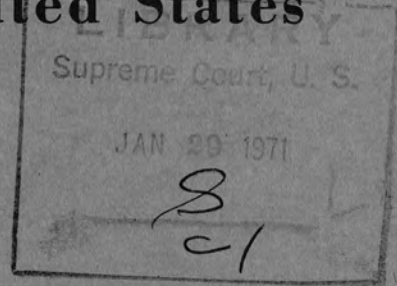


Supreme Court of the United States

OCTOBER TERM, 1970



In the Matter of:

Docket No. 5175

ADOLFO PEREZ, ET UX.

vs.

DAVID A. CAMPBELL, SUPERINTENDENT,
MOTOR VEHICLE DIVISION, ARIZONA
HIGHWAY DEPARTMENT, ET AL.,
----- x

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Place Washington, D. C.

Date January 19, 1971

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C O N T E N T S

ARGUMENT OF:

PAGE:

ANTHONY B. CHING, ESQ.
on behalf of Petitioners

4

ROBERT H. SCHLOSSER, ESQ.
On behalf of Respondents

22

REBUTTAL ARGUMENT OF:

ANTHONY B. CHING, ESQ.
on behalf of Petitioners

43

1 IN THE SUPREME COURT OF THE UNITED STATES

2 OCTOBER TERM, 1970

3 -----
4 ADOLFO PEREZ ET UX.,

5 Petitioners

6
7
8 vs.

No 5175

9
10 DAVID W. CAMPBELL, SUPERINTENDENT,
11 MOTOR VEHICLE DIVISION, ARIZONA
12 HIGHWAY, DEPARTMENT ET AL.

Respondent

13 Washington, D.C.

14 Tuesday, January 19, 1971

15 The above entitled matter came on for discussion
16 at 10:55 a.m.

17 BEFORE:

18 WARREN E. BURGER, Chief Justice
19 HUGO L. BLACK, Associate Justice
20 WILLIAM O. DOUGLAS, Associate Justice
21 JOHN M. HARLAN, Associate Justice
22 WILLIAM J. BRENNAN, JR., Associate Justice
23 POTTER STEWART, Associate Justice
24 BYRON R. WHITE, Associate Justice
25 THURGOOD MARSHALL, Associate Justice
HENRY BLACKMUN, Associate Justice

1 APPEARANCES:

2

3 ANTHONY B. CHING, ESQ.
4 Boston, Massachusetts
5 On Behalf of Petitioners

6

7 ROBERT H. SCHLOSSER, ESQ.
8 Special Assistant Attorney General
9 of Arizona
10 Phoenix, Arizona
11 On Behalf of Respondent

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1 and his car registration suspended until the judgement or a
2 part of it is paid.

3 Q The judgement ran against both the man and the
4 wife, then?

5 A Yes. That judgement is in the record. It's not
6 reproduced in the Appendix, however, it's in the record, on
7 pages 54 and 55.

8 Q When you speak of it as a confession of judgement
9 do you mean the conventional default judgement where they
10 did not respond or did they formally confess?

11 A The confession of judgement was entered by
12 their attorney. That is not in the record, but I will supply
13 that information to the Court if the Court desires the informa-
14 tion.

15 The Perezes retained counsel, and an answer was filed
16 denying negligence. On the date of trial, counsel advised the
17 Perezes to confess judgement so that he could take them through
18 bankruptcy proceedings.

19 Q And the theory on which the lawsuit was drawn
20 against her, the wife, was what? Because the husband was driving
21 the car. Alone in the car, was he not?

22 A Yes, the husband was alone. This was alleged in
23 the complaint.

24 Q And the complaint joined her as a defendant on
25 what theory? On the community property theory?

1 A Exactly. In Arizona it is a common practice in
2 suing a marital community to sue both the husband and the wife.
3 The complaint is also in the record, I believe it's page 53 and
4 54 preceding the judgement in the record, again it's not re-
5 produced in the Appendix.

6 The complaint named him and Jane Doe Perez, hisswife,
7 and subsequently the judgement named Emma perez as her name
8 was later on known.

9 But the complaint spelled out that the suit was against
10 Adolfo Perez and the marital community husband and wife.

11 Q And the confession of judgement was filed on be-
12 half of both defendants, man and wife?

13 A That's right.

14 And so it's a judgement reciting judgement against
15 Adolfo and Emma Perez, husband and wife.

16 Q Could the judgement have been entered against
17 the driver only, is there any impediment in Arizona law fo
18 doing that?

19 A In Arizona, they---a suit can be brought either
20 against the husband or against husband and wife, this is entirely
21 at the option of the Plaintiff.

22 Q Well, once having been brought against both of
23 them, could a lawful judgement have been entered against the
24 driver only, the husband?

25 A This is not shown by any of the case law in Ariz-

1 ora, regarding community property.

2 Q Well if the plaintiffs and the defendants had
3 agreed upon that, it probably could have been done, is that
4 correct?

5 A Most plaintiffs are not willing to do that,
6 because most plaintiffs felt that the wife has a job and it will
7 be easier to garnish --- on the wife if the complaint and the
8 judgement reads the wifes name.

9 In other words earnings are community property dur-
10 ing marriage, and the judgement against husband and wife will
11 facilitate the garnishment and execution of a judgement.

12 B But the original complaint was based, I suppose,
13 on the husbands negligent conduct in driving the car, is that
14 correct?

15 A Exactly.

16 Q Was it based at all on the--- against the wife
17 on the basis that she had been negligent in lending the car
18 to him to drive?

19 A No.

20 Q It was not based at all on her independent neg-
21 ligence, was it?

22 A No, there's no allegation in the complaint as
23 to that at all.

24 Q The --- of the complaint, that is the wrong, the
25 wrongful injuries were wrongful injuries because of the husbands

1 negligence, is that right?

2 A That's correct.

3 Q Nothing as to --- nothing in the complaint as to

4 the wifes negligence - no allegations.

5 A No.

6 Q She was joined merely as a member of the community

7 that owned the automobile, I suppose?

8 A That is correct.

9 Q Where was title to the automobile?

10 A The title to the automobile is in the name of

11 Adolfo Perez only.

12 Q But as a matter of Arizona law, if the auto-

13 mobile was aquired after their marriage, regardless of the title,

14 it nonetheless belonged half to his wife, is that right?

15 A Exactly.

16 Q Yes.

17 A The automobile is community property.

18 Q Right.

19 A And the wife has an interest in it, although the

20 husband is the manager.

21 Q Right.

22 Q Mr, Ching, do you know whether Arizona permits

23 the holding of personal property in joint tenancy?

24 A Yes. Arizona permits the holding of personal

25 property in joint tenancy.

1 Q Would your case be any different if this auto-
2 mobile were registered in the names of Adolfo and Emma as joint
3 tenants?

4 A The case would not be any different other than
5 not only the community property of the husband and wife but also
6 Emma Perez' separate property would then become liable. So in
7 other words, joint property would make a joint inseparable
8 obligation.

9 Q As long as I've interrupted you, one more question.
10 Do you concede that Arizona could have made insurance precedent
11 to the issuance of a license?

12 A Certainly, Your Honor. And this has been done in
13 two states, New York, Massachusetts and North Carolina.

14 After surrendering to the state their licenses on de-
15 mand, the Petitioners filed a lawsuit in the District Court.
16 The state filed a motion to dismiss, and a single judge granted
17 their motion to dismiss. The case then was appealed to the
18 Ninth Circuit, and that Circuit affirmed the decision.

19 And thereafter Certiorari was petitioned for by the
20 Petitioners and this Court granted Certiorari.

21 This case involves a very important and alleged con-
22 flict between a state statute and the Federal Bankruptcy Act.
23 This issue has been before the Court twice, within the last
24 20 years, in the case of Reitz vs, Mealy, a new York case, and
25 Kesler v. Department of Public Safety, a case coming from Utah.

1 The statute was upheld under similiar circumstances
2 as regarding Adolfo Perez by a divided Court in both cases.
3 Our argument here will be that this Court should re-examine
4 the earlier cases and after due consideration overrule these
5 cases because they are not logically sound and that they are
6 now out of date.

7 And also that in applying Arizona law, the rationale
8 used by the Court previously is not applicable. In the Reitz
9 case and in Kesler, this Court sustained the statute on the
10 basis that the purposes of these statutes are to deter irres-
11 ponsible driving and to promote public safety which, of course,
12 is a valid exercise of the states police power.

13 We would urge the Court to consider our argument
14 that the statute really doesnot deter irresponsible driving
15 and does not protect the public safety.

16 This type of suspension is not suspension for the
17 conduct of negligent driving, but a suspension for the non-pay-
18 ment of the judgement.

19 Q Well when you use the word "responsible" refer-
20 ring to it, I assume in the statute, in what sense do you think
21 that word is used?

22 A I---

23 Q Is it responsible meaning a careful driver, or
24 is it responsible in the sense of a driver who can respond and
25 does respond in damages?

1 A The Arizona statute has for the purpose the
2 financial irresponsible drivers that it's trying to reach, and
3 not the drivers who are irresponsible in their conduct. And
4 I will illustrate that by pointing out that this Court that
5 Arizona as in every other state, has criminal sanctions against
6 irresponsible driving, for drunk driving, for manslaughter,
7 for various violations.

8 And yet under Arizona law, no suspension can be for
9 more than one year, even if a persons license is revoked for
10 --- manslaughter, or for twice driving under the influence of
11 alcohol, drunk, he can apply to regain his license after one
12 year.

13 But in this case, a person whose license is suspended
14 can not get his license, and sometimes permanently, until
15 he pays that judgement. This I believe demonstrates that public
16 safety is not what is intended by this statute.

17 The statute is intended to collect a debt, to pay
18 the victim.

19 Q Well don't you suppose that the Arizona legis-
20 lature had in mind that if there were a criminal conviction,
21 manslaughter, for example, that there invariably, or then if not,
22 then almost invariably, there would be a judgement or a claim
23 that would be satisfied or else would come under the civil
24 provisions of the statute.

25 A Exactly. What I'm saying is that for a person who

1 has insurance, who is convicted of manslaughter, or drunk driv-
2 ing, his insurance company would pay the judgement, and he can
3 redeem his license, after one year.

4 Q Well, I thought you had just agreed, in response
5 to a question from Mr. Justice Blackmun that the state had the
6 lawful power under its police powers to require insurance. Did
7 I misunderstand you on that?

8 A No, I said a state can require everybody to have
9 insurance. I'm merely trying to point out to this Court that
10 there is an obvious conflict with the Bankruptcy Act. Had
11 neither of these Petitioners gone through bankruptcy, then I
12 would say there may be constitutional questions surrounding,
13 especially Emma Perez' claim. But now that both these Petitioners
14 have gone through bankruptcy, they have the shield of bankruptcy
15 and therefore the only conflict that needs to be resolved by
16 this Court is whether the state statute conflicts with the
17 Bankruptcy Act.

18 r I'm not asking this Court to reach any constitutional
19 decisions in this case.

20 Q Do you think you could prevail in this case
21 without overruling Kesler as far as Mrs. Perez is concerned?

22 A As far as Mrs. Perez is concerned, I believe that
23 this Court can very well distinguish the Kesler case on the ba-
24 sis that the Kesler case, as stated in the opinion by Mr. Justice
25 Frankfurter, the state statute has for the purpose to determine

1 irresponsible driving and that purpose is absent as far as
2 Mrs. Perez is concerned---

3 Q And that---

4 A She is in that case not a negligent driver.

5 Q What basis, then, would there be for us to set
6 aside the judgement as to Mrs. Perez? The state judgement?

7 A I'm not asking this Court to set aside a state
8 judgement. The state judgement is perfectly valid.

9 Q No, I mean the license.

10 A Becuase Mrs. Perez, having gone through bank-
11 ruptcy, the judgement is duly discharged in bankruptcy.

12 Q No, but this presupposes that this Court is
13 going to overrule Kesler. I'm asking you if Kesler still remains
14 on the books, do you think you have a claim as far as Mrs.
15 Perez is concerned, on the theory that the rationale of Kesler
16 didn't reach the one circumstance that this Mrs. Perez was.

17 A Yes, I believe that this Court can, because the
18 rationale of Kesler does not cover persons such as Mrs. Perez---

19 Q What ground would that be on? Would that be
20 on a constitutional approach?

21 A No, that would only--- the same approach under th
22 the Bankruptcy Act and the supremacy clause. As to Mrs. Perez
23 there was a clear conflict between the state statute requiring
24 that every person against whom a judgement is rendered to sur-
25 render their license, and the Federal Bankruptcy Act. The clear

1 conflict has emerged.

2 And as to the rationale in Kesler as pertaining to
3 the negligent driver, Mrs. Perez must have the cloak of pro-
4 tection of the Federal Bankruptcy Act.

5 Q Now Mr. Ching, you are raising a constitutional
6 question, then, to wit, you're basing your case on the supremacy
7 clause?

8 A Exactly.

9 Q Well, now, you do not mention due process, or
10 equal protection, or bill of attainder arguments which are con-
11 tained in the amicus briefs.

12 A No, it is not necessary to reach these arguments
13 because as I said before, if Emma Perez had not gone through
14 bankruptcy, these issues would have been raised.

15 But since she has gone through bankruptcy, the only
16 issue left is whether the Bankruptcy Act gives her that certain
17 protection.

18 Q Are you abandoning those issues?

19 A I am not abandoning these issues. These issues
20 were not decided by the lower Court. These issues would require
21 a Three Judge Court at least --- where the case law is now
22 existing, and if these issues were to be decided I believe at
23 least under existing case law, we would have to remand the
24 case in the Court to convene a Three Judge Court.

25 And I don't think that is necessary because the se-

1 supremacy clause as we know under Swift And Company vs. Wickham
2 does not need a Three Judge Court and a One Judge Court has
3 properly decided that issue.

4 Q Well independent of the bankruptcy discharge,
5 do you think you have no claim by reason of the state of Ari-
6 zona cancelling her license for conduct in which she had no
7 direct involvement?

8 A Yes, I believe the statute would be unconstitu-
9 tional even if Mrs. Perez had not gone through bankruptcy, but
10 once she had gone through bankruptcy she had the added protec-
11 tion of the Bankruptcy Act.

12 Q Well, I think---

13 A And if they reason that statute may be uncon-
14 stitutional, if she had not gone through bankruptcy it would be
15 more than enough to show that that statute violated the Bank-
16 ruptcy Act and thus the supremacy clause.

17 Q Well, I go back to Mr. Justice Blackmun's question.
18 Are you abandoning any claim that apart from the bankruptcy
19 problem, Arizona cannot constitutionally do this to her? To the
20 wife.

21 A I'm not abandoning the claims, I'm just fearful
22 that jurisdictionally this court cannot reach these constitutional
23 issues in that a Three Judge Court was not convened and there-
24 fore these issues were not properly brought before this Court.
25 But the One Judge Court did rule on the bankruptcy issue and

1 therefore this Court can properly adjudicate a Bankruptcy Act
2 claim.

3 Q Well you have to do that under the jurisdiction-
4 al problem, don't you?

5 A That's right.

6 Q Otherwise you'd have to go back and start all
7 over again.

8 A Which we don't think is necessary because the
9 basis of the act is the argument that we are asserting.

10 Q You accept, in other words, for your argument
11 the premise of the Three Judge Court, the Court of Appeals.
12 Both of them, that these other constitutional questions are
13 insubstantial and therefore not sufficient to require a Three
14 Judge Court.

15 A I don't accept these statements, however, I
16 think it is unnecessary to reach these issues. The Court should
17 limit itself to resolving the issues, that is the issue before
18 the Court in the Bankruptcy Act claim is the issue, and once
19 having resolved the Bankruptcy Act issue, it is unnecessary
20 thereafter to reach a constitutional---

21 Q Putting Mr. Justice Blackmun's question in a
22 different way, is what I found implicit in it. Suppose you don't
23 prevail on your supremacy clause, then are you arguing here---
24 are you abandoning or are you still maintaining the due pro-
25 cess or equal protection?

1 A I will say as a secondary line of defense I
2 would say that this Court can properly consider the constitution-
3 al issue as substantial and remand the case to the lower court
4 or a Three Judge Court for---if this Court deems necessary.

5 Q It would have to go back?

6 A This is up to this Court.

7 Q Now that takes care of Emma Perez, but in order
8 for you to prevail with respect to Adolfo it would be necessary
9 for you to persuade this Court to overrule Kesler, is that
10 correct?

11 A Exactly, and I propose to do so.

12 In addition to what I pointed out as to the criminal
13 sanctions, vis a vis the financial responsibility in my argu-
14 ment that the statute does not really protect the public to
15 insure that safe drivers drive on the public highways, I think
16 one question which a lot of people have in mind is this.

17 You know we can't allow these people to drive, get in-
18 to an accident, wipe out the judgement by bankruptcy and drive
19 again.

20 And what's going to prevent them from doing this over
21 and over again?

22 The answer of course, is that it wouldn't happen over
23 and over again, because the Arizona statute also provides that
24 in order for Adolfo Perez to get his license again, not only
25 must he pay the debt but he must also show that he has insurance

1 for the future,

2 And the Perez' are more than willing to obtain in-
3 surance for the future, and therefore if allowed to drive,
4 will be actually more financially responsible than some of the
5 drivers on the streets and highways in Arizona, who have no
6 insurance.

7 Another thing we must demonstrate, that the statute
8 is not for the purpose of public safety, I'd like to quote the
9 Arizona supreme Court decision in Schecter v. Killingsworth.
10 And this decision was cited both by myself and my opponent,
11 and the Arizona Court in that case came out in interpreting the
12 Financial Responsibility Act, of Arizona, saying that the
13 state statute does not have, for its primary purpose, the
14 purpose of public safety.

15 The Arizona Court said the Financial Responsibility
16 Act has, for its purpose the principal purpose, the protection
17 of the public using the highways, of financial hardship which
18 may result from the use of automobiles by financially irres-
19 ponsible persons.

20 It accomplishes the objective by requiring proof of
21 financial responsibility of those involved in an accident, either
22 by showing of insurance that covers the accident or by requir-
23 ing a bond, or deposit of cash or security. It may, as inciden-
24 tal purpose and effect, because of the threat of loss of driving
25 rights following an uninsured accident, one, encourage operators

1 of motor vehicles to obtain liability insurance, and two, to
2 encourage drivers to drive more carefully.

3 Because the uninsured motorist can avoid the adverse
4 effect of the statute, without obtaining insurance, and with-
5 out improving his driving skills, we cannot consider either
6 the encouragement to obtain insurance or the improvement of
7 safety conditions on the highways to be the primary objective
8 of this law.

9 And this point was admitted by the Respondents in
10 their brief as the proper interpretation of the Arizona stat-
11 ute, placed by the Arizona Supreme Court, and therefore it is
12 a well established doctrine in such a case, that the federal
13 court must be bound by the interpretation placed by the states
14 highest court.

15 I'd like to cite one case decided by this Court, on
16 that point, the Marine National Exchange Bank v. Carson Manu-
17 facturing Company, in 293 US 357. That case is also a case in-
18 volving bankruptcy, and it involves another --- law, the
19 Negotiable Instrument Act, and it involves a construction by the
20 state court, as to what is --- in due course.

21 And this court said that notwithstanding the law
22 regarding the contrary, the federal court is bound by the in-
23 terpretation placed by the Wisconsin Court.

24 I'd like to point out --- Justice Frankfurter, in
25 his opinions of the parents who felt that driving is not important

1 Mr. Justice Frankfurter said that the---in fact --- as to driv-
2 ing that only in particular cases where one seeks to drive to
3 restore his drivers license and registration.

4 I submit that this is no longer true, that in this
5 day when driving is such an important right as set by the Ari-
6 zona Supreme Court again in the same case, Schechter v. Kil-
7 lingsworth, when Arizona overthrew a prior decision and said
8 driving is no longer a priveledge, it is a right.

9 And I submit that every person whose license is sus-
10 pended will seek to have his license restored. Therefore the
11 effect of a statute is no longer tangential, it's --- and
12 complete. And --- again is complete.

13 I would like to --- to this court as to a recent case,
14 cited by the First Circuit on December 22, 1970, dealing with
15 the point whether an owner, who was vicariously liable, would
16 have his license suspended and then after bankruptcy can he
17 get --- his license restored.

18 The First circuit held that his license should be re-
19 stored. A laser, Second Circuit case decided a couple of weeks
20 ago reached a contrary decision. I have not read the Second
21 Circuit opinion, but I'd like to quote the opinion by the First
22 Circuit, the opinion by 7 judges out of 9. The opinion said "Nor
23 is this ability or qualification from owning or operating a mo-
24 tor vehicle an essentially tangential impingement upon the pur-
25 poses served by Section 17 of the Bankruptcy Act. One cannot ig-

1 more the fact of present day urban existence. A combination of
2 public and private policies has made use of an automobile an
3 actual necessity for virtually everyone who must work for a
4 living. For the urban poor, in particular, remoteness from the
5 thriving, suburban segments of the industry, economy, and a de-
6 teriorating public transportation system often make use of an
7 automobile the only practical alternative to welfare."

8 Q Is that decision cited in your brief?

9 A No, this decision was just decided less than a
10 month ago.

11 Q Do you have the citation?

12 A Page 39, Law Week, 2334.

13 Q 29 what?

14 A Law Week, 2334.

15 Q And then you mentioned a Second Circuit decision,
16 conflicting.

17 A Yes.

18 Q Have you got---

19 A It came out in Law Week, just a week ago. I don't
20 have the exact citation, but I was informed of that.

21 Q But a week ago in Law Week?

22 A Yes.

23 Q Thank you.

24 A I'd like to reserve a few minutes remaining,
25 thank you, Mr. Chief Justice.

1 Q Thank you, Mr. Ching. Mr. Schlosser?

2 ARGUMENT OF ROBERT H. SCHLOSSER, ESQ.

3 ON BEHALF OF RESPONDENT

4 MR. SCHLOSSER: Mr. Chief Justice---

5 Q By the way, Mr. Ching, I think you have about---
6 we'll make that a minute, Mr. Ching.

7 A Mr. Chief Justice and may it please the Court.

8 I might first state that, as the Court is well aware,
9 there have been two Womens Lib groups that have filed amicus
10 curiae in this particular action. I did not respond to the am-
11 icus curiae in my answering brief, for the simple reason that
12 the notification concerning the granting of the original amicus
13 curiae brief was not recieved until my brief was in preparation
14 on its way to the printers.

15 Notification as to the second one of which I feel
16 a response, a written response, definitely is more deserving,
17 did not reach my office until January 13, this year.

18 For that reason, I will attempt to cover those briefts
19 in oral argument, especially the one from the organization lo-
20 cated in Tucson, Arizona, and would request that if the Court
21 deem necessary as based on different citations which I will
22 utilize in oral argument that they might see fit to grant me
23 to file either additional authorities, and/or maybe a short an-
24 swering brief directed towards the amicus curiae briefs.

25 I would like first to briefly, actually devote a much

1 smaller portion of my argument to the overall issue as challenged
2 concerning whether or not to overrule Kesler and Reitz, and
3 reserve a primary portion of my argument, or rather of the la-
4 tter part of the argument go into the issue concerning Emma ,
5 which is by far the more novel and interesting possibility here.

6 Now as Mr. Ching has pointed out in his---and I think
7 has stated in both briefs that various lip service has been
8 given to the statute which is challenged here, if we take the
9 statute which is challenged here, has been enacted at least at
10 one time in 45 or more of our states.

11 This is based on the Uniform Act of local state ad-
12 options. The public purposes as justifying such statutes have
13 been enumerated as follows:

14 One, a deterrent to unsafe driving.

15 Two, a very nebulous, to protect others using the
16 highways.

17 Three, and as mentioned most specifically by Arizona
18 to keep persons who may be injured by the financially irres-
19 ponsible youths utilizing the highways off of our welfare rolls.

20 And four, mention has been made to encourage insurance.

21 Arizona does, can at least state that in their estim-
22 ation, the primary purpose of this particular statute in the
23 Arizona Supreme Courts estimation when they wrote the Schecter
24 case, was to keep persons who may be injured by the financially
25 irresponsible off the welfare rolls.

1 Gentlemen, I don't think that whether Arixona states
2 that they also did mention the incidental purposes, I don't
3 think that Arizona is placing its emphasis, as far as it was
4 concerned, on that particular element or alleged public purpose,
5 in any way should govern whether or not this statute is held
6 constitutional or unconstitutional or violative or unviolative
7 of the supramacy clause.

8 The reason why I say that is this is the challenge
9 portion of this statute in this case, all but verbatim the stat-
10 ute which was challenged in Reitz and the statute which was
11 challenged in Kesler, becuase Arizona says for various puropes
12 we happen to think this one is the more valid, is no reason
13 for this Court to feel that we're talking about a different
14 statute---

15 Q Well, Mr. Schlosser, as I read that opinion that
16 it's the more valid, am I right that in effect what your Court
17 said was that the primary, I think the word primary---

18 A The primary. I understand.

19 Q ---was financial inorder to keep, as you said,
20 victims off the welfate rolls, and the others were only inciden-
21 tal. Now are you suggesting that that has no significance for
22 us in the constitutional question?

23 A I'm suggesting that we are talking about thes
24 same statute. I'm suggesting---

25 Q Well, no, as I understand it, we're talking about

1 a statute, either identically or similarly phrased, as to which
2 however, your Supreme Court has given a gloss, not given in the
3 statute involved in the Kesler case. Is that right?

4 A I would have to agree with that.

5 Q And you think that nevertheless has no sig-
6 nificance for us on the constitutional question.

7 Q I do feel that if you feel the statutes are sub-
8 stantially the same for the purposes of judging the supremacy
9 argument that Arizona is classifying one as primary and others
10 as incidental should be binding upon this Court.

11 Q I'm a little dense, but I don't quite see the
12 connection between this statute and keeping people off the wel-
13 fare rolls, just as a matter of relevant connection. This--
14 if the person in Arizona is in an accident, and there's a judge-
15 ment against him that remains unpaid, he has to give up his
16 license, he can't drive. That's what the statute says, isn't
17 it?

18 A Yes.

19 Q And what does that have to do with the welfare
20 rolls? I think that discharging the bankruptcy would more likely
21 keep him off the welfare rolls.

22 A May I point out to the Court that in the Schecter
23 case, as I recall, the particular suspension which was discussed
24 there, was what the prejudgment suspension, the suspension
25 which is prior to any judgement --- where a determination is

1 made upon the reasonable possibility of judgement by the direc-
2 tor of the financial responsibilities section with a provision
3 for appeal from his determination wherein he also sets a bond
4 and the instant case, deals with a post-judgment suspension
5 where the liability issues and so forth have been cleared.

6 Now if that provides a distinction, I'm not certain,
7 other than that the bond is there. I would tend to agree with
8 this Court concerning the primary purpose of the statute
9 concerned as opposed to the Arizona Court.

10 Q Would you explain to me what it really has to
11 do with the welfare, presence on the welfare rolls, or not,
12 of anybody?

13 A (Interrupting) Yes, I'm confused, too, as Justice
14 Stewart is. I thought someone had been referring to the victims
15 of uncompensated---

16 A That's my understanding of the decision.

17 Q Not the driver of the car.

18 A No it's the victim.

19 Q It's the uncompensated victim.

20 A Yes. That is---

21 Q But by hypothesis, the victim has already been
22 victimized. He's been hit by a negligent driver. And injured,
23 et cetera. So for property loss. Now then, so he's already been
24 victimized---

25 A Yes.

1 Q By a man who can't pay a judgement, by hypothe-
2 sis. And so what does it matter what you do with that man who
3 can't pay the judgement with respect to whether somebody goes
4 on the welfare rolls?

5 Q (Immediate) I suppose your theory is, isn't it,
6 that if he's seriously hurt, and can't work, he may become an
7 object of welfare, ---

8 A That is true, but---

9 Q Yes, but by hypothesis a judgement for debtor
10 has hit this person. So therefore his injuries cannot be com-
11 pensated. Now whether or not the victim goes on the welfare
12 rolls hardly has anything to do with what you do to that judge-
13 ment proof debtor, does it?

14 A However, you're presupposing facts that were
15 not at issue in the Schecter case. First of all, there was no
16 discussion of whether the person was judgement proof.

17 In that case there were---

18 Q By hypothesis, this is it, isn't it, in this
19 case?

20 A In the instant case?

21 Q We're talking here about a judgement debtor who
22 cannot pay the judgement, aren't we?

23 A That's the allegation of the Petitioner, yes.

24 Q Well, that's the fact in this case, as it comes
25 to us.

1 A Well I have to dispute with the facts if you're
2 basing them on the Ninth Circuit opinion, also, Your Honor,
3 which I will cover in the Emma portion of my oral argument.

4 Q Very well. I didn't mean to throw you off, but
5 I just don't, myself, see the connection between this to any
6 possible, very rational or very relevant connection between
7 this statute and who goes on the welfare rolls.

8 A Well, might I say briefly in answer to that, and
9 I doubt that it will satisfy you, I'm not so sure I'm satisfied
10 with the Arizona explanation. I might say, Kesler was talking
11 about a prejudgement situation where they were trying to ex-
12 tract a bond.

13 Number two, it may not be every situation where you
14 have a person who is impecunious, or indigent, who is the per-
15 son subjected. You do have stubborn people who do maybe refuse
16 to get insurance and refuse to really protect themselves as they
17 should, but who are not necessarily ones who are indigent.

18 Q I suppose the Arizona legislature is feeling the
19 generality of people, not those who will be judgement proof.

20 A Well---

21 Q And they believe, at least, that this kind of a
22 statute, holding a cloak of cancellation---will lead in most
23 cases to the satisfaction of a judgement.

24 A I---

25 Q Isn't that a rational theory?

1 A That is a rational theory, but I'm not so certain
2 of the wisdom of it. I might point out that the Congress has
3 enacted some of the legislation for the District of Columbia as
4 well.

5 As to the theory which you propose as being rational
6 theory, I would definitely agree that that is probably one of
7 their motives, but that whether or not it is effective or not
8 is something of a speculation.

9 Now, if a, --- I might say that one of the valid
10 purposes which has been mentioned but never discussed in any
11 full degree in any of the cases I've read is to encourage the
12 obtaining of insurance or the posting of surety bonds.

13 These, as in Arizona and in many states, which don't
14 have compulsory insurance, rental agencies, persons who contract
15 for hire, and so --- are so often required to do and treated
16 in a different class because of their inordinate and use of the
17 highway looking toward direct pecuniary gain.

18 I might say that a complete reversal or detracting of
19 their rights Kesler position, I think would leave us in a position
20 where, as in a practical matter, the marginal owner would maybe
21 be financially ahead to not purchase insurance and save a few
22 dollars aside to pay for his bankruptcy discharge, and as long
23 as he's off --- does not have an accident for another six years
24 he's safe again.

25 Now I would like to direct the balance of my comment

1 and my time, I believe, to, with the exception of a very shory
2 summary, to the Emma Perez situation.

3 Thusfar we've had three briefs filed, as far as I'm
4 concerned, and an opinion written by the Ninth Circuit Court
5 of Appeals that is entirely in error concerning law, and facts,
6 concerning Emma Perez. There are certain aspects and basic doc-
7 trines of community law and tort liability law in Arizona that
8 best be explained.

9 The first one is that, number one, in Arizona, mere
10 ownership of a vehicle is not grounds for liability against the
11 owner by a borrower negligently driving the same.

12 Secondly, in Arizona it is not necessary for the wife
13 to be a party to a judgement vs the husband for driving of the
14 community vehicle. The case of Bristol v. Moser, which is in
15 99 Pacific Second 706, in the case of First National Bank v.
16 Rees, which is in 234 Pacific, 556, both Arizona cases, held
17 that a community, let's assume Mr. Perez is on a community
18 errand, I will give Mr. Ching that much, although I don't know
19 that that was established in the record or in the appendix.

20 Mr. Perez is driving the community vehicle on a com-
21 munity errand, Nevertheless, pursuant to Emmas contention she
22 had nothing to do with the accident, other than that she was
23 misfortunate enough to be married to an uninsured, non-negligent
24 community property husband, negligently driving her community
25 property vehicle.

1 Q Suppose Mrs. Perez was in London, same result?

2 A Yes. Mrs. Perez confessed judgement. If she is
3 to be believed in her allegations concerning no liability at
4 all, confessed a judgement which the law could not have imposed
5 upon her, had she chosen, or had her lawyer advised her to con-
6 test it.

7 In the First National Bank v. Rees, or the Bristol
8 case, and I can't recall which, one of them says the husband
9 is the only indispensable party to such a judgement. The other
10 one vacated a judgement vs. the wife and husband, on a community
11 obligation.

12 The case of Mortensen v. Knight, in Arizona deals
13 with the whether or not parties are inversely responsible for
14 their spouse' negligent operation of a community vehicle.

15 In Mortensen v. Knight, the wife was the negligent
16 driver. The husband who had liability was imposed against the
17 husband. On the theory of ownership? No.

18 Liability was imposed against the husband for the
19 following reason. He was a co-owner because it was a community
20 vehicle, yes, but the Court said that isn't enough. He is imposed
21 with liability because Arizona makes him the exclusive agent and
22 manager of the community. That was a community vehicle. He had
23 a right to control his wife.

24 Conversely, as pointed out in all these briefs, filed
25 by the amicus curiae Womens Lib group, conversely, by that very

1 own Arizona opinion, Mrs. Perez had no right to control what
2 Mr. Perez did, because she has no right to control the utilization
3 of community property contrary to her husbands wishes and con-
4 sequently could not have been held liable.

5 The law imposes a suspension vs. persons who are not
6 owners, or not drivers, or not ones who maintain vehicles. The
7 suspension is imposed against persons who are adjudged debtors
8 as a result of that type of relationship.

9 That does not presuppose that someone who has that
10 type of relationship to a vehicle is going to be a judgement
11 debtor. And I maintain, based on the decisions cited, that---
12 Mortensen v. Knight, I'm sorry, is 305 Pacific Second 463, and
13 Petersen v. Feldman, dealing with mere ownership is not suf-
14 ficient to impose liability is 436 Pacific Second 169, once
15 again both Arizona Cases.

16 Q Those are all cited in your brief, are they
17 not?

18 A No they're not, Your Honor, these are primarily
19 in response to the argument which is set out in the amicus
20 curiae brief from Tucson.

21 Q You're going to give us that, though, are you
22 going to supplement?

23 A I would like the Court to grant leave to sup-
24 plement my brief either by just giving you an official list
25 of these authorities which I cite in my opinion, or a brief

1 supplemental answering brief in response to the amicus curiae,
2 whichever the Court please.

3 Q You may just submit the list, if that suits
4 you.

5 A Thank you. I appreciate that.

6 So basically my contention is Emma Perez confessed
7 judgement on bad advice, when had she not confessed judgement
8 she could have received summary judgement if she could have
9 established the facts which she asks this Court to rely on.

10 Q Is there any procedure in the state of Arizona
11 for getting this corrected?

12 A I regret to say that if this were a prejudgement
13 situation, you have a review. The post judgement suspension re-
14 lies on the due process procedures which are afforded in your
15 tortious action tribunal. Consequently, by confessing judgement
16 and then not entering an appeal, there is no forum now, and the
17 judgement is a judgement. To that extent.

18 Q Mr. Schlosser, could you, would you say that
19 Arizona could give a cause of action against Mr. and Mrs. Perez
20 for the debt? In order to protect those people who are injured
21 on the highways?

22 A I'm not certain I followed your question, sir.

23 Q Well let's assume Mr. Perez has an accident and
24 he hurts somebody, and he gets sued and he has a debt.

25 A Yes, sir.

1 Q And there's a judgement against him.

2 A Yes, sir.

3 Q And he takes bankruptcy.

4 A Yes, sir.

5 Q Could Arizona nevertheless furnish the injured
6 person with a cause of action against Mr. and Mrs. Perez?

7 A No---

8 Q For the debt?

9 A No, I don't believe so, Your Honor, I believe
10 that Arizona would certainly feel bound by the Kesler decision
11 which makes the---

12 Q Do you think for this very same purpose, namely
13 of compensating the injured person, Arizona may take away the
14 drivers license?

15 A I would have to say my answer to that would
16 have to be in the affirmative, yes.

17 Q And if the answer is no, why then you're in
18 trouble.

19 A Yes.

20 Q Now Mr. Ching told us that it was the practice
21 in Arizona, in a situation such as is alleged here, i.e. per-
22 sonal injuries caused by the sole negligence of the husband
23 driving a car registered in his name that is community property.
24 He told us that it is the practice in Arizona to get a judge-
25 ment against husband and wife, because, assume the wife is a

1 wage earner, half of her wages, I guess, belong to the husband
2 and could be levied against by the judgement creditor, is that
3 right?

4 A I would say that that is the prevailing practice.
5 However, if---

6 Q You say that is the prevailing practice?

7 A Yes, but that does not alter what is the law
8 in Arizona, and there is one other factor that entertains the
9 subject. When you sue both husband and wife and get a judgement
10 against both husband and wife, if you have a negligent husband
11 driving, you sue him, excuse me, if you sue him you have a
12 judgement vs. the community if he's on a community errand, and
13 you have a judgement vs. his separate property.

14 If you joined the wife, not only is she subjecting
15 her community but there's a very good argument even if they
16 want to characterize it "husband and wife" after their judge-
17 ment heading, that you've also got her separate property too.

18 For something that should not in any way be affected
19 as long as she was not negligent, did not have any power to
20 control the operation.

21 Q What you're saying here is that if the allegations
22 are correct, the judgement against her was completely unjusti-
23 fied under Arizona law?

24 A That's right, and they relied on that attorneys
25 advice in the lower court.

1 The same advice which was to confess judgement and
2 go through bankruptcy.

3 Q Where do you think that all brings this out?

4 A It brings us to a situation, Your Honor, where
5 as far as relief for Mrs. Perez, there's one factor which is
6 later on in my notes but I might mention it, this may not
7 be justice, but I don't know what the law can do about people
8 who confess liability to actions they're not liable for.

9 And then let their appeal time ride. Now this is a
10 sanction which they relied on, they relied on an attorney who
11 gave them advice contrary to a statute which at least at the
12 time of his advice had been held constitutional or a like
13 counterpart had.

14 I don't know what advice to offer them other than the
15 fact that if the procedure set out in error as 28 ll 65 had
16 never been utilized in this case, which is a method for these
17 people to have their license returned, and I would call the
18 Courts attention to that. Arizona is unique, I think, as compared
19 to other states which have this, because in reviewing some of
20 the other states which have statutes bases on the Uniform Safety
21 Responsibility Act, Arizona is one of the few that in working
22 out and installing plan has not only have the situation where
23 you can have concurrence, of the person who was injured.

24 In other words you can have your license returned in
25 Arizona in a superior courts descretion by petitioning that court.

1 filing or serving notice on the injured persons, the persons
2 who would have a right to object or be the real party in in-
3 terest, actually, and you can go into that court, put on a show-
4 ing as to your ability to pay, and that court can set in-
5 stallment payments.

6 I would surmise it is much like a support proceeding
7 for fathers.

8 Q Once the bankruptcy has gone through, who is
9 the party in interest?

10 A The party in interest, pursuant to the Arizona
11 statute, and I would be less than candid if I told you different
12 were still the victims of the accident.

13 Q So bankruptcy wouldn't help at all.

14 A Bankruptcy merely precludes those people from
15 utilizing any technical aspects in collecting that judgement.
16 No garnishments or executions.

17 Q But they could object to their license.

18 A All they can do is, different than Utah, in
19 Utah they can litigate the action, in Arizona, they can relieve
20 the party, or a court can relieve the party over their objection
21 if the court orders them to pay installment payments in his
22 discretion, and they keep up their installment payments.

23 Q Without the license provision the judgement debt-
24 or wouldn't have any such right, would he? He only gets it under
25 the statute in Arizona which says the man can't drive or the

1 woman can't drive.

2 A I believe that's right.

3 Q That's a brand new right given to a judgement
4 debtor in a bankruptcy proceeding. The right to keep me from
5 getting my license.

6 A Oh, the creditor, Your Honor.

7 Q Yes, I meant to say---

8 A He doesn't have the right to keep you from get-
9 ting it, if we're playing semantics, Your Honor, probably I am
10 with you, he has the right to allow you off the hook, as opposed
11 to, he doesn't invoke it.

12 I may be playing a word game with you, I'm afraid
13 possibly I am.

14 QM Maybe we both are.

15 A I might explain now to the Court that we have,
16 that Mr. Ching has admitted that you can require compulsory
17 insurance. He's also, I would feel by this same admission, his
18 objection was to the creditor. The creditors power in the sit-
19 uation. What if we had a statute in Arizona which said you get
20 in an accident and you don't tell us that you had insurance or
21 some other funds deposited on the date of that accidnt, you lose
22 your license automatically.

23 Nothing about creditors, nothing about bankruptcy, or
24 anything else.

25 Q Well the creditor is not taking any action here,

1 it's only state action we're concerned with, isn't it?

2 A That's true, the creditor does have power to
3 relieve, also the superior court does, Your Honor, based on
4 conditional payments which either the creditor could waive if
5 he wanted to, we can't expect that, it's impractical, but they
6 could relieve on the installment plan. We're talking about---

7 They also have the power where you have a creditor
8 who's overbearing, the superior court does have the power to
9 --- set monthly payments in his discretion.

10 I merely point out to the Court the admissions con-
11 cerning insurance as a compulsory prerequisite and so forth and
12 once again I still have to admit that I am somewhat baffled as
13 are the Respondents who I represent, how a person can admit that
14 this could be required as a precondition to issuance of a lic-
15 ense yet a less severe restriction is unconstitutional.

16 Now---

17 Q Well only because of the existence of the Bank-
18 ruptcy Act, and because of the supremacy clause. Which wouldn't
19 touch the requirement of insurance.

20 A That's true, that's what I'm referring to.

21 Q Their argument is based upon the Bankruptcy
22 power of Congress and the legislation that Congress has enacted
23 under that power being supreme to the laws of Arizona. It's
24 not based, at the moment at least on any concepts of due pro-
25 cess or equal protection. That's the reason for the difference,

1 isn't it?

2 A Yes.

3 Q The bankruptcy legislation wouldn't have anything
4 to do with your compulsory insurance section, is that correct?

5 A Yes.

6 I might point out on the brief from the womens cen-
7 ter in Los Angeles, one of the amicus curiae briefs. In brief
8 response to that, once again they're relying on the fact, which
9 was pointed out in the Ninth Circuit Court erroneously by
10 Emma Perea, an established fact that was non negligent.

11 Only Mr. Chings assertion concerning the complaint
12 do we know that she is non negligent. Not---.

13 There are innumerable factual situations where this
14 could have been imposed.

15 Q And you say that everyone is foreclosed from
16 challenging that by reason of the entry of the judgement by
17 confession whether with good or bad advice.

18 A I would think so.

19 Q They can't go behind the judgement.

20 A I would think so. That would be my position,
21 right or wrong as to these facts.

22 Secondly, the Court of Appeals did rely on a case
23 by the name of Donado v. Fishbern, to say the wife is bound to
24 join in this judgement.

25 Gentlemen I have reread Donado v. Fishbern, I don't

1 know where Court of Appeals came to that conclusion. It's
2 certainly not in the case.

3 All it talks about is executing vs. the community,
4 based on the judgement. There's no discussion in there what-
5 soever concerning whether or not a wife has to be or does not
6 have to be any discussion concerning proper necessary indis-
7 pensible parties in a community property situation.

8 Q Well, as Mr. Justice Harlan asked you earlier,
9 where does all this lead us with respect to the issue in this
10 case, with respect to Emma Perez. The fact is that she is now
11 a judgement creditor, rightly or wrongly, erroneously or cor-
12 rectly under Arizona law, she is one, and a judgement debtor,
13 I beg your pardon, a judgement debtor.

14 And now her claim is that because of her discharge,
15 and because of the effect of the bankruptcy proceedings, her
16 liability to the judgement creditor is now discharged, as a
17 matter of the supremacy of federal law.

18 Now wouldn't that argument be just as good or bad,
19 just as sound or unsound whether or not the original judgement
20 against her was justified or unjustified?

21 A Yes, if you're talking about the supremacy
22 clause.

23 Q Yes.

24 A Definitely.

25 Q Well that, I gather, is what Mr. Ching is talking

1 about.

2 A Yes, but we do have other contentions in the
3 various other briefs and we also have some erroneous conclusions
4 in the Ninth Circuit brief which I did want to make sure was
5 clarified as to my position.

6 Yes, I would agree. I personally think, for instance
7 Mr. Ching mentioned that he's going, first his briefs it talks
8 about the Perez' and he says in addition here is Emma, and then
9 he says Emma is innocent therefore I personally think innocent,
10 not innocent, owner, driver, what have you, if it violates the
11 supremacy clause because the suspension isn't discharged it
12 doesn't make any difference whether she's innocent or if she's
13 guilty, or if it proves negligence, because of course that can
14 be discharged.

15 Q Right.

16 A Wilful and ---, excuse me.

17 Q Right.

18 A But the distinction and relationship I don't think
19 has any validity if supremacy is what we're talking about.

20 Q Right.

21 A My time is up, I want to thank you.

22 Q Thank you, Mr. Schlosser. We'll give you a little
23 more time, Mr. Ching.

24

25

1 REBUTTAL ARGUMENT OF ANTHONY B. CHING, ESQ.

2 ON BEHALF OF PETITIONERS

3 MR. CHING: Mr. Chief Justice, I would rebut Mr.
4 Schlossers argument as to ownership being a basis for the judge-
5 ment. Under the statute defining judgement in the Financial
6 Responsibility Act ---. Judgement---should become final except
7 by court as deriving out of the ownership, maintenance or use
8 of a vehicle.

9 That's ownership very much part of the judgement. As
10 to welfare, I would say to the court that there's more likli-
11 hood that a judgement debtor would go on welfare than a judge-
12 ment creditor. The creditor has insurance---

13 Q How can you categorize that, Mr. Ching, if it
14 depends on the economic status of the particular victim?

15 A Exzctly.

16 Q You really can't generalize about people who get
17 hit by automobiles, can you?

18 A No, but I'm saying that---providing for the
19 uninsured motorist provision for example and the insurance com-
20 pany pay off to the victims and that in the Schecter case the
21 Court took about 76% of the motorist being insured and there-
22 fore 2 out of 4 victims most likely have insurance. Therefore
23 those creditors pursuing the deptors 2 out of 4 are insurance
24 companies.

25 Q Thank you Mr. Ching, thank you, Mr. Schlosser,

1 the case is submitted.

2 (Whereupon at 12:00 noon, argument in the
3 above entitled matter was concluded.)
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