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Duane Roylance v. Stephen L. Davies : Appellant's Brief In Answer To Respondent's Petition For Rehearing

IN THE SUPREME COURT
of the
STATE OF UTAH

DUANE ROYLANCE,
Plaintiff and Respondent,
- vs. -
STEPHEN L. DAVIES,
Defendant and Appellant.

Case No.
10641

APPELLANT'S BRIEF IN ANSWER TO RESPONDENT'S PETITION FOR REHEARING

Appeal from the Verdict and Judgment of the
Fourth District Court in and for Utah County
The Honorable Joseph E. Nelson, *Judge*

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This brief is in response to the argument and authorities relied upon by Respondent in his brief in support of a Petition for Rehearing.

Respondent's Petition states:

> "This Court, in its opinion, applied the rule that our guest statute released the operator of an automobile from responsibility for injuries to a gratuitous guest unless the operator intended the accident to occur."

In support of this assertion, Respondent quotes excerpts out of context from the Court's opinion.

The Court did not so hold. The majority opinion reaffirms *Stack v. Kearnes* 118 Utah 237, 221 P. 2d 591 (1950) and the test laid down by that decision in the following language:

> "Willful 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 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 knowldege or appreciation that injury is likely to result therefrom."

It was the holding of this Court in the instant case that under this test there was "no evidence of willful misconduct in the record to sustain the verdict" for the Respondent.

Section 500(b) Restatement (Second), Torts cited by Respondent in no way detracts from and in fact supports the position of this Court in the present case.

Respondent's authority in support of his Petition for Rehearing is primarily a special concurring opinion in an Oregon case and a section from a treatise discussing the theory and weaknesses of guest statutes. The case of *Burghardt v. Watson,* 349 P.2d 792 (Ore., 1960) quoted by Respondent involved an action for personal injuries sustained by the plaintiff when the defendant driver's vehicle went out of control after rounding a curve in the highway. The Oregon court held that the evidence, including the driver's alleged violation of the speed limit, was insufficient to warrant a finding of gross negligence on the driver's part to allow recovery under the guest statute. The court mentioned that there was nothing in the record to indicate an "I don't care what happens attitude" which could transmute the defendant's ordinary negligence, if any, into gross negligence.

Respondent in his brief quotes the full text of Judge O'Connell's special concurring opinion except for the last paragraph which reads:

> "In my opinion, there was not sufficient evidence in the present case from which the jury could justifiably conclude that defendant's conduct was reckless within the meaning of O.R.S. 30.110. Therefore, I concur."

Judge O'Connell pointed out that "the full consciousness that a risk is to be encountered will not result in

reckless conduct if the probability of harm is slight or if the probability is great but the harm which will probably result is not serious." He stated that the ingredient lacking in the *Burghardt* case was a high degree of probability that serious harm would result. Therefore, in spite of all the dicta, Judge O'Connell concurred in holding there was not sufficient evidence to reach even the level of *gross negligence* and reversed as a matter of law the judgment in favor of the plaintiff.

In the second to last paragraph in his concurring opinion, Judge O'Connell pointed out the position of a court with regard to the theory and application of a guest statute:

> "Perhaps the time has come when the jury should be permitted to treat automobile guests in the same manner as it treats other injured plaintiffs; but that change must come from the legislature, not from us."

Five months after the *Burghardt* opinion was handed down, the Oregon Supreme Court was again faced with the guest statute in *McNabb v. Delaney*, 354 P. 2d 290 (Ore., 1960). That case has been set forth at page 16 of Appellant's original brief in this action. The Oregon Supreme Court with Judge O'Connell joining, held that the defendant's conduct did not amount to gross negligence stating among other things that "poor judgment viewed from hindsight is not enough to constitute gross negligence."

After the lengthy theoretical discussion quoted by Respondent from Harper and James on Torts, those authors conclude in the last paragraph of that portion quoted that:

> "When we come to consider the kind of showing which courts will regard as sufficient to warrant a finding of liability under guest statutes, there is far greater uniformity than there is as to theory or proper language for instructions."

CONCLUSION

The opinion of the Court in this case is a correct application of Utah law and not a departure therefrom as claimed by Respondent. An attack upon guest statutes in general is insufficient to support a rehearing in this case.

Respectfully submitted,

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