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Firemen's Insurance Co. of Newark, New Jersey v. Phillip L. Gordon and Neil Gordon : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT
of the
STATE OF UTAH

FIREMEN'S INSURANCE COMPANY OF NEWARK, NEW JERSEY,

Plaintiff,

—vs.—

PHILLIP L. GORDON and NEIL GORDON,

Defendants.

Case No. 10240

APPELLANT'S BRIEF

Appeal from the Judgment of the Third Judicial District Court for Salt Lake County
Hon. Stewart M. Hanson, Judge

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STATEMENT OF FACTS

STATEMENT OF THE KIND OF CASE

This is an action for recovery of a subrogation claim paid by and assigned to the plaintiff, arising out of a collision where the automobile of the plaintiff's assured (Ivan Johnson) was damaged and the insured Mr. Johnson was injured when an automobile owned by one defendant and driven by the other skidded onto the wrong side of the highway.

DISPOSITION IN LOWER COURT

The case was tried before the trial judge. From a judgment of no cause of action based on a finding that no negligence of defendant proximately caused the accident, plaintiff appeals.

RELIEF SOUGHT ON APPEAL

Plaintiff seeks reversal of the judgment, and judgment in its favor as a matter of law, or that failing, a new trial.

STATEMENT OF FACTS

The accident occurred December 27, 1960, on Sunnyside Avenue in Salt Lake City about 140 feet west of Padley Street, where Sunnyside runs east and west with private residences on the south and Fort Douglas on the north. The roads were dry, the weather was clear, and the visibility was good. Phillip Gordon, driving the automobile of Neil Gordon was traveling west on Sunnyside Avenue traveling 50 to 60 miles per hour, one and one-half car lengths behind a second car. Phillip Gordon failed to notice until it was too late for him to stop, that a third west-bound car had stopped to turn left at Padley Street, which intersects Sunnyside from the south. Traveling too fast to stop or slow down sufficiently, following to close behind the second car, and failing to observe the third car sufficiently early, Phillip Gordon swerved to the right onto the shoulder where he traveled some distance before his car skidded sidewards back across the west bound lane, across the center line, and still skidding sidewards in the east bound lane, struck with the side of defendant's car the front end of Ivan Johnson's vehicle which was facing east in the east bound lane. Ivan Johnson had been traveling less than 30 miles per hour and braked sufficiently to be almost stopped

at the time he was struck. The impact knocked Johnson approximately nine feet to the south. The record contains no indication of any negligence by Johnson.

At the time of the accident Phillip L. Gordon was using the automobile of Neil Gordon with gasoline furnished by Neil Gordon for the purpose of going to Park City and bringing Neil Gordon's girl friend to Salt Lake City to meet Neil Gordon about 5:00 P.M. when he got off work so that Neil Gordon and the girl friend could keep a social engagement. (Deposition of Neil Gordon, Pages 3 and 11, Deposition of Phillip Gordon, Pages 4 and 5.) Phillip L. Gordon was married at the time, but his brother Neil Gordon was unmarried. Phillip L. Gordon did not have a license and never had had one when Neil Gordon entrusted him with the automobile. (Record 72, 74 and Exhibit P-11.)

At the time of the collision Phillip L. Gordon did not have and never had had a driver's license (record 72). Phillip Gordon was driving westward and slightly downhill on Sunnyside Avenue at 50 to 60 miles per hour (record 72-73). At that point Sunnyside Avenue has a residential neighborhood to the south and a military reservation to the north. Phillip Gordon believed the speed limit to be 30 or 40 miles per hour (Phillip Gordon Deposition, Page 6, Line 7). Phillip Gordon drove 50 to 60 miles per hour as he was following another car at one and one-half car lengths distance (Exhibit P-11, Page 2; Neil Gordon Deposition, Page 12, Line 11). Although the visibility was good Phillip Gordon failed to observe until

too late a third car stop to turn south on Padley Street (Record 66; Deposition of Phillip Gordon, page 7, lines 6-13; page 15, Line 17, page 6, Lines 11-15). Phillip had good brakes and applied them (Deposition of Phillip Gordon, page 15, line 23, page 17, line 25).

The car ahead of defendant Gordon turned around the car waiting for the turn. Defendant Gordon was going too fast to stop and swerved to the right to avoid the stopped car and plowed furrows in the shoulder for a considerable distance (Record 75, 76, 79). Phillip Gordon failed to keep control of the car and skidded in a southwesterly direction with the car traveling in a sideways fashion rather than rolling forward. As the skidding car made a curving path across the west bound lane, across the center of the highway into the east bound lane, it still had a momentum of 25-30 miles per hour (record 72, 73, 76, 77, Exhibit P-7, Deposition of Phillip Gordon, page 8, line 8, page 14, line 20, page 10, line 20). Phillip Gordon did not see the Johnson car until it was 30 or 40 feet away (Deposition of Phillip Gordon, page 9, line 26). The right side of the defendants' car struck the front of the Johnson vehicle knocking the Johnson vehicle slightly back and forcing the front end of the Johnson car nine feet to the south almost at right angles (Record 68). Both autos were extensively damaged.

The investigating officer determined the probable point of impact by means of the right angle veering to the south as the front wheels of the Johnson vehicle were forced to skid sidewards. Point of impact was 140 feet

west of Padley Street and six feet south of the center line of Sunnyside Avenue (the east bound lane was 15 feet wide and the probable point of impact was nine feet north of the south edge of Sunnyside) (Record 69, 70). The defendants' car stopped facing east in the southern half of the road (Exhibit P-7).

The Johnson car left 30 feet of skid marks in the east bound lane. The officer estimated the speed of Johnson to have been less than 30 miles per hour before the emergency, and also estimated the Johnson car to have been stopped or almost stopped when hit by the defendant and forced to the south (Record 76). Phillip Gordon did not complain of or suggest that there was any negligence on Johnson's part at the time of the police investigation, at the time he signed a written statement for the adjuster (Exhibit P-11) or at the taking of his deposition. Phillip Gordon in his deposition denied any knowledge of any improper driving by Johnson (Deposition of Phillip Gordon, page 17, line 7).

Salt Lake City Police Officer Oscar J. Hendrickson investigated. He measured 30 feet seven inches of skid marks proceeding due east in the eastbound lane of Sunnyside Avenue made by the Johnson vehicle, and leading to the point of impact, where the front wheels then skidded abruptly at right angles and veered south nine feet (Record 68, 69). The officer observed that the defendant car had plowed furrows for some distance in the shoulder at the north side of Sunnyside Avenue (Record 70, Line 17), and that the defendant car skidded

on the hard surface in a curving line southwesterly across the westbound lane of Sunnyside and part of the eastbound lane of Sunnyside leaving skid marks of 63 feet 8 inches with the left front wheel and 40 feet 8 inches with the left rear wheel (Record 70). Defendant struck Johnson 6 feet south of the center line of Sunnyside (Record 70). Defendant Phillip Gordon stated his version of the accident to the investigating officer and the officer recorded Phillip Gordon's version in his notes as follows: "I came west on Sunnyside Avenue from Immigration Canyon, approaching 2200 East, following another car. The car ahead of me swerved to the left around a stopped car. I went around the right side to avoid the stopped car and hit the soft dirt and skidded sideways down the road and was hit by another car. Estimate of speed approaching the accident scene, 50 or 60 miles per hour. Estimate of speed at the time of the collision, 30 miles per hour (Record 72 and 73).

Ivan Johnson was too badly injured in the accident to be interviewed by the officer (Record 73, 74).

The officer's diagram was admitted as Exhibit P-7, with the vehicles located as he found them, the defendant vehicle as No. 1 and Johnson as No. 2 (Record 66, 67).

Shortly after the accident defendant Phillip Gordon gave to Mr. Severe, adjuster for Crawford & Company, a statement which was reduced in writing and read and approved and signed by Phillip Gordon. A copy was admitted as Exhibit P-11 (Record 101, 103, 105).

Damages were found by the trial court to be as alleged and testified by plaintiff (Record 27, Findings of Fact, Paragraphs 4, 5, 6, 7 and 8).

Ivan Johnson was alert, energetic, and fully active before his injury, making about $27,000.00 a year (Record 90). He was incapacitated by his injuries and his income fell off drastically (Record 91, and 92) and he never regained his formed state of health or earning capacity. (Mr. Johnson died before the time of trial of causes other than his injuries). Mr. Johnson retained counsel and claimed not only property damages but payment under the "Uninsured Motorist Coverage" provision of his policy with plaintiff.

Johnson's vehicle was damaged in the sum of $860.72, of which plaintiff paid $810.72. Prior to payment Mr. Severe, an adjuster, took reasonable precautions to accomplish the repairs at the lowest price (Exhibit P-2; Exhibit P-5; Record 46, 47, 95, 96 and 97; Deposition of Neil Gordon, page 9, line 2).

After prolonged negotiation with Ivan Johnson and his attorney the plaintiff paid Johnson $5,000.00 for his damages arising out of personal injury, and as subrogee under the policy, took the assignment of Mr. Johnson's claim against the defendants (Exhibit P-3; Exhibit P-6; Record 48, 50, 60, 61, 62, 65).

A copy of Johnson's insurance policy was admitted as Exhibit P-1.

The trial court in its memorandum decision denied recovery for the reasons set forth in Paragraph 4,

Memorandum Decision (Record 23), as follows: "The Court has carefully considered the testimony adduced in open court, together with the depositions of the defendants, and although it may appear from the depositions and the evidence that the defendant, Phillip L. Gordon, may have been negligent prior to the accident in question that negligence was not a proximate cause of the accident in question, and the Court, therefore, finds and concludes that Phillip L. Gordon was not negligent in any of the manners set forth in the Pretrial Order or in any other manner, and that the case should therefore be dismissed."

POINT ONE.

THE FINDINGS OF FACT, THE CONCLUSIONS OF LAW ARE UNSUPPORTED BY THE EVIDENCE IN OMITTING TO FIND NEGLIGENCE BY PHILLIP GORDON; PHILLIP GORDON WAS NEGLIGENT AS A MATTER OF LAW.

The evidence, credible and undisputed, shows that Phillip Gordon breached his duties as a driver in several respects. He did not come up to the standard of care of a reasonable prudent driver under the circumstances with respect to several duties of a driver which are so well established and familiar that they are embodied in standard instructions to juries:

Duty to use reasonable care to keep a lookout for other vehicles, obstacles, or other conditions reasonably to be anticipated. JIFU, 21.1A

Duty to keep his car under reasonably safe and proper control. JIFU 21.1B

Duty to drive at such a speed as was safe, reasonable and prudent under the circumstances, having due regard to the width, surface and condition of the highway, the traffic thereon, the visibility and any actual or potential hazards then existing. JIFU, 21.1C

Duty not to follow another vehicle more closely than is reasonable and prudent, having due regard for his own speed, the speed of such other vehicle, other traffic upon the highway, and all other conditions there existing, and to keep at such a distance and maintain such control of his automobile as is reasonable and prudent for the safety of himself and other. JIFU, 21.1D

Duty to drive his automobile on his own right side of the highway, JIFU, 21.1G, 41-6-53 UCA, 1953.

Duty not to attempt to pass another vehicle until he makes observation and ascertains that this can be done with reasonable safety under the circumstances. JIFU, 21.1H, 41-6-55 UCA, 1953.

Duty to attempt to overtake and pass another vehicle upon the right only under conditions permitting such movement in safety and in no event to attempt such movement by driving off the pavement or main traveled portion of the roadway. 41-6-56, Subsection (b), UCA. 1953.

POINT TWO.

THE FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT ARE UNSUPPORTED BY THE EVIDENCE IN FAILING TO FIND THAT THE PROXIMATE CAUSE OF

THE ACCIDENT WAS THE NEGLIGENCE OF PHILLIP GORDON; AS A MATTER OF LAW THE NEGLIGENCE OF PHILLIP GORDON WAS THE PROXIMATE CAUSE OF THE ACCIDENT.

The proximate cause of the accident and the resulting damage was the negligence of defendant Phillip Gordon which caused the vehicle he was driving to cross the center line and go onto the wrong side of the road and collide with the Johnson vehicle.

The fact that a motorist is on the wrong side of the road at the time of a headon collision alone raises a presumption of negligence by the driver on the wrong side of the road. *Wood vs. Strevell-Paterson Hardware Company,* Supreme Court of Utah, 1957, 313 Pac. 2d 800; 6 Utah 2d 340. There is no evidence in the record to overcome this presumption. The above case held that evidence that one driver was three feet over the center line was ample evidence to establish that the negligence of that driver was the proximate cause of the collision.

In *Xenakis, et al vs. Garrett Freight Lines, Inc.,* Supreme Court of Utah, 1954, 265 P. 2d 1007; 1 Utah 2d 299, the jury found that the Studebaker occupied by plaintiffs had crossed the center line into the wrong lane to collide with the defendants' truck. In affirming the judgment for the defendants the Supreme Court of Utah stated: "The defendant's truck having remained on its own side, there was no factor of negligence on the part of the defendant which, even if found to exist, would have contributed to the cause of the accident. If the Studebaker had kept on its right side . . . the truck could

have proceeded safely down its own right side of the highway with brakes ever so faulty, or with none at all, without any collision occurring.

"The fact that there was no negligence of the defendant contributing as a proximate cause of the collision, leaves the Studebaker going over onto the wrong side as the sole proximate cause. . . ."

POINT THREE.

UNDER THE EVIDENCE THE NEGLIGENCE OF PHILLIP GORDON IS IMPUTABLE TO DEFENDANT NEIL GORDON.

Neil Gordon gave his brother Phillip Gordon, an unlicensed driver, authority and direction to drive Neil Gordon's car to the place where Neil Gordon's girl friend lived and to drive her back to Salt Lake City to meet Neil Gordon. At the time of the accident Phillip Gordon as agent was doing on behalf of Neil Gordon exactly what he had been authorized to do by Neil Gordon, his principal.

The presumption of agency from the mere fact of ownership of an automobile imputes the driver's negligence to the owner, and it then becomes the responsibility of the owner to show that the negligence should not be so imputed. *Saltas v. Affleck,* 99 Utah, 65, 102 Pac. 2d 493. Defendants gave no evidence whatsoever tending to rebut the presumption of agency which arises from Phillip Gordon driving Neil Gordon's car.

Agency is not limited to an employee in a commercial venture. A member of a family or a friend or acquain-

tance who is gratitously performing an errand for the owner of a car may be the agent when acting within the authority of the car owner.

In *Cochran vs. Allyn,* 16 Wisc. 2d 20, 113 N.W. 2d 538, defendant, who was in the hospital, asked his mother to drive defendant's car to their jointly owned cottage to shut off the water for the winter, and the mother, while driving to the cottage, was involved in an accident which injured plaintiff. It was found that the mother-driver was acting as agent for the car owner.

In *Powels, et al vs. Ginsberg,* 245 Wisc. 45, 13 N.W. 2d 448 (1944) defendant's brother drove defendant in defendant's car to a restaurant to meet defendant's wife for lunch, and the defendants' brother in opening the door struck the plaintiff. Holding that the brother was the agent of the defendant car owner the court cited the Restatement of Agency as follows: "Section 1 (1). Agency is the relationship which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act."

In *Nallie vs. Peters, et al,* 241 N. Y. 177, 149 N.E. 343, defendant-owner Peters asked a friend to take the plaintiff Nallie on a pleasure ride. Owner-Peters was not in the car when the friend's driving resulted in damage to Nallie. The court held that evidence tending to establish the above would support a finding of agency even though the friend was to receive no compensation,

and the issue should be submitted to the jury. The court stated:

> "If Mondrone were driving Peters' car at his (Peters') request on his (Peters') business or enterprise, acting in this particular as his servant or agent, Peters would be liable for his (Mondrone's) negligence. Whether or not he was to receive pay would merely be evidence bearing upon the question. Peters might be liable, even though Mondrone was to receive no compensation. *Althorfe v. Wolfe,* 22 N. Y. 355; *Wyllie v. Palmer,* 137 N. Y. 248, 33 N. E. 381, 19 L.R.A., 285. We think that there was evidence in this case from which the jury might find, or reasonably infer, that Mondrone was driving for the defendant, at his request, and for his benefit, that at the time of the accident he was engaged on the defendant's business or undertaking. Even one acting under such circumstances as a volunteer might render the owner of the car liable . . . The liability for the acts of another is not dependent upon the strict relationship of master and servant, but upon relationship of similar nature, when one acts for another, at his request, express or implied, for his benefit, and under his directions. Under such circumstances, the negligence of the agent is the negligence of the master or the principal. *Lowell vs. Williams,* 183 App. Div. 701, 170 N.Y.S. 596; affirmed 228 N.Y. 592, 127 N.E. 916; *Orlando v. Pioneer Barber Towel Supply Co.*, 239 N. Y. 342, 146 N. E. 621; *Ferris v. Sterling,* 214 N.Y. 249, 108 N. E. 406, Ann. Cas. 1916D, 1161. * * *"

Dobson-Peacock vs. Curtis, 166 Va. 550, 186 S.E. 13, held an owner who was not in the automobile at the time of the accident to be liable for the negligence of a gratituous driver who was not paid for driving.

In *Cannon vs. Dupree* (Tex.) 294 S.W. 298, the owner of a vehicle who was not riding in the vehicle at the time of the accident was held liable for the negligence of a friend who was gratituously operating the vehicle at the request of the owner. The court stated:

> "When Mr. Taylor was directed and intrusted to drive the automobile on the remaining part of the contemplated journey to Rodger's Lake, as a substitute to relieve the appellant, who had been driving, he for the time became her driver; and that he undertook to drive at her request can make no difference. When he was directed to assume, and was intrusted with, control of the automobile as a driver, he was, for all purposes of a driver, her representation as special servant in legal view; and if careless, and injury resulted to occupants of the car, the owner was liable to the same extent as if he were the regularly employed driver. The driving was an act incident to service, and such special service was done by Mr. Taylor for the benefit of the owner of the automobile. 1 Labbott on Master and Servant, Sec. 22. As a general rule, authority may be conferred by one person upon another to do specially an act for him without any agreement to compensate him and without any binding undertaking on the part of such latter person to execute the authority."

See also *Acosta v. Smith,* La. App., 23 So. 2d 742, and *Butter v. Smith,* La. App., 23 So. 2d 745; *Prickett v. Whapples,* 10 Cal. App. 2d 701, 52 P. 2d 972; *Rubin v. Schupp,* 127 F. 2d 625.

Respectfully submitted,

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