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Nellie Dowsett v. Darwin Dowsett : Brief of Respondent

Utah Supreme Court

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Steward, Cannon & Hanson; E. F. Baldwin, Jr.;

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In the Supreme Court of the State of Utah

NELLIE DOWSETT,

Plaintiff and Appellant,

vs.

DARWIN DOWSETT,

Defendant and Respondent.

Case No.

7263

BRIEF OF RESPONDENT

FILED

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and Respondent.*

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In the Supreme Court of the State of Utah

NELLIE DOWSETT,
Plaintiff and Appellant,

vs.

DARWIN DOWSETT,
Defendant and Respondent.

Case No.
7263

BRIEF OF RESPONDENT

STATEMENT OF FACTS

While we substantially agree with appellant's statement of the evidence relating to the operation of the car by Harold H. Dowssett and Nellie Dowsett, his wife, father and mother of the defendant, Darwin Dowsett, we are not in accord with appellant's conclusions with respect thereto.

While in the Army at Camp Maxey, Texas, the defendant, Darwin Dowsett, arranged for living quarters for himself and his wife at a little town called Paris near the military camp (Tr. 45-6). His wife, Evangeline,

arranged for her sister and mother to care for the two small children while she was gone. She, Evangeline, did not drive a car, but the family car, a 1940 Dodge four-door sedan, record title of which was in her husband, Darwin Dowsett, was in her custody. When it was used by her, she would get someone else to drive. Defendant's mother, Nellie Dowsett, had driven this car on occasions ever since defendant purchased it in 1942 (Tr. 53). She was an experienced driver, and as to the use of her own family car, she drove as frequently as her husband (Tr. 55).

Darwin testified he telephoned his wife about two weeks before she left Salt Lake or Holladay, Utah, and asked: "If she couldn't get Mother and Dad to drive the car down." (Tr. 47). Thereafter, Evangeline phoned plaintiff, her mother-in-law, "and asked her if she and her husband could drive the car down," and "asked her if she would like to go," (Tr. 83) and "if she and her husband (Harold) could drive the car. Each was to relieve the other in the driving going down there" (Tr. 84). About a week after the first phone call, Evangeline told her husband "that she had made arrangements for them to bring it (the car) down" (Tr. 56). Nothing was said about anyone else driving other than Mr. and Mrs. Dowsett, and that was the extent of the arrangements made (Tr. 85).

The Dowsetts left as planned at four o'clock A.M. July 30, 1945. They were proceeding east in Daniels Canyon on U. S. Highway 40 about thirty-five miles east of Heber, Utah. Harold Dowsett was driving; the plain-

tiff, Nellie Dowsett, his wife, was sitting next to him in the front seat; and in the rear were Evangeline and another lady, a Mrs. Thomas, who was riding with them (Tr. 72). As the car reached the summit, the sunlight struck Mr. Dowsett in the face. He said: "Just as we came to the top, why, just as levelled out, why the sun was right in my eyes" so "I couldn't see." He "held the wheel right steady and straight. I thought it was, switch off or change—something; it didn't." He estimated he may have traveled two hundred feet, something like that, but further added: "I wouldn't know for sure, approximately, I don't know how far it was. I felt the car in the loose gravel, I put the brakes on" (Tr. 65-66). He did not remember anything further, as he was rendered unconscious (Tr. 67). It is undisputed that the car overturned, which resulted in plaintiff's injuries.

There was nothing out of the ordinary or unexpected so far the highway and the operations of the car were concerned, other than the fact that the sun suddenly blinded the driver.

Nellie Dowsett testified that she was turned talking to those in the back seat and was not watching the road, but that she did not remember anything that was unusual at the time; that her husband was driving in an ordinary and usual manner (Tr. 125); that he was paying attention to his driving, was on his proper side of the highway, traveling at a speed of about thirty to thirty-five miles per hour. He seemed to have perfect control of

the car, and she had no criticism at all of the manner in which he was driving and made no objection thereto (Tr. 126).

Evangeline testified that she had not noticed anything unusual about the driving on the highway (Tr. 82); that she did not expect an accident, and Mr. Dowsett was driving along in the usual and ordinary manner at a reasonable rate of speed on his proper side of the highway; that he was watching where he was going and seemed to have perfect control of the car (Tr. 83).

That was the sum and substance of the evidence, all elicited from plaintiff's witnesses, the only ones called being the four mentioned, namely: plaintiff and her husband, and the defendant, Darwin Dowsett, and his wife, Evangeline.

At the conclusion of plaintiff's evidence, both parties rested, and defendant moved for a directed verdict upon several grounds (Tr. 135-136), as follows:

“(1) The evidence affirmatively shows that the plaintiff and the driver of the automobile in which she was riding were fellow servants as a matter of law and that she cannot recover because of the fact that she was such a fellow servant.

“(2) That plaintiff is not for any reason a fellow servant, that she is then a guest in the automobile as a matter of law, and therefore cannot recover.

“(3) That the complaint does not state facts sufficient to constitute an action against the defendant.

“(4) That plaintiff has failed to prove any negligent act on the part of the driver of the

automobile in which plaintiff was riding.

“(5) That plaintiff has failed to prove that if there was any negligence on the part of the driver of the automobile in which plaintiff was riding, that such act of negligence, if any, was the proximate cause of the accident and resulting injuries.

“(6) That the evidence affirmatively shows that the plaintiff failed to make any objection to the manner in which the automobile was driven and acquiesced in the manner in which it was driven, and voluntarily assumed the risk.

“(7) That the evidence affirmatively shows that if there was any negligence on the part of the driver of said automobile, the plaintiff was herself guilty of contributory negligence, which proximately contributed to the cause of the accident.

“(8) That it affirmatively appears from the evidence that the accident was solely caused by reason of an unforeseen circumstance; namely, the blinding of the sun; and the accident was unavoidable so far as the driver was concerned.

“(9) That the evidence of the plaintiff is insufficient to go to the jury on any theory.” (Tr. 135-6).

QUESTIONS ON APPEAL

The only question argued by appellant, and she insists that it is the only question before this court, is that the court erred in granting defendant's motion on the basis of the fellow servant rule.

Respondent contends that the lower court properly directed a verdict in favor of defendant based upon the fellow servant rule, and also contends that there were other reasons why defendant's motion was properly

granted. In other words, we are firmly convinced that all of the reasons exist for the application of the fellow servant rule in this case, but there were also other grounds or reasons why the holding of the lower court was correct. It is a well-established rule in this and other jurisdictions that if the ruling of the lower court should be sustained on any grounds, the judgment should be affirmed.

Trudeau v. Pacific States Box & Basket Co.,

(Wash.) 148 Pac. (2d) 453;

Shaw v. O'Byrne, 64 Utah 139, 228 Pac. 570;

Burningham v. Burke, 67 Utah 90, 245 Pac. 977;

Badger & Co. v. Fidelity Building & Loan Ass'n.,

75 Pac. (2d) 669, 94 Utah 97.

Specific Questions

Specifically the legal questions can be summarized in the following propositions contended for by respondent:

I. If Darwin Dowsett had the *right to control* the operations of the car to be driven by his father, Harold Dowsett, and his mother, Nellie Dowsett, then the latter were working in the same grade of service together and for a common purpose within the definition of a fellow servant under the Utah Statute, *Section 49-6-2, Utah Code Annotated 1943.*

II. If Darwin Dowsett did not have the *right to control* the operations of the car as to how the car was to be driven, what route was to be taken, etc. (as contended by appellant. See App. Br. page 11), then Harold and Nellie Dowsett were not servants or agents of the defendant, Darwin Dowsett, and plaintiff cannot recover

from defendant, Darwin Dowsett, because the negligence, if any there existed, could not then be imputed to him.

III. If the foregoing reasons should not be existent, that is, if Nellie and Harold Dowsett were not agents or servants of the defendant, Darwin Dowsett, then Mrs. Dowsett was a guest in the automobile and as no willful misconduct or intoxication was claimed or proved, there could be no liability.

IV. Plaintiff voluntarily undertook the trip and acquiesced in the manner in which the car was driven and assumed the risks or hazards incident to the trip.

ARGUMENT

I. Application of Fellow Servant Rule.

Plaintiff insisted that she and her husband were acting for and on behalf of the defendant, Darwin Dowsett, their son, in the operation of the automobile, and upon that premise claim that the negligence, if any, of Harold Dowsett, was imputed to defendant, and therefore that defendant is liable to the plaintiff, Nellie Dowsett, his mother, for her husband's alleged negligence. The suit is one prosecuted by a mother against her son for her husband's negligence.

If Harold Dowsett was the agent or servant of Darwin Dowsett, his son, for the purpose of driving the car or delivering it to its ultimate destination at Camp Maxey, then the plaintiff, Nellie Dowsett, was likewise an agent and servant for exactly the same purpose. They were both requested and engaged to do the same thing. They had a common master. Their duties, if any, were co-equal and to a common purpose, namely:

to drive and deliver the car to Camp Maxey, Texas. Neither was placed in charge of the other or entrusted with any superintendency or control over the other. Each was expected to relieve the other in driving during the trip.

A. Reason and Basis for Fellow Servant Rule.

The fellow-servant rule is recognized in the common law and is in effect that the negligence of one fellow-servant will not be imputed to the principal or master in an action brought by a co-worker or a fellow-servant. The reason for the rule is based upon public policy and upon the doctrine of assumption of risk. It is an exception to the general rule of agency.

The common law rule was early recognized by the Utah courts, and the basis for the rule is summed up in *Dryburg v. Mining & Milling Co.*, 18 Utah 410, 55 Pac. 367, as follows:

“Before the enactment defining who shall be regarded as fellow servants, the Supreme Court of the late territory of Utah repeatedly held that the definition did not include all the agents and servants of the common master, but only those employed in the same line of duty, and of the same grade and habitually associating and working together under such circumstances that the care, caution, and watchfulness of each may have an influence upon the others, promotive of diligence, care, and caution with respect to their common safety, and under such circumstances that each may have an opportunity of observing the conduct of the others, and of making proper suggestions to him and to the common employer or his superintendent or proper agent, or of avoiding

injury from such negligence. This same rule may also be deduced from the decisions of the courts of other states. *Daniels v. Railway Co.*, 6 Utah 357, 23 Pac. 762; *Webb v. Railroad Co.*, 7 Utah 363, 26 Pac. 981; *Armstrong v. Railway Co.*, 8 Utah 420, 42 Pac. 693; *Railway Co. v. Moranda*, 108 Ill. 576; *Mill Co. v. Johnson*, 114 Ill. 57, 29 N. E. 186; *Railroad Co. v. Kelly*, 127 Ill. 637, 21 N. E. 203."

Prior to the enactment of our Utah Statute, the court points out in *Armstrong v. O. S. L. and Utah Northern Ry Co.*, 8 Utah 420, 32 Pac. 693, that the rule had no application where the negligent act was the act of one in authority over the plaintiff. Said the court:

"While it may be reasonable to infer that men laboring together with equal authority will, by their watchfulness, their suggestions, prudence, and their example, influence each other, it would be unreasonable to presume that they will so influence the men in authority over them, and to whose orders they are subject."

Title 49, Chapter 6, Utah Code Annotated 1943, originally adopted Revised Statutes of Utah 1898, dealing with fellow-servants, now provides:

"49-6-1. Vice Principal Defined.

All persons engaged in the service of any person and intrusted by such employer with authority of superintendence, control or command of other persons in the employ or service of such employer, or with authority to direct any other employee in the performance of any duties of such employee, are vice principals of such employer, and are not fellow servants.

"49-6-2. 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 superintendence or control over his fellow employees, are fellow servants with each other; *provided*, that nothing herein contained shall be so construed as to make the employees of such employer fellow servants with other employees engaged in any other department or service of such employer. Employees who do not come within the provisions of this section shall not be considered fellow servants."

In *Southern Pacific Co. v. Schoer*, (Ct. App. 8th Cir.) 114 Fed. 466, the court did not exempt the railroad company from liability in an action brought by a fireman injured by reason of the negligence of an engineer, who was entrusted with superior authority in the operation of the train, for the reason that the engineer was a vice principal within the definition of the statute. With respect to the statute, the court said:

"The purpose and effect of the sections of the statute of Utah which have been cited were not to change or to extend the liability of masters for the negligence of their servants, but their sole object and effect were to give an authoritative legislative definition of the terms 'vice principal' and 'fellow servant,' and to leave the liabilities of the masters for the acts of their servants as they were before these sections were enacted."

The court made the observation that had the workmen been engaged in the same grade of service in the opera-

tion of the railroad, then the negligence would not have been imputed to the principal.

In *Lukic v. Southern Pac. Co.*, (Cir. Ct. Dist. Utah) 160 Fed. 135, the court sustained a directed verdict for the defendant in an action brought by the plaintiff, a laborer in the construction of the road bed, based upon the alleged negligence of a brakeman of a construction train hauling gravel for the same road bed. A portion of the opinion follows:

“The true view of the fellow servant exception to the general rule of the master’s liability is based on the doctrine of assumption of risk. The servant realizes when he accepts the service that he is liable to injury by the negligence of other servants of the same master, whose service is so related to his own that negligence on their part in the natural and expected course of events may injure him, notwithstanding a complete performance by the master of his nonassignable duties. This anticipated risk the servant assumes, and his assumption is as broad as his reasonable anticipation of danger. When the services of two servants are so widely separated, so wanting in contact, that some unusual event must occur to direct the results of the negligence of the one to the other, the two are said to belong to separate departments. In the case of *Northern Pacific R. Co. v. Hambly*, 154 U. S. 349, 357, 14 Sup. Ct. 983, 984, 38 L. Ed. 1009, it was said:

“As the laborer upon a railroad track, either in switching trains or repairing the track, is constantly exposed to the danger of passing trains, and bound to look out for them, any negligence in the management of such trains is a risk which may or should be

contemplated by him in entering upon the service of the company. This is probably the most satisfactory test of liability. If the departments of the two servants are so far separated from each other that the possibility of coming in contact, and hence of incurring danger from the negligent performance of the duties of such other department, could not be said to be within the contemplation of the person injured, the doctrine of fellow service should not apply. In this view it is not difficult to reconcile the numerous cases which hold that persons whose duty it is to keep railroad cars in good order and repair are not engaged in a common employment with those who run or operate them.'

"And so in the case of *Randall v. Baltimore & Ohio R. Co.*, 109 U. S. 478, 3 Sup. Ct. 322, 27 L. Ed. 1003, it was held that a brakeman working a switch for his train on one track in a railroad yard was a fellow servant of an engineer of another train on an adjacent track. It was pointed out that they were employed and paid by the same master and that the duties of the two brought them to work at the same time and place for the common purpose of moving trains, so that the negligence of one in doing his work might injure the other. In *Northern Pacific R. Co. v. Charless*, 162 U. S. 359, 16 Sup. Ct. 848, 40 L. Ed. 999, a day laborer on a section was held to be a fellow servant with the crew of a freight train; and in *Martin v. Atchison, Topeka & Santa Fe*, 166 U. S. 399, 17 Sup. Ct. 603, 41 L. Ed. 1051, a similar laborer with the crew of a work train.

"Now, what change has the statute made? It has, it is true, ingrafted the discredited superior servant limitation; but that is not pertinent here.

Beyond this, it provides that to be fellow servants the two servants must be working together at the same time and place and to a common purpose. What is mean by 'together'? The Illinois doctrine of consociation does not require that the servants should be doing the same kind of work, or be engaged in aiding each other in the same detail of labor. By 'together' is meant physical nearness at the time of the injury, coupled with the common purpose of the labors of the two servants; the nearness required being only that which should arouse in the one a reasonable appreciation of probable danger from the neglect of the other. I do not believe that the statute should be otherwise construed."

B. Other Utah Cases.

While in most of the cases decided by this court under the statute, it was held the facts were not sufficient to establish the fellow servant relation, in each of the cases so holding, the plaintiff was either working under a superior, or not working in the same place or grade of service. However, once the relationship exists as defined by the statute, there is no reason why the master or principal is not exempted from liability.

In *Dryburg v. Mercur Gold Mining & Milling Co.*, 18 Utah 410, 55 Pac. 367, supra, the court held that there was a jury question as to whether plaintiff and a fellow miner were fellow servants where the plaintiff was working in a mine about forty feet from the top of a ladder and was injured when going down the ladder for a sledge, and the claimed negligence was the negligence of another miner who worked in a tunnel twelve feet below in removing at an earlier time that morning, waste which

had been supporting one of the uprights of the ladder.

In *Jenkins v. Mammoth Mining Company*, 24 Utah 513, 68 Pac. 845, it was held that a miner was not a fellow servant with one whose duty it was to manage and operate a cage by which miners were conveyed in and out of the mine. Says the court:

“The plaintiff and Knotts were employees of the defendant, and neither was intrusted by their employer with superintendence or control over the other; but in view of the evidence, and the provisions of said section, were they engaged in the same service, and working together at the same time and place, to a common purpose? Knotts was employed in running the elevator, while the occupation of the plaintiff was that of a miner on the 1,800 foot level of the mine. They were not, therefore, engaged in the same grade of service. Knotts’ employment was not that of a miner, and he was not engaged in working with the plaintiff on the 1,800 foot level; nor was the plaintiff engaged at work when injured, but was merely being conducted to his place of employment. They were not, therefore, engaged in working together at the same time and place.”

In *Meyers v. San Pedro Railroad Company*, 36 Utah 307, 104 Pac. 736, it appeared that two sections of a train were operated as two distinct and independent trains. It was held that the members of the crew of one section were not fellow servants of the members of the crew of the other section. Says the court:

“It is made to appear that the two sections of the train were run and operated as two distinct and independent trains, and that the defendant regarded and treated them as being subject to

the rules applicable to the running and operation of separate trains. The question then arises: Are the members of train crews of separate trains fellow servants within the meaning of the statute? We think they are not. They are not in such case 'working together at the same time and place and to a common purpose.' "

In *Shepherd v. Denver & Rio Grande Railroad Company*, 41 Utah 469, 126 Pac. 692, the question before the court was whether the jury had been correctly instructed. In discussing the fellow servant rule, the court declares:

"Before this exemption from liability can exist, however, our law requires that the two servants must be engaged in the same grade of service and working together at the same time and place and to a common purpose, and neither intrusted with any superintendence or control over the other. The term 'same grade of service' does not mean whether they earn the same amount of money, or whether they are doing exactly similar work; but it means whether they are on the same level, so far as the exercise of an authority over each other is concerned. The term 'working together at the same time and place' does not mean whether they were working at the exact spot and doing exactly the same kind of work; but it means whether, in the discharge of their duties, they may fairly be said to be thrown in such contact with each other so that they have a fair opportunity of observing the habits and demeanor of each other, and thus are in a position to form a conclusion as to the carefulness or noncarefulness of the habits and conduct of the other. The term 'working to a common purpose' means whether their work may fairly be said to be within some division or department

of the defendant's business, and directed to some end within such division or department."

In *Vota v. Ohio Copper Company*, 42 Utah 129, 129 Pac. 349, the plaintiff, a mucker in a mine, was called by an engineer to assist in unloading timbers by means of a hoist and had his arm crushed between a timber and the hoist drum. Held the plaintiff and the engineer were not fellow servants. The decision was predicated upon a consideration of what was the usual employment of the two servants rather than what they were doing at the time of the accident. Says the court:

"Under the undisputed facts in this case, appellant's regular and usual employment was that of a mucker in respondent's mine. He was temporarily transferred from the mine to assist in unloading timbers from railroad cars. The engineer in charge of the engine which was used to hoist the timbers was engaged in operating the engine. The two were, therefore, not, before they came together in unloading the timbers, engaged in the same grade of service within the meaning of our statute, although they were at the time of the accident working together at the same time and place and to a common purpose."

In *Shields v. Silver King Coalition Mines Co.*, 50 Utah 138, 166 Pac. 988, plaintiff was working on the 1,000 foot level, from which an incline extended upward to the 900 foot level, on which incline loaded cars were let down and empties drawn up, and plaintiff was injured by the negligence of a miner on the 900 foot level in letting one of the cars down. Held they were not fellow servants as they were not working together at the same time and place.

In *Arrascada v. Silver King Coalition Mines Co.*, 54 Utah 386, 181 Pac. 159, plaintiff, a miner, who had been engaged in the construction of a chute was directed to proceed to a higher level in the mine to work, which might be more dangerous than what he was doing. He inquired of miners above, who were drilling and blasting, if it was safe, and receiving an affirmative answer, he proceeded upward and was struck by a falling rock. Plaintiff was not present when the drillers were working and had nothing whatever to do with their work. Held drillers were not fellow servants of the plaintiff. Says the court:

“In an elaborate argument it is contended that, even if Breen and Allen were negligent, the defendant is not liable, because they were fellow servants of the deceased. According to the evidence of plaintiffs, the deceased was not a fellow servant of Breen and Allen, or either of them. The working place of the deceased was in the chute below the bulkhead. The working place of Breen and Allen was in the raise above the bulkhead. The deceased was doing timbering or carpenter work. Breen and Allen were doing the work of miners. In *Dryburg v. Mercur Gold M. & M. Co.*, 18 Utah 410, 55 Pac. 367, it is said:

“Two servants of a common master may be at work within five feet of each other, or a less distance, and still not be fellow servants. A wall may be between them, and the one may have no opportunity of knowing how the other performs his work.’ ”

C. Fellow Servant Cases in the Operation of Automobiles.

That the fellow servant rule is applied by the courts where the *fellow servants* are engaged in the operation of an automobile is illustrated in the following cases.

In *Carter v. Uhrich*, (Kan.) 264 Pac. 31, plaintiff was riding with a co-employee back to the factory after unloading a load at the railroad station. The judgment in favor of plaintiff was reversed on appeal and judgment entered for defendant. Said the court:

“We have no hesitancy in concluding that the injured workman in this case was a fellow servant of the driver of the truck and the doctrine of the assumption of risk caused by the negligence of a fellow servant should apply here and will prevent a recovery for the injury sustained.”

In *Black Diamond Lumber Co. v. Smith*, (Ark.) 76 S.W. (2d) 975, two employees were both truck drivers. Together they had delivered some lumber, picked up some furniture and were returning to their employer's mill when the truck left the road. We quote:

“Were Ward and Ogden fellow servants? If they were then there can be no recovery. We have held that ‘a truck driver transporting other employees of his master for the purpose of assisting him in unloading a car of cement was a fellow servant for whose negligence causing injury to one of such employees, the master was not liable.’ ”

The same result was reached in *Charles Weaver & Co. v. Harding*, (Miss.) 180 So. 825, where plaintiff was riding to work in his employer's truck with other fellow employees.

See also *Buckley v. United Gas Public Service Co.*, (Miss.) 168 So. 462, where plaintiff, an employee of a gas company crew laying a pipe line was injured while

being transported from work in a truck driven by a co-employee.

Zarski v. Creamer, (Mass.) 59 N.E. (2d) 704;
Blanchard v. Gallahar, (Ga.) 33 S.E. (2d) 378,
(where the matter was disposed of on demurrer);

Kendrick v. Ideal Holding Co., (Fla.) 188 So. 778.

D. There is No Legal Distinction Between Principal and Agent and Master and Servant.

Plaintiff argues there is a legal distinction between principal and agent and master and servant; however, these terms are used interchangeably in the law of torts. *The right to control* is the essential element which must be present and which is the legal basis for imputing the negligence of a servant or agent to his master or principal. That no consideration of compensation is paid by the principal or master for the service rendered does not change the relationship.

In *McNeal v. McKain*, (Okla.) 126 Pac. 742, it was held that a son was a servant of his father where he, the son, took a sister and a guest of the family riding in the father's automobile. No consideration was paid. Said the court:

“Vehicles and motor cars may be used, not only for the business of the master for profit, but also in his business for pleasure. If Paul, the minor son of the plaintiff in error, had been driving his father's carriage (whilst he was a member of his family) in which were contained his sister and a guest of his father's house, the same being done by him with the express or implied consent of his father, the relation of master and

servant would exist, and the father would be liable for the negligent acts of the son whilst engaged in the driving of the carriage, and the same rule is supported by authority as to motor cars.”

In *Janik v. Ford Motor Co.*, (Mich.) 147 N.W. 510, Werner purchased a car at the Ford Motor plant, which loaned one of its employees to assist the purchaser in driving the car to the outskirts of the city. The court held in so driving the car the Ford Motor car employee was the servant of Werner and not the Motor Company, although there was “no actual contract of employment between them or *payment for service*.” Said the court:

“If an employer loans a servant to another for some special service, the latter with respect to that service may be liable as a *master* for the acts of the *servant* without any actual contract of employment between them or payment for service. (Citing authorities).”

In *Andreas v. Cox*, (Mo.) 23 S.W. (2d) 1066, a garageman in returning an automobile to the owner as an act of accommodation, no consideration being paid, was held to be a servant. Said the court:

“One who drives a car as a mere accommodation or favor to the owner of the car is the *servant* of the owner.”

The master servant relationship was similarly held to exist in *Baker v. Maseath*, (Ariz.) 179 Pac. 53, although there was no consideration paid the agent or servant. The terms master and servant and principal and agent were used interchangeably by the court.

Similarly this court makes no distinction in *McFarlane v. Winters*, 47 Utah 598, 155 Pac. 437. It is pointed

out that "the right to control" is the one essential requirement to establish the relationship of principal and agent or master and servant in the operation of an automobile. The court further held that that relationship was not established as between a father and son who were named co-defendants upon proof that the father owned the car and had permitted his son to drive a guest of the family to a nearby town.

In *Fox v. Lavender*, 89 Utah 115, 56 Pac. (2d) 1049, this court said at the bottom of page 118 of the Utah report:

"The test of whether one is the agent of the other depends upon the *right of the control* of one over the other. The same principles of agency apply to the running of an automobile as apply to any other field of action."

Inasmuch as the *right to control* is required to establish the relationship of principal and agent or master and servant, and as *payment of compensation* is not essential to the establishment of either relationship, there is no distinction between the two terms. What name is used or attached to the relationship cannot legally operate to change the actual character of such relationship. We may call Mr. and Mrs. Dowsett servants of the defendant, Darwin Dowsett, whereas appellants may call them agents, but that does not make any actual legal distinction in the true character of the relationship.

The true test is that the circumstances and conditions enumerated in the statute exist, that is, that the persons involved are engaged in the same grade of service and working together at the same time and place

and to a common purpose, and under such circumstances that the care, caution and watchfulness of each would normally have an influence upon the other promotive of diligence, care and caution with respect to their common safety, and such that each would have an opportunity of observing the conduct of the other and of making proper suggestions to him or her or avoiding injury from such negligence. That is the basis of the rule defined by the statute and as aptly stated in the *Dryburg v. Mining and Milling Company* case, supra.

It would be difficult to find a situation where those conditions are clearer than in the instant case. Harold and Nellie Dowsett were rendering a service for the same person, together at the same time and place, and to a common purpose. Neither was charged with any superintendency over the other. They were equal in authority. While engaged together in the operation of the car, the manner in which one would drive would naturally tend to have an influence upon the conduct or care of the other. Each was interested in his or her own safety, and each concerned and intent upon reaching their destination in safety. These facts are established without dispute through the testimony offered by the plaintiff.

It follows the trial court did not err in directing a verdict upon the fellow servant rule.

II. No Right to Control

The only other distinction raised by appellant is that *right to control* is essential to the establishment of the relationship of master and servant, (see App. Br. page 10). Appellant argues that as there was no *right to con-*

trol as to defendant, Darwin Dowsett, then the relationship of master and servant does not exist. Says appellant:

“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.” (App. Br. page 11).

We concur in this view. Darwin Dowsett was not concerned and did not reserve any right to give directions as to how the car was to be driven, or as to what route was to be taken. His concern, if any, was that the car ultimately reach its destination at Camp Maxey, Texas. He did not claim the right to control the actual operations and details of the trip. As to the defendant, Darwin Dowsett, the services being rendered by Harold and Nellie Dowsett, his father and mother, were in the nature, if anything, of independent services or an independent contract, such as this court makes reference to in *For v. Lavender*, 89 Utah 115, 56 Pac. (2d) 1049, at page 120 of the Utah report:

“Many cases have loosely used expressions such as ‘for and on behalf,’ or ‘in the business of,’ or ‘for the benefit of.’ As stated before, the inquiry must be directed to the question of agency in the operation of the car rather than to the question of agency for the accomplishment of some *ultimate purpose*. In the case of an independent contractor a person may have the right of control over the act to be done at the destination or at the beginning, but another party or the driver himself may have control in the operation of the car during the trip. In the case of a taxi-

cab the fare has the right to control the destination but not to control the operation of it.”

Those in the car had control of the situation. They had the right to determine when they left Salt Lake what route they would take, who they would visit if they so chose on the way, what sights they would see, when and how far they would travel each day, or whether they would travel at all. Those in the car were in fact in complete *control* of the situation as to the operations of the car. In fact, no one claims to the contrary. Appellant so contends and defendant agrees. That matter appears without dispute.

The fact that the defendant, Darwin Dowsett, did not have the *right to control* the details of the trip is not inconsistent with defendant's contention that the fellow servant rule applies, because all the fundamental elements of the fellow servant rule may exist and the nature of the service being rendered fall within the category of that of an independent contractor or *ultimate purpose* rule as stated in *Fox v. Lavender*, *supra*.

However, if there was no *right to control*, (and that there was none appears without dispute), there could be no liability whatsoever upon the part of the defendant, Darwin Dowsett, under the rule of respondeat superior, which is the only possible basis that he could be held liable in any event. *McFarlane v. Winters*, 47 Utah 598, 155 Pac. 437 *supra*.

III. If Mrs. Dowsett was not a fellow servant, she was a guest.

The pertinent part of the Utah guest statute, *Section 57-11-7*, provides as follows:

"Any person who as a guest accepts a ride in any vehicle, moving upon any of the public highways of the state of Utah, and while so riding as such guest receives or sustains an injury, shall have no right of recovery against the owner or driver or person responsible for the operation of such vehicle. * * * Nothing in this section shall be construed as relieving the owner or driver or person responsible for the operation of a vehicle from liability for injury to or death of such guest proximately resulting from the intoxication or willful misconduct of such owner, driver or person responsible for the operation of such vehicle; *provided*, that in any action for death or for injury or damage to person or property by or on behalf of a guest or the estate, heirs or legal representatives of such guest, the burden shall be upon plaintiff to establish that such intoxication or willful misconduct was the proximate cause of such death or injury or damage."

"57-11-8. 'Guest' Defined.

"For the purpose of this section the term 'guest' is hereby defined as being a person who accepts a ride in any vehicle without giving compensation therefor."

If plaintiff was not a fellow servant in this case, then she was a guest within the terms of the foregoing statute, and cannot recover because no wilful misconduct or intoxication on the part of the driver or on the part of the defendant, Darwin Dowsett, was claimed or proved.

IV. Assumption of Risk.

The reason for the assumption of risk rule is similar in principal to the application of the fellow servant rule and is an additional reason in this case why a verdict was properly directed in defendant's favor. When

plaintiff left home, she knew her husband's ability as a driver. She likewise knew the ordinary hazards which are attendant upon such a trip, including the morning sun, which could and sometimes does have the effect of suddenly blinding eastbound travelers at that time of the morning.

Plaintiff testified that her husband was driving in an ordinary and usual manner (Tr. 125); that he was paying attention to his driving, was on his proper side of the highway traveling at a speed of about thirty to thirty-five miles per hour. He seemed to have perfect control of the car, and she, plaintiff, had no criticism at all of the manner in which he was driving and made no objection thereto (Tr. 126).

Mrs. Dowsett really did not blame her husband for the accident any more than she would blame herself had she been driving and the sun suddenly blinded her. At the outset of the trip, she knew the dangers of traveling and the dangers which were incident to the operation of the car by herself and her husband. Under the conditions, she and her husband were mutually undertaking to safely drive the car. Under such circumstances, she should not be entitled to recover against the defendant, Darwin Dowsett, who had no actual control or right to control the details of the trip.

Where the risk is voluntarily assumed, plaintiff is not allowed to recover. *Mabee v. Mabee*, 79 Utah 585, 11 Pac. (2d) 973.

SUMMARY

We have outlined several reasons why it was proper that a verdict be directed in this case. The defendant, Darwin Dowsett, was not present in the car, and admittedly his only concern was the ultimate destination of the car. Therefore, the only theory upon which he could be held liable at all would be under the doctrine of respondeat superior. The undisputed lack of *right to control* the automobile during the trip is sufficient and adequate reason for denying recovery in this case. That the rule of respondeat superior in its application often works an injustice or undue hardship upon the principal or master when he is not in actual possession and control of the automobile, but has *merely a right to control*, is recognized generally. However the law does not extend liability to an *owner* who does not have the *right to control*, during the trip, although he is interested in the arrival at the ultimate destination.

The decision in this case does not have to rest upon that reason alone. Assuming there were the *right to control*, the fellow servant rule would then apply for the reasons hereinabove outlined. We have rather extensively reviewed the authorities upon that question and we are convinced of its application.

If neither of those reasons exist, that is, if there was no agency or a fellow servant involved, then plaintiff was a *guest*, and cannot recover for that reason.

Fourth, plaintiff well knew the conditions under which she was traveling much better than defendant either knew or could have known. She and her husband

were in control of the situation. Knowing the conditions and having the better opportunity to avoid an accident, it is more logical to conclude that she assumed the risk and the hazards of the trip than to attach liability upon the defendant, who admittedly had no control over the particular situation or operation of the car.

If the court's ruling in directing a verdict was proper upon any grounds (and it is not our intention to waive any of the grounds assigned), the decision and judgment of the lower court should be affirmed.

We respectfully submit that such should be the decision of this court.

Respectfully submitted,

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