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# George O. Bishop, Jr. v. Charles Hollis Nielsen : Brief of Third-Party Defendant-Appellant

Utah Supreme Court


R. Scott Williams; Strong & Hanni; Attorneys fo Plaintiff-Appellant and Third-Party Defendant-Appellant;
Thomas A. Duffin; Attorneys for Defendant-Respondent;

IN THE SUPREME COURT

OF THE STATE OF UTAH

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| GEORGE O. BISHOP, JR., Plaintiff-Appellant vs. CHARLES HOLLIS NIELSEN, Defendant and Third-Party Plaintiff-Respondent, vs. GENICE GAY BISHOP, Third-Party Defendant-Appellant. | Case No. 17082 |

# BRIEF OF THIRD-PARTY DEFENDANT-APPELLANT

Appeal From The Verdict Of the Third Judicial District Court
of Salt Lake County, State of Utah,
Honorable G. Hal Taylor, Presiding

R. SCOTT WILLIAMS
STRONG & HANNI
Sixth Floor Boston Building
Salt Lake City, Utah 84111

Attorneys for Plaintiff-Appellant
and Third-Party Defendant-Appellant

THOMAS A. DUFFIN
ATTORNEY AT LAW
10 Broadway Building, No. 510
SALT LAKE CITY, Utah 84101

Attorneys for Defendant-Respondent

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THOMAS A. DUFFIN
ATTORNEY AT LAW
10 Broadway Building, No. 510
SALT LAKE CITY, Utah 84101

Attorneys for Defendant-Respondent

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# BRIEF OF THIRD-PARTY DEFENDANT-APPELLANT

## STATEMENT OF THE NATURE OF THE CASE

This is an action filed by plaintiff, George O. Bishop, Jr., against defendant, Charles Hollis Nielsen, for property damage incurred to plaintiff's vehicle in an automobile accident. Defendant filed a third-party complaint against the driver of plaintiff's vehicle, Genice Gay Bishop, for damage incurred by defendant's vehicle and for contribution upon plaintiff's cause of action against defendant.

## DISPOSITION IN THE LOWER COURT

Plaintiff, George O. Bishop, Jr., and third-party defendant, Genice Gay Bishop, originally filed a motion for a

partial summary judgment to dismiss the contribution claim against third-party defendant, by reason of the fact that Genice Gay Bishop cannot be a joint tort feasor with the defendant. The motion was denied by the Honorable Homer F. Wilkinson on August 13, 1979.

The trial of the above-captioned matter was held, and third-party defendant, Genice Gay Bishop, made a motion for a directed verdict to dismiss the contribution action against her on the same grounds that were urged at the motion for partial summary judgment. The motion for a directed verdict was denied, by the Honorable G. Hal Taylor, during the course of the trial, and the jury was presented with a "Special Verdict" to answer interrogatories concerning the negligence and liability of defendant, Charles Hollis Nielsen, and third-party defendant, Genice Gay Bishop.

The jury apportioned negligence of 70% to defendant and 30% to third-party defendant, Genice Gay Bishop. Judgment was rendered pursuant to the jury verdict in favor of plaintiff, George O. Bishop, Jr., against defendant, Charles Hollis Nielsen, for 100% of plaintiff's damages, $664.97, and a judgment was also rendered in favor of defendant, Charles Hollis Nielsen, againt third-party defendant, Genice Gay Bishop, for $199.49, representing 30% of the total damages incurred by plaintff, George O. Bishop, Jr.

## RELIEF SOUGHT ON APPEAL

Third-party defendant, Genice Gay Bishop seeks to have the judgment rendered against her in contribution overturned, and to have the order denying the motion for a directed verdict reversed.

## STATEMENT OF FACTS

On July 15, 1977, the third-party defendant, Genice Gay Bishop, was involved in an automobile accident with the defendant, Charles Nielsen. (R. 15, 142, 368) At the time of the accident, the third-party defendant was driving an automobile which belonged to her father, the plaintiff. (R. 362, 368, 394) In May of 1978, George Bishop instituted an action against the defendant to recover for the damages his automobile sustained in the accident. (R. 15, 362, 393) The defendant filed a third-party complaint against the third-party defendant for contribution. (R. 15, 363, 393)

The third-party defendant was born on June 30, 1960. (R. 108, 368) On July 15, 1977, the date of the accident, she was 17 years old. (R. 368, 394) She was single and lived at home with her parents, Mr. and Mrs. George O. Bishop, who were her sole means of support. (R. 106, 108, 362, 368, 394)

Plaintiff, George O. Bishop, Jr., and third-party defendant, Genice Gay Bishop, filed a motion for a partial summary judgment to dismiss the contribution claim filed by defendant on the basis that the third-party defendant was the uneman-

cipated minor child of the plaintiff at the time of the automobile accident and therefore cannot be a joint tort feasor responsible for her father's damage, on the basis of the intra-family immunity doctrine. The motion for partial summary judgment was denied on August 13, 1979. (R. 244-245) A notice of intent to appeal the denial of the motion for partial summary judgment was filed on August 13, 1979. (R. 246-247)

At the trial of the lawsuit, plaintiff and third-party defendant moved the court for a directed verdict in favor of third-party defendant upon the third-party complaint again urging the court that a contribution action against the third-party defendant was improper because of the "intra-family immunity doctrine. The court denied the motion on the basis that the denial of the partial summary judgment by Judge Wilkinson became the law of the case. (R. 400)

The jury was submitted the case on a "Special Verdict" and apportioned negligence in the amount of 70% against defendant, Charles Hollis Nielsen, and 30% against third-party defendant, Genice Gay Bishop.

## ARGUMENT

### POINT I.

### THE UTAH COURTS HAVE IMPLICITLY ADOPTED THE INTRA-FAMILY IMMUNITY DOCTRINE.

The intra-family immunity doctrine provides that a parent cannot sue his or her unemancipated child in tort. The doctrine first emerged in the American judicial system in 1891,

with Hewlett v. George, 68 Miss. 703, 9 So. 885 (1981). In that case a minor child brought an action against her mother for false imprisonment. The Mississippi court promulgated a rule denying a minor child the right to sue his parents for personal tort. The court said:

> The peace of society, and the families composing society, and a sound public policy, designed to subserve the repose of families and the best interests of society, forbid to the minor child the right to appear in court in the assertion of a claim to civil redress for personal injuries suffered at the hands of the parent. Id. at 887.

Courts upholding the intra-family immunity doctrine have rationalized it on three grounds; danger of fraud or collusion, preservation of family tranquility and parental discipline, and compliance with the intra-spousal immunity doctrine. The Iowa Supreme Court recently upheld the family immunity doctrine reasoning:

> We believe that the family unit, which is basic to all cultures and societies, and vitally important to ours, should not include in its internal structure a concept of recompensable fault in cases of ordinary negligence involving the family relationship. Moreover, we are satisfied that the arguments advanced for the rejection of the family immunity doctrine are fundamentally unsound, are utterly and completely repugnant and foreign to a harmonious family relationship, and feel they erroneously attempt to equate all human behavior in mere monetary values. Barlow v. Iblings, 156 N.W.2d 105, 109, (Iowa, 1968).

In Nahas v. Noble, 420 P.2d 127 (N.M. 1966), the Supreme Court of New Mexico upheld the family immunity doctrine and dismissed the plaintiff's mother's action against her daughter, even though the daughter had been emancipated subsequent to the injury but prior to the commencement of the action. The plaintiff had been injured in an automobile accident. At the time of the accident, the plaintiff was a passenger in an automobile driven by her daughter. With reference to the fact that the child was not liable to her mother, the court stated:

> Suits by a parent against the child tend to disrupt the family relationship because of the antagonism implicit in such suits. There is an inconsistency between the parent's position as the natural guardian of the child and the parent's position as plaintiff demanding damages from the child. . . It is repugnant to the prevailing sense of propriety that a mother should bring an action at law against her own minor child. [Citations omitted] Encouragement of family unity and the maintenance of family discipline being sound public policy, we hold that a parent cannot maintain an action in negligence against an unemancipated minor child. Id. at 128.

The court went on to hold that an action could not be brought by a parent against his or her child if the child was an unemancipated minor child at the time of the accident, even though the child had been emancipated prior to the trial.

Although the Utah Supreme Court has never dealt with the question of intra-family immunity, they did uphold the intra-spousal immunity doctrine in Rubalcava v. Gisseman, 14 Utah 2d

344, 384 P.2d 389 (Utah, 1963). In that case a wife sued the estate of her husband for injuries she received in an automobile-train accident. Her husband was the driver, and she was a passenger in the automobile. The Utah Supreme Court held that a wife cannot maintain a tort action against her husband. The court based their decision on the need for protecting family solidarity. They also noted that where insurance is involved, the spouses would have a common interest in the outcome, thus encouraging collusion. The court said:

> It has always been the law of our state, insofar as we have been able to ascertain, that a suit of this character could not be maintained. It is inevitable that this has been assumed to be the law. . . We are of the opinion that under these circumstances in fairness to those who have relied thereon, and in proper deference to the solidarity of the law, any change could be justified only to correct patent error, otherwise it should be made by the legislature, plainly so declaring, so that all may be advised what the change is and when it will be effective. Id. at 393.

In two subsequent cases, the Utah Supreme Court continued to uphold the doctrine of intra-spousal immunity. In Cannon v. Oviatt, 520 P.2d 883 (Utah, 1974), the court upheld the Utah's guest statute upon the rationale of preventing collusive actions. The court refused to follow the California decision which had overruled the guest statute, and the intra-family and the intra-spousal immunity doctrine on the ground that the possibility of collusive actions was not sufficient justification for

the doctrine. The Utah court reiterated its belief that the legislature, and not the court, was the proper forum for changing such rules. In 1978, the court again upheld the intra-spousal immunity doctrine in Hull v. Silver, 577 P.2d 103 (Utah, 1978).

The courts that have abrogated intra-family immunity have rationalized their decisions on the grounds that the injury has already been sustained and therefore family harmony has been disturbed. Furthermore, because most families are covered by insurance, the real parties in the action are the insurance companies, not the family members. Tamashiro v. De Gama, 450 P.2d 998 (Hawaii, 1969). The Utah Supreme Court has expressly rejected this reasoning. In Rubalcava v. Gisseman, the court rebutted the insurance argument saying:

> The question of liability can be ascertained justly only upon its own merits. Whether there is insurance or not is immaterial to this determination. However, the fact cannot be ignored that where there is insurance, and this is known to both parties, the temptation to collusion exists; and this is increased when the supposedly adverse parties are in the symbiotic relationship of husband and wife. The risk of loss, and the natural reaction to defend against a charge of wrong, may be negligible or non-existent; and are supplanted by the covert hope of mutual benefit. Id. at 391. (Emphasis added)

The court also upheld the family harmony argument, noting that such an action would "weaken the foundation of [the] relationship because when troubles arise . . . the parties would

then suspect each other's integrity." Id. at 392.

The rationale the Utah Supreme Court has relied upon in upholding the intra-spousal immunity doctrine is equally applicable to the intra-family immunity doctrine. The need to maintain family harmony and to protect against collusive actions between parent and child dictate a need for the intra-family immunity doctrine. As the court has noted on two occasions, if the doctrine is to be abrogated, the proper forum for such a change is the legislature, not the court. Rubalcava v. Gisseman, supra; Cannon v. Oviatt, supra. Thus, it is clear that the Utah Supreme Court has strongly upheld the rationale behind the intra-spousal and intra-family immunity docrines.

There is no dispute that on the day of the automobile accident involved in this matter, the third-party defendant, Genice Gay Bishop, was 17 years old, (R. 368, 394), and was single and living at home with her parents, Mr. and Mrs. George O. Bishop, who were her sole means of support. (R. 106, 108, 362, 368, 394) The intra-family immunity doctrine that has at least been implicitly adopted by the Utah Supreme Court would prevent an action by plaintiff, George O. Bishop, Jr., against his unemancipated minor child, Genice Gay Bishop, for the damages incurred to plaintiff's vehicle as a result of any negligence of his daughter.

## POINT II.

### THE TRIAL COURT ERRED IN GRANTING A JUDGMENT FOR CONTRIBUTION AGAINST THE THIRD-PARTY DEFENDANT BECAUSE THE THIRD-PARTY DEFENDANT IS NOT A JOINT TORT FEASOR.

In granting a judgment for contribution against the third-party defendant, the trial court committed error in either failing to affirm and recognize the intra-family immunity doctrine as in existence in the State of Utah, or in failing to apply the doctrine to a contribution cause of action.

Under Utah law, the right to contribution exists only against one who is "jointly or severally liable in tort for the same injury." U.C.A. 78-27-40(3)(1973). This statute provides that, "The right of contribution shall exist upon joint tort feasors. . . ," U.C.A. 78-27-39 (1973), and defines a joint tort feasor as:

> One of two or more persons jointly or severally liable in tort for the same injury to person or property, whether or not a judgment has been recovered against all or some of them. U.C.A. §78-27-40(3) (1973).

Under this statute, therefore, though a person has been negligent with reference to a particular injury, he will not be liable for contribution to that injury where he is not liable for that injury himself. Thus, Genice Bishop cannot be liable to her father, as a third-party defendant, because he could not sue Genice under the intra-family immunity doctrine.

The Utah Supreme Court interpreted the contribution

statute in Curtis v. Harmon Electronic Co., 552 P.2d 117 (Utah, 1976). In that case, a passenger was injured when the car he was riding in collided with a railroad car. The car was driven by a co-worker who was acting in the course of his employment. The passenger recovered from his employer's Workmen's Compensation insurance. He then brought an action against the railroad for negligence. The railroad tried to join the passenger's employer on a joint tort feasor and contribution theory. The court held that the employee's only remedy against his employer was under the Workmen's Compensation Act, and therefore the employer could not be a "tort feasor" and could not be liable for contribution under Utah's contribution statute.

Following this same reasoning, several courts have held that a party who is not liable to the plaintiff due to the intra-family immunity doctrine, will not be liable to the defendant for contribution. In Faul v. Dennis, 118 N.J.Supr. 338, 287 A.2d 470 (N.J. 1972), the plaintiff, an unemancipated minor child, was injured while a passenger in a car driven by his mother. The plaintiff sued the other driver involved in the collision, who brought in the mother as a third-party defendant for contribution. The New Jersey court stated:

> Since the infant plaintiff lacks a cause of action due to the immunity of the parent, no claim for contribution may be made against defendant (mother) by the other defendants who are liable for the infant's injuries. Id. at 473.

Similarly, in American Auto Ins. Co. v. Molling, 57 N.W.2d 847 (Minn. 1953), defendant was involved in a collision in which his wife was injured. The wife brought an action against the other driver for personal injuries and recovered. The other driver's insurance then sued the defendant for contribution. The court held that the husband was not a joint tort feasor under the intra-spousal immunity doctrine and thus was not liable for contribution. The court said:

> While the present action is not by the wife against the husband but is brought against the husband by the subrogee of the joint tort feasor, nevertheless the immunity of the husband from liability to his wife does destroy a necessary element of the action for contribution, and, consequently, is a good defense to such an action. Id. at 849.

This principle was reaffirmed by that court in Nelson v. Home Decorating Co. v. Nelson, 109 N.W.2d 154 (Minn. 1961).

Thus it is clear that where the intra-family immunity doctrine bars a party from liability for an injury, that party will not be liable for contribution for that injury. The fact that the parties are generally covered by liability insurance also militates against allowing an action for contribution against a family member.

> The presence of liability insurance in such instances may lead to fraud, or at least collusive, or at best friendly suits, the parent may encourage his minor child to bring such an action against him. This is not a far fetched possibility. Not only is it contrary to good faith, but it also has the tendency

> of promoting cynicism and lack of integrity . . . [which] the law should not encourage. Dennis v. Walker, 284 F.Supp. 413, 417 (1968).

Utah has recognized and affirmed the intra-spousal immunity doctrine, Rubalcava v. Gisseman, and by doing so, the Utah Supreme Court has indirectly approved of the intra-family immunity doctrine. Consequently, Genice Bishop cannot be liable to her father for the damages his automobile sustained in the accident. Since Utah law only recognizes an action for contribution among joint tort feasors, Genice Bishop cannot be liable in contribution to Charles Nielsen, and the lower court committed error in denying third-party defendant's motion for directed verdict and in entering a judgment aginst her upon the contribution cause of action.

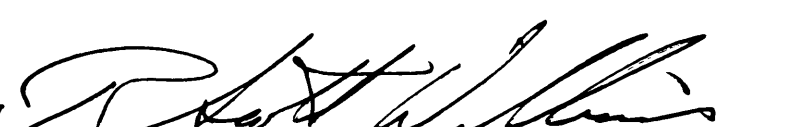
## CONCLUSION

In the present case, the plaintiff, George Bishop, brought an action to recover for damages his automobile sustained in an accident between his daughter and the defendant. The plaintiff's minor daughter was driving his automobile at the time of the accident. The defendant, Charles Nielsen, alleged that plaintiff's daughter should be liable to him for contribution. Since the third-party defendant cannot be liable to her father due to the intra-family immunity doctrine, she cannot be liable to the defendant, Charles Nielsen. Under the Utah contribution statute, it is evident that a party will not be liable for contribution if he is not jointly and severally liable with the

defendant for the plaintiff's injuries. Therefore, where the party from whom contribution is sought is not jointly and severally liable, due to the intra-family immunity doctrine, there can be no action for contribution. Genice Bishop, therefore, is not liable for the injury the plaintiff sustained and cannot be jointly and severally liable with the defendant for that injury. Third-party defendant respectfully requests that the judgment against her for contribution be overturned.

Respectfully submitted this 21st day of August, 1980.

STRONG & HANNI

By 
R. Scott Williams

Attorneys for Plaintiff-Appellant
and Third-Party Defendant-Appellant

## MAILING CERTIFICATE

I hereby certify that on the 21st day of August, 1980, two copies of the foregoing Brief were mailed, postage prepaid, to the following counsel:

THOMAS A. DUFFIN
Attorney for Defendant-Respondent
10 Broadway Building, No. 510
Salt Lake City, Utah 84101