

1958

# George D. Eyre v. Michael Frank Burdette : Brief of Respondent

Utah Supreme Court

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Rich & Strong; Attorneys for Defendant and Respondent;

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

**FILED**

JUN 20 1958

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

*Plaintiff and Appellant,*

**vs**

MICHAEL FRANK BURDETTE,  
*Defendant and Respondent*

Clerk, Supreme Court, Utah

Case No. 8829

**BRIEF OF RESPONDENT**

**RICH & STRONG**  
**Attorneys for Defendant and**  
**Respondent**

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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*

Case No. 8829

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BRIEF OF RESPONDENT

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STATEMENT OF FACTS

The case as tried below involved two separate actions—one by George D. Eyre, Administrator of Cecil Drewery Eyre, deceased, and the other by Lorene Massardi. Both Eyre and Massardi were riding in the defendant's vehicle at the time of the accident. Both actions were consolidated for trial and tried before a jury. Massardi admitted that she was a guest, but plaintiff Eyre claimed that he was a passenger for hire. The court ruled that Eyre also was a guest. Each plaintiff alleged that the

defendant was guilty of wilful misconduct and of intoxication. The jury returned a verdict for the defendant in both cases. Massardi accepted the verdict. The only appeal is by Eyre.

Eyre was killed in a series of accidents involving the defendant's vehicle at about 6275 So. Redwood Road in Salt Lake County on Sept. 22, 1956 at about 7:19 P.M. (R. 2). The action was brought on behalf of the heirs, Iole Eyre, widow, and three children, Russell, age 31; Douglas, age 27; and Pat, age 25, all of whom were married and living away from home (R. 1, 264-275). Mr. Eyre was seriously injured in October, 1953, as a result of which he was permanently crippled. He received the sum of \$6,500.00 in settlement for permanent disability on account of this accident from the California Industrial Commission some time in June of 1955 (R. 268-269). So far as Mrs. Eyre knew, Eyre didn't work following this injury (R. 269). Eyre and his wife quarreled about how the money was to be invested and Mrs. Eyre left her husband and moved into an apartment (R. 270). On August 5, 1955, Mrs. Eyre filed divorce proceedings in California against her husband, claiming that he had treated her in a cruel and inhuman manner. (Ex. D-25, R. 277-280). An interlocutory decree was entered on September 23, 1955, requiring the defendant to pay Mrs. Eyre alimony of One Dollar per month. The decree also provided that a final judgment could not be entered until one year from the entry of the interlocutory decree and that such final judgment would not be entered until requested by one of the parties (Ex. D-26, R. 280-281). The year would have expired the day following the accident. No final

judgment had, therefore, been entered. Mrs. Eyre could not state whether she intended to make the decree final or not (R. 271). She admitted that she and her husband had separated about five or six times before the divorce, the shortest period for possibly two weeks and the longest, about six months (R. 264.) She said that all of the separations and the eventual divorce were caused by her husband's drinking and quarrels resulting therefrom (R. 274). Prior to their separation they split fifty-fifty the money which Eyre received for his permanent disability on account of the industrial accident (R. 275). From the time of their separation in July 1955 to the date of her husband's death she never saw him again and they never corresponded with one another (R. 275-276). She admitted that her husband never paid her any money, not even the One Dollar a month alimony, from the time of the separation down to the time of his death (R. 276).

Mrs. Eyre was employed, earning \$56.00 a week and had been so employed since 1941 (R. 272-273). Her husband was good natured when he wasn't drinking, but "when he was drinking he was inclined to be quarrelsome" (R. 265, 266).

Massardi was introduced to the defendant as the wife of Eyre (R. 300) and Massardi admitted that she had gone out with him since about June or July of 1956. They had planned on selling the chickens, going to California, and getting married as soon as Eyre's divorce was final (R. 239). At the time of the accident Massardi was living at the American Motel and registered under the name of Mrs. Cecil Drewery Eyre (R. 240). Eyre was 51 at the time of his death (R. 263). After separating from

his wife, Eyre raised some chickens on a farm owned by his sister in Draper (R. 272).

Massardi said that she and Eyre customarily went out to his sister's ranch in Draper every night to feed the chickens and gather eggs. Sometimes they went out twice a day. When they went into the B Z B on the day of the accident, they were enroute to the ranch. (R. 238). After they had been in the BZB awhile, Massardi mentioned they had better go because it was getting late, meaning that they still had to feed the chickens and gather the eggs the same as they did every night. Eyre had mentioned something to Burdett about selling him some eggs at a good price. When they left the B Z B, she and Eyre started to walk over to Eyre's car. The defendant left the tavern with them. His car was parked next to Eyre's. Massardi "didn't know at that time Mr. Burdett had a car." When they got to the cars, according to Massardi, Burdett said "Let's go in mine," and so they got in his car (R. 230). Massardi testified as follows (R. 238):

"Q. Now, Mrs. Massardi, about these eggs, you and Mr. Eyre customarily went out there every night and got eggs and brought them in, did you not, and fed the chickens?

A. Yes, — Sometimes went twice a day.

Q. That is what you intended on doing when you left this B Z B, you were going out to feed the chickens and gather eggs.

A. *That is what we intended doing when we went to the B Z B, went to get crates to put the eggs in when we gathered them.*

Q. When you left, Mr. Burdett was with you and Mr. Eyre and you started over to Mr. Eyre's car, and Mr. Burdett asked if you would go in his car, is that correct?

A. He said "let's go in my car."

Q. *That is all you know about the transaction going out there, you intended going out in your own car and bringing the eggs back in?*

A. *That is all I know."*

In addition to Massardi, the defendant was the only one who testified regarding the eggs. Defendant worked regularly at Eimco Corporation and had completed his work there on the day of the accident at 3:00 P.M. (R. 297). He worked part time as a bar tender at the B Z B Tavern, but had no regular working hours there (R. 296-297). He checked every night to see if they wanted him. After finishing his regular work on the day of the accident he went to the B Z B Tavern to see if he was to work that night (R. 298). He arrived there about 4:30 P.M. The proprietor was not there. He waited for him and while doing so, saw Eyre and Massardi. He went over and Eyre introduced Massardi as his wife (R. 299-300). Massardi and Eyre were drinking beer and had a bottle in a wrapper on the floor. Defendant had two short beers with them (R. 300-301).

During the conversation Eyre said he had some eggs for sale. The defendant said he "couldn't use too many." The defendant and another bar tender agreed to take half a case between them and when the proprietor came in, he indicated he would take half a case (R. 301). Eyre indicated that he and Massardi "were going out to get

the eggs.” They had to feed the chickens. The eggs were to be delivered at the B Z B. Nothing was ever said about the defendant going out to get the eggs. As they were leaving, Eyre asked the defendant if he would like to go along. The defendant said he had some free time and would go. Eyre’s car was by the door; the defendant’s was around the corner. Defendant asked whose car they would go in, and mentioned that he had a full tank of gas, and they went in his car. He testified he had no other reason for going out there “other than to look at the chicken farm,” at Eyre’s invitation (R. 303). He also testified that until Eyre invited him to go out to see the chickens, he was going home. Eyre never paid him for the ride. (R. 312).

The defendant was questioned about his testimony given in a former hearing and the substance of this testimony is set forth in the appellant’s brief. However, Eyre’s attorney did not read all of the testimony and the additional testimony was brought out on redirect examination as follows (R. 351):

“Q. Mr. Burdett, counsel, Mr. Black, questioned you about your conversation about the eggs, but he didn’t read you all of the testimony that was given at the previous hearing to which he referred, and I will ask you to state if this was also the testimony which you gave at the hearing to which counsel questioned you and if this is not part of the same conversation—this is at the bottom of page 8.

“A. Well, Mr. Eyre, he asked if I would like to accompany them out to the ranch to get the eggs. I didn’t have anything pressing at the time to do, so I told him I would be glad to and then I

asked him, 'which car shall we take? Shall we go in mine or shall we go in yours,' and he said they would go in my car?"

Is that what you testified about at the prior hearing?

A. Yes sir."

The defendant testified that the price of the eggs was agreed upon and that whether the defendant went in his car or whether he went in Eyre's car or whether each went in his own car had no effect upon the price quoted (R. 351).

When they reached the farm in Draper, the defendant actually gathered all of the eggs and, in addition, fed the chickens while Massardi and Eyre sat out in the car (R. 307-308).

The highway both north and south of Bennion Hill is about as described in the plaintiff's brief. The weather was clear. It was dark (R. 191, 223, 309). The posted speed limit at the scene of the accident was 50 mph. (R. 320).

In support of the allegation of wilful misconduct, the plaintiffs offered testimony of certain witnesses to prove that the defendant's vehicle had been driven in an erratic manner and at an excessive speed up the south slope of Bennion Hill. Ed Jones and Clarence Lovendahl were in a vehicle which was preparing to enter the highway from a driveway on the east. Both testified that a light-colored Ford automobile passed going north. Jones estimated its speed at 60 to 70 miles per hour (R. 77). Lovendahl *guessed* the speed of this car at 70 miles per hour,

but readily admitted he was not a good judge of speed (R. 186-187). Both admitted that they did not actually see the accident. (R. 183, 187). Jones said it would be impossible to say that the vehicle which passed them was the defendant's car. (R. 183). Lovendahl likewise admitted that he could not identify the defendant's car as being the one whose movements he had observed. (R. 187). Both stated that the car which they observed went clear over to the west side of the road toward a cement culvert as it reached the brow of the hill (R. 183, 187). Jones indicated that the car which he observed was not passing any northbound cars (R. 182).

As a matter of fact, the defendant's car had actually passed two cars on the hill and was not more than a foot over the center line as it completed the passing of the last car and was not more than a foot over the center line as it went over the brow of the hill. Green testified that he was proceeding north and approaching the south side of Bennion Hill. He had just reached the point where the northbound road widened out into two lanes when the defendant's car passed him and then went back onto its own side of the road (R. 189). Perry was traveling north up the south side of Bennion Hill. As he approached the crest of the hill, he was traveling in the outside northbound lane when the defendant's car passed him in the inside lane. In so doing the defendant's car did not go more than a foot over the center line and was not more than a foot over the center line as it went over the hill (R. 201).

Regarding the actions of the defendant's car as it reached the crest of the hill and started down the north slope, Perry said that the defendant's car continued down

the hill on its own side of the road and then veered to the left just before the impact with the Giorgio car (R. 196-197). He admitted that it was dark and that all of the cars had their headlights burning (R. 191) and claimed that the impact occurred in the southbound lane. He admitted that he was a half a city block away when the collision occurred and his observations were made from this point (R. 196, 197).

Green testified that when he reached the top of the hill going north, the defendant's car was then on its own side of the road going down the hill. It looked to him like it barely edged to the east and then edged back and struck the Giorgio car (R. 189, 190). He admitted that he got to the brow of the hill just in time to see the accident (R. 195); that it was dark at the time (R. 194) and that at the time of the collision he was not quite a Salt Lake City block away (R. 193, 194).

Gary Hensley and Fred H. Bailey were traveling south on Redwood Road. (R. 219, 223). Hensley was about 40 to 60 feet behind the Giorgio car at the time of the accident (R. 221), yet he could not tell which vehicle was on the wrong side of the road at the time of the accident (R. 222). Bailey was not quite a city block north of the accident when the collision took place between the Giorgio and the defendant's vehicles (R. 225). He said the distance was so great that he couldn't tell on which side of the road or where with reference to the center the accident occurred (R. 225, 226).

Giorgio's testimony as to the position of the cars on the highway at the time of the accident was very incon-

clusive. He never saw the defendant's car until he saw its headlights just an instant before the accident. He had no idea how far away the car was (R. 211).

"Q. As a matter of fact you didn't see the car you had the collision with until you saw the headlights, that is the first time you saw the car?

A. Saw the headlights.

Q. It was dark enough so you didn't see the car without those headlights, is that it?

A. That is correct.

Q. Now, when you saw these headlights, how far away from you were they?

A. I don't know. Everything went so fast I just saw the lights and tried to turn and bang, that is it.

Q. You never saw these lights until you saw them the instant before the accident?

A. That is right.

Q. You haven't an idea how far away you were from it?

A. No," (R. 211).

He tried to turn right, but didn't know whether he got the car turned or not (R. 211). He could not say as to the position of the defendant's car or its lights on the highway (R. 212). He *guessed* his own car was a foot or two west of the center of the road (R. 204). He testified that his car left no tire marks on the highway (R. 210), but that fluid did leak from his power steering reservoir. (R. 209).

Burdett testified that he passed one northbound car as he was proceeding up the south side of Bennion Hill and passed another car near the top of the hill but did not go over the center of the road in so doing (R. 314, 315). As he came down the hill he was on his own side of the road in the inside lane and did not cross over the center line (R. 316, 317). He was traveling 50 miles per hour. Eyre and Massardi started to argue and were jostling him and interfering with his driving. He momentarily turned his head to ask them to stop. Then he saw the lights of a car coming toward him and the collision took place with the Giorgio car. His car was on its own side of the road at that time and he did not remember anything thereafter about any other accidents. (R. 317).

Massardi did not remember anything about the accident. (R. 231, 247).

Arthur E. Allen, an investigating officer, gave as his opinion that the impact was approximately two feet into the southbound lane of traffic, basing the same on the fluid mark left by the Giorgio vehicle. (R. 170). However, he admitted on cross examination that in a former hearing involving this same subject matter, he testified that the mark was "one foot west of the center line of the highway" (R. 172, 174). In this case he actually could not recall anything definitely except what his notes and diagram showed (R. 174)). He admitted that Exhibit No. 1 was prepared by him and Deputy Gunn the next day following the accident when everything was fresh upon his mind (R. 168, 169). He admitted that the point of impact as shown on that exhibit was only one foot inside the southbound lane (R. 172). He said that the fluid

from the power steering of the Giorgio car leaked out and left a mark upon the road, which was shown in Exhibit No. P-2. This was the only mark which he could identify as coming from the Giorgio vehicle (R. 170, 171) and was, therefore, actually the mark on which he based his measurement as to the point of impact.

Lewis J. Uzelac, an automobile mechanic, testified that the power steering reservoir on a 1953 Roadmaster such as was being driven by Giorgio was actually located  $29\frac{3}{4}$  inches in from the outside edge of the left front fender. He also testified that it was  $22\frac{1}{2}$  inches from the outside edge of the fender to the nearest portion of any hose leading to or from the power steering reservoir (R. 288, 289). He further testified that such a car had an apron extending down from the inside edge of the fender toward the engine (R. 289) and that if any hose were broken, the fluid from the hose would run down the apron before dropping onto the ground (R. 289). If any break occurred in the hose, it could not be closer than  $22\frac{1}{2}$  inches to the outside edge of the fender and that where the fluid could drop to the ground would be farther away from the fender than that (R. 292, 293). If the car was struck on the left side, the apron would be pushed closer in to the unit or engine and farther away from the wheel (R. 293).

Thus the physical evidence showed that the left side of the Giorgio vehicle at the time of the accident was at least a foot east of the center line and into the north-bound traffic lane because the officer indicated on his diagram that the fluid mark from the Giorgio vehicle was one foot west of the center line and the outside edge of the fender would be at least two feet further to the east.

The impact between the Giorgio and Burdett cars involved the left front and side of each vehicle. Both Giorgio and the defendant lost control of their vehicles following the initial impact. As a matter of fact, Giorgio's vehicle, according to officer Allen, traveled a distance of 334 feet after the impact before stopping (R. 174 and Ex. 1).

Massardi testified she said something about the defendant driving too fast and Eyre replied, "Don't worry about that, he is a race car driver" (R. 231, 232). She did not know whether this remark was made going out to the ranch or coming back. (R. 248).

On the issue of intoxication, Deputy Sheriff Allen said that he conversed with the defendant at the scene, could smell alcohol on him, and that he was irrational. He believed the defendant to be intoxicated. (R. 148).

Vasco Laub, a highway patrolman, said he conferred with the defendant on the night of the accident at about 9:00 P.M. at the hospital (R. 257, 259). He inquired whether the defendant would be willing to submit to a blood alcohol test. The defendant allegedly said he wouldn't take a blood test until he could talk to his attorney (R. 260). Laub then said:

"Q. Now, I will ask while you were talking to Mr. Burdett, will you describe his appearance, or anything you noticed about him in regard to smell, or anything like that?

A. Yes. After he technically refused to take a blood alcohol test I leaned close enough so I could smell his breath and observe his general condition, the condition of his eyes and his speech. I noticed

also an impairment of his speech, which I presumed to be permanent. He also had quite a bit of blood about his face; I could see he had been injured. *I observed a rather strong odor of alcohol on his breath and his tongue appeared quite thick, and his eyes were quite blood shot.*" (Italics ours) (R. 261).

He said he had made a study of intoxicants and their effect on people. In his opinion the defendant was intoxicated (R. 262).

The defendant admitted having only two short beers. (R. 300, 301). Massardi said she and Eyre observed that Burdett had two drinks of some alcoholic beverage from a glass while he was in the B Z B in their presence (R. 242). She also admitted that she and Eyre had been with the defendant for approximately three hours prior to the time of the accident (R. 250).

Massardi testified that about 4:00 P.M. on the day of the accident she and Eyre went to a restaurant and had something to eat (R. 228). They also went to a liquor store where they purchased a pint of whiskey and a bottle of 7-Up. There was an empty 7-Up bottle in the car in which the whiskey and mixer was poured half full, and they drank the contents therefrom. They then went to a restaurant to pick up a crate in which to gather some eggs, and from there to the B Z B Tavern, where they each ordered a glass of beer. They were sitting at a table in the B Z B when the defendant came over to them (R. 229).

Defendant said that Massardi and Eyre were drinking beer at the B Z B. He said they had a bottle in a wrapper

on the floor (R. 300, 301). He said that after they left the B Z B, a fifth of whiskey was purchased at North Temple and Fifth West (R. 304). At Riverton, at Eyre's request, defendant bought a small bottle of mixer and gave it to Eyre (R. 306). On the return trip, the defendant stopped in Riverton to buy another bottle of mixer for Eyre (R. 310). Massardi did not know whether Eyre took the bottle of whiskey with them into the B Z B (R. 241). She admitted testifying in another proceeding that she could have drunk some alcoholic beverage on the trip from the B Z B to Draper and that she and Eyre could have had something to drink at the ranch (R. 246, 247). She admitted testifying in a former trial that she had had a few drinks (R. 252).

In addition to the argument which defendant said took place between Eyre and Massardi just before the accident, defendant also testified that on the trip back from the ranch he had stopped for a semaphore in West Jordan and after he started up, Eyre and Massardi had argued. At that time he told them to stop so he could drive the car. They did, and he continued on north (R. 313, 314). Massardi at first denied that Eyre had made any statement that had caused an argument between them, but admitted testifying at a former hearing on that matter that Eyre might have made some remark on the way back that made her mad (R. 254, 255).

The defendant testified that not only did he drive Eyre and Massardi out to the ranch, but on arrival there, he gathered the eggs and fed the chickens (R. 307, 308). Neither Eyre nor Massardi at any time complained or protested about the nature of his driving the car or the man-

ner in which he was handling it (R. 319). He denied exceeding the speed limit (R. 320). His lights were properly burning (R. 320). Traffic wasn't heavy in the direction in which he was proceeding (R. 327). Massardi would not deny that the defendant gathered the eggs (R. 244) or that he fed the chickens (R. 245.) She remembered testifying in a former trial that the defendant was not driving in an erratic or reckless manner on the return trip (R. 248).

## ARGUMENT

We will consider the plaintiff's points in the order set forth in the plaintiff's brief.

## POINT I

THE TRIAL COURT DID NOT ERR IN HOLDING AS A MATTER OF LAW THAT THE DECEASED, CECIL DREWERY EYRE, WAS A GUEST IN THE BURDETT AUTOMOBILE.

The plaintiff has cited numerous authorities holding that the compensation required to remove an occupant from the status of a guest does not need to be a monetary one, but that any tangible benefit *which is the motivating influence for furnishing the transportation* is sufficient. We have no quarrel with this statement of the law. However, in each of the cases cited, there was in fact not only an actual benefit to the driver, but that benefit was *the motivating influence for the furnishing of the transportation*. We will not attempt to cover all of the cases cited in the plaintiff's brief because a reading of the brief

will clearly show that in the cases cited both factors were present.

For example, in the Utah case of *Jensen v. Mower*, 294 P. 2d 683, 4 Utah 2d 336, the defendant, prior to the accident, had posted on a bulletin board at Hill Field a notice that he wanted riders from Salt Lake City, in response to which the plaintiff contacted the defendant and was advised that the defendant charged \$3.50 per week, which was the amount charged by the bus, and that the plaintiff would be required to pay whether he rode or not as long as the car went. In other words, as the Utah Supreme Court so aptly stated:

“In this case appellant did not offer to give respondent transportation from Salt Lake City to Hill field as his guest. *Appellant made it crystal clear that if respondent rode with him that it would be on the terms named by appellant for the price he named and if respondent didn't like it he knew what he could do.*” (Italics ours).

In *Kruzie v. Sanders* (Cal.), 143 P. 2d 704, *the defendant requested the plaintiff to accompany her on a shopping tour to assist in the selection of a ring as a present for defendant's husband and also for her help in choosing presents for some other girls. After nearly a week's urging, the plaintiff went with the defendant for this sole purpose.*

The case of *Crawford v. Foster* (Cal.), 293 P. 841, involved a case where a salesman for the defendant automobile dealer was demonstrating a vehicle to the plaintiff as a prospective purchaser.

In *Whitechat v. Guyette* (Cal.), 122 P. 2d 47, the driver actually received money from an organization to which he and the plaintiff belonged to take the plaintiff and others to an organization meeting.

In *Druzanich v. Criley* (Cal.), 122 P. 2d 53, the defendant's husband permitted her to use his car in going to a Union convention *if the Plaintiff and others would help in the driving, which they agreed to do.*

In *Walker v. Adamson* (Cal.), 70 P. 2d 914, the plaintiff and defendant were business associates and owned property on Lake Tahoe which they rented out. The purpose of the trip 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 part of the expenses.

In *Gillespie v. Rawlings* (Cal.), 317 P. 2d 601, the sole purpose for which the plaintiff was riding in the defendant's car was to familiarize herself with the defendant's business so that she could talk intelligently with defendant's customers.

In *Roberts v. Craig* (Dist. Ct. of App. 1st Dist. Div. 1, Cal.), 268 P. 2d 500, the plaintiff, a licensed driver, was riding in the defendant's vehicle at his request because defendant only had a learner's permit and the law required her to have a licensed driver in the car when she drove.

In *Russell v. Pilger* (Vt.), 37 A. 2d 403, the plaintiff, a law officer, was riding in the defendant's milk truck to protect him during a milk strike.

In *Wittrock v. Newcom* (Iowa), 277 N. W. 286, the defendant, an auto salesman, requested the plaintiff

to accompany him to assist in selling a car to the plaintiff's brother.

An analysis of each case cited by plaintiff clearly shows that the plaintiff in each case was requested by the defendant to accompany the defendant for a specified purpose which was the motivating influence of the trip.

Neither we nor the trial court contended that the compensation must be in money. Both recognized that there must be a tangible benefit to the defendant and that *such benefit must be the motivating influence of the trip*. The plaintiff had the burden of proving by a preponderance of the evidence the affirmative allegation in the complaint that the deceased Eyre was a passenger for hire. See *Ames v. Seibert* (Ohio), 99 N. E. 2d 905; *Miller v. Miller* (Ill.), 69 N. E. 2d 878; *Pilcher v. Erny* (Kan.), 124 P. 2d 461.

It was and is our position that the plaintiff, as a matter of law, failed to prove by a preponderance of the evidence that there was any tangible benefit to the defendant; or, if there was any such benefit, that it was the motivating influence of the trip. It was upon this basis that the trial court ruled that Eyre was a guest.

The only evidence presented in the case on the purpose of the trip or the sale of eggs was that given by Massardi and the defendant. The defendant positively testified that he had purchased a quarter of a case of eggs from the deceased Eyre which were to be delivered to him by Eyre at the B Z B Tavern (R. 303). The remaining three-quarters of the case of eggs was admittedly purchased by another bar tender and the proprietor of the bar. The defendant said it made no difference on the price

whether he drove out to the ranch and picked them up or in whose car they might have gone (R. 351). Defendant intended on going home until the deceased Eyre invited him out to the ranch. Having time on his hands, he decided to go (R. 303, 312). Massardi did not refute any of these statements.

In order to prove that the deceased Eyre was a passenger for hire, it was incumbent upon the plaintiff to prove by a preponderance of the evidence that in selling the eggs to the defendant and as a condition thereof, it was agreed that the defendant would drive Eyre out to the ranch and get the eggs. To say the least, the proof would have to show some request by defendant that Eyre accompany him so that he could get the eggs. Such is the reasoning back of all of the authorities cited in the plaintiff's brief. There was not one scintilla of evidence to show that, as a part of the purchase price, the defendant had to drive the deceased Eyre out to the ranch to get the eggs or even requested Eyre to go with him for this purpose. In fact, all of the evidence proved directly to the contrary. In the first place, Massardi said she and Eyre went out to the ranch every day to feed the chickens and gather eggs (R. 238). They were enroute to the chicken farm to gather eggs and feed the chickens when they stopped in at the B Z B Tavern. This was their intention before anything was said about the sale of eggs. Massardi didn't even know the defendant had a car when the three of them left the tavern (R. 230). When they left the tavern, according to Massardi, it was their intention of going in Eyre's car (R. 238). Her testimony definitely fails to show that the sale of eggs had anything

to do with the trip, or was part of the purchase price, or in any event the motivating influence for the defendant taking Eyre in his car, or even that the defendant made any request that Eyre accompany him so that he could get the eggs. In the second place, Mrs. Massardi testified that when the three of them left the tavern, *she and Eyre walked over toward Eyre's car and the defendant toward his and that the defendant then invited them to go in his car* (R. 230):

“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.”

Obviously, if one of the terms of the sale and purchase of the eggs was that the defendant had to drive the deceased Eyre out to the ranch to get the eggs, or if defendant had requested Eyre to accompany him, Eyre and Massardi would have gone direct to the defendant's car. In the third place, the defendant testified that the price had been agreed upon and that the eggs were to be delivered by Eyre to the B Z B Tavern. In the fourth place, as they were leaving the tavern, and got to the door, Eyre asked if the defendant would like to go along (R. 303). This certainly negatives any duty on the part of the defendant to pick up the eggs or that the defendant had even requestd Eyre to accompany him for that purpose.

The fact that there may have been a business transaction between the deceased Eyre and the defendant rela-

tive to the sale and purchase of eggs cannot in and of itself transform what otherwise was a purely social trip into a business venture unless the trip itself was agreed upon as a part of the purchase and sale of the eggs. See *Ames vs. Seibert* (Ohio), 99 N. E. 2d 905. In that case the plaintiff had driven his car from his home to Beach City where his father resided and was enroute to Wilmot, a village about three and a half miles beyond Beach City, to take his car there to have it repaired by a friend, Seibert. The plaintiff had his father follow him to Wilmot in order to drive him back to Beach City after he had delivered the car to Seibert. A conversation ensued between the plaintiff and Seibert about the repairs, in which the plaintiff stated that he would like to have the repairs completed the next day. Seibert indicated that if the plaintiff would help him tear down the car that evening, he would have it fixed for him. The plaintiff said he would help tear it down, whereupon Seibert told the plaintiff's father to go home and that he, Seibert, would bring the plaintiff home after they were through work. Pursuant to this conversation and after the car had been torn down, Seibert started to drive the plaintiff back to Beach City when an accident occurred in which Seibert was killed and the plaintiff injured. The plaintiff brought an action against Seibert's estate for the injuries sustained. Plaintiff claimed that he was a passenger for hire because his aid and assistance in working on the car was for Seibert's benefit, and that in return for this benefit, Seibert had agreed to drive the plaintiff home. In holding that the plaintiff, as a matter of law, was a guest, the Ohio Appellate Court stated that it was "incumbent upon the plaintiff to show by a preponderance of the evidence that

he had paid or furnished to Seibert some pecuniary consideration for his transportation, as such."

"Did this arrangement create a contract for transportation with payment therefor? In the opinion of this court it did not. If Seibert had requested Ames to help him tear down the car of a third person for which Seibert was to receive the entire payment for repairs, a different question would be presented. *Here, there was no evidence that an agreed lump sum payment was to be made by Ames to Seibert for the repair of the car or that Ames was to be repaid a portion of such contract price for his assistance.* Such evidence was necessary to show that Ames was to be compensated by Seibert for Ames' assistance. The evidence does not show the rendering of any service to Seibert by this arrangement. In fact, the arrangement was made so that Ames could have his own car by the next evening, and, his service, if any, was contributed to the repair of his own car for that purpose. Furthermore, the statement of Seibert to Ames' father that he should go home and not wait for Ames, and that he, Seibert, would bring Ames home, raises an inference that Seibert was making the trip to accommodate the father. At any rate there was no evidence or inference of fact to the effect that either Ames or Seibert had formed any intent that Ames was to compensate Seibert for this short ride of three or three and a half miles. The most that can be inferred from the testimony is that Seibert took Ames home as a courtesy between friends. *There is no evidence to prove a contract to pay for transportation and the defendant's motion for a directed verdict should have been sustained.*" (Italics ours)

See also *Pilcher v. Erny* (Kan.), 124 P. 2d 461. The plaintiff was a seamstress whom the defendant had invited to accompany him on a trip to Stafford, prior to which time the defendant had left a coat with the plaintiff in order that she might fix it for him. When the defendant called for the coat, he offered to pay her the agreed charge of \$1.25 therefor, but the plaintiff refused to accept any money saying that she would let the cost of repairs go on her expenses on the contemplated trip. The plaintiff sustained injuries on the trip, for which she sued the defendant. The plaintiff contended that the benefit which she had given the defendant of not charging him for the repairs to his coat made her a passenger for hire. The defendant argued that the real motivating cause of having the plaintiff in his car was a desire on his part to be accommodating and to extend a courtesy to her; that the transaction with reference to the coat was only incidental. A judgment had been entered in favor of the plaintiff which was reversed by the appellate court with directions to enter judgment for the defendant. The court held that the plaintiff had the burden of establishing that she was a passenger for hire and that as a matter of law the payment was not the motivating cause for the trip.

See also *Melcher v. Adams* (Ore.), 146 P. 2d 354. In that case the plaintiff, who was a friend of the defendant, had been invited along for a ride. The plaintiff actually helped the defendant lift certain gear in and out of the automobile and contended that it was a benefit, which took him out of the guest statute. The Oregon Supreme Court in the course of its opinion said:

"The supreme court of the state of Washington has adopted the rule that in order to take out of the guest category one who rides in the motor vehicle of another, 'two requirements are necessary: (1) An actual or potential benefit in a material or business sense resulting or to result to the owner, and (2) that the transportation be motivated by the expectation of such benefit' \* \* \*

"Upon consideration of the entire evidence in the light most favorable to the plaintiff, we are of the opinion that the assistance which the plaintiff rendered the defendant in helping him lift the gear into and out of the automobile was not a substantial benefit to the defendant in a material or business sense; and that the expectation of such act of the plaintiff was not the defendant's reason for inviting the plaintiff to drive to the beach, nor was it the plaintiff's purpose in accompanying the defendant."

There is no disagreement among the authorities as to the general principles governing the determination of one status as guest or passenger. The courts generally hold that a mere incidental benefit resulting to the driver from the transportation is not sufficient to enlarge his liability, but *that the benefit must have been given as consideration for the transportation and, in some degree at least, have induced the defendant to extend the offer.*

In this case the sale of the eggs and purchase price, according to the evidence, had already been agreed upon before there was any discussion about riding to the ranch. The plaintiff failed to prove that as a part of the consideration for the purchase of the eggs the defendant had to drive Eyre out to the ranch. The lower court had no

alternative but to find that the deceased Eyre was a guest. Jurors cannot resort to speculation and conjecture. To have submitted Eyre's status as passenger or guest to a jury under the evidence in this case would have been clearly error. The jury could not possibly have found that part of the consideration for the purchase of the eggs was the defendant's driving Eyre out to the ranch, or that the defendant requested Eyre to accompany him so that he could get some eggs.

Plaintiff in his brief argues that getting the eggs that night and at a favorable price was a substantial enough benefit for the defendant to have considered it worth his time in driving out to get the eggs. What the defendant may have considered as being a benefit to him is of no concern. The question is, was the getting of the eggs on that night and at that price the motivating influence for the trip? On this the plaintiff failed to produce any evidence. There was no evidence that the defendant ever wanted the eggs that night, or requested Eyre to accompany him for that purpose. If the defendant had wanted the eggs that night it was still not necessary for him to drive Eyre. Eyre was already going out to the ranch in his own car. What possible difference could it have made to the defendant whether he went with Eyre, or Eyre with him, or whether they went in their own cars. Furthermore, the only testimony in the case is that it was Eyre who invited the defendant. There is absolutely no evidence that the defendant requested Eyre to accompany him so that he could get the eggs that night. Any benefit to the defendant was purely incidental.

Plaintiff also argues that there was no social purpose whatsoever in this trip because they were not very well acquainted with one another. Such an argument might have more appeal in a case where there had been no drinking. It is common knowledge that people who are drinking in taverns become more sociable with one another and, in fact, very friendly with persons with whom they may have even slight or no acquaintance. Furthermore, even though there was no social purpose involved, this in and of itself would not make the deceased Eyre a passenger for hire. It was still incumbent upon the plaintiff to prove that the furnishing of the eggs to the defendant was the real motivating influence of the defendant's taking deceased Eyre out to the ranch. Reference is made in the plaintiff's brief to the fact that at a former hearing the defendant did not make any statement that he was interested in going out to see the farm. However, in this connection the plaintiff's attorney quoted only a portion of the testimony given by the defendant in the former trial. The defendant also testified in that former hearing, in response to question from plaintiff's counsel:

"Well, Mr. Eyre, he asked if I would like to accompany them out to the ranch to get the eggs. I didn't have anything pressing at the time to do so I told him I would be glad to and then I asked him, 'which car shall we take? Shall we go in mine or shall we go in yours,' and he said they would go in my car." (R. 351).

The defendant's testimony at the former trial, therefore, clearly indicated that he had been invited by the deceased Eyre to go to the ranch and that he accepted the invitation. It did not establish any contract and certain-

ly, by no stretch of the imagination, could show that the purchase of the eggs was the motivating influence of the trip. The only reason for his going, as he testified in the former hearing and at this trial, was because he was invited by the deceased Eyre to accompany him and not because there was any obligation on him, nor because he had requested Eyre to accompany him so that they could pick up the eggs.

Not only did the plaintiff fail to prove that any benefit to the defendant was the motivating influence of the trip, but he also failed to prove that the defendant received any benefit from the trip. The purchase price of the eggs had already been agreed upon before any invitation was extended. This is clear from both Massardi and the defendant's testimony because when they left the tavern, Massardi and Eyre walked over to Eyre's car and the defendant to his, and it was only then that there was any discussion about whose car they would ride in and it clearly could not have been part of any business transaction. The sale of the eggs had been complete and was agreed upon. Thereupon Eyre asked the defendant if he would like to go out with them. The defendant then suggested they go in his car. He received no benefit whatsoever. He would have got the eggs and for the same price whether he went out or not. Actually, the benefit was all the other way. Eyre had to go to the ranch anyway, and on arrival at the ranch the defendant had to gather all of the eggs and feed the chickens.

Plaintiff states that it is a known fact that persons will travel many miles to participate in a bargain sale. We seriously doubt that anyone could sustain any benefit

from the purchase of a quarter of a case of eggs if he had to drive out to Draper and back from Salt Lake City to get them and, in addition, while there, feed the chickens and gather the eggs.

In this case the plaintiff failed to establish that the defendant received any benefit or, if any benefit was received, the plaintiff completely failed to establish that such benefit was the motivating influence of the trip. The primary purpose of the trip to the farm was to enable Eyre and Massardi to feed the chickens and gather the eggs as they always did. The defendant was invited to accompany them, and as an act of courtesy offered to take his car. The fact that he might get the eggs that night was purely incidental. There was no testimony that he needed or even wanted them that night. And there was no thought of his ever going to the farm until he was invited by Eyre to do so. Since the plaintiff had the burden of proving not only a benefit to the defendant, but that such benefit was the motivating influence of the trip, the lower court properly held that the deceased Eyre was a guest.

## POINT II

INSTRUCTION NO. 15 PROPERLY ALLOWED THE JURY TO CONSIDER ALLEGED SCUFFLING BY DECEDENT AND ANOTHER OCCUPANT AS A DEFENSE.

There was evidence in the case that just prior to the accident the decedent and Massardi started arguing and scuffling so as to interfere with the defendant's operation of the car; that he momentarily turned just long enough

to tell them to stop when he saw the Giorgio automobile coming toward him (R. 317). Massardi admitted that Eyre may have said something that made her mad (R. 254, 255). She did not otherwise refute the defendant's testimony as to the scuffling and seemed to remember very little of what happened. Mrs. Eyre testified that she and her husband had separated four or five times prior to their divorce, and that the reason both for the divorce and the separations was her husband's drinking and that when he drank, he became quarrelsome. (R. 265, 266, 274). There was evidence that all three parties had been drinking prior to the accident.

The plaintiff attempted to prove and argued to the jury that the impact between the Giorgio and the defendant's car occurred when the defendant's vehicle was partially on the wrong side of the road. Two objections are made to the instruction, the first, that since the defendant testified the accident occurred on his own side of the road, the scuffling could not have caused him to go on the wrong side of the road; the second, that since the defendant stated the oncoming car turned into his car suddenly, he did not have time to do anything about it. The plaintiff then says that any scuffling had nothing to do with the accident. We would agree with the plaintiff, if the plaintiff would admit that the accident occurred on the defendant's side of the road and that the Giorgio car turned suddenly into the defendant's vehicle. The plaintiff did not so admit but, in fact, claimed that the accident occurred on Giorgio's side of the road and that Giorgio did not swerve over toward the defendant. An issue was, therefore, presented to the jury as to whether the defen-

dant did cross over onto the wrong side of the road or whether Giorgio turned over onto the defendant's side of the road. Obviously, the defendant was entitled to have the jury instructed on all phases of the case. If the jury found, as the plaintiff contended, that the defendant edged or turned over onto the wrong side of the road, then the jury was entitled to consider whether such edging or turning was proximately caused by the scuffling that took place between Massardi and the deceased. The plaintiff cannot accept the defendant's testimony as true and undisputed on this point, when his whole case was based on the exact opposite of what the defendant said.

### POINT III

#### THE TRIAL COURT PROPERLY INSTRUCTED THE JURY ON DEFINITION OF NEGLIGENCE.

The plaintiff complains that the court should not have defined negligence, since negligence was eliminated as a basis of recovery.

Instruction No. 4 was a stock instruction in which the court defined the terms negligence, contributory negligence, ordinary care, and proximate cause. It was, of course, necessary to instruct the jury as to the meaning of wilful misconduct. This was covered in the court's instruction No. 5 wherein the court properly instructed as follows:

“ ‘Wilful misconduct’ connotes a greater wrongdoing than *mere negligence*. As used in these instructions it means intentional wrongful conduct, done with knowledge that serious injury

to the guest is a probable result. It involves deliberate, intentional or wanton conduct in doing or omitting to do an act with knowledge that injury is likely to result therefrom.” (*Italics ours*)

This definition was approved by the Utah Supreme Court in the case of *Stack v. Kearnes*, 221 P. 2d. 594, 118 Utah 237. The first sentence of that instruction refers to the term “negligence” and states that wilful misconduct connotes a greater wrongdoing than mere negligence. Obviously, if this sentence of the instruction is to have any meaning to the jury, negligence must be defined. In instruction No. 16 the court instructed the jury that even if it should find that the defendant was negligent and that such negligence was a proximate cause of the accident, this was not sufficient—that the jury must find that the defendant was guilty of wilful misconduct or intoxication. Again, if that instruction was to have any meaning the jury must know the definition of negligence. In other words, how could a jury decide that the defendant’s conduct was only negligent as distinguished from wilful misconduct without knowing what negligence was? The definition of negligence was not extraneous to the issues and evidence.

Under this point the plaintiff also excepts to the court’s Instruction No. 7 wherein the court instructed that it was the duty of a driver to keep a lookout, to keep his car under control, to drive on his own side of the highway, and to maintain a safe speed, the court adding that a violation of any of these requirements would constitute negligence. The court then stated that in order for the plaintiff to prevail on his claim of wilful misconduct he

had the burden of proving that the aforementioned acts of negligence were committed under such circumstances as to constitute wilful misconduct. This instruction embodied the substance of the language Judge Wade used in his dissenting opinion in *Esernia v. Overland Moving Co.*, 206 P. 2d 621, 115 Ut. 519, wherein he said:

“Under such a state of facts, in my opinion, it became a question for the jury to determine *whether such negligence was wilful misconduct* as required under our guest statute for recovery \* \* \*.”

Under this point complaint is also made of the court's Instruction No. 11 to the effect that conduct arising from momentary thoughtlessness, inadvertence, or from error of judgment, standing alone, did not indicate wilful misconduct. This instruction is likewise a proper statement of the law. In the case of *Ricciuti v. Robinson*, 269 P. 2d 282, 2 Utah 2d. 45, the Supreme Court cited with approval the cases of *Bashor v. Bashor* (Colo.), 85 P. 2d 732; *Neyens v. Gehl* (Iowa), 15 N. W. 2d 888; and *Rindge v. Holbrook* (Conn.), 149 A. 231, in each of which it was held that mere momentary thoughtlessness or inadvertence did not constitute wilful misconduct. In the *Bashor* case the driver, while traveling 45 to 55 miles per hour, momentarily withdrew his attention from the road while turning a radio dial. In the *Neyens* case the driver, while traveling at a speed of 50 to 60 miles per hour, sought to retrieve a lighted cigarette he had dropped. In the *Rindge* case the driver momentarily lost control when a bee flew in the car. The same principle was applied in the *Ricciuti* case by our Supreme Court when the driver lost control

of his car while attempting to retrieve a lighted cigarette which had fallen on the mouth of his girl friend, who was sleeping with her head on his lap. This instruction was proper in view of defendant's testimony that when Massardi and Eyre started to scuffle, he momentarily turned toward them to tell them to stop.

See also 4 Blashfield Cyclopedia of Automobile Law and Practice, Part 1, Section 2322, at page 379, wherein it is said:

“Conduct arising from a merely momentary thoughtlessness or inadvertence or from an error of judgment does not manifest a reckless disregard for the rights of others so as to serve as a basis for recovery by an injured automobile guest.”

And also at page 386 where it is said:

“Mere negligence is not sufficient, nor is momentary thoughtlessness or inadvertence, \* \* \*.”

There was no confusion in the court's instructions. The same properly submitted to the jury the distinction between negligence and wilful misconduct, together with a definition of what did and did not constitute wilful misconduct and that the plaintiff could not recover upon a mere showing of negligence.

#### POINT IV

THE TRIAL COURT DID NOT COMMIT REVERSIBLE ERROR IN INSTRUCTING THE JURY ON THE ISSUE OF INTOXICATION.

Under this point no complaint is made as to the definition of intoxication, but because the court instructed

that one who was driving while under the influence of intoxicating liquor is guilty of negligence as a matter of law. The court had, however, made it clear in Instruction No. 1 that the plaintiff Eyre claimed that the defendant was under the influence of intoxicating liquor, which was denied by the defendant, and in Instruction No. 7 had clearly instructed that under the guest law a guest could recover where the driver was intoxicated. Again in that instruction the court outlined the plaintiff Eyre's claims and specifically stated: "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 \* \* \*."

Again in Instruction No. 16, although the court instructed the jury that mere negligence was not sufficient on which to base a recovery, the court specifically instructed that the plaintiffs were entitled to recover if the defendant was guilty of wilful misconduct or was intoxicated. Certainly, considering the instructions as a whole, there could be no question in the jury's mind that it could find for the plaintiff if it believed the defendant to be intoxicated. This is further indicated by the court's instruction No. 14 to the jury that a guest who rides in a vehicle, knowing or having reason to know, that the driver is intoxicated, assumes that hazard and cannot in that event recover from the driver's intoxication.

## POINT V

THE TRIAL COURT DID NOT COMMIT REVERSIBLE ERROR IN ALLOWING THE DEFENSE

## OF ASSUMPTION OF RISK TO BE GIVEN TO THE JURY OR IN UNDULY EMPHASIZING THE SAME.

There are two phases to the court's instructions on assumption of risk as set forth in the plaintiff's brief. One as to intoxication and the other as to wilful misconduct.

On the first issue the court in Instruction No. 14 said in substance and effect that a guest who knows or reasonably should know that the driver is intoxicated, assumes the hazard resulting from the driver's intoxication. Also, that if, having entered a vehicle, a guest learns, or reasonably should be aware, that the driver is intoxicated, and having a reasonable opportunity to alight at a reasonably safe place, fails to do so, the guest then assumes the risk incident to the driver's intoxication by continuing to ride in the car. There can be no question that this instruction contains a proper statement of the law. It is in substance and effect the same principle as involved in the *Esernia v. Overland Moving Company* case, 206 P. 2d 621, 115 Ut. 519, wherein the Supreme Court held that guests who were aware of the driver's drowsiness when they accepted the ride and further when the truck ran off the road the first time and who had no opportunity thereafter to leave when the truck stopped at other points, had assumed the risk as a matter of law.

The evidence in this case on the intoxication of the parties was conflicting. The defendant admitted having consumed only two short beers (R. 300, 301). Massardi testified that she and Eyre saw Burdett have two glasses of alcoholic beverages to drink. She could not state

whether the drink was whiskey or beer (R. 242). However, with reference to the defendant's condition, the plaintiff had two peace officers positively testify that the defendant was intoxicated. (R. 148, 259, 261). The evidence showed without dispute that Massardi and Eyre had purchased a pint of whiskey before joining the defendant and had each drunk some of the whiskey before joining him. (R. 229). The defendant testified that they brought this whiskey into the B Z B Tavern with them. (R. 300, 301). He also testified that after the three of them left the tavern, he purchased a fifth of whiskey at the instance of the deceased Eyre (R. 304) and thereafter purchased mixer on the trip down at Riverton (R. 306) and another bottle of mixer on the trip back (R. 310). Massardi admitted that she testified in a previous hearing she had had a few drinks and that there may have been other drinking (R. 252).

Counsel in his brief argues that the deceased Eyre had no notice of the drinking on the part of the defendant, particularly because the defendant testified under oath that he was sober. This argument might have sounded a truer note if the plaintiff had not attempted to prove by two witnesses that the defendant was not sober but was, in fact, intoxicated. With such testimony certainly the jury could have found that the defendant was intoxicated, notwithstanding his own testimony that he was sober. This was exactly what the plaintiff sought to have the jury do. The evidence clearly shows that both the deceased Eyre and Massardi were in the presence of the defendant continuously for approximately three hours prior to the time of the accident, during all of which time

they clearly had an opportunity to observe what alcohol he may have consumed. If two investigating officers who only saw the defendant for a few minutes after the accident could positively state that he was intoxicated, then both the deceased and Massardi, who had been with him continuously for three hours prior to the accident, either knew or, in the exercise of ordinary care, should have known of the intoxication.

We did not take the position in the trial below, nor do we now take the position that the defendant was perfectly sober. We then stated to the jury and so state now that possibly there was more drinking than either of the parties admitted, but that whatever drinking was involved, it was done in the presence and with the acquiescence of Eyre. The issue of assumption of risk on intoxication was therefore a proper one.

Plaintiff in his brief refers to *Shoemaker v. Floor*, 117 Utah 434, 217 P. 2d 382. In that case this court specifically held that whether the guest had assumed the risk in connection with the driver's intoxication was a question of fact.

The other phase of assumption of risk had to do with the defendant's conduct wholly apart from intoxication. However, even though the jury may not have found the defendant intoxicated, it was entitled to consider on the issue of wilful misconduct the fact that the defendant had been drinking. The plaintiff attempted to prove that the defendant was driving at a high rate of speed and crossed over the center line after coming down the north slope of Bennion Hill, colliding with the Giorgio vehicle;

that the defendant was not keeping a proper lookout and failed to have his vehicle under control. Most of these alleged actions would constitute mere negligence and not be sufficient for a recovery unless considered in connection with the defendant's alleged drinking, whether it actually amounted to intoxication or not. The evidence also showed that either on the trip down or back Massardi had made some mention about the defendant's speeding, to which the deceased Eyre replied not to worry because the defendant was a race car driver (R. 231, 232). If this occurred on the trip down, then both she and Eyre assumed the risk by failing to get out when they had the opportunity either at Riverton or on arrival at the ranch. Her testimony indicates that Eyre fully acquiesced as to the manner in which the defendant's vehicle was being operated. As further bearing upon the issue of assumption of risk, apart from the intoxication, was the scuffling episode which took place just before the accident occurred, and the fact that Eyre at no time complained or protested as to the manner in which the vehicle was being operated.

On this phase of the matter the court gave two separate instructions, the same being Nos. 12 and 13, which in effect instructed the jury that even though they found the defendant was guilty of wilful misconduct, the jury would then have to determine whether the plaintiffs assumed the risk. These instructions properly set forth the law on assumption of risk. For a person to manifest his assent to high speed when the same was called to his attention by merely indicating not to worry, that the driver was a race car driver, manifest a consent to a dangerous conduct. Furthermore, knowledge on the

part of Eyre as to the nature and extent of any drinking by the defendant, whether it resulted in intoxication or not, was sufficient, coupled with this incident of alleged racing, to entitle the jury to find that Eyre assumed the risk of the manner in which the vehicle was being operated. Certainly there was enough evidence in the case on the question of assumption of risk when coupled with the fact that no complaints or protests were made by either Eyre or Massardi, to make an issue of fact for the jury. Even in the case of *Stack v. Kearnes*, 118 Utah 237, 221 P. 2d 594, this court held that there was an issue of fact on assumption of risk which was properly submitted to the jury and this court refused to reverse the jury's finding thereon. The court did not state as a matter of law that the plaintiff had not assumed the risk, but merely that a jury question was involved. We have the same situation in our present case. A jury question was involved, appropriate instructions were given, and the jury found against the plaintiff. There was no reversible error.

Plaintiff complains that three separate instructions were given on assumption of risk. There were two phases of this question, assumption of risk in connection with wilful misconduct and assumption of risk in connection with intoxication. Instructions on each of these phases were essential. The court gave only one instruction on assumption of risk in connection with the intoxication, but two instructions in connection with wilful misconduct, neither of which was in conflict with one another and the giving of which could not amount to prejudicial error. As a matter of fact, the court in several instances repeatedly advised the jury that they could find for the

plaintiffs in the event of wilful misconduct or intoxication. In instruction No. 1, the court in two separate places informed the jury that both the plaintiff Massardi and the plaintiff Eyre claimed that they were entitled to recover because of wilful misconduct and intoxication and that the defendant denied he was guilty of wilful misconduct or that he was intoxicated. Instruction No. 5 defined wilful misconduct and Instruction No. 6 gave the elements necessary to find intoxication. Instruction No. 7 indicated that a guest could recover for wilful misconduct or intoxication, and in addition thereto, reiterated the claims of the respective plaintiffs that the defendant was intoxicated and guilty of wilful misconduct and informed the jury that if the plaintiffs should prevail as to either the issue of intoxication or wilful misconduct, they were entitled to damages. Again, in Instruction No. 16, the court advised the jury that the plaintiffs could recover for wilful misconduct or intoxication. We submit that the court repeatedly indicated to the jury that the issues involved wilful misconduct and intoxication and that the plaintiffs were entitled to recover on either or both of these bases. The giving of the instructions on assumption of risk in connection with either the intoxication or the wilful misconduct was not confusing or misleading to the jury and did not constitute any reversible error.

## POINT VI

THE TRIAL COURT DID NOT ERR IN INSTRUCTING THE JURY THAT CONTRIBUTORY NEGLIGENCE IS A DEFENSE TO AN ACTION

## BASED ON WILFUL MISCONDUCT AND INTOXICATION.

This is a new ground, nowhere stated in the plaintiff's statement of points as required under the rules (R. 134, 135). For this reason alone this point is entitled to no consideration. However, we consider it trivial in any event and certainly not prejudicial error. In Instruction No. 7 the court stated:

“\* \* \* 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.”

The complaint is made of this instruction on the ground that contributory negligence is no defense to an action for wilful misconduct. Assuming for the sake of argument that this is a correct statement of the law, nonetheless there was no prejudicial error. The only conduct of which complaint was made or which was shown in the evidence was the failure to complain or protest as to the defendant's driving, riding with a person whom he knew or, in the exercise of due care, should have known was under the influence of intoxicating liquor, or at least had been drinking, acquiescing in the operation of a vehicle at a high rate of speed and justifying the same because the defendant was a race car driver, and scuffling between the deceased and Massardi which interfered with the driver's control of the vehicle. This was the conduct on

which it was claimed that the deceased was precluded from recovery, regardless of any wilful misconduct or intoxication on the part of the defendant. This conduct, regardless of what name or style called — contributory negligence or assumption of risk — was sufficient, if believed by the jury, to preclude the plaintiff from recovering.

The fact that the court used the term contributory negligence could in no manner have prejudiced the plaintiff because the only conduct on which there was any evidence in the case was sufficient to preclude a recovery on the plaintiff's part if, in fact, believed by the jury. There has been confusion in the courts, including our own Supreme Court, on the use of the term contributory negligence in describing the plaintiff's conduct under our own guest statute. We refer in particular to the case of *Esernia v. Overland Moving Company*, 206 P. 2d 621, which was decided under our guest statute. In that case both parties and the court in speaking of the guest's conduct, used the term "contributory negligence" and in the article referred to from the Restatement of the Law of Torts, again in speaking of the guest conduct, the term "contributory negligence" was used. However, in that case, as in this, it makes little difference by what term the conduct is characterized. The plaintiff's actions in the *Esernia* case in riding with a person known to be sleepy would bar the plaintiff's recovery for an accident occurring when the driver went to sleep whether the term contributory negligence or some other term were used in describing the conduct. So in our case, the conduct of the

plaintiff of which complaint was made, was sufficient to preclude such a recovery regardless of the term or name by which it was designated.

## CONCLUSION

It is respectfully submitted that the plaintiff was accorded a full and a fair trial; that the jury was properly instructed on the issues of law presented by the evidence; that there was no prejudice at all accorded to the defendant in the court's instructions. The jury's verdict should, therefore, be upheld.

Respectfully submitted,

**RICH & STRONG**

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Respondent