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AUTOMOBILES-SHARING OF EXPENSES AS EVIDENCE OF JOINT ADVENTURE-GUEST ACT

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AUTOMOBILES — SHARING OF EXPENSES AS EVIDENCE OF JOINT ADVENTURE — GUEST ACT — Through a mutual friend, respondents arranged with appellant car owner for transportation to an out-of-town football game, and it was agreed between the parties that the passengers should reimburse the owner for the expenses of transportation and cost of lunch provided by the appellant. After the game the parties decided to drive to another town for dinner; en route the car skidded and overturned as a result of appellant's negligence, and the respondent wife was seriously injured. *Held*, that the members of the party were engaged in a "joint adventure" so that the automobile guest statute would not bar recovery for injuries sustained by respondent wife as a result of appellant's negligence. *Pence v. Berry*, 13 Wash. (2d) 564, 125 P.(2d) 645 (1942).

In this decision the court recognizes the essential elements of a joint adventure to be (1) contract, (2) common purpose, (3) community of interest, and (4) equal right to a voice, accompanied by an equal right of control.[1] The great weight of authority, however, emphasizes only the latter two of these elements; [2] a small minority of decisions disregard the necessity of control and find a joint enterprise based simply on a common purpose.[3] In considering

[1] Instant case, 13 Wash. (2d) at 570. In the state of Washington these four elements have been the criteria of a joint adventure since the cases of Lampe v. Tyrell, 200 Wash. 589, 94 P. (2d) 193 (1939), and Carboneau v. Peterson, 1 Wash. (2d) 347, 95 P. (2d) 1043 (1939).

In respect to the element of contract these cases hold that the relationship of joint adventurer cannot be established "by mere loose statements, with no thought of any contractual obligation," Lampe v. Tyrell, supra; and that a contribution toward the purchase of gasoline is not of itself sufficient to elevate an informal arrangement to the dignity of a contract. Carboneau v. Peterson, supra.

The majority of cases hold that a mere unaccepted offer to share expenses does not affect the status of a person riding in the car as a mere guest. Master v. Horowitz, 237 App. Div. 237, 261 N.Y.S. 722 (1932); Duncan v. Hutchinson, 139 Ohio St. 185, 39 N.E. (2d) 140 (1942). Contra, Johnson v. Fischer, 292 Mich. 78, 290 N.W. 334 (1940), where offer to buy gasoline was not accepted, but there was evidence of control by passenger over driver in the way of directing routes to be taken. A tacit understanding or expectancy that passenger would supply gasoline does not impose obligations of joint enterprise. Eubanks v. Kielsmeier, 171 Wash. 484, 18 P. (2d) 48 (1933). Sharing of expenses, other than transportation costs, is not evidence of a common adventure. Adamson v. McEwen, 12 Ga. App. 508, 77 S.E. 591 (1913), guest to pay hotel expenses; Gill v. Arthur, 69 Ohio App. 386, 43 N.E. (2d) 894 (1941), group of boys, including driver, shared cost of a keg of beer; Chaplowe v. Powsner, 119 Conn. 188, 175 A. 470 (1934), guest supplied theatre tickets; Syverson v. Berg, 194 Wash. 86, 77 P. (2d) 382 (1938), guest supplied lodging at relative's house on overnight trip; Koplitz v. City of St. Paul, 86 Minn. 373, 90 N.W. 794 (1902), girls supplied lunch for picnic.

[2] Cunningham v. City of Thief River Falls, 84 Minn. 21, 86 N.W. 763 (1901); St. Louis & S. F. Ry. v. Bell, 58 Okla. 84, 149 P. 336 (1915); HUDDY, AUTOMOBILES, 6th ed., § 682, p. 893 (1922).

[3] See Weintraub, "The Joint Enterprise Doctrine in Automobile Law," 16 CORN. L. Q. 320 at 331 (1931), for collection of cases following the "common purpose"

the doctrine of the joint enterprise as applied to fact situations similar to the present case (i.e., where there has been a sharing of expenses of transportation), some courts have found that a joint enterprise does exist;[4] while other courts have held that the sharing of expenses by itself is not evidence of a joint undertaking.[5] The important factor in determining whether a joint enterprise exists under the particular set of facts is the element of control. Control does not mean the right to interfere at will in the driving of the car, but merely equal right of control and "of general supervision over the instrumentality, equal authority in directing how the instrumentality is to be used in the performance of the enterprise, and likewise, equal responsibility for the manner of such performance." [6] Some courts require a close legal relationship between the parties before they will find a joint enterprise: there must be circumstances

doctrine. Contra: Corn v. Kansas City, C.C. & St. J. Ry., (Mo. 1921) 228 S.W. 78 at 82, where it was held that common purpose alone was not enough if the purpose was not a business one, and that the common purpose of a husband and wife on way to depot to pick up daughter did not constitute a joint enterprise. "The general rule is stated to be 'a mere guest or . . . passenger who is riding in the machine, but who has no authority either over the machine or over the driver,' is not chargeable with the driver's negligence." Quoting Tannehill v. Kansas City, C. & S. Ry., 279 Mo. 158 at 170-171, 213 S.W. 818 (1919). If it can be said that a wife has no control over a husband's driving, how much more is it true that a friend sharing expenses has no such control.

[4] O'Brien v. Woldson, 149 Wash. 192, 270 P. 304 (1928); Lloyd v. Mowery, 158 Wash. 341, 290 P. 710 (1930) (a joint enterprise is an undertaking for the mutual benefit or pleasure of the parties—no consideration of the element of control); Jensen v. Chicago, M. & St. P. Ry., 133 Wash. 208, 233 P. 635 (1925) (which specifically denied the requirement of any element of control in a joint enterprise; the court said, "That is the rule when the question of the relationship is master and servant or principal and agent, but it is not the rule with reference to a joint enterprise or a community of interest." The Jensen case was cited with approval in Forman v. Shields, 183 Wash. 333, 48 P. (2d) 599 (1935).

[5] McCann v. Hoffman, 9 Cal. (2d) 279 at 285, 70 P. (2d) 909 (1937), noted 36 MICH. L. REV. 835 (1938) (held that sharing of expenses is usually "nothing more than the exchange of social amenities"); Zeigler v. Ryan, 65 S.D. 110 at 116, 271 N.W. 767 (1937) (held that the jury could reasonably conclude that "even though plaintiff was to pay a part of the expenses and do a part of the driving, the control and management of the car was left to the defendant"); Coleman v. Bent, 100 Conn. 527 at 530, 124 A. 224 (1942), where several men were returning from a fishing trip on which they shared current expenses, including gasoline, oil and garage bills equally, and one of the passengers was driving, the court held, no joint enterprise, and stated "The better considered cases hold that such common possession, and common right of control, resulting in common responsibility for negligent failure to control, are the earmarks of the legal relation of a joint adventure in the operation of a vehicle"; Moen v. Zurich General Accident & Liability Ins. Co., 3 Wash. (2d) 347 at 352, 101 P. (2d) 323 (1940) (where parties contributed toward operating expenses on trip, the court held, "The payment of a portion of the expenses of a journey does not of itself prove an agreement of joint venture"); Barnard v. Heather, 135 Neb. 513, 282 N.W. 534 (1935).

[6] Carboneau v. Peterson, 1 Wash. (2d) 347 at 376, 95 P. (2d) 1043 (1939).

which indicate a principal-agent relationship between passenger and driver; [7] the man at the wheel must be acting for the other as well as for himself; [8] the circumstances must be such that the vehicle was in their common possession; [9] the operation by all the parties should be somewhat inconsistent with the owner's sole and exclusive rights and obligations as owner of the car.[10] The "right of control" must be based upon the recognition of a right to be heard vested in the passenger by reason of the relationship of the parties growing out of the joint enterprise. Mere deference and desire to please the guest by acceptance of suggestions as to route, etc.,[11] or taking turns in the driving of the car,[12] are not sufficient to satisfy the requirement of control in a joint enterprise. Sharing of expenses by the parties is evidence of the existence of a right of control, but each case presents question of fact as to whether the other necessary elements of the joint enterprise are present.[13] Where the parties are travelling together

[7] Carroll v. Hutchinson, 172 Va. 43, 200 S.E. 644 (1939); Farthing v. Hepinstall, 243 Mich. 380, 220 N.W. 708 (1928); Fox v. Lavender, 89 Utah 115 at 119, 56 P. (2d) 1049 (1936). In the last case, the court said, "Complete control means that the principal could dictate when the car was to be used, the destination or where it should go, the route it should take, and how it should be driven, whether slow or fast, behind or around traffic, inside or outside the lane of traffic, etc. It is not necessary that the principal should be physically able to so direct or control, but only that he has the right to." Query: If an essential element of a joint enterprise is equal right to control, can it be said that the party contributing to the expenses of transportation becomes a joint enterpriser and has an equal voice in the operation of the automobile as above described?

[8] Crescent Motor Co. v. Stone, 211 Ala. 516, 101 So. 49 (1924).

[9] Noel v. LaPointe, 86 N. H. 162 at 165, 164 A. 769 (1933), stating "The fact that the plaintiffs in the present case may have contributed to pay for the gasoline used upon the ride is unimportant; the defendant still retained 'his rights and obligations as owner of his car.' "

[10] Coleman v. Bent, 100 Conn. 527, 124 A. 224 (1924).

[11] Carroll v. Hutchinson, 172 Va. 43, 200 S. E. 644 (1939); Stearns v. Lindow, (App. D. C. 1934) 70 F. (2d) 738; State for use of Chairs v. Norfolk & W. Ry., 151 Md. 679, 135 A. 827 (1927); Bryant v. Pacific Electric Co., 174 Cal. 737, 164 P. 385 (1917); Churchill v. Briggs, 225 Iowa 1187, 282 N. W. 380 (1938).

[12] Coleman v. Bent, 100 Conn. 527, 124 A. 224 (1924); Zeigler v. Ryan, 65 S.D. 110, 271 N.W. 767 (1937). *Contra:* Counts v. Thomas, (Mo. App. 1933) 63 S.W. (2d) 416 (1933) (where one boy borrowed father's car to go pleasure riding with a friend, and while friend was driving an accident occurred, held the driver was the agent of the son of the owner and they were engaged in a joint enterprise).

[13] Link v. Miller, 133 Kan. 469, 300 P. 1105 (1931); Barnett v. Levy, 213 Ill. App. 129 (1919) (held that it was a question of fact for the jury whether the driver had by virtue of the agreement to share expenses and the other circumstances relinquished his exclusive right of control); Christopherson v. Minneapolis, St. P. & S. S. M. Ry., 28 N. D. 128, 147 N. W. 791 (1914); Derrick v. Salt Lake & O. Ry., 50 Utah 573, 168 P. 335 (1917); Alexiou v. Nockas, 171 Wash. 369, 17 P. (2d) 911 (1933); Coleman v. Bent, 100 Conn. 527, 124 A. 224 (1924); Manos v. James, 7 Wash. (2d) 695, 110 P. (2d) 887 (1941), commented on in 21 BOST. UNIV. L. REV. 566 (1941). *Contra:* Frisorger v. Shepse, 251 Mich. 121 at 123, 230 N. W. 926 (1930), where owner-driver of car was invited to attend a dance and to bring his car as transportation for the group, for the cost of which each member contributed

for pleasure purposes in a hired vehicle, the cost of which had been shared equally, the members of the party are deemed to have a mutual right of control and are held to be joint enterprisers.[14] Courts seem to be more willing to find the requisite element of control as the basis for a joint enterprise where the parties share expenses of an automobile trip which grows out of a business venture.[15] The relationship between parties to a joint enterprise may be affected in three ways: (1) the contributory negligence of the driver will bar a recovery by an occupant of that car against a negligent third person; (2) the negligence of the driver of the car will make the occupant liable for injury to an innocent third person; and (3) an occupant of the car may recover from the driver of the car for injury caused by his negligence.[16] The overwhelming majority of cases which have established the law of the joint enterprise as applied to instances of expense-sharing between passenger and driver have involved either (1) or (3) above. Only two cases have been found which hold the contributing passenger liable for injury to innocent third persons caused by his negligent driver; in the one case the parties were riding together in a hired vehicle,[17] and in the other case the parties were engaged in a business enterprise.[18] It would seem, therefore, that if (1) and (2) above are equally valid legal incidents of the joint enterprise, the courts should not extend the joint enterprise doctrine without very clear and definite evidence that the parties have intended to assume the obligations which the relationship imposes. Also, as between guest and driver the scope of the doctrine of the joint enterprise should not be expanded so as to destroy the effect of the "guest acts" of the various states by removing

equally. The court said: "They had agreed on a joint pleasure party. Every member of the party had to do with the management and control of the enterprise. They shared equally in the expense. The fact that the defendant was driving the car is material, but not controlling of the question. As driver, he was acting as agent for the other members of the party. They had as much right to direct its movements and speed as he had. Each had a right to be heard in carrying out the details of the trip. This equal right of control is a very important matter to be considered in determining whether it was a joint enterprise." Query: Is there any legal basis for the right to control which the court here seems to assume exists?

[14] Christopherson v. Minneapolis, St. P. & S. S. M. Ry., 28 N. D. 128, 147 N. W. 791 (1914); Adams v. Swift, 172 Mass. 521 at 524, 52 N. E. 1068 (1899). In the latter case, the court said: "the mother of the young woman who was driving when the accident happened, was an equal promoter and manager, and not a mere guest." The facts show that the mother of the young lady driver exercised some actual control over the driver by giving directions in the driving of the carriage.

[15] Derrick v. Salt Lake & O. Ry., 50 Utah 573, 168 P. 335 (1917); Judge v. Wallen, 98 Neb. 154, 152 N. W. 318 (1915).

[16] HARPER, TORTS 320 (1933).

[17] Adams v. Swift, 172 Mass. 521, 52 N. E. 1068 (1899).

[18] Judge v. Wallen, 98 Neb. 154, 152 N. W. 318 (1915). In the following cases, which do not involve a sharing of expenses, passengers have been held liable, as joint adventurers, for injuries to third parties caused by negligence of their drivers: Crescent Motor Co. v. Stone, 211 Ala. 576, 101 So. 49 (1924); Carpenter v. Campbell Automobile Co., 159 Iowa 52, 140 N. W. 225 (1913); Fox v. Lavender, 89 Utah 115, 56 P. (2d) 1049 (1936); Howard v. Zimmerman, 120 Kan. 77, 242 P. 131 (1926); VanHorn v. Simpson, 35 S. D. 640, 153 N. W. 883 (1915); Boyd v. Close, 82 Colo. 150, 257 P. 1079 (1927).

a person from the status of a guest on facts showing only a sharing of expenses between the parties.[19]

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[19] McCann v. Hoffman, 9 Cal. (2d) 279 at 285, 70 P. (2d) 909 (1937), holding that the sharing of expenses "does not transform into a passenger one who without such exchange would be a guest. . . . It is obvious that if a different result obtained under any construction of the [guest] statute its purposes would be defeated and its effect annulled"; Chaplowe v. Powsner, 119 Conn. 188 at 192, 175 A. 470 (1934) ("Although the operation of the statute in denying a right of recovery should not be extended, by construction, beyond the correction of the evils and the attainment of the social objects sought by it . . . equally, the scope of the term 'guest' should not be so restricted as to defeat or impair those purposes, as would be the case if one riding as a mere recipient of hospitality [passenger supplying theatre tickets, driver supplying transportation] be excluded by the status of a guest"); Olefsky v. Ludwig, 242 App. Div. 637, 272 N. Y. S. 158 (1934) (holding that contribution for gas and oil does not constitute payment for transportation removing person from class of "guest").

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