, doctor, would be that the arc of the front wheel was the outside and the arc of the rear wheel was inside; is that correct?

A. Will you state the question again?

Q. Well, any turning of the curve that you made up here on your test, the arc of the—the curve that the outside front wheel would make would be outside of the curve or the outside of the back right wheel?

A. Yeah.

Q. Just like I've drawn it?

A. Yes.

Q. If I take it out and drive it in the snow it will do that same thing, won't it?

A. Yeah.

Q. And the reason for it is that we have old triangle question. We start out here with this as the base, this is the right side and this is the hypotenuse and right out here to the front wheels is going to be a longer distance than the point where we hit the center of the radius, isn't it?

A. That's right.

Q. Now, doctor, do you know whether or not this curve that these people have brought in to you was made by the right wheel or the left wheel and which side they had them on?

A. I was not concerned with that.

Q. Now if they have the wrong wheel on the wrong side they're in a skid rather than in a—

A. Oh, certainly not, no. You haven't made this a skid.

Q. No, I've done it just like you've drawn it.

MR. CALDERWOOD: Who drew it?

A. I didn't draw it.

Q. Just like I've drawn it, and I've drawn it just like a car will turn without skidding.

A. Yes.

Q. Now, if I'm going to have this tire on the inside, I've got to have my car pointed the other way when

I start this circle. So that this tire will be on the outside and I've got to skid rather than drive it, have I not, to have the rear wheel outside of the front one?

A. If you want to set up those conditions, I presume you'd do that."

Consequently I would say this, that Dr. Wood came in with only one thought in mind, that is: The assumption that the car was travelling, speeding around the outside of a circle, not skidding in any way, travelling exactly as a car would if it is being driven not if it is in any type of skid. He admits upon the blackboard after the matter has been brought to his mind for the first time, that the front wheel in any kind of a turn, due to the fact that the turning is made from the front wheels alone and is turned through solid back wheels that a triangle is formed, and that the outside front wheel will make a larger circle than the outside rear wheel, so that if the car is traveling freely, but not skidding the front wheel must be on the outside of the circle and not be inside as the officers had testified.

From a check of the transcript you will discover that the doctor went on and testified, basing his theory entirely upon the fact that the car was speeding; travelling around a curve and travelling at such a speed as to lay down tire marks with the outside tires from speed and not from skids. The court allowed him, over the defendant's objections (Tr. 292, line 17) to testify as to the speed of this vehicle, based upon testimony and marks which show conclusively that the marks were either from skids or brakes or both. One line 24, page 292 of the transcript he testified 110 miles an hour as the minimum speed and he sets out his theory (Tr. 293, line 27) and gives the

radius of the circle (Tr. 296, line 18) as 1134 feet. He admits (Tr. 297) that if the officer made a slight mistake in measuring the ordinate of the arc, that the radius could be reduced 200 feet by one inch error. He admits (Tr. 300 line 2) that the radius of the curve actually on the road was 717 feet. He admitted (Tr. 301) that with the shorter radius as compared to a larger radius, that a car travelling at the same speed would lay a mark down quicker on the shorter radius of the curve yet that there were no marks on this particular curve, which has been negotiated practically to its conclusion with a radius of 717 feet until all of a sudden some slight marks show up and he tells us that the radius of that mark is 1134 feet. Consequently we would have to conclude that in this particular case, the driver went around a sharp curve without leaving a mark and all of a sudden went into a big wide open curve and left a mark. Common sense tells us these marks made by tires on one side which are crossed from normal driving could only happen from one thing, and this is the skid, or brake pedal (Tr. 302).

The doctor was further examined (Tr. 303 line 13):

"Q. Now I've got to go back to that formula, doctor, if that's the case. The formula that you gave me the other day, you figured 133 miles, did you not?

A. Yes.

Q. Now, you figure a hundred ten—

A. Now refresh my memory on this.

Q. Well, you were sworn over to the preliminary hearing.

A. Yes.

Q. And you brought a formula forward, and in that formula, on page sixty-eight, line twenty, you testify as to speed of that automobile, didn't you?

A. Yes.

Q. And you brought a formula forward, and in that formula, on page sixty-eight, line twenty, you testify as to speed of that automobile, didn't you?

A. Yes.

Q. And at that time you had 133 miles?

A. Yes, I believe so.

Q. And they asked you this question: "Now, assuming, doctor, that the radius, or curvature, of a tire mark by a motor vehicle is 1134 and so on . . ." and what is that opinion? Answer: 133 miles per hour." That's correct, isn't it?

A. There were some other conditions associated with that, I think.

Q. Well, you did give that speed, 133 miles an hour, didn't you?

A. There were some other conditions.

Q. You can answer my question. You gave that as the speed?

MR. CALDERWOOD: Well, I object to it as irrelevant and immaterial. It's not the same form of question.

MR. MANN: Well, we've now had our speed reduced to 110 and it was 133 over there.

MR. CALDERWOOD: Well, I object to this as immaterial argument to the jury. The factors which the doctor took under consideration are not shown to be the same.

THE COURT: You'll have to prove that. He can ask him if he testified to that over there.

MR. CALDERWOOD: Well, it's immaterial what he testified to.

MR. MANN: It is not immaterial.

THE COURT: Go ahead.

A. This was one of nine values that I reported, I believe.

Q. You even got it up to 160 miles over there, didn't you?

A. That's right, yes."

There was diligent cross examination thereafter as to shifting of weights; the various speeds and how he reached them and in transcript 309 line21 , we have this question:

"Q. No, I'm asking you. I don't care whether they asked you. You don't know yourself whether there was any weight on the left wheels touching the cement; is that it?

A. No, I don't know whether there was any weight or not.

Q. And you don't know whether there was any weight tipped up on the car so that it was on two wheels and the car was tipped up at forty-five degrees or something of that nature?

A. No.

Q. So that you have to assume whether the car was up in the air or down and actually touching on the left wheels?

A. Yes."

The defendant employed a Mr. Keith A. Hansen, a professional engineer, to make a complete survey of the scene of the accident. His qualifications are set out on page 364 of the transcript. He was asked if he could plat the two lines that the state were relying on on his Exhibit No. 36 (Tr. 367-368) and he advised that you could not keep them parallel and still cause them to go off the cement at the points designated without some sudden change taking place. He was asked to plot on his exhibit a circle with a radius of 1134 feet (Tr. 371) through the purported tire marks and see if that course were followed if the same would follow the road, which it would not. One of the officers had suggested that the car cut corners, that is, did not follow the true radius of the road, but went from the outside to the inside and back to the outside. Consequently I had the engineer plot a course on his exhibit (Tr. 372-3) with variations of travel and had a radius varying between 663 and 758 feet as compared with Dr. Woods of 1134 feet. He was also asked about the position of tire travel, in regard to the front and rear wheels on the right side of a car travelling in a circle, with a radius of 78 feet (Tr. 374) and he said the right front tire would be to the left of the right rear tire eight inches. The position of these tires is just opposite than in our case. He was also asked about the position of the tires of a car travelling in a circle with a radius of 1134 feet (Tr. 374) and the right front tire would be approximately one inch on the outside of the right rear tire. He was asked, (Tr. 375-27):

“Q. From a mathematical equation, Mr. Hansen, can you compute the travel of a vehicle with a radius of 1134 feet and have the back wheel traveling eight

inches on the outside of the front wheel, for the whole distance, without assuming—

A. Not without assuming something.

Q. And what do you mean by that?

A. In order for the rear wheels to get on the outside of the front wheels, some forces had to act on that vehicle or that body to change its position. I would have to assume that the force had acted and then was remaining constant throughout the path.

Q. And held it there?

A. And held it there, yes.”

See a further explanation in transcription 387-388.

The professional engineer for the defendant made up to scale a plastic shape of an automobile 17½ feet long with holes in the approximate location of the tires and the tires the approximate width of the automobile. A demonstration was made on Exhibit 21 by placing a pencil in the position of the two right wheels (Tr. 407) and moving it along the course that the Officer Blair had testified that the car had taken. The front wheel would of necessity reach the edge of the oiled road first, and in order for it to stay on it would have to make a sudden change in direction with the front so that it would go up the hard surfaced road another approximate 22 feet.

Consequently the testimony of Dr. Woods was based upon a false premise to-wit: That the car was traveling on the outside of a circle with a radius of 1134 feet without the side skid or brake being applied; that it held that course while traveling in a normal manner and that the marks left were the result of side pressure created from an even speed being held uniformly

throughout the distance; that the speed would vary from 110 to 160 miles per hour. That the many controversies in the testimony of the officers and the measurements taken together with the fact that the car, as it left the oiled edge, was going into a right side bank (Tr. 79-28) prove that the permise was false and full of speculation. This spirit of speculation became the prevalent theme before the court and the jury took it with them to the jury room.

POINT II

(e) THAT THERE IS NO TESTIMONY IN THE RECORD THAT THE DEFENDANT EVER EXCEEDED THE SPEED OF 65 MILES PER HOUR IN A POSTED 60 MILE DAY SPEED ZONE AND THEN SUCH SPEED WAS ONLY MOMENTARY. THAT SPEED ALONE OF THIS SLIGHT VARIATION FROM THE POSTED SPEED IS NOT "RECKLESS DISREGARD OF THE SAFETY OF OTHERS."

(f) THAT THE ACCIDENT WAS THE RESULT OF A MOMENTARY INDECISION OF THE DRIVER AFTER HE REACHED GRAVEL DEPOSITS NEGLIGENTLY LEFT BY HIGHWAY OFFICIALS IN THE "Y" OF FORKING ROADS AS TO WHICH WAY THE ROAD WAS GOING. THAT SAID ACT WAS AT MOST NEGLIGENCE AND NOT HEEDLESS DISREGARD FOR THE SAFETY OF OTHERS.

(g) THAT THERE IS NO EVIDENCE IN THE RECORD OF A HEEDLESS DISREGARD OF THE SAFETY OF OTHERS IN THE DRIVING OF THE DEFENDANT.

I have set out in detail in the statement of facts the statement of Mr. Berchtold that he never once looked at the speedometer. That he did not believe that it was over sixty five miles per hour, if it were that fast. Officer Bair claimed that when he first talked with Mr. Berchtold, that Berchtold him that he was going seventy, but that in his written statement he said 65 miles. When Mr. Berchtold was placed on the stand he was asked if he made a statement to Officer Bair, about driving seventy miles per hour and he said: (Tr. 424-11) "No. I says, I don't think I could have possibly been going more than seventy miles an hour. I never stated the speed of seventy miles an hour."

The evidence is uncontradicted that up to just a moment or two, before the accident, they were driving slowly. That one of the passengers said the other girl would be in bed if they didn't pick up the speed. That the passengers were looking at the Thiokol badge of the Forrest boy, which was in their hands, and this badge was found at the scene of the accident. That it was just an ordinary night where three young people were very happy the moment before, but when they came down across the bridge into a division of the roads where one went left and the other right at slight angles from each other, with loose gravel out in center of the fork, that just one moment's hesitation made it so that the car reached the loose gravel before a decision to turn left was made. Then either from the loose gravel, the touching of the brakes, the turning of the steering wheel in connection with these, the car skidded own the embankment and struck a telephone pole and the scene of joy and merriment changed to one of tragedy. There is no recklessness and show-off-ness. There is a slight

picking up of speed with indecision and perhaps poor judgment being exercised, after the loose gravel was struck and the car turned to the left. Where, under all of these stated facts, was the conduct showing a marked disregard for the safety of others, as required under *State vs. Adams*, 125 P2d 430? There is none.

POINT II

(h) THAT THE COURT, AFTER ALLOWING HIGHLY SPECULATIVE EVIDENCE TO BE INTRODUCED TO THE JURY, WAS OBLIGATED TO TAKE SAID CASE FROM THE JURY TO PROHIBIT THEM FROM SPECULATING IN MAKING THEIR DECISION.

The court in instruction No. 6 (R. 30) in the last paragraph said:

“You are not to indulge in speculation or guesses as to the cause of the accident, or how or in what manner it originated, but you are to determine this cause solely upon the evidence presented. If you are required to resort to speculation as to any factual issue to be resolved by you, then reasonable doubt exists in your mind as to the facts, and you should resolve that issue in favor of the defendant.”

It is the contention of counsel for the defendant that the court understood the law and instructed the jury that they should not speculate. But this is like locking the barn door after the horse has been stolen. If Dr. Wood's testimony was stricken then they had no case whatsoever to stand on, as to speeds as set out in the bill of particulars, when they said in

excess of seventy miles per hour. However, with Dr. Wood's testimony based upon assumptions, speculations and false measurements, it set the stage for the jury to carry on in the same manner. No amount of instruction could have warded it away. We are in a small town; feelings are high; two people lost their lives; someone should pay and an excuse is all that is needed. It takes four days to try the case but only forty minutes to walk out and come back with a verdict. Consequently, I say that the court saw the situation and he should have taken it away from the jury and directed a verdict of not guilty.

POINT III

THAT THE TRIAL COURT ERRED IN FAILING TO GIVE, IN ITS ENTIRETY, DEFENDANT'S INSTRUCTION NO. 10 FOR THE REASON THAT SAID INSTRUCTION IS A TRUE STATEMENT OF THE LAW AND THE JURY SHOULD HAVE BEEN PROPERLY INSTRUCTED UPON IT.

Instruction No. 10 was requested for the reason that at the present time many jurors do not understand the difference between negligence and the reckless disregard for the safety of others, which means wilful or wanton misconduct. It was prejudicial error to fail to give this instruction as requested. It would have then made it possible for counsel to point out clearly to the jury the difference in this criminal proceeding. When the court refused to give it, it prejudiced the rights of the defendant. See *Schulz v. Fible*, 48 NE 2d 899.

CONCLUSION

We believe sincerely that the defendant was not charged properly under the information as modified by the bill of particulars. That the testimony of the officers was conflicting as well as their measurements. That the testimony of Dr. Woods was based upon a false premise and caused great speculation. That the case should have been taken from the jury and the defendant found not guilty. That the defendant was denied a substantial right when the court refused to give the jury defendant's instruction No. 10.

Respectfully submitted,

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