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Gross Negligence: Excessive Speed and the Guest Statute

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ment of a judgment lien is unnecessary in light of the available provisions that bar the fraudulent use of homestead exemption to escape the payment of just obligations. Regardless of when it is established, a true homestead should receive the full benefits provided in the constitution.

Additionally, common sense dictates that refusing to allow the homestead exemption to attach to a vested remainder because no right to present occupancy exists is nonsense when homestead status in fact is present. When actual occupancy does exist, there is no sound reason for preventing the benefits of homestead exemption from benefiting this particular estate inasmuch as mere occupancy in other situations has been held a sufficient basis for a claim of homestead.

In light of the inequity and confusion often present in this area, the need for legislative reform and clarification is readily apparent.[38] A more literal and humane constitutional interpretation, benefiting those in greatest need of the homestead exemption, is clearly the preferable approach.

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GROSS NEGLIGENCE: EXCESSIVE SPEED AND THE GUEST STATUTE

Hodges v. Helm, 222 So. 2d 418 (Fla. 1969)

Petitioner, a passenger in respondent's automobile, brought this action for personal injuries received when respondent, driving over an unfamiliar road at an excessive speed, failed to negotiate a curve, left the road, and collided with a utility pole. Petitioner and respondent had stopped for "a few beers" shortly before the accident.[1] The trial court granted respondent's motion for summary judgment based on petitioner's failure to establish a prima facie showing of gross negligence, the degree of negligence required by the Florida automobile guest statute.[2] The Third District Court of Appeal affirmed,[3] relying on the rule that excessive speed alone is not sufficient to establish gross negligence under the guest statute.[4] Petitioner alleged a conflict between the district court opinion and three decisions of the Second

38. Two other possible suggestions to eliminate the harshness exemplified in the instant case come to mind: either prevent judgment liens from attaching to vested remainders or allow the lien to attach to the remainder interest rather than the land. With either method the termination of the life estate would create a new estate, free of liens, equally subject to homestead occupancy or attachment.

1. 222 So. 2d 418, 420 (Fla. 1969).

2. FLA. STAT. §320.59 (1967) (requires the showing of gross negligence or willful and wanton misconduct for an automobile guest to recover from his host).

3. Hodges v. Helm, 207 So. 2d 318 (3d D.C.A. Fla. 1968).

4. *Id.* at 319; *see* Orme v. Burr, 157 Fla. 378, 392, 25 So. 2d 870, 878 (1946); O'Reilly v. Sattler, 141 Fla. 770, 773, 193 So. 817, 818 (1940).

District Court of Appeal[5] and on certiorari the Supreme Court of Florida HELD, that excessive speed seldom occurs by itself and that the facts were sufficient to establish a prima facie showing of gross negligence, thereby precluding a summary judgment.[6] The decision of the district court was quashed and the case remanded.

From 1927 to 1939, twenty-seven states,[7] including Florida,[8] enacted automobile guest statutes. To recover from his host the guest passenger must prove a higher degree of negligence than usual. The primary rationales center around discouragement of suits by ungrateful guests against their hosts and the protection of insurance companies from collusive lawsuits.[9] The distinction between gross and ordinary negligence has never been satisfactory and has continually proved to be a bane to the courts.[10]

In the instant case the court at the outset acknowledged that the delimitation between gross negligence and other forms of negligence "is neither conceptually satisfactory nor practically simple."[11] The court went on to say that "[t]he effect of having to resolve matters within this framework has been to force a case-by-case adjudication which admittedly has not satisfied the desire of the Bench and the Bar for definitive guide lines."[12]

Gross negligence within the Florida guest statute was initially considered to be synonymous with willful and wanton misconduct.[13] In 1959 *Carraway v. Revell*[14] modified this by placing gross negligence between ordinary negligence and willful and wanton misconduct. In doing so, *Carraway* affirmed the definition of ordinary negligence as conduct that a reasonable man might possibly know would result in injury. Gross negligence then would be conduct that a reasonable man would know would probably and most likely result in injury; or, in other words, gross negligence would exist only where the likelihood of injury were known to be imminent or "clear and present."[15]

Throughout the history of the Florida guest statute the courts have maintained that excessive speed alone, while usually sufficient to establish ordinary negligence, is not sufficient to constitute gross negligence.[16] In

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5. Reynolds v. Aument, 133 So. 2d 562 (2d D.C.A. Fla. 1961); Douglass v. Galvin, 130 So. 2d 282 (2d D.C.A. Fla. 1961); Myers v. Korbly, 103 So. 2d 215 (2d D.C.A. Fla. 1958).

6. 222 So. 2d 418 (Fla. 1969).

7. Tipton, *Florida's Automobile Guest Statute*, 11 U. FLA. L. REV. 287, 288 (1959).

8. Fla. Laws 1937, ch. 18033, §1.

9. Note, *Florida Automobile Guest Statute: What Constitutes Gross Negligence and Willful and Wanton Misconduct?*, 4 U. FLA. L. REV. 79 (1951).

10. *See, e.g.*, Lascher, *Hard Laws Make Bad Cases—Lots of Them (The California Guest Statute)*, 9 SANTA CLARA LAW. 1 (1968); Tipton, note 7 *supra*; Comment, *Judicial Nullification of Guest Statutes*, 41 S. CAL. L. REV. 884 (1968).

11. 222 So. 2d 418, 419 (Fla. 1969).

12. *Id.*

13. O'Reilly v. Sattler, 141 Fla. 770, 773, 193 So. 817 (1940); *see* Note, note 9 *supra*.

14. 116 So. 2d 16, 22 (Fla. 1959); *see* Tipton, Carraway v. Revell, *Guest Law Landmark*, 35 FLA. B.J. 369 (1961).

15. Carraway v. Revell, 116 So. 2d 16, 23 (Fla. 1959), *quoting with approval* Bridges v. Speer, 79 So. 2d 679, 682 (Fla. 1955).

16. *E.g.*, O'Reilly v. Sattler, 141 Fla. 770, 773, 193 So. 817, 818 (1940).

Dexter v. Green[17] the court qualified this by adding that "all the circumstances of each particular case—every act or omission entering into the particular happening—must be considered in determining whether liability exists." However, the sufficiency of the facts alleged to establish a prima facie case of gross negligence is a question of law to be initially determined by the trial judge.[18] There have been many cases where the "speed alone" rule has been relied on in affirming summary judgments against plaintiffs under the guest statute.[19]

Previously, a jury case was presented only when factual evidence of negligence in addition to excessive speed was alleged.[20] This could be some negligent act, such as intentional weaving[21] or passing on the right.[22] It could also be a negligent omission, for example, failure to heed some particularly dangerous circumstance such as knowledge of wet brakes.[23] Prior knowledge of a preexisting condition is an important concept in distinguishing guest statute cases. Knowledge of mechanical defects[24] or knowledge of the road and subsequent curves[25] have each been held, when coupled with excessive speed, to establish a conscious disregard of a "clear and present" danger. A composite of negligent actions must exist, creating express or implied knowledge of danger. *Dexter v. Green*[26] concluded that while each separate action by itself might not establish liability, the entire course of conduct of the driver was such that she knew or should have known that she was placing others in danger of injury. Yet, even presentation of a composite situation did not always create immunity from summary judgment. In 1952 the Florida supreme court found eleven counts of negligence—including excessive speed, worn tires, inadequate brakes, driver fatigue, and affected vision—insufficient to establish a prima facie case of gross negligence and affirmed a summary judgment.[27]

A composite situation is not presented in the instant case. Night driving over an unfamiliar road does not constitute negligence. However, these are the conditions that make speeding negligent. The posted speed limit anticipates these conditions, as well as the width of the road and the traffic. This

17. 55 So. 2d 548, 549 (Fla. 1951).

18. *E.g.*, Cormier v. Williams, 148 Fla. 201, 205, 4 So. 2d 525, 526 (1941); Stone v. Chichester, 198 So. 2d 108, 109 (1st D.C.A. Fla. 1969).

19. Ling v. Edenfield, 211 F.2d 705, 708 (5th Cir. 1954); Belick v. Sperry, 88 So. 2d 495, 497 (Fla. 1956); Ayers v. Morgan, 42 So. 2d 2, 4 (Fla. 1949); Koger v. Hollahan, 144 Fla. 779, 786, 198 So. 685, 688 (1940); O'Reilly v. Sattler, 141 Fla. 770, 773, 193 So. 817, 818 (1940); Wilson v. Eagle, 120 So. 2d 207, 208 (2d D.C.A. Fla. 1960); Dye v. Freeman, 116 So. 2d 647, 648 (2d D.C.A. Fla. 1959); Vihon v. McCormick, 109 So. 2d 400, 402 (2d D.C.A. Fla. 1958), *cert. denied*, 122 So. 2d 9 (Fla. 1959).

20. Cadore v. Karp, 91 So. 2d 806, 808 (Fla. 1956); Faircloth v. Hill, 85 So. 2d 870, 872 (Fla. 1956).

21. Cormier v. Williams, 148 Fla. 201, 203, 4 So. 2d 525, 526 (1941).

22. Bridges v. Speer, 79 So. 2d 679, 680 (Fla. 1955).

23. Martin v. Clum, 142 So. 2d 149, 150 (3d D.C.A. Fla. 1962).

24. Webster v. Kemp, 164 So. 2d 814, 816 (Fla. 1964).

25. Weiss v. Kamen, 67 So. 2d 761 (Fla. 1953).

26. 55 So. 2d 548, 549 (Fla. 1951).

27. DeWald v. Quarnstrom, 60 So. 2d 919, 920 (Fla. 1952).

should not be considered a composite situation, and speed alone, without other factual evidence of negligence, is not gross negligence. In comparison, however, driving a defective automobile at any speed is negligence. To do so at an excessive speed may be gross negligence. This additional element is the key distinction in the "excessive speed alone" rule.

The only possible additional condition presented in the instant case is that of consumption of intoxicating beverages by respondent. By implication the trial court found it insufficient to complete the composite. The supreme court does not deal with it directly. In the past, however, the question of alcohol consumption presented an interesting dilemma for plaintiffs. In prior speed cases, if consumption of alcohol were alleged to be moderate, as in the instant case,[28] the courts found it insufficient to establish a prima facie case of gross negligence, and invoked the "speed alone" rule.[29] In one instance a district court of appeal stated: "Such evidence could have no effect other than to open the minds of the jurors to improper speculative excursions outside the issues developed by the pleadings and proofs."[30] On the other hand, if it were established that consumption was of a degree to create a dangerous situation, and if the plaintiff knew of this condition (as from joining in defendant's revelry) recovery was barred because of plaintiff's assumption of risk.[31] There was no middle ground on which recovery might be granted.

By reversing the district court of appeal the supreme court has effectively eliminated the "excessive speed alone" concept without expressly saying so. Yet, if speed is "the factor most often contributing to the confusion" in proving gross negligence,[32] what purpose is served by perpetuation of the now emasculated rule of "speed alone"? Since the present case is sufficiently devoid of distinguishing characteristics, it will provide "conflict"[33] with any future district court of appeal affirmance of a summary judgment for defendant wherever the issue of speed is raised. This needlessly compounds the judicial process.

The present case is not concerned solely with excessive speed or with the limited application of a "speed alone" rule of law. Rather, it reflects the continuing dissatisfaction with guest statutes in general.[34] Today it seems unjust for an injured party to be denied recovery because of the relationship of guest to host. The vast majority of drivers are covered by liability insurance and the uninsured motorist, supposedly protected by the guest statutes, is now looked upon with disfavor. Nor is the denial of recovery to all, on the basis of a conjectural possibility of collusion, totally acceptable. The

28. Respondent's Brief on Jurisdiction at 2, Hodges v. Helm, 222 So. 2d 418 (Fla. 1969) (two-and-one-half beers).

29. Herring v. Eiland, 81 So. 2d 645, 646 (Fla. 1955); Dye v. Freeman, 116 So. 2d 647 (2d D.C.A. Fla. 1959); *cf.* Orme v. Burr, 157 Fla. 378, 380, 25 So. 2d 870, 872 (1946).

30. LeFevre v. Bear, 113 So. 2d 390, 392 (2d D.C.A. Fla. 1959).

31. Mascerenas v. Johnson, 280 F.2d 49, 51 (5th Cir. 1960); Henley v. Carter, 63 So. 2d 192 (Fla. 1953). *See also* Godinez v. Soares, 216 Cal. App. 2d 145, 30 Cal. Rptr. 767 (1963).

32. 222 So. 2d 418, 419 (Fla. 1969).

33. FLA. CONST. art. V, §4; FLA. APP. R. 4.5c.

34. FLA. STAT. §320.59 (1967).

guest statutes do not operate in a vacuum. If the purposes for enacting guest legislation have deteriorated, then the legislatures should act accordingly. Yet, apparently under the persistent and effective lobbying on the part of liability insurance companies, guest statutes remain in force.[35]

Although it is said by some that the distinction between degrees of negligence is too complex to be left to the jury,[36] it is perhaps in the face of legislative inaction that the court has now concluded:[37]

> [W]e live in an age where few persons are not in daily contact with the operation of an automobile either as operators or as passengers. Certainly a jury composed of citizens experienced in the ordinary affairs of life, and properly guided by the instruction of the court, should have been allowed to decide whether the respondent's driving . . . was within, or without, the confines of the Guest Statute's limitations.

The court seems to be saying that justice may best be served when the question of the degree of negligence under the guest statute is placed before the jury for adjudication. If such is the case, excessive speed in any context or any other singly alleged act of negligence should provide a jury question.

Given the guest statute, the distinction between ordinary and gross negligence, and the resulting confusion, an open question remains as to what discretion the trial judge should retain in taking a case from the jury. The present case unfortunately provides no positive answers. *Carraway v. Revell*[38] placed gross negligence *between* ordinary negligence and willful and wanton misconduct. By viewing negligence as a continuum, ordinary negligence could be said to set a lower limit to gross negligence. To be grossly negligent one must at least be guilty of ordinary negligence. Taking this to its logical conclusion, it could be held that as a *matter of law* a prima facie showing of ordinary negligence must be established in order to preclude a summary judgment. The present case contains this implication. Thus, the trial judge would have an adequate and workable measure of sufficiency at law and the final adjudication would be left to the jury. This would go a long way toward alleviating guest statute confusion and inconsistency at both the trial and appellate levels of litigation.

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35. W. PROSSER, THE LAW OF TORTS 190-91 (3d ed. 1964).
36. 222 So. 2d 418, 420 (Fla. 1969).
37. *Id.*
38. 116 So. 2d 16, 22 (Fla. 1959).