1965

Diane Favatella, By and Through Her Guardian, Ad Litem, Felix E. Favatella v. Jean W. Poulson and Mary Ellen Carter : Appellant's Brief

IN THE SUPREME COURT
of the
STATE OF UTAH

DIANE FAVATELLA, by and through her Guardian Ad Litem, FELIX E. FAVATELLA,
Plaintiff-Respondent,

vs.

JEAN W. POULSEN and MARY ELLEN CARTER,
Defendant-Appellant.

Case No. 10264

APPELLANTS' BRIEF

APPEAL FROM THE PRE-TRIAL ORDER OF THE THIRD DISTRICT COURT FOR SALT LAKE COUNTY

HON. STEWART M. HANSON, JUDGE

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STATEMENT OF THE NATURE OF THE CASE

This is a negligence action for personal injuries by the Guardian Ad Litem of a seven-year old child against the defendant driver of an automobile in which the child was riding when injured.

DISPOSITION IN LOWER COURT

At the pre-trial, the lower court denied the Motion of the defendant driver, Mary Ellen Carter, to dismiss the Complaint of the plaintiff against her.

RELIEF SOUGHT ON APPEAL

The defendant and appellant, Mary Ellen Carter, wants an Order from this court directing the lower court to grant her Motion to dismiss the Complaint of the plaintiff against her.

STATEMENT OF MATERIAL FACTS

On December 2, 1964, this court granted the appellant, Mary Ellen Carter's petition for an Interlocutory Appeal. (R 25)

In the Complaint in Civil Case No. 140856, the plaintiff alleges that on January 7, 1963, she was a passenger in an automobile being driven by the defendant, Mary Ellen Carter, and at that time she was seven years of age. The Complaint does not allege wilful misconduct or intoxication on the part of the defendant driver, nor does the Complaint allege that the seven-year old plaintiff or her parents made payment for the ride. (R 1, 2, and 3)

At the pre-trial, it was stipulated and agreed that the minor plaintiff made no payment for the ride in question, nor did her parents make any payment, and that she was riding as a convenience to her parents, and that this arrangement was made between the driver and the parents of the minor child, and the minor child had no part in making the arrangement. (R 9)

The defendant, Jean W. Poulsen, was the driver of a second car involved in the collision.

ARGUMENT

POINT I

THE PLAINTIFF IS BARRED FROM RECOVERY AGAINST THE DEFENDANT AND APPELLANT, MARY ELLEN CARTER, BECAUSE AT THE TIME OF THE INJURY, THE PLAINTIFF WAS A GUEST

IN THE AUTOMOBILE DRIVEN BY MARY ELLEN CARTER.

The issue before the court is:

Was the plaintiff, Diane Favatella, a seven-year old child, a guest at the time of injury, inasmuch as her parents arranged for the ride for her with the defendant driver?

Section 41-9-1, Utah Code Annotated, 1953, reads as follows:

> "Responsibility of owner or driver of a vehicle to a 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 or person responsible for the operation of such vehicle. In the event that such person while so riding as such guest is killed, or dies as a result of injuries 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 riding 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 wilful misconduct of such owner, 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 property 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 wilful misconduct was the proximate cause of such death or injury or damage."

Section 41-9-2 defines guest 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."

In *Welker vs. Sorenson* (1957) 209 Or. 402, 306 P. 737, the problem presented in this case is discussed in a situation where an action was brought for the wrongful death of a twenty-nine-month old child, who was a guest passenger at the time of the accident. In *Welker vs. Sorenson,* supra, the court said:

> "The identical question, under similar facts, was presented in Buckner vs. Vetterick, 124 Cal. App. 2d, 417, 269 P. 2d, 67, 68, and the Court held that the child's status was determined by that of the mother. After referring to the policy of the guest statute as explained in previous decisions of the California Courts it was said:

> '* * * Thus, under the legislatively declared public policy of this state, the mother of plaintiffs, who was injured in accident, cannot recover from the defendant. As she had the responsibility of their care and direction. It was her decision that determined whether they should go on this trip. In accepting the ride for herself and deciding to take the children along, she also accepted for them. Otherwise, we would have the anomalous situation of the mother who made the decision being a guest and her infant children not being guests and their status with respect to the operator of the car being different from that of their mother, with the result that during the trip the driver would owe a different degree of care to the children from that which she owed to their mother. Such a differentiation is both illogical and out of harmony with the purpose of Section 403 of the vehicle code. It would therefore seem both reasonable and logical to say that when a parent accepts a ride as a guest of the operator and takes along her small children, she also accepts the ride for them, and they have the same status with relation to the driver on such ride that the parent has. Therefore, since the mother was a guest, the children were guests, and none of them could recover as only simple negligence was involved."

In Indiana, in *Whitfield vs. Bruegel* (1963) 134 Ind. App. 636, 190 N.E. 670, where the father of a minor child had given a great aunt unrestricted

custody of minor child, and where child without permission of father visited great aunt and where great aunt while operating an automobile drove into a parked car and injured the child, the Indiana court, sitting, In Banc, rejected the contention the child was not a guest because she could not give requisite consent and held the child to be a guest. The Court said there seemed to be no reason why a natural guardian could not accept an invitation for a child to take a ride.

In *Horst vs. Holtzen* (1958) 149 Iowa, 958, 90 N.W. 2d, 41, where the mother of the plaintiff, a thirteen-day old infant asked the defendant to drive her and the plaintiff to a meeting, and the defendant granted such permission, the court held the infant was a guest in the defendant's automobile notwithstanding the fact that infant might have been incapable of accepting an invitation to ride and said lower court properly directed a verdict for the defendant.

In *Lynott vs. Sells* (1958) 52 Del. 385, 158 A. 2d, 583, where a five-year old minor rode with the defendant motorist with the infant minor's mother's express consent, the court held the infant was not excluded from the operation of the automobile guest statute as a matter of law.

In *Morgan vs. Anderson* (1939) 149, Kan. 814, 89 P. 2d, 866, where a seven-year old child, left to the unrestricted custody of driver, was taken on an automobile trip and injured while in Wyoming and

where the Wyoming law provided that no person transported by the owner or operator of the motor vehicle as his guest without payment for such transportation shall have a cause of action for damages against such operator for injury unless such accident shall be caused by gross negligence or wilful or wanton misconduct, the Kansas Court sustained a demurrer in favor of the defendant driver dismissing the case as a matter of law.

And again, in In Re Wrights Estate (1951) 170 Kan. 600, 228, P. 2d, 911, where a four-year old child was left to the unrestricted care and custody of child's grandparents, the four-year old child was held a guest within the meaning of Kansas guest statute, even though incapable of accepting a ride.

In *Letterel vs. Cerniglia* (1948) 274 App. Div. 896, 82 N.Y. 2d, 670, an eleven-year old child accompanying her mother and step-father was held a guest as a matter of law within the meaning of the Ohio guest statute, which provided owner of motor vehicles is not liable for injuries to a guest transported without payment unless injury is caused by wilful misconduct.

In *Tilghman vs. Rightor* (1947) 211, Ark. 229, 199, S.W. 2d 943, where three boys, ages seven, nine and fourteen flagged a truck and obtained a ride they were held guests within the statute and court declared in defining guests the statute made no exception in favor of minors.

In *Schlitz vs. Pictor* (1938) 66, S.D. 301, 220 N.W. 2d, 519, a ten-year old boy was held a guest within the meaning of the guest statute of South Dakota.

In what may be the latest California case, *Buckner vs. Vetterick* (1954) 124 C.A. 2d, 417, 269, P. 2d, 67, the California District Court of Appeals held children were guests where a mother accepted a ride and took her two children, ages fifteen months and twenty-six months along. This decision is particularly important in view of other California Supreme Court holdings to the effect a child of minor age is not a guest where the ride was given to the child without the consent or permission of the parent.

In *Haarstrich vs. Oregon Shortline Railroad Company* (1927) 70 U. 552, 262 P. 100, where an action was brought against Railroad Company for injury sustained by a fifteen-year old girl, injured in a crossing collision, and where the fifteen-year old girl accepted the invitation of the owner of the automobile to ride and where the automobile was driven by another with the owner's permission, and where it was shown that she had no control over the operation of the car, this court held that the fifteen-year old minor was a guest as a matter of law.

The purpose of guest statutes is to relieve a generous driver who is sued by an invited rider for ordinary negligence of the driver, in a situation where the rider gives nothing to compensate for the

transportation. Just as a dog should not bite the hand which feeds it, a generous driver should not be sued by a person who gives nothing by way of compensation for the ride. Further, if the purpose of the guest law is to be accomplished, it seems that the reasoning of the California court in *Buckner vs. Vetterick*, supra, and the Oregon court in *Welker vs. Sorenson*, is logical and sound.

When children are visiting business premises with their mother or other custodians, invariably the children are held to be business invitees even though they have no intention of buying anything for themselves and no invitation has been issued to them. In that situation, the mother impliedly accepts the invitation and if an acceptance is required by a child riding in a vehicle to be a guest, impliedly, it would seem the acceptance of the parents is sufficient, and since Diane Favatella's parents arranged for the ride, an acceptance was made on her behalf.

CONCLUSION

The lower court should be directed to grant the defendant and appellant, Mary Ellen Carter's Motion to Dismiss.

Respectfully submitted,

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I hereby certify that on this ..... day of

....., 1965, I mailed two copies of this Brief by United States mail, postage prepaid, to Ernest F. Baldwin, and two copies to Dwight L. King, at the addresses shown on this Brief.

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