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Rose Casados, Albert Casaus, And Lourdes v. Montoya v. Peggy Micklewright, Ad.Ministratrix of the Estate of Henry S. Lucero, Deceased : Appellant's Brief

IN THE

SUPREME COU

OF THE

STATE OF UT

ROSE CASADOS, ALBERT C
and LOURDES V. MONTOY
Plaintiffs and

vs.

PEGGY MICKLEWRIGHT,
tratrix of the estate of H
LUCERO, deceased;
Defendant

APPELLANT

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WITHOUT A JURY, IN
COURT, SALT LAKE CO
THE HONORABLE D.

L.
Suite
Salt

W. EUGENE HANSEN
Newhouse Building
Salt Lake City, Utah
Attorney for Plaintiffs-Respon

LORRAINE PRESS 1297 SOUTH MAIN STREET SALT LA

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IN THE

SUPREME COURT

OF THE

STATE OF UTAH

ROSE CASADOS, ALBERT CASAUS, and LOURDES V. MONTOYA,
Plaintiffs and Respondents,

vs.

PEGGY MICKLEWRIGHT, Administratrix of the estate of HENRY S. LUCERO, deceased,
Defendant and Appellant.

Case No. 13278

APPELLANT'S BRIEF

STATEMENT OF THE NATURE OF THE CASE

This is a personal injury action by Plaintiffs against the Defendant estate arising out of an automobile collision involving the vehicle in which Plaintiffs were riding and a vehicle driven by Henry S. Lucero, who was killed when the two vehicles collided headon in Salt Lake County, Utah.

DISPOSITION IN LOWER COURT

Trial was held without a jury before the Honorable D. Frank Wilkins, Judge, who rendered judgment in favor of Plaintiffs and against the Defendant estate.

RELIEF SOUGHT ON APPEAL

Defendant-Appellant seeks a reversal of the Lower Court Judgment remanding the case with instructions to enter judgment in favor of the Defendant no cause for action; or in the alternative, for a new trial.

STATEMENT OF FACTS

On New Year's Eve, 1968, the Plaintiffs, occupants of an eastbound Oldsmobile, were enroute to a New Year's Eve dance in Salt Lake City. Their driver, Adonis Casados was intoxicated, having a blood alcohol content of .112% (Ex. D-12, T-112-116). Before they commenced the trip to Salt Lake, they all spent the day together in the small home of the Casados' (T-145, 158, 168). Albert Casaus (despite the different spelling) is the brother of Adonis Casados (T-157). Albert remembers drinking 4 to 5 whiskey cocktails at the house before the group left for Salt Lake (T-158) but testified he did not remember whether his brother, Adonis, drank whiskey or not (T-158, 163). Rose Casados and Adonis are husband and wife (T-167). She was with her husband all day (T-168, 174). She testified she only saw him drink one beer, and that was all (T-168). Miss Lourdes Montoya is Rose's sister, and she was with Adonis all day in the Casados' home (T-151). She also testified she saw Adonis drink only one beer (T-146), but did see Albert drink several whiskeys (T-152).

Adonis Casados is not a party to the law suit, and did not testify.

When the group left for Salt Lake, they took with them a fifth of bourbon, partially consumed, a pint of whiskey, and a supply of beer (T-45, Ex. 1-P; 2-P).

It was dark, and they were proceeding east on the New Bingham Highway, a two-lane asphalt surface, when they collided with a westbound Ford, driven by Henry Lucero who was also intoxicated (.250% blood alcohol) and who was instantly killed. None of the survivors remember the accident (T-150, 160, 171).

The investigating officers established the point of impact is being in the westbound lane of traffic based on a gouge mark (T-18, Ex. 10-P), tire marks of the Oldsmobile extending from that mark to where the Oldsmobile came to rest (T-27, etc.), road asphalt material found on the undercarriage of the Oldsmobile (T-42, 43, etc.), all of the debris was in the westbound lane of travel (T-43, 44, etc.) and the position of the cars, the damages observed.

Newell Knight of the Utah Highway Patrol was retained by the Plaintiffs a few days before the trial. Over constant and continuing objections he was permitted to testify from his examination of the photographs, that the impact occurred in the eastbound lane (Ex. 13-P, T-71, etc.); that the gouge mark could have been caused either by the Ford's front suspension (T-89) or the oil pan (T-90). He denied that there could be road tar on the undercarriage of the Oldsmobile; (T-103, 104) as testified by the investigating officers. The fact that tire

marks from the Oldsmobile started at the gouge mark was not considered by him T-261).

Mr. and Mrs. John Cruz (now divorced) were traveling east on the highway one-half block, or 100 yards behind Plaintiffs when they saw the accident (T-129, 136). They did not hear the collision (T-132). Both saw the Lucero car swerve to its left sharply (T-132, 136) and saw lights turning in circles.

The impact was left front against left front, and the invesigating officers and Newell Knight agreed the impact itself would cause the Ford to swerve to its left.

ARGUMENT

POINT I.

THE TRIAL COURT ERRED IN PERMITTING PLAINTIFFS' EXPERT TO TESTIFY CONCERNING THE POINT OF IMPACT, AND IN OTHER CONCLUSIONS BASED ON NO FOUNDATION.

POINT OF IMPACT

It is true that many of Defendant's objections to the efforts of Mr. Knight to establish the point of impact were sustained. However, Exhibit 13-P, drawn by Mr. Knight, depicts the point of impact in the eastbound lane. The The Defendant's objections to this exhibit and Motion to Strike were denied (R-306).

The obvious thrust of Mr. Knight's entire testimony

was an effort to counteract the conclusion of the investigating officers that the point of impact was in the westbound lane.

In the Court's Findings of Fact, the Court found that the impact occurred in the eastbound lane. The fact that the Trial Court must have been greatly influenced in its decision by Mr. Knight's improper conclusions, seems obvious.

Rule 56 (2) *RULES OF EVIDENCE* adopted by the Utah Supreme Court provides:

> "If the witness is testifying as an expert, testimony of the witness in the form of opinions or inferences *is limited to such opinions as the Judge finds are (a) based on facts or data perceived by, or personally known or made known to the witness at the hearing . . .*" (Emphasis added.)

The Trial Court permitted Plaintiffs' expert, Newell Knight, to completely disregard the facts observed by the investigating officers, and based on his examination of the photographs only, give his opinion that the point of impact was in the eastbound lane. The fact that Mr. Knight conducted his own investigation, four years after the accident based solely on those photographs, is clear from the record, a portion of which we quote in comparison with the testimony of Deputy Jack F. Peterson, Plaintiffs' own witness, who investigated the accident at the scene, and the testimony of Sgt. Taylor, who assisted in the investigation.

DEBRIS

Peterson: (T-31)

> ". . . the debris on the road, and that's all we could find. It was all in the westbound lane."
>
> (T-44) "Q. Was there any debris from accident in the eastbound lane?
>
> A. No, not to my knowledge."

Knight: (T-82) over Defendant continuing objections.)

> "The debris that is seen is distinctive for a couple of reasons. One, there isn't a great deal of debris there. No. 2, the debris that's there primarily came from the westbound vehicle, the Ford Fairlane . . . It primarily looks to be oily material rather than a great deal of runoff or undercarriage dirt . . ."

After admitting that if the impact occurred in the eastbound lane he would expect debris to be in that lane, Mr. Knight further testified:

> (T-105-106) "You may have had some dirt fall off, and maybe it was there to be seen, but at least it isn't photographed . . . Maybe it was an exceptionally clean car. Maybe it was taken off, I don't know."

GOUGE MARK

Peterson testified the gouge mark was in the westbound lane, and described it in detail (T-27) Exhibit 3-P, a photograph showing a flashlight at the mark, and a

diagram drawn by him from his investigation at the scene, Exhibit P-10. He further testified that he found road tar material on the undercarriage of the Oldsmobile (T-42). This was verified by Sgt. Taylor (T-189, 239, 246) who saw, felt and handled the material which he identified as pea gravel and tar, the same as on the road. He had previously worked on road construction with this type material (T-188).

Plaintiffs admitted that the gouge mark was left by one of the cars in this accident (T-42), but Mr. Knight, over Defendant's objections, was permitted to speculate that the mark was left by the Ford. He never examined the Oldsmobile; never saw a photograph of the undercarriage of the Oldsmobile; and refused to accept the factor in evidence that the undercarriage of the Oldsmobile had road tar on it.

> (T-103) "I wouldn't expect to see road tar from an accident on the 31st of December that would adhere to it."

(And at T-104) Sgt. Taylor had testified he *handled* the material which was on a "shelf" on the undercarriage, having been scooped up from the gouge. There was no testimony that the road tar had "adhered" to the metal.

He was further permitted to conjecture as to what portion of the Ford caused the gouge in the westbound lane at T-89, 90, as either the stabilizer arm, or the oil pan, but not explained by him was why the gouge mark was in the westbound lane.

TIRE MARKS

Plaintiffs witness, investigating officer testified:

(T-25) "There was tire marks sliding off the possible point of impact made by the Oldsmobile, vehicle no. 2, going east, crossing the road to where it came to rest."

All four tires left a continuing mark to where the car came to rest (T-27).

These marks started at the gouge (T-44).

Mr. Knight (T-201):

"Q. In your conclusions . . . have you considered the fact that skid marks from the Oldsmobile started from this gouge mark over to the south side of the road?

A. I don't know that I was told that.

Q. You haven't considered that?

A. I considered the fact where it ended up and that there were marks on the highway. I don't know that I was ever told or ever heard that they started at the point of the gouge.

Q. The question is, you didn't include that in your conclusion?

A. That's correct. I did not."

DAY vs. *LORENZO SMITH,* 17 Ut. 2d 221, 408 P. 2d 186:

FACTS: Head-on collision. Question: Which vehicle was over the center line?

Four eye-witnesses, two for Plaintiff, two for Defendant.

Highway Patrol Officer, Sherwood was near the scene investigating another accident, but did not actually see the impact.

HELD:

"We believe the proper rule to be that a Trial Judge, in his discretion, may permit a qualified expert . . . to give his opinion as to the point of collision, *when a proper foundation for his opinion has been laid.*" (Court's emphasis.)

"The record does not disclose a proper foundation to support his opinion testimony as to the point of impact. He did not see the actual impact, therefore his opinion had to be based upon the facts derived from his investigation."

"We hold that it was error to permit Sherwood's testimony as to the point of impact, because his opinion was not supported by sufficient facts, and, what meager facts he did testify to were not connected up or related to his opinion."

"Was this error prejudicial? Yes."

MACHERA vs. *GARFIELD*, 20 Ut. 2d 152, 434 P. 2d 756:

"The Trial Court was correct in not allowing the officer to in effect reconstruct the accident and the speed and direction of the vehicles on the basis of such physical evidence as: gouge marks on the lawn and on the curbing, damage to the automobiles and the course he assumed they took after the impact."

BEARDALL vs. *MURRAY*, 27 Ut. 2d 340, 496 P. 2d 260:

> "A city policeman investigated shortly thereafter and established the point of impact, the position of the vehicles and other physical facts about which he testified. In contrast, a witness for Plaintiff, who was an experienced investigator, visited the scene about four months later, and based upo what he had heard, gave an opinion as to the point of impact. He arrived at his conclusion by use of a formula relating to the physics of a hypothetical case based on weights, angles of travel, etc., which were not shown to be connected with those extant here."
>
> HELD:
>
> Trial Court properly sustained the objection to the testimony.

It was prejudicial error to permit Mr. Knight to establish a point of impact based on photographs, and ignoring facts in evidence observed by the investigating officers.

POINT II.

THE EVIDENCE DOES NOT PREPONDERATE IN FAVOR OF A JUDGMENT FOR THE RESPONDENTS AGAINST APPELLANT.

The appellant submits that the evidence offered at trial does not preponderate in favor of a judgment for respondents. The litigation arose from an automobile

collision on New Year's Eve, December 31, 1968, a little before 8:35 p.m. (R. 55). The accident occurred on the new Bingham Highway, U-48 at about 1.5 miles east of U-111 (Magna Cutoff) in Salt Lake County (R. 56). The highway where the accident occurred runs east and west, one lane each way (R. 56). The speed limit was 50 mph (R. 83). The two automobiles involved were an an Oldsmobile Toronado that was traveling in the east-bound lane and a Ford Fairlane traveling in the west-bound lane (R. 57). The respondents, Lourdes Montoya, Albert Casaus, and Rose Casados were all passengers in the Oldsmobile Toronado driven by her husband Adonis Casados who did not join in the action. The collision was headon (R. 102) and the main question at trial was which vehicle strayed over the center line. None of the respondents could remember how the accident occurred (R. 201, 209, 222). The operator of the Ford, who appellant represents, was apparently killed instantly.

The witnesses for plaintiffs consisted of an investigating deputy sheriff, the respondents who could shed no light on how the accident occurred, a Toronado mechanic, two persons who had been following the respondents in the same lane, and a highway patrolman. He had not investigated or seen the accident scene but was permitted to testify concerning the accident from photographs and the testimony of the investigating deputy sheriff. Appellant called a witness who observed the accident and a Sergeant from the Salt Lake County Sheriff's Department who also investigated the accident on the night it occurred.

It was stipulated that both drivers had blood alcohol levels that would indicate they were intoxicated. The Toronado driver had a blood alcohol level of .112 (R. 163), the Ford driver of .250 (R. 143). There were whisky and beer bottles in the Toronado vehicle (R. 95, 96). Both drivers would have been under the influence so that their operation of their vehicles would likely be impaired (R. 144, 163, 263-64). The driver of the Toronado was not called to testify.

Deputy Sheriff Jack Peterson had the principal responsibility for investigating the accident (R. 59). He arrived at the scene approximately seven minutes after receiving a call at 8:35 p.m. (R. 55). He observed the Toronado to be off the road to the South pointing west, and the Ford was in the westbound lane on its top (R. 57). He used a gouge mark in the road to determine the point of impact (R. 68). The gouge mark was 2 feet four inches into the westbound lane. The westbound being the wider lane. He observed no turn or scuff marks prior to collision point (R. 75). The gouge mark in the road was about 1½ inches into the surface of the road, approximately 2 inches wide and constant (R. 77, 78). The gouge mark appeared fresh (R. 103). The officer testified the gouge mark was the point of impact. The road surface was asphalt and the next day the officer found road surface on the left side undercarriage of the Toronado (R. 92). It was about a foot and half from the front wheel and the officer believed that portion of the Toronado caused the gouge mark (R. 93). Debris was detected by the officer only in the westbound lane, he observed none

in the eastbound (R. 93, 94). The officer testified he had no doubt that the point of impact was in the westbound lane (R. 104) which would mean the vehicle in which plaintiffs were riding strayed over the center line.

Sergeant Ray Taylor of the Salt Lake County Sheriff's Office also examined the scene on the night in question (R. 234). He couldn't stay through the full investigation because he had to answer another accident call (R. 235). He observed the gouge mark and noted debris was primarily in the westbound lane (R. 235, 284, 285). After the accident, he examined the left front portion of the Toronado (R. 237). He found road base on the undercarriage in the vicinity of the arm assembly going to the wheel (R. 241). He testified the undercarriage of the Toronado caused the gouge (R. 258). He traced a shadow mark of the Toronado wheel in a direct line to the gouge. He testified the Toronado was approximately a foot and a half over the center line at impact (R. 278). He felt the westbound car, the Ford, could not have made the gouge (R. 260). He testified the damage to the vehicles indicated the Toronado Oldsmobile was penetrating into the Ford (R. 276).

The only on scene expert testimony supported a conclusion that the Toronado was over the center line and therefore the cause of the accident.

The respondents called Newell G. Knight, a member of the Utah Highway Patrol. He was allowed to testify as an expert. He did not view the scene of the accident, had never examined either car nor observed the gouge

or road surface (R. 115). His testimony and opinion was predicated on the photographs taken at the scene and Officer Peterson's testimony (R. 113). His testimony was as to the force angle of the collision. His testimony was that from the photographs the Ford was more canted than the Oldsmobile (R. 124). He had been retained on the case about two weeks before trial (R. 151). The trial court refused to allow him to testify as to point of impact (R. 159). Hence, his testimony was only as to angle of impact damage which could still be consistent with testimony that the Toronado was over the center line. Sgt. Taylor who examined the scene and the cars disagreed with Mr. Knight as to the force direction (R. 252) and the damage cause (R. 276).

The respondent called Sandra Lee Zinnie who testified that she was on Highway U-48 a little after 8:00 p.m. and about a half block behind the car going east (R. 177) although she testified on direct examniation that she saw headlights coming over into her lane of travel and then the cars coming together (R. 179). On cross-examination she admitted she couldn't really say she knew how the the cars came together (R. 184). Mr. John Cruz testified he was on the Bingham Highway traveling east when the accident occurred riding as a passenger in the Zinnie vehicle (R. 187). His testimony was similar to Mrs. Zinnie. He estimated his vehicle was about 100 yards away when the accident occurred (R. 187). He testified that he saw the vehicle in the westbound lane pull over (R. 187). However, he had been talking and was apparently in the

same position to see what occurred as Mrs. Zinnie, who couldn't really say how the cars came together (R. 184).

The appellant called Mr. William D. Osoro who was driving in the eastbound lane and had observed the Toronado before the accident (R. 227). He was behind the Toronado approximately one hundred yards away when the accident occurred (R. 229). He believed he was the first car at the scene (R. 230). He only could observe the cars spinning out of control even though he was close enough to hear the crash (R. 229, 232).

It is submitted that based upon the evidence it cannot be said that respondents made out a case in their behalf by a preponderance of the evidence. The testimony of the investigating officers as to the point of impact was never rebutted. The evidence of the point of impact and the evidence of physical debris all support appellant's contention that respondents' vehicle was over the center line.

Appellant is aware of the rule that where the Trial Court has made a finding the reviewing Court will not upset it so long as there is any reasonable or substantial basis in the evidence to support it, *Erickson* vs. *Bennion*, 28 Ut. 2d 371, 503 P. 2d 139 (1972).

If we assume that the Honorable Trial Court did not accept the testimony of Officer Knight as establishing the point of impact in the eastbound lane, the only testimony Plaintiff produced was the testimony of the "eyewitnesses" who were one-half black away, in the night-

time. Eye-witnesses, like drivers, are subject to reaction time. Their versions sustain the defense version as well as the Plaintiffs. The impact itself, as admitted by Mr. Knight and Sgt. Taylor, being left front against left front caused the Ford to swerve to its left. The witnesses "reconstruction" of the accident, after the lapse of the reaction time, is, to say the least, suspect. As indicated by this Court in *Day* vs. *Lorenzo Smith*, 17 Ut. 2d 221, 408 P. 2d 186, there were 4 eye-witnesses, 2 of whom testified for the Plaintiffs, and 2 for the Defendant, as to which vehicle was over the center line. The obvious reason for such variance, is the human element.

Certainly, their testimony, under such circumstances, cannot and should not, as a matter of law, be permitted to preponderate over the testimony of the Plaintiffs' own witness, the investigating officer, who saw the physical facts at the scene, and drew the only possible conclusion therefrom.

In the instant case, therefore the quality of the evidence clearly preponderates in favor of placing the point of impact between the two vehicles in the westbound lane, and thus precludes Respondents' recovery.

It is respectfully submitted that this Court should reverse and hold that the Respondents have not met their burden of proof.

POINT III.

THE PLAINTIFFS WERE UNDER A GREATER DUTY TO ESTABLISH THEIR

CASES BY CLEAR AND CONVINCING EVIDENCE THAT THE PROXIMATE CAUSE OF THE ACCIDENT WAS NOT THE INTOXICATION OF THEIR DRIVER, WHO HAD THE DUTY TO USE A HIGH DEGREE OF CARE IN DRIVING THE VEHICLE IN WHICH THEY WERE RIDING.

Even should this Court find that under the usual preponderance of the evidence requirements, the Lower Court's Judgment would ordinarily be upheld, the Appellant is entitled to a reversal.

Driving a vehicle on the public highways while intoxicated is a highly dangerous, and illegal activity. 41-6-44 U. C. A. 1953 DRIVING UNDER INFLUENCE OF INTOXICATING LIQUOR:

> "(a) It is unlawful and punishable as provided in sub-section (d) of this section for any person who is under the influence of intoxicating liquor to drive or be in actual physical control of any vehicle within this state.
>
> . . . (e) In any . . . civil suit or proceeding arising out of acts alleged to have been committed by any person while driving or in actual control of a vehicle while under the influence of intoxicating liquor, the amount of alcohol in the person's blood at the time alleged as shown by chemical analysis of the person's blood . . . shall give rise to the following presumptions:
>
> . . . (3) If there was at the time 0.08% or more by weight of alcohol in the person's blood, it shall

be presumed that the person was under the influence of intoxicating liquor."

This Honorable Court in *State* vs. *Capps*, 1947, 176 P. 2d 873 at 874, 111 Utah 189:

> "It is our opinion that a person who drives a car while in (an intoxicated condition) is reckless and evinces a marked disregard for the safety of others, and is therefore guilty of criminal negligence."

The Idaho Supreme Court in *Packard* vs. *O'Neil*, 262 Pac. at 885:

> "Operating an automobile . . . is recognized as a dangerous instrumentality, when improperly or carelessly driven, and especially so when under the control of a person not in his normal condition, because of the exhiliration or excitement of intoxicants."

The Oregon Supreme Court in *Dorn* vs. *Wilmarth*, 458 P. 2d 945:

> "We think the conduct of one who drives a car after voluntarily drinking to excess is best classified as wanton or reckless."

In *Harrell* vs. *Ames* (Ore.), 508 P. 2d 214, in discussing the test for the imposition of punitive damages in a case involving a drinking driver, the Court states:

> "If any conduct is a "sufficiently aggravated violation of societal interests to justify the sanctions of punitive damages as a preventative mea-

> sure . . . one who undertakes to drive an automobile after voluntarily drinking to excess can properly be found by a jury to satisfy that test."

Appellant contends that plaintiffs, when they voluntarily condoned the driving of the car by Casados, whom they either knew or should have known was intoxicated, were *themselves* negligent, as a matter of law in participating in that highly dangerous and illegal activity; that they assumed the risk that their driver would use a high degree of care to avoid an accident, which duty the law placed upon the driver; that plaintiffs clearly anticipated that if he did not, injury would result to them; and that when an accident did in fact occur, resulting in their injuries, they must prove by clear and convincing evidence, that their driver's intoxication was not, in fact, a proximate cause of the accident.

We must admit, with some incredulity, that no precedent has yet been found wherein the above contentions have been advanced, or considered by the Courts.

We believe that this Honorable Court must be the first to announce that passengers in a car driven by an intoxicated driver under the circumstances here, are equally culpable with the driver, and are not innocent parties as in the usual guest occupant case; that even though they had no control over the actual operation of the car, they assumed the terrible risk of their driver's actions; and that they are therefore bound by the same requirements of proof as the driver would be, and that is clear and con-

vincing proof that the intoxication was not, in fact, a proximate cause of the accident.

The plaintiffs here totally failed in that proof as we have heretofore discussed in Point Two.

In analogous factual situations where a highly dangerous activity is engaged in, even though in those cases the activity is legal, this Court has announced the requirement that the actor must use the highest degree of care to avoid harm to others.

Brigham vs. *Moon Lake Electric Association*, 24 Utah 2d 292, 470 P. 2d 393, involving injury by high voltage wires:

> ". . . The highest degree of care must be used to prevent harm from coming to others."
>
> ". . . The amount of care to avoid negligence always varies with the risk of harm which is known, *or under the circumstances ought to be known to exist.*" (Emphasis added.)

In *Menchaca* vs. *Helms Bakeries, Inc.*, 67 Cal. Reptr. 775, 439 P. 2d 903 (1968):

> "The quantum of care required by ordinary prudence varies with the danger of the activity undertaken . . . Driving a motor vehicle may be sufficiently dangerous to warrant special instructions . . ."
>
> "The Supreme Court of California approved the instruction that 'the amount of caution required in the exercise of ordinary care depends upon the danger . . . in the particular situation.' "

In *Scott* vs. *Mackey*, (Cal. App. 1958) 324 P. 2d 703:

> "It is too elementary to require further discussion that, although the degree of care does not change, as the possibility of danger and injury to others increases, the amount of care which the ordinary prudent person is required to exercise becomes greater."

In another analogous case involving loaded firearms, in *Huber* vs. *Collins*, 50 N. E. 2d 906, 908 (Ohio):

> "The care enjoined upon one handling a loaded firearm is variously defined by the Courts as ordinary care and the highest degree of care. Whichever degree of care is enjoined upon one handling a loaded gun it is obvious that even ordinary care required extreme caution at all times to avoid the discharge of the gun and injury to another."

Certainly driving a vehicle while intoxicated is vastly more dangerous than the above dangerous activities.

Had these plaintiffs sued their driver, Casados, they would have been faced with the defenses of contributory negligence and assumption of risk, which we submit would and should have barred their recovery for the same reasons we here propose. In the case at bar, however, they claim the rights of passengers completely innocent and free of any wrongdoing.

Ferguson vs. *Jongsma*, 10 Ut. 2d 179, 350 P. 2d 404, at 411:

"Contributory negligence is based on carelessness, inadvertence and unintended events, that assumption of risk requires an intelligent and deliberate choice to assume a known risk . . . assumption of risk requires knowledge by Plaintiff of a specific defect or dangerous condition . . . or lack of due care which Plaintiff could have, but voluntarily and deliberately failed to avoid and thereby assumed the risk of the injuries he sustained."

Calahan vs. *Wood*, 24 Ut. 2d 8, 465 P. 2d 169:

". . . The doctrine of assumption of risk in many instances overlaps into the field of contributory negligence, but it must be distinguished and applied only in a proper case, that is, when the question involved the reasonableness of Plaintiff's voluntary action in the face of known danger."

". . . The fundamental consideration *is that one should not be permitted to knowingly and voluntarily incur an obvious risk of personal harm when he has the ability to avoid doing so, and then hold another responsible for his injuries. Its essential elements are: 'Knowledge of a danger and a free and voluntary consent to assume it!'* "

Johnson vs. *Maynard*, 9 Ut. 2d 268, 342 P. 2d 884.

Hindmarsh vs. *O. P. Skaggs*, 21 Ut. 2d 413, 446 P. 2d 410.

Foster vs. *Steed*, 23 Ut. 2d 148, 459 P. 2d 1021.

The California Courts properly name the doctrine as the "Equal Culpability Rule".

Schneider vs. *Brecht*, 44 P. 2d at 665; 6 Cal. App. 2d 379:

> "It is true that in general the negligence of a driver of a vehicle is not imputable to a passenger so as to bar . . . a recovery, yet the conduct of the Plaintiff in riding and in continuing to ride in an automobile when he must have known that the driver was intoxicated is established independent negligence . . . from the driver's negligence, barring the right to recovery."
>
> ". . . The circumstances of the case show that the guest was a participant in all of the acts and events which led up to the intoxicated condition . . . recovery cannot be had for the simple reason that both parties are equally culpable."
>
> ". . . The efficient cause in the instant case was intoxication, intoxication superinduced by the active participation of the Plaintiff, and we find no line of demarcation separating the result from the cause, upon which the Plaintiff can rely and at the same time hold the Defendant liable in damages."

In *Price* vs. *Schroeder*, 96 P. 2d 949; 35 Cal. App. 2d 700, the Court states:

> "Of course, if the Plaintiff had known Harward was intoxicated at the time they embarked on the journey, he would probably be in a position of having assumed the risk."

The self serving testimony of the plaintiffs that they saw Adonis Casados drink only one beer before they left on the trip, is incredible of belief, when only a few moments later the accident happened, after which he had a high blood alcohol content. All plaintiffs were with him in a small home all day.

(T-151—Mrs. Montoya)

Q. Now, was Adonis in your sight all the time?

A. Yes, they lived in a small home.

(T-154)

Q. When you left his home, did you make any inquiries as to how he felt?

A. No sir.

Q. You just assumed he was O. K.?

A. Yes.

(T-158-164—to Albert Casaus)

A. I was drinking whiskey. I must have had, if I remember 4 or 5 mixed drinks.

Q. Now, didn't you realize at that time that anyone who drives while under the influence is a dangerous thing?

A. Yes. I knew that.

Q. But despite that, you were encouraging Adonis to have drinks before you left?

A. Yes.

Both Mr. Knight and Sgt. Taylor qualified as experts on the effects of alcohol in the system.

Trooper Knight testified, (T-112-114) that a person with .112% would be under the influence; that his drinking would be apparent from his actions, his eyes appearance, his slowed reactions and his inability to perform "simple balance tests", and that he would be a danger on the highway.

Sgt. Taylor (T-112) testified that his reflexes would be affected; that he would have consumed 8 ounces of 100 proof alcohol; and that he would definitely be under the influence.

Under these circumstances, plaintiffs were not innocent parties to this venture. They are presumed by law to see what was there to be seen. Their only effort to overcome the presumption of their driver's intoxication was the feeble effort that they only saw him drink one beer. The overwhelming evidence was to the contrary.

CONCLUSION

If we assume from the Record that the Honorable Trial Court was not influenced by Plaintiffs' expert witness, Newell Knight, in his efforts to establish a point of impact other than in the westbound lane, the Plaintiffs obviously did not sustain their burden of proof. If we assume that the Honorable Trial Court was influenced by the testimony of Mr. Knight, either directly or indirectly, to establish a point of impact other than in the

westbound lane, the Defendant was denied a fair trial. The evidence was overwhelmingly in favor of the conclusion that the impact occurred in the westbound lane, as testified to by the Plaintiffs' own witness, Deputy Peterson, and the Defendant is entitled to a reversal.

Respectfully submitted,

L. E. MIDGLEY
Suite 600 El Paso Gas Building
Salt Lake City, Utah
Attorney for
Defendant-Appellant