1981

Steven L. Malan v. James C. Lewis and Brett Lewis : Brief of Appellant

Utah Supreme Court

IN THE SUPREME COURT

OF THE

STATE OF UTAH

STEVEN L. MALAN,

Plaintiff/Appellant,

-vs-

JAMES C. LEWIS and
BRETT LEWIS,

Defendants/Respondents.

Case No. 17606

BRIEF OF APPELLANT

Appeal from Judgment against Appellant in the
Judicial District Court in and for the County of
Weber, State of Utah, the Honorable [illegible]
presiding.

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IN THE SUPREME COURT OF THE STATE OF UTAH

STEVEN L. MALAN,)

Plaintiff/Appellant,)

--vs--) Case No. 17606

JAMES C. LEWIS AND BRETT LEWIS,)

Defendants/Respondents.)

BRIEF OF APPELLANT

STATEMENT OF THE NATURE OF THE CASE

The Appellant was a guest passenger riding in an automobile being driven by Respondent, Brett Lewis.

The parties entered into a written Stipulation in the lower court stipulating as to negligence, contributory negligence, and damages.

DISPOSITION IN LOWER COURT

The Honorable John F. Wahlquist granted Respondents' Motion For Summary Judgment.

RELIEF SOUGHT ON APPEAL

The Appellant is requesting that the lower court's decision be reversed, and that a judgment be granted to

Appellant pursuant to the stipulated damages in the amount of $15,000 and costs.

STATEMENT OF THE FACTS

It was stipulated in this action in the lower court that the Respondent was negligent, the Appellant free from contributory negligence, Appellant's damages exceeded $15,000; and that, under the Utah Guest Statute, §41-9-1, Utah Code Annotated, 1953, the action would be barred. The prior Utah Supreme Court cases of Milligan v. Harward, 355 P.2d, 62, and Ricciuti v. Robison, 269 P.2d, 282, which are similar factual situations, would cause the court to have to deny recovery. The only issue to be decided is the present constitutionality of our guest statute. The trial court granted Respondents' Motion For Summary Judgment.

The Respondent, through inattention, ran off the road, struck the guard rail, causing the Appellant to sustain compound fractures of his right leg decreasing its length and requiring the wearing of a brace for the remainder of his life. His actual damages would be several times $15,000, but this was the extent that any insurance recovery could be collected from the driver, who is Appellant's cousin.

ARGUMENT

There have been numerous assaults on the so called "guest statutes" in various states and in the State of Utah.

This law had been enacted originally in 27 states between 1922 and 1939 because of the lobbying efforts of the liability insurance companies. It now has been declared unconstitutional or repealed in 17 of those 27 states. Utah's Guest Statute, §41-9-1, Utah Code Annotated, 1953, provides in part as follows:

> "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 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; . . ."

and §41-9-12, Utah Code Annotated, 1953, defines a guest as follows:

> "'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."

CONSTITUTIONAL CHALLENGES TO THE UTAH GUEST STATUTE

The Appellant challenges the constitutionality of the Utah Guest Statute as being in violation of the Equal Protection Clause of the Fourteenth Amendment, Section 1, of the United States Constitution, as follows:

> " All persons born or naturalized in the United States, and subject to the jurisdiction thereof,

are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

and the Equal Protection Provision of the Utah State Constitution in Article I, Section 2, as follows:

" All political power is inherent in the people; and all free governments are founded on their authority for their equal protection and benefit, and they have the right to alter or reform their government as the public welfare may require."

and Article I, Section 7, Utah State Constitution, as follows:

" No person shall be deprived of life, liberty or property, without due process of law."

and the right to be compensated for injuries, as stated in Article I, Section 11, of the Utah Constitution, as follows:

" All courts shall be open, and every person, for an injury done to him in his person, property or reputation, shall have remedy by due course of law, which shall be administered without denial or unnecessary delay; and no person shall be barred from prosecuting or defending before any tribunal in this State, by himself or counsel, any civil cause to which he is a party."

and the Uniform operation of laws provision in Article I, Section 24, as follows:

" All laws of a general nature shall have uniform operation."

A recent 1978 Utah Law Review article by David K. Broadbent, page 509, discusses the Utah Guest Statute, "The Utah Guest

Statute: Has It Over Stayed Its Welcome?" This article, on page 510, quotes Dean Prosser as follows:

> " The typical guest act case is that of the driver who offers his friend a lift to the office or invites him out to dinner, negligently drives him into a collision, and fractures his skull, after which the driver and his insurance company take refuge in the statute, step out of the picture, and leave the guest to bear his own loss. If this is good social policy, it at least appears under a novel front."

This article, further, discusses the guest statutes, their origin, and rejection, further, on page 510, as follows:

> "II. BACKGROUND OF AUTOMOBILE GUEST STATUTES
>
> A. Common Law Origins
>
> " The development of the automobile early in this century made it necessary for courts to determine the respective rights and duties of a driver and his guest. A small minority of courts held that only in cases of gross negligence would drivers be liable for injuries to non-paying guests. Such a standard was derived by analogizing automobile drivers to the common law gratuitous bailee, and reasoning that 'justice requires that the one who undertakes to perform a duty gratuitously should not be under the same measure of obligation as one who enters upon the same undertaking for pay.' The majority of courts rejected the bailment analogy, insisting that society has a greater interest in human life and limb than in preserving property. A host driver was consequently held by most courts to the stricter standard of reasonable care.
>
> B. Rise of the Guest Statutes
>
> " The rational that one who undertakes a gratuitous task should be held to a lesser standard of care than one who receives compensation for his services was never accepted in more than a few courts. It did, however, become the policy underlying automobile guest statutes. Enactment of the

statutes in twenty-seven states between 1922 and 1939 has been attributed to an intense lobbying effort on the part of liability insurance companies.

" The Utah Guest Statute, enacted in 1935, was patterned after California's guest act and was introduced to the legislature at the request of the insurance industry. The statute denies any right of recovery to automobile guests who are injured or killed due to the host's negligence unless the guest's injuries or death result from the willful misconduct or intoxication of the host driver. A guest is defined as one 'who accepts a ride in any vehicle without giving compensation therefor.'

III. EQUAL PROTECTION CHALLENGES TO THE UTAH GUEST STATUTE

" In its purest form, equal protection of the law means that no group of individuals are 'classified' so as to receive treatment by the law different from that received by the rest of society. Recognizing, however, that classifications are inherent in any legislative act, courts have usually given latitute [sic] to state legislatures in formulating classes for separate treatment. With the exception of cases involving 'suspect classifications' or 'fundamental interest,' which require a greater degree of judicial scrutiny, the United States Supreme Court, in deciding the constitutionality of various statutes, has applied a 'rational relation' test, also described as 'restrained review.' Under this test, statutes pass equal protection muster as long as the classifications do not rest 'on grounds wholly irrelevant to the achievement of the State's objective' and do not result in 'invidious discrimination.' In extreme deference to legislative acts, courts have occasionally hypothesized legislative intent and purpose to sustain otherwise questionable legislation. Because of this wide leeway granted to legislation and the failure of the courts to require a rational relation in fact between the classifications and objectives of a statute, the 'rational relation' test has been characterized as offering 'minimal scrutiny in theory and virtually none in fact.'

" In recent years the United States Supreme Court has required a closer relationship between a statute's

classifications and its objectives. In McGinnis v. Royster, 410 U.S., 263 (1973), for example, Justice Powell's majority opinion inquired whether 'the challenged distinction rationally furthered some legitimate, articulated state purpose' and insisted that the state's purpose for the statute be 'nonillusory.' In Reed v. Reed, 404 U.S., 71 (1971), where the Court purported to apply a minimum scrutiny test, equal protection was held to require that the classification 'be reasonable, not arbitrary, (and that it) rest upon some ground of difference having a fair and substantial relation to the object of the legislation . . . . ' At the same time, many state courts are more strictly scrutinizing legislative classifications that do not fall within the 'suspect classification' or 'fundamental interest' categories, and several courts have accordingly stricken state guest statute legislation. In Brown v. Merlo, 506 P.2d, 212, for example, the California Supreme Court declared:

> ' Although by straining our imagination we could possibly derive a theoretically "conceivable," but totally unrealistic, state purpose that might support this classification scheme, we do not believe our constitutional adjudicatory function should be governed by such a highly fictional approach to statutory purpose. We recognize that in past years several Federal equal protection cases have embraced such an excessively artificial analysis in applying the traditional "rational basis" equal protection test . . . . (But) we believe that it would be inappropriate to rely on a totally unrealistic "conceivable" purpose to sustain the present statute . . . . '

"Under this new test, characterized as traditional equal protection with bite, judicial deference to conjectural legislative purposes wanes as courts look for actual, articulated purposes."

As is indicated in this article, there must be some reasonable factual basis or rational classification to deny citizens

equal protection under the Fourteenth Amendment, Section 1, of the United States Constitution and Article I, Section 2, of the Utah State Constitution, which give "equal protection" to all citizens. It, further, appears that this statute is in violation of Article I, Section 24, of the Utah Constitution in that it does not have "uniform operation with other laws; and, further, contrary to Article I, Section 11, in that it denies regress to "every person, for an injury done to him in his person." It is obvious to anyone who has had any experience with personal injury litigation that this law is the "creator of fraud" and the collusion is between the defendant and his insurance company rather than the driver and the host guest. It is "ludicrous" to assume Appellant and Respondent agreed to have this accident so that Appellant would sustain in excess of $5,000 in medical bills and have a crippled leg for the rest of his life.

The Michigan Supreme Court in Stevens v. Stevens, 355, Mich., 363, 94, N.W.2d, 858, discussed the injustice in allowing a person to recover if their personal property were damaged by host driver as follows:

> " The friends of the driver . . . must suffer injury at his hands without recompense, solaced only by the thought that, after all, the skull was cracked by a friendly hand . . . . Why? Because the relationship between them was one of trust and friendship. No money had changed hands. If, however, not the neighbor himself is carried to town,

> but rather his livestock to the slaughterhouse, many modern courts will permit full recovery for injury to the unfortunate animal through failure to use reasonable care for its safety. Is this one answer of an enlightened people to the hallowed question: 'How much then is a man better than a sheep?'"

The assumption by legislators that collusion would be created between driver and the host has no factual basis in reality. How many people would "plan an automobile accident" with the uncertainty as to the extent of injury to recover "easy money." With the discovery methods and rights of medical examinations by the defendant, the possibilities of some insurance company being victimized are at or less than zero. Any plaintiff can "fake injury" in any negligence action or any case, and the legislature has not yet decided to disallow all rights of recovery for all injuries because of this possibility. Why, then, is there any rational basis to say to the "slaughtered guest" you cannot recover for the driver's wrongdoing because you were sitting in his car? In some situations in the negligence field an "invited guest" is offered a higher degree of protection than the general public, e.i., maintenance of premises, etc.

Regarding the ability of our judicial process to avoid injustice and fraud or collusion claims, the California Supreme Court in Klein v. Klein, 376 P.2d, 70, stated as follows:

> "It would be a sad commentary on the law if we were to admit that the judicial processes are so

ineffective that we must deny relief of a person otherwise entitled simply because in some future case a litigant may be guilty of fraud or collusion. Once that concept were accepted, then all causes of action should be abolished. Our legal system is not that ineffectual."

There have been numerous Utah Supreme Court cases construing the guest statute in recent years. The most recent case is Strange v. Ostlund, 594 P.2d, 877, where the court was almost ready to "sua sponte" raise this issue on its own. Our supreme court should now follow the decisions of several other states in holding that the guest statute is in violation of provisions of the constitution, mentioned herein.

A recent annotation in 66 A.L.R.3d, 532, contains a general discussion of the constitutionality of guest statutes and the trend in recent years. As of the writing of this article in 1975, as indicated on page 566, several states have now held guest statutes to be in violation of the equal protection clause of the United State Constitution. California, in Brown v. Merlo, decided in 1973, in 506 P.2d, 212, declared the California Guest Statute to be unconstitutional at least in so far as it applied to guests other than the owner of the vehicle in question on the ground that it was in conflict with the state and federal constitutional guarantees of the equal protection of the laws. The court found there were two proffered justifications of the guest statute, the protection of hospitality and the elimination of collusive law suits but concluded that neither constitute

a rational basis for the different treatment actually accorded by the statute classifications scheme.

As indicated in the A.L.R. annotation on page 540:

> "The arguments are myriad as to why guest statutes fail to achieve their stated purposes and purported justifications. It is difficult to find independent opinion in defense of the merits of these statutes and the commentators and law review contributors are particularly unanimous in condemnation of them."

The State of Idaho, in the recent case of Thompson v. Hagan, 523 P.2d, 1365, decided in 1974 the Idaho Guest Statute was declared to be unconstitutional.

The purported justifications for the guest statute promoting hospitality, eliminating collusive law suits, and placing the automobile guest into parity with a trespasser on real property, were examined by the Idaho Court. The conclusion was reached that denial to a motor vehicle guest of a cause of action against his host did not bear any rational relationship to any of those objectives. In this case, the Idaho Court states, on page 1368, as follows:

> "To prevent the risk of fraudulent collusion, the Guest Statute eliminates a negligence cause of action for all guests. If, as the rationals suggests, a host will agree to fraudulently state that he was negligent, there is nothing preventing him from stating that he was grossly negligent or intoxicated in order that the guest may recover from the insurer."

The State of Kansas, in Henry v. Bouder, 1974, cited in 518 P.2d, 362, likewise held the Kansas Guest Statute to be unconstitutional as a denial of equal protection under the Fourteenth Amendment to the United States Constitution and the Kansas Bill Of Rights.

THE UTAH GUEST STATUTE IS IN VIOLATION OF THE UNIFORM OPERATION PROVISION OF THE UTAH STATE CONSTITUTION

The guest statute is contrary to Article I, Section 2 and Article I, Section 24, of the Utah State Constitution. As indicated, Article I, Section 2 allows regress to "every person for injury done to him and his person." Article I, Section 24 states that the laws must "have uniform operation with other laws."

In a 1978 Wyoming case, Nehring v. Russell, 582 P.2d, 67, the Wyoming Supreme Court, with an identical constitutional provision guaranteeing "uniform operation of the laws," held that the Wyoming Guest Statute violated that provision of the Wyoming State Constitution. The court, considering the "legislative ends of hospitality and gratuity" stated, on page 78, as follows:

> " We as well fail to see how total denial of recovery through the distinction the statute draws can rationally be found to promote the legislative ends of hospitality and gratuity. Even if at the time of passage of a majority of the existing guest statutes a lack of automobile liability insurance allowed a rational basis to be found, such justification has been eroded away by time and changing circumstances."

Concerning the argument that the guest statutes "prevent collusion," the Wyoming court, further, held, on page 79, as follows:

> ". . . Yet in furthering this obvious legitimate state interest in the prevention of collusion, the statute eliminates all negligence causes of action for nonpaying passengers, a technique reminiscent of employing a cannon to kill a flea. Not only is such a method grossly over-inclusive, doing away with negligence actions for an entire class of persons solely because some portion thereof may be 'tainted by the mischief,' it is impractical as well. If the mischievous parties would be tempted to commit perjury or aid and abet a false claim on the issue of liability to allow recovery, wouldn't they be just as tempted to lie about the payment of compensation for the ride and avoid the statute in that way? McGeehan v. Bunch, supra. Our judicial system is not helpless in this area, as it is well armed with numerous implements for prevention and detection of fraud including the penalties for perjury as well as the tools of cross-examination and various discovery devices. As stated in Emery v. Emery, 1955, 45 Cal.2d 421, 431, 289 P.2d 218, 225:
>
> > 'Courts must depend upon the efficacy of the judicial processes to ferret out the meritorious from the fraudulent in particular cases.'
>
> "By barring all suits by guest passengers for ordinary negligence, the guest statute exceeds all bounds of rationality and in so doing constitutes a denial of uniform operation under the Wyoming Constitution.
>
> " By way of summary, we conclude that the distinction drawn by the Wyoming guest statute between those denied and those permitted recovery for injuries inflicted by ordinary negligence do not bear a substantial nor rational relation to the statute's ascribed purposes of promoting hospitality, protecting against ingratitude, and preventing collusive lawsuits. We therefore hold that the Wyoming guest

statute violates the guarantee of a uniform operation of laws established by § 34, Article I, Wyoming Constitution. Further, cognizant that the determination is ours to make, we conclude that in consideration of all the factors and any prior reliances involved, our holding should be applied prospectively only, i. e., to this action and all cause of action accruing after 30 days following the date of this decision."

In 1975 the Nevada Supreme Court in Laakonen v. Eighth Judicial District Court, 538 P.2d, 574, concluded that the Nevada Guest Statute was in violation of Article IV, Section 21 of the Nevada Constitution, which provides, with identical language as Article I, Section 24 of the Utah Constitution, that "all laws shall be general and of uniform operation throughout the state"; and that it, further, violated the Fourteenth Amendment to the United States Constitution. That court, on page 579, held as follows:

" We conclude, therefore, that the denial of recovery for negligently inflicted injuries to those who by chance fall within the provisions of NRS 41.180 does not bear a substantial and rational relation to the statute's purposes of protecting the hospitality of the host driver and in preventing collusive lawsuits. Such irrational discrimination cannot stand in light of the applicable constitutional standards. It is ordered that a writ of mandamus shall issue, directing the district court to enter an order of partial summary judgment, declaring NRS 41.180 unconstitutional."

The State of North Dakota in Johnson v. Hassett in 217 N.W.2d, 771, decided in 1974, also, found their statute to be

unconstitutional that it did not operate uniformly because it gave special immunity from liability for ordinary negligence to a special category of persons.

"EFFECT OF APPLICATION IF UNCONSTITUTIONAL"

Another issue to be considered is assuming that our guest statute is declared to be unconstitutional, what retroactive effect would this ruling have? The case of Critchley v. Vance, 575 P.2d, 187, was decided after the accident in the case at bar, which occurred on April 9, 1977. The general law is that a statute that is declared to be unconstitutional is void from the day of its inception and enactment and confers no rights, benefits to anyone after that date.

The Idaho case of Thompson v. Hagan, 523 P.2d, 1365, squarely addressed this issue. The court, after declaring the Idaho statute to be unconstitutional, then, on page 1370, discussed the effect of this ruling as follows:

> " Since this action involves a major change in a host's liability in a negligently caused automobile accident, the question of its applicability to past, pending and future cases must be addressed. In the case of Linkletter v. Walker, the United States Supreme Court made an exhaustive analysis of retroactivity of court decisions. It was held that there are no constitutional requirements concerning retroactivity, and it is a matter of discretion for the state courts. Three different approaches to retroactivity can be identified. The first approach is the traditional rule which is derived from the concept that courts do not pronounce new law, but

only discover the true law. Under this approach there are no new decisions, but only clarifications of the true law which makes a decision applicable to both past and future cases. The second approach is the prospective rule. Under this rule a decision is effective only in future actions, and does not affect the rule of law in the case in which the new rule is announced. The third approach is the modified prospective rule which is a combination of the traditional and prospective rules. Under the modified prospective rule, the new decision applies prospectively and to the parties bringing the action resulting in the new decision; or, to the parties bringing the action and all similar pending actions.

" To aid the courts in determining which rule to apply, Linkletter v. Walker set forth the following factors to be considered. First, the purpose of the new decision must be analyzed in connection with the question of retroactivity. The purpose of holding the automobile guest statute unconstitutional is to prevent guests from being denied equal protection of the law. The purpose would be served by applying the case to both past and future actions. The second factor is reliance on the prior rule of law. The possibility exists that hosts may have offered rides to guests relying on the protection of the guest statute from negligence actions. Additionally, insurance companies may have relied upon the guest statute in setting their rates. The factor of reliance is very strong in this action. The third factor is the effect on the administration of justice. This factor takes into account the number of cases that would be reopened if the decision that the guest statute is unconstitutional is applied retroactively.

" After weighing the three factors, it is concluded that the modified prospective rule should be applied in this action. The decision holding the guest statute unconstitutional applies to this action and all pending actions at the date of this decision, and it applies to all actions arising in the future."

As stated, the Idaho ruling applied to "this action and all pending actions at the date of this decision."

The effect of a statute declared to be unconstitutional is discussed in 16 Am. Jur.2d, 724, §256, as follows:

> " The general rule is that an unconstitutional statute, whether federal or state, though having the form and name of law, is in reality no law, but is wholly void, and ineffective for any purpose; since unconstitutionality dates from the time of its enactment, and not merely from the date of the decisions so branding it, an unconstitutional law, in legal contemplation, is as inoperative as if it had never been passed. Such a statute leaves the question that it purports to settle just as it would be had the statute not been enacted. No repeal of such an enactment is necessary.
>
> " Since an unconstitutional law is void, the general principles follow that it imposes no duties, confers no rights, creates no office, bestows no power or authority on anyone, affords no protection, and justifies no acts performed under it. A contract which rests on an unconstitutional statute creates no obligation to be impaired by subsequent legislation.
>
> " No one is bound to obey an unconstitutional law and no courts are bound to enforce it. Persons convicted and fined under a statute subsequently held unconstitutional may recover the fines paid."

The dissent in Thomas v. Union Pacific Railroad Company, 548 P.2d, 624, states as follows:

> " With that part of the main opinion, which permits the action to proceed, I concur. I dissent from that part of the opinion, which fails to strike down the guest statute.
>
> " The guest statute was unconstitutional the day it was enacted, it has been since, it is now, and

it will continue to be so long as Article I, Section 11, Constitution of Utah, reads as it does, to wit:

> ' All courts shall be open, and every person, for an injury done to him in his person, property or reputation, shall have remedy by due course of law, which shall be administered without denial or unnecessary delay; and no person shall be barred from prosecuting or defending before any tribunal in this State, by himself or counsel, any civil cause to which he is a party.'

" The guest statute is blatantly contrary to this provision so much so it is a monstrous impudence.

" In 1935, the legislature attempted to take away an existing remedy for injury, leaving nothing in its place. Such, it had no power to do. All prior Utah cases upholding the guest statute should be overruled; and an announcement of the statute's nullity made, before any more damage is done to the hapless citizens of Utah, because of the invidious discrimination visited on unsuspecting citizens by this pretended law."

A dissenting opinion in Critchley v. Vance, 575 P.2d, 189, stated as follows:

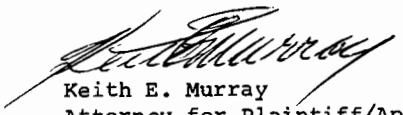
> ". . . if implied repeal of the guest statute has not occurred by enactment of Chapter 41, Title 31, a residuum of constitutionally impermissible discrimination remains against those automobile guests who receive 'the most serious types of injury.' I believe this unreasonable classification within a class, i.e., the class of 'guests,' is repugnant to Art. I, Sec. 2, Constitution of Utah. Also, it appears to me that singular irony obtains when a legal system permits less injured guests to recover though there is no negligence while the seriously injured guest cannot recover when there is negligence."

With 17 of 27 states having either declared their guest statute to be unconstitutional or with it having been repealed by the legislatures, it is apparent that this law creates unjust discrimination; and that this classification cannot be permitted under the United States Constitution and the Utah State Constitution, as stated herein.

CONCLUSION

It is respectfully submitted that the Utah Guest Statute should be declared unconstitutional for the reasons stated herein, and that the lower court judgment be reversed; and the Appellant granted a judgment in the stipulated amount of $15,000 and costs.

Respectfully submitted,



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