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Determination of Guest or Paying Passenger Status -- Effect of Sharing Expenses -- Application of the Guidelines

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CASES NOTED

DETERMINATION OF GUEST OR PAYING PASSENGER STATUS—EFFECT OF SHARING EXPENSES—APPLICATION OF THE GUIDELINES

Three women, related by blood or marriage and longtime friends, after considerable discussion among themselves and their husbands, planned a trip to New York to visit friends and relatives. They agreed that the deceased and defendant *A* would drive to New York from Clearwater, Florida, each taking turns driving and sharing expenses equally. Defendant *B*'s car was to be used. Defendant *B* was to fly to New York and return by her car in which all three women were to share expenses equally. On the first portion of the trip while still in Florida and while defendant *A* was driving, the accident occurred and the deceased was killed. The deceased's husband, alleging ordinary negligence, sued the defendants for wrongful death.[1] The trial court entered summary judgment on behalf of the defendants. On appeal to the Second District Court of Appeal, *held*, affirmed: The deceased was a guest within the meaning of the guest statute,[2] thereby precluding the plaintiff from recovering. *Pooton v. Berutich*, 199 So.2d 139 (Fla. 2d Dist. 1967).

In 1937, when the Florida automobile guest statute[3] was adopted, the effect was to alter the degree of negligence necessary to be proved as a prerequisite to recovery by a guest passenger.[4] More precisely, it relieves owners and operators of automobiles, who act gratuitously, of the con-

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1. *See* FLA. STAT. § 768.01 (1965).

2. FLA. STAT. § 320.59 (1965):

> No person transported by the owner or operator of a motor vehicle as his guest or passenger, without payment for such transportation, shall have a cause of action for damages against such owner or operator for injury, *death* or loss, in case of accident, unless such accident shall have been caused by the gross negligence or willful and wanton misconduct of the owner or operator of such motor vehicle . . . . (Emphasis added.)

In Brailsford v. Campbell, 89 So.2d 241, 243 (Fla. 1956), the Supreme Court of Florida stated:

> [W]hen construed as a whole, in the light of the legislative intent, we have no doubt that it was intended to apply to actions for *wrongful death* as well as to actions by the injured guest, or his personal representative, for the injuries suffered by the guest himself. (Emphasis added.)

See also Kolodgy and Capps, *Torts, Third Survey of Florida Law*, 12 U. MIAMI L. REV. 469, 484 (1958) for an analysis of the interrelationship between the wrongful death statute and the guest statute.

3. FLA. STAT. § 320.59 (1965) [hereinafter referred to as the guest statute]. Guest statutes of other states will be denominated by the applicable state.

4. Erlichstein v. Roney, 155 Fla. 333, 20 So.2d 254 (1944) (dictum).

The Florida courts use the terminology "guest," "guest passenger" or merely "passenger" to indicate one who may recover by showing the greater degree of negligence. The designation "paying passenger" is used to indicate one who may recover for the operator's ordinary negligence. Some other jurisdictions use "passenger for hire" for the latter meaning. Still others use "passenger" for the latter, which is contrary to the Florida usage.

sequences of ordinary negligence to their guests.[5] In operation, the statute precludes a guest passenger from recovering against his host in the absence of the latter's gross negligence or willful and wanton misconduct.[6]

"Since [the guest statute] . . . is a restriction on and in derogation of a common law right, such statute may be extended only so far as a strict construction of the language of the statute makes it imperative."[7] The three main areas of judicial construction of the guest statute are: (1) who is a guest passenger; (2) what is gross negligence or willful and wanton misconduct; and (3) when does the host-guest relationship begin and terminate. Once it is decided that the person is a guest within the confines of the statute, its legislative purpose must be given full effect. Therefore, the Florida courts have tended toward a liberal interpretation with respect to what constitutes gross negligence[8] and when the host-guest relationship begins and ends.[9] However, in the determination of whether a person comes within the statutory classification of a guest passenger, the courts require strict construction.[10] Nevertheless, judicial construction should not be so strict as to result in unwarranted exceptions to the applicability of the statute.[11]

Serious conflict over the determination of guest status arises in cases

5. Nelson v. McMillan, 151 Fla. 847, 10 So.2d 565 (1942) (dictum); *accord*, Brailsford v. Campbell, 89 So.2d 241 (Fla. 1956) (dictum).

6. Koger v. Hollahan, 144 Fla. 779, 198 So. 685 (1940). Jackson v. Edwards, 144 Fla. 187, 197 So. 833 (1940); *accord*, Juhasz v. Barton, 146 Fla. 484, 1 So.2d 476 (1941).

> The sole purpose of the legislature in passing the act, as we construe the simple language which they used, was to prevent one who traveled with another in a car as a guest, or without compensation, from recovering unless it was proven that the driver of the car was guilty of the greater degree of negligence. Evidently, they were concerned with the propriety and fairness of the recovery by a free rider . . . for ordinary negligence of a driver . . . .

Koger v. Hollahan, *supra* at 783, 198 So. at 687.

> But the Ohio Supreme Court casts doubt on such a conclusion:
> "[G]uest statutes" generally are designed and intended to discourage fraud and collusion between gratuitous guests in motor vehicles and the owners or operators thereof in the making of unjust demands against liability or casualty insurance companies for the injury of guests.

Kitchens v. Duffield, 149 Ohio St. 500, 503, 79 N.E.2d 906, 907 (1948) (dictum).

See also 2 HARPER & JAMES, THE LAW OF TORTS § 16.15, at 961 (1956).

7. Summersett v. Linkroum, 44 So.2d 662, 664 (Fla. 1950) (dictum); *cf.* Berne v. Peterson, 113 So.2d 718 (Fla. 3d Dist. 1959).

8. *E.g.*, Carraway v. Revell, 116 So.2d 16 (Fla. 1959) (in which the Supreme Court indicated that gross negligence is not synonymous with willful and wanton misconduct, but that it lies between ordinary negligence and willful and wanton misconduct); Klem's v. Cline, 105 So.2d 881 (Fla. 1958); Raggs v. Gouse 156 So.2d 882 (Fla. 2d Dist. 1963); Douglass v. Galvin, 130 So.2d 282 (Fla. 2d Dist. 1961); Madden v. Killinger, 97 So.2d 205 (Fla. 3d Dist. 1957). *But see* Miami Beach First Nat'l Bank v. Fuchs, 137 So.2d 846 (Fla. 3d Dist. 1962); Kaplan v. Taub, 104 So.2d 882 (Fla. 3d Dist. 1958).

9. *See* Fishback v. Yale, 85 So.2d 142 (Fla. 1955); Fleming v. Smart, 153 So.2d 748 (Fla. 3d Dist. 1963); La Rue v. Hoffman, 109 So.2d 373 (Fla. 2d Dist. 1959); Kaplan v. Taub, 104 So.2d 882 (Fla. 3d Dist. 1958).

10. Gregory v. Otts, 329 S.W.2d 904 (Tex. Civ. App. 1959) (dictum).

11. Berne v. Peterson, 113 So.2d 718, 720 (Fla. 3d Dist. 1959) (dictum).

where the expenses of the trip are shared equally or borne, entirely or partially, by the passengers.[12] The language of the guest statutes of the various states goes to the heart of the conflict. Of twenty-seven states that have guest statutes, the overwhelming majority use the words "without payment,"[13] as does the Florida statute which defines a guest as a person transported by the operator as his guest without payment for such transportation.[14] Of the remainder, five states use the words "without compensation"[15] and three states use "by invitation and not for hire."[16] A perusal of recent decisions does not indicate any correlation between the statutory language and the judicial construction of who is a guest.[17] Rather, the courts of the various states use these words as a beginning in order to elaborate on legislative intent and, thereby, decide whether the person comes within the confines of the statute.

The Supreme Court of Florida, in *McDougald v. Couey*,[18] ruled that an occupant was not a paying passenger merely because he made a contribution to the expenses of operating the automobile.[19] The decision is

12. *See* 2 HARPER & JAMES, THE LAW OF TORTS § 16.15, at 960 (1956) and authorities cited therein.

13. ALA. STAT. tit. 36, § 95 (1958); COLO. REV. STAT. ANN. § 13-9-1 (1963); DEL. CODE ANN. tit. 21, § 6101 (1953); FLA. STAT. § 320.59 (1965); IDAHO CODE § 49-1401 (1947), *as amended*, ch. 114, § 1 (1963); ILL. ANN. STAT. ch. 95, § 9-201 (1957) ("[R]iding in or upon a motor vehicle . . . as a guest without payment for such ride . . . ."); IND. STAT. ANN. § 47-1021 (1965); KAN. STAT. ANN. § 8-122(b) (1963); MICH. COMP. LAWS ANN. § 257.401 (1967); N.M. STAT. ANN. § 64-24-1 (1953); OHIO REV. CODE ANN. § 4515.02 (1965); ORE. REV. STAT. § 30.115 (1965); S.C. CODE OF LAWS § 46-801 (1962); TEX. CIVIL STAT. ANN. art. 6701(b) (1959); VA. CODE ANN. § 8-646.1 (1950); WASH. REV. CODE ANN. 46.08.080 (1962); WYO. STAT. ANN. § 31-233 (1957).

14. FLA. STAT. § 320.59 (1965).

15. CAL. VEHICLE CODE ANN. § 17158 (Deering 1959), *as amended*, ch. 1600, § 1 (1961) ("[W]ho as a guest accepts a ride in any vehicle . . . without giving compensation for such ride. . . ."); NEV. REV. STAT. § 41.180 (1965) (similar to California statute, *supra*); N.D. CENTURY CODE ANN. §§ 39-15-01 to -02 (1960) (similar to California statute, *supra*); S.D. CODE § 44.0362 (1939) ("Transported . . . as his guest without compensation for such transportation. . . ."); UTAH CODE ANN. § 41-9-1 to -2 (1953) (similar to California statute, *supra*).

16. IOWA CODE ANN. § 321.494 (1965); MONT. REV. CODES ANN. § 32-1113 (1947); NEB. REV. STAT. § 39-740 (1943).

ARK. STAT. ANN. § 75-913 (1947) merely states "transported as a guest"; VT. STAT. ANN. tit. 23, § 1491 (1967) is more specific: "[U]nless such owner or operator has received or contracted to receive pay for the carriage . . . or unless . . . caused by . . . gross . . . negligence . . . ."

17. *Compare, e.g.*, Johnson v. Kolovos, 224 Ore. 266, 355 P.2d 1115 (1960) *with* Jancar v. Knapic, 171 Ohio St. 165, 168 N.E.2d 407 (1960). Even though the statutes are similar, the courts reach opposite results by different methods of construction.

18. 150 Fla. 748, 9 So.2d 187 (1942). This was the first Florida case to rule on whether bearing part of the automobile expenses constituted "payment" within the guest statute.

19. Prior to the *McDougald* decision the only case construing the Florida guest statute that ruled on this question was Teders v. Rothermel, 205 Minn. 470, 286 N.W. 353 (1939). On a planned motor trip to Florida, where the accident injuring the plaintiff occurred, the Minnesota Supreme Court held that sharing of automobile expenses per se constituted payment and was enough to take the case outside the guest statute. The court used a definitional approach, distinguishing "payment" from "compensation" and "for hire." However, as put by the same court in a later case: "The Florida court passed upon this question later on and arrived at a contrary result. McDougald v. Couey, 150 Fla. 748, 9 So.2d 187." Burt v. Richardson, 251 Minn. 335, 337-38, 87 N.W.2d 833, 835 (1958).

predicated primarily on the fact that the traveling arrangement was not contractual in nature in that there was no bargaining and no definite proposal. Rather, "the matter of donating a small amount of money to defray the cost of the venture was merely an after-thought."[20] The court, although aware that the occupant and driver were life-long friends, did not emphasize the relationship of the parties in reaching its decision.[21] The reliance on the contractual aspect is brought out by the court's citing, as an analogous case, *Kerstetter v. Elfman*,[22] where the Pennsylvania Supreme Court held that the occupants who shared all expenses were paying passengers. Although the occupants were not friends, the Pennsylvania court also chose not to predicate its decision on the relationship of the parties,[23] but rather placed emphasis on the contractual nature of the arrangement.[24]

In *Yokom v. Rodriguez*,[25] the Supreme Court of Florida subtly introduced another approach to solving the contribution-toward-expenses cases. The travel arrangement was construed, not in terms of offer and acceptance, but in terms of everyday courtesy. That is, the driver merely acted chivalrously when he agreed to the request of his female acquaintance to take her on a short trip, provided she paid *all* the expenses attendant upon operation of the automobile. The decision to categorize the female passenger as a guest was based on two factors: (1) the driver failed to receive any money which could be considered as profit to him for transportation; and (2) the transportation was "an act of graciousness."[26] The first factor, which looks to the adequacy of consideration, coupled with the second factor, which looks to the entire act of transportation, indicates that the basis of the decision is really the motivating purpose of the journey, which, in turn, depends to a certain extent on the relationship of the parties.

In a well reasoned opinion, the Ohio Supreme Court reached a decision[27] that, in effect, synthesized the respective approaches taken in

20. McDougald v. Couey, 150 Fla. 748, 753, 9 So.2d 187, 189 (1942).

21. The court merely mentioned that the contribution was "[T]he gesture of a person who did not wish to impose upon his companion's generosity. . . ." *Id.*

22. 327 Pa. 17, 192 A. 663 (1937). The court construed the Delaware guest statute which is similar to Florida's. *See* statutes cited at note 13 *supra*.

23. "It may be mentioned *incidentally* that plaintiffs were not friends, nor even acquaintances, of defendent . . . ." *Id.* at 19, 192 A. at 664. (Emphasis added.)

24. A distinction must also be carefully made between cases involving an enforceable agreement to share the expenses of an automobile trip and those in which there is merely a voluntary payment of expenses, or part of them, by a rider, not in liquidation of a contractual liability assumed by him, but to return the favors of a host as a matter of social amenity and companionship . . . .

Id. at 21, 192 A. at 665.

25. 41 So.2d 446 (Fla. 1949).

26. *Id.* at 448.

27. Hasbrook v. Wingate, 152 Ohio St. 50, 87 N.E.2d 87 (1949).

In Perdue v. Watson, 144 So.2d 840 (Fla. 2d Dist. 1962), the court in a skeletal manner, uses the reasoning of the *Hasbrook* case. *Perdue* points out that Wagnon v. Patterson, 260 Ala. 297, 70 So.2d 244 (1954), contains an extensive review of the law of what constitutes "payment." The *Wagnon* case, in turn, states that *Hasbrook* correctly and clearly sets out

McDougald and *Yokom*. The court first discussed, at length, the various tests used by jurisdictions having "without payment" type guest statutes[28] to determine guest status in contribution-toward-expenses cases. The expertise of the court lay, not only in its application of these tests, but in the logical order in which it considered them, to wit: (1) existence of an express contract; (2) existence of a joint venture or implied contractual agreement; (3) persons benefited; (4) motivation of the parties, concerning the entire undertaking; and, (5) the relationship of the parties.[29] By considering, first, contractual arrangements [tests (1) and (2)], secondly, the purpose of the journey [tests (3) and (4)], and finally, the relationship of the parties [test (5)], the court gave the word "payment" broad connotations that do not appear in a dictionary or in the guest statutes. Its step by step deductive technique gave thorough and properly weighted consideration to each of these factors.[30]

The Second District Court of Appeal is the only Florida court subsequent to the *Yokom* case to have considered the guest status question in contribution-toward-expenses cases.[31] In *Minnick v. Keene*,[32] where the driver making a pleasure trip agreed to take the passenger in consideration of the latter's paying certain trip expenses, only the contractual aspects of the arrangement were considered. The case held that agreeing to share in the expenses of a trip did not establish a joint enterprise. The contributions were construed as mere acts of courtesy.[33] The same court in *Perdue v. Watson*,[34] where the driver agreed to take a total stranger on a short trip only after the latter offered to pay a sum of money for taking him, considered, first and primarily, the contractual aspects of the arrangement; mentioned, secondly, the purpose of the journey; and finally, the relationship of the parties.[35]

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the applicable law and goes on to quote its reasoning extensively. Wagnon v. Patterson, *supra* at 248.

28. *See* statutes cited at note 13 *supra*.

29. The tests are discussed in Hasbrook v. Wingate, 152 Ohio St. 50, 55-60, 87 N.E.2d 87, 90-92 (1949), and their application in the same case at 63-64, 87 N.E.2d at 93-94.

30. After examining the lack of contractual arrangements, the court stated:

> Since there was no joint adventure between plaintiff and defendant in the instant case to make the trip necessary, and since the transportation of the plaintiff was not necessary for any business project of the defendant, her transportation was clearly for her own benefit. The question then arises, in the absence of any express agreement on the subject, what motivated the parties, concerning the transportation of the plaintiff?
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> . . . .
>
> Finally, when the family relationship between the plaintiff and defendant is taken into consideration . . . the plaintiff has utterly failed to carry the burden required of her to make out a [paying] "passenger" status . . . .

Harsbrook v. Wingate, 152 Ohio St. 50, 63-64, 87 N.E.2d 87, 94 (1949).

31. Pooton v. Berutich, 199 So.2d 139 (Fla. 2d Dist. 1967); Perdue v. Watson, 144 So.2d 840 (Fla. 2d Dist. 1962); Minnick v. Keene, 139 So.2d 172 (Fla. 2d Dist. 1962).

32. 139 So.2d 172 (Fla. 2d Dist. 1962).

33. *Id.*

34. 144 So.2d 840 (Fla. 2d Dist. 1962).

35. First, ". . . the agreement between these parties was a contractual relationship for transportation . . . on a definite proposal made and accepted for the furnishing of this

The recent decisions in the various jurisdictions indicate that the contractual arrangement factor, the journey-purpose factor, and the party-relationship factor are the tests used to decide whether or not an occupant is a guest because he shared or contributed toward automobile expenses.[36] These cases, however, do not apply the factors using the deductive technique of the *Hasbrook v. Wingate* case.[37] Instead, the cases are usually predicated on one factor and, as an afterthought, one or both of the remaining factors may be mentioned. Some jurisdictions have, in fact, rejected several of the factors and settled on one as *the* test.[38]

Several jurisdictions, having no guest statute of their own and construing the Florida statute in contribution-toward-expenses cases, have gone so far as to practically ignore all of the factors and adopt a strict, definitional approach.[39] While giving consideration to one of the factors, two other jurisdictions, similarly construing the Florida statute, failed to apply certain of the factors that necessarily warranted consideration because of the circumstances.[40]

In the instant case, the Second District Court of Appeal admirably

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transportation for a price." Secondly, "[t]his journey was not for the purposes of companionship, pleasure, social amenities, hospitality, and the like . . . and it was not a share expense trip. . . ." Finally, "[t]he parties here were total strangers." Perdue v. Watson, 144 So.2d 840, 841 (Fla. 2d Dist. 1962).

36. Mears v. Kovacic, 152 Colo. 362, 381 P.2d 991 (1963) (relationship of parties); Clayton v. Bartoszewski, — Del. —, 198 A.2d 692 (1964) (contractual arrangement; construing Virginia statute); Lightcap v. Mettling, 196 Kan. 124, 409 P.2d 792 (1966) (contractual arrangement); Pence v. Deaton, 354 Mich. 547, 93 N.W.2d 246 (1958) (contractual arrangement); Cappellano v. Pane, 178 Neb. 493, 134 N.W.2d 76 (1965) (journey-purpose; construing Iowa statute); Ledford v. Klein, 87 N.W.2d 345 (N.D. 1957) (journey-purpose); Burrow v. Porterfield, 171 Ohio St. 28, 168 N.E.2d 137 (1960) (journey-purpose; Hasbrook v. Wingate, 152 Ohio St. 50, 87 N.E.2d 87 (1949), is relied on extensively, but not its reasoning); Easter v. Wallace, 318 S.W.2d 916 (Tex. Civ. App. 1958) (journey-purpose); Smith v. Franklin, 14 Utah 2d 16, 376 P.2d 541 (1962) (journey-purpose).

37. 152 Ohio St. 50, 87 N.E.2d 87 (1949).

38. Johnson v. Kolovos, 224 Ore. 266, 355 P.2d 1115 (1960). Oregon rejects the motivating purpose of the journey factor and decides that any expense-sharing prearrangement, which is not vague or trivial, is determinative. *See also* Scotvold v. Scotvold, 68 S.D. 53, 298 N.W. 266 (1941). South Dakota applies the motivating purpose of the journey factor by seeing if it completely overshadows mere hospitality. *See generally* 2 HARPER & JAMES, THE LAW OF TORTS § 16.15, at 961-62 & n.54.

39. Teders v. Rothermel, 205 Minn. 470, 286 N.W. 353 (1939). *See* discussion at note 19 *supra*. Masone v. Ferino, 32 Misc. 2d 15, 221 N.Y.S.2d 472 (N.Y. City Ct. 1961). The occupants were paying passengers merely because of an expense-sharing prearrangement that was of mutual benefit to both parties. This mutual benefit, however, is meant literally as (1) the benefit to the driver of receiving money and (2) the benefit to the occupants in getting a ride.

40. Kizer v. Bowman, 256 N.C. 565, 124 S.E.2d 543 (1962) (where the contractual arrangement alone constituted payment, even though the parties were friends and the trip was taken to see points of interest in Florida); Clemmons v. United States, 105 F. Supp. 260 (N.D. Fla. 1952) (where a joint venture was found without adequate consideration being given to either the journey-purpose or contractual arrangement factors); *cf.* Katz v. Ross, 216 F.2d 880 (3d Cir. 1954) (discussing instructions to the jury, the opinion considers only contractual aspects of the arrangement).

sets out the factors to be used as guidelines[41] for this type of contribution-toward-expenses case. The *Kerstetter* case[42] is effectively distinguished by using, first, the contractual arrangement factor, and then the party-relationship factor.[43] In applying the guideline factors to its own case, however, the court intertwines hem to the extent that their effectiveness as logical, deductive principles is seriously impaired.[44]

Predicating cases of this nature on one or all of the factors indiscriminately may result in an undesirable conclusion from the standpoint of the legislative intent of the guest statute. The statute itself uses only the words "without payment" to define a guest. On the one hand, where no money payment is involved, the courts rely almost exclusively on the "mutual benefit rule," which directly relates to the journey-purpose factor, and sometimes conclude that the person was a *paying* passenger.[45] Such a conclusion is justifiable in order to effectuate the purpose of the legislature. On the other hand, in contribution-toward-expenses cases, where money payment is involved, "there is the implication of debt or obligation either expressly or impliedly assumed and its satisfaction or discharge in some kind of specificity and equivalence."[46] Thus, initially, an investigation of the contractual arrangement is warranted. If the results prove inconclusive, the motivating purpose of the journey naturally arises as the determining factor. By then examining the relationship of the parties, the motivating purpose may be further illuminated. Such methodology will give added assurance to proper determination of guest status in contribution-toward-expenses cases.

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41. *[I]n light of the prior guidelines set forth above*, we cannot see how his [the plaintiff's] contention will withstand the test. The underlying purpose of this undertaking by persons, who were long time friends related by either blood or marriage, was not one of financial contribution or mutual profit based upon a definite and certain contractual relationship. The essence of this undertaking is bottomed upon companionship and social amenities, with a mere oral agreement among long time friends and relatives to share equally in the expenses and obligations to be incurred on the trip. The facts and all reasonable inferences therefrom in favor of the appellant bring the deceased squarely within the confines of the "Guest Statute" . . . .
Pooton v. Berutich, 199 So.2d 139, 143-44 (Fla. 2d Dist. 1967). (Emphasis added.)

42. 327 Pa. 17, 192 A. 663 (1937).

43. Pooton v. Berutich, 199 So.2d 139, 142 (Fla. 2d Dist. 1967).

44. *See* note 41 *supra*.

45. Peery v. Meershon, 149 Fla. 351, 5 So.2d 694 (1942); 60 C.J.S. *Motor Vehicles* § 399(5) (1949) (authorities therein cited at 1012-13).

46. Hasbrook v. Wingate, 152 Ohio St. 50, 57-58, 87 N.E.2d 87, 91 (1949).