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IN THE SUPREME COURT OF THE STATE OF UTAH

MICHAEL MUKASKEY,
Plaintiff and Appellant,

vs.

ROBERT S. AARON,
Defendant and Respondent.

Case No.
~~11008~~
11008

BRIEF OF APPELLANT

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

FILED
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Supreme Court, Utah

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IN THE SUPREME COURT OF THE STATE OF UTAH

MICHAEL MUKASKEY,
Plaintiff and Appellant,

vs.

ROBERT S. AARON,
Defendant and Respondent.

Case No. 11088

BRIEF OF APPELLANT

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 a summary judgment of No Cause of Action in favor of defendant and against plaintiff.

RELIEF SOUGHT ON APPEAL

Plaintiff seeks reversal of the entry of the summary judgment and seeks a decision remanding the case for trial by jury.

STATEMENT OF FACTS

The Amended Complaint alleges that on the 3rd day of August, 1963, plaintiff was riding as a passenger in a 1963 Chevrolet automobile being driven by the defendant. That near the City of Huntington, Emery County, State of Utah, defendant so negligently and/or willfully misconducted himself in the operation of said automobile as to cause an accident which resulted in plaintiff suffering severe personal injuries.

Defendant answered the Amended Complaint and admitted plaintiff was a passenger in the automobile, but denied defendant was negligent or guilty of willful misconduct. As an affirmative defense, defendant alleged he was driving the automobile as the agent or under the control of plaintiff and therefore, his negligence, any, was imputed to plaintiff.

In reply to the defense of imputed negligence, plaintiff claimed the parties were engaged in a joint enterprise and therefore, the negligence of the defendant driver would not be imputed to plaintiff.

Defendant filed Motions for Summary Judgment. In support of these motions, defendant had published and introduced into evidence the depositions of the

parties. In these depositions, the parties testified to their legal relationship and the facts surrounding the accident.

Plaintiff testified he and the defendant were school friends and residents of the New York City area; that during the summer of 1963 they decided to travel together to the western part of the United States, and, particularly to Utah and Colorado area to look for employment on oil rigs. They secured transportation for their trip by answering an ad in the New York Times which offered rides to Denver and California on a share expense basis. After arriving in Colorado, they lived and worked in several towns, including Craig, Colorado, and on August 2, 1963, returned to the City of Denver. Up to this point they shared equally all of their expenses for lodging, food and transportation.

While in Denver, they decided to continue their trip west and travel to the State of California. An additional reason for selecting this state was to enable defendant to visit his brother. To obtain transportation for this journey, the parties answered a newspaper ad of the Atlantic Pacific Driveaways Company which furnished to qualified applicants an automobile to be driven to California.

In order to qualify for this automobile, it was necessary to post a $25.00 deposit and execute a written contract with the company. Due to the financial condition of defendant, plaintiff consented to make the deposit and sign the contract. It was agreed, however,

that defendant had equal right to drive the automobile. It was also agreed that defendant would repay one half the deposit, or $12.50 and pay one half of all of the operating expenses.

The contract was general in nature and by its terms transferred possession of the automobile to plaintiff. (Ptf. Dep. pgs. 8-20).

The defendant, by his deposition, verified all of the facts testified to by the plaintiff. (Dft. Dep. pgs. 5-12).

After completing these arrangements with the company they received a 1963 Chevrolet automobile and started their trip to California.

In describing the accident, the parties testified that after leaving Denver they alternated driving and slept in the automobile that evening. The following day, defendant started driving and immediately prior to the accident was traveling at a speed of approximately 50 miles per hour. Defendant testified that he suddenly approached a curve and because of his speed was unable to negotiate the same and the automobile left the highway and overturned. Plaintiff testified that just prior to the accident he had been sleeping and awakened just as the automobile entered the curve. Plaintiff admitted that prior to this point in the journey defendant had evidenced reasonable care in the manner in which he drove the automobile. (Dft. Dep. pgs. 16-19).

Defendant contended the testimony from these depositions established, as a matter of law, there was

no issue of fact regarding the claim of either joint enterprise or willful misconduct. On two separate occasions, Judge Keller and Judge Ruggeri denied Motions for summary judgment. At the conclusion of the pretrial conference, however, defendant, over the objection of plaintiff, again moved for a dismissal. This time, Judge Ruggeri granted the Motion. In rendering this decision, the court stated as follows:

> " * * * The Court feels that, the Court was about - - - let me say, to grant the Motion at the time the matter was overruled, and felt that there might be some question of fact as argued by counsel for the plaintiff in his memorandum, that there might be some question of fact. The Court is of the opinion that there is no question of fact; * * * and it is ordered that Summary Judgment be had * * * in favor of defendant and against plaintiff."

It is the entry of this judgment which is the subject of this appeal.

POINT I

TO JUSTIFY SUMMARY JUDGMENT, THERE MUST BE NO GENUINE ISSUE OF FACT PRESENTED.

As previously stated, the pretrial judge, in granting defendant's Motion for Summary Judgment, ruled there was no genuine issue of fact concerning either the legal relationship between the plaintiff and defendant or whether defendant was guilty of willful mis-

conduct in the manner in which he drove the automobile. If an issue of fact existed with respect to these matters, then the trial court committed error. See *Young vs. Felornia,* 121 Utah 646, 244 P. 2d 862; *Morris vs. Farnsworth Motel,* 123 Utah 289, 259 P. 2d 298.

In *Abdulkabir vs. Western Pacific Railroad Company,* 7 Utah 2d 53, 318 P. 2d 339, this court stated:

> "We are in accord with the idea that the right of trial by jury should be scrupulously safeguarded. This, of course, does not go as far as to require the submission to a jury of issues of fact merely because they are disputed. If they would not establish a basis upon which plaintiff could recover, no matter how they were resolved, it would be useless to consume time, effort and expense in trying them, the saving of which is the very purpose of summary judgment procedure. The pertinent inquiry is whether under any view of the facts the plaintiff could recover. It is acknowledged that in the face of a motion for dismissal on summary judgment, the plaintiff is entitled to have the trial court, and this court on review, consider all of the evidence which plaintiff is able to present, and every inference and intendment fairly arising therefrom in the light most favorable to him."

With this controlling rule in mind, plaintiff will now move on to a consideration of whether the pleadings and depositions and statements made at the pretrial conference present a genuine issue of fact that should have been presented to a jury.

POINT II

THE PRETRIAL JUDGE COMMITTED ERROR IN RULING THE PARTIES WERE NOT ENGAGED IN A JOINT ENTERPRISE.

It is a well accepted principle of law that the legal relationship of a joint enterprise or joint venture may exist between a driver of an automobile and a passenger riding with him. It is also well accepted that in this relationship the negligence of the driver is not imputed to the passenger so as to preclude recovery in an action between the two members of the joint enterprise. This legal proposition is set forth by the following authorities:

In 8 *Am. Jur., 2d, Automobiles,* Sec. 681, P. 233, is stated:

> "The negligence of one member of a joint enterprise driving a motor vehicle may not be imputed to another member of the joint enterprise riding with him, for the purpose of precluding liability of the former to the latter for personal injuries resulting from the negligent operation of the vehicle. In other words, where one joint adventurer is guilty of a tortious act in the operation of a motor vehicle to the damage of an associate in the joint venture, he must respond in damages."

In the annotation 62 *A.L.R.* 440, 85 *A.L.R.* 630, appears the following:

> "The rule announced in the reporting case that the doctrine of imputed negligence is in-

applicable to a member of a joint enterprise or common adventurer injured as a result of negligence of the owner or operator of an automobile while using it within the scope of the enterprise while the act is between the parties to the enterprise, has been followed or at least recognized in the following cases. * * *"

It is also a well accepted principle of law that in cases involving joint enterprise, a determination of the issue is a matter which should be presented to a jury. See *Robinson Transportation Co., et al., v. Hawkeye-Security Insurance Company,* 385 P. 2d 203, wherein the Wyoming Court, in referring to another case, stated:

"Where the existence of the relationship is in issue, the question is pre-eminently one for the finder of fact."

In *Howard v. Alta Chevrolet Company, et al.,* 243 P. 2d 804, the California Court stated as follows:

"The law is well settled that in order to come within the joint enterprise rule, a passenger in an automobile must either exercise control or have the right to exercise control over its operation. * * * Whether or not such a right of control exists depends upon the circumstances in each particular case, and usually depends upon several questions of fact which are for the jury to determine in light of the applicable principles of law."

See Re-Statement of 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. Whether these elements exist is frequently a question for the jury, under proper direction from the court."

This court, in a number of decisions, has set forth the requirements necessary to establish this legal relationship of joint enterprise in automobile cases.

In the early case of *Derrick v. Salt Lake Railway Company*, 50 Utah 573, 168 P. 335, plaintiff was a passenger in a car being driven by the owner. Both parties were salesmen and were traveling to Northern Utah and Idaho when they collided with defendant's train at a crossing. The evidence revealed the parties had planned the trip together and plaintiff was to pay his proportionate share of the expenses. Based on this testimony, defendant requested the court to instruct the jury on the theory of joint enterprise and imputed negligence. The trial court refused. In reversing this ruling, this court stated as follows:

"The undisputed evidence shows that the automobile trip was a joint affair in which Merritt and plaintiff were mutually and equally interested, and in which their rights to direct and govern the conduct of each other in relation thereto were coextensive. Each had a voice and

the right to be heard in regard to the details of the trip. Merritt testified that 'the arrangements were equal; that is ,they were mutual among us all.' He further testified: 'When we started we had agreed to take lots of time and not drive fast. We discussed this on the way out,' and that 'it was clearly understood' that each would pay his share of the expenses of the trip. Plaintiff testified that costs of the trip included gasoline, oil, tires, 'wear and tear on the car, and other expenses connected with the trip.'

The contractual relations of plaintiff and his traveling companions were substantially the same as they would have been if they had jointly hired an automobile with which to make the trip, with the understanding that they woud jointly pay the expenses and mutually and concurrently direct the journey and the details thereof. The trip was therefore a joint enterprise in which these parties had a community of interest and in which they all equally had a voice and a right to be heard respecting the details of the journey. Under these circumstances the negligence of Merritt in the management of the automobile at the time of the collision was imputed to plaintiff. * * *

Under the law applicable to the admitted facts defendant would have been entitled to have the jury instructed, if it had so requested, that if they should find that Merritt was negligent, such negligence, as a matter of law, would be imputed to plaintiff."

This rule was followed in *Balle v. Smith,* 81 Utah 179, 117 P. 2d 224, and *Hill v. Blackham,* 18 Utah 2d 164, 417 P.2d 664.

In *Fox v. Lavender,* 89 Utah 115, 56 P.2d 1045, Justice Wolfe discussed the theory of joint enterprise as follows:

> "In several of the cases there were slight circumstances beyond the mere owner's presence; in others there are loose statements of there being a 'joint enterprise' or 'common purpose,' when the common purpose was only a destination or a pleasure ride such as any guest might participate in. Certainly where a driver invites several to go to a dance or agrees to carry them because he is going there himself, there is in a sense a common purpose; but no sound 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. Such a joint venture or common enterprise as makes occupants of a car mutual agents and principlals in the operation of the car is one in which the business they are on or which they intend to do on the outcome of the journey involves such a community of interest and obligations as will make the trip itself an integral part of such venture, and therefore each throughout the trip is the agent of the other, not only for the purpose to be accomplished by the journey, but in the journey itself. The purpose for which they are being transported and the thing which they intend to do must involve such a community of interest as to make each the agent of the other in the actual accomplishment of that final purpose, so that there is derived from the mutual agency in the control and operation of the car on the journey which is an inseparable incident from the purpose on which they are going, the pur-

pose and the trip itself being considered as one whole transaction in which throughout there is a reciprocal agency or a cross-relationship of agent and principal. The nature of the thing to be jointly accomplished makes the trip itself a part of that purpose. * * *"

See also 8 Am. Jur. 2d, *Automobiles and Highway Traffic,* Sec. 679, page 230 and 48 *A.L.R.* 1055, 1061.

In applying the foregoing principles to the case at bar, it is clear all of the elements listed have been established by the testimony of the parties.

The parties testified as to their *agreement;* their *community of purpose;* their equal right to *control* and their agreement to share equally all of the expenses and *costs* of the trip. The foregoing facts are supported by the record. Plaintiff is at a loss to understand what additional proof is necessary to establish the legal relationship of joint enterprise.

Plaintiff submits this case presents a classic situation of two persons banding together to jointly accomplish a common goal. Plaintiff respectfully submits that for a court to conclude, as a matter of law, that the testimony of the parties did not at least raise an issue of fact as to whether they were engaged in a joint enterprise, is to completely ignore the testimony of the parties and the proper inferences to be drawn therefrom. We submit this is not a case where two mutual friends were embarking on a trip to the corner drug store for a soda or on a duck hunting trip, but this is a case where two people, 1500 miles from their home,

were joined together for not only their mutual benefit, but because of necessity. It is our position that when these parties obtained the automobile and commenced the trip to California, each had a vested interest in the automobile and the trip and each had an equal voice and right to be heard respecting the details of the journey.

In view of the testimony contained in the depositions and considering the same in the light most favorable to plaintiff, we respectfully submit a jury question was presented regarding the legal relationship of the parties and the decision of the pretrial judge was error.

POINT III

THE PRETRIAL JUDGE WAS PRECLUDED FROM CONSIDERING A MOTION FOR SUMMARY JUDGMENT.

Plaintiff respectfully submits the pretrial judge was precluded from entertaining the Motion for a Summary Judgment. As the court will recall, on August 20, 1965, Judge Keller, in denying the same motion, stated in a memorandum decision as follows:

> "I conclude from the allegation of the 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 * * *."

Plaintiff respectfully submits that in view of the foregoing decision, the pretrial judge abused his discretion in reconsidering the motion.

We submit that a party is entitled to rely on decisions made by judges and the pretrial judge should have deferred a ruling on the issue of joint enterprise until all of the evidence had been presented to him and the parties had rested. The court would then have been in a position to consider the merit of Judge Keller's decision. Therefore, we respectfully submit the court should reverse the decision of the pretrial judge.

POINT IV

THERE WAS AN ISSUE OF FACT AS TO WILLFUL MISCONDUCT OF THE DEFENDANT.

While plaintiff does not concede he was a passenger in the automobile and not abandoning the argument made under the other points of this brief, plaintiff respectfully submits there was an issue of fact regarding the willful misconduct of defendant. As the court will recall, defendant was traveling at approximately 50 miles per hour when he suddenly became aware he was approaching a curve. In view of his excessive speed, he was unable to negotiate the curve and therefore the automobile left the road, overturned and caused injuries to plaintiff.

It is the position of plaintiff that reasonable minds could conclude that defendant, in driving at such an excessive rate of speed in an area of which he was unfamiliar constituted willful misconduct.

CONCLUSION

For the reasons above set forth, and in the interest of justice, it is respectfully submitted that this Court should reverse the District Court ruling and remand the case for a trial by jury.

Respectfully submitted,

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