1965

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

Case No.
10264

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.

RESPONDENTS' 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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In the SUPREME COURT of the STATE OF UTAH

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STATEMENT OF THE NATURE OF THE CASE

Plaintiff sued defendants for injuries resulting from a collision between the automobiles driven by the two defendants which collision occurred at an intersection. Plaintiff was a passenger in the automobile being driven by Mary Ellen Carter.

DISPOSITION IN LOWER COURT

Judge Stewart M. Hanson denied the Appellants Motion to Dismiss the Complaint at the time of pre-trial and from said order this appeal is prosecuted.

RELIEF SOUGHT ON APPEAL

Appellant seeks to have the order of the Pre-trial Court reversed and a dismissal of plaintiff's action against the appellant, Mary Ellen Carter, ordered.

STATEMENT OF FACTS

Plaintiff, a 7 year old minor child, was a passenger in an automobile being driven by appellant, Mary Ellen Carter, who was a teacher at St. Ann's School. The child was a student at St. Ann's School. (See appellant's petition for interlocutory appeal.) The arrangement for transportation of the minor child was made by her parents. No payment by the parents or the minor child to the appellant was made for the ride.

No social relationship existed between the minor child and the appellant and the ride arises out of the fact that the relationship of teacher and pupil exists.

The collision occurred on the 7th of December, 1963, at the intersection of Wilmington Avenue and 5th East Street in Salt Lake City and plaintiff claims that the collision occurred as the result of the negligence of the drivers of both automobiles.

As a result of the collision the plaintiff suffered serious and permanent injuries.

STATEMENT OF POINTS

POINT I

PLAINTIFF IS NOT A GUEST AS A MATTER OF LAW.

POINT II

A MINOR CHILD OF THE AGE OF 7 YEARS CANNOT BE HELD TO BE A GUEST AS A MATTER OF LAW.

ARGUMENT

POINT I

PLAINTIFF IS NOT A GUEST AS A MATTER OF LAW.

It is the position that a teacher hauling a student to her school is not doing so for the pleasure of the student's company especially when the student is a 7 year old child.

In the absence of a statutory enactment, the general rule in the United States is that a person operating or responsible for the operation of an automobile must use ordinary care for the safety of guests therein and is liable for any injuries proximately caused by negligence in the operation of the vehicle. *Godfrey v. Brown,* 220 Cal. 57, 29 P.2d. 165; *Shapiro v. Bookspan,* 155 Cal. App. 2d 353, 318 P.2d 123.

A guests is defined as a person who rides in the automobile of another without conferring benefit on him other than the pleasure of his company. *Hart v. Hogan,* 173 Wash. 598, 24 P.2d 99; *Gillespie v. Rawlings,* 49 Cal. 2d 359, 317 P.2d 601; *Cook v. Fariah,* 73 Nev. 295, 318 P.2d 649; *Parrish v. Ash,* 32 Wash. 2d 637, 203 P.2d 330.

This Court in the case of *Smith v. Franklin,* 14 Utah 2d 16, 376 P.2d 541 where both a social relationship and a small monetary consideration was disclosed held that a Jury question was created. It was for the Jury to determine whether or not the person being transported was a passenger or guest. The Court stated in its decision as follows:

> "Where both payment and social incentive are present and the evidence would support a finding that each exerted a substantial influence on hauling the passenger the problem as to the relationship between the parties must be faced up to and resolved by submitting the issues to the Jury." p. 20.

The Smith case followed the earlier case of *Jensen v. Mower,* 4 Utah 2d 336, 294 P.2d 683 where the California case of *Whitmore v. French* was approved and the following holding quoted:

> "Where however the driver receives a tangible benefit, monetary or otherwise which is a motivating influence for furnishing the transportation the driver is liable for ordinary negligence." (p. 344)

The holdings of this Court are consistent with what seems to be the modern trend and the great majority of cases on the question of guest or passenger classification. All the Courts seem to hold that the intention of the driver in undertaking the transportation is a prime consideration. The teacher intends to obtain a benefit by getting the student to school and this benefit is the real motive for the invitation to ride.

It is respectfully submitted such relationship would present a question of fact for the Jury to determine and the Trial Court's ruling is therefore correct. See *Smith v. Franklin, Supra; Jensen v. Mower, Supra; Shapiro v. Bookspan,* 155 Cal. App. 2d 353, 318 P.2d 123; *Parrish v. Ash,* 32 Wash. 2d 637, 203 P.2d 330; *Nyberg v. Kirby,* 65 Nev. 42, 188 P.2d 1006, 193 P.2d 850; *Cook v. Fariah,* 73 Nev. 295, 318 P.2d 649.

The case of *Follansbee v. Bengenberg,* 122 Cal. App. 2d 466, 265 P.2d 183 is quoted frequently for the statement that:

> "A return which may make it worth the others while to furnish a ride."

See also: *Gillespie v. Rawlings,* 49 Cal. 2d 359, 317 P.2d 601, and *Spring v. Liles,* ..... Ore. ....., 387 P.2d 578, and *Thuente v. Hart Motors,* 234 Iowa 1294, 15 N.W. 2d 622.

It is respectfully submitted that the relationship of

teacher and student in the same school might be found by the Jury to be the motivating factor in the drivers furnishing a ride to the minor child.

POINT II

A MINOR CHILD OF THE AGE OF 7 YEARS CANNOT BE HELD TO BE A GUEST AS A MATTER OF LAW.

It has been held that a child of tender age lacks the capacity to accept an invitation to ride. His capacity to understand is recognized to be limited.

The Statutes of the State of Utah provide that a child under the age of 7 years is incapable of committing crimes. That a child between the ages of 7 years and 14 years is incapable of committing a crime in the absence of clear proof that at the time of committing the act charged against it, it knew its wrongfulness. *U.C.A. 76-1-41.*

The Guest Statute states:

> "who as a guest accepts a ride in any vehicle." *Sec. 41-9-1 U.C.A. 1953.*

This language makes a question of fact as to whether or not this minor child had the capacity to accept the ride. The Utah Legislature did not intend minors to be responsible for their acts between the ages of 7 and 14 in the absence of a clear proof that the minor understood the nature of the undertaking engaged in.

Defendant places great emphasis on the language of the statute which states that a guest minor may not recover. It is this plaintiff's position that the basic question is whether or not the minor is a guest. Where the relationship of host and guest is a consentual relationship, did the child consent?

The basic question of fact is whether or not this child could understand the nature of the guest-host relationship and whether or not she possessed the necessary ability to accept a ride.

This matter has been considered by a number of our neighboring states where the language requires, as does Utah Statute, that the guest accept the ride. The decisions are contrary to the position taken by defendant Carter. The earliest and leading case on the position of a minor child being carried without compensation from the child and probably the leading case concerning this subject is *Rocha v. Hulen,* 6 Cal. App. 2d 245, 44 P.2d 478. In this case a police officer was hauling a 5 year old child who had been injured in an accident to the hospital when the collision and injury to the child occurred. The California Supreme Court stated as follows concerning the law and its concept of the child's position:

> "(3) Section 141 3/4 supra, reads: 'Any person who as a guest accepts a ride in any vehicle, moving upon any of the public highways of the State of California,' etc., shall not recover for any injury. This section calls for some specific and

voluntary action on the part of a person who becomes an occupant of the vehicle moving upon the public highways of the state involved in the accident, resulting in an injury to such occupant. To be a guest one must have accepted the ride in the vehicle involved. We think this imports both a knowing and a voluntary acceptance, and does not include either involuntary or a forced ride.

The word "accept" has a definite meaning. In *1 C.J. p. 377,* it is thus defined: 'To admit and agree to; to accede to, or consent to; to receive with approval; to adopt; to agree to. In the past tense the word is commonly used to signify assent and agreement.' The meaning of the word "agreement" is thus set forth in *2 C.J. p. 979*: 'In its broad and comprehensive sense, demonstrated by general usage, a coming or knitting together of minds; a coming together in opinion or determination; the coming together in accord, of two minds, on a given proposition.* * * In law, a concord of understanding and intention, between two or more parties, with respect to the effect upon their relative rights and duties, of certain past or future facts or performances; the consent of two or more persons concurring respecting the transmission of some property, right or benefits, with the view of contracting an obligation, a mutual obligation,' etc." P. 482

The case of *Kudrna v. Adamski,* 188 Ore. 396, 216 P.2d 262, 16 A.L.R. 2d 1297 which have been annotated at the cited A.L.R. volume is the case of a 5 year old child being taken to the doctor by her mother in an automobile being driven by an uncle. The accident oc-

curred and the child was injured. The Oregon Supreme Court following the *Rocha v. Hulen* case and other cases to a like affect held that the minor child could not be a guest under these circumstances as a matter of law. The Court reserved the question as to whether a child of tender years could not under any circumstances be a guest. The case stands for the proposition however that the consent of the person transported to enter into the relationship is necessary for a host-guest relationship to exist.

In the case of *Fuller v. Thrun,* 109 Ind. App. 407, 31 N.E. 2d 670, a 6 year old child was left in the custody of the defendant who took it for a ride without the knowledge or consent of the child's parents and it was ruled as a matter of law again that the child was not a guest and that children under 7 years of age are conclusively presumed not to be able to consent and when they are under this age as a matter of law they are not guests and the question should not be left to the Jury.

Hart v. Hogan, 173 Wash. 598, 24 P.2d 99 is the earliest case plaintiff has discovered which discusses the basic problem for this Court. This involved a 12 year old child who was accompanying her mother, the nurse-companion of the driver of the automobile. The nurse-companion accompanied the driver for the driver's convenience. The child was in the automobile because her mother had no place to leave her.

The Washington Court viewed the matter in the same general light as did the California Court and the Oregon Court in the other cases cited and indicated that a minor child under such circumstances has no real voluntary action. It accompanies the police officer to the hospital without its consent. It accompanies its mother to the doctor without being consulted and it accompanies its mother on a trip without being asked. In the present case, a child under Utah Law could not refuse to go to school nor is it consulted about the way transportation is arranged for it to that school. Certainly it has no volition in the matter of obtaining transportation.

The latest case plaintiff has discovered which discusses this matter is the case of *Green v. Jones,* 136 Colo. 512, 319 P.2d 1083. A 2 year old child was involved. The Colorado Court citing the criminal statutes of Colorado which are analogous to the Utah statutes cited in this point held that a 2 year old child was incapable of giving consent to the relationship of host and guest and could not as a matter of law accept the ride. In this case a babysitter took the child in her custody out in her car and the child fell out of the car and was run over by one of the wheels of the car.

One case cited by the defendant in her Brief is worthy of comment and that is the case of *In re: Wrights Estate,* 170 Kan. 600, 228 P.2d 911. In this case Justice Wertz authored the majority opinion as required by the Court and then dissented from his own opinion writing

a much more humane and common sense opinion in dissent than his majority opinion.

Many of the cases cited do involve both the social relationship as well as affording some other consideration. Many of the cases are similar to the *Smith v. Franklin* case supra where there was a social relationship and also other incentives and it is respectfully submitted that under such facts the Utah decision in *Smith v. Franklin,* 14 Utah 2d 16, 376 P. 2d 541 that a jury question is presented is the only reasonable and lawful disposition.

In the light of the authorities cited and the *Smith v. Franklin, supra* decision, it is respectfully submitted that a question of fact to be determined by the Jury was presented by the pre-trial discussion, the Petition for Interlocutory Appeal and the facts in this case.

CONCLUSION

It is respectfully submitted that this Court should affirm the judgment of the lower Court and order this matter on for trial.

RESPECTFULLY SUBMITTED this ..... day of March, 1965.

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