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Marinda Day v. Lorenzo Smith & Son, Inc. : Appellant's Brief

IN THE

SUPREME COURT

OF THE

STATE OF UTAH

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Clerk, Supreme

MARINDA DAY,

Plaintiff-Appellant,

vs.

LORENZO SMITH & SON, INC., a
Utah corporation,

Defendant-Respondent.

APPELLANT'S BRIEF

Appeal From the Judgment of
Third District Court for Salt Lake
Hon. A. H. Ellett, Judge

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MARINDA DAY,
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Defendant-Respondent.

Case No. 10256

APPELLANT'S BRIEF

STATEMENT OF THE KIND OF CASE

This is an action for personal injuries arising out of an automobile collision that occurred on September 11, 1961, on U. S. 91, 4.3 miles north of Nephi, Utah, in which the plaintiff suffered injuries to her back, requiring two operations.

DISPOSITION IN LOWER COURT

This case was tried to a jury. The court submitted a special verdict to the jury in the form of five questions and upon the basis of answers given to the special verdict,

the court ordered the clerk to enter judgment, no cause of action, which was done accordingly. Plaintiff made motion for judgment n. o. v. or in the alternative for a new trial which was denied, from which plaintiff appeals.

RELIEF SOUGHT ON APPEAL

Plaintiff-appellant seeks reversal of the judgment in the court below and for a new trial.

STATEMENT OF FACTS

Plaintiff-appellant will be hereafter referred to as plaintiff and defendant-respondent will hereafter be referred to as defendant.

On the morning of September 11, 1961, two vehicles approached an accident scene from opposite directions on U. S. 91, 4.3 miles north of Nephi, Utah. A Utah highway patrolman, Eldon Sherwood, was at the accident scene completing his investigation (R. 176). The accident involved a rollover of a foreign car that came to rest on the west shoulder of the highway, a few feet onto the hard surface (R. 344, Exh. P-2 and D-4). The weather was clear (R. 138) and the road was a two lane asphalt highway (R. 139).

Plaintiff Marinda Day, a 47 year old housewife, (R. 231) was a passenger in the vehicle proceeding north (R. 216, 231). It was a 1949 Chevrolet pick-up truck driven by a friend, Larry Roberts, age 16, (R. 214) and owned by Ted Davis (R. 181, 215). Plaintiff was on her way to Provo to pick up some glasses and Larry offered to give

her a ride (R. 215, 230). The Robert's truck was followed by a sheriff's car driven by Juab County Sheriff Ray Jackson (R. 139).

The other vehicle proceeding south was a 1961 Corvair box truck (red Greenbriar) owned by defendant corporation, Lorenzo Smith & Son (R. 181) and driven by an employee, Joseph Ivy Mitchell (R. 143). Defendant, in its answer to the complaint, admitted agency of its employee (R. 4). Mr. Mitchell has since died from causes not associated with this accident.

The two vehicles came upon the accident scene and sideswiped each other (R. 224). After impact, the Robert's truck careened some distance down the right or east side of the highway, turned sideways and skidded, and then rolled one complete turn and came to rest 310 feet north of the collision on the east shoulder (R. 177, 178). Defendant's vehicle travelled south approximately 150 feet and pulled off on the right hand side of the road (R. 178). The ultimate question for the jury was which vehicle was in the wrong lane of traffic at the time of impact.

Patrolman Sherwood found plaintiff lying on her back on the pavement near the Robert's truck complaining of severe pain (R. 178). She suffered back and neck injuries and subsequently had two operations fusing vertabrae in her lower back (R. 277) and neck (R. 284) with permanent disability (R. 290).

Plaintiff alleged that defendant was negligent in (a) failing to maintain a proper lookout, and in (b) driving

left of the center of the highway into the path of the vehicle in which plaintiff was riding (R. 41, 42). Six eyewitnesses to the accident appeared at the trial. Four of these witnesses testified the impact occurred in the east lane (plaintiff's side) of the highway: Desmond Naismith (R. 194), Larry Roberts (R. 218), Marinda Day (R. 232) and Marion Brown (R. 322), a telephone company employee who was standing by the Naismith car at the time of the accident. Another witness, Helen Naismith, saw defendant's vehicle drive over on the white line shortly before impact, but did not see the collision (R. 212). Defendant produced two witnesses who testified the impact occurred in the west lane (defendant's side) of the highway: Henry Kelly (R. 339) and his son Robert (R. 384). The special verdict submitted to the jury was answered as follows:

> Question No. 1: Was Joseph Ivy Mitchell negligent in one or more of the particulars claimed by Mrs. Day, viz.,
>
> (a) By failing to keep a proper lookout for other vehicles upon the highway (R. 41)?
>
> Answer: *Yes.*
>
> Signed by 6 jurors.
>
> (b) By driving to the left of the center of the highway?
>
> Answer: *No preponderance.*
>
> Signed by 6 jurors.
>
> Question No. 2: If you answered "Yes" to either (a) or (b) above, do you further find that such negligence was a proximate cause of the injuries

sustained by Mrs. Day?

Answer to (a) above *No.*

Signed by 6 jurors.

Answer to (b) above..... (No answer)

Signed by no jurors.

Question No. 3: Was Mrs. Day negligent as claimed by Lorenzo Smith and Son in failing to advise her driver to slow down immediately prior to the collision (R. 42)?

Answer: *No she was not negligent.*

Signed by 8 jurors.

Question No. 4: If you found negligence in Question No. 3, was it a proximate cause of the injuries sustained by Mrs. Day?

Answer: *No.*

No jurors signed.

Question No. 5: (a) As shown by a preponderance of the evidence in this case, what amount of money would fairly and adequately recompense Mrs. Day for any and all pain and suffering and loss of bodily function which was occasioned to her as a result of injuries which she received from the collision in question?

Answer: $60,000.00.

Signed by 8 jurors.

(b) (1) Has Mrs. Day sustained any loss of earning capacity as a result of the injuries she received in the collision?

Answer: *Yes.*

(2) If so, what has been the diminution in her income per year?

Answer: $450.00.

(3) For how many years will the diminution continue (R. 43)?

Answer: 5 *years.*

Signed by 8 jurors.

Special damages were stipulated by counsel in the sum of $3,125.20.

The court thereupon entered judgment in favor of the defendant, no cause of action.

ARGUMENT

POINT I.

THE COURT ERRED IN PERMITTING THE HIGHWAY PATROLMAN TO GIVE HIS OPINION AS TO THE POINT OF IMPACT.

Investigation by counsel before trial revealed that the two police officers had developed varied and conflicting opinions as to which side of the highway the impact occurred. However, these opinions were not based upon an examination of the physical evidence at the scene (R. 145, 181). Sheriff Jackson was of the opinion that the accident occurred in the east portion of the highway while patrolman Sherwood judged that it occurred in the west portion. Whether these opinions would be admissible at the trial was a crucial question since the subject was the pivotal issue of the case and the opinion of a police officer occupying an official position would greatly impress the jury.

Plaintiff elected to call Sheriff Jackson as her first witness. He testified that the point of impact could not

be determined from an investigation of the physical evidence at the scene of the accident.

"Q. Were you able to determine the point of collision that these cars had?"

"A. No."

"Q. Why not?"

"A. There was no marks on the highway other than the debris, which covered a large area. Now, this debris was glass and dirt, and there was no point that I — we could determine or I could determine where the point of impact were and where one car was in relationship to the other car. The first marks laid down by any vehicle was the Robert's car after it left the scene, and if you don't mind, I will show you where they started."

"Q. Please do" (R. 145).

"A. The marks of the Robert's car extended from its position down into about this area, something like that, and these were the only marks that you could find indicating where the impact occurred. Could not tie it down."

"Q. And on which lane of the highway were those marks?"

"A. On the right-hand side facing north, or on the extreme — on the east side of the highway."

"Q. Did those marks extend to any — from any point over on to the west side of the highway?"

"A. No they did not" (R. 146).

Sheriff Jackson testified that he examined the marks on the highway in the company of highway patrolman Sherwood and the patrolman could not find a point of impact from an investigation of the physical evidence.

"A. And officer Sherwood requested them to take some pictures because I always carry cameras, and I said, 'Yes, come down and show me where the point of impact is'; and he says, 'You can't find the point of impact'; and he walked down with me, and then he pointed out these — or the skid marks. This is the oil, and this is this — caused in the first accident by this Volkswagen, and I think the people were from Canada, and they had tripped over going down the road, and then he pointed out to me that the glass and dust and debris, this came from the second accident, and we both examined the highway very carefully together, and we both agreed I thought at the point — at least I agreed that I could not tie that point of impact down to any one particular segment of the highway, and then I went back and shot the photographs that are here" (R. 153).

Then, on direct examination, Sheriff Jackson volunteered an opinion based upon the marks he found on the east side of the highway and the Court excluded this testimony upon objection by defendant's counsel.

"Q. All right. Now, I believe you indicated that there were marks on the highway running from the Robert's vehicle."

"A. That's right."

"Q. And all of these marks were on the east side of the highway" (R. 155)?

"A. That's right. This vehicle — from the marks I would be of the opinion that the vehicle —"

"MR. NEBEKER: I object your Honor, to any opinion given by the officer."

"THE COURT: Yes."

"MR. NEBEKER: I think he ought to confine himself to what he saw."

"THE COURT: Just tell what you saw."

"MR. BEESLEY: Certainly."

"A. I saw the marks leading directly from the Robert's car back along the highway to the south for quite some distance, and they were quite wide apart, wider than would be made by the normal, oh, skidding of a car going down the highway straight, and then they ceased. All these marks were on the east side of the highway" (R. 156).

Plaintiff then called patrolman Sherwood. In so doing, plaintiff vouched for the patrolman's credibility when she put him on the stand, but she had the right to assume that he would not be permitted to give improper testimony, *Chester* v. *Shockley* (1957 Mo.) 304 S. W. 2d 831, especially in view of the court's previous ruling excluding the opinion of sheriff Jackson. Patrolman Sherwood testified that he did not see the collision.

"A. The noise was more to my rear and to my right, so I just turned to the right and saw this Davies (Roberts) vehicle taking off down the pavement on the right or east side of the highway, (R. 177) and it traveled some distance, and then it turned sideways and skidded and then rolled one complete turn."

"Q. I see. You didn't then see the collision?"

"A. No" (R. 178).

Patrolman Sherwood found no skidmarks by either vehicle prior to the impact and the Robert's vehicle was the only car to leave any marks on the road after impact (R. 179). Patrolman Sherwood corroborated the testimony of Sheriff Jackson that there was no objective evidence whatsoever to determine the point of impact.

> "Q. I see. Now, were there any objective signs whatsoever to determine the point of collision?"
>
> "A. No."
>
> "MR. NEBEKER: I will object to that, Your Honor. I think he can state what he saw and let the jury decide."
>
> "THE COURT: Well, since he says no, I guess we don't have to pursue it further."
>
> "MR. BEESLEY: I don't intend to, Your Honor" (R. 181).

Then, on cross examination, counsel for defendant elicited from the patrolman the improper testimony complained of in this appeal. The patrolman was asked his opinion as to the point of impact. The court had previously excluded sheriff Jackson's opinion but now chose to admit testimony of that same nature from patrolman Sherwood by distinguishing between the terms "opinion" evidence and "judgment" evidence.

> "Q. From your examination of the road, you made a determination as to the approximate point of impact, did you not?"
>
> "A. Yes."

"Q. Was that point of impact on the east or the west side of (R. 182) the road?"

"A. It was near the center line, and my best opinion, it may have been —"

"MR. BEESLEY: I will object to any opinion, Your Honor."

"THE COURT: Well, you may give your judgment. If you are giving us an opinion, he would be right. If you mean by your opinion your best judgment as to what you judge it would be, I think you might proceed, Sergeant, and I don't quite know —"

"Q. Give us your judgment."

"MR. BEESLEY: Make the same objection, Your Honor."

"THE COURT: Let's find out if he has a judgment or giving an opinion. If he is giving an opinion, he can't."

"Q. Do you have a judgment as to where the point of impact occurred?"

"A. Yes."

"Q. Will you tell us what the judgment is?"

"MR. BEESLEY: Objection, Your Honor."

"THE COURT: It's overruled. He may give his judgment."

"A. As near the center line and probably a little bit west."

"MR. BEESLEY: I object to any probability, Your Honor."

"THE COURT: If you are confining it to your judgment —"

"Q. Just give us your best judgment."

"THE COURT: You can tell us your judgment."

"MR. BEESLEY: I believe he said the center line."

"A. Near the center line" (R. 183).

"Q. Was it on the west or the east of the center line?"

"A. Do I have to answer that 'yes' or 'no'?"

"Q. Yes."

"A. My *opinion* is no good?"

"Q. Just give us your judgment."

"THE COURT: You can give us your judgment, Sergeant."

"A. My judgment, slightly to the west of the center line."

"Q. Would you say it was about a foot to the west of the center line?"

"A. I think that would be a fair figure."

"Q. It could have been a little further west? It could have been a little further east?"

"A. Yes" (R. 184).

Plaintiff submits that a distinction between the two terms "opinion" and "judgment" was indistinguishable to counsel, the witness, or to members of the jury. In 29 Words and Phrases 595, these two terms are held to be synonymous.

> "Best judgment means substantially the same thing as opinion or belief." Harris v. State, (Tex.) 137 S. W. 373, 376.

More often than otherwise, the question of the admissibility of expert opinion evidence in an action for damages arising out of highway accidents has involved testimony by highway patrolmen, sheriffs, deputies, police officers or other public officials who viewed the facts and circumstances at the scene after the accident occurred and gave their opinion as to what happened. The courts are sharply divided numerically and otherwise respecting the admissibility of evidence of this kind. See notes to *Tuck* v. *Buller* (1957 Okla.), 66 A. L. R. 2d 1043. Cases supplementing this 1958 annotation indicate a trend to exclude such opinions. Counsel for plaintiff is unaware of any Utah cases directly considering the question.

This point presents four basis issues for consideration: (1) Is the point of impact a proper subject matter for expert opinion evidence by a highway patrolman? (2) Assuming point of impact is a proper subject matter for expert opinion evidence, is such an opinion admissible when based upon some source other than competent facts? (3) Assuming point of impact is a proper subject matter for expert opinion evidence, was it error for the court to admit in evidence the opinion of patrolman Sherwood after excluding the opinion of sheriff Jackson? (4) If the admission of the highway patrolman's opinion was error, was such error prejudicial?

(1) *Is the point of impact a proper subject matter for expert opinion evidence by a highway patrolman?*

It is a fundamental principle of the law of evidence as administered by our courts, that testimony at a trial upon matters within the scope of the common knowledge and experience of mankind must generally be confined to statements of concrete facts within the observation, knowledge, and recollection of the witness as distinguished from their opinions, impressions, judgments or conclusions drawn from such facts. However, when the jury is confronted with issues, the proper understanding of which requires specialized knowledge or experience and which cannot be determined intelligently merely by deductions made and inferences drawn on the basis of ordinary knowledge and practical experience gained in the ordinary affairs of life, then there is created a necessity for skilled or expert witnesses to be permitted to give opinion testimony (20 Am. Jur. § 765). Such testimony should not be admitted unless its admission is demanded by the necessity of the individual case, but unless the subject of inquiry relates to some trade, profession, science, or art, it is within the province of the jury to form their own opinion and not of witnesses, although experts, to express theirs. The rule is clearly defined in 20 Am. Jur. § 780:

> "The rule permitting opinions of expert witnesses to be given in evidence is chiefly applicable to cases in which, from their very nature, the facts disconnected from such opinions cannot be clearly presented to the jury so as to enable them to pass thereon with the requisite knowledge and informed judgment. The governing rule deductible from the

> adjudicated cases seems to be that the subject must be one of science or skill, or one of which observation and experience have given the opportunity and means of knowledge which exists in reason rather than descriptive facts, and, hence, cannot be intelligently communicated to others not familiar with the subject so as to possess themselves of a full understanding of it. Expert testimony is admissible only where, by reason of peculiar skill and experience, inferences can be drawn from facts which an ordinary untrained mind cannot deduce, or where such testimony relates to a subject which is not within the average experience and common sense of the jury. Expert opinion testimony is never admissible where the subject is one of common knowledge as to which facts can be intelligently described to the jury and understood by them, and they can form a reasonable opinion for themselves. Furthermore, the facts on which an expert opinion is based must permit of reasonably certain deductions as distinguished from mere conjectures."

In a manslaughter case, the Utah Supreme Court held that a highway patrolman could not state his opinion as to causation where the facts were neither complicated nor technical. *State* v. *Bleazard,* (1943) 103 Utah 113, 133 P. 2d 1000. In that case the state called the patrolman to identify a map containing measurements and attempting to locate the point of impact. On cross examination, he was asked by counsel for defendant if, in his opinion, it was not possible and probable that the crash of another car caused the death of deceased and not the impact with defendant's vehicle. Counsel for the state objected that the question was not subject to opinion evidence and the trial court sustained the objection. On appeal, the exclusion was sustained in the following language:

> "The facts upon which his opinion would have been based were all before the jury. They were neither complicated nor technical so as to require interpretation by an expert. Under those circumstances, a witness may not be permitted to give an opinion. It is not the province of a witness to act as a judge or jury, and questions calling for his opinion should be so framed as to not call upon him to determine controverted questions of fact or to pass upon the preponderance of testimony."

The general rule concerning the application and admissibility of expert opinion testimony in point of impact cases is stated in 9 C Blashfield Cyc. of Automobile Law and Practice, Perm. Ed. Sec. 6311:

> "Normally, expert testimony is inadmissible to show how and where an accident took place, or the position of the automobile."

The landmark decision to rule that the point of impact was not so technical and complicated a subject matter as to require opinion evidence in accident cases is *Beckman* v. *Schroeder,* (1947 Minn.) 28 N. W. 2d 629. The rule established in *Beckman* has found wide support and comment in a majority of the states and the Supreme Court of Minnesota has repeatedly reexamined its basis for rejection of opinion evidence of this nature. *Murphey* v. *Hennon,* (1963 Minn.) 119 N. W. 2d 489; *Carmody* v. *Aho* (1957 Minn.) 86 N. W. 2d 692. In *Beckman,* the trial court received the opinion testimony of a sheriff and highway patrolman, over objection, concerning point of impact. On appeal, the court stated, p. 637:

"In this case, in determining whether the accident happened on the other side of the center line, the jury was as competent to make the decision as an opinion witness. No superior knowledge was required. The debris was practically all south of the center line; the Schroeder car was several feet south of the south slab of the pavement when it came to rest after the collision; the front of the Hertzgaarde car was over the center line into the south lane several feet. In our opinion, the jury was as competent to determine where this collision took place as the experts, and the place where this accident occurred is the crucial question in this case. No doubt the official position of these experts carried great weight with the jury in locating the place of the collision in the north lane."

Murphey v. *Hennon,* supra, involved two police officers stating their opinion as to point of impact. The court held, p. 493:

"* * * It is settled by our decisions that the *opinion* of a police officer as to the point of impact of a collision is not admissible because such *opinion* is usually not based on any special skill, learning, or experience but is simply the *judgment* of the officer based on facts or assumptions ordinarily possessed by persons of common intelligence. The vice of admitting such testimony is that it permits the jury to substitute the *opinion* of the officer for the combined *judgment* of the jury, to which parties are entitled. Even though it may be rather common practice for adversaries to agree that such opinions be received, especially from experienced and dedicated traffic officers, the mischief of having the rule conform to the practice is that it encourages trial by experts rather than by witnesses, * * *. Moreover, receiving such opinions fost-

> ers the loose practice of receiving (as was done in this case) opinions not based wholly upon facts or data perceived by, or personally known or made known to, the witness at trial, but also upon hearsay and instinct. We, therefore, hold that it was error to receive these opinions * * *."

Some states have applied slight modification or variation to the Minnesota rule but with the same result. In *Thomas* v. *Dad's Root Beer and Canada Dry Bottling Company,* (1960 Oregon) 356 P. 2d 418, 419, the court compared opinion evidence on point of impact to its decisions rejecting opinion evidence on rate of speed by a person not an eyewitness to the accident:

> "* * * one not an eyewitness to an accident cannot give his opinion of the rate of speed based upon physical facts at the scene of the accident, because the jury is as well able to draw its own inferences and form its own opinion from the facts presented as is the witness. * * * The rule that such testimony is inadmissible is salutory and should apply also to testimony from one not an eyewitness to the accident concerning the point of impact upon the highway."

The Supreme Court of Wisconsin, in the case of *City of Milwaukee* v. *Bub* (1962 Wisc.) 118 N. W. 2d 123, 127, holds that opinions by one not an eyewitness concerning point of impact is a subject matter reserved for physicists or engineers and not a police officer:

> "It takes a high degree of training, plus experience, to become an expert on the complex problem of where an impact occurs in an automobile accident. The testimony of police officer Watters

> certainly does not qualify him as an expert witness. Although the record discloses that Watters is an experienced police officer, that in itself does not qualify him as a physicist or engineer and without such knowledge his testimony can be given no weight as to the point of impact." (See also Stuart v. Dotts, et al., (1949 Cal.) 201 P. 2d 820.)

On the other hand, Mississippi has expressed its repugnance to permitting even a highly trained and experienced accidentologist to opinionate as to point of impact when the drivers of both vehicles suffered amnesia after the accident in *Hagan Storm Fence Company* v. *Edwards*, (1963 Miss.) 148 So. 2d 693, 695:

> "Where the facts can be produced and presented to the jury or other trier of facts by direct evidence, in such a manner that they can have an adequate basis for formulation of their own decision, without extraneous assistance, opinion evidence (such as here) should not be admitted. Ordinarily a witness must confine his testimony to matters within his own knowledge."

Some states have held that when a party seeks to elicit opinion evidence in the absence of showing the prerequisites for that expert opinion evidence, i. e., necessity, technical and complicated subject matter not within the common knowledge of the jury, impossibility for the jury to draw its own inferences, etc., then the party seeking such opinion evidence has failed to establish a proper foundation. North Dakota is the leading state to adopt this line of reasoning in the case of *Fisher* v. *Zuko* (1959 N. D.) 98 N. W. 2d 895, 900:

> "The facts and circumstances disclosed by the evidence are such that it may be assumed the jury was capable of understanding them and arriving at its own conclusion as to where the accident happened without the aid of the opinion of the highway patrolman. Where such a situation affirmatively appears there is no foundation for the expression of an opinion by an expert as to point of impact. The trial court erred in overruling defendant's objections and denying the motion to strike the conclusion of the witness on the ground that it was elicited without sufficient foundation." (See also Satterland v. Fieber, (1958 N. D.) 91 N. W. 2d 623; Bischoff v. Koenig, (1959 N. D.) 100 N. W. 2d 159.)

Nebraska has also refuted this type of evidence on the basis of improper foundation in the cases of *Barry* v. *Dvorak,* (1964 Neb.) 126 N. W. 2d 226; *Danner* v. *Walters,* (1951 Neb.) 48 N. W. 2d 635. See also *Turcotte* v. *DeWitt,* (1954 Mass.) 124 N. E. 2d 241, 245.

The Ohio Supreme Court held in the cases of *Dickman* v. *Struble,* (1957 Ohio) 146 N. E. 2d 636, *Roeder* v. *Fisher's Bakery, Inc.,* (1963 Ohio) 188 N. E. 2d 78, that the place of impact of two vehicles is a matter within the experience, knowledge and comprehension of an average layman or juror and not a matter involving an interpretation of scientific or technical knowledge with which the jury itself is not supposed to be competent to deal. The court stated in *Dickman* that to permit opinion evidence on such a simple question, even though the facts to be given consideration must be complicated, is to open wide the door

of speculation by the jury, and to the return of verdicts based upon illegitimate considerations.

Other courts taking a similar view are: *Reed* v. *Humphreys,* (1964 Ark.) 373 S. W. 2d 580 (opinion inadmissible when facts can be given jury to reach its own conclusion); *Conway* v. *Hudspeth,* (1958 Ark.) 318 S. W. 2d 137; *Waller* v. *Southern California Gas Co.,* (1959 Cal.) 339 P. 2d 577 (facts could be shown without opinion on ultimate issue); *Mills* v. *Redwings Carriers, Inc.,* (1961 Fla.) 127 So. 2d 453 (expert opinion not requiring scientific skill or knowledge excluded); *Whatley* v. *Henry,* (1941 Ga.) 16 S. E. 2d 214; *Presser* v. *Schull,* (1962 Ind.) 181 N. E. 2d 247 (error to admit opinion when jury could determine based upon eyewitness testimony); *Turcotte* v. *De Witt,* (1954 Mass.) 124 N. E. 2d 241 (jury could comprehend facts without opinion of officer); *Delta Chevrolet Co.* v. *Waid,* (1951 Miss.) 51 So. 2d 443 (jury as well qualified as witness to determine position of vehicle at impact); *Duncan* v. *Pinkston,* (1960 Mo.) 340 S. W. 2d 753 (not proper subject matter of expert or opinion evidence); *Stillwell* v. *Schmoker,* (1963 Neb.) 122 N. W. 2d 538 (all physical facts before jury and opinion should have been excluded); *Biggs* v. *Gottsch,* (1961 Neb.) 112 N. W. 2d 396, (not proper subject matter of opinion evidence on cross-examination); *Padget* v. *Buxton-Smith Mercantile Co.* (1958 CA10 N. M.) 262 F. 2d 39 (opinion based on skid marks error since layman can trace and arrive at conclusion); *Kelso* v. *Independent Tank Co.,* (1960 Okla.) 348 P. 2d 855 (cause of collision within experience and understanding of

ordinary person); *Giffin* v. *Ensign,* (1956 CA 3 Pa.) 234 F. 2d 307 (jury capable of drawing its own conclusion); *Jenkins* v. *Hennigan,* (1957 Tex.) 298 S. W. 2d 905 (jury was as able to trace skid marks as witness); *Venable* v. *Stockner,* (1959 Va.) 108 S. E. 2d 380 (opinion based on common knowledge inadmissible); *Macey* v. *Billings,* (1955 Wyo.) 289 P. 2d 422 (error when jurors competent to draw their own conclusions); *Grayson* v. *Williams,* (1958 CA 10 Wyo.) 256 F. 2d 61 (opinion inadmissable when jury able to draw its own conclusion).

In the final analysis, expert evidence must take the form of either of two general classes: (a) The first class deals with facts, the existence of which are not within the common knowledge and ordinary intelligence of the lay person and said facts are peculiarly within the knowledge of men whose experience or study enables them to speak with authority concerning these facts. If, in this class of expert evidence, the jury can form a conclusion or reasonable inference after the presentation of the facts by the expert, then it is their sole province to do so. (b) The second class of expert evidence is that situation wherein the conclusion as well as the knowledge of the facts themselves depend upon professional or scientific skill not within the range of ordinary knowledge. In this second class of cases, not only facts but conclusions to which they lead may be testified to by experts in opinion form.

The distinction between these two kinds of testimony is apparent. In the one instance the facts are to be stated by the expert, and the conclusion is to be drawn by the

jury; in the other, the expert states the facts and may then give his conclusion in the form of an opinion. *Dougherty* v. *Millikan* (1900 N. Y.) 57 N. E. 757, 759; *Presser* v. *Schull,* (1962 Ind.) 181 N. E. 2d 247, 251.

The instant case did not require the necessity of expert evidence under either of these classes mentioned. The facts were simple and uncomplicated. The debris from the accident was light (R. 182). The skid marks, which were all on the east side of the highway, did not commence until some distance after the impact when the Robert's car started its side skid (R. 146). The Robert's car rolled over after the side skid so that the entire car was damaged. The defendant's car had a side scrape (R. 185). Relating these facts to the jury did not require any special skill or peculiar knowledge. In any event, the jury was as well able to reach its own conclusion of reasonable inference from the facts presented as was the patrolman. The conclusion of the officer was not dependent upon any professional or scientific skill for a proper inference. It must follow that the admission of the patrolman's opinion was error.

(2) *Assuming the point of impact is a proper subject matter for expert opinion evidence, is such an opinion admissible when based upon some source other than competent facts?*

Some states have held, under certain circumstances, that the point of impact or collision in motor vehicle accident cases may be a proper subject for expert or skilled opinion evidence. Where these opinions are based upon the expert witness' own knowledge or observations at the acci-

dent scene as contrasted from opinions based upon hypothetical questions and assumed facts, the vast majority of these courts require that the witness show sufficient facts and knowledge thereof to enable him to form an opinion entitled to be given weight by the jury. 66 A. L. R. 2d 1062. As a general rule, the expert witness must first state the facts upon which his opinion is predicated before his opinion will be admitted. This practice permits the trial court to exclude opinions based upon insufficient facts or insufficient knowledge of these facts.

> "It is necessary according to the great weight of authority, that an expert witness giving an opinion upon facts of his own knowledge or based upon his own observation first testify to the facts upon which his opinion is based" 20 Am. Jur. § 794.

It was held in *Xenakis* v. *Garrett Freight Lines*, (1954) 1 Utah 2d 299, 265 P. 2d 1007, 1010:

> "Yet it is obvious that the court and jury must be made aware of the facts upon which the expert bases his conclusion, otherwise the testimony would be of little assistance, and there would be no way of testing the validity of his opinions."

Patrolman Sherwood failed to reveal to the jury any competent facts upon which he based his opinion concerning the point of impact. On direct examination, he discussed the skid marks of the Robert's car, but testified the skid occurred some distance after impact and on the right or east side of the highway (R. 177-178); he discussed the roll over of the Robert's car, but testified it ended up with the entire vehicle on the east or right hand side of the

center line (R. 179); and he concluded his testimony by admitting there were no objective signs whatsoever to determine the point of collision (R. 181). On cross examination, he discussed light debris on the road, but did not identify its location, (R. 182) and he then gave his objectionable opinion as to the point of impact. Certainly those facts alone constituted little basis for an opinion as to the point of impact, and if anything, more pointedly inferred that the impact occurred in the east portion of the highway. Thus, the patrolman must have derived his opinion from some source other than competent facts, such as hearsay, speculation, or conjecture.

In a number of cases where it appeared that the witness' opinion as to the point of impact was based in part, at least, upon what others had told him, and not entirely from his own investigation of the accident scene, it has been held that the witness' opinion was inadmissible.

Thus, in *Jackson* v. *Brown,* (1961 Okla.) 361 P. 2d 270, the court held that the opinion must be derived *solely* from an examination of physical evidence found at the scene, and in *Ward* v. *Brown,* (1962 C. A. 10 Okla.) 301 F. 2d 445, the court held that an opinion by an officer based in part upon statements made by the drivers was hearsay.

> "What the two drivers told him was hearsay and could not be a proper foundation for opinion evidence by an expert. Neither were the remaining physical facts on which he based his opinion such as to entitle him to give an expert's opinion as to where the collision occurred."

California has repeatedly refused to admit opinions as to the point of impact in accident cases where the opinions were based in part upon statements made by others. In *Francis* v. *Sauve,* (1963 Cal.) 34 Cal. Rptr. 754, 760, the court held:

> "However, his opinion as to the point of impact is not admissible when it is based on what witnesses told him rather than what he himself observed." See also Kalfus v. Fraze, (1955 Cal.) 288 P. 2d 967; Robinson v. Cable, (1961 Cal.) 359 P. 2d 929; Brooks v. Gilbert, (1959 Iowa) 98 N. W. 2d 309.

Those courts that hold the point of impact to be a proper subject for expert opinion evidence require a careful review of the sufficiency of the facts in evidence before the opinion is admitted, to insure that the facts support a rational and intelligent opinion. In *Hodges* v. *Severns,* (1962 Cal.) 20 Cal. Rptr. 129, 134, the court stated:

> "His fixing of the point of impact was not competently done. He relied upon three elements, — debris on the street, skid marks and statements of 'both parties involved' which would mean Hill and Hislar, who were the drivers involved in the accident. Debris alone cannot fix the point of impact. (Waller v. Southern California Gas Company, supra, 339 P. 2d 577.) The skid mark could not suffice for the officer testified that he could not say whether it was in lane 2 or not, and did not state that it began four feet north of the south curb; he had no recollection of having measured the skid marks. Statements made by Hislar at some subsequent time (and probably to another investigating officer) were pure hearsay and could not enter in-

to an admissible opinion as to where the impact occurred."

In the case of *Gilbert* v. *Quintet,* (1962 Ariz.) 369 P. 2d 267, 268, the Supreme Court of Arizona held that skid marks and dust marks on the bumper of one of the vehicles were not competent facts for a police officer to base his opinion concerning the point of impact.

> "An expert may be allowed, in cases where an expert opinion is appropriate, to interpret facts in evidence which the jury are not qualified to interpret for themselves. * * * He may base such an opinion either on his personal observations given into evidence, * * * or upon assumption that some portion of the testimony of others already in evidence is true. * * * He must however, base his opinion only upon competent evidence. * * * The officer admitted that he could not form an opinion as to the impact point solely from the skid marks and dust marks on the bumper of the bus, nor could such an opinion be admitted where there are insufficient facts in evidence to support a rational and intelligent opinion."

Similarly, in *Fryda* v. *Vesely,* (1963 S. D.) 123 N. W. 2d 345, 348, the court held that the police officer did not have sufficient knowledge of facts to enable him to form an opinion.

> "Other than stating that he saw some tractor-tire marks at the accident scene he did not describe any other physical facts that he observed pertinent to the point of impact. Even if opinion evidence as to the point of impact were proper, it is not shown that 'the witness has sufficient knowledge of facts to enable him to form an opinion entitled to be given weight by the jury.' 66 A. L. R. 2d 1062."

Also, the Supreme Court of Arkansas refused to permit the opinion of an expert based upon the position of a guardpost, the length of the truck, gauge marks on the highway and an examination of the vehicles, in the case of *Little* v. *George Feed and Supply Company,* (1961 Ark.) 342 S. W. 2d 668, 672, holding these facts insufficient to support an opinion.

> "We do not unequivocally hold 'reconstruction' of an accident by an expert to be inadmissible when supported by proper evidentiary facts, but we do say that the evidence in this case, upon which Snyder's opinion was predicated, was inadequate to support his conclusions."

In jurisdictions that permit expert opinion evidence as to point of impact, the sufficiency of the facts upon which the opinion is predicated may be a variable factor for each case under consideration. But in no event should the court accept an opinion in the total absence of competent facts upon which the opinion is based. It is submitted that patrolman Sherwood did not reveal to the court or jury any competent facts which would enable him to form an opinion as to the point of impact, and there were no facts to corroborate the opinion given.

Disregarding the testimony of the eyewitnesses as to where the impact occurred, a reconstruction of the accident scene would reveal that all of the activity and conjestion immediately prior to the accident took place in the west lane of traffic. The Naismith car was on the west shoulder of the highway a few feet onto the hard surface

(R. 344). There were other cars parked on the west side of the highway south of the Naismith's car (R. 185, 204) with people standing by their vehicles (R. 186). Clothing from the Naismith car was stacked in a pile on the west shoulder just south of the Naismith vehicle (R. 191). Patrolman Sherwood's car was parked on the east side but completely off the road (R. 140). Some glass remained in the west lane of traffic from the first accident (R. 341, 345, 224). Patrolman Sherwood was standing on the hard surface of the road in the west lane of traffic (R. 177, 182) about 10 feet from the center of the road (R. 179) talking to Mrs. Naismith (R. 176). Mrs. Naismith was standing right behind her car (south) on the west side of the road (R. 211). Mr. Naismith was standing in front of his car on the west side of the road (R. 199). Mr. Brown was standing just off the highway to the west by the debris adjacent to the Naismith car (R. 318). Henry Kelly was standing in the west lane of traffice 6 to 8 feet from the center of the highway (R. 337) and his son was on the west side of the road (R. 381, 385) about 200 feet north of the Naismith vehicle (R. 379, 386). The accident occurred just south of the Naismith car (R. 204, 346).

Experience would indicate that a driver (Mitchell) proceeding south in such a congested lane of traffic would normally and naturally turn to the east out and around the congested area. Likewise, the northbound driver (Roberts), with the oncoming vehicle and the people and cars along the west side of the road clearly in his line of vision, would hardly be likely to drive into or toward those objects.

The opinion expressed by the officer did not lend itself to the facts nor to common experience of the normal and reasonable reaction of drivers under those conditions. The patrolman arbitrarily decided to judge for the jury where the point of impact occurred when he said:

> "Q. It could have been on the center line. Is that correct?"
>
> "A. Could have been, but it was over the center line" (R. 189).

The motive for such an opinion was revealed by patrolman Sherwood when he acknowledged that he knew Mr. Mitchell prior to the accident, (R. 189) and the admission of the patrolman's opinion constituted error.

(3) *Assuming the point of impact is a proper subject matter for expert opinion evidence, was it error for the court to admit in evidence the opinion of patrolman Sherwood after excluding the opinion of Sheriff Jackson?*

It should be noted that the court refused to permit plaintiff's first witness, Sheriff Jackson, to give his "opinion", (R. 43) but, thereafter, permitted patrolman Sherwood to give his "judgment" on cross examination by counsel for defendant, as to the point of impact in spite of the fact that the patrolman did not see the collision (R. 75) and found no objective sign whatsoever to determine the point of impact (R. 68).

In *McNabb* v. *Jeppson*, (1960 Minn.) 102 N. W. 2d 709, defense counsel similarly elicited opinion evidence from a police officer on cross examination. In that case plaintiff

called a highway patrolman to testify concerning measurements and distances and defendant on cross examination asked the patrolman's opinion as to point of impact. Plaintiff failed to make a proper objection and the opinion testimony was admitted. Thereafter, plaintiff called an expert engineer to rebut the officer's opinion evidence as to point of impact and the court on defendant's objection excluded this evidence. In reversing, the court held that the case did not constitute a proper case for expert testimony as to point of impact but that plaintiff failed to make proper objection thereby giving the officer's testimony probative effect. Therefore, the court held that the opinion evidence of the engineer, while normally inadmissible, should have been admitted in rebuttal.

> "Generally, where a party elicits evidence, he cannot thereafter be heard to say that such evidence is not admissible, and where he offers evidence that certain conditions exist, he cannot complain that the court permits his evidence to be rebutted. * * * It is immaterial that the initial inadmissible evidence is brought out on cross examination. * * * We believe that in the situation here where inadmissible opinion testimony is in evidence and must be given probative force by the jury, it constitutes prejudicial error to exclude testimony of a similar character introduced by the party who is adversely affected by such testimony."

Conversely, where a sheriff's opinion testimony is excluded by the court and not given probative force by the jury, it should constitute prejudicial error to admit testimony of a similar character given by a highway patrol-

man, introduced by the party who objected to the previous opinion testimony.

(4) *If the admission of the highway patrolman's opinion was error, was such error prejudicial?*

After culmination of the trial, the jury was asked to find whether defendant was negligent by driving left of the center of the highway under special verdict 1(b). This was the issue upon which the case turned. After 8 hours of deliberation six of the jurors found "No preponderance of the evidence." The opinion of the highway patrolman upon this subject, given as a witness occupying an official position, must have greatly impressed the jury in its finding, particularly since the average layman undoubtedly would be inclined to place great weight upon testimony by a highway patrolman. The test to be applied in determining the prejudicial effect of the erroneous testimony is stated in *Joseph* v. *Groves Latter Day Saints Hospital*, (1957) 7 Utah 2d 39, 318 P. 2d 330, 333.

> "if, * * * the error appears to be of such a nature that it can be said with assurance that it was of no material consequence in its effect upon the trial because reasonable minds would have arrived at the same results, regardless of such error, it would be harmless and the granting of a new trial would not be warranted. On the other hand, if it appears to be of sufficient moment that there is a reasonable likelihood that in the absence of such error a different result would have eventuated, the error should be regarded as prejudicial and relief should be granted."

The prejudicial effect of erroneously permitting an officer to give his opinion as to the point of impact in an accident case was discussed in *Padgett* v. *Buxton-Smith Mercantile Company,* (1958 CA 10 N. M.) 262 F. 2d 39, 42. There, the court found that skid marks, debris and damage marks on the vehicles did not require scientific skill or knowledge for an expressed opinion as to the point of impact and such an opinion thereon was as much within the knowledge and competence of a lay juror as a highway patrolman. The court held the error was prejudicial in the following language:

> "* * * While we are loathe to interfere with the broad discretion of the trial courts in matters of this kind, the opinion came from an officer of the law whose badge of authority gave it evidential significance which may not be dismissed as harmless or non prejudicial. As an official opinion of a fact matter within the knowledge or comprehension of members of the jury it carries a weight which tends to usurp the judicial function. It is indicative, we think, of what appears to be a constantly growing tendency in cases of this kind for an investigating officer to assume the prerogative of assessing liability. This is the responsibility of the trier of the facts."

Other courts have expressed themselves in a similar language. In *Carmody* v. *Aho,* supra, the court said:

> "In a case such as this is, the impact of such testimony upon the jury easily can be a determining factor. We think that it was prejudicial error to admit it."

Also in *Presser* v. *Schull,* (1962 Ind.), supra, the court held:

> "The very fact that the court permitted officer Jarrett to express his opinion gave weight to his testimony tending to cause the jury to substitute the opinion of the investigator for the opinion of the jury." (See also Maben v. Lee, (1953 Okla.) 260 P. 2d 1064, 1067; Kelso v. Independent Tank Company, (1960 Okla.) 348 P. 2d 855, 858; Chester v. Shockley, (1957 Mo.) 304 S. W. 2d 831; Beckman v. Schroeder, supra; Fisher v. Zuko, supra; Jackson v. Brown, supra; Hadley, et al. v. Ross, (1944 Okla.) 154 P. 2d 939.)

In the case of *McNelley* v. *Smith,* (1962 Colo.) 368 P. 2d 555, 558, the court discussed the prejudicial effect of erroneously permitting an officer to give his opinion as to how plaintiff got into the south bound lane of traffic.

> "The officer's testimony placed the stamp of authenticity upon Schaefer's testimony and by implication branded the McNelley testimony as false. Under these circumstances it was error to permit the officer to express his opinion * * *."

It can be said with reasonable assurance that patrolman Sherwood's opinion was of material consequence in the outcome of the trial. The effect of admitting his testimony after excluding Sheriff Jackson's opinion was to indicate to the jury court approval of the patrolman's opinion and thereby cause the jury to give greater weight to his testimony. By implication it tended to brand the testimony of plaintiff's four eyewitnesses as false, and created serious and sober confusion in the minds of the jury as to which vehicle had crossed the center line. As an official

opinion of a fact matter, it carried a weight which could easily have been the determining factor in the trial. Therefore, the error should be regarded as prejudicial and a new trial granted.

CONCLUSION

The jury found that plaintiff had been damaged in excess of $66,000.00 as a result of the injuries she received from the accident. After an exhaustive eight hours of deliberation in an attempt to determine which vehicle had crossed the center line of the highway, six members of the jury were unable to conclusively return a finding on this question and answered the special verdict "no preponderance". Two of the jurors agreed with plaintiff's version. The point of impact was not a proper subject matter for expert opinion evidence nor were there competent facts in evidence upon which such an opinion might be based. In any event, it would seem that fair play would not permit the patrolman to give unfavorable opinion evidence while not allowing favorable evidence of the same nature to be given by the sheriff. Plaintiff should not be governed by one set of rules and defendant by another.

Plaintiff, therefore, earnestly submits that the judgment of the lower court should be reversed and plaintiff, in the furtherance of justice, should be granted a new trial.

Respectfully submitted,

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