

Solomon David Barr, a patron in the hotel barroom during the incident testified to seeing Ted, along with the other Hensons, holding Barnhart down on the floor. If Ted aided or encouraged the others, he may be equally liable in trespass to Barnhart regardless of whether he was present when the actual shooting occurred. Here we are not dealing with a case which is clear and free from doubt, and summary judgments are meant only for those cases. See 2 Goodrich-Amram 2d Sect. 1035(b):2.

In making his motion for summary judgment, Ted relies on his deposition and those of his co-defendants and others. In *Nanty-Glo v. American Surety Co.*, 309 Pa. 236, 163 A. 523 (1932), the court stated that testimonial, non-documentary evidence of the moving party or his witnesses will not afford sufficient basis for the entry of a summary judgment because the credibility of the testimony is still a matter for the jury. This is so even though the testimony is uncontradicted. See 2 Goodrich-Amram, Sect. 1035(b):4 and *Bremmer v. Protected Hom Mutual Life Insurance Company*, 436 Pa. 494, 260 A.2d 785 (1970) where it was held that in granting summary judgment the trial court erred in passing on the credibility of the depositions witness whose testimony supported the motion.

In the more recent case of *Amabile v. Auto Kleen Car Wash*, 249 Pa. Super 240, 376 A.2d 247 (1977) the court held that if the depositions on file show there is no genuine issue as to material facts and that the moving party is entitled to judgment as a matter of law, then summary judgment may be granted in favor of the moving party. The depositions in this case do not establish that there are no genuine issues of material facts.

In the alternative, Ted has requested a partial summary judgment. He claims not to be liable for any of Barnhart's damages resulting from the gunshot wound. Whether he can be found liable on a conspiracy, is, as we said before, a matter for the jury so this request will also be denied.

ORDER OF COURT

NOW, February 27, 1979, the motions for summary judgment are denied.

COMMONWEALTH v. STRODE, C.P. Cr.D. Franklin County Branch, No. 264 of 1978

1. The elements of the offense of driving under the influence which the Commonwealth must prove beyond a reasonable doubt are: (1) the defendant was operating a motor vehicle; (2) the defendant was under the influence of alcohol; and (3) the defendant was under the influence of alcohol to a degree which rendered him incapable of safe driving.

2. That a defendant is under the influence of alcohol is established beyond a reasonable doubt by the evidence of odor of alcohol on his breath, his glassy eyes, his slurred speech, his statement that he was drunk or was not exactly drunk, and a blood alcohol test result of 0.12.

3. That a defendant was under the influence of alcohol to a degree which rendered him incapable of safe driving is established beyond a reasonable doubt where it is shown that the defendant rapidly accelerated after each stop, exceeded the speed limit, veered five times within several streets from his established lane of travel into an adjoining lane, and failed to promptly come to a stop upon being signaled to do so by a police officer.

John F. Nelson, Assistant District Attorney, Attorney for the Commonwealth

Lawrence C. Zeger, Esq., Counsel for the Defendant

OPINION AND ORDER

KELLER, J., February 7, 1979:

On July 28, 1978, the defendant was charged with operating a motor vehicle under the influence of alcohol, violation of Section 3731(a)(1) and violation of Vehicle Code Section 3309(1), driving on roadways laned for traffic-driving within single lane. The matter was bound over for court and on November 13, 1978, the defendant waived trial by jury on the misdemeanor charge and requested a trial without jury which was approved by the Court. On November 17, 1978, trial without jury was held.

The evidence established that:

1. At about 4:45 A.M. on July 28, 1978, Officer Haldeman of the Chambersburg Police Department was on routine patrol and observed a green Ford pickup truck proceeding East on West Loudon Street at the speed of approximately 45 mph in a 35 mph zone. He followed the truck without activating his flashing lights or siren.

2. As the pickup truck entered West Queen Street it moved to the center of the road to effect the rather gradual right turn.

3. Continuing East on West Queen Street the truck stopped at redlights at the intersections of Queen Street and Second Street, Third Street and Fifth Street. Between the redlights the truck accelerated rapidly and achieved a speed of 45 mph between Third and Fifth Streets in a 35 mph zone. Between the intersection on Third and Fifth Street the truck also veered 5 times from the right lane of travel to the left lane; a distance of 2 or 3 feet.

4. Queen Street merges into Lincoln Way East a short distance beyond Sixth Street, and the truck proceeded on Lincoln Way East accelerating rapidly to a stop light at Sixth Street, then accelerated to a speed of 45 mph on Lincoln Way East as it passed the intersection of Seventh Street, and then was stopped by a redlight at the intersection of Coldbrook Avenue.

5. At the intersection of Seventh Street with Lincoln Way East, Officer Haldeman activated the two revolving redlights and two strobe lights on the marked police cruiser and followed immediately behind the pickup truck a distance of approximately 1,000 feet to Coldbrook Avenue. The driver of the truck did not stop in response to the officer's flashing lights, but did stop at the redlight at Coldbrook Avenue. Officer Haldeman then flashed his lights and honked his horn to get the attention of the truck driver. When the traffic light turned green the driver drove an additional 300 to 400 feet before turning left into the Cressler's Market parking area where he stopped.

6. From the time Officer Haldeman commenced following the pickup truck on Loudon Street until it was stopped beyond Coldbrook Avenue on Lincoln Way East, there were no vehicles or pedestrians at any time in the right lane of travel.

7. Loudon Street and Queen Street are both one-way East streets with two lanes established for moving traffic. Lincoln Way East at the points here relevant is a two-way street with single lanes East and West.

8. The pickup truck was not involved in any accident or near accident, and there was no evidence that the movement of the truck from the right lane into the left lane on Loudon Street and Queen Street threatened the safety of any person or property.

9. Officer Haldeman brought his cruiser to a stop at the rear of the pickup truck, and observed the defendant as he exited his truck and walked to the police cruiser. The officer observed that he was not "real unsteady on his feet."

10. While talking to the defendant, the officer detected the odor of alcohol on his breath; observed that his eyes were glassy and that his speech was slurred.

11. The officer intended to administer the "heel to toe field sobriety test", and the defendant, after trying it for three steps, stopped and stated either that he was drunk, he wasn't exactly drunk, but was mad because he and his wife had had a quarrel.

12. The defendant testified that he became aware of the following police cruiser while he was driving between Second and Third Street on Queen Street, and he might have changed lanes, but wasn't paying attention at that hour of the morning. He also testified that he first saw the red flashers on the police cruiser around the Chambersburg Hospital, but didn't pull over until after he had stopped at Coldbrook Avenue and then proceeded an additional 300 or 400 feet beyond that to the Cressler Market parking lot.

13. The defendant consented to a breathalyzer test which was administered by Officer Glenn Manns at the Chambersburg Police Headquarters. The test results were 0.12.

14. The defendant testified that he had 6 or possibly 8 draft beers between 4:30 P.M. and 7:30 P.M. the preceding afternoon and evening, but only four swallows of beer from 9:00 P.M. until his arrest at approximately 4:50 A.M.

15. The Court sustained the defendant's demurrer to the charge of violation of Section 3309 of the Motor Vehicle Code.

16. At the conclusion of the trial the defendant was found guilty of violation of Section 3731(a)(1), driving under the influence.

DISCUSSION

The defendant filed motions for new trial and in arrest of judgment setting forth 8 separate allegations, but in his brief consolidated the various allegations and contended that the verdict was against the evidence, against the law, and against the weight of the evidence. The primary thrust of the defendant's argument is that if he was not guilty of violation of Section 3309 of the Motor Vehicle Code, had no accident or near accident, and stopped at each redlight, then the Commonwealth has failed to prove that he was under the influence of alcohol to a degree which rendered him incapable of safe driving.

Section 3309 of the Vehicle Code provides inter alia:

LEGAL NOTICES, cont.

tribution and notice to the creditors of The Valley Bank and Trust Company, executor of the last will and testament of Virginia L. McKinney, late of Greene Township, Franklin County, Pennsylvania, deceased.

POE First and final account, reasons why distribution can not be proposed and notice to the creditors of The Farmers and Merchants Trust Company of Chambersburg, Pa., executor of the estate of Ralph Poe, late of Antrim Township, Franklin County, Pennsylvania, deceased.

SACKMAN First and final account, statement of proposed distribution and notice to the creditors of Louella E. Stinson and Judy L. Peters, executors of the estate of Lillie B. Sackman, late of the Borough of Chambersburg, Franklin County, Pennsylvania, deceased.

SHOEMAKER First and final account, statement of proposed distribution and notice to the creditors of Robert P. Shoemaker, executor of the estate of M. Anna Shoemaker, late of the Borough of Chambersburg, Franklin County, Pennsylvania, deceased.

VARNER First and final account, statement of proposed distribution and notice to the creditors of The Citizen's National Bank and Trust Company of Waynesboro, Pennsylvania, executor of the estate of Rebecca W. Varner, late of the Borough of Waynesboro, Franklin County, Pennsylvania, deceased.

GLENN E. SHADLE
Clerk of the Orphans' Court
Franklin County, Pennsylvania

(4-6, 4-13, 4-20, 4-27)

"Whenever any roadway has been divided into two or more clearly marked lanes for traffic the following rules in addition to all others not inconsistent therewith shall apply:

(1) Driving within single lane - A vehicle shall be driven as nearly as practicable entirely within a single lane and shall not be moved from the lane until the driver has first ascertained that the movement can be made with safety."

Despite the fact that Section 3309 is a summary offense punishable by a fine of \$25.00 it nevertheless remains a criminal charge and the Commonwealth has the burden of proving each of the elements beyond a reasonable doubt. In the case at bar, the Court concluded that the Commonwealth failed to prove beyond a reasonable doubt that the defendant did not first ascertain that his movements from the right lane into the left lane could be made with safety. The fact that five separate such movements were made between Third and Fifth Streets without accident, near accident or a threat to the safety of any person or property established that indeed the movements could and were made with safety.

Section 3731 of the Vehicle Code provides inter alia:

"(a) Offense defined - A person shall not drive any vehicle while:

(1) under the influence of alcohol to a degree which renders the person incapable of safe driving."

The elements of this offense which the Commonwealth must prove beyond a reasonable doubt are that:

1. The defendant was operating a motor vehicle.
2. The defendant was under the influence of alcohol.
3. The defendant was under the influence of alcohol to a degree which rendered him incapable of safe driving.

In testing the sufficiency of the evidence at the post-trial motion stage, the Commonwealth's evidence must be viewed as being true and correct and the Commonwealth is entitled to all reasonable inferences which may be derived therefrom. *Commonwealth v. Portalating*, 223 Pa. Super. 33, 297 A. 2d 144 (1972).

In the case at bar:

1. The defendant concedes that he was operating a green

pickup truck which was followed by Officer Haldeman.

2. That the defendant was under the influence of alcohol is established beyond a reasonable doubt by the evidence of the odor of alcohol on his breath, his glassy eyes, his slurred speech, his statement that he was drunk or wasn't exactly drunk, and the blood alcohol test results of 0.12.

3. His rapid and unexplained acceleration after each stop, his exceeding the speed limit on Queen Street and Lincoln Way East, his swing into the center of West Queen Street while effecting a gradual right turn, the unexplained veering five times from his established lane of travel into the adjoining lane, and his failure to promptly come to a stop upon being signaled to do so by Officer Haldeman, established beyond a reasonable doubt that the defendant was under the influence of alcohol to a degree which rendered him incapable of safe driving.

ORDER OF COURT

NOW, this 7th day of February, 1979, the defendant's motions in arrest of judgment and for a new trial are dismissed.

The Probation Department of Franklin County is directed to prepare a Pre-Sentence Investigation Report. Upon the filing of the same the District Attorney shall notify the defendant to appear for sentencing.

Exceptions are granted the defendant.

WOODS v. LUM, ET AL, C.P. Franklin County Branch, No. 335 A.D. 1978

Procedure - Preliminary Objections - Breach of Promise - Damages

1. In an assumpsit action where claim for damages is indefinite as to whether the amount represents the cost of repairs or the difference in market value, the plaintiff will be required to re-plead the paragraph containing the claim.

George E. Wenger, Jr., Esq., Counsel for Plaintiff

Michael B. Finucane, Esq., Counsel for Defendant

OPINION AND ORDER

KELLER, J., March 1, 1979:

This action was commenced by the filing of a complaint in

assumpsit on June 27, 1978, and service of the same upon the defendant, Howard M. Lum, Jr., on June 28, 1978. The defendant Lum filed preliminary objections on July 17, 1978, and an amended complaint was filed by plaintiff on October 10, 1978. Preliminary objections to the amended complaint in the nature of a demurrer, motion to strike, and motion for more specific complaint were filed by defendant Lum on November 2, 1978.

The defendant's demurrers allege only that the two counts of the plaintiff's complaint "fail to state a cause of action against the defendant, Howard M. Lum, Jr." General demurrers of this nature are prohibited by Pa. R.C.P. 1028(a) which provides that "preliminary objections shall state specifically the grounds relied upon." "General averments in preliminary objection that the complaint is indefinite, vague and lacking in particularity or that it fails to state a cause of action, without amplification are inadequate." Goodrich-Amram, 238 Section 1020(a), and cases cited thereunder. The demurrers will be dismissed.

While we will not dispose of defendant's demurrers on the merits, we do take note of the plaintiff's statement that count 2 is against defendant, Ohio Casualty Insurance Company, and not against the individual defendant Lum. The plaintiff has offered to recaption count 2 to identify the defendant as Ohio Casualty Insurance Company only.

In the defendant's motion to strike, he alleges that paragraph 8 of the amended complaint fails to state the time and place of the verbal promise in violation of Pa. R.C.P. 1019(a). He similarly claims that the time and place of the verbal promise stated in paragraph 16 of the amended complaint is also not pled. Reading paragraph 7 and paragraph 8 of the amended complaint, it is clear that the alleged verbal promise to provide the change of insurance to the Blazer and to include collision coverage was made during the phone call between the parties at around 9:00 A.M. on November 2, 1977. The place at which the call was made, office or home, is not averred. However, we do not believe that it is material to the defendant in preparing an answer. "Good pleading requires that the opponent be sufficiently apprised of what he has to meet." *Daus v. Karr*, 61 D&C 479, 481 (1948). We find the allegations of the verbal promise in paragraph 8 and paragraph 16 are sufficiently pled to meet the requirement of Pa. R.C.P. 1019(a) and, therefore, paragraphs 3 and 4 of the preliminary objection are dismissed.

In paragraph 16.5 of the amended complaint, the plaintiff