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Michael Mukasey v. Robert S. Aaron : Brief of Respondent

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IN THE SUPREME COURT OF THE STATE OF UTAH

MICHAEL MUKASEY,
Plaintiff and Appellant,

vs.

ROBERT S. AARON,
Defendant and Respondent.

Case No.
11008

BRIEF OF RESPONDENT

Appeal from the Judgment of the Seventh District Court
for Emery County
The Honorable Henry Ruggeri

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MICHAEL MUKASEY,
Plaintiff and Appellant,

vs.

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BRIEF OF RESPONDENT

STATEMENT OF THE CASE

This is an action to recover damages for personal injuries arising out of an automobile accident.

DISPOSITION IN LOWER COURT

The Seventh Judicial District Court, at a pretrial hearing, granted summary judgment of no cause of action in favor of the defendant and against the plaintiff.

RELIEF SOUGHT ON APPEAL

Respondent seeks affirmance of the Court's order of summary judgment granted herein.

STATEMENT OF FACTS

Since the record forwarded to this Court by the Clerk of the District Court does not have the pleadings numbered by page, it will be necessary to refer to the pleading itself without reference to page numbers.

The plaintiff and defendant were college students on summer vacation. Plaintiff resided in the State of New York, and defendant was a resident of New Jersey. They desired to visit several cities in the western states and to seek employment as they traveled from city to city. They were primarily interested in working on oil rigs. (Ptf. Dep. pp. 7 & 8) In answer to a newspaper advertisement in a New York City newspaper, the boys accompanied the owner of a vehicle to the State of Utah, assisting in driving the vehicle and in sharing the automobile expenses. After arriving, they obtained various jobs and stayed for several weeks in Utah and Colorado. (Ptf. Dep. pp. 8-13) Thereafter, the defendant indicated that the manual labor they were doing was too strenuous for him and that he desired to quit his job. It was then agreed that they would go to California and while there visit with the defendant's brother. (Ptf. Dep. pp. 46-47) The two of them left where they were working and traveled to

the City of Denver. The following morning, they answered a newspaper ad indicating that an automobile could be made available to drive to California if they would pay the expenses of driving the automobile. Both of them went to the owner of the automobile, and after the plaintiff made inquiry as to whether or not it would be permissible for the defendant to assist him in the driving, he thereafter signed a written contract with the owner of the automobile agreeing to transport the automobile to California and to pay all the operating expenses of the automobile. In addition thereto, the plaintiff was required to give a \$25.00 deposit on the automobile to guarantee its safe delivery, whereupon he was to receive a refund of the money. Plaintiff and defendant both testified that it was understood between them they would share in the expenses of operating the automobile, as well as the deposit on the automobile, and that defendant would assist the plaintiff in driving. (Ptf. Dep. pp. 13-20; Def. Dep. pp. 9-12)

They left Denver and drove to the State of Utah during the first day after receiving the automobile. A few miles south of Huntington, Utah, they drove to the edge of the roadway to sleep in the car overnight. The following morning the defendant was the first to drive. (Ptf. Dep. pp. 21-23) The plaintiff was awake from the moment they started to drive until the accident occurred. (Ptf. Dep. p. 23) Neither of the parties were familiar with the highway. The weather was clear; the day was sunny and warm. Visibility was good. As

the defendant drove down the highway, he noticed that the highway curved to the left. At this point, both plaintiff and defendant agreed that the car was moving about fifty-five miles per hour. The defendant was unable to negotiate the curve for some reason, and the car left the highway, overturning. Plaintiff and defendant were both injured. (Ptf. Dep. p. 23-30)

Plaintiff testified that he was fully satisfied with the defendant's driving. The defendant obeyed all traffic rules and regulations, did not drive beyond the speed limit and at no time did he partake of intoxicating beverages. (Ptf. Dep. p. 21-30) He did state, however, that immediately before the car left the highway he commented to the defendant to slow down as they were entering a curve. (Ptf. Dep. p. 27 and 43)

Plaintiff thereafter sued the defendant, the owner of the automobile and the driveaway company providing the automobile, alleging that the defendant Aaron was an agent or employee of the owner and driveaway company. Motions for summary judgment were filed by the owner of the vehicle, the driveaway company and defendant Aaron based upon the written contract signed by the plaintiff, which contained an agreement to hold harmless the owner, the driveaway company, and any of its agents or employees for any injury to the plaintiff. Defendant Aaron, prior to the taking of the depositions, entered an Answer to the Amended Complaint, denying any acts of negligence or willful misconduct and generally pleading the de-

fenses of contributory negligence, agency and joint venture.

The Court granted the motions for summary judgment filed by the owner and the driveway company, but denied defendant Aaron's motion, based upon his pleading that the acts of plaintiff and this defendant might constitute a joint venture. Thereafter, defendant Aaron, without objection from the plaintiff, was permitted to abandon the defense of joint venture.

The depositions of plaintiff and defendant were taken in the City of New York by associate counsel. After reviewing the depositions, a motion for summary judgment was again filed by defendant Aaron, claiming that there was no joint venture as plaintiff now alleges, based upon the depositions of the parties, and that based upon plaintiff's own testimony there was no evidence of willful misconduct.

The motion was argued to The Honorable Henry Ruggeri, District Judge, and denied. The matter was then called on for pretrial some months later. At the time of pretrial, Judge Ruggeri indicated to counsel for the plaintiff that he would have granted defendant Aaron's second motion for summary judgment had it not been for the fact that perhaps the plaintiff might develop further evidence to be considered at the time of pretrial that the Court was not aware of. The Court then thoroughly considered the issues claimed by the plaintiff, and heard the substance of the evidence that would be produced at the time the case went to trial.

Thereafter, the Court ruled that there was no evidence of a joint venture as alleged by the plaintiff, nor was there any evidence of willful misconduct by the defendant.

Plaintiff contended that these were the two issues involved in the case. (Pretrial transcript p. 34 and 46)

It should also be noted that at the time of the pretrial conference, upon motion of defendant Aaron and without objection of the plaintiff, the defense of agency or imputed negligence was abandoned by the defendant. (Pretrial transcript p. 29)

POINTS URGED FOR AFFIRMANCE

POINT I

SUMMARY JUDGMENT BY THE COURT WAS PROPER AS THERE WAS NO GENUINE ISSUE OF FACT TO BE PRESENTED TO THE JURY.

POINT II

THE PRETRIAL JUDGE CORRECTLY RULED THAT THE PARTIES WERE NOT ENGAGED IN A JOINT ENTERPRISE.

POINT III

THE PRETRIAL JUDGE WAS NOT PRECLUDED FROM CONSIDERING THE MOTION FOR DISMISSAL AT THE TIME OF PRETRIAL.

POINT IV

THERE WAS NO ISSUE OF FACT AS TO WILLFUL MISCONDUCT ON THE PART OF THE DEFENDANT.

ARGUMENT

POINT I.

SUMMARY JUDGMENT BY THE COURT WAS PROPER, AS THERE WAS NO GENUINE ISSUE OF FACT TO BE PRESENTED TO THE JURY.

The Court inquired of plaintiff's counsel whether or not the plaintiff had any additional evidence other than the depositions of the plaintiff and defendant concerning the facts as to how the accident happened or the arrangement of the plaintiff and the defendant in the use of the automobile. Plaintiff's counsel responded that there was no additional evidence that could be presented at the time of trial and that the depositions were in sum and substance the evidence concerning both the issue of joint venture and the issue of willful misconduct. It was agreed that there were

only two issues to be resolved: Was there a joint venture and or willful misconduct, excluding plaintiff from the terms of the Guest Statute.

Viewing the evidence most favorable to the plaintiff, as we must do, the testimony of the plaintiff was that he and the defendant were college students desiring to visit several cities in the western United States during their summer vacation from college. They shared in the expenses of transportation when the plaintiff arranged for an automobile to drive to California. It was agreed that defendant would assist him in the driving, together with sharing expenses of operation. After being informed by counsel for the plaintiff that there would not be any additional evidence, the Court ruled that there was insufficient evidence to raise a jury question either as to joint venture or willful misconduct.

This Court has said on many occasions that although issues concerning joint venture or willful misconduct are usually to be decided by a jury, where the evidence is such that reasonable minds could not differ, the Court may rule on the issues as a matter of law. See *Ricciuti vs. Robinson*, 2 Ut.2d 45, 269 P.2d 282, and *Roylance vs. Davies*, 18 Ut.2d 395, 424 P.2d 142.

POINT II.

THE PRETRIAL JUDGE CORRECTLY RULED THAT THE PARTIES WERE NOT ENGAGED IN A JOINT ENTERPRISE.

The defendant takes no issue with the authorities cited by the plaintiff in support of the proposition that members of a joint venture are not barred from suit against one another for the individual negligence of one of the members. In reviewing plaintiff's authorities, specific attention is called to plaintiff's reference to the Restatement of the Law, Torts 2d, Section 491 (c) wherein it is stated:

"The elements which are essential to a joint enterprise are commonly stated to be four: (1) An agreement, express or implied, among the members of the group; (2) a common purpose to be carried out by the group; (3) *a community of pecuniary interest in that purpose, among the members*; and (4) an equal right to a voice in the direction of the enterprise, which gives an equal right of control." (Emphasis ours.)

The defendant respectfully submits that elements No. (3) and (4) referred to in the Restatement are absent in the instant case. In a most recent case, the Supreme Court of South Dakota considered this question. See the case of *Frederickson vs. Kleuver*, 152 NW.2d 346 (July 1967). In that case, two brothers drove to a city to attend a cattle sale, each separately interested in inspecting the cattle for his own personal benefit. On the return trip home, one of the brothers driving the automobile became involved in an accident with the plaintiff. The plaintiff attempted to join the other brother as a defendant, alleging a joint enterprise by virtue of their attending a cattle sale. The Supreme Court of South Dakota stated in part:

“The elements necessary to constitute a joint enterprise are seldom found in purely social arrangements or matters of friendly accommodation between friends, neighbors, and relatives. As pointed out in Prosser, Law of Torts, Third Edition, Page 490: ‘It is generally agreed that something more is required for a joint enterprise than the mere showing of a contract or agreement to travel together to a destination for a common purpose. Something in the nature of a common business, financial or pecuniary interest in the object of the journey is said to be essential.’ The essential elements are generally considered to be: (1) An agreement, express or implied, among the members of the group; (2) a common purpose to be carried out by the group; (3) a community of pecuniary interest in that purpose among the members; and (4) an equal right to a voice in the direction and control of the enterprise, which gives an equal right of control.”

The Court thereafter ruled that the evidence in the Frederickson case fell short of showing that the brothers were involved in a joint enterprise on their cattle buying trip. The Court said that since they went to the cattle sale to inspect cattle separately for their individual benefit, not connected with any joint business arrangement, the elements of a common financial interest in the purpose of the trip was lacking.

This Honorable Court stated in the recent case of Hall vs. Blackham, 18 Ut.2d 164, 417 P.2d 664, as follows:

“In the present case, the only purpose of the trip was duck hunting among friends, a trip

from which they were returning. In that sense, there was a common purpose, but no decision ever imputed the driver's negligence to the guests, just because they were all pleasure riding and meant to enjoy themselves together or separately at the journey's end."

This Court further stated:

"If we were to conclude as the plaintiffs request that there was a joint venture, the doctrine of joint enterprise would be applied to situations which are in fact only matters of friendly or social cooperation and accommodation where the reason for placing liability upon the participants is not the same as if they were engaged in business or a commercial venture."

Plaintiff, at page 9 of his brief, cites the case of *Derrick vs. Salt Lake Railway Company*, 50 Utah 573, 168 Pacific 335. It is respectfully pointed out that in the *Derrick* case, the parties involved in the accident were traveling salesmen on a business trip. The sole purpose of the trip was business. It was certainly not a trip of companionship, society and friendly accommodation as we have in the instant case. Nowhere is it contended by the plaintiff that he and the defendant were traveling to California on a mutual business trip of any nature whatsoever. It is admitted by plaintiff that they were going to California as part of their itinerary of visiting various cities in the western states during their summer vacation and in conjunction therewith defendant could visit with his brother. Under no stretch of the imagination could such a purpose con-

stitute a commercial or business relationship between the parties.

Plaintiff, at page 8 of his brief, cites the Restatement of the Law, Torts 2d as to what the necessary elements are to constitute a joint enterprise. One of the elements is a community of pecuniary interest in the purpose among the members. This element was totally lacking in the instant case as concluded by the pretrial judge. The purpose of the trip between plaintiff and defendant was purely social. They were accompanying each other on their vacation tour for society and companionship. The plaintiff quotes the case of *Fox v. Lavender*, 89 Utah 115, 56 P.2d 1049, as support for his claim of joint venture. The quotation at page 11 of his brief clearly shows that a mere pleasure ride between two individuals does not constitute a joint venture. The case involved the owner of the vehicle who was riding in the vehicle at the time of the accident, injuring a third person, which is unlike the facts in the instant case.

At page 12 of plaintiff's brief, he states:

"The parties testified as to their agreement: their community of purpose; their equal right to control and their agreement to share equally in the expenses of the trip."

Defendant respectfully points out that no reference to any part of the record or to the depositions of the parties have been referred to by the plaintiff in support of such a statement. The fact of the matter is the testi-

mony of the plaintiff and the defendant was to the effect that the plaintiff inquired of the owner of the automobile if it would be permissible to allow the defendant to assist him in the driving of the vehicle. (Ptf. Dep. p. 15) The mere fact that the defendant was to assist in payment of some of the expenses in the operation of the automobile on their sight-seeing trip to California is not sufficient to constitute a joint venture. See *Greenhalgh v. Green*, 16 Ut.2d 221, 398 P.2d 691; *Smith v. Franklin*, 14 Ut.2d 16, 376 P.2d 541; and *Hall v. Blackham*, (supra).

Plaintiff argues at page 11 of his brief that each of the parties had a vested interest in the automobile and an equal voice and right to be heard respecting the details of the journey. Again, his statement is made without support of the record in any manner. Nor does the plaintiff plead that there was an agency or joint venture between the parties, but specifically alleges in his Amended Complaint that the defendant was the agent of the owner of the vehicle in driving the vehicle. The defendant withdrew and abandoned any claim of agency or joint venture without objection from the plaintiff, and with approval of the Court.

The plaintiff represented to the pretrial judge that his claim against the defendant was based upon two separate grounds. One, that there was a joint venture between the parties; and, two, in the event of a failure to prove joint venture, the defendant was guilty of willful misconduct. (Trans. p. 34 and 46) Based upon

these allegations and the facts contained within the record, coupled with statements of counsel, the Court determined as a matter of law that plaintiff was not entitled to recover. The Court correctly ruled that the agreement between the parties to make a pleasure trip to California with a sharing of the automobile expenses did not constitute a joint venture.

POINT III.

THE PRETRIAL JUDGE WAS NOT PRECLUDED FROM CONSIDERING THE MOTION FOR DISMISSAL AT THE TIME OF PRETRIAL.

At page 13 of plaintiff's brief, he quotes from the decision of Judge Keller concerning the first motion for summary judgment by the defendant Aaron wherein the Court denied the motion because of the *allegations of defendant Aaron's Answer that he and the plaintiff were engaged in a joint or common enterprise at the time of the plaintiff's alleged injuries.* (Italics ours.)

Defendant has no argument with the statement of the Court, based upon the facts presented to the Court at that time. However, it is respectfully pointed out that the motion was made at the commencement of the suit and prior to the taking of the depositions of the parties. Thereafter, the defendant Aaron moved the Court for permission to abandon the defense of

joint enterprise without objection from the plaintiff, and the Court granted said motion.

Plaintiff also fails to include in his brief that the motion was based upon matters not now before the Court, as the original motion for summary judgment made by defendant Aarfon was based upon the written contract introduced into evidence at the commencement of the suit, and plaintiff's original Complaint. It is respectfully submitted that a trial court may at any stage of the proceedings entertain a motion to dismiss a suit where the Court feels the motion is well taken. Plaintiff maintains that if a motion to dismiss or for summary judgment is denied at the commencement of litigation that the parties are thereafter forever barred from obtaining a dismissal of the action by motion. Such a contention is obviously incorrect on its face. The Court has the inherent power to dismiss an action at any time the Court deems that such action is without merit and the issues are still before the Court.

POINT IV

THERE WAS NO ISSUE OF FACT AS TO WILLFUL MISCONDUCT ON THE PART OF THE DEFENDANT.

The plaintiff testified throughout his deposition that the defendant did not drive at an excessive rate of speed, that he obeyed all of the traffic rules and regulations, and that he did not partake of intoxicating beverages at any time. In substance, he was com-

pletely satisfied with the manner in which the defendant was operating the automobile. Under such a state of facts, the Court properly ruled that the mere fact that the defendant failed to negotiate a turn on the highway under the facts as presented by the plaintiff was not sufficient evidence to justify submitting to any jury an issue of willful misconduct. This Court's attention is respectfully called to the case of *Ricciuti vs. Robinson* (supra.) wherein the Court fully sets forth the conduct of a driver to be considered in relation to a charge of willful misconduct. The opinion further states that willful misconduct is not shown by allegations of ordinary negligence. See also *Milligan vs. Harward*, 11 Ut.2d 74, 355 P.2d 62, and *Roylance vs. Davies*, (supra.)

CONCLUSION

It must be kept in mind that the testimony of the plaintiff and the defendant would constitute the sum and substance of the evidence that could be produced at the time of trial as to the relationship of the parties and the conduct of each leading to the accident. It is respectfully submitted that neither the plaintiff nor the defendant testified to any state of facts sufficient to constitute a joint venture. The plaintiff's evidence is completely lacking in facts showing a business or commercial venture involving a pecuniary interest to the parties sufficient to bring the case within the rules as set forth in the Restatement of the Law of Torts 2d.

Section 491, which he adopts in his brief. The necessary elements of a joint venture cannot be found in plaintiff's evidence.

The mere fact that defendant failed to negotiate the curve in question does not constitute willful misconduct. It is respectfully submitted that the facts as presented by the plaintiff and construed most favorable to him show nothing more than two college students on a summer vacation sight-seeing trip to California and to visit with defendant's brother. In accomplishing this purpose, the parties agreed to share the automobile expenses and the task of driving a borrowed automobile. Plaintiff alleges in one breath that the defendant was guilty of willful misconduct in the operation of the automobile, but in the next breath, states that he was completely satisfied with the manner in which the vehicle was being operated. The inconsistency of plaintiff's position appears obvious.

It is respectfully submitted that the ruling of the Trial Court in dismissing plaintiff's case should be sustained.

Respectfully submitted,

BAYLE, HURD & LAUCHNOR

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