

1949

# Nellie Dowsett v. Darwin Dowsett : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

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NELLIE DOWSETT,

Plaintiff and Appellant,

-vs-

DARWIN DOWSETT,

Defendant and Respondent.

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BRIEF OF APPELLANT

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**FILED**

JAN 20 1949

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IN THE SUPREME COURT OF THE STATE OF UTAH

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NELLIE DOWSETT,

Plaintiff and Appellant,

-vs-

DARWIN DOWSETT,

Defendant and Respondent.)

Case No. 7263

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BRIEF AND ARGUMENT OF APPELLANT

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## STATEMENT OF FACTS

The defendant and respondent, Darwin Dowsett, on the 30th day of June, 1945, and prior thereto, was a resident of Holladay, Utah, but during the entire month of June, 1945, was in the military service of the United States and stationed at Camp Maxey, near Dallas, Texas (pp. 45, 46). He was a married man, his wife being Evangeline Dowsett, who resided at Holladay, Utah. Harold H. Dowsett and Nellie Dowsett, father and mother respectively of defendant, also resided at Holladay, Utah. At that time defendant was the owner of a 1940 model 4-door Dodge sedan, located and kept at Holladay (p. 46). In said month of June defendant made arrangements for living quarters for his wife in a small town near Camp Maxey, and desired that his wife and automobile be brought to Camp Maxey (p. 46). His wife could not drive the car, but both his father and mother could, which he knew (pp. 47, 54, 55). About two weeks prior to said June 30th he had a telephone conversation with his wife and asked her

to have his father and mother bring her and the car to where he was stationed (pp. 47, 48). The<sup>re</sup> was a later telephone conversation with his wife, but prior to June 30th., through which he learned that his wife had arranged with his father and mother to drive the car to Camp Maxey, as he had requested (pp. 56, 57). Harold H. Dowsett, in particular, did not want to go, but consented (p. 61). These statements of fact are from the defendant's own testimony, and are corroborated by Harold H. Dowsett (pp. 58, 60, 61), Evangeline Dowsett (pp. 78, 79) and Nellie Dowsett (pp. 90, 91, 93, 94). Evangeline Dowsett, at the instance of the defendant made the arrangements, Harold H. Dowsett was to drive and Nellie Dowsett, the plaintiff, was to relieve him from time to time (pp. 64, 78, 79, 84). Darwin Dowsett communicated with his wife by telephone, and she in turn communicated with the father and mother. There was no conflict in the evidence on these matters. Darwin Dowsett gave no instructions as to how to drive or what route to take.



Harold H. Dowsett, Nellie Dowsett and Evangeline Dowsett, with a fourth person, left Holladay between four and five o'clock in the morning on June 30, 1945 (pp. 40, 65), to make the trip to Camp Maxey, with Harold H. Dowsett driving (p. 95). When a bout 33 miles east of Heber City, Utah, in Daniels Canyon, while going up a fair grade and travelling east, the sun blinded Harold H. Dowsett, who was still driving the car, so he couldn't see (p. 65). He continued going ahead for about 200 feet (pp. 65, 66, 75) when he couldn't see the road (p. 65). Just after reaching the top of the grade he put the brakes on because he felt the car on loose gravel and the car started to shake (p. 66). He was off the road. This was the first time he set the brakes after the sun had struck him in the face and blinded him (p. 66). He had travelled about 200 feet (p. 75). The car was travelling at a speed of about 35 miles per hour (pp. 69, 70). From the time the sun struck him in the face he could not see the highway ahead of him (p. 74). During the time that Harold H. Dowsett was blinded by the sun, Nellie Dowsett, the

plaintiff, was riding in the front seat of the car, but was turned talking to the people in the back seat, and she did not know that Harold H. Dowsett, the driver, was blinded by the sun (p. 95).

After the car left the road and struck loose gravel, even though the brakes had been set, it went over the grade or embankment and turned over, injuring Nellie Dowsett and others. Nellie Dowsett's injuries consisted of five broken ribs on her left side, injured back and chipped backbone, ruptured spleen and both legs bruised and injured, including an injured right knee. She was confined to a hospital and her home for about eight months, and claims permanent injuries. She claimed special damages in the sum of \$1289.90 and general damages in the sum of \$7500.00 (pp. 2, 3). Evidence was submitted in support of the allegations contained in the complaint, and the plaintiff rested, whereupon counsel for defendant asked leave of court to amend their answer and plead that Harold H. Dowsett and Nellie Dowsett were fellow servants,

(p. 134), which amendment was allowed (pp. 137, 138). The defendant rested and counsel for defendant moved for a directed verdict on nine grounds (pp. 135, 136), the first being that plaintiff and Harold H. Dowsett were fellow servants, and, as a matter of law, she could not recover. The court granted the motion and directed a verdict in favor of the defendant on this first ground only (p. 137). All other grounds were disregarded.

In due time plaintiff filed a motion for a new trial (p. 26), which was denied (p. 29). The plaintiff particularly set up in the motion for a new trial that the decision of the court to direct a verdict, that the verdict and the judgment entered thereon, and the decision of the court to the effect that the master and servant rule was applicable to this action, were against the law, and that there was error in law occurring at the trial.

## STATEMENTS OF ERROR

1. That the decision of the court to direct a verdict in favor of the defendant was against the law.

2. That the decision of the court to the effect that Nellie Dowsett, plaintiff, and Harold H. Dowsett, driver of the automobile, were fellow servants, was against the law.

3. That the verdict was against the law, in that it was contrary to both the law and the evidence.

4. That the judgment entered on the verdict is against the law.

5. That the court erred in denying plaintiff's motion for a new trial.

6. Error in law occurring at the trial and excepted to by the plaintiff, in that the court erred in directing a verdict in favor of the defendant and in denying plaintiff's motion for a new trial.

## STATEMENT

We do not think there can be any question regarding the facts in this case. The testimony all came from plaintiff's witnesses, and, was uncontradicted. The plaintiff contended that she and her husband, Harold H. Dowsett, were the agents of the defendant for the purpose of taking defendant's wife and automobile to Camp Maxey, Texas, where he was stationed. The trial judge on hearing of motion for a new trial stated that he thought such agency had been established. The trial court directed a verdict in favor of the defendant on the ground, and the sole ground, that plaintiff and Harold H. Dowsett were fellow servants (p. 137). The assignments of error herein all relate to this decision of the court, and this brief will necessarily be confined to that one question. In directing a verdict and in denying plaintiff's motion for a new trial we contend that the trial judge disregarded the plain language of the Utah fellow servant statute, 49-6-2, Utah Code Annotated, 1943, and the decisions

of this Supreme Court thereon. We contend that Nellie Dowsett, the plaintiff, and Harold H. Dowsett, were the agents of the defendant, Darwin Dowsett, but not employees or servants of Darwin Dowsett, and that they were not fellow servants under the provisions of 49-6-2, Utah Code Annotated, 1943, which defines fellow servants in the State of Utah. All principals are not masters and all ~~xxx~~ agents are not servants. A master may be a species of principal and a servant a species of agent, however.

~~CONFIDENTIAL~~  
AGREEMENT

HELLIE DOWSETT, THE PLAINTIFF, AND HAROLD H. DOWSETT, WERE AGENTS OF DARWIN DOWSETT, THE DEFENDANT, BUT NOT SERVANTS OR EMPLOYEES OF DARWIN DOWSETT.

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1. THE RELATION OF MASTER AND SERVANT.

The relation of master and servant is that which arises out of a contract of employment, express or implied.

39 C. J. p. 33, Sec. 1.

The relation of master and servant arises out of contract.

39 C. J. p. 34, Sec. 2.

The relation of master and servant, or employer and employee, is a contractual relationship.

35 Amer. Juris. p. 450, Sec. 8.

"The relationship of master and servant is one that arises out of a contract of employment, express or implied, between a master or employer on the one hand, and a servant or employee on the other. 39 C. J. 33."

Gleason vs Salt Lake City, et al. 94 Utah 1.  
Alexander Film Co. vs Williams (Texas Civil Appeals), 102 S. W. 2nd. 514, 516.

There was no contract of employment between Darwin Dowsett and Harold H. Dowsett and Nellie Dowsett.

a. When the relation of master and servant exists

"Where one person is employed to do certain work for another who, under the express or implied terms of the agreement between them, is to have the right of exercising control ~~on~~ over the performance of the work, to the extent of prescribing the manner in which it shall be ~~done~~ executed, the employer is a master, and the person employed is a servant."

1 LaBlatt's Master & Servant (2nd Ed.) p. 9.

Again from the same authority giving the tests:

"(1) The existence or absence of a right on the employer's part to control the employee as to the manner in which his functions are to be performed. This test is decisive, whatever may be the character of the work assigned to the employee."

1 LaBlatt Master & Servant (2nd Ed.) p. 230.

"The relation of master and servant exists between an employer and employee when the employer retains the right to direct the manner in which the business shall be done, as well as the result to be accomplished, or, in other words, 'not only what shall be done, but how it shall be done'."

Berry Automobiles (4th Ed.) p. 1012



A servant merely acts for the principal, usually according to his direction without discretion.

35 Am. Juris. p. 447, Sec. 4.

The right to control is a missing element in this Dowsett case. As was stated by this Supreme Court in it's opinion in the case of Auerbach Co. et al. vs The Industrial Commission of Utah and Relia Wardle, 195 Pac. 2nd. 245, 246, one of the most important elements of the master-servant relationship is missing, that of the right to control the employment, the right to require performance of a duty if such a duty exists

In the present case there was a total absence of a right to control what was to be done. Darwin Dowsett gave no directions as to how his car was to be driven or as to what route was to be taken. His agents were to use their discretion.

## 2. THE RELATION OF PRINCIPAL AND AGENT.

An agent represents his principal, while a servant merely acts for his principal.

35 Amer. Juris. p. 447, Sec. 4.

"It is not essential to the existence of authority that there be a contract between principal and agent or that the agent promise to act as such, \*\*\*\* nor is it essential to the relationship of principal and agent that they, or either, receive compensation".

Gorton vs Doty (Idaho) 69 Pac. 2nd 136, 139.

An agent is one who acts for or in the place of another by authority from him.

2 C. J. S. p. 1025, Sec. 1, c.

An agent need not be appointed directly by the principal, but an indirect appointment through another is valid.

2 C. J. S. p. 1044, Sec. 22.

While agency is not necessarily contractual, the relation is always consensual.

Lohmuller Bldg. Co. vs Gamble, 160 Md. 534.

As between principal and agent the creation of the agency relationship arises from the consent of the parties. It is not essential that an actual contract should exist or that compensation should be expected by the agent.

2 Amer. Juris. p. 25, Sec. 23.

Considering these authorities in connection with the evidence in the present case and it

is clear that Harold H. Dowsett and Nellie Dowsett were the agents of Darwin Dowsett. He requested that they act and they consented.

3. THE UTAH FELLOW SERVANT STATUTE.

The Utah legislature of 1896 modified the common law doctrine of fellow servants when it made and passed the present Utah fellow servant law, which is as follows:

"FELLOW SERVANTS DEFINED. All persons who are engaged in the service of any employer, and who while so engaged are in the same grade of service and are working together at the same time and place and to a common purpose, neither of such persons being intrusted by such employer with any superintendency or control over his fellow employees, are fellow servants with each other. \*\*\*\*\* Employees who do not come within the provisions of this section shall not be considered fellow servants."

49-6-2, Utah Code Annotated, 1943.  
Laws of 1896, page 99.

a. The statute to be liberally construed.

This law is to be liberally construed. The rule of the common law that statutes in derogation thereof are to be strictly construed has no application to the statutes of this state. The statutes establish the laws of this state respecting the subjects to which they relate,

and their provisions and all proceedings under them are to be liberally construed with a view to effect the objects of the statutes and to promote justice.

88-2-2, Utah Code Annotated, 1943.

b. Authority of legislature and purpose.

The legislature had the power to pass the statutes.

Dryburg vs Mining & Milling Co., 18 Utah, 410, 423.

Heesley vs Southern Pacific Co., 35 Utah, 259, 264.

Vota vs Copper Co., 42 Utah, 129, 139.

The court in the Dryburg case, after quoting the statute said:

"To make the definition more certain, it is declared that other employees who do not come within the provisions of this section shall not be considered fellow servants. Undoubtedly, the legislature had full power to make this law defining who shall be fellow servants. That body has unquestioned authority to abolish the exception to the general rule of respondeat superior in favor of the employer; to make the common master liable to one of his employees or servants for all damages to him caused by the negligence of another of his servants while acting about the business or labor the negligent servant is authorized to do, regardless of the fact that such servants are fellow servants. The language of the section is peremptory and absolute." 18 Utah 422, 423.

"The manifest purpose of the statute was to abrogate the common-law doctrine of fel-

low servants, as the same was applied by the courts."

Hessley vs So. Pac. Co., 35 Utah 259, 264.

"It is manifest that the legislature by adopting the statute intended to modify the common law rule applicable to fellow servants. The legislature had the power to do this, or to abrogate the rule altogether. The lawmaking power having acted in a matter entirely within its power the courts have no choice save to enforce the law as promulgated."

Vota vs Copper Co., 42 Utah, 129, 139.

s. Conditions precedent to relationship.

Three affirmative elements and one negative must unite, to-wit: (1) they have to be employed by a common master, and (2) while so employed be engaged "in the same grade of service", and further (3) be "working together at the same time and place and to a common purpose", and (4) neither "being intrusted by such employer with any superintendence or control" over the other.

Vota vs Copper Co., 42 Utah 136.

In Shepherd vs Railroad Co., 41 Utah, at page 475, the court said:

"For example, the statute defines fellow servants to be those who, while working for a common master, "are in the same grade of service and are working together at the same time and place and to a common purpose, neither of such persons being intrusted by such employer

with any superintendence or control over his fellow employees, are fellow servants with each other." We are thus given all the elements that are necessary to constitute the relation; and, if any one or more are shown not to exist in a given case, the relation is not established."

In the Dryburg case, above cited, 18 Utah, 410, 423-424, the court considered these same matters and said:

"To make the requirement more definite and certain, the ~~statute~~ section declares the employees must be working together at the same time and place, in order to be considered fellow servants. The meaning of the word together, and the phrases the same time, and the same place often vary, in view of their application. Individuals may, as suggested, be associated together in the prosecution of various enterprises when residing far apart; but the word "together", as connected and used in the section, will not admit of such a construction; and the phrase at the same time as used in the same section, must be held to refer to the time the employees are working together, and to no other time, and the place as connected with the terms working together, and the phrase the same time, must be held to refer to the place and time the labor is being performed."

Shields vs. Silver King Coalition Mines Co., 50 Utah 128, 131, considered the question of who are fellow servants and cited the Dryburg, Meyers, Shepherd and Vota cases above cited.



Particular attention is called to the fact that the relation of employer and employee must exist under the Utah fellow servant statute. Harold H. Dowsett and Nellie Dowsett had not been employed by Darwin Dowsett to take his automobile and wife to Camp Maxey, but if they had been employed, they would not have been fellow servants at the time the accident occurred, under the Utah fellow servant statute and as defined by that statute. All of the elements were not united, they were not working together at the same time and place.

The Utah fellow servant statute, herein cited and quoted, and as interpreted by this court in its decisions, is the sole and only law defining fellow servants in Utah. All of the elements must be present, and if all are not present, then the relation is not established. In the case at bar two elements are missing, first, the relation of employer and employee, or master and servant, a contractual relation, did not exist, and, second, Harold H. Dowsett and Nellie Dowsett were not working together

Holladay several hours before the accident occurred, but Nellie Dowsett had not driven the automobile and was not "working" at the time of the accident. She was just riding in the automobile, turned in the seat, talking to the persons on the back seat. Harold M. Dowsett had driven all the way and was driving at the time of the accident. The fact that Nellie Dowsett may have driven an hour or so later is of no consequence on the question. Fellow servants must be working together at the same time and place.

At the trial in District Court, and prior to the court directing a verdict for defendant, counsel for defendant cited and read from opinion in cases in other states, and cited but one Utah case, the Arrascada case in 54 Utah, at page 386, but they did not read from the opinion in that case. We now quote from the opinion in the case, at page 392, as follows:

"Whether doubt was left by the Dryburg case, and other early cases, as suggested by appellant, the fellow-servant question is well settled in this state by the more recent



cases of Miller v Utah Con. M. Co. 53 Utah 366, Urich v Apex Min. Co. 51 Utah 206, Vota v Ohio Copper Co. 42 Utah 129, Shields v Silver King M. Co. 50 Utah 128, and Shepherd v Railroad Co. 41 Utah 469. Many cases based upon the common-law rule of fellow service and one federal case interpreting the Utah statute have been cited by the defendant, but those cases have never been accepted as authority on the law of fellow service in this jurisdiction. In harmony with the trend of judicial thought, this court has interpreted our fellow service statute liberally in favor of the injured. It has refused to emasculate the statute, and has construed its provisions in accordance with the manifest legislative intent to mollify the barbaric rigor of the common law rule of fellow service."

### CONCLUSION

In conclusion we will again state that there is but one question for determination in this case, and that is, were Harold H. Dowsett and Nellie Dowsett fellow servants under the Utah statute and decisions at the time Nellie Dowsett suffered the injuries mentioned? We think the uncontradicted facts clear. The relation of principal and agent existed between Darwin Dowsett, defendant, and Harold H. Dowsett and Nellie Dowsett, but the relation of employer and employee, or master and servant, did not exist. Harold H. Dowsett and Nellie Dowsett were not

fellow servants under Utah law. The law on the matter has long been settled in this state, and we contend that the trial court was clearly in error in directing a verdict for defendant, that the judgment should be reversed and the verdict set aside and a new trial granted.

Respectfully submitted,

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