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Jack A. Milligan v. Melvin Coy Harward, Kenneth B. McDuffy and C. E. Lindsey : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT
of the
STATE OF UTAH

FILED

APR 5 - 1960

Clerk, Supreme Court, Utah

JACK A. MILLIGAN,
Plaintiff and Appellant,

—vs.—

MELVIN COY HARWARD,
KENNETH B. McDUFFY,
and C. E. LINDSEY,
Defendants and Respondents.

Case No.

9121

BRIEF OF RESPONDENT
MELVIN COY HARWARD

L. E. MIDGLEY
*Attorney for Defendant and Respondent,
Melvin Coy Harward*

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BRIEF OF RESPONDENT
MELVIN COY HARWARD

STATEMENT OF FACTS

In this brief, we shall also refer to the parties as they appeared in the Court below.

We do not fully adopt the Statement of Facts related

by plaintiff in his brief, as they do not properly reflect many material details of the evidence adduced at the trial. However, inasmuch as this defendant will recite further pertinent facts in the Argument, pertaining to the questions of law at issue, we shall not detail them here for the sake of brevity.

Generally speaking, plaintiff's statement of facts gives a sufficiently general picture of the facts and nature of the litigation, to suffice for that purpose.

STATEMENT OF POINTS

POINT I

THERE WAS NO EVIDENCE OF ANY WILFUL MISCONDUCT ON THE PART OF DEFENDANT, HARWARD.

POINT II

THE PLAINTIFF ASSUMED THE ADDED RISK OF DEFENDANT'S ORDINARY NEGLIGENCE CAUSED BY DEFENDANT'S DRINKING.

A. THERE CAN BE NO JURY QUESTION WHERE PLAINTIFF KNEW OF DEFENDANT'S DRINKING, AND THE ACCIDENT WAS NOT THE RESULT OF WILFUL MISCONDUCT.

ARGUMENT

POINT I

THERE WAS NO EVIDENCE OF ANY WILFUL MISCONDUCT ON THE PART OF DEFENDANT, HARWARD.

Plaintiff has assumed, in his brief, that in order to prove wilful misconduct, all that need be shown is that the driver intentionally or consciously acted, or failed to act, and that an accident then happened. That such an argument is completely fallacious, seems almost unnecessary to argue.

“Unless he be unconscious, any driver of an automobile is conscious of his conduct.” *Pettingill v. Moede*, 129 Colo. 484, 271 P2d 1038.

A person who exceeds the speed limit; a driver who looks to the right when he should have looked to the left; a driver who merely lights a cigarette and in doing so momentarily takes his eyes off the road, all can be said to be acting intentionally. But the test of wilful and wanton misconduct is of course, a great deal more complex. The Colorado Supreme Court in the *Pettingill* case, (*supra*) wherein defendant relied on his snow tires and did not follow advise to put on chains, and later skidded off the highway, states:

“For the purpose of properly construing this statute ordinary or simple negligence should be considered as resulting from a passive mind, while a wilful and wanton disregard expresses the thought that the action of which complaint is made was the result of an active and purposeful intent. Wilful action means voluntary; by choice; intentional; purposeful.

“Wantonness signifies an even higher degree of culpability in that it is wholly disregarding of the rights, feelings, and safety of others. It may at times, even imply an element of evil. One may be said to be guilty of wilful and wanton disregard when he is conscious of his misconduct, and although having no intent to injure anyone, from his knowledge of surrounding circumstances and existing conditions is aware that his conduct in the natural sequence of events will probably result in injury to his guest, and is unconcerned over the possibility of such result.

“A failure to act in prevention of accident is but simple negligence; a mentally active restraint from such action is wilful. Omitting to weigh consequences is simple negligence; refusing to weigh them is wilful.”

“*Without realization of the danger*, it is unrealistic to say that he was intentionally heedlessly reckless, guilty of wilful and wanton misconduct, and disregarding of the safety or rights of his guest, or others.”

(Citing *Ricciuti v. Robinson*, 2 Utah 2d 45, 269 P.2d 282) (Emphasis added.)

“Wilful misconduct is the intentional doing of an act or intentional omitting or failing to do an act, with knowledge that serious injury is a probable and not merely a possible result, or the intentional doing of an act with wanton and reckless disregard of the possible consequences. It involves deliberate intentional or wanton conduct

in doing or omitting to do an act with knowledge or appreciation that injury is likely to result therefrom . . . Wilful misconduct connotes a greater wrongdoing than mere negligence or even gross negligence. It includes a conscious or intentional violation of definite law or rule of conduct with the knowledge of the peril to be apprehended from such act or failure to act."

The above was cited with approval in *Ricciuti v. Robinson*, (*supra*) cited by plaintiff, and in which this Court stated:

"There is no fact or combination of facts in the record which showed a wanton or reckless disregard of the consequences."

To permit a jury to deliberate on facts constituting simple negligence only, where plaintiff must prove facts showing wilful and wanton disregard, would be to completely destroy the purpose and meaning of the Guest Statute, 41-9-1, U.C.A. 1953.

"There is no evidence from which it could sensibly be found that appellant . . . was guilty of wilful misconduct unless we are to pervert the plain meaning of the statute. It is one thing to leave questions of fact upon which reasonable minds might differ to the decision of a jury, but quite another where there is only one possible reasonable answer. Certainly the term 'Reasonable Minds' would here lose all significance as a practical, ordinary and common sense measure of

conduct were we to so far stray from reality as to hold that a mother's protective glance at her young child could be considered as wilful misconduct even at the time and place where the hazard was considerable. Courts have sometimes held that law is reason, which we take to mean reason according to the standards of ordinary people in everyday life. Although appellant turned her head to look at the child and disregarded or failed to see the stop sign, there is no evidence that her inattention to her driving was more than momentary or that it was done or continued for any appreciable distance . . . It is admitted that prior to her momentary inattention to her driving appellant was driving slowly and in a cautious and careful manner. A finding of wilful misconduct cannot be predicated upon mere inadvertence or even gross negligence."

Winn v. Ferguson, 132 Cal. App. 2d 539, 282 P2nd 515.

In Neyens v. Gehl, 235 Iowa 115, 15 N.W. 2d, 888, where the driver sought to retrieve a lighted cigarette, the Court states:

"We are aware of the principle that ordinarily the matter of wilful misconduct is a jury question, but not where the facts are such that reasonable minds could not conclude that defendant showed that type of intention or knowledge, or indulged in that type of aggravated negligence necessary to create liability on account of wilful misconduct in guest passenger cases."

A cursory review of Appellant's citations, which we will review in the order they appear in his brief, clearly renders his own argument untenable.

Johnson v. Marquis, 93 Cal. App. 2nd 341, 209 P 2nd 63 (at page 6 and page 14) involved facts wherein the defendant was driving at speeds estimated from 80 to 100 miles per hour, on a dark night, with sufficient moisture in the air to require windshield wipers, with visibility below normal, and on a winding road with sharp curves, when she collided into the rear of a truck with lights and flares showing. The Court properly held that under those facts, coupled with the defendant's drinking, the jury was justified in finding the defendant guilty of wilful, wanton or reckless disregard for the safety of her guest.

In Cox v. Johnson (Colorado) 339 P 2nd, 989, (pg 7 & 14) that Court points out that there was considerable conflict in the evidence, but that the jury could have believed that defendant was warned by plaintiff to slow down from his high speed; the highway was icy and defendant ignored that fact; the defendant had been drinking, and plaintiff was not aware of that fact.

In Perry v. Schmitt, 184 Kan. 758, 339 P 2nd 36, (page 8) the Supreme Court stated:

“We have never applied the doctrine of assumption of risk as a defense to (a guest case) and we are not disposed to do so now.”

Even so, the evidence showed that the defendant was driving at speeds from 80 to 85 miles per hour; that he had previously been warned by the sheriff and the highway patrol officers to stop speeding; the accident occurred on Christmas Eve when the traffic was heavy; he had been drinking; and with all those facts the Court held that there was enough to be submitted to the jury.

In *Ricciuti v. Roberts*, 2 Utah 2nd 45, 269 P. 2nd, 282, (pg 99) counsel for appellant has completely overlooked the clear meaning of the decision. It is not enough to show that the defendant's act was intentional; it must be shown that the act was wanton and wilful.

In *Gustaveson v. Vernon*, 165 Nebr. 745, 87 N.W. 2nd 395, (p. 10), counsel for appellant has neglected to advise that the Nebraska law requires only gross negligence which the Court defines as follows:

“Gross negligence within the meaning of the motor vehicle guest statute is great and excessive negligence or negligence in a very high degree. It indicates the absence of slight care in the performance of a duty.”

Furthermore, the facts, not pointed out by counsel, were that the defendant was driving a car with a loose steering gear; she knew that the car veered if she did

not constantly watch her driving; when she moved her attention from the road, to look back into the back seat for a period of four seconds, she did so to play a joke upon the plaintiff, in a pre-arranged plan with other passengers to surprise plaintiff with her boy friend who was hiding on the floor. The Court simply held, therefore, that there was a jury question as to whether her conduct constituted *gross negligence*.

In *Dirks v. Gates*, 182 Kan. 581, 322 P 2nd, 750, (pg. 10) there was considerably more evidence than the mere fact that the defendant had removed his eyes from the road ahead. Plaintiff's brief failed to recite that the defendant was engaged in a race with another vehicle on a detour; driving at 80 to 85 miles per hour; he had been drinking; and the plaintiff had requested defendant to slow down and not to try to pass the other car, which the defendant ignored.

In *Topel v. Correz*, 273, Wis. 611, 79 N.W. 2nd 253 (pg 10 and 14) the Court did not hold as claimed by plaintiff, that the mere looking at the speedometer constituted wilful misconduct. In that case, the Court held that there was no evidence in the trial that the plaintiff knew that the defendant had had more than one drink; or that he had an opportunity to observe defendant's behavior prior to the driving; or that the defendant's drinking was in

the presence of the plaintiff or known by plaintiff. For those reasons, the Court held that there was a jury question as to whether the plaintiff knew and appreciated the hazard of riding in the automobile driven by the defendant, and therefore assumed the risk of the ride.

In *SIMPSON v. MARKS*, 349 Ill. App. 527, 111 N.E. 2nd 370 (pg 11) the Court pointed out that the defendant himself had testified that he had "gaped" at the accident on the other side of the highway, traveled 200 to 300 yards while looking away and had slowed down during that time to a speed of 20 to 25 miles per hour. The Court held that if the jury believed the defendant's version, it was justified in finding in favor of the plaintiff.

In *McGOWAN v. CAMP*, 87 GA. App. 671, 75 S.E. 2nd 350, (pg 11) again, the statute requires the showing of gross negligence only and is hardly a proper precedent for facts required to show wanton or wilful misconduct. The facts also showed that the car was traveling 50 miles per hour, defendant had been having difficulty with the children, she had looked back several times and before she lost control of the car she had taken her eyes off the road and tried to strike one of the children, during which time the car traveled about 150 feet.

In SHOEMAKER v. FLOOR, 117 Utah 434, 217 P 2nd, 382, (pg 13) the Honorable Court will recall that there was evidence that defendant after the trip started, was driving at a high speed, on icy roads, and he refused to heed the pleas of plaintiff to slow down.

In DAVIS v. HOLLOWELL, 326 Mich. 673, 40 N.W. 2nd, 641, 15 A.L.R. 2, 1160, (pg 15) plaintiff inadvertently overlooked that the the facts showed defendant was speeding; he ignored plaintiff's pleas to slow down; defendant became indignant and swerved from side to side on a gravel road purposely, and at 60 miles per hour he lost control, all in addition to his drinking.

In every single case cited by plaintiff, (other than gross negligence cases) there were ample facts in evidence from which a jury could properly find wilful misconduct, and under circumstances which the jury reasonably could find that the plaintiff did not anticipate such conduct.

We gladly test the facts of the case at bar with the above cases. Those cases make it clear that there was no jury question in this case.

The evidence is undisputed that plaintiff, Milligan, had full knowledge of this defendant's drinking during the evening prior to the accident.

As to the complete lack of wilful misconduct, we turn to the record of the testimony.

Plaintiff Milligan testified:

(R-164)

Q. When you left the Lackawanna, Mr. Milligan, and started up toward the Noodle House, did you observe anything unusual, or that caused you any alarm, about the way the car was being driven?

A. No.

A. Well, I was all relaxed; just laying over there in the car this way (indicating) with my arm up over the back of the seat . . . I was talking to Jim in the back, and Coy. And I was riding along just relaxed, I didn't pay any attention.

(R-165)

Q. Did you feel it necessary for you to pay attention to the way the car was being driven, or participate in the driving in any way?

A. Well, I was right there watching it, and everything was going along just perfect. I couldn't watch for anything different.

(R-179)

Q. Now, when he drove the car from the Lackawanna to the scene of the accident, there was nothing wrong in the way he drove the car?

A. Not a thing.

Q. He drove safely?

A. Very.

Q. And you weren't worried or apprehensive?

A. Not a bit.

Q. The speed of the car was normal?

A. Absolutely.

Mr. Finnegan, who testified for plaintiff, fully confirmed plaintiff's praise of defendant's manner of driving.

(R-130)

Q. Now how did Coy drive from the Lackawanna Club to the time of the accident? Describe his manner of driving.

A. Oh, he drove very good. As good as anybody else could drive.

Q. Was there anything unusual about the speed he went?

A. Nothing unusual about his driving, speeding either. (See also R-71)

The cigarette incident, according to plaintiff, changes the above "very good" driving to wilful and wanton misconduct. Mr. Finnegan, whom the defendant states was handing him a cigarette, does not recall the incident. (R-130). The only testimony was from the defendant.

(R-144)

A. Well, I didn't see any, any truck ahead of me. Right at that time, I asked . . . well, Mr. Finnegan had lit a cigarette in the back, and I asked him to light one for me, which I heard the match strike. I turned just . . . (illustrating)

Q. Now you are indicating, Mr. Harward, that you turned to your right, is that correct?

A. That is right, just like that. (Indicating) As I came back, the impact was right at that moment. . . . I had no time to put on brakes, or . . .

Q. If I understand the motion you made, you turned so that you looked back at Mr. Finnegan sitting in the back seat, is that correct?

A. That is right. I did. Took my eyes off the road, that is right.

Q. In that process, Mr. Harward, did you turn your car out of the traveled portion of the inside lane of traffic?

A. To my knowledge, no.

(R-149)

A. Well, I know that it wouldn't have delayed me over one second to make the turn to reach to get it.

The witness on the stand demonstrated his movement by turning his head to look over his right shoulder, which of course was in the presence of the Honorable Trial Judge. There was no indication that he looked in the rear seat, other than by means of his peripheral, or side vision, as his body during the illustration, was not shifted from his seated position.

These men were all friends; the defendant had offered to buy the plaintiff and Finnegan their meal; en

route to the cafe, he admittedly drove very carefully. He failed to see the truck parked ahead, and *not knowing it was there*, took his eyes off the road for not more than one second. Not even a jury can change those elements of "momentary inattention" into an intentional, wanton, deliberate act with knowledge that injury is a probable consequence and in reckless disregard of the safety of his friends and guests.

POINT II

THE PLAINTIFF ASSUMED THE ADDED RISK OF DEFENDANT'S ORDINARY NEGLIGENCE CAUSED BY DEFENDANT'S DRINKING.

A. THERE CAN BE NO JURY QUESTION WHERE PLAINTIFF KNEW OF DEFENDANT'S DRINKING, AND THE ACCIDENT WAS NOT THE RESULT OF WILFUL MISCONDUCT.

It is common knowledge that a person's faculties for safe driving are dulled and reduced proportionately to the extent of liquor consumed. There is, of course, more likelihood that a driver who has imbibed will be involved in an accident, than a sober person. This likelihood increases to almost a certainty when the driver is unquestionably intoxicated. A plaintiff guest knows the added risk involved in riding with such a person, and by law is presumed to anticipate the probability of an accident, and therefore assumes the risk of the ride.

All well reasoned cases can be rationalized on the following basis:

1. If the driver's drinking was not enough to affect

his driving ability, the Guest Statute bars the guest's recovery, unless wilful misconduct is shown.

2. If the driver's ability was impaired, and the guest had knowledge of the amount so consumed, the guest assumes the risk of an accident resulting from the driver's impaired ability.

3. If, under No. 2, the driver engages in wilful misconduct, it is a question of fact for the jury as to whether the guest should have reasonably anticipated the driver's conduct, under the circumstances.

In the facts of the case at bar, plaintiff *knew* the amount of beer consumed by defendant; he *knew*, or is told by law that he knew, that defendant's ability was impaired, whether he were totally drunk, or one quarter drunk. The accident was the result of simple or ordinary, negligence, and nothing more. The plaintiff is barred from recovery, and properly so.

"The effect of intoxicating liquor in depriving a driver of care and caution and inducing physical incapacity in the operation of a car is universally known and tragically illustrated daily. Where one becomes a guest and imprudently enters a car *with knowledge that the driver is so under the influence of intoxicants as to tend to prevent him from exercising the care and caution which a sober and prudent man would employ in the operation and*

control of the car, the guest is barred from recovery by reason of his contributory negligence, and as having assumed the risk involved. Where the evidence of such fact is without conflict, plaintiff is barred from a recovery as a matter of law. (cases cited) Where the evidence is sufficient to raise a question *as to plaintiff's knowledge and prudence*, the determination of that issue must be submitted to the jury."

United Brotherhood v. Salter, 167 P 2nd 954 at 958 (Colo.).

Bear in mind that plaintiff complains of defendant, on one hand, that defendant had been drinking, as the basis for his action and yet he encouraged and participated with defendant in that very act. It matters not how much defendant had to drink. If the defendant were intoxicated, (a fact we deny the evidence proved) it was as apparent to plaintiff Milligan as to officer Iba. The fact that is important is the admitted fact that plaintiff was drinking with defendant, drink for drink, during the entire evening, and was fully aware of the amount consumed inasmuch as he himself had the same amount to drink as the defendant.

The California Courts have adopted, with sound reasoning, "The Equal Culpability Rule". The reasoning applies to Assumption of Risk, which we submit is the same thing:

“... The circumstances of the case show that the guest was a participant in the drunken orgy in all the acts and events which led up to the intoxicated condition . . . Recovery cannot be had for the simple reason that both parties are equally culpable.”

“... The efficient cause in the instant case was intoxication, intoxication superinduced by the active participation of the plaintiff, and we find no line of demarkation seperating the result from the cause, upon which the plaintiff can rely, and at the same time hold the defendant liable in damages.”

Schneider v. Brecht, 6 Cal. App. 2nd 379, 44 P2nd 662.

That rule was approved in Price v. Schroeder, 35 Cal. App. 2nd 700, 96 P2d 949, wherein the Court states:

“The Appellant was equally at fault in bringing about the very mental condition of which he complains, and which led to the accident.”

CONCLUSION

Plaintiff failed to sustain the necessary burden of proof to properly establish any question for the jury to determine.

The Honorable Trial Court correctly granted this defendant's motion to dismiss.

The plaintiff had to maintain his action on some reasonable showing of wilful misconduct on defendant's

part, which he failed to do. He complains also of the defendant's sobriety, (although he testified defendant was sober) and that while he drank drink for drink with defendant during the entire evening, accepted defendant's offer of a free meal, enjoyed the careful driving of defendant enroute to the cafe, by some unexplainable reason, plaintiff maintains he should not have anticipated the possibility of an accident happening, and that defendant should respond to him in damages. Justice disagrees.

We respectfully submit that the judgment of the Trial Court should be affirmed.

Respectfully submitted,

L. E. MIDGLEY

*Attorney for Defendant and Respondent,
Melvin Coy Harward*

1012 Boston Bldg., Salt Lake City, Utah