

1964

Melvin Greenhalgh v. Elaine G. Green : Brief of Defendant-Respondent

Utah Supreme Court

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IN THE SUPREME COURT
of the
STATE OF UTAH

MELVIN GREENHALGH,
Plaintiff-Appellant,

vs.

ELAINE G. GREEN,
administratrix of the estate of
GERALD F. GREEN,
deceased,

Defendant-Respondent.

Case No.
10169

BRIEF OF DEFENDANT-RESPONDENT

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

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BRIEF OF DEFENDANT-RESPONDENT

STATEMENT OF THE NATURE OF THE CASE

This is an action for personal injuries brought by an occupant of an automobile against the administratrix of the estate of the deceased driver arising out of the roll-over of the vehicle.

DISPOSITION IN LOWER COURT

The lower court granted the administratrix of the estate of the deceased driver a summary judgment of "No Cause of Action."

RELIEF SOUGHT ON APPEAL

Defendant wants the summary judgment affirmed.

STATEMENT OF FACTS

The facts most favorable to the Plaintiff show that on or about October 18, 1963, the Plaintiff, Joseph Lockyer, a third person, and the deceased driver, Gerald F. Green were involved in an accident on U.S. Highway 91 approximately five miles south of Cove Fort, Utah while on a deer hunting trip. (Dep. 6-7).

The deceased, Gerald F. Green was the sales-manager for the Peerless Barber and Beauty Supply, and Joseph Lockyer and the plaintiff were salesmen for the same Company. This was the last of a number of hunting and fishing trips that they had taken for mutual pleasure and enjoyment. (R. 21).

At the time of the accident, they were riding in a Dodge Pickup Truck owned by the deceased, Gerald F. Green. Mr. Lockyer was sitting in the middle and Mr. Greenhalgh, the plaintiff, was sitting on the right side and allegedly Mr. Green was driving. (R. 21).

In his deposition, Mr. Greenhalgh stated the expenses of the trip were to be split three ways, with each member sharing and paying an equal part of the expense. All occupants of the car at the time of the accident were residents of Salt Lake City and on the night before the trip started they met at the home of Mr. Green and then left to make purchases for supplies for the trip. At the AG Market on east 33rd south near the Motor-Vu Theatre some food was purchased. The plaintiff

stated that Mr. Green purchased two-fifths of vodka, two-fifths of bourbon and they purchased four cases of beer at the AG store. Further, the plaintiff said Mr. Green filled the Dodge Pickup truck with gas in Salt Lake City, Utah and that no other gas was obtained until Holden, Utah where the plaintiff stated he paid for the purchase of some gas. (Dep. 16-17).

No claim is made that Mr. Green was guilty of willful or wanton misconduct or that he was intoxicated, but it is interesting to note that all bottles of bourbon and vodka were opened at the time of the accident, and that the occupants of the automobile were drinking beer or had just finished drinking beer at the time of the accident. (Dep. 19-20).

Two years before this accident occurred, the plaintiff and Mr. Green had gone on another hunting trip for deer and had shared expenses equally. (Dep. 21.)

ARGUMENT

POINT I.

AS A MATTER OF LAW THE PLAINTIFF WAS A GUEST IN THE DECEDENTS AUTOMOBILE AT THE TIME OF THE ACCIDENT.

Section 41-9-12 Utah Code Annotated 1953, defines a guest in an automobile as follows:

“GUEST DEFINED — For the purpose of this section the term “guest” is hereby defined as being a person who accepts a ride in any vehicle without giving compensation therefor.”

Further, with respect to the duty owed to a guest, Section 41-9-1 Utah Code Annotated 1953 provides:

“Responsibility of owner or driver of a vehicle to guest — Any person who as a guest accepts a ride in any vehicle, moving upon any of the public highways of the state of Utah, and while so riding as such guest receives or sustains an injury, shall have no right of recovery against the owner or driver of such vehicle. In the event that such person while so riding as such guest, is killed, or dies as a result of injury sustained while so riding as such guest, then neither the estate nor the legal representative or heirs of such guest shall have any right of recovery against the driver or owner of said vehicle by reason of the death of said guest. If such person so rides as a guest be a minor and sustain an injury or be killed or die as a result of injury sustained while so riding as such guest, then neither the parents nor guardians nor the estate nor legal representatives or heirs of such minor shall have any right of recovery against the driver or owner or person responsible for the operation of said vehicle for injury sustained or as a result of the death of such minor. Nothing in this section shall be construed as relieving the owner or driver or person responsible for the operation of a vehicle from liability for injury to or death of such guest proximately resulting from the intoxication or willful misconduct of such owner, or driver or person responsible for the operation of such vehicle; provided, that in any action for death or for injury or damage

to person or properly by or on behalf of a guest or the estate, heirs or legal representatives of such guest, the burden shall be upon plaintiff to establish that such intoxication or willful misconduct was the proximate cause of such death or injury or damage”.

The plaintiff contends because of the agreement to share expenses of the trip that he was not a guest in the deceased's automobile at the time of the accident. If the plaintiff is a guest, he is barred from recovery, because neither willful misconduct nor intoxication are alleged in the complaint.

In *Jensen vs. Mower* (1956) 4 U. 2d 336, 294, P.2d, 683, this court said that if a driver of an automobile extended the courtesy of the ride to a friend without more or takes on a hiker overtaken on a highway, the status of “guest” would within the meaning of the automobile guest statute, is not replaced by that of passenger merely because gasoline is purchased, meals are paid for, or cash is given by the rider to assist the driver in meeting the expenses of the trip. In *Jensen vs. Mower*, supra, our court said our guest statute is substantially the same as the California statute which reads:

“No person who as a guest accepts a ride in any vehicle upon a highway *without giving compensation* for such ride * * * has any right of action for the civil damages against the driver of such vehicle * * * unless the Plaintiff in any such action, establishes that such injury or death proximately resulted in intoxication or willful misconduct of said driver.” (Emphasis added)

In the leading case of *Whitmore vs. French*, (1951) 37 Cal. 2d 744, 235 P.2d 3, the California Supreme Court used this language:

“The designations ‘passenger’ and ‘guest’ have been adopted for the purpose of distinguishing a person who has given compensation within the meaning of section 403 of the Vehicle Code from one carried gratuitously. *Gruzie vs. Sanders*, 237, 241, 143 Pacific 2d 704. A person who accepts a ride does not cause to be guest and become a passenger merely by extending customary courtesies of the road, such as paying bridge or ferry tolls (see Rest., Torts, Section 490, a), and it has been held that the sharing of expenses does not destroy the host and guest relationship if nothing more is involved than the exchange of social amenities and reciprocal hospitality. *McCann vs. Hoffman*, 9 Cal 2nd, 279, 70 Pacific 2d 909. Where however, the driver receives a tangible benefit, monetary or otherwise, which is a motivating influence for furnishing the transportation, the rider is a passenger and the driver is liable for ordinary negligence. (Citing cases.)”

In Harper and James, Law of Torts, Volume II, Section 16.15, Page 958, it is stated:

“* * * All agree that the occupant is a guest where he obtains the benefits of the ride if his presence confers none upon the host except the satisfaction of hospitality and social relationships. On the other side, the passenger who pays money as a fare, and not by way of reciprocating hospitality in clearly not a guest.”

In California in *McCann vs. Hoffman* (1937) 9 Cal. 2d 279, 70 P. 2d 909, the California Supreme court, sitting in bank, sustained a judgment of nonsuit, for two couples who went on a family automobile trip to an apparent tacit and natural understanding that such expenses would be equally shared and when an accident arose at an intersection on the trip.

In *McCann vs. Hoffman*, supra, the California Court said:

“The great weight of authority is to the effect that the sharing of the cost of gasoline and oil consumed on a trip when that trip is taken for pleasure or social purposes, it is nothing more than the exchange of social amenities and does not transform into a passenger one who without such exchange would be a guest, and consequently is not payment for the transportation or compensation within the meaning of statute. It is obvious that if a different result obtained under any construction of statute, its purposes would be defeated and its effect annulled. The relationships which will give ride to the statute, of a passenger must confer a benefit of tangible nature and are limited”.

In another California case, *Kroiss vs. Butler*, (1954) 129 C. A. 2d 550, 277 P. 2d 873, where the plaintiff tried to bag a golden goose subsequent to an accident which occurred on a quail hunting expedition and where the plaintiff claimed he was a passenger for hire because he has superior knowledge of terrain offering seclusion, cover and feed

for quail, and superior ability to call quail and to recognize signs of quail, and where the driver and appellant were friendly and had hunted together previously, and where each party took his own gun and shells, where the driver selected the place to hunt and where there was no discussion regarding their relative abilities, the court held evidence not sufficient to support a verdict for the appellant.

In Kansas, in *Bedenbender vs. Watts*, (1955) 177 Kan. 531, 280 P. 2d 630, where a lawsuit arose subsequent to a pheasant hunting trip, the court declared where the parties of the pheasant hunt had agreed to share expenses and where the trip was for social and mutual pleasure and where there was an arrangement to share expenses for gasoline, oil and meals, that the payment for those did not constitute payment for transportation within the meaning of the guest statute and that the parties enjoyed the relationship of host and guest and the court affirmed a Judgment of Dismissal on demurrer to the complaint.

In South Dakota in *Schlim vs. Gau* (1963) S. D., 125 N.W. 2d 174 where four friends were on an antelope hunting trip under an arrangement whereby they were to share the automobile expenses and where an accident occurred after the automobile owner permitted another member of the hunting group to drive it, and where the trial judge directed a verdict for the defendant driver, the appellant court held that the trial judge correctly directed the verdict for the defendant driver as the

arrangement to share expenses for gasoline did not change the plaintiffs' status from that of guest to passenger.

In Nevada, in *Kuser vs. Barengo* (1953) 70 Nev. 66, 254 P. 2d 245, where the plaintiff asked for a ride to a convention in Las Vegas from Reno, where the parties lived, and where permission to take the trip was taken with the understanding that each party would pay a portion of the expense for the gasoline and auto, the court held as a matter of law, the plaintiff was a guest and could not recover.

In *Ansback vs. Greenberg*, (1953) 256 S.W. 2d 1, the Kentucky Court, where the plaintiff and defendant went to Florida to visit the daughter of the plaintiff, and where the trip was made in the defendant's automobile, and driver fell asleep, and where it was agreed the plaintiff would pay one-half of the cost of the gas and oil, and court held the plaintiffs were "guests" of the defendant and not "paying passengers," and that within the meaning of the Georgia guest law, the plaintiff could not recover for accidental injuries unless such acts were caused by gross negligence, which the facts did not show.

In Idaho in *Riggs vs. Rogers* (1953) Idaho 37 743, 264 P. 2d 698, the Idaho court said mere paying for gas and oil or sharing payment therefore of itself is not sufficient to establish a passenger status where the occupant paid nominal cost to help defray the expenses of the transportation.

In Colorado, in *Mears vs. Kovacic* (1963) Colo....., 381 P. 2d 991, the Colorado Supreme Court, sitting en banc, held where the automobile occupant had agreed to pay the driver, a close personal friend, for such incidental expenses as gasoline, oil, food and lodging, but did not contemplate paying driver for depreciation of automobile or otherwise compensating the driver and the plaintiff occupant was a guest within the guest statute, and that as a matter of law sustained the trial court's Judgment of Dismissal.

In argument it is submitted this trip was motivated or induced by the members who wished to satisfy the social pleasure of a hunting and camping trip, and that the lower court, recognizing the ordinary facts of life, properly resolved the question in favor of the defendant administratrix.

Manifestly, these men didn't drive to southern Utah merely to share in the expenses of the trip equally three ways. All substantial evidence clearly indicates the sharing of expenses was merely an act of social reciprocation and that it was not compensation for the ride.

In Utah in *Smith vs. Franklin*, (1962) 14 U. 2d 16,376 P. 2d, 541, the question arose as to what constituted compensation sufficient to change what normally would be a "guest" to a "passenger" for hire. This quote said:

"It must be conceded that where it is shown that the driver is basically a social guest,

neither the giving of just any compensation, which might be some inconsequential amount of money or other consideration of value, or even the sharing of expenses, merely for social reciprocation for the ride, would change the relationship of that of "passenger" to that of "passenger for hire." The phrase compensation therefore, as used in the statute mean compensation for the ride. Therefore, it would have to be sufficient money (or other thing of value) that it reasonably could be supposed that the party so regarded it. But whether there is profit in the transaction is obviously not the determining factor. Where payment for the ride is the main inducement for it, the fact that there may also exist some social incentive which makes giving the ride enjoyable or desirable for the driver could not change his character to that of host and guest."

Further, in *Smith vs. Franklin*, supra, it is interesting to note that the rider paid \$2.00 for gas, a sum which the driver deemed sufficient to purchase the gas for the trip, and thereafter the question was submitted to the jury as to whether or not plaintiff was a passenger for hire, and the jury found the plaintiff was not, and thereafter on appeal, two dissenting, justices of this court indicated that as a matter of law the trial court should have held the giving of the \$2.00 fare was not compensation.

In summary, it is submitted this trip was motivated by the mutual desire of the members to do some hunting and engage in a little social drinking.

The \$6.45 the plaintiff paid for a tank of gas at Holden, Utah was merely an act of social reciproca-tion. Mr. Green furnished the car and purchased all gas at the start of the trip. The plaintiff's purchase of the \$6.45 of gas was an exchange of one social amenity for another. After all, he stated they were to share the expenses equally three ways from the supplies taken, it's clearly evident they took the trip to hunt deer and do a little drinking and not merely for the purpose of sharing expenses, or compensating Mr. Green.

POINT II.

THERE IS NO COMPETENT EVIDENCE THE RIDE WAS INDUCED BY OFFER OF COMPENSA-TION.

The respondent claims as a matter of law no compensation was given and that the plaintiff was a guest in the decedent's automobile at the time of the accident. However, for the sake of argument this point is discussed as at the pre-trial hearing where the Motion for Summary Judgment was granted, Mr. Dibblee said he could prove that the decedent was induced to take his car by an offer for compen-sation.

The respondent contends proof of the rider being induced by an offer of compensation is barred.

What induced Mr. Green to drive his car is par-ticularly within his own knowledge. Section 78-11-12 Utah Code Annotated provides:

"Injury to person or death — No abatement

of cause of action upon death of wrongdoer — Action against personal representative of wrongdoer — Evidence required — Causes of action arising out of physical injury to the person or death caused by the wrongful act or negligence of another, shall not abate upon the death of the wrongdoer, and the injured person or the personal representatives or heirs of one meeting death, as above stated, shall have a cause of action against the personal representatives of the wrongdoer; provided, however, that the injured person or the personal representatives or heirs of one meeting death shall not recover judgment except upon some competent satisfactory evidence other than the testimony of said injured person.” (EMPHASIS ADDED)

Further, paragraph 3 of Section 78-24-2, Utah Code Annotated 1953, provides that the following person cannot be witnesses:

(3) *“A party to any civil action, suit or proceeding, and any person directly interested in the event thereof, and any person from, through or under whom such party or interested person derived his interest or title or any part thereof, when the adverse party in such action, suit or proceeding claims or opposes, sues or defends, as guardian of an insane or incompetent person or as executor or administrator, heir, legatee or devisee of any deceased person, or as guardian, assignee or grantee, directly or remotely or such heir, legatee or devisee, as to any statement by, or transaction with, such deceased, insane or incompetent person, or matter of fact whatever, which must have been equally within the*

knowledge of both the witness and such insane, incompetent or deceased person, unless such witness is called to testify thereto by such adverse party so claiming or opposing, suing or defending, in such action, suit or proceeding.” (EMPHASIS ADDED)

It is equally within the knowledge of the decedent, Mr. Green, what was said at the time the share-expense arrangement was made. However, it would be peculiarly within the knowledge only of Mr. Green what induced him to take the plaintiff along. Mr. Lockyer and the plaintiff, the other parties of the share-expense agreement were persons directly interested in the event and each are or were clients of Mr. Dibblee. Any opinion they had as to any matter of fact or a statement by Mr. Green would be barred by Section 78-24-2 which is commonly spoken of as the “dead man’s act.”

In *Andreades vs. McMillan* (1953) C.T. of Civ. App. of Tex., 256 S.W. 2d 477, where a personal injury action was brought against an administrator of a deceased motorist whose vehicle collided with the vehicle in which the plaintiff was riding and where it was held the trial court properly refused to allow introduction of testimony of plaintiff as to the facts and circumstances surrounding the collision the court quoted from *Holland vs. Nimitz* 111 Tex, 419, 232 S. W. 2d 298, 299, 239 S. W. 2d 185, in which the Supreme Court of Texas said.

“The object of the statute was to prohibit the interested heirs and legal representatives from

testifying as to facts, or opinions based upon observations, arising out of any transaction with the decedent which the decedent could, if living, contradict or explain. Death having sealed the lips of one of the parties, the law for reason founded upon public policy seals the lips of the other."

The purpose of the dead man's statute is to put the parties upon terms of equality in regard to giving evidence of the transaction.

In *Davis vs. Pearson* (1941) 220 N. C. 163, 16 SE 2d 655, where an action was brought against the administrator of a deceased motorist for injury sustained in an automobile accident it was held plaintiff's testimony concerning the events preceding and subsequent to accident were inadmissible under statute as concerning a personal transaction between the plaintiff and the deceased.

In *Burke vs. Peter*, (1951) 115 U 58 202 P 2d 543, where an action was brought by an administratrix of an estate to recover a promissory note found in among the possessions of the deceased and signed by the defendant as payor, this court held the trial court did not err in refusing to allow the defendant to testify concerning alleged lack of consideration for execution of note, where such fact was equally within the knowledge of the defendant and the deceased, and where administratrix did not testify concerning that transaction but only testified about a conversation purporting to referred to non-payment of the debt owed by defendant to the deceased.

As a result of the enactment of Section 78-11-12, Utah Code Annotated 1953, no longer does death of the wrongdoer abate an action against the estate or personal representative of the wrongdoer. However, the injured person may not recover judgment against the administratrix of the estate except on competent satisfactory evidence other than the testimony of said injured person and it is submitted that the dead man's act bars the plaintiff and Mr. Lockyer from offering testimony as to what induced Mr. Green to take him on the trip.

CONCLUSION

Respondent submits the plaintiff's deposition shows as a matter of law the plaintiff was a guest and he did not give compensation for the ride. The judgment of the lower court should be affirmed. Futher, it is noted that in the case of *Smith vs. Franklin* 14 U. 2d 6, 376 P 2d 541, the question of whether or not the plaintiff was a guest as a matter of law was not before the court as it was not necessary to consider the question in the *Smith vs. Franklin* case inasmuch as the jury found the plaintiff was a guest.

Respectfully submitted.

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I hereby certify that on this day
of September, 1964, I mailed two copies of the afore-
going Brief by United States mail, postage prepaid,
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at Law at the address shown on the cover of this
brief.

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