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IN THE COURT OF APPEALS OF IOWA

GILBERT GAVRONSKY, a minor, by OSCAR GAVRONSKY, his father and next friend, and OSCAR GAVRONSKY, Individually,

Appellants,

v.

DAVID M. SEAT and DORIS M. SEAT,

Appellees.

Filed October 7, 1977

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2-58524

Appeal from Appanoose District Court - L. R. Carson, Judge.

Plaintiffs appeal from finding that motor vehicle in which minor plaintiff was injured was operated without the owner's consent under § 321.493, The Code. Affirmed.

Glenn Norris & Lex Hawkins, of Hawkins, Hedberg & Ward, of Des Moines, for appellants.

Kenneth L. Keith, of Dull, Keith & Beaver, of Ottumwa, for appellees.

Heard by Allbee, C.J., and Donielson, Snell, Oxberger and Carter, JJ.

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CARTER, J.

This appeal involves the application of section 321.493, The Code, commonly referred to as the "owner's liability" statute. The appellees are the defendants, David M. Seat and Doris M. Seat, who were the owners of a motor vehicle in which plaintiff-appellant, Gilbert Gavronsky (plaintiff), then a minor, was injured while riding as a passenger. At the time of the accident in which plaintiff was injured this automobile was being operated by one Christopher Mattingly. The defendants were not in the automobile at the time.

The claims of the plaintiff, and his father who was also a plaintiff, were in three counts; one alleging a non-guest status on plaintiff's part and asserting negligent operation of defendants' car by Mattingly; one alleging reckless operation of defendants' car by Mattingly; and one alleging that Mattingly was intoxicated while operating defendants' car. In all three counts it is alleged that Mattingly was operating defendants' car with their consent. The defendants in their answer have denied that Mattingly was operating the automobile with their consent.

The parties by written stipulation agreed to a trial procedure where the only issue to be presented to the jury was "whether the automobile involved was driven by. . . Mattingly with the consent of the owners. . . as contemplated by the provisions of Section 321.493, Code of Iowa." This issue was tried to a jury which returned a verdict finding that the automobile involved was driven without the consent of the defendants at the time of plaintiff's injury. This appeal followed.

Plaintiffs present two assignments of error: these are (1) that the trial court erred in failing to direct a verdict in favor of the plaintiffs on the issue of owners' consent; and (2) that the trial court erred in failing to give plaintiffs' requested instructions pertaining to the issue of owners' consent.

I. Jurisdiction. Before considering the merits of the appeal, we are confronted with a serious jurisdictional issue. The record, including the court file and list of docket entries, reveals that following the jury verdict there was no entry of judgment by the court or clerk. Even though the legal effect of the verdict was a denial of plaintiffs' right to recover against defendants in the action, the verdict is not a final judgment from which an appeal may be taken. Moreno v. Vietor, 261 Iowa 806, 811, 156 N.W.2d 305 (1968). Nor is there any other entry which might be construed as a final judgment. See

Moreno v. Victor, supra, at 814. Fortunately for appellants, all of the issues which they seek to advance on appeal were raised in a motion for new trial filed in the trial court and overruled in that court. An order denying a motion for new trial is an appealable order under rule 1, Rules of Appellate Procedure. Because the notice of appeal filed by appellants purports to appeal from the order denying their motion for new trial as well as from a nonexistent final judgment we hold we have jurisdiction to consider all of the issues raised on appeal.

II. Did the Trial Court Err in Denying Plaintiffs' Motion for Directed Verdict?

With respect to plaintiffs' first assignment of error it is undisputed that on the day of the accident defendant Doris Seat gave permission to defendants' 17 year old son, David Jr., to take defendants' car to Rathbun Dam to go swimming. She knew he was going to take some other boys with him for this purpose. There was testimony from defendants that prior to this occasion they had occasionally told David Jr. he should not permit other people to use the car but they had not checked on this or asked him if this had ever occurred. No specific instructions of this type were given at the time of the trip in question.

After arriving at Rathbun Beach, David Jr. gave permission to Mattingly who was one of his companions to drive the car to the town of Rathbun while he waited at the beach. Mattingly, who was then 16, returned with some food and some beer of which the group, including plaintiff and David Jr. partook. Later Mattingly again took the car and drove toward the restroom area at Lake Rathbun. David Jr., although admitting he may have had a conversation with Mattingly shortly prior to this occurrence denied that he knew of Mattingly's intention to take the car on this occasion and denied that he gave permission to do so. Mattingly testified that David Jr. was advised of and consented to his driving the car to the restroom but also testified that he and plaintiff extended the trip to the restroom some two miles to the spot where the accident occurred.

Plaintiffs contend that in determining the issue of owners' consent they are entitled to the application of a rule whereby, as a matter of law, a parent who permits his child to use his car is deemed to have given consent to the operation of his vehicle by any third person driving with the child's permission which will be inferred absent conditions which approach the status of a conversion or theft. As authority for this

contention plaintiffs rely upon the doctrine applied in the Minnesota case of Granley v. Crandall, 180 N.W.2d 190, 192 (Minn. 1970) and extended in the subsequent case of Hutchings v. Bourdages, 189 N.W.2d 706, 710 (Minn. 1971).

This contention was timely urged in plaintiffs' motion for directed verdict made at the conclusion of their evidence and renewed at the conclusion of all of the evidence. We conclude that based on the evidence presented the motion for directed verdict was properly overruled by the trial court. We do not perceive in any of the decisions of the supreme court of this state construing section 321.493 any inclination to adopt a conclusive presumption of the type applied by the Minnesota court. Abel v. Dodge, 261 Iowa 1, 6-10, 152 N.W.2d 823 (1967), which plaintiffs claim is indicative of an intent to adopt the Minnesota rule, goes no further than to hold that in circumstances similar to those involved in the Minnesota cases nonconsent cannot be found as a matter of law. We do not feel we can expand upon this holding so as to find consent as a matter of law. The issue of consent was for the jury.

III. Did the Trial Court Err in Instructions Given the Jury? After their motion for directed verdict was overruled plaintiffs submitted proposed jury instructions on the issue of consent. They excepted to the failure of the trial court to give their requested instructions 3 and 4. The trial court, in its instruction number 6, did give all of requested instruction 3, except the last sentence thereof. That sentence reads, "The law looks with disfavor on secret limitations of authority which the general public does not know and has no duty or reason to know." Rather than being an instruction on the law to be applied by the jury in deciding the case, the omitted portion of the requested instruction is a commentary on what plaintiffs believed the underlying policy of the law to be. The trial court did not err in refusing to give it. Plaintiffs' requested instruction 4 is also couched in terms of the" "policy of the law" and sets forth an extensive list of circumstances which the jury should consider in deciding the issue of owners' consent. The trial court adequately covered the matters the jury should consider in other instructions which were less inclined to overemphasize plaintiffs' theory of the case. There was no error in failing to give requested instruction 4.

We have considered all issues presented and find no basis for reversal.

AFFIRMED.

DONIELSON, J., concurs; ALLBEE, C.J., and SNELL, J., specially concur; OXBERGER, J., dissents.

ALLBEE, C.J. (specially concurring)

I concur with the result reached by the majority. The supreme court has declared the principal function of the court of appeals to be "decisionmaking rather than development of the law." (Order of November 1, 1976.) Our limited function requires affirmance of this case.

SNELL, J., joins in this special concurrence.

OXBERGER, J. (dissenting)

I dissent. I agree that the issue of consent was for the jury. The trial court submitted this issue to the jury in two parts: first, did the Seats give their son David Jr. the authority to permit a third person to drive the family vehicle; and second, did David Jr. consent to Chris's operation of the vehicle. I think only the second consent query--whether David Jr. gave Chris permission to drive the car--could properly be submitted to the jury for resolution. I would remand for new trial.

At trial the Gavronskys moved for a directed verdict on the basis of their reading of Tuttle v. Longnecker, 258 Iowa 393, 138 N.W.2d 851 (1965) and Hutchings v. Bourdages, 189 N.W.2d 706 (Minn. 1971). The **Tuttle** and Abel v. Dodge, 261 Iowa 1, 152 N.W.2d 823 (1967) decisions affirmed the submission to the jury of the consent issue. The owner-defendants in both cases on appeal sought to avoid liability by claiming nonconsent under § 321.473, The Code. In both cases the permittee was present in the car as a passenger. **Tuttle** held that if the permittee was present in the car as a passenger, the operation of the vehicle is still his operation and the negligence of the driver will bind the owner. In grappling with the consent statute, **Tuttle** observed:

> "Only a narrow construction of the statute would permit holding that an owner, placing his vehicle in the care of members of his family to be used for their pleasure or for the family business would escape liability if his wife or son or daughter should give over the wheel to the management of a friend." 258 Iowa at 400, 138 N.W.2d at 855.

Abel expressly refused to restrict its holding to the fact that the minor permittee was present in the car as a passenger. 261 Iowa at 6, 152 N.W.2d at 826. Rather, it grounded its decision on the broad purpose of the consent statute: protection of the public.

> "... In harmony with that purpose it would seem that an owner of a motor vehicle should be held liable for injuries or damages which occur while his car is being driven by a third person allowed by owner's permittee to drive or use the car, since the power to prevent injury to the public by the negligent use of his car is vested in the owner." **Abel**, supra, quoting from annotation to Sousa v. Corti, 22 Cal.2d 454, 139 P.2d 645(1943), 147 A.L.R. 861, 875-76.

Although there was no evidence in **Abel** that the owner had instructed his permittee not to allow another to drive, one of the cases cited by **Abel** in support of its

holding was a federal decision construing § 321.473 The Code Webb v. Moreno 363 F.2d 97 (8th Cir. 1966). The **Webb** defendant owner appealed solely on the issue of consent The **Webb** son was not present in the car when the accident occurred The owner-father argued he was entitled to a directed verdict on the issue of consent. The jury verdict was affirmed. The parent-owner could not by a general warning to his son against permitting others to drive his vehicle conclusively establish nonconsent under § 321.473.

> "As a parent of ordinary intelligence the father undoubtedly knew that any young man 18 years of age finds pleasure in the company of other young people and that if not expressly restrained he would likely share the driving with others. . ." 363 F.2d at 101.

Certainly in the case at bar there was no more than a previous general warning by the parents.

The supreme court has not decided the issue presented by this case. If David Jr. had been present in the car, I think unquestionably the general warnings of his parents would have been insufficient under the case law to establish nonconsent. I find it crucial to the decision of this case to consider the import of our case law.

Tuttle, **Webb** and **Abel** affirmed jury verdicts for plaintiffs imposing liability upon defendant owners claiming nonconsent under § 321.473 The one Iowa case which has affirmed the granting of a directed verdict for a defendant-owner under § 321.473 did not involve familial relationships between the owner and the permittee and did include an express written prohibition against the permittees allowing any other person to drive the vehicle. Schneberger v. Glenn 176 N.W.2d 782 (Iowa 1970).

For the first time, an Iowa appellate court is faced with a plaintiff's appeal of a jury verdict allowing no recovery. We are presented for the first time with the propriety of submission to the jury as a fact question the issue of the parents consent to their permittee child's allowing another person to drive the family vehicle. I am persuaded the majority wrongly concludes **Abel** ". . . goes no further than to hold that in circumstances similar to those involved in the Minnesota cases nonconsent cannot be found as a matter of law." As I read Hutchings v. Bourdages, 189 N.W.2d 706 (Minn 1971), the cases which preceded it in the Minnesota court had

brought Minnesota law to the precise juncture at which Iowa law now stands: whether the presence of the child in the car is a necessary condition to the imposition of liability upon the automobile owner.

Hutchings presented the Minnesota court with a plaintiff's appeal, similar to the Gavronskys', with facts strongly indicating nonconsent -before the child's departure, the parent-owner told him not to drive into Minnesota and warned him not to allow anyone else to drive the vehicle. The Minnesota court ruled the owner had consented as a matter of law; when the parent permitted his child to drive, he had cloaked him with the authority to consent to third parties operating the vehicle. Public policy demanded such a result:

> ". . . parents cannot blind themselves to the realities of youthful behavior, the universal proclivity of young people for joyriding and the inclination of young people to permit friends to drive their automobiles." 189 N.W.2d at 709.

I am persuaded the Iowa Supreme Court presented with this question would take the next step in the direction begun in the **Tuttle** and **Abel** decisions. It would hold consistent with the stated public policy of **Abel** that a parent who permits his minor child to drive the car, consents to the operation of that car by whomever the child allows to drive. I think the supreme court would refuse the narrow construction espoused by the majority. Indeed, I think this is the meaning of the **Tuttle** language regarding an owner entrusting his automobile to his family. Such an owner cannot but contemplate that his wife or son or daughter may give over the management of the wheel to a friend. **Tuttle**. 258 Iowa at 400. 138 N.W.2d at 855. **Abel** quickly followed to solidify the public policy--liability is imposed at the source of control: the owner-parent. **Abel**, 261 Iowa at 6, 152 N.W.2d at 826.

I cannot agree with the Gavronskys' contention that there is no conflict in the evidence on the issue of the consent given by their minor son to the driver. The Seats' minor son did not appear at trial. In depositions taken during discovery procedures, introduced into evidence, David Jr. denied giving permission; on cross examination he said it was possible he gave permission. A jury question was generated on the issue of the minor son's consent. The Gavronskys are entitled to have the factual question of the son's consent submitted directly to the jury with a proper instruction that if his consent be found on the facts, the owner parents are bound by that consent. I would grant the new trial the Gavronskys seek.