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Utah Supreme Court

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In the Supreme Court of the State of Utah

GARY MUGLESTON, by his Guardian ad litem, KENNETH MUGLESTON,

Plaintiff and Respondent,

vs.

EMIL R. GLAITTLI,

Defendant and Appellant.

Case No. 7676

BRIEF OF APPELLANT

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vs.

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Case No. 7676

BRIEF OF APPELLANT

NATURE OF THE CASE

This suit was brought by the respondent, Gary Mugleston, by his guardian ad litem, Kenneth Mugleston, against the appellant, Emil R. Glaittli, to recover damages for personal injuries sustained by the respondent as the result of the appellant's minor son driving an automobile in which the respondent was a passenger, which said automobile, on a sharp

turn went off the highway and into the bar pit on the 13th day of September, 1950, wherein judgment was rendered in favor of the respondent and against the appellant for the sum of Three Hundred (\$300.00) and costs, by reason of which this appeal is taken.

STATEMENT OF THE FACTS

Upon the night in question the appellant and his wife left their home at 225 Paxton Avenue, in Salt Lake City, Utah, in company with another couple and went to a picture show in the automobile of the other couple. There were several youngsters around the place at the time the appellant and wife left the home with the other party, at which time one of the youngsters suggested that they all get in the truck and go for a ride, which was agreed, and the son of the appellant got in the truck under the wheel and started out for a ride. They went west on 17th South, and when they arrived at a sharp turn at the end of 17th South and into 4th West, the son of appellant lost control of the car and it went off the road and caused the injury to the plaintiff. It appears that before leaving home the appellant warned his son to leave the cars alone except to drive them in the garage, and particularly advised him that he should not get any funny ideas and attempt to take the cars out on the street. Out of this situation the injured boy, through his guardian ad litem, brought a suit against the appellant, the father of the boy who took his father's car with the other children in it including the respondent, after his father and mother had gone to a picture show

and after the father, appellant herein, specifically directed him not to take the car out on the street and attempt to drive it. Upon this statement of facts this action arose.

STATEMENT OF POINTS UPON WHICH APPELLANT RELIES

Point 1. Was the appellant in any way responsible for the injury to the respondent, and under the circumstances that existed, can appellant be charged with negligence that would support a judgment against him?

Point 2. Is a parent, in his absence, and who has not directed the son to use the automobile on the specific occasion in question, nor consented to its use, responsible to a third party (the respondent herein) for an injury to such third party?

Point 3. Can a party who is a guest passenger in an automobile recover for damages sustained by him without charging intoxication or willful misconduct as the proximate cause of such injury or damage, and establishing such allegation by competent proof against the party charged?

ARGUMENT

Point 1. Was the appellant in any way responsible for the injury to the respondent, and under the circumstances that existed, can appellant be charged with negligence that would support a judgment against him?

This point largely covers the situation before us. There is no dispute about the facts of the case, that is, that the minor son of the appellant was driving the automobile and that while so doing, the respondent was injured, but is the injury he suffered chargeable to the appellant?

Having come into this case after the same was tried and judgment entered, it is just a little difficult to understand why the judgment was entered, as the evidence shows that before the father and mother left the home that night the father said to the boy, "Take and drive the cars in and don't get any ideas of going out with them. We will be back after awhile." That shortly after the father and mother left, he stated, "We got in the truck and went after we talked it over. We had already had things planned the time they were starting to go." Transcript, Page 57.

Perhaps the Court had in mind Section 57-4-26 of the 1943 revised statutes which states as follows:

"Every owner of a motor vehicle causing or knowingly permitting a minor under the age of eighteen years to drive such vehicle upon a highway, and any person who gives or furnishes a motor vehicle to such minor, shall be jointly and severally liable for such minor and any damages caused by the negligence of such minor in driving such vehicle."

Also Section 67-4-31, sub-section (a):

"No person shall authorize or knowingly permit a motor vehicle owned by him or under his control to be driven by any person who has no legal right to do so in violation of any provisions of this Act."

However, I cannot believe that the Court could have followed these sections, as to the provision, "causing or knowingly permitting." Certainly there is no evidence in this record to support the fact that the father either knew, caused or knowingly permitted the boy to take the car on to the highway. In fact, the evidence is just contrary to such a proposition.

From going into the cases upon the facts in this case we find that the overwhelming weight of authority is contrary to a judgment in this case as against the father, the defendant herein.

I first refer to 39 American Jurisprudence, Page 691, which recites as follows:

"The parent is not liable merely because the child lives at home with him, works for him, and is under his care, management, and control. Rather, liability exists, apart from the parent's own negligence, only where the tortious act is done by the child as the servant or agent of the parent, or where the act is consented to or ratified by the parent. The rule that the parent is not liable holds true whether he is present or absent when the tort of the child is committed."

In 5 American Jurisprudence, page 701, Section 369 under automobiles we quote the following:

"In order, however, to hold the parent liable on the theory of responsibility under a doctrine of respondeat superior, a child must have been acting upon the scope of his employment. Even conceding the existence of an agency or master and servant relationship, the parent cannot be held responsible for an act of the child while engaged in some private matter of his own,

unless the parent, with full knowledge of the facts, ratifies the act of the child. The question of liability, if any, in cases where there may be an issue of fact as to the nature of the mission in which the child may be engaged by other than his or her personal ends and pleasure and is to be determined upon the facts of each particular case."

In the case of *Schafer vs. Osterbrink*, 30 Northwestern 922 at page 925 it holds that:

"In order to charge the father, defendant Everhart, with the consequences of Henry's negligence, it must appear from the evidence satisfactorily to your minds that the relation between them of master and servant existed at the time; that Henry was the servant of his father; and that the negligent acts of Henry were committed in the line of his employment as such servant. And again it is undisputed that the defendants were, at the time, father and son, and that the son was a minor. This relation does not of its own, render the father liable for the wrongful conduct of the son."

Referring to *Stumpf vs. Montgomery*, 226 Pacific, page 65, we find the following:

"It is conceded that there is no liability on a parent as such for the tort of a child. The liability of a parent for the act of a minor child rests upon the basic facts as a liability of the master for the acts of a servant.

"It is well settled that even though the driver of a car is a servant of the owner of the car, the owner is not liable unless at the time of the accident the driver was acting within the scope of his authority in regards to his master's business." (Citing numerous cases).

The case of McFarlane vs. Winters, Utah Case 155 P 437, holds as follows:

"We have carefully read the evidence which is preserved in a bill of exceptions, and we have been unable to arrive at the conclusion that, under the facts and circumstances disclosed by the evidence, the father, under the law, can be held responsible for the acts of the son, which acts the jury found caused the accident and the consequential injuries and damages as before stated. It conclusively appeared from the evidence that Dr. Winters was not present at the time and place of the accident, and therefore had no control over the son in driving and managing the automobile, and that he knew nothing concerning the accident until after it had occurred. The plaintiff, however, sought to establish the doctor's liability upon the theory that the automobile was owned by him, that it had theretofore been driven by the son in the father's business affairs, and that at the time of the accident it was being driven by the son in the father's affairs. In other words, the plaintiff seeks to hold the father responsible for the acts of the son upon the theory of principal and agent or that of master and servant. All the evidence produced by the plaintiff relating to the question now under consideration is in substance, as follows: the plaintiff and the last two of his witnesses testified that they knew of the automobile in question; that it was owned by Dr. Winters, and that he used it in his business of practicing medicine; that prior to the accident they, on several occasions, had seen the son driving the car, both when the doctor was in it and when other members of his family were in the car with the son It will be observed that from plaintiff's evidence in the case it was made to appear that the automobile in question was, in fact, in the possession and under the control of Glen Winters, the son, so that what must

be inferred in this case is that Glen was the servant or agent of his father and was engaged in the latter's business affairs at the time and place of the accident. Can such an inference be legitimately deduced from the mere fact that Glen was at the time driving an automobile owned by his father? Is not the inference just as natural and quite as strong that Glen was driving the automobile either for his own use or for the use of someone other than the father It is certainly going to what we consider, undue lengths to hold that, because an automobile or any other vehicle or instrumentality is shown to be owned by one person, but is found in the possession and use of another, the only legitimate inference to be deduced from such fact is that such other person is the agent or servant of the owner, and is using the instrumentality in the owner's business affairs or for his use and benefit . . . in this case judgment was entered against the minor son and was withheld against the father, owner of the automobile.

In the case of *Watkins vs. Clark*, Kansas Case, 176 Pacific, page 131, which was an action for damages for personal injuries which the plaintiff suffered in an automobile accident:

"A demurrer to the plaintiff's evidence was sustained and he appeals . . . In this case the father was charged with negligence in permitting his daughter to operate the family car which resulted in the injury. The demurrer to the evidence was properly sustained. There was neither admission nor evidence to submit to the jury proving *prima facie* or otherwise, or tending to prove that the defendant's daughter was acting for him as agent, or servant, or in any other representative capacity, or under his direction or control, or in any joint enterprise from which agency might be implied.

"The automobile was not a dangerous instrumentality which the defendant let loose in the community. The automobile was not a guilty agent in the accident, bringing punishment on the owner, like the deodands of English law. Management by the driver was the cause of the accident."

The case of *Knight vs. Gossitt* was a case of joint ownership of an automobile between the father and his 23-year-old son. An accident occurred while the son was driving, the son being on his own business, held, that the evidence was not sufficient to establish the relation of master and servant between the father and the son.

In the case of *Boling vs. Asbridge*, 203 Pacific 894, it is held as follows:

"In presenting the second assignment of error counsel do not seem to disagree upon the general principle that, when the plaintiff in an action seeks to charge the owner of an automobile with liability for an injury inflicted by the car while it was being operated by another, the burden is on the plaintiff not only to show that an injury was the proximate result of the negligence of the operator, but also that such person was the servant or agent of the defendant, and was at the time of such negligence, acting within the scope of his employment. Quoting *Berry on automobiles*, 683."

Quoting from the case of *Smith vs. Jordan*, Massachusetts, 97 Northeastern 761:

"Where a father was possessed of an automobile which he kept upon his premises, and his daughter, about 19 years of age, was accustomed to drive it and did so whenever she felt like it, asking permission

to use it when the father was at home, and when not at home took it sometimes without permission, there being no proof that the daughter was actually employed by the father to operate the machine, held, in an action against the father, where the daughter, in using the machine for her own pleasure in driving her personal friends, negligently injured a person in the highway, that such proof was not sufficient to constitute the daughter the servant or agent of the master, and that a motion for a direction of a verdict for the defendant should have prevailed."

In the case of Blair vs. Broadcaster, Virginia, 93 South-eastern, page 632, it is held:

"The principals of law which govern this case are plain. A father is not liable for the torts of his minor son, simply because of paternity. There must exist an authority from the father to the son to do the tortuous act, or a subsequent ratification and adoption of it, before responsibility attaches to the parent. The wrongful act must be performed by the son in performance of the business, incident, or undertaking authorized by the father before the latter can be held liable. If the act is not done by the son in furtherance of the father's business, but in performance of some individual design of his own the father is not liable. The controlling rules of law are the same, whether the business in question concerns the operation of an automobile or any other matter."

In the case of Parker vs. Wilson, Alabama Case 60 Southern, page 150, it is held:

"General principals of law governing the case are more or less familiar. The mere fact of paternity does not make the father liable for the torts of his

minor child a strict relation of master and servant invariably arises out of contract express or implied. It involves an agreement by the servant to do something for the master and the master's liability to strangers for the negligence of his servant is founded upon the argument that he controls the manner of the performance of the thing to be done. As to third persons the minor child may become by particular arrangement the servant of the father, and this without agreement for compensation; but the relation of father and child has never of itself sufficed that the common law, prevailing in this state, to make the child a servant of the father within the meaning of the rule of respondeat superior, or to impose upon the parent liability for torts committed without his knowledge or authority. 29 Cyc. 1665.

“The parents’ responsibility in such case is governed by the ordinary principals affecting the liability of a principal for the act of his agent or a master for his servant.”

While there are numerous cases supporting the propositions set forth in the cases cited, we do not deem it advisable to extend the quotations upon the principal involved.

That the cases cited do not support, but are in direct opposition to the judgment entered against the appellant in this case.

It naturally follows that the answer to Point Two, to-wit:

Point Two. Is a parent, in his absence and who has not directed the son to use the automobile on the specific occasion in question nor consented to its use, responsible to a third party (the respondent herein) for an injury to such third party?

From the cases referred to above we submit that Point Two must be answered in the negative, that is, that the parent is not responsible for the injury to the plaintiff herein under the circumstances involved in the case.

Our next point in question is Point Three: Can a party who is a guest passenger in an automobile recover for damages sustained by him without charging "intoxication or willful misconduct," as the proximate cause of such injury or damage and establishing such allegation by competent proof against the party charged?

This point refers to the statutory provision respecting guest passengers. There is not any question but that the plaintiff in this action was a guest passenger in the automobile from which he received the injury complained of. We have Section 57-11-7 of Revised Statutes of Utah 1943, which we refer to, "Responsibility of owner or driver of a vehicle to guest."

"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 any person responsible for the operation of such vehicle If such person so riding as a guest be a minor and sustain an injury or be killed or die as a result of injury sustained while so riding as such guest, then neither the parents nor guardians, nor the estate nor legal representatives or heirs of such minor shall have any right of recovery against the driver or owner or person responsible for the operation of said vehicle for injury sustained or as a result of the death of such minor."

It follows in the section that if the owner or driver or person

is responsible for the operation of the vehicle while intoxicated or guilty of willful misconduct, then such person can be held.

The Complaint neither charges the operator of the car with intoxication or willful misconduct, although the complaint in Paragraph One designates the plaintiff as a guest in the automobile. While it is true that the Complaint does not cover this guest statute, the Answer in its first defense alleges that the Complaint fails to state a claim against defendant upon which relief can be granted, so I am assuming that the question here was involved in the case, at least if not, the pleading in the Answer raises this question in the paragraph just above quoted, and if the Court did not make a finding in accordance therewith he should have done, as the point is certainly involved in the/ Answer
of the defendant.

CONCLUSION

We therefore submit that the Court erred in his Finding of Fact, Conclusions of Law and Decree entered in the above entitled case, and that the same should be reversed by this Court and returned to the District Court with an order directing said Court to enter a judgment in favor of the defendant and against the plaintiff of no cause of action.

Respectfully submitted,

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