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Richard Jacques v. Dallas Farrimond : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT
of the
STATE OF UTAH

RICHARD JACQUES, by and
through his guardian, ad litem,
Pauline Murphy,

Plaintiff-Appellant,

vs.

DALLAS FARRIMOND, by and
through his guardian ad litem, Tho-
mas Smith Farrimond and THOMAS
SMITH FARRIMOND, personally,

Defendants-Respondents.

Case No.
9724

RESPONDENTS' BRIEF

Appeal from the Judgment of the Third District
Court for Salt Lake County
Honorable A. H. Ellett, Judge

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SMITH FARRIMOND, personally,

Defendants-Respondents.

Case No.
9724

RESPONDENTS' BRIEF

STATEMENT OF KIND OF CASE

This is an action by plaintiff against defendant, under the guest statute, to recover damages for personal injuries sustained in a one car accident.

DISPOSITION IN LOWER COURT

The case was submitted to the jury on special interrogatories on which the jury found that defendant was guilty of intoxication and wilful misconduct, both of which contributed to cause the accident, and further found that the plaintiff was guilty of assumption of risk. The trial court entered judgment on the verdict in favor

of defendants, no cause of action. Plaintiff's motion for new trial, or for judgment notwithstanding the verdict, was denied.

RELIEF SOUGHT ON APPEAL

Respondents seek an affirmance of the judgment below.

STATEMENT OF FACTS

The statements of facts contained in appellant's brief is wholly inadequate to inform the court as to the background out of which the case arises, or as to the evidence upon which the jury's findings were based. There was conflicting evidence relative to each of the issues of fact submitted to the jury for determination. Because we admit that the findings of the jury relative to intoxication and wilful misconduct on the part of the defendant are supported by competent evidence, and we raise no issue on those questions here, we do not detail the evidence in support thereof. Likewise, under familiar principles, the jury's finding that plaintiff assumed the risk must be affirmed if supported by substantial and competent evidence. It is not necessary to review all of the evidence, but simply that which supports the jury's findings, which was abundant.

In this brief, we shall refer to the parties as they appeared in the court below. The word "defendant" refers to the defendant driver, Dallas Farrimond, except where specifically indicated differently.

Plaintiff and defendant, and five of their comrades were involved in an accident on the evening of January 4, 1961. (R. 122, 148, 177, 217 244.) These seven high school aged boys were close personal friends, “ran around” together almost continuously, and it was their custom to go driving around almost every evening. (R. 133, 254, 260, 339-340). Although only teen-aged, none of them were strangers to the use of alcohol. (R. 139, 159, 162, 188-9, 196, 229, 252, 317, 344, 348). All of them admitted that they had used alcohol; that they had seen other members of the party use alcohol on other occasions, and that they knew and understood the effects of alcohol on the human body. (R. 139, 162, 163, 188, 189, 196, 230, 252-253, 344, 348). Plaintiff admitted on cross-examination that he knew and understood the effects of alcohol on the human body, and specifically that he knew it was not safe to ride in an automobile with someone who had been drinking. (R. 252, 253).

On the evening of the accident, the defendant picked up the other six boys, and after riding around awhile, they went to the House of Pizza. (R. 122-123, 148, 177, 202, 218, 245, 316, 327, 341). The plaintiff was the first of the passengers picked up by the defendant. (R. 122, 135, 177, 245).

All seven boys testified at the trial, and all of them, except Glen Ulmer, testified that there was no drinking of alcoholic beverages prior to the time they arrived at the House of Pizza. (R. 123, 136, 149, 157, 161, 177, 191,

220, 227, 250, 326). Ulmer testified that although there was no evidence that any of the boys had been drinking prior to the time that they picked him up, there was a bottle passed around in the car, and there was drinking during the time that they drove out to Murray to pick up Gorringer, and also on their return up to the time they arrived at the House of Pizza. (R. 341, 351-352).

Although plaintiff denied having anything to drink on the evening of the accident, and denied knowledge of any drinking by defendant, and in fact denied seeing any alcoholic beverages at all, (R. 246, 250), his testimony was contradicted by every other member of the party. Several of the boys testified that one of their party, Ligaros, obtained a one-fifth bottle, partly filled with gin, from some acquaintances inside the House of Pizza, which he presented to the occupants of the car. (R. 123, 124, 178, 187, 227). This was mixed with some mixer, which the boys conveniently had available, and was consumed by plaintiff, defendant, and Ligaros. (R. 135, 178, 219, 228, 327, 332, 343, 351). Although Richard Rhead did not actually see any part of the contents of the bottle consumed, he did see the bottle, and assumed that some of the boys drank it, because that would be the usual thing for them to do. (R. 162-163). There was no evidence that any of the other four drank any part of the liquor, except that one of the boys admitted that he tasted it and didn't like it. (R. 150, 158, 228, 229, 343).

The boys remained at the House of Pizza for approximately an hour. (R. 149, 158). During this time,

besides engaging in what drinking they did, they talked with some girls inside the House of Pizza, (R. 202, 316, 379), and engaged in a dough fight amongst themselves; and decorated the automobile of one of the girls with dough. (R. 126, 136, 150, 196). Before they finally departed the House of Pizza, on the trip that resulted in the accident, plaintiff and one of the other boys took defendant's car and drove to Rhead's home. (R. 181-182, 195, 231, 329). Another time plaintiff drove the car and all seven of them rode around a few blocks, and then came back to the House of Pizza. (R. 196, 230, 329). During this time defendant was sitting in the back seat. (R. 230, 329-330). There was also evidence that while defendant was in the House of Pizza talking to his girl friend, the rest of the boys drove his car away but they came back later and picked him up. (R. 322-323, 382, 384).

Besides the testimony of plaintiff's own companions as to his drinking, there was testimony by two girls who saw him inside the House of Pizza, to the effect that he had been drinking, and that others of the boys had also been drinking. (R. 317, 380, 381, 392, 393). The investigating officer detected the odor of alcohol on plaintiff's breath while he was attempting to render first aid to him at the scene of the accident. (R. 111).

There was testimony that the influence of alcohol on defendant was observed at the time the boys finally left the House of Pizza. (R. 222-223, 230, 328, 343, 345, 352). Dwight Tolley testified that defendant was "acting

goofy", and that he was "pretty drunk." (R. 223). Ulmer testified that he was "pretty well gone," (R. 345), and Gorringer testified that defendant and plaintiff were messing around and that they were acting the same. (R. 328). Both were acting different from normal. (R. 328).

Although appellant claims that defendant was angered by the fact that his girl friend was at the House of Pizza in another boy's car, and suspected that she intended to marry him, the record citations in appellant's brief do not support the claim. In fact, there is very little evidence in the record to sustain it, principally the testimony of plaintiff's mother and stepfather, that at the hospital defendant said in their presence that he had a fight with his girl friend. (R. 257, 261). However, both defendant and his girl friend denied that there had been a fight or argument of any kind, or that defendant was in any way upset. (R. 180, 315-316). The testimony was also refuted by defendant's parents. (R. 372-373, 401, 411). None of his companions noticed his being upset or anything unusual, and none of them was aware of any trouble between defendant and his girl friend. (R. 216, 263, 365, 367). There was considerable evidence that he was happy, gay and having a good time. (R. 203, 205, 230, 231, 328).

In summary, the jury found that defendant was intoxicated, and that his intoxication was a cause of the accident. (R. 81-83, 456-457, 461-462). There is abundant

evidence that all of the drinking which defendant did on the evening of the accident, was done after he picked up the plaintiff (R. 123, 136, 149, 157, 161, 177, 191, 220, 227, 250, 326); that all of the drinking done by defendant was done in the presence of the plaintiff (R. 191, 220, 236); that plaintiff was fully aware of the drinking done by defendant and was aware of the effect that the drinking would have on defendant (R. 191, 220, 252-253); that plaintiff had on previous occasions seen defendant when he had been consuming alcoholic beverages (R. 252); that plaintiff imbibed equally with the defendant and participated freely and equally with him in the pleasures of the evening (R. 135, 178, 191, 219, 228, 327, 332, 343, 351); that the effects of the alcohol upon defendant were obvious and were observed before the time the boys left the House of Pizza (R. 222, 223, 230, 328, 343, 345, 352); that there were four boys in the car that had had nothing whatsoever to drink and were fit and able to drive, but none of them offered to drive or insisted upon driving (R. 150, 158, 228, 229, 343); that the House of Pizza from which the party departed was a "hangout" for teenagers, where they met their friends, and where it may be fairly assumed none of them would have any difficulty in obtaining a ride from another friend, if they did not care to ride with defendant in his then condition. The evidence was that the other boys felt free to take defendant's car and that they did in fact do so. (R. 181-182, 195, 196, 230-231, 329). There is also abundant evidence that at no time in the course of the ride did plaintiff in anywise protest the manner in which defendant was

driving, nor did he ask to be let out of the car. (R. 131, 232, 330, 331, 346, 347). On the contrary, when the other boys requested the defendant to slow down, plaintiff exhorted him to go faster. (R. 191, 330, 346, 369). Not only was the jury's finding of assumption of risk amply supported by the evidence, but the evidence would hardly permit any other inference.

It should also be noted that neither at the time the case was submitted to the jury, nor at any subsequent time, did plaintiff ever take exception to the verdict forms, or to the submission of the case to the jury on special interrogatories.

ARGUMENT

POINT I.

THE TRIAL COURT COMMITTED NO ERROR IN SUBMITTING THE ISSUES, INCLUDING THE ISSUE OF ASSUMPTION OF RISK, TO THE JURY ON SPECIAL INTERROGATORIES.

Rule 49, specifically authorizes the submission of issues of fact to the jury on special verdicts in the form of special written interrogatories on each issue of fact, rather than upon a general verdict:

“The court may require a jury to return only a special verdict in the form of a special written finding upon each issue of fact. In that event the court may submit to the jury written interrogatories susceptible of categorical or other brief answer or may submit written forms of the several special findings which might properly be

made under the pleadings and evidence; or it may use such other method of submitting the issues and requiring the written findings thereon as it deems most appropriate. * * *

Where a case is submitted on special findings it then becomes the duty of the court to apply the law to the determined facts and direct the appropriate judgment. See Rule 58 A:

“* * * If there is a special verdict . . . pursuant to rule 49, the court shall direct the appropriate judgment which shall be forthwith signed by the clerk and filed.”

The use of special interrogatories was not an innovation of the new rules, nor was it a stranger to our code practice. On the contrary, this procedural device has been used through the history of the state, extending back into territorial days. Its use has been known to the common law for centuries. It has uniformly been held that whether the case should be submitted to the jury on a general verdict, or on a special verdict, or on a general verdict with special interrogatories, is a matter within the sole discretion of the trial court, and in the absence of a showing of an abuse of discretion, the losing party has no ground of appeal. 53 Am. Jur. 736-7, Trial § 1064. See also 5 Moore's Federal Practice 2204, § 49.03:

“Under Rule 49(a) the court has complete discretion as to whether a special or general verdict is to be returned. As with other discretionary acts, this should not be reviewable, except, perhaps, for gross abuse, which could rarely be shown.”

In *Smith vs. Ireland*, 4 Ut. 187, 7 P. 749, the territorial court said:

“It was within the discretion of the court to direct a general or special verdict, or special as to the controverted facts and general as to those not controverted on the trial.”

That rule has been consistently followed since that time. See *Mangum v. Bullion Beck & Champion Min. Co.*, 15 Ut. 34, 50 P. 834, and *Genter v. Conglomerate Min. Co.*, 23 Ut. 165, 64 P. 362.

In *Prye v. Kalbaugh*, 34 Ut. 306, 97 P. 331, this court said:

“We think under the statute it was within the discretion of the court to submit or refuse to submit the particular questions of fact requested, and that error cannot be imputed to the trial court without a showing of an abuse of discretion.”

See also *Lindsay Land & Livestock Co. v. Smart Land & Livestock Co.*, 43 Ut. 554, 137 P. 837, and *Berg v. Otis Elevator Co.*, 64 Ut. 518, 231 P. 832.

A more recent case is *Baker v. Cook*, 6 Ut.2d 161, 308 P.2d 264. There, as here, the losing party made no objection or exception to the submission of the case to the jury on special interrogatories, or to the form of the questions. There, as here, complaint was made to the reviewing court for the first time. The language of this court in that case is singularly applicable here:

“But defendant neither objected nor excepted to the form of questions and counsel cannot sit back and permit the court to submit the propositions and object if the verdict is unfavorable. * * * After the case was submitted the jury returned to ask the court what would happen if they answered ‘yes’ in both questions 1 and 2. Neither before the jury was charged, nor in the exceptions taken after the jury left to deliberate, nor when the jury came in for further instructions, did defendant suggest that the propositions were confusing and should be clarified. Never until the proposition was presented to this court was it urged that the propositions were confusing. If the defendant felt that the questions were so drawn as to confuse the jury, request should have been made to clarify the questions, particularly when the jury came back to see what would happen if they answered questions 1 and 2, ‘yes’.”

And in apparently the most recent expression on the subject, this court said in *Hanks v. Christensen*, 11 Ut. 2d 8, 354 P. 2d 564:

“It is elementary that there is no impropriety in submitting special interrogatories if the court so desires.”

Plaintiff has cited not a single case or text to support his contention that the court erred in submitting the case to the jury on special interrogatories. He has quoted from the record as to certain conversations between the court and members of the jury before the verdict was finally received. Although he now complains

as to the special interrogatories, he did not at that time by motion, objection, exception, or otherwise, indicate to the court that he had any objection whatsoever to the manner in which the court proceeded. No abuse of discretion has been shown. Appellant's first point is entirely without merit.

POINT II.

BY PARTICIPATING WITH THE DEFENDANT IN THE DRINKING OF ALCOHOLIC BEVERAGES, AND BY RIDING WITH HIM WITH FULL KNOWLEDGE OF THE LIQUOR THAT HE HAD CONSUMED, PLAINTIFF VOLUNTARILY ASSUMED THE RISK OF ANY MISHAP RESULTING FROM DEFENDANT'S INTOXICATED CONDITION.

Plaintiff apparently contends that one may freely and without penalty elect to ride with a driver known to have been drinking and obviously physically impaired to drive, and after having done so, to assess against the driver any loss sustained by the rider as a result of the driver's own impaired condition. Such clearly is not and never has been the law.

In 5 A Am. Jur., page 739, Automobiles, Sec. 792, the rule is stated as follows:

“Reason and authority alike support the rule that if a person voluntarily rides in an automobile driven by one who is intoxicated, and whom the passenger knows, or, under the circumstances, should have known was intoxicated, he is precluded from recovering from the driver for injuries sustained in an accident if the intoxicated

condition of the driver was the proximate cause or one of the proximate causes of the accident in which the plaintiff was injured. * * * The cases which have applied the doctrine of assumption of risk to guest actions hold that where the guest had knowledge, or should know, of the intoxicated condition of the driver, then the guest is deemed to have assumed the risk of riding with his host."

See also 4 *Blashfield, Cyclopedia of Automobile Law and Practice*, Sec. 2512, p. 716:

"Likewise, one voluntarily riding with a drunken driver assumes the risk arising from such driving, especially where the guest voluntarily becomes intoxicated himself."

See also 2 *Harper and James, the Law of Torts*, page 1171, and *Restatement of Torts* §§ 482(2) and § 503(2). The same rule is stated in the principal authority cited and relied upon by appellant, 44 A. L. R. 2d 1342, 1343:

"To the extent that the doctrine of 'assumption of risk' has been accepted as a defense in other than master-and-servant or other contract situations, most of the courts have held that a guest who voluntarily assumes the risk of injury from his host's wilful or wanton misconduct, gross negligence, or intoxication, cannot recover for the injuries to the infliction of which he has, in effect, assented."

The rules as stated by the textwriters are fully supported by the decisions.

In *House v. Schmelzer*, (Cal. App.), 40 P.2d 577, the court said at page 579:

“While an innocent person is entitled to protection from intoxicated drivers and to redress for injuries caused by them, one who *accepts a ride under circumstances which should be a sufficient warning to any reasonable person that the driver is not in a fit condition to operate his car has no just cause for complaint when the law leaves him where he finds himself.*” (Emphasis ours.)

The court of last resort of the State of Kentucky, the home of Bourbon Whiskey, has, as might be anticipated, had occasion to treat the problem here involved in many cases. That court, apparently fully acquainted with the frequent results of mixing gasoline and alcohol, has consistently and repeatedly affirmed the general principle that one who elects to ride with a driver known to have been drinking to a substantial extent, is barred from recovery if an accident ensues resulting in whole or in part from the driver's impaired condition. One of the earliest decisions was in the case of *Winston's Administrator v. City of Henderson*, 179 Ky. 220, 200 SW 330, where the court said at p. 332 of 200 S.W.:

“Winston and Nunnelly were associated together for some hours on the evening of the accident, and had been in and about restaurants and saloons together. . . Winston was fully acquainted with Nunnelly's intoxicated condition if he was intoxicated; *he knew all of the facts or had the opportunity of knowing them before he entered*

the car, and is therefore charged with that knowledge. * * *” (Emphasis ours.)

The principles there laid down have been consistently followed. In *Rennold's Administratrix v. Waggener*, 271 Ky. 300, 111 S.W. 2d 647, the court said at page 649 of 111 SW2d:

“It is an established rule in this jurisdiction that a person who enters an automobile as a guest with knowledge that the driver is intoxicated to an extent that renders him careless or indifferent to his own safety or the safety of others, or incompetent to properly operate the automobile, is guilty of contributory negligence, and that *the guest assumes the risks incident to the operation of the automobile by a driver in such condition.*

“It has been a subject of comment by this court that as a matter of common knowledge the use of intoxicants begets a spirit of recklessness and that their use to an appreciable degree of intoxication so disturbs the normal volitional and reflex powers as to render a driver of an automobile incapable of responding with the precision, judgment, and accuracy necessary to a proper and safe operation of an automobile.” (Emphasis ours.)

In *Makin's Adm'r. v. McLelland*, 279 Ky. 595, 131 S.W.2d 478, the court said:

“The principal controversy before us involves the question as to whether or not Jessie Makin knew that McLellan was drunk when she entered his car. If she did, she assumed the risk

when she got in the car to ride into Louisville with McLellan."

To the same effect see *Toppass v. Perkins*, 268 Ky. 186, 104 SW2d 423; *Spivey's Administratrix v. Hackworth*, 304 Ky. 141, 200 SW2d 131; *Spencer v. Boes*, 305 Ky. 573, 205 SW2d 150; *Irby v. Williams*, 313 Ky. 353, 231 SW2d 1; *Lewis v. Perkins*, 313 Ky. 847, 233 SW2d 985 and *Kavanaugh v. Myers' Administratrix*, (Ky.), 246 SW2d 461.

Another court which has had frequent occasion to pass on the same problem is that of Louisiana. In *Richard v. Canning*, (La. App.), 158 So. 598, 599, that court used language singularly appropriate to the case at bar:

"Canning's condition must have been obvious. He and Richard had been together for several hours, and though, at the various homes at which they had visited, they may have been separated for a few moments, they were sufficiently together for Richard to have become fully aware of the fact that his friend was imbibing freely of intoxicating liquors." (Emphasis ours.)

In the case of *Mercier v. Fidelity & Casualty Company* of New York, (La. App.), 10 So. 2d 262, 264, the court said:

"They [plaintiff and defendant] drank freely and continuously, each to the knowledge of the other, and both knew that they were under its

influence. . . Plaintiff had enough experience in life to discern when one was sober, or under the influence of liquor, and was thus able to appreciate danger and risk of continuing to drink and over-indulge with one whom he knew would operate the automobile in returning to their homes. *He knew, or should have known, that by excessive drinking, Furey would be deprived of his normal faculties and be unable to exercise the ordinary care and caution possessed by one when sober. He knew, or should have known, all of the facts, and had full opportunity of knowing them before continuing with his revelry. Their continued drinking was of sufficient importance to cause an apprehension of danger and an anticipation and realization of the peril in which he was voluntarily entering.* One cannot close his eyes to obvious danger, or entrust his safety absolutely to the driver of an automobile when the same knowledge of obvious or threatened danger is possessed by both. Experiencing the exhilaration and sensations incident to the swirl and dash of a mixture of intoxicating liquor and rapid transit, plaintiff assumed the risks of danger attendant thereto.* * *” (Emphasis ours.)

And in *Elba v. Thomas*, (La. App.), 59 So. 2d 732, 736, the same court said:

“This court can take judicial notice of what is common knowledge and human experience. Anyone who has indulged in alcoholic beverages knows that it dulls perception and reflexes to the extent that one cannot react normally to impending emergencies and dangers.”

To the same effect: *Livaudais v. Black*, (La. App.), 127 So. 129; *Clinton v. City of West Monroe*, (La. App.),

187 So. 561; *Willis v. City of West Monroe*, (La. App.), 187 So. 829; *Madden v. City of West Monroe*, (La. App.), 187 So. 829; and *Perritt v. City of West Monroe*, (La. App.), 187 So. 830.

In *Aycock v. Green*, (Tex. Civ. App.), 94 SW2d 894, 898, the court said:

“The record at large, raises the constantly recurring question of whether a willing and active participant, such as the decedent in this case, can be heard to complain of fortuitous circumstances occurring to him in an escapade of this nature, in which all the participants join, deliberately and voluntarily, with equal zest and with full knowledge of its possibilities for an unhappy ending. Our courts have many times held, with obvious reason, that in such cases a victim of the folly (or his unfortunate survivors) cannot recover of his fellow whom he had joined wholeheartedly in producing the very result which all had equal opportunity of foreseeing and avoiding.”

To the same effect see *Schiller v. Rice*, (Tex.), 246 SW2d 607, and *Mooneyhan v. Benedict*, (Tex. Civ. App.), 284 SW2d 741.

In *Hicks v. Herbert*, 173 Tenn. 1, 113 SW2d 1197, 1199, the court said in a case analogous to the one at bar:

“It was not necessary for the defendant, relying on plaintiff’s contributory negligence, to prove actual knowledge of defendant’s intoxication on the part of plaintiff. *If an ordinarily*

prudent man under the circumstances we have related would have regarded defendant as intoxicated and appreciated his condition, such knowledge and appreciation must be imputed to plaintiff.

“Plaintiff was in a position to see just as much of defendant and of defendant’s condition as were the other witnesses testifying in the case . . .

“We think the record discloses a case in which it appears ‘that reasonable men, acting as the triers of the fact, would find, without any reasonable probability of differing in their views, either that the plaintiff knew and appreciated the danger or that ordinarily prudent men, under the same circumstances would readily acquire such knowledge and appreciation. . .’” (Emphasis ours.)

See also *Schwartz v. Johnson*, 152 Tenn. 586, 280 SW2d 32.

A leading case from Iowa is *Garrity v. Mangan*, (Ia.), 6 NW2d 292. The court there said at p. 295:

“Although the distinction has been made by our courts at various times, it seems to us reasonable and clear that one who enters a car as a guest, knowing that the driver is under the influence of intoxicating liquor should be deemed to take his chances of an accident and resulting injury, and such has been the holding of various courts.

“In the instant case, under the evidence, the fact remains that defendant’s decedent was either

intoxicated or he was not. If not, there would be no cause of action. Under the uncontradicted evidence, *if he was intoxicated it must have been obvious to his companion, who was with him all the evening previous to the accident. . . ; the doctrine of assumption of risk would apply, and it would be held as a matter of law that the plaintiff's decedent assumed the risk of riding with a drunken driver. In either event, there could be no recovery.*" (Emphasis ours.)

In *Booth vs. General Mills*, 243 Ia. 206, 49 NW2d 561, the same court said :

"It is appellant's claim that at the time plaintiff entered defendant's car, just shortly before the fatal accident, he knew or should have known that Shocklee was intoxicated. Where the facts clearly show such a situation, there can be no recovery . . ."

See also *Helmig v. People's National Bank*, (Ia.), 220 NW 45.

In the West Virginia case of *Hurt v. Gwinn*, 95 SE2d 248, 251, the court said :

"The evidence before us leaves no doubt that the three persons who took the drive in defendant's automobile . . . to the place where the accident occurred, had been drinking intoxicating liquor prior to the commencement of the drive, *each having knowledge of the drinking by the others. . .* It is not questioned that *each of the three voluntarily entered into the venture of the drive and the hazards thereof. . .* It cannot be

doubted in such circumstances, that *each of the parties was fully cognizant of the hazards of such a drive from the time of commencement thereof*. A guest passenger voluntarily following such a course of known hazardous conduct, fraught with strong possibility of the very type of the accident which occurred, cannot be permitted to recover merely because she had no opportunity to escape injury after the accident began to take place — in the instant case after the automobile of defendant began to skid.” (Emphasis ours.)

In *Stekovich v. U. S.*, (M.D. Pa), 102 F. Supp. 925, 926, the court said :

“Where a passenger accompanies the driver of an automobile, *knowing of the driver's drinking*, and is injured through negligence of the driver, brought about by the alcohol he has taken, such passenger *assumes the risk* of voluntarily riding with him.” (Emphasis ours.)

In *Taylor v. Taug*, (Wash.), 136 P.2d 175, the Supreme Court of Washington said at page 180 :

“That the drinking of intoxicating liquor effectually destroys the faculties essential to safe driving is of such common knowledge that no one with sense will submit to the peril of riding with a driver who has recently consumed liquor. Any one who submits to that peril *assumes the risk attendant upon the journey* and is guilty of contributory negligence which precludes recovery. *Appellant was a high school graduate and certainly must have appreciated the danger of rid-*

ing in a car driven by one whom she had just seen drinking intoxicating liquor." (Emphasis ours.) And in conclusion the court further said at p. 180:

"Rem. Rev. Stat. Sec. 6360-119, provides: 'It shall be unlawful for any person to operate any vehicle upon the public highway of this state while under the influence of or affected by the use of intoxicating liquor . . .'"

"We have held that one driving in violation of this statute is guilty of negligence per se . . .

"By the same reasoning, we must hold that one who voluntarily rides with such a driver assumes the risk of the venture and contributes to the injury. This conclusion is borne out by the statement we have quoted from *Parker v. Taylor*, supra. *This accident was simply the aftermath of a drinking party, and while appellant did not drink intoxicating liquor, she certainly knew that liquor was being consumed by the driver and others in his company.*

"We hold that appellant assumed the risk attendant upon the journey, and that she was guilty of contributory negligence." (Emphasis ours.)

See to the same effect *Hemington v. Hemington*, 221 Mich. 206, 190 NW 683.

In *Packard v. Quesnel*, 112 Vt. 175, 22 A2d 164, the court said:

"Reason and authority alike support the rule that if a person voluntarily rides in an automobile

driven by one who is intoxicated and the passenger knows, or under the circumstances should have known, the intoxicated condition of the driver, he is precluded from recovering from such driver or a third person for injuries sustained in an accident if the intoxicated condition of the driver was the proximate cause or one of the proximate causes of the accident producing the injuries in question. * * *"

In a recent case from Colorado, the Supreme Court of that state said at p. 600 of 309 P.2d:

"From the facts herein related, which are undisputed, to the effect that plaintiff participated in what we will call a drinking party on the evening of the accident and imbibed freely from the intoxicating liquor that was about her before leaving on the trip during which the accident occurred, that she went so far as to offer some of her liquor to the driver, that she knew the driver and her companions were in a state of intoxication before starting on the disastrous journey, it is clear that plaintiff was contributorily negligent *and assumed the risk* of whatever might happen when she entered defendant's automobile with the other intoxicated occupants and continued on the trip in a party where sobriety was wholly absent. The motion for a directed verdict based upon the grounds just enumerated, should have been sustained and error of the trial court attached.

"Plaintiff while legally a minor, was 19 years old and possessed of the usual and ordinary faculties of an adult person and it may be assumed that she was fully capable of knowing, or

could anticipate, danger that might follow from the operation of the car due to the physical incapacity of the driver, and she made no effort to avoid the likelihood of the accident and it must be said that she assumed the risk, which bars her recovery.” (Emphasis ours.) *Hiller v. Gross*, (Colo.), 309 P.2d 598.

In the earlier case of *United Brotherhood of Carpenters and Joiners of America, Local Union No. 55 v. Salter*, (Colo.), 167 P.2d 954, the same court said:

“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 almost 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 recovery as a matter of law. * * * 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 or other trier of facts.

* * *

“It is a matter of common knowledge, that whatever may be the result in a particular case, the drinking of intoxicating liquors generally in-

creases the likelihood of negligent driving. Voluntarily becoming the guest of a driver who has been drinking intoxicants is analogous to becoming the guest of an operator who is known to have been a negligent driver.

“Where the guest has knowledge of substantial drinking of intoxicating liquor by the driver and there is evidence tending to show that such drinking was a contributing cause of the driver’s negligence, then the issue as to whether the guest was sufficiently forewarned so that under all the circumstances he was negligent in becoming or remaining a guest in the car should be submitted to the jury. He is not barred as a matter of law except where his knowledge of the physical incapacity of the driver and the surrounding circumstances are such that reasonable men could draw but one inference as to his negligence.

* * * The issue of assumption of risk should have been submitted to the jury.”

See also *Franco v. Vakares*, (Ariz.), 277 P. 812; *Smart v. Masker*, (Fla.), 113 So. 2d 414; *Herring v. Erland*, (Fla.), 81 So. 2nd 645; *William v. Owens*, 85 Ga. App. 549, 69 SE2d 787; *Besserman v. Hines*, 219 Ill. App. 606; *Krimse v. Chicago, T. H. & S. E. Ry. Co.*, 73 Ind. App. 537, 127 N.E. 837; *Saxton v. Rose*, (Miss.), 29 So.2d 646; and *Nardone v. Milton Fire Dist.*, 261 App. Div. 717, 27 NYS 2d 489.

In nearly all of the above cases the appellate court held, under the evidence, that *as a matter of law* plaintiff was debarred from recovery. We believe that the facts

of this case are equally strong, and that the trial court would have been amply justified in granting defendant's motion for directed verdict. However, it is not now necessary to go that far. It is sufficient to hold that the finding of the jury is supported by competent and substantial evidence.

The precise problem does not appear to have been previously presented to this court. However, in *Milligan v. Harward*, 11 Ut. 2d 74, 355 P2d 62, this court indicated by a strong dictum that it would follow the line of reasoning of the cases above quoted:

"Of course, if the plaintiff had known Harward was intoxicated at the time they embarked on the journey, he would probably be in the position of having assumed the risk."

A similar expression is found in the earlier case of *Balle v. Smith*, (Ut.), 17 P.2d 224:

"Where one rides with an intoxicated driver, or one who . . . drives at an excessive or unlawful rate of speed, and the guest, with knowledge of such condition of the driver or such negligent or unlawful acts without objection continues to ride in such automobile, and an accident happens which is caused or contributed to by such negligence cannot recover."

And in *Esernia v. Overland Moving Co.*, 120 Ut. 647, 206 P.2d 621, the same principle was applied to a plain-

tiff who rode and continued to ride with a driver, known by plaintiff to be in a sleepy condition. This court there held as a matter of law that plaintiff was debarred from recovery.

POINT III.

THERE WAS NO REVERSIBLE ERROR IN THE COURT'S INSTRUCTIONS TO THE JURY.

Although plaintiff asserts prejudicial error in the court's stock instruction to the jury, defining among other things, negligence and contributory negligence, counsel devotes only one short paragraph to the support of this proposition and cites not a single authority-statute, case or text, in support of his position. Therefore, the contention does not merit extensive treatment.

While it probably would have been better had the court omitted the instruction with reference to ordinary negligence and contributory negligence, no harm could possibly have come to either party, in view of the fact that the case was submitted to the jury upon special interrogatories, and the jury was specifically required to find on the issues of intoxication, wilful misconduct, and assumption of risk. Each of these doctrines was fully explained to the jury in other instructions. The doctrine of wilful misconduct was further explained by the court in response to a question put by the jury during the course of its deliberations. It is inconceivable on the record before the court, that the jury could have been misled by the surplusage of instructions defining negli-

gence and contributory negligence. We call the court's attention to the provisions of Rule 61, which reads as follows:

"No error in either the admission or the exclusion of evidence, and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties, is ground for granting a new trial or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties."

The reasoning of this court in the recent Utah case of *Hadley v. Wood*, 9 Ut.2d 366, 345 P.2d 197, is applicable here. In that case the trial court withdrew from the jury the issue of contributory negligence by reason of plaintiff's tender years. However, the court gave an instruction to the jury to the effect that there could be more than one legal cause of an accident, notwithstanding that such instruction had become irrelevant in view of the withdrawal of the issue of contributory negligence from the jury. In holding that the presentation of the irrelevant instruction to the jury was harmless, this court said:

"Notwithstanding there is some justification for the charge that irrelevant instructions were given, if they are viewed as a whole, as they should be, the issues were presented to the jury

fully and fairly and in such a manner that we see no prejudice to the rights of the plaintiff."

CONCLUSION

There was no error the court below. The court acted within the bounds of its discretion in submitting the case to the jury on special interrogatories and plaintiff made no objection or exception thereto. The evidence abundantly supports the jury's finding that plaintiff voluntarily assumed the risk in riding with a driver whom he knew, or should have known, had imbibed a sufficient amount of alcoholic beverage to become intoxicated. There was no prejudicial error in the instructions to the jury. The judgment should be affirmed.

Respectfully submitted,

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