

1957

Loa Johnson v. Elizabeth F. Syme : Appellant's Petition for Rehearing and Brief in Support Thereof

Utah Supreme Court

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APPEAL No. 8547

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**IN THE SUPREME COURT
of the
STATE OF UTAH**

FILED

AUG 12 1957

LOA JOHNSON,

Plaintiff and Appellant, Clerk, Supreme Court, Utah

vs.

ELIZABETH F. SYME, Adminis-
tratrix of the Estate of Bailey Syme,
Deceased,

Defendant and Respondent.

**APPELLANTS PETITION FOR REHEARING AND
BRIEF IN SUPPORT THEREOF.**

LEE W. HOBBS

Attorney for Appellant

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PETITION

Comes now the plaintiff and appellant, Loa Johnson,
by her counsel, and respectfully petitions the Supreme
Court of the State of Utah, to grant to the plaintiff and
appellant a rehearing in the above entitled cause. This
petition is based upon the Statement of Points and Argu-
ments which follow.

POINT I.

THE COURT IN ITS OPINION FAILED TO CONSIDER THE APPELLANT'S SECOND CAUSE OF ACTION, VIZ. THAT APPELLANT'S INJURIES WERE A PROXIMATE RESULT OF WILLFUL AND WANTON MISCONDUCT ON THE PART OF THE DECEASED.

ARGUMENT

In the appellant's complaint, two causes of action were pleaded: The first cause of action alleged that her injuries were the proximate result of negligent conduct on the part of the deceased, Bailey Syme. The second cause of action alleged that the appellant was injured by the willful and wanton misconduct of the decedent. The lower court dismissed both causes of action and appellant raised on appeal to this court the propriety of both dismissals.

This court in its written opinion and Mr. Justice Wase in his dissenting opinion dealt entirely with the dismissal of the first cause of action. Both opinions were devoted solely to a discussion of whether the appellant was guilty of contributory negligence as a matter of law. Neither opinion considered the propriety of the lower court's ruling dismissing the second cause of action which was bottomed on willful and wanton misconduct of the deceased.

The grave importance of this omission is that even though the appellant was guilty of contributory negligence as a matter of law (as a majority of the court concluded) her negligence in no way bars her recovery for injuries inflicted by the willful and wanton misconduct of the deceased. *Jensen vs. D. & R. G. Ry. Co.*, 44 Utah 100, 111, 138 Pac. 1185, citing 2 Cooley on Torts, 3rd Ed., pg. 1442.

In his treatise on the Law of Torts, Sec. 151, pg. 324, Professor Harper points out that "willful and wanton" misconduct or "reckless and wanton" misconduct consist of acts or omissions which involve a higher degree of culpability than acts which are merely negligent. He states:

"Such conduct differs from wilful harm in that defendant does not act for the purpose of harming the plaintiff; it differs from negligence in that the actor knows and is full conscious that his conduct involves a grave risk to others whereas in merely negligent conduct, it may be that the actor does not realize the danger to others but, as a reasonable man, should recognize the nature and extent of the risk."

Harper quotes approvingly from *Atchison, T. etc. R. Co. vs. Baker*, 79 Kans. 183, 98 Pac. 804, 21 L.R.A. (N. S.) 427, wherein the court stated:

“One who is properly charged with recklessness or wantonness is not simply more careless than one who is guilty of negligence; his conduct must be such as to put him in the class with the wilful doer of wrong. The only respect in which his attitude is less blameworthy than that of the intentional wrongdoer is that instead of affirmatively wishing to injure another, he is merely willing to do so. The difference is that between him who casts a missile intending that it shall strike another, and him who casts it where he has reason to believe it will strike another, being indifferently whether it does or not.”

Harper further points out that by the rule established in a number of states a defendant may be guilty of “reckless and wanton” misconduct *even though he did not know of the plaintiff’s presence*, if the probability of his presence was very high and the defendant’s activity was dangerous.

“The fundamental characteristic of reckless misconduct is that it usually indicates an indifference on the part of a person to the safety of others and such indifference may be shown, it would seem, in cases where the actual presence of the other is not known, if the chances of his presence and the gravity of his peril, if present, are sufficiently great to establish a consciousness on the part of the defendant that he is creating an unreasonable risk.”

Applying Professor Harper's definition and examples to the instant case, it is clear that there is evidence of "willful and wanton" misconduct on the part of Bailey Syme, the deceased. As appears in the statement of facts in the opinion of this court, he drove along a country road at a speed of 40 m.p.h., past a stop sign and thence onto a busy four lane transcontinental highway where automobiles were traveling at or about the speed limit of 50 m.p.h. Whether he failed to see the stop sign or whether he saw it and disregarded it is not known, *and makes no difference here*. He at least knew or is chargeable with knowledge that he was approaching State Street, a heavily traveled thoroughfare where automobiles customarily travel at 50 m.p.h. Yet he drove onto State Street without stopping, directly into the path of the plaintiff. Here, in the words of Professor Harper, "the probability of the plaintiff's presence was very high and the activity of the defendant very dangerous to life and limb." Bailey Syme was indifferent to the safety of others. While he may not have actually wished to injure anyone, he was at least willing to do so. The intent to injure some one is not a necessary ingredient of "willful misconduct." *Cope vs. Davison*, Cal., 180 P. 2d 873; *Tighe vs. Diamond*, 149 Oh. St. 520, 80 N. E. 2d 122. "Willful" or "wanton" misconduct is such disregard of known duty necessary to the safety of the person and

entire absence of care for life, person or property of others as exhibits a conscious indifference to the consequences, said the Illinois Court in *Pittman vs. Duggan*, 336 Ill. App. 502, 84 N. E. 2d 701, 703. Certainly Bailey Syme in driving onto U.S. 91 without first stopping and waiting until the traffic cleared fits well the definition by the Illinois Court. His conduct was more than merely negligent. It was willful and wanton, and the plaintiff's contributory negligence in failing to see him sooner does not bar her recovery, *Jensen vs. D. & R. G Ry. Co.*, supra. The conduct of Bailey Syme in running the stop sign and driving onto busy State Street where a constant stream of automobiles race by at 50 m.p.h. was not much less "willful and wanton" than had he fired a gun into a crowd of people.

Had the plaintiff been a guest in the automobile of Bailey Syme and were she now bringing this action under our guest statute (41-9-1, U.C.A. 1953) where "willful and wanton" misconduct is required to be shown, this court, we predict, would not hesitate to hold that the facts justified submission of the case to a jury. In fact, the instant case is stronger on its facts than any guest case which has been decided by this court. The conduct of Bailey Syme was more dangerous to life and limb than that of the defendant in *Stack vs. Kearns*, 221 P. 2d 594, where he drove around a curve at an excessive rate of speed while braking at the same time.

Further, as pointed out in appellant's original brief, the conduct of Bailey Syme would warrant his conviction of involuntary manslaughter had the plaintiff been killed and Syme survived. See *State vs. Lingman*; *State vs. Barker*; *State vs. Anderson*, cited in original brief.

CONCLUSION

It must be remembered that this case was dismissed by the court at a pretrial conference. The plaintiff has never had "her day in court." She has never had the opportunity of presenting to the court and jury her evidence of "willful" and "wanton" misconduct. Clearly, a jury question was made out by the offer of proof made by the plaintiff at the pre-trial hearing. This court should grant a re-hearing and consider at length the plaintiff's second cause of action bottomed on willful and wanton misconduct.

Respectfully submitted,

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