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Duane Roylance v. Stephen L. Davies : Brief of Defendant and Appellant

IN THE SUPREME COURT
of the
STATE OF UTAH

DUANE ROYLANCE,
Plaintiff and Respondent,
- vs. -
STEPHEN L. DAVIES,
Defendant and Appellant.

Case No.
10641

BRIEF OF DEFENDANT AND APPELLANT

Appeal from the Verdict and Judgment of the
Fourth District Court in and for Utah County
The Honorable Joseph E. Nelson, *Judge*

SKEEN, WORSLEY, SNOW &
CHRISTENSEN
701 Continental Bank Building
Salt Lake City, Utah
*Attorneys for Defendant
and Appellant*

RAY H. IVIE
48 North University Avenue
Provo, Utah
*Attorney for Plaintiff and
Respondent*

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NATURE OF THE CASE

This is an action for personal injuries suffered by a guest arising out of a collision of the host's automobile with a steel pole.

DISPOSITION OF LOWER COURT

The case was tried to a jury in the District Court of the Fourth Judicial District in and for the County of Utah. From a verdict and judgment for the plaintiff, defendant appeals.

RELIEF SOUGHT ON APPEAL

Defendant seeks reversal of the judgment and judgment in his favor as a matter of law, or that failing, he seeks a new trial.

STATEMENT OF FACTS

On December 25, 1964, at the time the accident occurred, Roylance and Davies had known each other for about a year and were good personal friends. (R. 100) Roylance worked mostly at night as a bartender and Davies had a key to Roylance's apartment where he could stay if he wanted to and which he did occasionally. The day of the accident was not the first time that Roylance had ridden with Davies and he had always found him to be a capable driver. (R. 101) At the time of the accident Roylance was employed as a bartender at the Nugget Lounge and he was due at work on the day of the accident at approximately 5:30 p.m. (R. 91)

On the day of the accident it had been storming most of the day; some light snow was falling and the streets were wet. (R. 83) Davies picked Roylance up at about 2:00 or 2:30 p.m. to drive to Orem to visit some friends. (R. 48) Their friends were not at home when they reached Orem so they stopped at the Imperial Lounge in Orem and had two light drinks of whiskey. Prior to this time Davies had had nothing to drink that day.

(R. 49) They arrived at the Imperial Lounge at 3:00 p.m. and after two drinks they left to drive back to Provo so that Roylance could go to work at the Nugget. As they drove past the Nugget, located north of Provo on U.S. Highway 91, the boss or whoever was to open up had not yet come so Roylance and Davies decided to drive over to the Veterans' Club for a few minutes to wait. They stayed at the Veterans' Club for one quarter to one half an hour. (R. 50) While at the Veterans' Club, Davies had one drink which he did not finish.

The Veterans' Club in Provo is located on Columbia Lane. After they had been there just a short time, they left to take Roylance to work. They proceeded on Columbia Lane down to Riverside Avenue and turned east up Riverside Avenue toward U. S. Highway 91 which runs generally north and south. (R. 51) As they approached the intersection of Riverside Avenue and U. S. Highway 91, they noticed that the traffic was heavy in both directions along the highway. (R. 56) Davies pulled up and stopped at the stop sign at the intersection. (R. 93)

At this intersection Riverside Avenue intersects the highway at approximately a sixty degree angle. The highway traffic lines are painted with two four-inch yellow lines on each side of a four-foot median in the center. The highway has two traveling lanes in each direction. There is a break in the lines at the Riverside Avenue inter-

section. (R. 40) The two southbound traveling lanes a each 11 feet in width, making a total of 22 feet and fr the western edge of the southbound traveling lane to t curb is an additional 30 feet, making the curb a dista of 52 feet from the center of the highway. (R. 35, 3 Steel street light poles are approximately 15 feet fr the curb on the west side of the highway and approx mately the same distance from the west edge of t southbound traveling lane.

To reach the Nuggett it was necessary to trav north from this intersection approximately 400 feet. A ter observing the heavy traffic in both directions o the highway, Davies decided not to cross the highwa but rather to drive along the west side of the highwa since he intended to buy gas at Reed's Service Stati located just south of the Nugget and drop Roylance the Therefore, he made a left-hand turn off Riverside Aven and proceeded up the west side of the highway. (R. 5

Davies had purchased gas from Reed's Service St tion many times prior to this accident. (R. 53) H normal route in traveling from his home to Reed's Ser ice Station was to come down Columbia Lane, turn ea up Riverside Avenue and then north along the west sid of the highway to the service station. (R. 70) Davi was familiar with the particular section of the road t the west of the highway. (R. 53) This area was sepa ated from the southbound traveling lanes of the high

way and was used extensively for vehicular traffic in and out of the businesses to the side of the highway. (R. 87)

Prior to the accident he had driven on this west shoulder in both directions and knew of the light posts. (R. 54) Reed's Service Station is approximately 100 feet beyond where the accident occurred. (R. 71)

The road surface between the face of the curb and the southbound lanes of the highway was gravel and dirt. (R. 72) The good asphalt surface of the highway extended to about the street light portion of the road. (R. 96) The accident occurred at approximately the south corner of the Commercial Tire Building. Reed's Service Station is the next building to the north and the next building to the north of Reed's is the Nugget Lounge where Roylance worked. (R. 87, Ex. P-1)

The alternative to using the west side of the highway was to make a left turn onto the highway, travel north to the next break in the center line which was well beyond the Nugget, make a "U" turn and double back south to Reed's Service Station. (R. 41) Riverside Avenue as it approached the intersection with the highway was up grade from approximately the market on the corner to the stop sign. Riverside Avenue was paved but there was loose gravel on the top of it.

automobile around a curve at a high rate of speed causing the automobile to overturn. In discussing the case this court accepted the instructions concerning willful misconduct given by the trial court which were:

> "The trial court, in its instruction No. 7 defined willful misconduct as 'the intentional doing of an act or intentional omitting or failing to do an act, with knowledge that serious injury is a probable and not merely a possible result, or the intentional doing of an act with wanton and reckless disregard of the possible consequences. It involves deliberate intentional or wanton conduct in doing or omitting to do an act with knowledge or appreciation that injury is likely to result therefrom.' The jury was further instructed in instruction No. 6 that 'willful misconduct connotes a greater wrongdoing than mere negligence or even gross negligence. It includes a conscious or intentional violation of definite law or rule of conduct with the knowledge of the peril to be apprehended from such act or failure to act.'"

Ricciuti v. Robinson, 2 Utah 2d 45, 269 P.2d 282 (1954) followed the basic interpretation of willful misconduct as was used in the *Stack* case, *supra.*

In the *Ricciuti* case, plaintiff and a girl friend met defendant and his friend at a tavern about midnight, and after making a round of several such places, and at about 3:30 a.m. the defendant drove the party over a canyon road to a dam and return to the city. The morning was dark, and although there was no snow on the streets, they were wet and a light snow was falling

Proceeding through a residential district where the speed limit was 30 m.p.h., and while the sleeping girl in the front seat had her head in defendant's lap, a lighted cigarette fell from the later's mouth into the folds of her clothing and in attempting to rid himself of it and while sparks were flying, defendant lost control of his car. It jumped the curb, traveled along the lawned parking 192 feet, jumped several other driveway curbs, sideswiped 2 trees, knocking the rear door off, returned to the highway and traveled another 183 feet before being stopped. There was evidence that defendant at one point on the parking applied his brakes, but there was no evidence of brake marks on the street either before the car jumped the curb or after it returned to the street. Over objection, a policeman was allowed to give his opinion that the car was traveling at about 60 m.p.h.

The plaintiff testified that defendant drove very carefully down the canyon, and that at the time of the accident she had no complaint as to the manner in which he was driving, and that she didn't think he was doing anything wrong. There was no evidence that any of the other occupants at any time complained of defendant's driving.

The Utah Supreme Court said at 283:

> "Under the facts of this case, a reasonable person could not conclude that defendant intentionally did or failed to do an act that would fall

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

* * *

"We are aware of the principle that ordinarily the matter of willful misconduct is a jury question, but not where the facts are such that reasonable minds could not conclude that defendant showed that type of intention or knowledge or indulged in that type of aggravated negligence necessary to creat liability on account of willful misconduct in guest passenger cases."

In the present case the most that can be said of the defendant's conduct is that he failed to see the cement abutment so as to avoid it. This certainly does not prove even gross negligence, to say nothing of willful misconduct.

Milligan v. Harward, 11 Utah 2d 74, 355 P.2d 62 (1960) involved a situation where the driver and guests had consumed an unascertainable number of beers during the evening and while traveling at an approximate speed of 35 miles per hour the driver turned his head and shoulders to the right to obtain a cigarette at which time the automobile collided with a parked truck. The only evidence of intoxication other than the consumption of beer by the driver was testimony of the investigating officer to the effect the driver immediately after the accident appeared to be under the influence of intoxicating liquor. However, the plaintiff and the other guest testified that the driver appeared sober and up to the point of impact drove in a reasonably prudent manner. This Court held that the evidence was insufficient to conclude that the driver was intoxicated and wholly deficient in proving that intoxication was the proximate cause of the accident.

> "Harward, in reaching for the cigarette, took his eyes from the road and it was at the precise time that the accident occurred. Taking ones eyes from the road under such circumstances is not inconsistent with sobriety."

The court in interpreting the "willful misconduct" language of the statute and holding that the driver's act in reaching for a cigarette could not be construed as willful misconduct stated:

> "Willful misconduct is the intentional doing of an act or in intentional omitting or failing to do an act, with knowledge that serious injury is a probable, and not merely a possible result, or the intentional doing of an act with one in reckless disregard of the possible consequences. Willful misconduct cannot be predicated upon mere inadvertence or even gross negligence."

In the present case, there was no claim that Davies was intoxicated nor was there any evidence of defendant's "wanton and reckless disregard of the possible consequences." He was only traveling at 20 to 25 miles per hour (R. 79) over a well traveled route which he himself had traveled many times before. (R. 70) In fact it may well have been the safer route since it eliminated a left turn on to the highway followed by a "U" turn to double back to his destination and all this upon a highway busy with holiday traffic.

This Court has indicated the degree of proof necessary to show willful misconduct in cases discussing the negligent homicide statute, 41-6-43.10, U.C.A., 1953. That statute applies to death caused by driving "in reckless disregard of the safety of others." In *State v. Berchtold*, 11 Utah 2d 208, 357 P.2d 183 (1960), this Court in

referring to the wording of the negligent homicide statute stated:

> ". . . Our statute only requires reckless disregard for the safety of others, which is a much greater lack of care than ordinary negligence, but does not require as great a consciousness of the danger confronted as willful misconduct required to create civil liability under our guest statute. To be 'reckless' does not require 'willfulness' but means rather heedless, careless and rash inadvertence to consequences."

Recovery under the Guest Statute requires a "willfulness" an intentional disregard. There is no evidence of such intention in the present case.

Certainly willfulness is not shown by the fact that Davies was traveling up the west side of the highway. The route selected by Davies was not a part of the traveled portion of U. S. Highway 91. In fact it was protected from traffic by the existence of steel light posts along the right edge of the southbound lanes.

In *Enycart v. Borgeson,* (Wash., 1962) 374 P.2d 543, the court was presented with the question whether the defendant was guilty of willful or wanton misconduct in traveling to the left of a painted barrier in a lane reserved for oncoming traffic. The court said:

> "The most that can be said for the evidence in this record is that the defendant driver was negligent. There is a complete absence of any proof that the defendant driver was the 'willful doer of wrong.' It may be admitted that he passed unlawfully and that such was a negligent act, but such is not proof of an intention to harm the plaintiff. The court instructed on wanton misconduct with great reluctance, and only upon the insistence of the plaintiff's counsel. It is impossible for anyone to say that there is anything in the evidence by either party which could characterize the defendant husband's driving as evincing an intention to inflict injury."

In *Sparrer v. Kersgard,* (Calif., 1939) 85 P.2d 449, there was evidence that the driver was driving beyond the speed limit and on the wrong side of the road. The court stated:

> "After all of the evidence had been taken the defendant made a motion that the jury be directed to bring in a verdict in his favor. The trial court denied the motion and the defendant claims the trial court erred. We think that claim is well founded. It must be conceded at once that there was evidence that the defendant violated the statute prescribing the speed of motor vehicles and that he was driving on the wrong side of the road. But such facts, standing alone, do not constitute willful misconduct . . .
>
> "It is clear that the evidence does not disclose that the defendant, prior to entering the curve where the accident occurred, knew, or should

> have known, of the dangers in traversing it and therefore that the defendant is not liable."

The court referred to another California case and quoted from its language saying the language was peculiarly applicable to the facts in the instant case.

> "His conduct under the circumstances, constituted, at most, gross negligence. Upon the record now before us, it cannot be said that he proceeded in utter disregard of, or that he was utterly indifferent to, the rights of his guests. While his judgment under the circumstances confronting him, may have been poor, it does not appear that he was wantonly reckless in exposing his guests to danger, nor did his conduct partake of the nature of a willful, intentional wrong."

The court went on with reference to the case before it saying:

> "Even if it be assumed that the defendant knew or should have known of the curves on the road then being traveled, there is nothing in the facts to indicate that he was conscious or should have known that injury to his guest was a probable result so as to constitute his actions willful misconduct, as defined in the cases cited herein . . ."

There is no evidence in the present case that indicates Davies was conscious or should have known that injury to Roylance was a probable result of his actions.

Kile v. Kile, (Okla., 1936) 63 P. 2d 753, involved a situation where the defendant driver was using free wheeling and was going very fast, the testimony being that he was traveling around 60 miles per hour; that the road was over mountainous country; that the car was traveling south and was on the wrong side of the road at the time the accident happened; that the plaintiff had protested against the speed at which they were traveling several times prior to the happening of the accident; and that immediately after the accident the defendant had said that he was driving too fast and should not have been in free wheeling and did not have as good control of his car as he thought he had. The court pointed out at 754:

> "It will be observed from what has been said that the proof of plaintiff was clearly sufficient to establish a violation by the defendant of both sections of the Colorado statute pleaded by plaintiff and that this would constitute negligence per se and is sustained by the weight of authority. The plaintiff, however, in order to recover by reason of the so-called guest statute, had to prove negligence consisting of a willful and wanton disregard of the right of others."

The court held there was not sufficient proof to show willful and wanton disregard of the guest's rights.

In *McNoble v. DeLaunay,* (Ore., 1960) 354 P. 2d 290, the plaintiff and defendant were proceeding west on a

highway upon which a truck was attempting to turn around after dumping a load of hot asphalt for a State Highway Commission patching crew. At the time of the accident, the truck completely blocked the westbound lane of the highway, and, according to a diagram drawn by a state police officer, his truck extended to, and possibly across the center line of the pavement, at right angles to the line of traffic.

The plaintiff, a guest, predicated her claim that the defendant was grossly negligent upon the following facts:

He continued at 55 miles an hour after seeing a caution sign;

He failed to see the "One Way" sign described by other witneses;

He failed to see the flagman; and

He failed to keep his automobile under control.

The plaintiff contended that the combination of failure to maintain a lookout, failure to decrease speed after a warning, and failure to maintain control added up to a combination of acts of negligence which presented a jury question on gross negligence.

The Oregon Supreme Court said:

"The driver's lack of care fails to demonstrate a foolhardy or 'I don't care what happens' attitude. Before a series or combination of negligent acts may constitute gross negligence, they must add up to a reckless state of mind.

"From all the evidence most favorable to the plaintiff, the cause of the collision was the failure of the host driver to see the flagman. For the purpose of reviewing the directed verdict we assume that the flagman was properly stationed, an asumption, however, which is not free from serious question. But asuming that the flagman was properly performing his duty, the host driver's conduct amounts to defective lookout coupled with poor judgment. Poor judgment, viewed from hindsight, is not enough to constitute gross negligence.

"There was no proof that DeLaunay had his mind on anything but his driving. He said he saw the caution sign, and started to slow down when he saw the truck, but did not think it was necessary to stop until he saw the flagman. The cause of the accident was his failure to see the flagman and to exercise prudent judgment in time to stop. His failure to stop or control his vehicle arose out of his failure to keep a steadfast lookout. This default was momentary inadvertence.

The trial judge correctly allowed the motion for the directed verdict in favor of the host driver."

The evidence in this case showed that the plaintiff and the defendant were "good friends." Indeed, the defendant had stayed in the apartment of the plaintiff

prior to the occurrence of the accident. On the day of the accident, the plaintiff and the defendant had spent the afternoon together. At the time of the accident they were en route to the plaintiff's place of employment where the defendant intended to drop the plaintiff while he purchased gasoline at Reed's Service Station.

There is no dispute concerning the fact that the defendant's driving on the day of the accident and prior thereto was in no way improper. There was a complete absence of any evidence of "showing off" or reckless conduct, thrill seeking or flirtation with danger, as typifies the usual guest case.

On the contrary, the evidence showed that the defendant stopped at a stop sign on Riverside Avenue protecting U.S. 91, waited because traffic was heavy before deciding to travel along the west side of U.S. 91 to Reed's Service Station, a distance of only about 300 feet. (The evidence showed that the accident occurred about 189 feet from Riverside Avenue and that the service station was only 100 feet further on).

The route selected by the defendant was not a part of the traveled portion of U.S. 91. In fact, it was protected from traffic by the existence of light posts at periodic intervals along the right edge of the highway. It was, however, a well traveled way, characterized by the investigating officer as "used extensively for ve-

hicular traffic." (R. 87) This route had been followed by the defendant on many occasions as it was his custom to purchase his gasoline at Reed's Service and he ordinarily took Riverside Avenue from his residence in South Orem.

The area was well lighted and wider than the traveled portion of U.S. 91. The plaintiff himself had driven along this route in the opposite direction prior to the accident as did other traffic going to and from the parking lot for Norton's Food Center.

The defendant's alternative to what he did was to wait until heavy traffic had cleared in both directions, travel north well past his intended destination, half way up the hill, before the break in the painted lines would have permitted him to make a "U" turn and return south to the Nugget.

There is nothing about the accident itself to indicate willful misconduct. The cause of the collision was the striking of the abutment. There was adequate distance between the wooden telephone pole and the steel light pole to permit the passage of automobiles. The striking of the abutment threw the defendant's automobile out of control into the light pole at approximately a 45 degree angle.

The only evidence of willful misconduct claimed by the plaintiff was accelerating rapidly, sufficient to throw

gravel and jerk his head backward and driving along the west edge of U.S. Highway 91, that is, in the wrong direction. The evidence, however, showed that the point from which the defendant started was on an up-hill grade and that there was loose gravel on the roadway. The highest speed disclosed by the evidence was between 20 and 25 miles per hour. Oncoming traffic was in no way involved.

To say that this rises to the level of willful misconduct is to emasculate the guest statute and wholy frustrate its purposes.

POINT II

THE DEFENDANT'S TRAVELING ALONG THE WEST SIDE OF U.S. HIGHWAY 91 IN A NORTHERLY DIRECTION WAS NOT A PROXIMATE CAUSE OF THE ACCIDENT.

The plaintiff's theory of this case was that "the defendant digressed from the regularly traveled portion of the road, and drove off the regular traveled portion of the road on the west side of U.S. 91 into a steel utility pole." (Instruction No. 2.)

It is obvious that statutes requiring vehicles to travel on the right-hand side of the roadway are intended to regulate traffic. Traffic was in no way involved in this case. It must be equally obvious that the defendant's

striking the pole had nothing to do with the direction in which he was traveling.

The law does not concern itself with cause and effect in a philosophical sense. That the accident would not have occurred "but for" the defendant's having been where he was does not establish "proximate cause." The familiar law school illustration is that of the man driving across New Jersey at an excessive rate of speed so as to arrive in Philadelphia in time to be struck by lightning. His speed was not a proximate cause, even thought the accident would not have occurred "but for" his excessive speed.

In 60 C.J.S. 658, (Motor Vehicles, §281) it is said:

> "*Proximate cause.* The operation of a motor vehicle on an improper place or in an improper position on the highway or street does not constitute actionable or contributory negligence unless such operation was a proximate cause of the injury. Hence the mere fact that a motor vehicle was being operated upon, or partially upon, the wrong side of the highway or street at the time of an accident, or shortly prior thereto, or in violation of a rule requiring motorists to drive in the right-hand lane or as near to the right-hand curb as possible or practicable, or in the wrong direction on a one-way street, does not fix liability on the owner or operator for, or establish contributory negligence precluding his recovery for, injuries which were not proximately caused by the violation of the rule of the road."

In *Bolin, et al. v. Kimmelman,* 295 Pa. 301, 145 A. 203 (1929) the evidence showed that the defendant, drove his car east on Morris Street to Fifth Street, and thence turned south on Fifth Street which had been declared a one-way street for northbound traffic, where the car came in contact with the minor plaintiff, and quite seriously injured him. The evidence was conflicting as to whether the accident happened at Morris Street or in the middle of the block south. To all intents and purposes it was a darting-out case, but as there was evidence that the accident happened at the crossing and negative evidence of the lack of warning, together with a city ordinance, under which Fifth Street was declared a one-way street for northbound traffic, the trial judge submitted the case to the jury.

The appellate court said:

> "While moving against the current of traffic is a circumstance to be considered with other evidence, standing alone it does not establish negligence. * * * Moreover, the proximate cause of the accident was the boy coming in contact with the car, and not the direction in which it was moving."

In *Huber v. Anderson,* 355 Pa. 247, 14 A. 2d 688 (1946), the defendant, traveling at an excessive rate of speed on the left side (wrong side) of the road, struck a child on a sled approaching at a right angle from defendant's left. The court, in affirming a judgment for the defendant notwithstanding the verdict, said:

> "The fact that the driver was on the left side of the road . . . does not in itself establish negligence unless his position on that side was the efficient cause of the accident."

In *Dickson v. Lzicor,* (Iowa, 1920) 225 N.W. 406, the plaintiff, a pedestrian, was struck by a truck as he crossed an alley on the sidewalk while the truck was making an illegal left turn into the alley. The trial court charged the jury that the defendant was negligent in driving on the wrong side of the street, that is, left of the center line in violation of law.

The Supreme Court said that the purpose of the statute was to protect people on the left-hand side of the road to keep traffic moving, and that the defendant's driving on the wrong side of the road was not a proximate cause of the accident as it did not occur in the vehicular portion of the roadway. A judgment in favor of the plaintiff was reversed.

The proximate cause of this accident was the defendants failure to observe the abutment. The direction of his travel had nothing whatever to do with this. Statutes requiring automobiles to be driven on the right half of the roadway have as their purpose protection from oncoming traffic, not from objects in the roadway.

Accordingly even if it be conceded that driving on the left half of a roadway is evidence of willful misconduct, it would not support the verdict in this case.

POINT III

THE CONDUCT OF THE PLAINTIFF AS A MATTER OF LAW CONSTITUTED CONTRIBUTORY NEGLIGENCE OR ASSUMPTION OF RISK.

The plaintiff had known the defendant for some time prior to the accident. He had spent the afternoon immediately prior to the accident riding in an automobile driven by the plaintiff. He had consumed alcoholic beverages with the defendant. There is, however, no evidence of anything except complete acquiescence in everything the defendant did immediately preceding the accident.

The plaintiff contends that there was a sudden spurt of willful misconduct and that he did not have an opportunity to protest. This is contrary to the physical evidence. It is manifest that it would have taken at least 10 seconds for the defendant to have reached the place where the accident occurred, which is more than ample time for anyone desiring to make a protest to say something. The clear fact emerges that the plaintiff found nothing objectionable with the driving of the defendant until after he had had an opportunity to consider his plight and possible solutions.

POINT IV

THE COURT ERRED IN ITS INSTRUCTIONS TO THE JURY.

Instruction No. 2 as given by the court set forth the plaintiff's theory of the case and delineated his claim of willful misconduct. This instruction set forth no other theory than that the defendant had driven on the wrong side of the highway. This as a matter of law does not constitute willful misconduct and as a matter of law was not the proximate cause of the accident.

If Instruction No. 2 was not plaintiff's theory of the case then Instruction No. 4 as given by the court permitted the jury to base a finding of willful misconduct upon any ground they might choose. There was no delineation by the court of the specific acts of willful misconduct to be considered by the jury. Rather, the instruction was so broad as to be tantamount to submitting the case to the jury without instruction as to the applicable law.

In *Holmes v. Heidebracht,* 10 Utah 2d 74, 348 P.2d 565 (1960), Justice McDonough said:

> "One of the most common falacies attendant upon our system of formulating instructions and taking exceptions and assigning error with respect thereto is that courts attempt to so design them that they would be universally applicable and then losing counsel uses all possible ingenuity to imagine situations in which instruciions would not be applicable. It is much better that the instructions be designed to cover *the specific fact situation.*" (Emphasis added.)

Instruction No. 5 as given by the court states that the defendant was doing an unlawful act without further explanation. The jury was not told whether this was willful misconduct, evidence of willful misconduct or what. Such a vague instruction merely invites the jury to conclude that being in the wrong side of the road was proof of willful misconduct even though it is not conclusive proof even of negligence.

In the case of *Thompson v. Ford Motor Co.*, 16 Utah 2d 30, 395 P. 2d 62 (1964) the defendant contended that under the facts the leaving of the truck unattended in violation of a state statute constituted proof as a matter of law that the plaintiff was guilty of negligence and that it proximately contributed to cause his own injury. The court stated:

> "We are aware that it has sometimes been stated as a general rule that violation of a statutory standard of care is negligence as a matter of law. This is indeed a sound rule, but like all generalities, it has its limitations, and is applicable only under proper circumstances."

In this case the jury was given general instructions and informed of a provision of the traffic code but not its legal effect. Even if this case is one for the jury, a new trial is necessary to prevent manifest injustice.

CONCLUSION

The evidence in this case is insufficient to support a finding of willful misconduct. The evidence showed that the plaintiff's injuries were the result of the accidental striking of an abutment which was barely visiable. The defendant could not in any sense be said to have been aware of the *probability* of injury in electing to do an act which he had done on numerous prior occasions without untoward result.

Defendant's driving on the west side of U.S. 91, as a matter of law was not a proximate cause of the plaintiff's injuries. All other acts, conduct, and behavior of the defendant were assumed by the plaintiff.

If the guest statute has any vitality, it is a bar to this action. The facts of this case describe the classic guest case — one friend giving another a ride to work. The evidence is barren of even a suspicion of willfulness.

This verdict should be set aside and judgment entered in accordance with the defendant's motion for directed verdict.

Respectfully submitted

SKEEN, WORSLEY,
SNOW & CHRISTENSEN
701 Continental Bank Bldg.
Salt Lake City, Utah
Attorneys for
Defendant and Appellant