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

Utah Supreme Court

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Ingebretsen, Ray, Rawlins & Jones; Attorneys for Respondents;

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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.

CASE NO.
7195

RESPONDENTS' BRIEF

ILED

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ERK, SUPREME COURT, UTAH

INGEBRETSEN, RAY, RAWLINS & JONES,
Attorneys for Respondents.

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STATEMENT OF FACTS

Respondents agree with the Statement of Facts set forth in Appellant's brief, except in the following particulars:

1. It is stated by Appellant that the evidence is not entirely clear as to whether the driver of the van stated to Esernia that he was sleepy and wanted someone to keep him company so he wouldn't fall asleep before Esernia entered the van or after the journey had started. The record shows

that Esernia stated that the driver of the van told him before he got in the truck that he (the driver) "was tired" and "wanted somebody to keep him company on the road, so he wouldn't fall asleep." (R. 122-123.)

"Q. And you and your buddy, called Meredith, were standing in front of the hamburger stand and you were talking to some girls?

"A. Yes sir.

"Q. And the truck driver drove up and stopped and asked you if you were going to Salt Lake?

"A. He asked us if we wanted a ride to Salt Lake.

"Q. Is that all he said to you at that time?

"A. Well, we argued a little bit. I did not want to go. One of us did not want to go, I believe it was Meredith wanted to go. I wanted to stay there with the girls. He wanted to go. The driver said, then, he wanted some company.

"Q. Did he say why he wanted some company?

"A. He was kind of weary.

"Q. He said he was kind of weary?

"A. Yes sir.

"Q. Did he say anything else about being weary at that time?

"A. I don't believe so.

"Q. Did he say why he wanted you to go with him?

"A. He wanted us to talk to him, he wanted company.

"Q. Why did he want you to talk to him?

"A. He wanted company, something to do, besides driving, I suppose.

"Q. Did he tell you why he wanted company?

MR. THURMAN: You are now talking about in Elko?

MR. JONES: In Elko.

"A. Well, I don't know if it was right there on the spot, or after we got in the truck, but a little while after we did get in the truck, and he told us he was tired and he wanted somebody to talk to.

"Q. Your deposition was taken, was it not, in Connecticut?

"A. Yes sir.

"Q. I am goin to read to you your answer to the same question.

"Q. How did he happen to pick you up?

"A. We were standing there talking to the girls. We were going to stay with the girls that night. This driver pulled up alongside of us. He stopped his truck and he asked us if we wanted a ride, and we told him we were going to stay in that town. We sort of figured if we went all the way to Salt Lake we would not be able to get back in time. He told us he was tired, he wanted somebody to keep him company on the road, so he wouldn't fall asleep and he asked us if we would not go with him.

"Well, the fellow I was with wanted to go to Salt Lake and I wanted to stay around with the girls. We argued a little while, and the truck driver wanted us to go with him, so we went.'

Was that your answer to that question?

"A. Yes, I believe it was.

"Q. Was that what happened?

"A. Well, I don't know word for word, but that is about the same thing.

"Q. Did he, at any time, after you started on the road from Elko to Salt Lake, again tell you that he was tired and sleepy?

"A. Yes sir.

"Q. How long was that after you got into the truck?

"A. I don't know that, I don't know how long.

"Q. Well, did he tell you how far he had driven without sleep or rest?

"A. He told us he came from San Francisco, California.

"Q. Did he tell you he had come from San Francisco without any sleep or rest?

"A. Yes sir.

"Q. And he had been driving all the time?

"A. Yes sir." (R. 121-122-123.)

Later in the trial of the case, Esernia testified as follows:

"Q. He told you he was tired and sleepy at the time he picked you up; is that correct?

"A. Yes sir.

"Q. Then he told you he was tired and sleepy about two hours afterward; is that correct?

"A. I think he told us he was tired and sleepy after that first time he went on the shoulder, that was about, maybe two or three hours afterwards.

"Q. He did tell you he was tired and sleepy before you got on the truck?

"A. I don't know if we were in the truck or getting in the truck. I know it was in Elko there.

“Q. Before you started on the trip, at any rate?

“A. Yes sir.” (R. 142-143.)

2. The Statement of Facts set forth in Appellant’s brief fails to set forth the fact that Esernia did not at any time after entering the van request permission to leave it. The testimony of Esernia shows that after he entered the van, the driver several times stated that he was sleepy and tired, and that he, Esernia, or Meredith would have to keep talking to the driver in order to keep him awake. (R. 124, 143, 82.) The testimony of Esernia also shows that sometime after the van left Elko it went off the road and bounced along the shoulder of the highway, and that the driver of the van stated that “he had dozed off”. (R. 86, 124.) The record shows that neither Esernia or Meredith made any request for permission to leave the van. (R. 132, 145.)

3. The Statement of Facts set forth in Appellant’s brief fails to set forth the fact that Esernia had ample opportunity to leave the van, had he desired so to do. The record shows that after the van left Elko and before the accident happened, it stopped at Wendover and at Delle, Utah. (R. 154-155.) Esernia testified that he remembered a couple of little towns between Elko and the place of the accident. (R. 125.) The driver of the van testified (and his testimony was in no way refuted) that the van stopped at Wendover for about an hour. (R. 154.) He testified that he stopped at Delle long enough to have a piece of pie and a cup of coffee. (R. 155.)

ARGUMENT

The trial court did not err in directing a verdict in favor of the respondents.

1. It is argued by Appellant that there was sufficient evidence in this case to require the trial court to submit to the jury the question as to whether or not the defendants were guilty of "willful misconduct". Whether the defendants were or were not guilty of willful misconduct within the meaning of those words as they are used in Section 57-11-7, Utah Code Annotated 1943, becomes immaterial in this appeal, because the evidence in the record clearly shows that the plaintiff was guilty of contributory negligence and that he assumed the risk as a matter of law.

2. *The evidence shows that plaintiff, as a matter of law, was guilty of contributory negligence and that he assumed the risk barring his right of recovery from the defendants.*

The testimony of the plaintiff shows:

(1) Before or at the time he entered the van, the driver told plaintiff that he was tired and sleepy and wanted someone to keep him company on the road so that he wouldn't fall asleep. (R. 122-123.) ;

(2) After the van left Elko the driver told plaintiff that he had driven from San Francisco, California, without sleep or rest. (R. 123.) ;

(3) After the van left Elko, the driver told the plaintiff and Meredith, the other "guest" in the van, that one of

them could go to sleep, but one would have to stay awake talking to him to keep him awake. (R. 124.) ;

(4) About one hour, or about four hours, after they left Elko, the driver dozed, ran off the road onto the shoulder and stated to plaintiff and to Meredith that he had dozed and stated that he wanted them to keep talking to him to keep him awake. (R. 86, 124.) ;

(5) Plaintiff did not at any time request permission to leave the van. (R. 145.) ;

(6) The van passed through a couple of little towns before the accident happened, and plaintiff did not request permission to leave the van. (R. 125.) The driver of the van stated that he stopped at Wendover for one hour and for a short time at Delle, which towns are between Elko and the place of the accident. (R. 154-155.)

Prior to the adoption of the Guest statute by the State of Utah, this court decided the case of *Maybee vs. Maybee*, 79 Utah 585, 11 P. (2d) 973. In that case the plaintiff sought to recover damages against the defendant, her mother, for personal injuries sustained by her when the automobile driven by her mother and in which she was riding as a guest hit a chuck hole and overturned. The mother was near sighted and had always worn glasses when driving. The daughter had known for many years that the mother was near sighted and that she had to wear glasses. At the time the accident occurred, the mother was not wearing her glasses and had been driving without them for three or four hours. At the time of the accident, plaintiff was riding in the front seat reading a book. Plaintiff had asked her mother

once or twice whether she was getting along all right without her glasses and the mother replied that she was. The mother testified that she could have seen the chuck hole had she been wearing her glasses. This court in that case sustained a directed verdict in favor of the defendant. In its decision the court (page 975) stated:

“It is not disputed that every fact circumstance, and condition relied on by the plaintiff as constituting negligence on the part of the defendant was fully known to and appreciated by plaintiff, and that, notwithstanding her knowledge of the fact that she was driving without the aid of glasses, the plaintiff paid no attention to the conditions in the road, but was content to sit by and read a book while her mother was driving at a speed of forty to forty-five miles an hour. If it was negligence for the defendant to drive at this speed with her vision impaired as it was, and without the aid of glasses, it would follow that, where all these facts are fully known to and appreciated by the plaintiff, and notwithstanding such facts and such knowledge she was willing to be driven in the car, she not only assumed the risk or hazard to her own safety, which resulted from such driving, but, by her acquiescence, was guilty of independent negligence which contributed to the accident. The plaintiff identified herself with whatever negligence there was on the part of the mother because of her knowledge of all such facts and her approval, consent, and acquiescence in the driving of the car by her mother.
* * * Because of her acquiescence and consent to be driven under these circumstances, she herself participated in the negligence which caused the injury, and she is therefore barred from recovery.”

This court in that case cited the case of *Krueger vs. Krueger*, 197 Wis. 588, 222 N. W. 784, stating:

“In *Krueger v. Krueger*, supra, it was held that the plaintiff, the mother of defendant, could not recover where the negligence relied on was the sleepy condition of the driver who had driven a long distance and was without sleep the night before, because the plaintiff had full knowledge of the condition of the driver and was bound to know, as a matter of common knowledge, what might result from the defendant dozing while at the wheel. Ordinarily a guest may not continue to ride in the car without protest against recklessness or negligence of the driver in charge of the car, thereby assuming the risk and participating in the negligence, and then claim that he was without fault.”

In the case of *Markovich vs. Schlafke, et al.*, 284 N. W. 516, it was held that a guest who knew that the driver had been up all night, and had been indulging in intoxicating liquors, and who observed the drowsiness of driver, but permitted driver to remain at wheel, assumed risk of injury sustained when driver fell asleep and automobile ran into ditch. In that case the court said:

“It thus clearly appears from the plaintiff’s own testimony that he noticed that Schlafke went to sleep a little two or three times on the trip; that because he observed Schlafke was sleepy he made him stop at the intersection of county trunk E with highway No. 55 and wanted to drive the car himself; but after being assured by the defendant that the latter knew what he was doing he rode on with Schlafke still at the wheel, a distance of about a half mile when Schlafke again went to sleep and lost control of his car.

“These facts testified to by the plaintiff himself made out about as clear a case of assumption of risk by a guest as may well be found. In *Knipfer v. Shaw*, 210 Wis. 617, 246 N. W. 328, 330, 247 N. W. 320, we

reviewed a number of our prior cases in each of which it had been held that the guest had assumed the risk. We said: 'In all of those cases three elements were present: (1) A hazard or danger inconsistent with the safety of the guest; (2) knowledge and appreciation of the hazard by the guest; and (3) acquiescence or a willingness to proceed in the face of the danger.'

"In every case where those elements have unquestionably existed we have applied our doctrine of assumption of risk and consistently denied recovery from the host by a gratuitous guest riding in the former's automobile. * * * Under the circumstances of this case it clearly appears that for some time prior to the accident a hazard or danger wholly inconsistent with the safety of the plaintiff existed; that the plaintiff had full knowledge and appreciation of that hazard and acquiesced or willingly continued to ride with the defendant notwithstanding such hazard or danger. The undisputed facts of this case more strongly impel the conclusion that the plaintiff assumed the risk than do the facts in *Krueger v. Krueger*, 197 Wis. 588, 222 N. W. 784, 785, where a guest sought to recover from her host because the latter went to sleep while operating his automobile."

The case of *Rennolds' Adm'x vs. Waggoner*, 271 Ky. 300, 111 S. W. (2d) 647, involved these facts: The defendant and Rennolds with others attended a dance about 40 miles from their home. About midnight during intermission they had lunch and some liquor but the evidence showed that none of them were intoxicated. During that intermission and when they were starting home, there was a discussion about how hard they had worked the day before and how tired and sleepy they were. On the return trip Rennolds drove the car for about 20 miles. When they stopped and

had a drink from a spring, Rennolds complained of being sleepy and asked Waggoner to drive. Waggoner was also tired and sleepy and when they got back into the automobile he cautioned the others that he was sleepy and requested that they remain awake and talk to him to keep him from going to sleep. Shortly after leaving the spring, all of the occupants of the car went to sleep. Within three miles of their home Waggoner went to sleep, the automobile ran off the road, overturned, and Rennolds was killed. The court in that case held that the deceased Rennolds had known that Waggoner was in a state of drowsiness and fatigue and when he entered the automobile under those circumstances he assumed the risk of injury resulting from such causes.

Appellant's brief cites the case of *Freedman vs. Hurwitz*, 164 Atlantic 647 (Conn. 1933) in support of the argument that the appellant was not guilty of contributory negligence or assumption of risk. The facts in that case differ materially from the facts established by the record in this case. There, as appears from the opinion of the court, it was not shown that the plaintiffs knew the defendant was tired and sleepy at the time they entered the automobile as guests, it was not until a few minutes before the accident happened that plaintiffs knew the defendant was tired and sleepy. In that case the plaintiffs had no opportunity to leave the car after they knew the driver's condition before the accident occurred.

The court, at page 649, stated :

"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 de-

fendant 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.”

The court, in that case, in discussing the defense of assumption of risk, (page 649), stated :

“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.”

The facts in our case fit squarely with all of the conditions stated by that court as being required in order to apply the defense of assumption of risk.

Cited in Appellant’s brief is the case of *Erickson vs. Vogt*, 80 Pac. 2d 535. In that case the court, in discussing the facts, at page 536, stated :

“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 ap-

pearance was such as necessarily to warn appellant of his inability properly 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 facts in our case go far beyond the facts in that case. In our case the plaintiff testified that the driver of the van told him that he was tired and sleepy and that he wanted the plaintiff and his buddy to ride with him to keep him awake. Under those circumstances the plaintiff could have refused to ride or he could have left the van at Wendover or at Delle.

In Appellant's brief is cited the case of *Smith vs. Williams*, 178 P. (2d) 710. In that case it was held that the fact that the guest was asleep at the time the driver was overcome by sleep did not, as a matter of law, bar the guest's right to recover. It clearly appears from the opinion in that case that the guest did not know that the driver was sleepy at the time the guest went to sleep.

In our case there can be no dispute as to the plaintiff's knowledge of the condition of the driver because the plaintiff testified that before he got into the van the driver told him that he was tired and wanted plaintiff to ride with him to keep him awake.

The acts and conduct of the defendants, which are alleged and relied upon by plaintiff as constituting willful misconduct are set forth in Paragraph 4 of plaintiff's amended complaint:

“That said carelessness, recklessness and willful misconduct consisted of the following: That the individual defendant, within the hour preceding the accident hereinafter set out, and while driving said truck, fell asleep, and thereafter and to and including the time of said accident, was sleepy and tired, and was in an unfit mental and physical condition to drive and operate said truck on said highway, in this, that he had driven and operated said truck without relief or sleep, or without rest, for a distance of more than 600 miles; that the individual defendant knew of his said mental and physical condition, and knew that the continued driving and operation of said truck while in said condition, would be accompanied with extreme and probable danger to all persons riding therein, including plaintiff; that notwithstanding his said condition and said knowledge, the individual defendant, carelessly, recklessly and with willful misconduct continued to drive and operate said truck, with plaintiff as a guest passenger aforesaid, and that upon reaching said point approximately one-fourth of a mile east of said Lake Point Service Station, the individual defendant again fell asleep, and, as a result of his so doing, said truck left said highway, went out of control, travelled off said highway for a distance of 600 feet, and turned over three times.”

The testimony of plaintiff shows that every act and circumstance relied upon as constituting willful misconduct on the part of the driver was known to plaintiff and acquiesced in by him, and that he accepted the ride and continued to ride notwithstanding the fact that he had ample opportunity to refuse to ride and to leave the van before the accident happened.

We respectfully submit that the judgment should be affirmed.

INGEBRETSEN, RAY, RAWLINS & JONES,
Attorneys for Respondents.