

1983

**Tamara "Tammy" Sorenson v. Steve M. Aller, James J. Hill, And
Fred A. Moreton & Company, A Utah Corporation v. Pam A.
Mcconaghy : Appellant's Brief**

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IN THE SUPREME COURT OF THE STATE OF UTAH

BERNICE "MAMMY" SORENSON,)
)
 Plaintiff,)
)
 vs.)
)
 STEVE M. ALLER, JAMES J. HILL,)
 and FRED A. MORETON & COMPANY,)
 a Utah corporation,)
)
 Defendants, Third-)
 Party Plaintiffs and) No. 19029
 Respondents,)
)
 vs.)
)
 PAM A. McCONAGHY,)
)
 Third-Party Defendant)
 and Appellant.)

APPELLANT'S BRIEF

Appeal from a Judgment of the District Court
of Salt Lake County, State of Utah
Honorable J. Dennis Frederick

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FILED

JUN 6 - 1983

IN THE SUPREME COURT OF THE STATE OF UTAH

 "AM" SORENSON,)
)
 Plaintiff,)
)
vs.)
)
STEVE M. ADLER, JAMES J. HILL,)
and FRED A. MORETON & COMPANY,)
a Utah corporation,)
)
 Defendants, Third-)
 Party Plaintiffs and)
 Respondents,)
)
 vs.)
)
RAM A. McCONAGHY,)
)
 Third-Party Defendant)
 and Appellant.)

No. 19029

APPELLANT'S BRIEF

Appeal from a Judgment of the District Court
of Salt Lake County, State of Utah
Honorable J. Dennis Frederick

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IN THE SUPREME COURT OF THE STATE OF UTAH

TAMMY SORENSON,)
Plaintiff,)
vs.)
JEFF M. ALLER, JAMES J. HILL,)
and FRED A. MORETON & COMPANY,)
Utah Corporation,)
Defendants, Third-) No. 19029
Party Plaintiffs and)
Respondents,)
vs.)
PAM A. McCONAGHY,)
Third-Party Defendant)
and Appellant.)

APPELLANT'S BRIEF

STATEMENT OF NATURE OF CASE

This is an appeal from a judgment granting contribution against third-party defendant, Pam McConaghy, who was the host driver of a vehicle in which the plaintiff was riding as a guest when injured in a three-car accident on I-15 at the Alpine overpass in Utah County.

DISPOSITION IN LOWER COURT

The guest plaintiff, Tammy Sorenson, alleged in her complaint that her host driver, Pam McConaghy, and two other drivers, Steve Aller and James J. Hill, were all negligent in

causing her injuries arising out of the accident which occurred on January 30, 1981.

Judge David Dee granted defendant McConaghy's motion for summary judgment as against the plaintiff on her complaint against defendant McConaghy because of the Utah guest statute but denied defendant McConaghy's motion for dismissal of the cross-claims of James Hill and Aller for contribution. (R. 103-104) The case was tried to a jury with the Honorable Dennis Frederick presiding. At the conclusion of the evidence, a motion by McConaghy for a directed verdict against Hill and Fred A. Moreton & Company was denied. (R. 228-229)

The issue of comparative negligence was submitted to the jury and the jury found 40% negligence on the part of James Hill and 60% on Pam McConaghy and awarded damages in the sum of \$114,890.07. (R. 284-285)

Steve M. Aller settled with plaintiff just prior to trial for the sum of \$5,000 and was dismissed out of the case. (R. 217) Third-party defendant McConaghy's motion for judgment notwithstanding the verdict or in the alternative for a new trial was denied by the court. (R. 228-229)

Defendants Hill and Moreton & Company satisfied the judgment for the sum of \$95,000 and obtained a judgment for contribution against defendant McConaghy for the sum of \$54,200 after crediting a portion of the no fault benefits paid by McConaghy's insurance carrier to the plaintiff.

RELIEF SOUGHT ON APPEAL

Defendant McConaghy seeks reversal of the judgment of contributory negligence, and a judgment in her favor as a matter of law.

STATEMENT OF FACTS

Because the issue in this case is one of law and there is no dispute as to the facts raising that issue, a transcript of the testimony of the witnesses was not ordered.

The following facts are undisputed:

The plaintiff was a student at Brigham Young University and was a guest passenger in the vehicle driven by Pam McConaghy from Provo toward Salt Lake City on January 30, 1981. The accident occurred on I-15 at the overpass over the Alpine Road in Utah County at approximately 5:55 p.m., when third-party defendant McConaghy's vehicle traveling in the outside northbound lane went out of control as it hit ice on the overpass and collided with a northbound vehicle being driven by Steve Aller in the center lane of northbound traffic. McConaghy's vehicle then spun into the inside northbound lane of traffic where it was struck by Fred A. Moreton & Company's vehicle being driven by James J. Hill.

ARGUMENT

POINT 1.

THE TRIAL COURT ERRED IN SUBMITTING THE ISSUE OF COMPARATIVE NEGLIGENCE TO THE JURY AND IN DENYING THIRD-PARTY DEFENDANT MCCONAGHY'S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT.

The Utah guest statute, Utah Code Ann. §41-9-1 (1953) prohibits the third-party plaintiff in this case from any right of recovery against the host driver, third-party defendant-appellant. This Court has consistently upheld the validity of the Utah guest statute. Critchley v. Vance, 575 P.2d 187 (1978); Thomas v. Union Pacific Railroad Co., 548 P.2d 621 (1976); Cannon v. Oviatt, 520 P.2d 883 (1974); cert. denied 419 U.S. 810; rehearing denied 419 U.S. 1060. In Thomas v. Union Pacific Railroad Co., supra, this Court stated that "a re-examination of the (Utah guest statute) should be left to the legislature." Thomas at 622-23. In Critchley v. Vance, supra, this Court held that the Utah No-Fault auto insurance statute does not make a host driver of an automobile liable to his guest passenger for simple negligence. In Critchley, plaintiffs also claimed that the Utah comparative negligence statute repealed the Utah guest statute in that the comparative negligence statute provides that damages sustained by plaintiff may be reduced by reason of contributory negligence on the part of the plaintiff. This argument was rejected in Critchley. This Court has, therefore, in the past not only recognized the public policies underlying the

the present statute, but has also avoided judicial interpretations of the statute that would have allowed what is expressly forbidden by the Utah guest statute itself.

Third-party plaintiffs, however, seek to have this Court interpret the Utah contribution statute, Utah Code Ann. §78-27-39 (1973) to allow a tortfeasor to obtain a benefit that the tortfeasor's victim is specifically prohibited from obtaining by the Utah guest statute. Other than the dissent in Shonka v. Campbell, 152 N.W.2d 242 (Iowa 1967), Bishop v. Nielson, 632 P.2d 464 (Utah 1981), is the only authority upon which third-party plaintiffs rely for their contention that a tortfeasor has a right of contribution against a host driver.

The right to contribution among joint tortfeasors did not exist at common law but was created in this state by a legislative enactment, Utah Code Ann. §78-27-39 (1973). The right to contribution created by that statute is not a new cause of action; it is a derivative right that is based on a common liability to an injured party in tort. See Bishop v. Nielson, supra. Under Utah's contribution statute, a joint tortfeasor has the right to contribution from other joint tortfeasors if he has "discharged the common liability or more than his pro rata share thereof." Utah Code Ann. §78-27-39 (emphasis added). The statute defines a joint tortfeasor "as one of two or more persons, jointly or severally liable in tort for the same injury" Utah Code Ann. §78-27-40(3) (emphasis added). See Phillips v. Union Pac.

R.R., 614 P.2d 153, 154 (Utah 1980). Thus, to determine whether a person is a joint tortfeasor from whom a tortfeasor can seek contribution, it is necessary to determine what the legislature intended the term "liable" to mean.

The Utah Supreme Court has rendered several decisions in which it has discussed the right to contribution. Although the decisions appear to be inconsistent, a careful reading of those cases proves otherwise. In Phillips v. Union Pac. R.R., 614 P.2d 153 (Utah 1980), an action was brought against Union Pacific Railroad ("the railroad") to recover damages for the death of the plaintiff's husband which occurred when a car in which he was riding collided with the railroad's train. The vehicle was being driven by a fellow employee at the time of the accident. Both the decedent, the employee driving the vehicle, and their employer were residents of North Carolina. The railroad moved to join the driver and the decedent's employer as third-party defendants, seeking contribution. The trial court dismissed the third-party complaint, and the Utah Supreme Court affirmed. The court's rationale for affirming the trial court, inter alia, was that the Workmen's Compensation Acts of Utah and North Carolina were the exclusive remedies for actions against an employer and that the acts barred an action against fellow employees. The court believed that to allow an action to be brought for contribution in those circumstances "would only permit indirectly that which cannot be done directly," a result that "would be a violation

relation of expressed legislative policy." 614 P.2d at 154.

The Utah court then decided Bishop v. Nielson, 632 P.2d 868 (1981), an apparently inconsistent decision. Bishop involved an action to recover damages for property damage resulting from the collision of automobiles driven by the defendant and the plaintiff's minor, unemancipated daughter. The defendant joined the plaintiff's minor daughter, seeking contribution. The daughter moved to dismiss the third-party complaint on the ground that she was not a joint tortfeasor within the meaning of the contribution statute because the doctrine of parent-child immunity shielded her from liability to her father. The trial court denied the motion, and the Utah Supreme Court upheld that denial, finding that "the equities in favor of contribution . . . far outweigh[ed] the benefits to be achieved by a strict application of the doctrine." 632 P.2d at 868. In reaching its decision, the court quoted extensively from decisions in other jurisdictions that supported its conclusion that the doctrine of parent-child immunity did not bar an action for contribution. Even though that decision seems at odds with the court's decision in Phillips, the following language which the Utah court quoted may provide a key to why the result in Bishop is different than the result in Phillips:

With respect to the doctrine forbidding inerspousal suits in this state, it is clear that a cause of action exists which cannot be enforced . . . We agree with the plaintiff's statement that the term liable . . . refers to the existence of a

cause of action rather than the right to enforce the same and that under our law the immunity of one spouse from suit by the other is merely procedural.

632 P.2d at 867 (citations omitted) (emphasis in original). Furthermore, in discussing the result in another case, the Utah court stated: "In allowing contribution, the court held that the immunity statute did not destroy substantive causes of action arising between parent and child but only operated as a procedural bar to such actions." 632 P.2d at 867 (emphasis in original).

The Utah court's latest discussion of the right to contribution among joint tortfeasors, Madsen v. Salt Lake City School Board, 645 P.2d 658 at 662, flies in the face of the Bishop case but lends support to Phillips and the appellant's position in this case. That discussion was dicta, however, and would not be given the weight that is accorded the Bishop and Phillips decisions.

The right to contribution as between joint tort-feasors has extensively been before the courts. In considering that right courts appear to have rather uniformly taken the position that for the right of contribution to exist among joint tort-feasors, it is essential that both tort-feasors be liable for and subject to suit by the party injured by the joint negligent acts of each. Thus where suit against one of the tort-feasors was barred by a guest statute, or by a parental relationship to the injured party, or under Workmen's Compensation laws, the right to contribution from such joint tort-feasors is held not to exist.

at 662.

Appellant reads those decisions from the Utah Supreme Court as establishing a distinction between substance and procedure when determining whether a right of contribution exists. If the plaintiff has a cause of action, either enforceable or unenforceable, against a person, that person is "liable in tort," as that term is used in the contribution statute, and may be sued for contribution. However, if no cause of action exists against a particular person, he is not "liable in tort" and therefore may not be sued for contribution.

In the Bishop case contribution was allowed because the plaintiff had a cause of action against the third-party defendant but it couldn't be enforced. This would not preclude defendant's claim for contribution. However, in the Phillips case the plaintiff had no cause of action against the third-party defendant since it had been eliminated by the legislature when the Workmen's Compensation Act was enacted. The same holds true here. The legislature by enacting the guest statute eliminated, except in certain circumstances, plaintiff's cause of action against the third-party defendant. Therefore, contribution is not available to the third-party plaintiff.

CONCLUSION

The appellant is convinced that the Utah automobile guest statute destroys the substantive right to bring a cause of action and is not merely a procedural bar to an action. Thus,

under Utah law, an action may not be brought against a host seeking contribution if he is not directly liable to the guest under the guest statute. To hold otherwise would allow to be done indirectly that which the legislature has determined cannot be done directly, a result that would improperly circumvent legislative policy. Shonka v. Campbell, 152 N.W.2d 242, 245 (Iowa 1967).

Respectfully submitted this _____ day of June, 1983.

STRONG & HANNI

By _____

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MAILING CERTIFICATE

I hereby certify that two true and correct copies of the foregoing Appellant's Brief was mailed, postage prepaid, this _____ day of June, 1983, to the following:

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