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Steven M. Esernia v. Overland Moving Co and Thomas C. Jones : Brief of Appellant

Utah Supreme Court

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Case No. 7195

IN THE SUPREME COURT
of the State of Utah

STEVEN M. ESERNIA,

Plaintiff and Appellant,

- VS -

OVERLAND MOVING COMPANY,
a corporation, and THOMAS C.
JONES,

Defendants and Respondents.

BRIEF OF APPELLANT

FILED SKEEN THURMAN & WORSLEY,
AUG 4 - 1943 *Attorneys for Appellant*

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APPELLANT'S BRIEF

STATEMENT OF FACT

(All italics, unless otherwise noted, are appellant's)

On June 24, 1943, Steven M. Esernia, age 26 (Tr. 79) and Paul Meredith were in the town of Elko, Nevada. At the time both men were in the United States Marine Corps. At about ten o'clock in the evening (Tr. 80), a truck of the defendant Overland Moving Company, loaded with furniture and household goods (Tr. 152) and being driven by the defendant Thomas C. Jones, pulled alongside a small hamburger stand in the eastern

outskirts of Elko, where the plaintiff and Meredith were standing. The driver asked them if they were going to Salt Lake and if they wanted a ride (Tr. 81). The offer was accepted, and the two men entered the moving van as guests (admitted by answer Tr. 25). Esernia was sitting on the right side of the van cab and Meredith in the middle between the driver and Esernia (Tr. 82). The driver was alone at the time the trip from Elko commenced and prior to the time Esernia and Meredith entered the cab (Tr. 82).

At the time Esernia entered the van, the driver stated that he was tired and weary and wanted someone to talk to and also wanted company (Tr. 122). Esernia later testified (Tr. 122) that the driver stated he wanted company so he wouldn't fall asleep, although the evidence is not entirely clear as to whether the driver made this statement at the time of or prior to Esernia's entering the van or shortly after the journey had started. About an hour out of Elko, the driver stated that he did not mind either Esernia or Meredith dozing, but that he wanted one of them to keep busy so he would stay awake (Tr. 82). About an hour after the trip started, or possibly four hours (Tr. 124), Esernia dozed a little and woke up to find the truck bouncing along the shoulder of the road, the country adjacent to the road being wilderness and flat (Tr. 84). It was, of course, dark at that time. The driver pulled the truck back onto the highway and stated that he had dozed off (Tr. 86). The driver mentioned a few times that

he was sleepy and stated that he did not want both of the guests to sleep as it would make him sleepy (Tr. 123, 124). During the entire trip, neither Esernia nor Meredith got out of the cab, and Esernia did not recall that the driver stopped, other than at a stop sign (Tr. 125, 126).

The driver stated that he had stopped at Wendover and Delle, Utah, on the trip, and that at the latter place both guests were asleep at the time of the stop (Tr. 156).

At about six o'clock in the morning of June 25, the truck was travelling toward the scene of the accident near the junction of U.S. highway 40 and 50, which is approximately one mile in an easterly direction from the Lake Point Service Station and somewhat over a mile west of Black Rock Beach in Utah (Tr. 59). The road at the scene of the accident ran in a northerly direction, curving slightly to the east (Tr. 61). (See also Exhibit "A" prepared by State Highway Patrolman Frank Eastman, Tr. 60.) At the northerly side of the curve were a series of six guard rails, the center of which were five feet six inches (Tr. 64) from the northerly edge of the paved portion of the highway, and to the north of these guard rails was a culvert some thirteen feet northerly from said edge (Tr. 64). The truck failed to make the curve and crossed from the southerly side of the highway across and onto the gravel on the northerly side of the highway, and passed between the culvert and the guard rails (Tr. 65) some distance to the north and east where the truck ultimately tipped

over on its side. Two of the guard rails, 6" x 6", were damaged by the truck's passage (Tr. 70). The distance from the point where the truck left the north edge of the hard surface of the highway to the culvert was 264 feet (Tr. 65), and from that point to the point where the truck came to rest was approximately 386 feet. There is some conflict in the testimony relative to this latter distance (Tr. 72). The road at the scene of the accident was more or less level (Tr. 74) with a slight upgrade (Tr. 75) and of standard two-lane width.

As a result of the departure of the truck from the road and the fact that it tipped over on its side, the plaintiff Esernia received very substantial and permanent injuries, necessitating extensive periods of hospitalization (Tr. 91 to 118).

The first thing of the accident that the driver recalled was the front wheel of the truck hitting the gravel on the side of the road (Tr. 156), passing between the guard rails and the culvert, striking the last two guard rails, and tipping over on its side. The reason the truck left the highway was, as the driver stated, "I must have dozed, or something" (Tr. 188; see also Exhibit "B"), and he assumed that the accident was caused by his going to sleep (Tr. 189). The driver did not agree with Patrolman Eastman as to the distance the truck traveled on the gravel from the hard surfaced portion of the highway to the guard rail, his estimate being about 40 or 60 feet (Tr. 190). Dilworth S. Wooley, vice-president and general manager of the company,

stated that drivers were instructed not to take riders in the truck (Tr. 200).

At the conclusion of the testimony of plaintiff, a motion to dismiss as to both defendants was denied by the court (Tr. 148). Thereafter, and at the conclusion of the testimony of both plaintiff and defendant, the court granted a directed verdict in favor of both the defendant Thomas C. Jones and the defendant Overland Moving Company (Tr. 202, 203).

STATEMENT OF ERROR

Appellant and plaintiff relies upon the following errors:

Error Number 1

The trial court erred in granting the motion of defendant Thomas C. Jones for a directed verdict (Tr. 37, 202).

Error Number 2

The trial court erred in granting the motion of defendant Overland Moving Company for a directed verdict (Tr. 37, 203).

ARGUMENT

Since the motion for a directed verdict as to each defendant involves substantially the same considerations, for purposes of this brief they will be treated together. An adequate consideration of the action of the trial court in granting the motions resolves itself

into several categories. The motions were made not only upon the ground that there was a failure of the plaintiff to prove the willful misconduct of the defendants, but also that the plaintiff was guilty of contributory negligence and that he assumed the risk. As to the defendant Overland Moving Company, there is also the additional ground alleged in its motion that the driver and employee had no authority to carry guest passengers in the van. Since the court did not indicate the ground upon which the motions were granted, other than as reflected in the motions themselves, it becomes necessary to consider the several grounds of the motions.

A. Action on the part of the defendants amounting to willful misconduct.

It is believed that there can be no dispute that there was adequate evidence from which the jury could have found that the driver of the van dozed and went to sleep at the wheel, with the result that the van continued on across a curve in the highway to the opposite side of the road and turned over, injuring plaintiff. Actually, the evidence on this point is so clear and convincing, that no other conclusion could possibly have been reached. It also seems equally clear that the driver had a premonition of his physical condition and a knowledge that he was sleepy and tired. It will be noted that at the time plaintiff and his traveling companion were picked up in Elko, Nevada, there is some testimony that the driver initially stated he was sleepy and wanted

company on the trip to keep awake, although there is also testimony indicating that at this particular time he merely stated that he was tired and wanted company. The testimony is not entirely clear on this matter, there being positive statements as to both versions in the testimony of plaintiff. At any rate, some time after departing from Elko and while en route to Salt Lake City, the truck left the hard surface portion of the highway and traveled for some distance on the shoulder when the driver momentarily dozed, although nothing happened as a result of his action and the van was ultimately pulled back upon the highway. Also there is an abundance of testimony that at numerous times during the trip, the driver stated that he was tired and sleepy, and that he was aware of his physical condition which was one dangerous to the adequate driving and control of the van. We believe that the evidence relative to the cause of the accident and premonition of physical condition is so clear that additional reference to the transcript beyond that set forth in the statement of facts is unnecessary.

By virtue of the requirements of the Utah "guest" statute, 57-11-7 U.C.A. 1943, an action by a guest against the driver of a vehicle must be grounded either upon intoxication or willful misconduct. Since there is no element of intoxication in this case, the complaint was predicated upon the actions noted above as being willful misconduct. We believe that the applicable law clearly establishes that a driver who goes to sleep at the wheel

of a moving vehicle with the result that it leaves the highway and turns over, with premonition of his sleepy condition, is guilty of "willful misconduct" under a guest statute such as was in effect in Utah at the time of the accident here involved.

The physical attributes of a sleepy condition and their effect on driving ability have been frequently considered in cases of this kind. One of the most quoted decisions is that of *Bushnell vs. Bushnell*, 131 Atl. 432 (Conn. 1925), and the language of that decision is particularly applicable here, even though the problem of negligence was not that of willful misconduct. At page 435, the court stated:

"Sleep in such a situation does not ordinarily come upon one unawares, and, by watching for indications of its approach or heeding circumstances which are likely to bring it about, one may either ward it off or cease an activity capable of danger to himself or to others. There are few ordinary agencies so fraught with danger to life and property as an automobile proceeding upon the highway freed of the direction of a conscious mind, and, because this is so, reasonable care to avoid such a danger requires a very great care."

In *Steele vs. Lackey*, 177 Atl. 309 (Vt. 1935) defendant was driving plaintiff home from a dance when, without previous indication of sleepy condition, he dozed at the wheel while rounding a slight curve. The car left the highway and in the resulting accident plaintiff was injured. The action was brought under a Vermont guest

statute requiring gross negligence, which the court viewed as a degree of fault between ordinary negligence and reckless or wanton misconduct. Judgment for plaintiff was affirmed. The court stated at page 312:

“It is said that sleep does not ordinarily arrive without warning or premonitory symptoms. *Bushnell v. Bushnell*, supra, page 435 of 131 A; *Gower v. Strain*, supra; *Devlin v. Morse*, supra. Normally it did not come unheralded to the defendant, as he admitted. There was sufficient evidence to enable the jury, acting reasonably, to find that he knew, or ought to have known, that it was likely that sleep would come, and that, in these circumstances, his operation of the car was conduct indicating an indifference to the duty owed to the plaintiff as his guest, or an utter forgetfulness of her safety.”

In *Marks vs. Marks*, 31 N. E. 2d 399 (Ill. 1941), plaintiff guest and defendant driver were proceeding from Detroit to Chicago. They left Detroit about 5 or 5:30 p. m. and about 9:30 p. m. plaintiff suggested they stop for night but defendant was anxious to continue on into Chicago for business reasons, which they did. Plaintiff himself participated in driving a portion of the way, and actually was driving the car when they entered Chicago at 5:00 a. m. where they ran out of gas. While obtaining gasoline, one of the men stated he was tired and sleepy, and they were admonished by the attendant at the gas station that they had better watch their step. Shortly after leaving the gas station defendant fell asleep, and plaintiff himself was also asleep, when the

accident occurred. Judgment for the plaintiff was affirmed.

The Illinois statute required and the complaint charged the defendant, second count, with wanton, willful, and malicious misconduct. This the defendant denied, but he also stated that if such conduct constituted such willful and wanton misconduct, the plaintiff was equally guilty of the same misconduct.

The case contains a review of many Illinois decisions, and also emphasizes that ill will is not an element of wilful misconduct. Thus at page 401:

“In *Bernier v. Illinois Cent. R. R. Co.*, 296 Ill. 464, 129 N. E. 747, 749, the court said: ‘Ill will is not a necessary element of a wanton act. To constitute a wanton act, the party doing the act or failing to act must be conscious of his conduct, and, though having no intent to injure, must be conscious, from his knowledge of surrounding circumstances and existing conditions, that his conduct will naturally or probably result in injury. * * * It is difficult, if not impossible, to lay down a rule of general application by which we may determine what degree of negligence the law considers equivalent to a willful or wanton act. Whether an act is willful or wanton is greatly dependent upon the particular circumstances of each case. Where the omission to exercise care is so gross that it shows a lack of regard for the safety of others, it will justify the presumption of willfulness or wantonness.’”

Again at page 402:

“In the instant case, the evidence shows that the plaintiff and defendant were sleepy and tired. Defendant admits that to be true as does the plaintiff. The attendant at the gasoline station also testified that the two men appeared to be very tired and sleepy and he warned them to be careful. Defendant knew that he was sleepy and was apt to fall asleep while driving, yet he took control of the automobile and drove until he actually fell asleep which resulted in the accident whereby plaintiff was injured.

“In *Barmann v. McConachie*, 289 Ill. App. 196, at page 202, 6 N. E. 918, 921, the court continuing in its opinion said:

‘Defendant seriously contends that defendant’s failure to judge correctly of his ability to resist sleep was an error of judgment and that it will not support a finding of willful and wanton negligence. Defendant’s act did not arise from an error of judgment. It came about by reason of his failure to exercise judgment. He permitted himself to go to sleep while driving, and an act of omission may be made the basis of willful and wanton negligence, the same as an act of commission.

‘The finding of the jury that the defendant was guilty of willful and wanton negligence is supported by the law and evidence.’ ”

In the case of *Barmann vs. McConachie*, 6 N. E. 2d 918 (Ill. 1937), plaintiff sued for personal injuries allegedly the result of defendant’s willful and wanton negligence in the operation of his automobile at a time when plaintiff was riding with him as his guest. The evidence showed that the defendant driver, when two

or three miles from his destination, knew the guest was asleep, appreciated that an accident might happen if he also went to sleep and that he was sleepy. He continued to drive, however, and the automobile crashed into a telephone pole. Judgment for the plaintiff was affirmed upon appeal.

See also *Secrist v. Raffleson*, 62 N. E. 2d 36 (Ill. 1945).

In *Potz vs. Williams*, 155 Atl. 211 (Conn. 1931) defendant driver was proceeding at a moderate rate of speed on the proper side of a rather wide street when his car suddenly swerved across the street and collided with an oncoming car. He had been driving all day before the accident, was tired and yawning, and had apparently momentarily dozed a short time before the actual collision. Judgment for guest plaintiff was affirmed. The applicable law was stated by the court at page 212 as follows:

“As a guest in the car the plaintiff could only recover if she satisfied the jury that the defendant was guilty of reckless conduct within the provisions of section 1628 of the General Statutes. This statute, in the aspect of it here presented, requires proof by a guest in an automobile seeking to recover from the operator of it that the accident was “ ‘caused by his heedless and his reckless disregard of the rights of others,’ and, in substance, that it constituted wanton misconduct which consisted of a reckless disregard of the just rights or safety of others in their lives, limbs, health, reputation, or prop-

erty, or of the consequences of one's action." Grant v. MacLelland, 109 Conn. 517, 520, 147 A. 138, 139. In Bushnell v. Bushnell, 103 Conn. 583, page 592, 131 A. 432, 435, 44 A. L. R. 785, in considering sleep in its relation to negligence, we said: "In any ordinary case, one cannot go to sleep while driving an automobile without having relaxed the vigilance which the law requires, without having been negligent. It lies within his own control to keep awake or cease from driving. And so the mere fact of his going to sleep while driving is a proper basis for an inference of negligence sufficient to make out a prima facie case, and sufficient for a recovery, if no circumstances tending to excuse or justify his conduct are proven." We also there pointed out (page 591 of 103 Conn., 131 A. 432, 435): "There are few ordinary agencies so fraught with danger to life and property as an automobile proceeding upon the highway freed from the direction of a conscious mind, and, because this is so, reasonable care to avoid such a danger requires very great care." It is but the plainest common sense to recognize that there are circumstances under which the operation of an automobile upon the highway by one who is or should be aware of the likelihood that sleep will overtake him could reasonably be held to constitute reckless misconduct. Blood v. Adams (Mass.) 169 N. E. 412. Whether in a particular case this is so must depend upon the circumstances, and especially upon the extent to which the driver realizes or ought to realize that there is a likelihood of sleep overtaking him. *Ordinarily the decision of the question must be one of fact for the jury*, and, if the conclusion they reach is reasonable in the light

of the evidence and the inferences they may properly draw, it must stand.”

In *Erickson v. Vogt*, 80 P. 2d 533 (Calif. 1938) the plaintiff guest and defendant driver were returning to San Diego somewhat after midnight, when the driver dozed to such an extent that the automobile grazed the curb. Sometime later he dozed again and the car struck a pole, injuring plaintiff. The case was predicated upon willful misconduct and intoxication, as to which later element there was also some evidence. Judgment on an instructed verdict for defendant was reversed, the court holding that it was a jury question on the issues.

The court stated at page 535:

“As was again said in *Wright v. Sellers*, 79 P. 2d 209, page 215, with respect to the matter of proof:

‘It is sufficient if the act, or the failure to act, be done or omitted under such circumstances as would justify the reasonable inference that the driver should have known that injury to his guest was a probable result, for again, positive evidentiary proof of such knowledge would be an impossibility in most cases.’

In the circumstances we think that the question whether respondent was or was not guilty of willful misconduct was in the instant case one of fact for the jury, rather than of law for the court.”

In *Hardgrove vs. Bade*, 252 N. W. 334 (Minn. 1934) plaintiff guest and defendant driver were on a trip from Minneapolis to Bismarck, N. D. While on a detour, de-

defendant fell asleep and plunged the automobile into a ditch injuring the plaintiff. Three times during the trip the plaintiff had requested the defendant to let her drive if tired and sleepy, but defendant assured her he was all right and needed no assistance. Defendant had stated he was tired and sleepy several times prior to the accident. At the time the car left the highway, the plaintiff had closed her eyes, but was not certain whether she was actually asleep or not. The court applied the law of North Dakota and its guest statute granting a cause of action for intoxication, willful misconduct or gross negligence and held the case presented a jury question as to defendant's liability. Judgment for plaintiff was affirmed.

In *Masters vs. Cardi*, 42 S. E. 2d 203 (Va. 1947), the court stated at page 206:

“Gross negligence has been defined in many of our opinions and we need not define it again. Each case must depend upon its own peculiar facts, and we generally leave the determination of the question to the jury. It is their province to consider all of the evidence including the circumstances and surroundings of each case and then ascertain whether the acts and conduct of the host amount to gross negligence.”

See also *Curtis vs. Curtis*, 70 P. 2d 369 (Ida. 1937); *Salvas vs. Cantin*, 160 Atl. 727 (N. H. 1932); *Corvalho vs. Oliveria*, 25 N. E. 2d 764 (Mass. 1940); *Tennes vs. Tennes*, 50 N. E. 2d 132 (Ill. 1943); *Hoffart vs. Southern Pacific Co.*, 92 P. 2d 436 (Cal. 1939); *McMillan vs. Sims*,

112 S. W. 2d 793 (Tex. 1939); *Manser vs. Eder*, 248 N. W. 563 (Mich. 1933); *Freedman vs. Hurwitz*, 164 Atl. 647 (Conn. 1933).

Appellant is fully cognizant of the fact that a few of the above citations deal with an issue of gross negligence as contrasted to willful misconduct. The citations have been incorporated herein, however, because the definitions of gross negligence seem to embody the main essentials of willful misconduct as defined in cases from jurisdictions whose statute is of the latter type. For example in *Smith vs. Williams*, 178 P. 2d 710 (Ore. 1947), the court stated at page 717:

“We hold that evidence that respondent drove a bantam automobile over a road which was surfaced with loose rock and gravel at a speed upward of 50 miles per hour at 4:00 in the morning while he was sleepy and notwithstanding this knowledge continued to drive and did go to sleep thereby permitting the car to leave the road and turn over, is sufficient to take this case to the jury on the issue of gross negligence. We hold this constitutes evidence of conduct which indicates an indifference to the probable consequences of the act, a *reckless disregard of the right of others.*”

In addition, these cases on gross negligence clearly point to the considerations involved in determining whether or not there is a jury question in a given set of facts involving dozing at the wheel of an automobile.

What is the net result of the application of the rules of law set forth above to the facts of the instant

case? A driver with forewarning of sleep, even including an incident where the van he was operating left the highway as a result of dozing, later does go to sleep and his van leaves the highway, turns over and damages plaintiff. As the cases point out, sleep does not come about instantly, and an experienced driver who finds his faculties impaired and who must know that to sleep at the wheel not only might but probably will produce serious results, but notwithstanding continues the operation of the car, would certainly seem to be guilty of willful misconduct. The extent of forewarning may not always be possible of accurate determination, but there is certainly in this case overwhelming evidence of such a forewarning. For a court to take the position as a matter of law that willful misconduct could not be adduced from the evidence of this case by the jury is difficult to understand. In fact, the evidence seems so uncontroverted in this regard, that it might be said that the willful misconduct was established as a matter of law.

B. Contributory negligence and assumption of risk.

Both contributory negligence and assumption of risk are asserted in the motions for directed verdicts. The distinction between the two seems clearly established in Utah, whatever the rule elsewhere, even though reliance is made on the same set of facts.

In *Kuchenmeister vs. Los Angeles and S. L. R. Co.*, 52 Utah 116, 172 Pac. 725 (1918), the court stated, pages 728, 729:

“* * * The defenses of assumed risk and contributory negligence are entirely independent, and in case there is a conflict in the evidence, or where the facts are such that reasonable men may legitimately draw different conclusions from the evidence, or may arrive at different conclusions, it cannot be determined as a matter of law that either the one or the other defense is established, and the jury may, therefore, find that one of the defenses was established and may also find that the other was not. While in some of the cases there is some confusion respecting the distinction between the two defenses, yet, as a general rule, the courts have found little difficulty in enforcing the true distinction. The distinction is, perhaps, as well and as clearly stated in a few words as that can be done in the case of *Thomas v. Quartermaine*, in L. R. 18, Q. B. Div. at page 697, where, in discussing the distinction, it is said:

‘But the doctrine of *volenti non fit injuria* (assumed risk) stands outside the defense of contributory negligence and is in no way limited by it. In individual instances the two ideas sometimes seem to cover the same ground, *but carelessness is not the same thing as intelligent choice.*’ (Italics ours.)

“The distinction is also very intelligently discussed and clearly stated by the author in 3 *Labatt Mast. & Serv.* Sec. 1219 et seq. The fundamental element in assumption of risk, where it is not assumed as a matter of contract, as stated in the foregoing quotation, is ‘intelligent choice’; that is, the employe, before he may be charged with having assumed the risk, must not only have fully understood and appreciated the danger, but

he, in the very face of the danger, must, voluntarily, have assumed the risk of injury. Nothing short of that constitutes intelligent choice. As a matter of course, whether in any case the risk was or was not assumed must be determined from all the facts and circumstances. But whatever those facts and circumstances are, it must appear therefrom that the employe voluntarily elected to continue in the hazardous work. It needs no argument, therefore, to demonstrate that while in a particular case facts may be such as to justify a finding of both contributory negligence and assumption of risk, yet contributory negligence does not necessarily arise from intelligent choice, and therefore is not necessarily included in assumption of risk, as contended for by counsel.

“In view of what has just been said, it was the province of the jury to say which one of the two defenses was established.”

Contributory negligence is not a defense to actionable conduct involving willfulness or wantonness, and since this case does involve willful misconduct, it is difficult to see how such a defense in the usual sense of the term can be asserted. Thus in *Bordonaro vs. Senk*, 147 Atl. 136 (Conn. 1929) the court stated, page 137:

“Error is predicated upon the charge that contributory negligence upon the plaintiff’s part would constitute no defense to an action based upon the defendant’s reckless disregard of the rights of others. The defense of contributory negligence is not available where injury is inflicted under conditions open to the charge of willfulness or wantonness.”

The rule seems so well established as not to require extensive citation. See *Moreno vs. Los Angeles Transfer*, 186 Pac. 800 (Calif. 1919); annotation: "What amounts to gross or wanton negligence in driving an automobile precluding the defense of contributory negligence." 38 A. L. R. 1424; s. 72 A. L. R. 1357; s. 92 A. L. R. 1367; s. 119 A. L. R. 654.

It may be, however, that an act or failure to act on the part of the defendant amounting in itself to willful misconduct, could become a defense, which for want of a more accurate term could be called contributory negligence. The importance lies in the fact that if such a defense is available, the degree of culpability must be equal. The cases cited above set forth the rules of law to be applied in determining willful misconduct and in a broad sense would be equally applicable to any alleged conduct of the plaintiff.

Assumption of risk and what might be termed contributory willful misconduct have certain elements in common, even though they may present distinct theories of possible defense. Assumption of risk seems to have originated in the contractual relationship of master and servant, and is still in many jurisdictions unavailable as a theory of defense to a tort action. In those jurisdictions wherein the theory is permitted as a defense, however, the basic assumption is that the plaintiff is fully and completely aware of all of the hazards which confront him, and notwithstanding that knowledge elects to continue his conduct or acquiescence in the actions of

another. Before he can assume the risk, he must first fully know and appreciate what that risk entails. Contributory willful misconduct, if such there be, also requires that a complete and thorough knowledge of the hazards confronting the plaintiff be known and fully understood. The theory could only be, thereafter, that notwithstanding that knowledge and appreciation he then fails to take the action indicated or continues a course of action so clearly against his own interest as to amount to willful misconduct.

In the instant case the action of the trial court in granting a directed verdict means that as a matter of law plaintiff fully appreciated the dangers confronting him, assuming this was the ground upon which the court's action was predicated. As has been previously indicated, sleep is a peculiar thing, and somewhat different from other physical conditions such as intoxication. The knowledge of the extent to which the condition affects the physical abilities is peculiarly within the knowledge of the individual affected. True there may be external indications, but there is always a serious question as to just what they indicate. In this case, the driver stated a number of times that he was tired and sleepy, and he even on one occasion left the road momentarily before the accident. But how was the plaintiff to know that any such real danger continued to exist? He was confronted by a man who was a professional driver, engaged in van movements on a cross country basis, and obviously experienced. The driver might

well have been tired and sleepy, but in view of the circumstances how can it be said *as a matter of law* that he was so tired and sleepy, that plaintiff fully appreciated the dangers confronting him? The driver was unknown to the plaintiff prior to the time he entered the van, and there is nothing whatsoever to indicate that he knew anything of the mode of operation of the van line, or of the previous driving time of the driver. That there actually was a danger, and real one, is apparent from the fact that the driver went to sleep and turned over the van. Only one man knew with certainty the extent of the danger, and that was the driver himself. Can it be said *as a matter of law* that the defendant fully appreciated the hazards?

The contributory feature goes further, however, since there must not only be the complete appreciation of the danger, but also a failure to act. This leads to the interesting inquiry of just what the plaintiff could do as a practical matter. There is, incidently, nothing in the record to show whether or not the plaintiff could drive a car at all. Assume that he could, it is entirely possible that the ordinary man would assume that a request to drive a commercial van of large size would be denied, and there is also the question as to whether or not an inexperienced individual would be capable of driving such a vehicle. Was he as a matter of law required to keep up a running flow of conversation, under the circumstances? As a matter of law was it necessary to step out of a van in the middle of the night in country

which the plaintiff believed, and which could accurately be described as, wilderness? Or to alight at Wendover or Wells again in the middle of the night? In actuality, was there anything to be gained by staying awake? In this latter connection, the evidence is far from clear as to whether or not plaintiff was asleep or awake during the period just prior to the accident, and for that matter as to just how much of the trip he was asleep.

It seems clear that these are matters within the province of the jury to decide, and it is difficult to see how a trial court could resolve the problem as a matter of law. The cases clearly indicate that a jury question is presented.

Thus in *Freedman vs. Hurwitz*, 164 Atlantic 647 (Conn. 1933), the court considered at length the doctrine of assumption of risk. The plaintiffs, age 15 and 60, were riding as guests in the rear seat of defendant's automobile. They had joined defendant after he had done considerable driving and was tired, and prior to the accident and while driving, defendant and his wife in the front seat of the automobile had stated that he was tired and was afraid he might go to sleep and that if he did, his wife was to tickle him or pinch him. The automobile swerved suddenly to the left side of the highway and into an oncoming car some distance after this conversation had taken place. The court held that jury might have reasonably inferred that the cause of the accident was due to the defendant's falling asleep as he came opposite the other car. The defendant had

interposed a special plea of assumption of risk in each of the actions brought by the two plaintiffs. Judgment for plaintiff in each case was affirmed. The defendant on appeal contended the verdict should have been set aside because the jury could not reach any conclusion other than that the risk had been assumed and also because, at the trial, the court had refused to submit to the jury this defense. In discussing the doctrine, the court stated at page 649:

“One is entitled to assume that another will exercise proper care until he perceives, or ought reasonably to perceive, that that other is not doing so, and he does not assume the risk that another will by some sudden negligent act or omission subject him to danger. *Stout v. Lewis*, 11 La. App. 503, 123 So. 346. A pedestrian crossing a highway and injured by the negligent operation of an automobile upon it, or the driver of one car injured by collision with another, may be guilty of contributory negligence, but he does not assume the risk of the sudden negligent act or omission of the party who caused the collision. 1 Pollock, Torts, 173. So the mere fact that there is a possibility known to the guest in an automobile that the driver may be guilty of a negligent act or omission may not be a sufficient basis upon which to hold that he has assumed the risk. *Marks v. Dorkin*, supra, page 524 of 105 Conn., 136 A. 83. And the doctrine can only apply where the particular situation or condition producing the risk has continued for such a length of time that the party alleged to have assumed it can be found to have known it or been charged with knowledge of it, to have appreciated the risk to

which he was subjected by it, either actually or because he ought reasonably to have done so, and to have had an opportunity to avoid it.

“It remains to apply these principles to the case before us. The plaintiffs are a young girl about fifteen years old at the time of the accident and a woman then about sixty. They were riding as guests of the defendant in the rear seat of his automobile. It is true that the jury could have reasonably found that each knew that the defendant was tired and sleepy and that he realized he might fall asleep while driving the car, yet thereafter, without remonstrance or effort to guard themselves from danger, they continued to ride in it for a few minutes—just how long the record does not disclose. As far as the denial of the motion to set the verdict aside is concerned, it must be remembered that the defense of assumption of risk is an affirmative one with the burden of proof upon the defendant, and we cannot say that the jury were bound to find as matter of law that the plaintiffs appreciated the risk of the defendant falling asleep. But beyond that, considering the ages and sex of these plaintiffs, their position as guest of the defendant riding upon the rear seat of the car, the hour of the night, and the place where they were, with the other surrounding circumstances, it does not appear that there was any course which it could reasonably be said they ought to have adopted to avoid such danger as there was in the situation. The jury could not reasonably have found that by continuing in the car they voluntarily chose to assume the risk within the true meaning of the doctrine. The trial court was correct in not submitting to the jury the issue raised by the special pleas.”

And in *Erickson vs. Vogt*, supra, the court stated at page 536:

“What we have here is a verdict for the defendant brought in under the courts instructions. Upon an appeal from such a verdict appellant is entitled to have every legitimate inference drawn in her favor. While it is true that in the instant case the parties had both been drinking during the time they were at the dance hall, and had the case been submitted to the jury it might have found respondent to have been so far intoxicated as to affect the safety of his driving, either by making him drowsy or otherwise, still the evidence does not indicate that his appearance was such as necessarily to warn appellant of his inability to drive. So far as appears she may have had no reasons for real apprehension, at least until he fell into the doze and grazed the curb, and *may not, even then, be chargeable with fully realizing her danger or being in any position to have avoided it.*”

The court also quotes from the case of *Lindemann v. San Joaquin Cotton Oil Company*, at page 536, as follows:

““There is no merit in the suggestion or contention that the evidence which tended to establish the intoxication of defendant Ewing to the degree which would render him liable for the injuries and damages suffered by reason of the accident is necessarily conclusive of the question as to whether plaintiff had, or should have had, knowledge that Ewing was so far affected by intoxicating liquor as to defeat his claim for damages. *If that is true, then every person riding*

as a guest would be defeated by proof of the single fact that the driver was not in a fit condition to drive the automobile . . . ’’

And in *Smith vs. Williams*, *supra*, the court stated at page 718:

“We hold that it is a question of fact as to whether or not appellant was guilty of contributory negligence by reason of the fact that he was asleep at the time of the accident. Even if the jury should find that this constituted negligence upon the part of the appellant, still it is a question of fact as to whether or not that negligence proximately contributed to the happening of the accident. 38 Am. Jur. 898, and cases cited in notes 4 and 5. The question would still be: Could he have done anything if awake?”

While the defendants pleaded the defense of assumption of risk the answer is silent as to any defense of what might loosely be called contributory negligence. Both are affirmative defenses, and assumption of risk must be pleaded. See *Slobodnjak vs. Coyne*, 165 Atl. 681 (Conn. 1933); *Maurer vs. Fesing*, 290 N. W. 191 (Wis. 1940). Because of the similarity between the defenses, it seems entirely logical to assume that the defense of willful misconduct must also be pleaded, and that if it is not, no assertion of the defense can be made. In this connection it is noted that willful misconduct is an entirely distinct matter from the ordinary defense of contributory negligence.

Lastly, defendant Overland Moving Company asserts that it cannot be held liable for the actions of its

driver because he was specifically instructed not to pick up riders, and his action in taking the plaintiff into the truck as a passenger and guest was in direct violation of those instructions. This may well be true as to a guest in an action predicated upon ordinary negligence. In a case, however, involving willful misconduct, the converse is true, and the defendant employer is liable.

An annotation, "Liability of master for injury to one whom servant, in violation of instructions, permits to ride on vehicle," 12 A.L.R. 145, it is stated at page 147:

"On the other hand, one riding on a vehicle by the permission of a servant, in violation of his master's instructions, is not, according to the weight of authority, deprived of all recourse against the master for an injury sustained, though the servant, in granting the permission, is not acting within the scope of his employment, or is not clothed by the master with the apparent authority to grant it. In the case of such an authorized permission to a third person to be on the vehicle, it is generally held that, although the master is not required to exercise the same degree of care as where the permission is authorized actually or ostensibly, he is nevertheless liable for a wanton, wilful, or reckless injury inflicted on the third person by a servant who is acting within the scope of his employment."

In conclusion, it is submitted that there was more than adequate evidence to submit the issue of the defendants' willful misconduct, and their liability, to the

jury, and that the action of the trial court in directing a verdict in favor of each of the defendants was clearly error.

Respectfully submitted,

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