1969

Le Roy Sweat and Virginia M. Sweat, Administritrix of the Estate Of Blaine Orvel Sweat, Deceased, v. Rex T. Fuhriman, Craig Fuhriman, James H. Maddox and Dan Allison : Brief of Respondents Rex T. Fuhriman and Craig Fuhriman

IN THE SUPREME COURT OF THE STATE OF UTAH

LE ROY SWEAT AND VIRGINIA M. SWEAT, ADMINISTRATRIX OF THE ESTATE OF BLAINE ORVEL SWEAT, DECEASED,

Plaintiffs-Appellants,

vs.

REX T. FUHRIMAN, CRAIG FUHRIMAN, JAMES H. MADDOX AND DAN ALLISON,

Defendants-Respondents.

Case No. 11,596

BRIEF OF RESPONDENTS REX T. FUHRIMAN AND CRAIG FUHRIMAN

Appeal from the District Court of Wasatch County Honorable Maurice Harding, District Judge

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CASES AND AUTHORITIES CITED

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STATEMENT OF KIND OF CASE

This is an action for the wrongful death of appellants' son.

DISPOSITION IN LOWER COURT

The lower court granted summary judgment against the plaintiffs and in favor of all defendants.

RELIEF SOUGHT ON APPEAL

Defendants Fuhriman seek affirmance of the judgment of the lower court.

STATEMENT OF FACTS

Respondent Rex T. Fuhrman is the father of Craig Fuhriman, who at the time of the accident was twenty-one years of age. Rex Fuhriman owned the vehicle that had been driven by his son, Craig, but was not present at the time of the accident and is only involved in this litigation by a claim of agency made in the original Complaint.

Respondent Craig Fuhriman and a boy friend had been to Flaming Gorge Reservoir fishing and were returning home when they ran out of gas in the Strawberry Valley. (Dep. of Craig Fuhriman p. 11 to 13.)

The point on the highway where the accident occurred and where the Fuhriman vehicle was being gassed was generally straight highway nearly level and running generally east and west on U.S. Highway 40. (R. 124. p. 125) The highway was of sufficient width and marked for one lane of travel in each direction. (R. 124, attached diagrams to deposition.)

The plaintiff's son, Blaine Orval Sweat, and his friend, Rickie Allison, were riding in a jeep vehicle being driven by Rickie Allison. They had been to a Saturday night high school dance at the Wasatch High

School in Heber City, Utah, on May 18, 1968, and thereafter, accompanied by two girlfriends, had stopped at the service station where defendant Craig Fuhriman and his boyfriend were waiting, attempting to obtain assistance in carrying gas to their vehicle in the Strawberry Valley (R. 136, p. 14). Fuhriman and Lund had been returning from a fishing trip at Flaming Gorge when they ran out of gas in the Strawberry Valley and were required to pull off to the edge of the highway on the right, facing generally in a westerly direction, about 22 miles east of Heber City. They then turned off the lights of their vehicle and began hitchhiking a ride to Heber City in an effort to obtain a container with gasoline to return to their automobile. (R. 136, pgs. 13 and 14)

At the Conoco Gas Station in Heber City, the Fuhriman and Lund boys were unable to obtain a container for gasoline and while trying to obtain some sort of assistance, Blaine Sweat and his friend, Rickie Allison, offered to drive them back to their vehicle. (R. 136, p. 15) The boys then took their girlfriends home in the jeep and returned to the service station where Fuhriman and Lund got into the back seat of the open jeep and started up Daniel's Canyon from Heber City toward the Strawberry Valley. The boys stated that it was too cold and the wind created too much noise for them to talk with each other. (R. 136, p. 18)

Upon arriving in the Strawberry Valley, the Allison boy who was driving the jeep, drove to the service

station about one mile or so east of the stalled Fuhriman vehicle and awakened the operator, attempting to obtain a container of gas. (R. 136, p. 16) The station attendant was unable to obtain a container for the boys but after some discussion, $2.00 worth of gasoline was purchased by the Fuhriman boy and delivered into the tank of the jeep after the boys had decided that they could siphon the gas from the jeep back to the stalled Chevrolet. (R. 136, pgs. 16 and 17)

Rickie Allison then drove the jeep back in a westerly direction where the Chevrolet was stopped, Blaine Sweat riding in the right front seat and the Fuhriman boy, with his friend, riding in the rear of the jeep. Upon arriving at the scene of the Chevrolet, the driver of the jeep proceeding slightly beyond the Chevrolet in a westerly direction where he then made a U-turn pulling up alongside of the stalled Chevrolet vehicle on the north side of the roadway facing east and directly into the path of oncoming traffic. (R. 136, pgs. 19 and 20) The lights were turned on which caused a flashing or blinking light to blink on either side in the front of the vehicle as well as to the rear. (R. 136, pgs. 22 and 23) The jeep was parked in such a manner that a siphon hose could be inserted in the gas tank of the jeep and brought to the rear of the Chevrolet so that when a gasoline flow commenced, it could be delivered into the tank of the Chevrolet. There was about three feet between the vehicles.

After the jeep had been stopped, all of the boys

got out of the vehicle with the lights of the jeep shining east on the highway, as previously indicated. (R. 136, p. 26) The siphon hose was obtained from the jeep vehicle and at this time, the Allison boy commenced to attempt to siphon gasoline from the jeep but in doing so, he received a mouthful of gasoline almost immediately, causing him to be unable to continue. (R. 136, p. 24) He then stepped over to the rear of the Chevrolet to expel the gasoline from his mouth. At this time, the deceased Sweat boy then, without request from anyone, picked up the siphon hose and began to attempt to siphon gasoline from the jeep to the Chevrolet. (R. 136, pgs. 25 and 26)

At this time, Craig Fuhriman and his boyfriend, Henry Lund, were standing between the jeep and the stalled Chevrolet waiting for the transfer of gas to take place. While the Sweat boy was siphoning gasoline into the Chevrolet automobile, the Fuhriman boy looked to the east and observed a vehicle approaching at a speed he judged to be approximately 60 miles per hour. He first noticed the oncoming automobile when it was perhaps a block away. (R. 136, p. 62) When the automobile reached a point close to the front of the jeep, it appeared to the Fuhriman boy that the vehicle might not slow down or turn out for the jeep, at which time, he immediately shouted a warning to all of the other boys and he started to run to the rear of the jeep. (R. 136, p. 62) The deceased Sweat boy was still siphoning gas when the warning was given. The Fuhriman boy took perhaps three of four steps in an effort to extricate himself

from danger but was immediately struck down by the oncoming vehicle. (R. 136, p. 64)

After the accident had occurred, the Fuhriman boy regained his feet and noticed that the jeep was still facing in an easterly direction with headlights and blinker lights still burning and apparently unharmed. The oncoming vehicle had struck the rear of the Fuhriman vehicle, pushing it farther off the roadway into the field adjacent thereto. Rick Allison and Blaine Sweat were both found lying unconscious in the barrow pit northwest of where he last saw them. (R. 136, p. 66)

The investigating officer testified in his deposition that the facts indicated that the Allison boy was standing to the rear of the Chevrolet when it was struck by the westbound vehicle driven by Harold J. Sargent, who was proceeding in a westerly direction on the roadway. He apparently observed the headlights of the jeep and drove to the right of the jeep to avoid a head-on collision, thereby going off the road and striking the rear of the Chevrolet vehicle, killing both the Sweat and the Allison boys. (R. 124.)

POINT I

THE SUMMARY JUDGMENT IN FAVOR OF REX T. FURHIMAN SHOULD BE AFFIRMED.

The brief of appellants does not attack the lower court's order of summary judgment in favor of Rex T. Fuhriman. There was no evidence of any nature to show

agency or that he was involved in the case other than the fact that he owned the automobile used on the fishing trip by his son. Since no error is claimed, this Court should affirm the lower court's summary judgment in favor of Rex T. Fuhriman, as a matter of law. See *Lepasiotas* vs. *Dinsdale,* 121 Utah 359, 242 Pac. 297.

POINT II

IF RESPONDENT CRAIG FUHRIMAN'S ACTIONS WERE NEGLIGENT, THE ACTIONS OF APPELLANTS' SON WERE ALSO NEGLIGENT, BARRING RECOVERY BY APPELLANTS.

Point IV of appellants' brief raises ten issues of claimed negligence against respondent Craig Fuhriman, in which they claim there is a justification for permitting appellants' recovery. It is respectfully pointed out that the negligent conduct they claim against this respondent applies equally well to their deceased son. Their son was aware of the fact that the Fuhriman vehicle was out of gas and parked at the edge of the highway. He was also aware of the fact that perhaps the left side of the vehicle was barely on or near the edge of the highway and that no lights were burning in the vehicle at the time. He also knew that gasoline was to be siphoned from the Jeep to the stalled vehicle, and he was actually doing this act when the accident occurred. He was aware that his friend, Ricky Allison, had parked the Jeep on the wrong side of the highway, facing east, toward oncoming traffic, and that no one had put out any warning signals or

devices, with the exception of turning on the flasher lights of the Jeep. All of these facts were known and obvious to all four boys, including appellants' son. In addition, when the fellows alighted from the Jeep at the scene of the accident, it was apparent to all concerned where each was standing while the siphoning of the gasoline was taking place. Appellants claim that Craig Fuhriman was negligent in failing to observe oncoming traffic as soon as he should have, although the same oncoming traffic was as obvious to their son as it must have been to Craig Fuhriman, as Blaine Sweat was standing at the rear of the stalled vehicle and closer to the oncoming traffic. All of the physical facts at the scene of the accident were apparent to all the boys, and the court so held. If one was negligent, all were negligent.

It is respectfully contended that all four boys at the scene of the accident had equal opportunity to observe the condition of both vehicles, their relation to the roadway, and were fully aware of what was transpiring before the unfortunate accident occurred. The lower court found, and rightfully so, that if one of the boys was negligent in his conduct, then all must have been negligent, as each had the same knowledge and opportunity to avoid the accident, as did the others. See *Maybee* vs. *Maybee,* 79 Ut. 585, 11 P.2nd 973.

POINT III

THE DOCTRINE OF LAST CLEAR CHANCE DOES NOT APPPLY IN THE INSTANT CASE.

The appellants seek to invoke the doctrine of last clear chance and apply it to the conduct of respondent Craig Fuhriman, again overlooking the issues as found by the trial court. That is, any claim of this nature to be applied to Craig Fuhriman is equally applicable to the decedent, Blaine Sweat. Sweat was in a position of peril moments before the accident, but so were the other three boys, as evidenced by the fact that they were injured, or killed by the same vehicle. The brief of appellants points out quite rightfully that Craig Fuhriman did shout a warning moments before the impact, but he himself was unable to avoid injury, because of the close proximity of the oncoming vehicle before it could be determined that the driver might not have observed the position of the Jeep on the roadway ahead. (Appellants' Brief P.7.) In any event, there was no legal duty breached by Craig Fuhriman. The doctrine of last chance does not apply in the instant case. When the approaching automobile came into view, no one could anticipate the driver's actions at this point. It was not until the approaching vehicle was extremely close to the Jeep that the boys suspected that its driver was inattentive. At this point, there was no chance for anyone to avoid being struck by the vehicle. There was no last clear chance to avoid injury to himself or to the other boys, as is evidenced by the admissions of the appellants. When it became apparent that the oncoming driver was not going to take heed of the headlights, and the blinking lights of the Jeep and act accordingly, time did not permit Craig Fuhriman to move but two or three steps before being

struck down. At this point in time none of the boys had any chance to avoid the accident, without regard to a last clear chance. *Donahue* vs. *Rolando,* 16 Ut. 2d 294, 400 P.2d 12; *Charvoz* vs. *Cottrell,* 12 Ut. 2d 25, 361 P.2d 516. See especially *Fox* vs. *Taylor,* 10 Ut. 2nd 174, 350 P.2nd 154.

In the Fox case, this Court considered a factual situation wherein the driver of a motor vehicle struck a pedestrian crossing the street and its relationship to the doctrine of last clear chance. The Court stated:

> "The plaintiff here is faced with a dilemma: She is either in inextricable peril or she was not. If she was not in inextricable peril, then in any instance up to the time she got into such predicament by the exercise of reasonable care, she could have observed the oncoming car and have avoided being hit. On the other hand, she could only have gotten into inextricable peril by getting into the path of the defendant's car, and her peril could be considered inextricable only if the defendant was then too close to avoid striking her. Thus, by the very description of the situation, he did not have the last clear chance to avoid the injury. As the phrase indicates, it must be a fair and clear opportunity and not a mere possibility that the collision could have been avoided."

Under the facts of the instant case, it shows without question that even assuming that defendant Fuhriman was driving the vehicle causing the accident, there was no time at which the doctrine of last chance would have applied to the facts of the case. The appellants' attempt to apply the doctrine in spite of the facts pointed out

and in spite of the additional factor in the instant case, that is, that the Fuhriman boy was not operating the vehicle in question. Two cases are cited by appellants on Pages 7 and 8 of their brief concerning negligence and lookout; however, both cases involve the drivers of vehicles and are unrelated to the facts of the instant case.

There has been no breach of duty shown by appellants as it pertains to Craig Fuhriman. He was not driving the car involved in the collision. All of the boys at the scene of the accident assumed the risk of their conduct and all had equal knowledge of the physical facts prior to the accident. Therefore, if one was negligent, all were negligent. And likewise, if one was not negligent, then none were negligent, because each was guilty of the same conduct and had the same knowledge of the facts. See *Nelson* vs. *Arrowhead Freight Lines* (Ut.) 99 Ut. 129, 104 P.2nd 225 and *Burns* vs. *Wheeler* (Ariz. 1968) 446 P.2nd 925.

CONCLUSION

The summary judgment of the trial court should be affirmed for the following reasons:

1. The appellants failed to assign any error committed by the trial court in granting summary judgment in favor of Rex T. Fuhriman.

2. If defendant, Craig Fuhriman, was negligent in any manner, his negligence was concurred in by the

negligence of the decedent, Blaine Orval Sweat. The trial court found that if one of the boys was negligent, all were negligent as all were guilty of basically the same conduct.

Respectfully submitted,

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I hereby certify by United States Mail, postage prepaid, I mailed two (2) copies of the foregoing brief to J. Harold Call, Attorney at Law, 23 Center Street, Heber City, Utah; Raymond M. Berry, 701 Continental Bank Building, Salt Lake City, Utah 84101; and John L. Chidester, 51 West Center Street, Heber City, Utah on this ..... day of September, 1969.