JOLLY v. SMITH.

4-3259

Opinion delivered December 18, 1933.

1. MASTER AND SERVANT—FELLOW-SERVANT.—A fellow-servant is one engaged in a common business for a common master, the purpose of which is to accomplish a single result.
2. MASTER AND SERVANT—JURY QUESTIONS.—Whether a boy employed to assist on a milk delivery truck was a fellow-servant and as-

summed the risk of the driver's negligence, or whether he was a mere volunteer *held* questions for the jury.

3. MASTER AND SERVANT—INJURY TO EMPLOYEE—EVIDENCE.—Evidence *held* to support a finding that a boy employed to assist on a milk delivery truck was injured through negligence of the driver acting as vice-principal.
4. TRIAL—OBJECTION TO EVIDENCE—ACTION OF COURT.—Error, if any, in plaintiff asking jurors on *voir dire* examination whether the fact that some insurance company might be interested in the litigation *held* not prejudicial where the objection was promptly sustained and the jury directed to disregard the question.
5. DAMAGES—PERSONAL INJURIES.—Where a 17-year-old boy received personal injuries, including a broken arm and collar bone and other serious injuries which were probably permanent, an award to the boy of $1,000 and to his mother of $250 for loss of services, *held* not excessive.

Appeal from Phillips Circuit Court; *W. D. Davenport,* Judge; affirmed.

STATEMENT BY THE COURT.

To compensate an injury received by Newton G. Smith, a minor 17 years of age, this suit was instituted by appellee, Viola Smith, the mother and next friend of said minor, against appellant. The jury was warranted in finding the following facts from the testimony:

Appellant S. E. Jolly is engaged in the dairy business in the vicinity of Helena, and in the prosecution of said business makes deliveries of his dairy products over the residential and business sections of said town. These deliveries are made by motor truck, and begin about 2:30 A. M. each day. An employee of appellant has charge and control of the truck and dairy products in effecting deliveries, and, at the time of the injury here complained of, one James Surman was in charge and control of the truck and dairy products. This truck driver was authorized by appellant to hire and fire boys used as assistants in making deliveries of the dairy products, and Newton G. Smith was so engaged when injured.

On April 13, 1933, while working the regular milk route, the truck which was being driven by Surman collided with a car driven by Mrs. Ferguson at a street intersection in Helena, and Newton G. Smith was painfully and seriously injured. The testimony tended to show and the jury so found that Mrs. Ferguson's car had

the right-of-way in the street intersection at the time of the collision. From the injuries received, young Smith was confined in the hospital for several days. One of his arms was broken, a collarbone was broken, a contusion was found on the head, and he was otherwise injured.

The case was defended on the theory that young Smith was a fellow-servant to James Surman, the driver of the truck, and therefore assumed his negligent acts. The suit was also defended on the theory that, at the time of the injury, young Smith was a volunteer riding on the truck, and was there without the knowledge, consent, or invitation of the owner.

The respective theories were submitted to the jury under the instructions requested by the respective parties, and we deem them not of sufficient importance to here set out. The jury returned a verdict in favor of appellee for the sum of $1,250, and, from the judgment rendered thereon, this appeal is prosecuted.

Brewer & Cracraft, for appellant.

W. G. Dinning, for appellee.

JOHNSON, C. J., (after stating the facts). The principal contention of appellant for reversal is that Newton G. Smith was a fellow-servant with James Surman, the driver of the delivery truck, and thereby assumed the risk of his negligence. A number of cases are called to our attention in support of this contention. We cannot agree that any case cited is decisive of the question here presented. The fellow-servant doctrine, and the doctrine of vice-principal, are wholly dependent upon the facts and circumstances in each particular case. We understand the fellow-servant doctrine to be: "Those engaged under the control of the same master, in the same common business, the purpose of which is to accomplish a single result." Those servants who did not come within the letter of the rule are not bound by its consequences. In *Haraway* v. *Mance,* 186 Ark. 971, 56 S. W. (2d) 1023, this court had occasion to discuss in detail the many cases theretofore decided by this court, and courts of other jurisdictions. As applied by us in that case, the fellow-servant doctrine is: "That one to be a fellow-servant

must be engaged in a common business, for a common master, the purpose of which is to accomplish a single result." As appears from the statement of facts hereinbefore recited, the minor, Newton G. Smith, was not, as a matter of law, a fellow-servant with James Surman, the driver of the truck, and the trial court was correct in submitting this question to the jury. *Dellinger* v. *Tilghmon, ante* p. 146.

It is next insisted by appellant that young Smith was at the time of the injury a mere volunteer assisting James Surman, the driver of the truck, in making wholesale deliveries of the dairy products. On this question, the testimony was amply sufficient for the jury to conclude that young Smith was not a volunteer in the assistance which he was rendering to the driver of the truck in making the deliveries on the wholesale route. The fact is, the driver of the truck testified in no uncertain terms that the delivery boys assisted him until 8:30 or 9:00 A. M. each day, on both the wholesale and retail routes alike.

Likewise, this question was submitted to the jury on proper instructions by the trial court, and it has determined the question adversely to appellant. The assignment here discussed also disposes of appellant's contention that young Smith was merely an invitee of the driver, James Surman, at the time of the injury. The testimony warranted the jury in finding that, at the time of the injury, young Smith was performing services for appellant, not as a fellow-servant with James Surman, but was injured through the negligent act of the driver of the truck, a vice-principal. The case of *Thomas* v. *Magnolia Petroleum Co.,* 177 Ark. 963, 9 S. W. (2d) 1, cited and relied upon by appellant, has no application to the facts of this case.

Appellant complains about certain instructions given by the trial court, but we deem it unnecessary to here set out the instructions given or to discuss in detail the principles of law therein stated. It suffices to say that we have considered all the instructions given, and that they, and each of them, appear to conform to the previous holdings of this court.

Neither can we agree that the trial court erred in refusing appellant's request for a mistrial, based upon the fact that appellee's attorney asked the panel of the jury on *voir dire* examination the following question: "Would the fact that some insurance company might be interested in the outcome of the litigation affect your verdict?" The record discloses that the trial court promptly sustained appellant's objection to the question, and directed the jury not to consider it. Even if the question were determined to be erroneous—which we do not here decide—the court's ruling thereon removes any vestige of prejudice.

Lastly, it is insisted that the verdict of the jury awarding appellee, the mother and next friend of young Smith, $250, and the verdict of the jury awarding young Smith $1,000, aggregating $1,250, as compensation for the injury sustained, is greatly excessive. In reference to the contention but little need be said. Young Smith received a broken arm and collarbone, and was otherwise seriously injured; he was confined to a hospital for several days; a physician testified that he was probably permanently injured. This testimony warranted the jury in returning a verdict in his behalf for $1,000. Neither can we say that the jury was not warranted in awarding his mother and next friend $250 as compensatory damages. Young Smith, at the time of the injury, was approximately 17 years of age. His mother and next friend was entitled to his earnings until he reached majority. At the time of the injury he was employed, and certainly had expectations of greatly increasing his earning capacity. We therefore conclude that the judgment is not excessive.

No error appearing, the judgment is affirmed.