

2001

Kay Goff v. Annette Goff: Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT
OF THE STATE OF UTAH

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KAY GOFF,

Plaintiff and Respondent,

—vs—

ANNETTE DOBLE GOFF,

Defendant and Appellant.

DEC 9 1975

BRIGHAM YOUNG UNIVERSITY

J. Reuben Clark Law School

13893

BRIEF OF APPELLANT

Appeal from the Judgment of the
Second District Court for Weber County
Honorable Calvin Gould, District Judge

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Clerk, Supreme Court, Utah

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IN THE SUPREME COURT OF THE STATE OF UTAH

KAY GOFF,

Plaintiff and Respondent,

—vs—

ANNETTE DOBLE GOFF,

Defendant and Appellant.

Case No.
57116

BRIEF OF DEFENDANT-APPELLANT

NATURE OF THE CASE

This was an action by plaintiff-respondent (hereafter called Kay Goff or plaintiff) against defendant-appellant (hereafter called Annette Doble Goff or defendant) for damages for plaintiff's bodily injuries and which resulted from an automobile accident that occurred on January 22, 1973. The sole issue involved before the Trial Court and which is involved on this appeal concerns whether at the time the accident occurred the plaintiff was or was not a guest and as that term is defined in 41-9-2, U.C.A. 1953.

DISPOSITION IN THE LOWER COURT

The trial of this case was heard on September 10, 1974 before the Honorable Calvin Gould, in and for Weber County, Utah, sitting without a jury, the same

having been waived by both parties. Thereafter and by Memorandum Decision dated September 20, 1974, the Court found in favor of the plaintiff and against the defendant and thereafter formal Findings of Fact, Conclusions of Law and a Judgment were entered.

RELIEF SOUGHT ON APPEAL

Defendant seeks reversal of the Trial Court's verdict and seeks a Judgment in defendant's favor and as against the plaintiff of no cause of action.

STATEMENT OF FACTS

This case involves a claim for damages for personal injuries by the plaintiff and against the defendant and relating to an automobile accident that occurred on January 22, 1973. At the trial the attorneys for both parties waived a jury and tried the only issue that was in dispute to the Trial Judge. As stipulated to in the Trial Transcript, the defendant's attorney agreed that there was liability in favor of the plaintiff and against the defendant and if the plaintiff was found not to be a "guest" and as defined in 41-9-2, U.C.A. 1953. The defendant's attorney further stipulated that if any recovery was allowable that it should be in the amount of \$10,000.00, those being the policy limits of the defendant's insurance policy, and since the injuries suffered by the plaintiff entitled him to at least that amount. By reason of these stipulations, the trial was a short one and only covered 36 pages of transcript.

Considering that the Trial Judge ruled in the plaintiff's favor and against the defendant, the defendant

recognizes that this court must consider the facts in the light most favorable to the plaintiff. Therefore, most of this Statement of Facts will be just as the Trial Judge stated what he believed the facts to be and as contained in his Memorandum Decision, most of which is quoted as follows:

"The facts surround a family relationship of mother, father, two sons and the fiancée of each son. The father is one Kay Goff, who had some earlier bodily injuries, and who had received a written communication to appear before the Railroad Retirement Board in Salt Lake City. Kay Goff and his wife Sarah Goff reside in Riverdale, Utah, a suburb of Ogden, in a residence near the North Gate of Hill Air Force Base. John U. Goff is their 29 year old son, who appears quite uneducated and was employed as a garbage hauler for a private refuse company. The son John owns an automobile, but the parents do not own an automobile. Annette Goff was the fiancée of John's brother, now married to John's brother. John's fiancée, Dianne, and Annette were engaged in selling 'Tupperware', and were required to be in Salt Lake City, Utah, for a Tupperware sales meeting on Monday morning. The Sunday evening prior to the meeting, Annette asked John for the use of John's car to make a trip to Salt Lake City, Utah. John agreed, but next morning instead of loaning the car, John elected to 'lay off' from work Monday and drive Annette and Dianne to Salt Lake City for the meeting. Upon learning of the trip, Kay Goff, needing to travel to the Railroad Retirement Board in Salt Lake City, asked if he could go and offered to pay for the gas if he and Sarah Goff could ride to Salt Lake City, Utah. Next morning John arose early and traveled to his place of employment to arrange his layoff. He

then returned to Kay Goff's residence, whereupon he was given \$5.00 by Sarah for the trip. John then traveled into Ogden to a service station at 13th and Wall Avenue and used \$4.00 of the money for gas, and placed \$1.00 in his pocket which he used for lunch later in the week. After purchasing gas, John picked up Annette and Dianne at their homes, which were within a few blocks of the gasoline station. It should be noted at this point that John had access to the Interstate Highway 15 to Salt Lake City via 12th Street, and could have entered I-15 to Salt Lake City at several locations without returning to the home of his parents in Riverdale. When asked why he returned to his parents' home, he answered 'They give me \$5.00 for gas.' John did return to his parents' home, entered the driveway, and left the car to go into the house to get his parents. At this point Annette slid under the steering wheel, it being her intention to drive the car to Salt Lake City. John brought his parents out of the house and Kay and Sarah entered the car and sat in the rear passenger compartment. Annette, Dianne and John all sat in the front passenger compartment with Annette driving.

"Approaching Salt Lake City, Utah, near the Beck Street exit from I-15, Annette was distracted by an accident scene on the northbound leg of Interstate 15 and ran into the rear of a car directly in the traffic lane ahead of her. The collision caused serious injuries to Kay Goff for which he seeks recovery."

As indicated above by Judge Gould in his Memorandum Decision, the plaintiff's son and the owner of the car involved in the accident, John Goff, did testify that the reason he returned to his parents' home to give his father a ride was because his parents gave him \$5.00 for

gas. (TR 31) This testimony was elicited from John Goff by plaintiff's attorney. However, on cross-examination by defendant's attorney, the following questions and answers were given on this same general subject matter by John Goff.

"CROSS-EXAMINATION

"BY MR. MIDGLEY:

"Q. Now, Mr. Goff, when, on the morning I believe it was of the Monday you happened to mention to your folks that you were going to Salt Lake?

"A. Yes.

"Q. And Annette had asked you the day before if she could drive your car to Salt Lake?

"A. Yes.

"Q. And you said yes?

"A. (Nods head.)

"Q. Is that correct?

"A. Yes.

"Q. And you knew that Dianne was going with Annette to the Tupperware meeting in Salt Lake?

"A. Yes.

"Q. And so if they took your car, I presume you assumed they would put the gas in it, is that right?

"A. Yes.

"Q. And you were engaged to Dianne at that time?

"A. Yes.

44- "Q. So then you decided you would drive down with them?

45- "A. Yes.

46- "Q. Because you were engaged to Dianne and that would be a nice pleasure trip, wouldn't it?

47- "A. Yes

48- "Q. Yeah. And then as I understand it, your mother and father said 'well, as long as you are going to Salt Lake, can we ride down'?

49- "A. Yes.

50- "Q. And you said 'certainly'?

51- "A. Yes.

52- "Q. *And you would have taken them down whether they gave you any money or not, wouldn't you?*

53- "A. Yes

54- "Q. Surely. But they offered you \$5.00 to help out with the expense of the car?

55- "A. Yes.

56- "Q. And they have done that before, haven't they?

57- "A. Yes.

58- "Q. I believe your dad said that he always likes to pay his own way. So then you had already agreed with your folks that they could ride to Salt Lake City with you?

59- "A. (Nods head.)

60- "Q. So you went and got the gas and picked the girls up and then you went back to pick your folks up?

61- "A. Yes.

"Q. Now, having told them they could ride with you, why you would have gone and picked them up anyhow, whether they had given you any money or not, wouldn't you?"

"A. (Nods head.)"

"Q. You would like to keep your word with them, I guess, wouldn't you?"

"A. Yes." (TR 32-34 emphasis added)

The record is quite clear that John Goff did not ask his father or parents for the \$5.00 nor did he ever condition their being allowed to ride in his car upon them giving him the \$5.00. This appears from the testimony of Sarah Goff (plaintiff's wife) who testified on this subject matter as follows:

"Q. So as I understand it, you and your husband asked if you could ride down so that your husband could go to the railroad?"

"A. (Nods head.)"

"Q. Is that correct?"

"A. Yes."

"Q. And you just volunteered and gave him \$5.00?"

"A. Yes, we give him \$5.00."

"Q. John didn't ask you for it, you just gave it to him?"

"A. We just gave it to him." (TR 24)

To some extent the testimony of the plaintiff at the trial contradicts the testimony of his wife just quoted, although it was clear from his pretrial deposition that

his testimony on this subject agreed with her's. His testimony in his deposition was as follows:

"Q. Now when you say you gave John the \$5.00—

"A. Yes, sir.

"Q. —what was the reason for that?

"A. To pay for my wife and I going on the trip down there with him. I had to be hauled around.

"Q. Well, you just didn't want to be a free-loader?

"A. That's right. We always pay. That's right.

"Q. And you just offered \$5.00 to pay for the expense?

"A. Well, we paid \$5.00.

"Q. That was just to help with the expense of the gasoline and the car?

"A. Yes, sir.

"Q. Had John demanded \$5.00 from you?

"A. No." (Dep. of Plaintiff pp 5 and 6.)

Concerning this deposition, it is to be noted that both parties agreed at the conclusion of the trial that the Trial Judge could consider the deposition of the plaintiff. (TR 36) It is further to be noted that at the time of the accident, and in addition to the others in the car who are mentioned by Judge Gould in his Memorandum Decision that there was also present Shane Schoolcraft, a four-year old grandchild of the plaintiff and his wife, who was sitting with them in the back seat of the car.

ARGUMENT

POINT I

THE PROPER TEST FOR DETERMINING GUEST STATUS UNDER THE FACTS OF THIS CASE WAS WHETHER THE COMPENSATION WAS THE CHIEF INDUCEMENT FOR THE CARRIAGE. BASED UPON THAT TEST, THE COURT SHOULD HAVE FOUND AS A MATTER OF LAW THAT THE PLAINTIFF WAS A GUEST IN HIS SON'S AUTOMOBILE.

The section of the statute which is involved in this case is as follows:

“41-9-2. ‘*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.”

The first Utah case to consider the question of “compensation” was *Jensen v. Mower*, 4 Utah 2d 336, 294 P. 2d 683 (1956). In the *Jensen* case, the defendant driver had posted an advertisement at his place of employment seeking riders, and he had quoted a weekly price for transportation which was comparable to bus fare. Plaintiff and others agreed to carriage under those terms and it was further part of the understanding that the weekly rate would be charged whether the plaintiff rode or not and as long as the defendant drove. There were no facts in the *Jensen* case to indicate any basis for the carriage other than that the defendant wished to be paid and that the plaintiff agreed to pay a particular amount in return for the transportation. On those facts, the Trial Court in the *Jensen* case did find compensation

had been paid sufficient to take the plaintiff out from under the Guest Statute and the Supreme Court affirmed that finding. However, the Supreme Court in the *Jensen* case was careful to make it clear that a rider didn't cease to be a guest in every circumstance where money was paid to the owner or driver, and on this subject matter the Court stated as follows:

"As indicated in the language quoted from Am. Jur. the cases turn not on whether money is received or paid as a result of carrying the rider, but upon the fact that the money or other consideration was given to the driver, not as a gratuity or in appreciation but rather as an inducement for making the trip for the rider or furnishing carriage for the ride. If the driver extends the courtesy of a ride to a friend without more or takes on a hiker overtaken on the highway, the status of guest in either case is not replaced by that of passenger if gas is purchased, meals purchased or cash given to assist the driver in meeting the expenses of the trip. Such rider is not in the car because of any compensation or payment which induced the driver to give the ride. That the driver had already done."

The *Jensen* case differs, of course, from the instant case inasmuch as the only inducement for the ride being granted in the *Jensen* case was on monetary considerations and there was no countervailing question of social incentive for the ride and as there is in the instant case.

A case decided after the *Jensen* case and which involved a situation where there was both a monetary and a social inducement for the ride was *Smith v. Franklin*, 14 Utah 2d 16, 376 P. 2d. 541 (1962). In the *Smith* case,

the evidence was that both the defendant and the plaintiff's decedent were young women and cousins who resided in Tooele, Utah. On the date in question in that case, the deceased told the defendant that she needed to go to Salt Lake from Tooele to obtain a loan and asked the defendant to drive her there. When the defendant advised the plaintiff's decedent that she did not have any money for gasoline, the deceased agreed to pay \$2.00 so that gas could be obtained and the defendant indicated that she thought this amount would be sufficient to buy gas for the trip. After the young women had come to Salt Lake City and were returning to Tooele, the accident occurred and the plaintiff's decedent was killed as a result thereof.

On the facts just recited, the Trial Court submitted the issue of whether or not the plaintiff's decedent was a guest to the jury. The jury found that she was a guest and in favor of the defendant. Upon appeal, the plaintiff contended, among other points, that the Trial Court should have ruled as a matter of law that she was not a guest. The Supreme Court rejected that argument and affirmed the Judgment entered in favor of the defendant in the Trial Court. Considering that the jury had ruled as it did in the *Smith* case, the majority decision, authored by Justice Crockett, did not find it necessary to decide whether the Trial Court properly could have ruled as a matter of law that the decedent was a guest on those facts and therefore removed that issue from the jury. In their concurring opinions in the *Smith* case, both Justices Wade and Henriod stated it as their opinion that the evidence was susceptible of only one in-

terpretation on this issue and this was that the decedent was a guest as a matter of law. Therefore, they concluded that that issue should not have been submitted to the jury at all.

In his majority opinion in the *Smith* case, Justice Crockett further refined the test relating to compensation and which had been earlier enunciated in the *Jensen* case and as it now applied to a situation where both a monetary and social inducement existed for the carriage. On this subject matter, Justice Crockett stated as follows:

"The test is simple to state and under most circumstances is easy to apply: a passenger for hire is one who pays for his ride; a guest is one who is furnished a ride free of charge. The former is in the nature of a business transaction for money; whereas the latter is motivated by other considerations, usually of a social nature. Difficulties are encountered where both factors are present in such a way that it does not appear with sufficient certainty to justify a ruling as a matter of law either that the rider was a guest or a passenger for hire. Where such uncertainty exists, the definition given by Sec. 41-9-2, U.C.A. 1953, that a guest is 'a person who accepts a ride in any vehicle without giving compensation therefor,' does not provide the conclusive answer. The question arises as to what constitutes 'compensation' sufficient to change what normally would be a guest to a passenger for hire.

"It must be conceded that where it is shown that the rider is basically a social guest, neither the giving of just 'any compensation,' which might be some inconsequential amount of money or other consideration of value, nor even the shar-

ing of expenses, merely in social reciprocation for the ride, would change the relationship to that of passenger for hire. The phrase 'compensation therefor' as used in the statute means compensation for the ride. Therefore, it would have to be sufficient money (or other thing of value) that it reasonably could be supposed that the parties so regarded it. But whether there is profit in the transaction is obviously not the determining factor. Where payment for the ride is the *main inducement* for it, the fact that there may also exist some social incentive which makes giving the ride enjoyable or desirable for the driver would not change its character to that of host and guest.

* * *

"From our consideration of this subject and the authorities which have dealt with it, we are persuaded that the sound and practical view is that the determination should be made on the basis of which was the *chief inducement* for giving the ride." (emphasis added)

The later case of *Greenhalgh v. Green*, 16 Utah 2d 221, 398 P.2d 691 (1965), involved another fact situation where the plaintiff passenger had agreed to pay and did pay a sum for gas on the trip and before the accident in question. In the *Greenhalgh* case, the facts were undisputed and were as follows: The plaintiff, Greenhalgh, the defendant and a third person had jointly planned a deer hunt similar to one they had enjoyed before. The defendant was to supply the camper and the other two agreed to share all costs. During the course of their trip, the defendant was driving and became involved in an accident causing the plaintiff's injuries. Prior to the accident, the plaintiff had paid \$6.45 for

gas. On the facts just recited, the Trial Court (through then District Court Judge Ellett) granted a summary judgment in favor of the defendant and on the basis that, as a matter of law, the plaintiff could not be other than a guest and under these circumstances. The Supreme Court affirmed that decision and in a per curiam decision stated as follows:

"It is axiomatic that when a trip is for a social purpose, not conditioned on contribution for the benefit of the carrier, the passengers are guests though they agree to share the costs of the trip or purchase gas, oil or meals on the trip. The fact that a passenger pays traveling expenses as an act of social reciprocation, courtesy or amenity does not make a paying passenger one who otherwise might be a guest.

"Green was not induced to provide the truck for the hunting trip because plaintiff paid \$6.45 for gas. Even sharing costs, Green was supplying his truck free of charge. This trip was social. It was a common courtesy for plaintiff to share the gas expense. Plaintiff clearly was a guest and not a passenger for hire, and a reasonable man could not find otherwise. Hence, the summary judgment was not error.

"Plaintiff bases his entire case on *Smith v. Franklin*. There the passenger, as distinguished from this case, induced the car owner to carry her. The jury found the passenger to be a guest. That case is not a precedent or a rule that cases involving the Utah Guest Statute always are to be determined by a jury. The judge, in his discretion, gave the case to the jury. The appeal was on alleged erroneous instructions. This court is well aware that a summary judgment

cannot be given if there exists a genuine issue of fact. But no issue of fact exists when patently it is clear that plaintiff was a guest."

A case decided still later and which touches on this same question was *Willden v. Kennecott Copper Corporation*, 25 Utah 2d 96, 476 P.2d 687 (1970). In the *Willden* case, the plaintiff, who was an employee of Boyles Brothers Drilling Company, was injured on the job and he was then taken to a medical facility nearby, maintained by the defendant Kennecott. Later, the plaintiff was transported in an ambulance of Kennecott's to Salt Lake City for further treatment and during the course of this trip an accident occurred causing further injuries to the plaintiff and for which he brought that lawsuit. The evidence further indicated in the *Willden* case that the defendant charged \$7.50 for its ambulance service of the kind involved and that such amount would have been billed to the plaintiff and he would have been required to pay that amount. On these facts, the Trial Judge in the *Willden* case granted a Summary Judgment in favor of the defendant finding as a matter of law that the plaintiff was still a guest. The Supreme Court reversed and held that a jury question existed on that issue. Justices Henriod and Callister dissented and would have affirmed the Trial Court's finding. In the majority opinion, authored by Justice Crockett, it was pointed out that there were countervailing considerations of Kennecott's being a Good Samaritan in furnishing the ride on one hand and on the other in wishing to obtain the \$7.50 for the carriage. Under those circumstances, the Court stated that

the issue should be submitted to the jury for them to make a determination as to "which was the *chief inducement* for giving the ride". (emphasis added) See also *Eyre v. Burdette*, 8 Utah 2d 166, 330 P.2d 126 (1958), and a lengthy annotation on this subject matter entitled "Payment on Expense-Sharing Basis as Affecting Guest Status of Automobile Passenger", 39 A.L.R.3d 1224.

Turning from the authorities just mentioned to the facts in the instant case, it is apparent that the Trial Court erred in finding in the instant case that the plaintiff was not a guest. In fact, it appears from the Court's Memorandum Decision that the Court may have been mistaken as to the legal standard to be applied in a case of this kind, that being the one enunciated in the *Smith* case and the other authorities cited above and which makes critical a determination as to what was the "chief inducement" for giving the ride and where both a social and a monetary inducement are involved. One of Judge Gould's findings recited in his Memorandum Decision was as follows:

"(2) That the parties intended the \$5.00 as an inducement not for making the trip, but for furnishing carriage for the ride to Kay Goff."

It is clear from the authorities cited above that it is not sufficient that it merely have been an inducement for the carriage. Rather, it must have been the chief inducement. From Judge Gould's finding, it appears that he did not make this critical distinction, although considering the evidence before him it is evident that he could not have found that it was the chief inducement.

It is true that there was evidence before the Trial Court that the reason that John Goff returned to his parents' home was because of the payment of the \$5.00. John Goff's response to a question on that subject matter is quoted in the Trial Judge's Memorandum Decision. However, it is also of some consequence to note that this response and the question to which the response was given are somewhat ambiguous and as they concern the inducement for granting the carriage. That is, it does appear from this answer of John Goff's that, at least, one of the reasons for him going out of his way and up to his parents' home to pick them up was that they had given him this money. He didn't testify this was his only reason nor does the question asked and response given relate to why John Goff took his father in the car to Salt Lake City. Certainly, this answer does not establish that the chief reason for his father being transported at the time of the accident was because the father had given \$5.00 to John Goff. On the contrary, the only testimony on that subject matter from John Goff was that he would have made the trip regardless of whether or not the money had been paid. On two occasions while being cross-examined by defendant's attorney, John Goff stated that he would have taken his father regardless of whether or not the latter had paid him any money. This was the only testimony that went directly to that issue and that was given at the trial and it is very clear from this testimony that there can only be one conclusion as to the chief inducement for the carriage. Since John Goff would have taken his father whether or not he had been paid the \$5.00, it follows in-

escapably that the chief inducement was a consideration other than his being paid this money.

It is clear from the Supreme Court's Opinion in the *Smith* case, and to a lesser extent from language found in other cases, that the "chief inducement" test requires that "except for" the payment of the money, the carriage would not have been allowed. As just noted, and considering the un rebutted testimony of John Goff on this subject matter, it is evident that the ride would have been given to the father regardless of the payment of the \$5.00. It is also obvious from other testimony that the money was paid not in a commercial sense but that it was paid as an act of reciprocation, in order to aid the son to eliminate any possibility that the father would be a "free-loader" in making the trip and without having paid something to his son.

While it is apparent from decisions of this Court that the issue is one to be submitted to the trier of fact and if there is any evidence to sustain a finding that the plaintiff is not a guest, that issue should not have been ruled upon by the Trial Judge in the instant case. This is so because the testimony and circumstances were such that the Trial Court should have ruled as a matter of law that plaintiff was a guest. In addition to what has been stated above, there are other factors which compel the result and these will be stated in the paragraphs that follow.

1. The evidence is clear that the trip that was being made at the time of the accident would have been made

regardless of whether plaintiff had paid his son the \$5.00 and, in fact, regardless of whether the plaintiff had even been along on the trip. Considerable emphasis seems to be attached both by plaintiff's attorney and the Trial Judge to the fact that the vehicle being driven by the defendant had earlier gone out of its way to pick up the plaintiff and that a more expeditious route down Interstate 15 could have been followed but for the plaintiff and his wife and grandson having been picked up. It is difficult to understand why this is supposed to be significant. The accident did not occur while they were on this "side trip" to get the father. If it had, perhaps there would be some significance to this "side trip" claim. However, all of the evidence indicates that the accident occurred where the car would have been anyway whether the father had paid the \$5.00 or whether he had even been along.

2. John Goff did not solicit money from his parents for the trip. As indicated above under the Statement of Facts, it is clear from the mother's testimony that the payment of the \$5.00 was a spontaneous contribution. It is true that some of the testimony of the plaintiff is to the contrary, although it is respectfully submitted that it would be totally unreasonable to accept as a fact based upon all of the testimony at the trial and also the testimony of the plaintiff in his pretrial deposition that, in fact, John Goff had solicited payment from his parents.

3. It is clear that there was no pre-arrangement for payment by the plaintiff or his wife to John Goff. That

is, it is very evident that the trip was going to be made and would have been made and that after these plans were decided upon that the money was then paid to John Goff. Not only did John Goff not solicit the payment of that amount but it is apparent that the granting of the carriage was not conditioned upon the payment of the \$5.00. (On this point, see 39A.L.R.3d at Page 1240.)

4. It is very evident from the overall factual context, and particularly the close family situation that existed, that we are involved here with a social situation and not a commercial situation. With all due respect to those who testified at the trial, it will, of course be evident to this Court that none of the Goff family or their in-laws would be out anything and if the decision were that the plaintiff was not a guest. To the contrary, it is perfectly obvious that all of the Goffs knew that the only loser under these circumstances would be the insurance carrier who covered John Goff's vehicle at the time in question. It is further to be noted that in this case we have the strongest kind of fact situation relating to family ties in that at the time of the accident John Goff was not only the son of the plaintiff who was riding in his car but he was then residing with his parents. The parents did not own an automobile and he did. That the mother, and plaintiff's wife, was also along on the trip as well as this young grandson of whom they had charge, strongly indicates the family and social nature of the trip and as distinguished from its being some kind of a commercial for hire transportation.

5. Some emphasis appears to have been laid on the use that was actually made of the money that was paid to John Goff by his father. That is, there was testimony that \$4.00 of this very \$5.00 was used that morning to purchase gas for the trip and that the other \$1.00 was later spent by John Goff for his lunch. It is submitted that the specific use made of that \$5.00 is irrelevant. The evidence is clear that the trip would have been made regardless of this payment. Firm arrangements had already been made by John Goff's then fiancée and the other brother's then fiancée to make the trip to Salt Lake in connection with their Tupperware work. There is nothing to indicate that either of the girls was contributing anything for their transportation and this is understandable considering that one was John's fiancée and the other John's brother's fiancée, and whom both have since married. Obviously, and considering this relationship, it is apparent that John would have allowed the girls to make the trip without charge and regardless of what his father had done. It is absolutely naive to suggest under these circumstances and where the trip was being made anyway that if the father had not paid the \$5.00 that they wouldn't have allowed him to ride. The only reasonable interpretation that can be made is that he would have been allowed to ride anyway and that the payment of \$5.00 was simply a courtesy payment to the son. Moreover, John Goff testified that he was working regularly at that time and receiving a regular salary. Thus, he had money of his own, and clearly could have met the expense for this trip and without being paid anything by his father.

POINT II

NO BUSINESS TRIP WAS INVOLVED AT THE TIME OF THE ACCIDENT THAT COULD REMOVE THE PLAINTIFF FROM THE EFFECT OF THE GUEST STATUTE.

The other finding of the Trial Court recited in his Memorandum Decision was the following.

“(1) The trip was a business trip and not a social trip for all persons in the car except John Goff.”

Although the claimed significance of this finding or conclusion to the Court's Decision that the plaintiff was not a guest is not elaborated upon by the Trial Judge, presumably it was his conclusion that plaintiff escaped being a guest both by reason of his payment of the \$5.00 and also because he was part of a business trip or joint enterprise at the time.

This Court has ruled upon the question of a joint enterprise and its effect upon the guest statute in *Mukasey v. Aaron*, 20 Utah 2d 383, 438 P.2d 702 (1968). In that case, two young friends and college students were traveling and working together in the Western United States. In connection with this plan, the plaintiff, Mukasey, signed a contract with an automobile drive-away company in Denver enabling him to drive a car to Los Angeles and under certain conditions specified in the contract. Thereafter, the two started out for Los Angeles and with an agreement between them whereby they would share expenses of the automobile and they would share the driving of the automobile to Los Angeles.

While driving through Utah and with the defendant driving, an accident occurred and both young men were injured. The plaintiff passenger then sued the defendant driver contending that he was entitled to recover against the driver, and based upon simple negligence only, since the guest statute did not apply because there was a joint enterprise. On this subject matter, Justice Tuckett speaking for the majority stated:

“We are in accord with the general rule that if the parties were engaged in a joint enterprise that relationship would be sufficient to remove the case from the provisions of the guest statute.”

The court then considered what is required for this relationship and stated as follows:

“The elements which are essential to a joint enterprise are commonly stated to be four: (1) an agreement, express or implied, among the members of the group; (2) a common purpose to be carried out by the group; (3) a community of pecuniary interest in that purpose, among the members; and (4) an equal right to a voice in the direction of the enterprise, which gives an equal right of control.”

In *Mukasey*, the Trial Court had granted a Summary Judgment in favor of the driver defendant. The Supreme Court affirmed and held that this was proper since even if the evidence was reviewed most favorably to the plaintiff it would not show that the parties were engaged in a joint enterprise. The Court then went on to state:

“The evidence fails to show that the object of a journey involved a common business purpose or

that a financial or pecuniary interest was involved which is essential to show that the parties were engaged in a joint venture or joint enterprise."

In *Mukasey*, Justice Ellett dissented and on the basis that the plaintiff was the host and the defendant was the guest and that therefore the guest statute had no application under those circumstances. Of course, that factual situation is not involved in the instant case and there is nothing in Justice Ellett's dissent to indicate that he disagreed with the majority on the joint enterprise issue referred to above.

In the instant case, it appears that the Trial Judge believed that a business trip or joint enterprise was involved with all occupants of the car other than the owner John Goff and that therefore the guest statute did not apply to plaintiff's claim against the defendant. If this is what the Trial Court decided, it is apparent that the evidence before him was totally lacking to sustain any such finding or conclusion. It is apparent from a review of the four elements of a joint enterprise referred to above from the *Mukasey* case that none are present under the facts of the instant case and as between the plaintiff and defendant. There was certainly no agreement between the two, either express or implied, and concerning the carriage and except possibly that which would be involved in any kind of a social situation. Even more obvious is that there was no "common business purpose or that a financial or pecuniary interest was involved". In fact, the purpose of the driver defendant, Annette Doble Goff, in going to her Tupperware sales

meeting was totally different from the purpose of plaintiff in going to the Railroad Retirement Board to discuss a claim involving prior injuries. Nor, does there seem to have been any possible business purpose for plaintiff's wife and their infant grandson to have been in the car at the time. Certainly, any business purpose the plaintiff had (i.e. going to the Railroad Retirement Board to see about his claim) had absolutely no relationship in a business sense to what the driver or anyone else in the car was doing or intending to do. With all due respect to Judge Gould, it is difficult to understand what he conceived to be the legal significance of this finding quoted at the first of the Argument under this Point II and it is even more difficult to understand what the factual basis is for that finding.

CONCLUSION

In this case the Trial Court sitting without a jury found that the plaintiff was not a guest since he paid compensation for the ride and also found that the trip was a "business trip" and that presumably therefore, this also excluded plaintiff from being a guest. Neither of these findings has any support in the evidence. The factual background involved in this case concerns a family situation with the strongest possible implications of a social, as distinguished from a commercial type of situation or a ride for hire type of situation. It is clear that the \$5.00 that was paid by the plaintiff for the ride was merely a token of reciprocation or appreciation and it was definitely not the chief inducement for the carriage furnished the plaintiff and if it was any induce-

ment at all. This is so, for among other reasons, since it is clear that the same trip would have been made regardless of this payment or even if the plaintiff had not been present on the trip. There was no business relationship of any kind between the plaintiff and anyone else in the car and the reasons the driver-defendant and plaintiff-passenger were making the trip were totally different and unrelated.

The Judgment of the Trial Court should be reversed and this Court should enter a Judgment in favor of the defendant of no cause of action.

Respectfully submitted,

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CERTIFICATE OF MAILING

I hereby certify that I mailed two copies of the foregoing Brief to Richard Richards, Attorney for Plaintiff-Respondent, 670 28th Street, Ogden, Utah 84403, this¹⁸..... day of February, 1975.

DAVID K. WINDER

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