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George D. Eyre v. Michael Frank Burdette : Brief of Appellant

Utah Supreme Court

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No. 8829

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IN THE SUPREME COURT
of the
STATE OF UTAH

GEORGE D. EYRE, Administrator
of the Estate of CECIL DREWERY
EYRE, deceased,

Plaintiff and Appellant,

—vs.—

MICHAEL FRANK BURDETTE,

Defendant and Respondent.

BRIEF OF APPELLANT

RAWINGS, WALLACE, ROBERTS & BLACK
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IN THE SUPREME COURT of the STATE OF UTAH

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Defendant and Respondent.

No. 8829

BRIEF OF APPELLANT

PRELIMINARY STATEMENT

The parties will be referred to as in the Court below.
All italics are ours.

STATEMENT OF FACTS

This law suit was commenced for the wrongful death of Cecil Drewery Eyre in an accident which took place and occurred on Redwood Road at approximately 6275 South, in Salt Lake County, State of Utah, at approximately 7:19 o'clock P.M. on the 22nd day of September, 1956. At the time of the accident the decedent was an occupant of an automobile belonging to and being driven

by the defendant in a northerly direction. The only other occupant in this automobile was Lorene Massardi who also filed a law suit against the defendant. The two law suits were consolidated for trial. This accident was caused by collisions with oncoming automobiles. The road at the place of the accident is a straight, level, black-topped highway with two lanes divided by broken lines. To the South there is a hill, the brow of which is approximately 300 yards from the place of the accident. Traveling South past the point of the accident, as the incline starts, the South bound lane widens into two lanes to the top of the hill and then becomes one lane proceeding down the hill to the South. Proceeding North approaching the hill, the North bound lane widens into two lanes going up the hill and at the top becomes one lane again proceeding Northerly down the hill. (R.-149). The series of collisions resulting in the death of Cecil Drewery Eyre occurred when the Burdette car collided first with the North bound Giorgio car; then, proceeding North approximately 46 feet collided with the North bound Hensley car and then proceeding North approximately 199 feet collided with the Bailey car resulting in the deceased being thrown out of the automobile of defendant and directly into the path of the oncoming Dr. Madsen car approximately 103 feet North from the collision with the Bailey car (Ex. P-1). The investigating officer, Arthur E. Allen, gave it as his opinion that the first point of impact was approximately 2 feet into the South bound lane of traffic. This opinion was based on a tire mark and also a line left by fluid coming from the Giorgio car

(R-157). (Also see Exhibit P-2 showing clearly the line left by the fluid.) The officer further gave it as his opinion that points of impact with the other automobiles were also in the South bound lane of traffic (R-157, 158). The driver of the first automobile involved with the Burdette car is Frank Giorgio who testified that he was driving South on said highway and that the traffic going South was fairly heavy because of automobiles proceeding to West Jordan where a prize fight was being held that night. He stated that it was dark and that the automobiles had their lights on. He further stated that he was traveling in his own lane of traffic when suddenly an automobile came right at him and that he was hit while trying to turn to the right (R-203-204). His automobile was damaged on the left front and left side (Ex. P-16).

Testimony was produced as to the manner in which the defendant's car was driven from the point where the car proceeded up the South side of Bennion Hill down to and including the collisions in which it became involved. Mr. Ed. Jones testified that he and Mr. Clarence Lovendahl were preparing to come out of his driveway at 6981 South Redwood Road in Mr. Lovendahl's automobile; that his home is located at the bottom of Bennion Hill on the South; that they had to stop to let a light colored Ford automobile proceeding North pass by; that this automobile was proceeding at a high rate of speed which he estimated to be between 60 and 70 miles per hour; that as the automobile proceeded up the hill it proceeded in an erratic course across the double center line and

over to the extreme West side of the road and back to his side of the road again and then back over the double center line a second time before passing over the hill. Mr. Jones and Mr. Lovendahl then proceeded North, and at the top of the hill observed what appeared to be a ball of fire and observed, on reaching the scene of the accident, that the car which he had seen had been involved in an accident (R-175-179).

Mr. Lovendahl in his testimony added that the light colored car almost hit a culvert on the extreme West side of the highway when it passed over the double center line and estimated the speed of the light colored automobile to be 70 miles an hour (R-186).

Mr. Wilford Green was driving an automobile in a Northerly direction proceeding up the South side of Ben-nion Hill in the lane to the immediate right of the double center line when the defendant's automobile crossed to the left of the double center line to pass him and went to the extreme West side of the highway by the canal bridge and then cut back again almost hitting an automobile on the top of the hill. Mr. Green observed, when he reached the top of the hill, that defendant's automobile had come back to his own side of the road and that he then barely edged to the East of the road and then edged back and cut right into the line of northbound traffic. He stated that he observed the collision seeing the lights go out and then sparks and more lights going out with the defendant's car swerving around. Mr. Green stated that in his opinion the speed of the defendant's automobile was 70 miles per hour or better (R-188-190).

Mr. Melvin J. Perry testified that he was driving North on Redwood Road up the South side of Bennion Hill, in the outside or East lane when a '54 Ford, light colored, passed him doing a high rate of speed. He further stated that this automobile was over across the double line a short distance and then proceeded down the hill coming back into the correct lane and then veered to the left into collision with a North bound automobile (R-196-197). He stated (R-197):

“Q. Will you tell us how the collision happened?

A. As I say, the Ford just veered over to the left in the opposite lane of traffic, where I had a position on the left side of the hill to view it.”

Mr. Perry stated that he was approximately a half block from the place of the collision when it happened. Mr. Perry also observed the subsequent collisions which the Burdette car had with the other North bound cars and that they were all in the South bound lane. He estimated the speed of the Burdette car as a “high rate of speed” (R-198-199). Later on on cross examination (R-200) Mr. Perry stated that the speed was at least 60 miles an hour.

Deputy Sheriff Arthur E. Allen testified that he had a conversation with the defendant Burdette at the scene of the accident and that he could smell alcohol on him, and from his manner of speech and rationalness, he believed him to be intoxicated (R. 148).

Highway Patrolman Vasco Laub testified (R-257) that he interviewed the defendant at the hospital at approximately 9:00 P.M. on the evening of the accident.

He testified (R-262) that in his opinion he was under the influence of alcohol.

Burdette testified that he was traveling about 50 miles an hour coming down the hill on his own side of the highway and that the oncoming car came into his lane of traffic and hit him. He further testified that just prior to the accident Mr. Eyre and Mrs. Massardi started to argue and further (R-317) :

“Q. What happened then?

A. I turned and asked them to stop it.

Q. Was there any motion?

A. They were jostling me.

Q. Did the jostling have any effect on the driving?

A. It was interfering, and bothering and I turned my head and asked them to stop.

Q. Then what happened?

A. Then I turned and saw the lights coming toward me.

Q. On which side were they on?

A. My side.

Q. Then what happened?

A. I had a collision and struck my face on the steering wheel, that is all I remember.

Q. At the time of the collision, which side of the road were you on, Mr. Burdett?

A. On my side of the road.”

At R. 350 on cross examination the defendant testified as follows:

“Q. It was your testimony, as I understand it, that this accident happened so quick, when you first noticed those lights, there was nothing you could do about it?

A. That is correct.

Q. It was too late to do anything at all?

A. I tried.

Q. But it was too late?

A. Yes.

Q. If you had of had time you could have done something about it?

A. I suppose I could.”

Lorene Massardi remembered nothing concerning the happening of the accident.

Mr. Burdette also testified that all he had to drink that night were two short beers consisting of half foam and half beer of which he had not drunk the complete glasses. He stated that at the time of the accident he was sober, and he further testified that there was nothing concerning the way in which he was driving immediately prior to the accident to give any cause for concern. He testified as follows, on cross examination (R-350):

“Q. (By Mr. Black) It is also your testimony is it not, that your driving on the way out and on the way back was perfectly normal?

A. Yes sir.

Q. There is nothing to give anyone any cause for concern there, was there?

A. No sir.

Q. And, of course, there was nothing to give anyone cause for concern about drinking either?

A. No sir."

In regard to the purpose of the trip, Lorene Massardi testified that she and Mr. Eyre had gone to the B Z B Bar where Mr. Burdette worked as a bartender and had ordered a glass of beer when Mr. Burdette came in and sat down at their table (R-229). She stated that they started talking about chickens and eggs and further (R-230):

"Q. And then what happened?

A. Well, we just sat there, and they were talking about the chickens and eggs, and I said to Mr. Eyre, 'we better go get them because it is getting late, we better go and gather up the eggs, because it is getting late.

Q. What, if anything, was said about getting the eggs?

A. He mentioned something about selling a crate of eggs, I don't know just how it came about, but the three bartenders with Mr. Burdett—two other bar tenders and Mr. Burdette were going to buy a case of eggs for the three of them.

Q. Was anything said to Mr. Burdette about the price?

A. Mr. Eyre said he would sell them to him for less than he got for a case of eggs.

Q. What did Mr. Burdett say?

A. He said that would be a good deal, because they could use them in the bar.

Q. Then what happened?

A. Well, I don't know just how long we were in there, we then started to leave and went outside, and Mr. Eyre and I started to his car, Mr. Burdett's was parked next to it, I didn't know at that time Mr. Burdett had a car. He said to Jack 'let's go in mine,' so we got in his car and went.

Q. Then where did you go?

A. He said he wanted to go home and change his clothes, Mr. Eyre said it wouldn't be any use. Then we started out to the chickens.

Q. Did you go to the chicken farm?

A. Yes."

And again at R-238:

"Q. Mrs. Massardi, will you tell me what the purpose of this trip was out to the farm?

A. Yes. To feed the chickens and gather the eggs.

Q. All right. Did you hear anything mentioned, or talked about between Mr. Eyre and Mr. Burdett, any other reason than that mentioned for going out to the farm?

A. No."

Burdette testified that on the day in question he went to the BZB bar to see if he was needed for work that night and saw Mr. Eyre and Mrs. Massardi. He stated that Mr. Eyre offered to sell him some eggs cheaper than he could buy them; that Eyre sold eggs by the case and the other two bartenders agreed to go in on a case with him. He claimed that the eggs were to be delivered

by Eyre. However, in explaining why he went outside with Eyre and Massardi, Burdette, for the first time, claimed that he was invited by Eyre to see the chicken farm and went for that reason volunteering to take his car (R-347).

On cross examination Burdette testified as follows (R-347):

“Q. Now, Mr. Burdett, it is true, isn’t it, that you only had a casual acquaintance with Mr. Eyre, is that not true?

A. Just casual, yes.

Q. That is of short duration, — you hadn’t known him very long?

A. Not too long, no sir.

Q. Just seen him, of course, a couple of times?

A. Several times.

Q. And, of course, there was no reason why you should just merely desire Mr. Eyre’s company, or to be in his company, is that right?

Mr. Strong: What time are you speaking of?

Q. (By Mr. Black): At the time they went with you in your car?

A. Well, he invited me to go out.

Q. I see, but the reason you went out was to get the eggs, wasn’t it?

A. Not purposely, no.

Q. Isn’t it true you thought this was a pretty good deal he offered you?

A. Yes sir.

Q. You agreed to buy these eggs?

A. Yes sir.

Q. And you talked to the bartender and also the owner to see if they would cut in on this deal with you?

A. He wanted to sell a case of eggs, I couldn't afford one myself.

Q. He wanted to sell these eggs?

A. Yes sir.

Q. You wanted them for use in your home?

A. Yes sir.

Q. Isn't it true in this other hearing in this matter you said nothing about Mr. Eyre inviting you to go out to see this farm, did you?

A. I can't remember.

Q. You can't remember?

A. No.

Q. Let's see if I can refresh your memory then. This is on page 8. It is right near the top?

Q. What did you do then?

A. Well Mr. Eyre made me a proposition to buy some eggs. He said he had quite a few chickens out in Draper, out on a ranch out there, and he said he would make me a deal on some eggs and it sounded all right to me. So I asked Leo if he would like to buy some.

Q. Asked who?

A. Leo.

Q. The bartender?

A. Yes, sir, and he said 'sure' and Mr. Eyre said he would like to sell by the case rather than sell a few dozen eggs. So I asked Mr. Bolinder and he said he would be glad to buy a half a case of eggs because he could use them in his business and in his home.

I believe that is all—did you so testify at the prior hearing of this matter?

A. Yes sir.

Q. Then it is true, isn't it, that you said nothing at that prior hearing, at that time about Mr. Eyre inviting you just to go out and look over his ranch?

A. No sir.

Q. Is it not true?

A. No sir. May I have the question again?

Q. It is true then at this prior hearing then you said nothing about Mr. Eyre coming out to look at this ranch?

A. Yes sir.

Q. *At that hearing you testified the purpose, the sole purpose was to go out and get those eggs?*

A. Yes sir.

Q. You remarked, as Mr. McCarty reminded you, you stated in this transcript you wanted to tell the whole truth, the whole story in this matter?

A. Yes sir."

Plaintiff is entitled to all reasonable inferences deducible from the foregoing evidence. A jury could well have found that the motivation for the trip was the sale and purchase of eggs. In order to consummate the sale, an exchange would have to take place. Burdette would receive the eggs and Eyre would receive the money. Presumptively, this exchange would take place at the time Eyre placed the eggs in the crate and delivered the crate to Burdette. This exchange could have taken place either at Eyre's place of business, the tavern, or at the Burdette home, but this would be immaterial. These men went out to consummate a business transaction, to wit, the sale and the purchase of eggs. This was the motivation for the trip, the purpose of the trip, and it was in the execution of this purpose that the collision occurred. The mutual obligations and advantages of any sale of property were present in the transaction here involved. This was not a sightseeing tour, this was not a social venture, but on the contrary was a business transaction as will be hereinafter clearly indicated by citation of numerous authorities. These facts taken in a light most favorable to plaintiff clearly established that the deceased Eyre was a passenger and not a guest of Burdette at the time of the collision. Yet, the trial court not only failed to instruct that Eyre was a passenger but refused to even submit the passenger-guest issue to the jury as an issue of fact. It instructed that Eyre was a guest.

STATEMENT OF POINTS

POINT I.

THE TRIAL COURT COMMITTED ERROR IN HOLDING AS A MATTER OF LAW THAT THE DECEASED, CECIL DREWERY EYRE WAS A GUEST IN THE AUTOMOBILE BEING DRIVEN BY THE DEFENDANT MICHAEL FRANK BURDETT.

POINT II.

INSTRUCTION NO. 15 INCORRECTLY ALLOWED THE JURY TO CONSIDER ALLEGED SCUFFLING BY DECEDENT AND ANOTHER OCCUPANT AS A DEFENSE WHEN DEFENDANT'S OWN TESTIMONY ELIMINATED IT AS A CAUSE OF THE ACCIDENT.

POINT III.

THE TRIAL COURT INCORRECTLY INSTRUCTED THE JURY ON NEGLIGENCE AFTER HAVING ELIMINATED NEGLIGENCE FROM THE LAWSUIT.

POINT IV.

THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN GIVING INSTRUCTION NO. 6 WHICH STATED THAT DRIVING A VEHICLE WHILE UNDER THE INFLUENCE OF LIQUOR IS NEGLIGENCE AS A MATTER OF LAW—THIS AFTER HAVING ELIMINATED NEGLIGENCE AS BEING ACTIONABLE.

POINT V.

THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN ALLOWING THE DEFENSE OF ASSUMPTION OF RISK TO BE GIVEN THE JURY, AND COMPOUNDED ITS ERROR IN UNDULY EMPHASIZING THIS DEFENSE IN ITS INSTRUCTIONS.

POINT VI.

THE TRIAL COURT ERRED IN INSTRUCTING THE JURY THAT CONTRIBUTORY NEGLIGENCE IS A DE-

FENSE TO AN ACTION BASED ON WILFUL MISCONDUCT
AND INTOXICATION.

ARGUMENT

POINT I.

THE TRIAL COURT COMMITTED ERROR IN HOLDING AS A MATTER OF LAW THAT THE DECEASED, CECIL DREWERY EYRE WAS A GUEST IN THE AUTOMOBILE BEING DRIVEN BY THE DEFENDANT MICHAEL FRANK BURDETT.

In his instruction No. 10 the Trial Court stated as follows: (R. 79)

“You are instructed as a matter of law that the deceased Eyre was riding as a guest passenger in defendant’s vehicle at the time and place of the accident.”

The court went on to instruct that the lawsuit of the estate of Cecil Drewery Eyre was based on allegations of wilful misconduct and intoxication of the defendant. (Instructions Nos. 7 and 16). Plaintiff requested in the alternative, instructions both that the deceased Cecil Drewery Eyre was a passenger as a matter of law (R. 40) and leaving the question of whether the deceased was a guest or a passenger for the jury to determine (R. 46).

It is respectfully submitted that the trial court committed reversible error in holding as a matter of law that the deceased was a guest, according to the clear line of authorities to which this Court has committed itself. The only Utah case dealing with the question of whether an occupant is a guest or a passenger is the case

of *Jensen vs. Mower* (1956) 294 P. 2d 683, 4 U 2d 336. This court held under the facts of that case that the plaintiff was a passenger and not a guest. In its opinion this court relied heavily on the California case inasmuch as the Guest Statute in California is substantially the same as the one in Utah. On page 688, the Court quotes from the leading California case of *Whitmore vs. French*, (1951) 235 P. 2d 3, which in turn cites the case of *Kruzie vs. Sanders* (1943) 143 P 2d 704. The following language is stated from the *Whitmore* case:

“Where, however, the driver receives a *tangible benefit, monetary or otherwise*, which is a motivating influence for furnishing the transportation, *the rider is a passenger* and the driver is liable for *ordinary negligence*.”

The *Kruzie* case, *supra*, is one of the leading cases in California. In that case, the parties had been acquainted for some time, the defendants occasionally taking meals at a cafe operated by plaintiffs. In December, 1940, Mrs. Kruzie, the plaintiff, was asked by Mrs. Sanders, the defendant, to go with her to Fresno to assist her with some Christmas shopping. The defendant told the plaintiff that she wanted her advice in the selection of a ring as a present for defendant's husband and also for her help in choosing presents for some girls. The plaintiff had no special knowledge of the jewelry business but she had good taste and she knew “the sizes and different things” appropriate as presents for the girls. After nearly a week's urging plaintiff went with defendant, the plaintiff having done her shop-

ping at a prior time. The trial court granted a non-suit against plaintiffs, and plaintiffs appealed on the question of whether plaintiff was a guest or a passenger. In rendering its decision the court stated at p. 706:

“It is settled that benefits to the driver other than cash or its equivalent may be ‘compensation’ (citing cases). In the Druzanich case the sole benefit received by the driver was the promise of the passenger to share in the driving. In *Haney v. Takakura*, 2 Cal. App. 2d 1, 37 P 2d 170, 38 P 2d 160, cited with approval in the Druzanich case, compensation was found where the defendant driver asked the plaintiff to accompany him into town to assist in selling oranges. In the present case the evidence that plaintiff took the trip at defendant’s request in order to aid defendant with her Christmas shopping clearly shows a substantial benefit to defendant within the Druzanich and Haney decisions. * * *

“Although Section 403 of the Vehicle Code defines a guest as a person who accepts a ride ‘without giving compensation for such ride,’ it is not necessary, in order to avoid the prohibition of the statute, for plaintiff to establish that the compensation received by the driver was given ‘for such ride’ in the sense that plaintiff obtained or purchased transportation for some independent purpose of her own. *Where the trip was not primarily for a social purpose, it is sufficient to show that defendant was to derive a substantial benefit from the transportation of plaintiff,* and the fact that plaintiff received no benefit therefrom is immaterial. Guest statutes must be interpreted in accordance with the intention of the Legislature. A primary policy underlying

these statutes is to prevent recovery for ordinary negligence by a guest in an automobile who has accepted the hospitality of the owner or driver."

In discussing the legislative purpose of the Guest Statute, this court, in the Jensen case, cited the following language from the case of *Crawford vs. Foster*, (Cal. 1930), 293 P 841, at page 687:

"The purpose and object that the Legislature had in mind sometimes throws light upon the meaning of the language used. The situation that this section was apparently designed to prevent is well known. As the use of automobiles became almost universal, the proverbial ingratitude of the dog that bites the hand that feeds him, found a counterpart in the many cases that arose, where generous drivers, having offered rides to guests, later found themselves defendants in cases that often turned upon close questions of negligence. Undoubtedly, the Legislature, in adopting this act, reflected a certain natural feeling as to the injustice of such a situation. *Neither this feeling nor the reasons therefor apply to a situation arising out of an ordinary business transaction,*
* * *"

The Crawford case involved a situation where the plaintiff was being taken for a demonstration ride by an agent of the defendant automobile dealer. The court in that case pointed out that the definition in the statute does not say "without paying therefor" but rather says "without giving compensation therefor" and that this language indicates an intention not to limit the same to a person definitely and specifically paying cash or its equivalent for his transportation but to include in its

scope a person who gives such recompense for the ride as may be regarded as compensation therefor; that is, a return which may make it worth the other's while to furnish the ride. The court states:

"A consideration may be any benefit conferred or any prejudice suffered."

In defining a guest the court stated:

"We think the meaning of the language used is that a guest is one who is invited, either directly or by implication, to enjoy the hospitality of a driver of a car; who accepts such hospitality; and who takes a ride either for his own pleasure or on his own business, without making any return to or conferring any benefit upon the driver of the car, other than the mere pleasure of his company."

The California cases have distinguished a situation where one of the objects of the trip is business from a situation where the trip is purely social. It was stated in the case of *Whitechat v. Guyette*, (Cal. 1942), 122 P 2d 47, at page 49:

"On the other hand, if the parties are engaged in a business venture for their mutual advantage and the ride is an integral part of that business venture, then the driver may be said to be in receipt of benefits sufficient to be classified as compensation, and the occupant becomes 'passenger,' who may recover for injuries suffered as a result of the negligence of the driver."

This case involved a situation where the purpose of the trip was to take the occupants to a meeting of an

organization, the driver receiving money from the organization to cover the costs of the trip.

In the case of *Druzanich v. Criley*, (Cal. 1942) 122 P. 2d 53, the driver and other occupants were delegates from a Union going to a convention. The defendant's husband allowed her to use the car if the others would help in driving which they agreed to do. The court held that the appellant's promise was the "special tangible benefit" which was the "motivating influence for furnishing the transportation" and that this must be termed compensation. The court stated:

"The instant case cannot be distinguished from the case of *Lerma v. Flores*, 60 P 2d 546, wherein the plaintiff was invited by the defendant to ride with him so that he (plaintiff) might show the defendant which route they should follow, nor does it differ materially from the case of *Haney vs. Takakura*, 2 Cal. App. 2d 1, 37 P 2d 170, in which the plaintiff, who had experience in selling oranges, was asked to accompany the defendant driver into town to aid the defendant in selling his crop of oranges."

The case of *Walker vs. Adamson* (Cal. 1937), 70 P. 2d 914, involved a situation where the plaintiff and defendant were business associates, having purchased real property at Lake Tahoe with two main houses and guest cottages, which they rented out and in which they divided the profits and shared the expenses. The purpose of the trip in question was to take hardware and other materials to carpenters who were doing construction work on the property. The defendant took his car and

the plaintiff furnished some money for expenses. It was held that the evidence supported the verdict for the plaintiff on the theory that the parties were engaged on a business venture for their mutual advantage and that plaintiff was, therefore, a person who had given compensation for the transportation and not a guest.

The case of *Duclos v. Tashjian*, Dist. Ct. of App. 4th Dist. Cal. 1939, 90 P 2d 140, involved a situation where the deceased was an expert machinist and plaintiff owned a farm a short distance away. On the day in question the plaintiff came to deceased's place of business and asked him to come to his farm to look at his pump and see if he could fix it. The deceased took his tools and went with the defendant. The court held that the deceased was not a guest stating at page 143:

"The journey was not undertaken by Tashjian as an act of hospitality nor as a favor, but as a real and vital part of his own business with an eye to his own benefit. It was participated in by Duclos, not as a means of obtaining free transportation, but as an integral part of a business transaction. * * *.

"An actual contract of employment of Duclos by Tashjian was no more necessary to constitute compensation for the ride in his car than was an actual sale of an automobile necessary in the Crawford case. *Because some benefit from the trip may accrue to the rider is not controlling.* The statute does not so provide. *A prospective benefit to the rider does not compensate and destroy by balancing an independent and separate compensation for the ride given by the rider to the driver.* It is sufficient if, as here, the person

who accepts the ride gives compensation to the driver for it.”

The foregoing language shows that it is immaterial whether or not the passenger receives any benefit from the ride. The controlling factor is whether or not the driver receives a benefit as defined in the cases. Furthermore the California cases indicate that in any business type situation there is a benefit within the Statute sufficient to make the occupant a passenger and not a guest.

The case of *Follansbee v. Benzenberg*, Dist. Ct. App. 2nd Dist. Div. 3. Cal. 1954, 265 P 2d 183, involved a situation where *the hope of future business was held to be a present consideration* sufficient to take the occupant out of the guest status. In this case decedent bought a car from the defendant and the defendant's servant was taking the decedent to get his license plates. The court stated at page 186:

“An opportunity thus obtained is a direct and substantial benefit, and may well be as beneficial to the driver where he is selling something not necessarily connected with the ride as where he is demonstrating the car itself to a prospective purchaser or using it to take a prospect to look at a piece of land. The hope of future business is present, and such an opportunity is a real benefit to a salesman even though another place for his labors might have been chosen. * * * *It is enough that there is ‘any’ consideration for the ride.*”

In the case of *Gillespie v. Rawlings* (Cal. 1957), 317 P. 2d 601, the plaintiff had worked for the defend-

ant real estate broker as a receptionist and clerk for approximately four months. There was evidence that defendant wanted plaintiff to learn more about the business so that she could talk intelligently with customers. One of the objects of the trip in question was to see some real estate in another town. The defendant told the plaintiff that he wanted her to come on the trip. The defendant further testified that although he planned to see the property the purpose of the trip was primarily for pleasure. A jury verdict for the plaintiff was affirmed, the court holding that the jury properly decided that the purpose of plaintiff being in the car was to familiarize herself with the business and that she accepted the ride because of the employment relationship.

See the following additional California cases which substantiate the foregoing propositions:

Sumner v. Edmunds, 21 P. 2d 159, plaintiff being driven over paper route for purpose of familiarizing himself therewith—no contract of employment had been entered into—held not a guest.

Boysen v. Porter et al, Dist. Ct. of App. 2nd Dist., Div. 1, 1935, 52 P 2d 482—employee of committee to elect mayoralty candidate,—to which committee, owner lent truck and driver who operated in accordance with employee's directions—held not a guest.

Carey vs. City of Oakland, (Cal. 1941) 112 P 2d 714—plaintiff was riding in the City ambulance to assist in caring for an injured friend being taken to the hospital—held evidence susceptible of the inference that the motivating influence which induced the officer in

charge of the ambulance to allow Mrs. Carey to go along and which prompted her to make the request was that she could and would render a beneficial service in assisting him in caring for the unconscious Mrs. Gordon on the way to the hospital. The court cites the following at page 716:

“In the case of *McCann v. Hoffman*, 9 Cal. 2d 279, 70 P 2d 909, the court in reviewing the origin, purpose and the construction place upon the operation of said law clearly points out, first, that such statutes, depriving a person carried without reward of the right to recover damages for injuries caused by failure to exercise ordinary care, are in derogation of the common law, and therefore must not only be construed strictly against the change but its operation should not be extended beyond the correction of the evils and the attainment of the permissible social objects which were the inducing reasons for its enactment;”

Jensen vs. Hansen, Dist. Ct. of App. Fourth Dist. Cal. 1936, 55 P. 2d 1201 — Deceased riding with defendant — they and one other were appraisers hired by a loan company all three of which had to make any appraisal. Frequently they went together to see properties in the car of one or the other. Held-deceased not a quest since appraisals had to be signed by all and they had a good deal of appraisals that day and compensation could not be received until all three had signed. The presence of the three appraisers conferred a benefit on each of them by *enabling all of them to receive their compensation more promptly.*

Martinez v. So. Pac. Co., (Cal. 1955) 288 P 2d 868. Action by daughter and daughter-in-law against father and minor son who was driving. Evidence showed that they all lived together as a family unit, the members contributing part of their wages to a common fund. The plaintiffs worked at a packing plant. They had a ride to work every morning which was stopped, and from that time on various members of the family group drove them to work. Held — sufficient evidence to justify a finding by the jury that they were passengers and not guests.

Roberts v. Craig, Dist. Ct. of App. 1st Dist. Div. 1, Cal. 1954, 268 P. 2d 500 — Defendant had a limited instruction permit — law required her to have licensed driver in car when she drove — defendant wanted to drive to Martinez to pick up husband's salary checks — asked plaintiff, a licensed driver to go with her — plaintiff had no business there. Held — jury justified in finding plaintiff a passenger.

Thompson v. Lacey, (Cal., 1954) 267 P. 2d 4.

Malloy v. Fong (Cal., 1951) 232 P. 2d 241.

Fachadio v. Krovitz, Dist. Ct. of App. 1st Dist. Div. 2, Cal. 1944, 144 P. 2d 646.

The following cases from other jurisdictions are cited for the assistance of the court:

Liberty Mutual Ins. Co. v. Stitzel, (1942) (Ind.) 41 N.E. 2d 133 — Complaint alleged that plaintiff, a salesman for a furniture store, was riding with the defendant for the purpose of conducting her to a wholesale furniture mart and helping her to select furniture, which

would then be sold to her by the plaintiff's employer— held — could not be said as a matter of law that this was not such a substantial, material benefit to her as to pay her for plaintiff's transportation.

Zaso vs. De Cola (Ohio) 51 NE 2 654—Defendant requested plaintiff, his sister, to come to his house to try to make peace for him with his wife — after she failed he was taking her home — held — benefit was tangible.

Russell v. Pilger (Vermont) 37 A 2d 403 — Officer of law riding on defendant's milk truck to protect him during milk strike — held — passenger for hire.

Scholz v. Leuer, (Wash.), 109 P. 2d 294 — Plaintiff's decedent accompanied defendant on early morning delivery trip principally to help him by reading names of customers — fact that she wanted to go and that she might have regarded the venture as a lark, was said to be of little moment — held, substantial benefit to constitute payment.

Cardinal v. Reinecke (Mich.), 273 NW 330—plaintiff in defendant's car at her request to advise defendant's daughter upon prospective employment — held — passenger for hire.

Goldberg v. Cook (Minn.) 289 NW 512 — mother traveling with daughter to West Coast where daughter planning to set up new home — mother came solely to help daughter find a place and arrange it — held — passenger for hire.

Delk v. Young (Ohio) 35 NE 2d 969 — occupant went with driver who was a candidate for public office, to a meeting where they hoped to advance his candidacy — held — passenger for hire.

O'Hagan v. Byron (Pa.) 33 A 2d 779 — plaintiff went with defendant, her sister, at defendant's request so that she might give her opinion as to the health of their brother — held — passenger for hire.

Elkins v. Foster, (Texas) 101 SW 2 297 — plaintiff accompanied defendant in defendant's car at defendant's request in order to discuss plaintiff's efforts to aid defendant's brother in retaining a position which would be of financial benefit to defendant — held — passenger for hire.

Nyberg v. Kirby (Nev.) 188 P. 2d 1006 — Plaintiff was requested to accompany defendant on trip to get supplies because defendant had been ill the same morning — held — not a guest — compensation even though plaintiff had actually performed little or nothing in the way of services.

Porter v. Tecker (Iowa), 270 NW 897 — defendant asked plaintiff to accompany him to help load and unload truck — defendant injured on return trip — held — for jury.

Wittrock v. Newcom (Iowa) 277 NW 286 — defendant demonstrating car to plaintiff's brother requested plaintiff to come along to assist in selling car — held — passenger for hire.

Mitchell v. Heaton (Iowa) 1 NW 2d 284 — plaintiff went with defendant because plaintiff's brother to whom defendant wished to sell a tractor refused to negotiate unless plaintiff was brought along — held — passenger for hire.

Albrecht v. Safeway Stores (Ore.) (1938) 80 P. 2d 62 — defendant was a district manager of defendant Safeway Stores — had to make inspection trips — asked plaintiff his brother-in-law to go on trip with him — that he might need some help in driving — plaintiff did assist in driving and in loading sacks of salt in car — held — jury question.

Dorn v. Village of North Olmstead (Ohio) (1938), 14 N.E. 211 — defendant driving to see a man on business, stopped in village — asked deceased and another to ride with him to show him where man lived — held — defendant cannot claim the protection of Guest Statute.

George v. Stanfield, et al (D. C. Idaho) (S. D., 1940) 33 F. Supp. 486 — defendant, a stock man, asked plaintiff to go with him to help him find the place where defendant wanted to go on business — held — payment does not mean money or performance of a pecuniary obligation — not a guest either under Oregon or Idaho Statutes.

Palmer v. Miller, 35 NE 2 104.

Bailey v. Neale (Ohio), 25 NE 2310.

Forsling v. Mickelson (S. D.), 283 NW 169.

Van Auken v. Steckley's Hybrid Seed Corn Co.
(Neb.) 8 N.W. 2d 451.

Lloyd v. Mowery (Wash.) (1930) 290 P. 710.

Thompson v. Farrand (Iowa) (1933) 251 NW. 44.

Bree v. Lamb (Conn. 1935) 178 A 919.

Applying the law as set forth in the foregoing cases it can readily be seen that the trial court committed reversible error in holding as a matter of law that the deceased Cecil Drewery Eyre was a guest and; not a passenger. The evidence shows without dispute that the deceased who operated a chicken farm in Draper, Utah, consummated a sale of a case of eggs to the defendant. Taking the evidence in a light most favorable to the plaintiff, the primary purpose of the trip to Draper was to pick up the eggs which had been sold to the defendant, and to bring them back to the B Z B lounge. Certainly, this was a mutual business transaction whereby the deceased was selling and defendant was buying the eggs in question. The evidence shows that the defendant was getting a good price on the eggs, and certainly, *getting the eggs that night and at that price was substantial enough benefit for defendant to have considered it worth his time in driving out to the farm to get said eggs.* It will be remembered that the evidence showed defendant and deceased had merely a slight acquaintance and that there was no social purpose whatsoever in the trip in question. Defendant stated at the trial that he was interested in going out to see the farm, although at the former hearing referred to in the record, defendant had made no such statement at all. It cannot be argued that

in such a transaction the buyer does not benefit as well as the seller. In every sale of any type of product, it goes without saying, that both the seller and the buyer benefit. Otherwise, there would be no buyers. It can be pointed out as an illustration of this, that as a matter of common knowledge, persons will travel many miles to participate in a bargain sale. Also, the hoards of people converging on the doors of department stores on mornings before sales can verify this well known fact. It cannot be said as a matter of law that there was no benefit accruing to the defendant in the trip in question. Maybe the jury could have found that these men put the egg transaction off in some corner and decided as a purely collateral venture to go on an evening sightseeing tour of Eyre's hen yard. But we suggest to this Honorable Court that such a conclusion, to say the least, is somewhat unreasonable.

It is of no moment in determining whether or not the decedent Eyre is a passenger, to state that he also benefited from the trip. As was pointed out by the foregoing authorities, the one and only question involved is whether or not the defendant Burdette benefitted from the trip. The cases clearly hold that in a business transaction where there is a mutual benefit we do not have a guest relationship.

It will be remembered that the purpose of the guest statute was to prevent generous drivers giving rides to guests from being sued for negligence. It will also be remembered that since the guest statute is an abrogation of common law and takes rights away from per-

sons which they had at common law, that it must be construed strictly within its narrow purpose.

It was a gross injustice for the trial court in the case at bar to take away from the jury the question of whether or not the defendant Burdette benefitted from the trip in question and deciding as a matter of law that he did not. This was something which the trial court decided, on which all reasonable men could not agree. Many of the foregoing cases cited to this court for its assistance, contained instances where the benefits were less tangible than were the benefits in the case at bar.

POINT II.

INSTRUCTION NO. 15 INCORRECTLY ALLOWED THE JURY TO CONSIDER ALLEGED SCUFFLING BY DECEDENT AND ANOTHER OCCUPANT AS A DEFENSE WHEN DEFENDANT'S OWN TESTIMONY ELIMINATED IT AS A CAUSE OF THE ACCIDENT.

Instruction No. 15 given by the court states as follows (R. 84):

“If you find from a preponderance of the evidence in this case that at or immediately prior to the time of the collision, the plaintiff Massardi and the deceased Eyre were so conducting themselves as to interfere with the proper operation of the vehicle by the defendant Burdette and that such conduct on their part was a proximate contributing cause of the accident, then and in that event you are instructed that the plaintiffs cannot recover and your verdict must be in favor of the defendant and against both plaintiffs, no cause of action.”

It will be remembered that the defendant Burdette testified that the accident happened on his side of the highway with the oncoming car coming across and into the car he was driving. In addition to this, on cross examination (R. 350) the defendant testified as follows:

“Q. It was your testimony, as I understand it, that this accident happened so quick, when you first noticed these lights, there was nothing you could do about it?

A. That is correct.

Q. It was too late to do anything at all?

A. I tried.

Q. But it was too late?

A. Yes.

Q. If you had of had time you could have done something about it?

A. I suppose I could.”

According to the defendant's own testimony the alleged scuffling that he spoke about could have had nothing whatsoever to do with the happening of the accident. In the first place, the defendant testified that the accident happened on his side of the highway. Therefore, there is nothing that the two occupants of the automobile could have done to have caused him to go on to the wrong side of the highway. In the second place, the defendant states that the oncoming car turned into his car so suddenly that he did not have time to attempt to do anything about it. Therefore, according to defendant's own testimony there is nothing that the

two occupants of the automobile could have done to have prevented him from avoiding the accident. Certainly, it is well established law that a party's testimony is no stronger than its weakest link. The defendant is bound by his own testimony and his case must stand or fall with it. It will be remembered also that the only testimony in the entire record concerning any scuffling by the two occupants was the testimony of the defendant himself. Then, the defendant went on to testify that there was nothing that this alleged scuffling could have had to do with the cause of the accident. For this reason, the instruction given as aforesaid by the trial court was prejudicial error, since it was not justified according to the evidence in the case.

POINT III.

THE TRIAL COURT INCORRECTLY INSTRUCTED THE JURY ON NEGLIGENCE AFTER HAVING ELIMINATED NEGLIGENCE FROM THE LAWSUIT.

After the trial court had eliminated any question of negligence from the lawsuit by ruling and instructing as a matter of law that the deceased Cecil Drewery Eyre was a guest and not a passenger, it went on to give the following instructions, Instruction No. 4 in part (R. 72):

“The terms ‘negligence,’ ‘contributory negligence,’ ‘ordinary care,’ and ‘proximate cause,’ as used in these instructions, are defined as follows:

- (a) ‘Negligence’ means the failure to do what a reasonably prudent person would have done under the circumstances of a situation, or doing what such person under

such existing circumstances would not have done. The essence of the fault may lie in acting or omitting to act. The duty is dictated and measured by the exigencies of the occasion;”

Instruction No. 7 in part (R. 75) :

“Under the law of the State of Utah at the time of the accident in question, it was the duty of a driver of a motor vehicle to keep a lookout for other vehicles or conditions reasonably to be anticipated upon the highway, to keep his car at all times under reasonably safe and proper control, to drive his car on his own right side of the highway, and to maintain a speed within that set by law for any particular locality. A violation of any one or more of these requirements would constitute negligence on the part of the driver.

“To prevail on a claim of wilful misconduct on the part of the defendant, the plaintiffs have the burden of showing to you by a preponderance of the evidence, that such act or acts of negligence as referred to above were committed under such circumstances as to constitute wilful misconduct. In this connection you are directed to the definition of wilful misconduct given in instruction No. 5.”

Instruction No. 11 (R. 80) :

“Conduct arising from momentary thoughtlessness, inadvertence, or from error of judgment does not, standing alone, indicate wilful misconduct. If, therefore, you find from a preponderance of the evidence in this case that the accident was caused by nothing more than the defendant’s momentary thoughtlessness, inadvertence, or error of judgment, there can be no recovery and

your verdict should be in favor of the defendant and against the plaintiffs, no cause of action."

Instruction No. 16 (R. 85):

"Even should you find from a preponderance of the evidence in this case that the defendant was negligent and that such negligence was a proximate cause of the accident, the court instructs you that such evidence alone is not sufficient. In this case you must find either that the defendant was guilty of wilful misconduct or was intoxicated as defined in these instructions, and that such wilful misconduct or intoxication proximately caused the accident. If all you find is that the defendant was guilty of negligence, your verdict must be in favor of the defendant and against the plaintiffs, no cause of action."

It is well established in Utah as well as in other States that it is error to give instructions which are extraneous to the issues and evidence in the case. After eliminating negligence from the case, it was improper for the trial court to dwell at great length, as he did, in instructing the jury as to what negligence was. The only two issues remaining in the case were wilful misconduct and driving under the influence of intoxicating liquor. The case of *Moore v. D & R. G. W.* (1956) 4 U. 2d 255, 292 P. 2d 849, in discussing two instructions given in said case, one, to the effect that since this was an F.E.L.A. case that the plaintiff was not covered by Workmen's Compensation, and two, that plaintiff did not assume the risk, stated that though the statements of law contained in said instructions were correct, they were extraneous to the issues of the case and it was

error to give them. The court in the Moore case cited the case of *Parker vs. Bamberger*, et al, (1941) 100 U. 361, 116 P. 2d 425, where it was stated at page 430:

“As to the first point, it is error for the trial court to give an instruction, though such instruction correctly states the law, on a matter extraneous to the issues and evidence of the case.”

Also, cited in the Moore case was the case of *Bruner vs. McCarthy*, 105 U. 399, 142 P. 2d 649.

It will be observed from the foregoing instructions that the court, in instructing on negligence and repeatedly stating that the plaintiffs had to prove more than mere negligence, made the burden of the plaintiffs in the case seem almost insurmountable. In the first part of Instruction No. 7 the court stated:

“Under our law a guest cannot recover from his host driver for mere negligence, that is, the failure to exercise ordinary care in the operation of a vehicle. Before a guest can recover, he or she must prove by a preponderance of the evidence that the driver was guilty of wilful misconduct or of being intoxicated which proximately caused the injury complained of.”

Certainly, this part of Instruction No. 7 was entirely sufficient to instruct the jury that a quest cannot recover for mere negligence. Subsequent to this it was only necessary for the court to instruct the jury as to what they must find to find wilful misconduct or intoxication. However, the court went on to confuse the jury by stating at great length what negligence was under certain conditions and then to instruct the jury that they must find

more than this in order to hold for the plaintiffs. This created confusion and misunderstanding in the mind of the jury and was extremely prejudicial to plaintiff.

POINT IV.

THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN GIVING INSTRUCTION NO. 6 WHICH STATED THAT DRIVING A VEHICLE WHILE UNDER THE INFLUENCE OF LIQUOR IS NEGLIGENCE AS A MATTER OF LAW—THIS AFTER HAVING ELIMINATED NEGLIGENCE AS BEING ACTIONABLE.

The argument under this point is based on the same law as was cited under the preceding point but it was felt necessary to deal with this error by the trial court separately. The trial court instructed in Instruction No. 6 (R. 74) as follows:

“A person who drives a vehicle upon a public highway while under the influence of intoxicating liquor is *guilty of negligence as a matter of law*. One is under the influence of intoxicating liquor when, as the result of drinking thereof, his abilities of perception, coordination, or of will or judgment, are so affected as to impair, to an appreciable degree, his ability to operate the vehicle with a degree of care which an ordinary prudent person in full possession of his faculties would exercise under similar circumstances.”

It can be seen from the foregoing instruction that the trial court has added to the confusion which he had created by delving into the question of negligence by instructing that a person driving a vehicle under the influence of intoxicating liquor is guilty of negligence as a matter of law. The court failed to state that the

plaintiffs would be entitled to recover if such a finding were made. Irreparable prejudice was created for the plaintiff when this instruction is considered with the other instructions which emphatically emphasize that plaintiff could not recover for mere negligence.

The trial court emphatically instructed the jury that plaintiff could not recover for mere negligence. The court then instructed the jury that driving while under the influence of intoxicants "is negligence as a matter of law." If driving while under the influence of intoxicants is negligence as a matter of law and the plaintiff cannot recover for mere negligence then the plaintiff cannot recover under the court's instructions even though plaintiff proves that defendant was driving while under the influence of intoxicants and that his conduct in such regard proximately caused the collision.

At no place in the instructions is the jury clearly advised that if defendant was driving while under the influence of intoxicants and his conduct in that regard proximately caused the collision plaintiff would be entitled to recover. The only portion of Instruction No. 16 discussing the subject states: "In this case you must find either that the defendant was guilty of wilful misconduct or was intoxicated as defined in these instructions, and that such willful misconduct or intoxication proximately caused the accident." This portion of the instruction does not advise the jury that plaintiff is entitled to recover on proof of intoxication and causation. But even if such an inference were deducible from said language standing alone that meaning is lost when the

court advises the jury in the same instruction "If all you find is that the defendant was guilty of negligence, your verdict must be in favor of the defendant * * *." And, of course, the jury had previously been instructed that driving while under the influence of intoxicants was "negligence as a matter of law."

Furthermore, it is not incumbent upon the plaintiff to establish that the meaning hereinabove set forth is the only meaning that could be attached to the instructions. It is only incumbent upon the plaintiff to demonstrate that said meaning *could* have been given the instructions by the jury. It is so obvious as to be beyond the possibility of dispute that the jury *could* have believed from the instructions that driving while under the influence of intoxicants is negligence and that for mere negligence plaintiff would not be entitled to recover.

It is true that part of this instruction was contained in plaintiff's requested instruction No. 9 (R. 50). However, a note was appended to said request (R. 51) which stated:

"NOTE: This instruction to be given if the Court leaves the question of whether Eyre was a guest or a passenger to the jury."

Certainly, with negligence having been eliminated from the case, the foregoing instruction was extraneous to the issues and created irreparable prejudice to the plaintiff which constituted reversible error by the trial court.

POINT V.

THE TRIAL COURT COMMITTED REVERSIBLE ERROR
IN ALLOWING THE DEFENSE OF ASSUMPTION OF RISK

TO BE GIVEN THE JURY, AND COMPOUNDED ITS ERROR IN UNDULY EMPHASIZING THIS DEFENSE IN ITS INSTRUCTIONS.

The defense of assumption of risk has been defined at 15 A.L.R. 2d 1180, as follows:

“The necessary elements of assumption of risk by the guest have been clearly defined as follows:

“First, there must be a hazard or danger inconsistent with the safety of the guest; Second, the guest must have a knowledge and appreciation of the hazards; and Third, there must be acquiescence or willingness on the part of the guest to proceed in the face of danger. *Knipfer v. Shaw* (1933) 210 Wis. 617, 246 NW 328, 247 NW 320.”

In this regard it will be remembered that the defendant Burdette testified that he was perfectly sober throughout the trip in question, having had nothing more than two short beers at the B Z B bar before leaving on the trip in question and that said short beers consisted of half foam and half beer and that he had not finished either one of them. The only other witness, Lorene Massardi, stated that she saw Burdette take two drinks from a glass about four inches tall approximately half full and that she could not tell whether it was whiskey or beer (R. 242). She further testified that during the trip she did not see anyone in the car take any drinks (R. 244). Mrs. Massardi had no memory of the events immediately preceding the accident (R. 247). She remembered that at one point Mr. Burdette had driven too fast and that she had objected and that they had stopped at a filling station

and Burdette had stated that he wouldn't drive so fast, but she is quite hazy as to when and where this happened (R. 231, 247). It will also be remembered that the total evidence in the record as to the manner in which Burdette was driving prior to the accident covered his driving from the bottom of Bennion Hill on the South up and over the hill to the point of the accident. There is no evidence in the record as to any reckless or heedless driving prior to that time.

There is also testimony in the record by defendant Burdette and Lorene Massardi to the effect that deceased Eyre and Massardi had consumed a fair amount of liquor during the afternoon and evening preceding the accident (R. 241, 300, 304, 306, 310). With the record in this state, the trial court gave the following instructions:

“Instruction No. 12 (R. 81)

“If you find from a preponderance of the evidence that the defendant was guilty of wilful misconduct as herein defined, you will be required to determine whether the plaintiffs voluntarily assumed the risk of such misconduct of the defendant. If so, they are barred from recovering in this action. In making such determination you will bear in mind that there must be a knowing concurrence by them in the wilfulness of the driver's conduct and a knowing acceptance of the hazard. In other words, the guest, to be barred from recovery under this rule, must have knowledge at the time of the ride, of the facts that make it perilous and must have sufficient experience and understanding to appreciate the dangerous

character of the conduct and with this knowledge and appreciation, they nevertheless *assumed* the risk incident to the driver's wilful misconduct."

"Instruction No. 13 (R. 82)

"There is a legal principle commonly referred to by the term 'assumption of risk' which is as follows:

"One is said to assume a risk when he voluntarily manifests his assent to dangerous conduct or to the creation or maintenance of a dangerous condition and voluntarily exposes himself to that danger, or when he knows, or in the exercise of ordinary care should know, that a danger exists in either the conduct or condition of another, or in the condition, use or operation of property and voluntarily places himself or remains within the position of danger.

"One who has thus assumed a risk is not entitled to recover for damage caused him without intention and which results from the dangerous condition or conduct to which he thus exposed himself."

"Instruction No. 14 (R. 83)

"When upon entering a vehicle to accept a ride as a guest, *one knows, or reasonably should know, that the driver is intoxicated*, the law holds that the guest assumes the hazard and, therefore, may not recover in the event of injury or death resulting from the driver's intoxication. The same result also follows when, after having entered a vehicle, a guest learns, or reasonably should be aware, that the driver is intoxicated, and the guest having a reasonable opportunity to alight at a reasonably safe place, fails to do so, thus voluntarily accepting the risks incident to the driver's intoxication by continuing to ride with him."

The evidence conclusively shows that the decedent Eyre had no notice of drinking on the part of Burdette or of any wilful misconduct in driving the automobile prior to the time when the defendant commenced the wild ride over Bennion Hill at which time it was entirely too late to make any protest or to get out of the automobile. It will also be remembered that Burdette testified under oath that he was absolutely sober. For the defendant Burdette to avail himself of the defense of assumption of risk as to his intoxication he must take a position that he may avail himself of his own perjury and benefit therefrom. With the record in this state, it was improper for the trial court to instruct on assumption of risk at all. The court not only wrongfully instructed on assumption of risk but compounded its error by giving three separate instructions on this defense and, in effect, drilling it into the minds of the jurors. The prejudice resulting to the plaintiff from these three instructions is patent on the face of said instructions.

This court in the case of *Shoemaker v. Floor* (1950) 117 U. 434, 217 P. 2d 382, affirmed the trial judge's findings as to lack of assumption of risk in a case where the plaintiff stated that she had gone out with the defendant on several previous occasions and that on such occasions he nearly always had something to drink; that the only effect that the drinking had upon him which she noticed was that it caused him to drive faster; that she saw him take three drinks in Pocatello during the course of an hour and a half prior to the trip in

question; that she had no reason to anticipate that there might be any drinking on the trip when she left Salt Lake City for Pocatello; and that, although she had seen him take three drinks, she had seen him take three drinks containing the same amount of liquor on previous occasions without his appearing or acting other than normal. Moreover, it has been held in a great number of cases that mere knowledge that the driver has been drinking is not sufficient to preclude recovery under the Guest Statutes as the trial court here instructed in Instruction No. 14 See 15 ALR 2d 1169, par. 4. The authorities hold that the extent of the knowledge must be such that the guest has knowledge or with the exercise of reasonable care should have knowledge that the driver is so under the influence of intoxicants as to be unfit to operate his car. 15 ALR 2d 1170, par. 5.

In the case of *Stack v. Kearnes* (1950) 118 U 237, 221 P. 2d 594, this court upheld a jury finding of no assumption of risk as to the defendant's wilful misconduct when it was shown by the evidence that on the same trip the defendant had driven at an excessive rate of speed, at which times, plaintiff has requested him to slow down, and that there was an opportunity to leave the car prior to the return trip. The court particularly noticed the fact that there was no opportunity for plaintiff to get out of the automobile after it had become evident to him that the defendant did not intend to heed his request as he had done before. It will be remembered that the evidence in the case at bar shows that there was no opportunity whatsoever

for the decedent to leave the car of defendant after defendant started on his wild drive over Bennion Hill to the point of the accident.

POINT VI.

THE TRIAL COURT ERRED IN INSTRUCTING THE JURY THAT CONTRIBUTORY NEGLIGENCE IS A DEFENSE TO AN ACTION BASED ON WILFUL MISCONDUCT AND INTOXICATION.

The trial court stated in Instruction 7 in part as follows (R. 75):

“* * * If the plaintiffs should prevail in your finding as to either the issue of intoxication or that of wilful misconduct as a proximate cause of injuries or damages suffered by them, they will be entitled to recover damages unless they, or either of them, are barred from relief by *contributory negligence*, if any, or *by an assumption of the risk*, if such there was under the instructions given you.”

It will be noted in the instruction that the court had originally used the word “misconduct” and had crossed it out writing the word “negligence” above it. Furthermore, the court in Instruction 4 part b, defined contributory negligence as follows (R. 72):

“‘Contributory negligence’ means that a person injured has proximately contributed to such injury by his want of ordinary care, so that except for such want of ordinary care on his part the injury would not have resulted.”

In the aforesaid instructions, the trial court clearly committed reversible error which was prejudicial to the

plaintiff. In Instruction No. 7, the trial court instructed the jury that there were two separate defenses which the defendant had to the action, contributory negligence and assumption of risk. It is true that there have been a few authorities which have used the words "contributory negligence" and "assumption of risk" interchangeably. However, there are no authorities found which have given a defendant both such defenses. The universal rule is that contributory negligence is not a defense to an action based upon wilful misconduct. This is stated at 38 Am. Jur. 854, par. 178:

"There is an abundance of authority for the proposition that contributory negligence is not a defense in an action based upon wilful or wanton misconduct or intentional violence. Even in jurisdictions where the doctrine of comparative negligence is rejected as a general principle of the common law, contributory negligence is no defense to an action based on the defendant's reckless, wilful, wanton, or intentional misconduct. There is no more reason for permitting the defense of contributory negligence in a case where the injury was caused by willful, wanton, or reckless misconduct, than there is for permitting it in a case of assault and battery."

It is also stated at 114 A.L.R. 837:

"However, even in jurisdictions where the doctrine of comparative negligence is repudiated, it is conceded that contributory negligence is no defense to an action based on defendant's reckless, wilful, wanton, or intentional misconduct."

Numerous authorities are cited substantiating the

aforesaid statements. Also see *Loomis v. Church* (Idaho, 1954) 277 P. 2d 561.

It is well known Hornbook law that the aforesaid statement is a sound and correct statement of the law.

CONCLUSION

The trial court committed reversible error in holding as a matter of law that the deceased, Cecil Drewery Eyre, was a guest in the automobile of the defendant, when the evidence clearly showed that a benefit accrued to the defendant from a trip which amounted to a joint business venture. Subsequently, the trial court in its instructions, in effect, directed a verdict against the plaintiff by instructing on matters that were extraneous to the issues of the lawsuit such as the alleged scuffling, which according to defendant's own testimony had nothing to do with the accident and the detailed instructions on negligence after having eliminated negligence from the lawsuit and in particular, Instruction 6, which stated that driving a vehicle while under the influence of liquor is negligence as a matter of law.

The court proceeded to erroneously instruct on the defense of assumption of risk with the evidence showing, first, that there was nothing for the decedent to be alarmed at concerning the sobriety of the defendant and, second, that the evidence clearly showed that, after the defendant started his wilful misconduct, the plaintiff had no opportunity to get out of the automobile. It will be remembered that the defendant himself testified that the plaintiffs had no cause for alarm either

as to his sobriety or as to his driving during the trip to the ranch and back again. In effect, defendant is given the advantage of being able to state "even if you believe I lied under oath, you may still hold that the deceased assumed the risk of my drunkenness and wilful misconduct." The trial court not only wrongfully instructed on assumption of risk but greatly over emphasized the defense in three separate instructions, stating it over and over again thereby creating irreparable prejudice to the plaintiff.

The court further erred in instructing the jury that contributory negligence is a defense to an action based on wilful misconduct and intoxication. This instruction was clearly erroneous under the universal line of authority on the subject. It is a basic principle of the law of negligence that contributory negligence is only a defense to a negligent act and is not a defense to an act of wilful misconduct.

Plaintiff was not given a fair trial because of the numerous errors committed by the trial court and is entitled to have the case heard again before a jury correctly and adequately instructed on the law governing the case.

Respectfully submitted,

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