1969

Marilyn B. Calahan v. Kay Laurel Wood : Appellants Brief

Utah Supreme Court

IN THE SUPREME COURT
OF THE STATE OF UTAH

MARILYN B. CALAHAN,
Plaintiff and Appellant,

v.

KAY LAUREL WOOD,
Defendant and Respondent.

No.

FILED

AUG

Clerk

APPELLANT'S BRIEF

Appeal from the Judgment of the Second District
Weber County.

Honorable John F. Wahlquist

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Civil No. 11552

APPELLANT'S BRIEF

STATEMENT OF THE KIND OF CASE

This is an action for damages for injuries sustained by the plaintiff, Marilynn B. Calahan, when the car in which she was a guest passenger, was struck in the rear by a truck driven by the defendant.

DISPOSITION IN LOWER COURT

Plaintiff in her cause of action alleged that defendant was negligent in driving the truck into the stopped vehicles (R.3). Defendant alleged that plaintiff was contributorily negligent in remaining in the car, had assumed the risk of injury and denied his own negligence (R.5). Although the plaintiff objected, the jury was allowed to decide on the issues of contributory negligence and assumption of risk, and were instructed also on unavoidable accident (R. 23 Instruction numbers 14 and 20, Interrogatory No. 2). The jury found that defendant had operated his truck in a negligent manner, but also found that plaintiff's remaining in the car while it was stopped constituted contributory negligence. Plaintiff's contributory negligence and defendant's negligence were found on special interrogatories submitted to the jury.

RELIEF SOUGHT ON APPEAL

Appellant urges the court to rule that other submission to the jury of the issues of unavoidable accident, assumption of risk and contributory negligence were prejudicial error, and that as a matter of law there was insufficient evidence of negligence on the part of plaintiff to submit the issue to the jury; that the verdict of the jury as to the contributory negligence of the plaintiff be overruled, and a new trial granted to determine the amount of damages sustained by the plaintiff.

STATEMENT OF FACTS

This case arose out of an automobile accident which occurred in the early morning hours of December 19, 1966 (Tr. 6, 8, 17, 20, 28). Plaintiff was a passenger in an automobile driven by Ron Holbrook. (Tr. 18, 53). The Holbrook car had trouble starting, (Tr. 6, 18, 21, 42), so a friend of Mr. Holbrooks, Richard Cornia, agreed to use his car in pushing the stalled car in an attempt to get it started (Tr. 6, 18, 21, 42). The Cornia vehicle alternately pushed and followed the Holbrook vehicle down the road on State Road 39 for about one mile from Chris', where they had embarked (Tr. 6, 12, 18, 28). When the Holbrook car did not start after traveling about one mile, both cars pulled to the side of the road and stopped (Tr. 7, 18). The drivers of the vehicles felt they had pulled off the road as far as possible (Tr. 43, 55, 65). There was patchy fog on the road, (Tr. 13, 18, 29, 47, 65), but Mr. Cornia testified visibility was about one block (Tr. 47). The cars left their lights on after stopping (Tr. 7, 11, 18, 21, 24, 25, 42, 55, 65). Within minutes after stopping, the Cornia vehicle was struck in the rear by a truck driven by defendant (Tr. 8, 14, 27, 85). The force of impact was sufficient to cause extensive damage to the Cornia vehicle, drive the Cornia vehicle into the Holbrook vehicle, and cause extensive damage to the

Holbrook vehicle (Tr. 8, 20, 31, 43, 44). The damage was so extensive that both cars were determined to be total losses by the insurance company (Tr. 8, 20, 43, 44).

Defendant claimed he did not see any lights from the vehicles prior to the impact (Tr. 85), and therefore did not apply his brakes. The evidence is uncontradicted by Mr. Wood that the truck struck the cars before he applied his brakes (Tr. 27, 30, 86). Mr. Wood also failed to see Mr. Cornia giving signals to go around the cars (Tr. 44).

At the time of the collision, plaintiff was sitting in the front seat of the Holbrook vehicle waiting for the men to get it started (Tr. 55). She had remained in the vehicle because of the extremely cold weather and snow outside, and her desire to remain as warm as possible (Tr. 66). Plaintiff has injuries to her neck and back, which resulted from the collision (Tr. 66), and has suffered severe pain, lost work and has been unable to continue her schooling (Tr. 56, 57, 75, 76, 77).

ARGUMENT

POINT 1

THE COURT ERRED IN INSTRUCTING THE JURY, OVER THE OBJECTION OF PLAINTIFF, ON THE DOCTRINE OF ASSUMPTION OF RISK.

In its instruction number 14 to the jury, the court instructed on the Doctrine of assumption of risk.

It is a well recognized legal principle that the doctrine of assumption of risk differs from contributory negligence. The main difference is that assumption of risk requires a person to have knowledge of the danger, appreciate the danger, and then deliberately expose himself to the danger. Strand Enterprises v. Turner, 233 Miss. 588, 78 So 2d 769 (1955); Prescott v. Ralphs Grocery Co., 42 Cal. 2d 158, 265 P 2d 904 (1954); Talizan v. Oak Creek Riding Club, 176 Cal. App. 2d

429, 1 Cal Rptr 514 (1959); Klepp v. Prawl, 181 Kan. 590, 313 P 2d 227, (1957).

In the Strand case supra, the Mississippi Supreme Court stated:

> "In order for one to be barred of recovery under the doctrine of assumption of risk, he must know and appreciate the danger and deliberately expose himself thereto." 78 So 2d at 773

In the Klepp case supra, the Kansas Supreme Court speaking of assumption of risk stated:

> " . . . it implies intentional exposure to a known danger, it embraces a mental state of willingness . . ."
> 313 P 2d at 230

The court has often recognized the distinction between contributory negligence and assumption of risk. In Ferguson v. Jongsma, 10 Utah 2d 179, 350 P 2d. 404 (1960) this court stated:

> "Contributory negligence is based on carelessness, inadvertence, and unintended events, but assumption of risk requires an intelligent and deliberate choice to assume a known risk."
> 10 Utah 2d at 190

This court further stated in the Ferguson case:

> "Assumption of risk requires knowledge by plaintiff of a specific defect or dangerous condition caused by defendant's negligence or lack of due care which plaintiff could have, but voluntarily and deliberately failed to avoid and thereby assumed the risk of the injuries he sustained."
> Supra at 190.

In other words, to assume the risk of injury from a person's negligence, plaintiff must know of the negligent act, realize the danger it creates and then voluntarily submit to the danger. These requirements of knowledge and consent are

applied in the case of Johnson v. Maynard, 9 Utah 2d 268, 342 P 2d 404 (1959); and Hindmarsch v. O. P. Skaggs Foodliner, 21 Utah 2d 413, 446 P 2 d 410 (1968);

In the Hindmarsch case this court stated:

> "The doctrine of assumption of risk is but a specialized aspect of the defense of contributory negligence. This court has repeatedly declared the law in that respect: That it applied only where the plaintiff knew of and appreciated the danger, and had a reasonable opportunity to make alternative choice, but nevertheless voluntarily exposed himself to the danger in question." 21 Utah 2d at 416.

Therefore, before palintiff can be said to have assumed the risk, she must have known of a dangerous condition created by a person's negligence, she must appreciate the danger such negligent act has caused, and then she must willingly and knowing submit herself to the possibility of harm caused by the negligent act.

In Fisher v. U. S. Steel Corp., 334 F2d 904 (5th Cir., 1964), the Fifth Circuit Court of Appeals stated that before assumption of risk would apply, plaintiff must have actual knowledge of the hazard and not be merely in a position where by ordinary care the hazard should be apparent. This requirement of actual subjective knowledge and not merely an opportunity to obtain it has been accepted as absolutely necessary before assumption of risk will apply in most other jurisdictions, and seems to be the better rule. The courts have recognized that where the plaintiff could have realized the presence of danger, but did not, the proper defense is contributory negligence, since assumption of risk requires actual subjective knowledge. Johnson v. Maynard, supra; Clay v. Dunford, 121 Utah 177, 239 P2d 1075 (1952); Sullivan v. Shell Oil So., 234 F2d 733 (9th Cir., 1956) Cert. denied 352 U.S. 925,

77 S. Ct. 221, 1 L. 1d. 2d 160; Benwell v. Dean, 38 Cal Rptr. 542 (Dist. Ct. 1964); Cooper v. Lunsford, 44 Cal Rptr. 530 (Dist. Ct. 1965); Rogers v. L. A. Transit Lines, 45 Cal. 2d 414, 289 P 2d 226 (1955); Hacker v. Burkner, 263 Minn. 278, 117 NW 2d, 13 (1962); Restatement of Torts 2d Sec. 496D.

Defendant urges that plaintiff assumed the risk of injury by remaining in the car in a dangerous position. As a matter of law, a person has a right to assume that others will comply with the law and operate their vehicle in a careful manner and comply with the rule of the road. Lazar v. Black & White Cab Co., 50 Ga. App. 567, 179 S.E. 250 (1935); Rogers v. Jefferson, 224 Iowa 324, 275 N.W. 874 (1937); Jacobson v. Asahay, 188 Minn. 179, 246 N.W. 670 (1933); a plaintiff is not required to anticipate a danger which can only arise due to the subsequent negligence of another person. Woodall v. Wayne Steffner Productions, 201 Cal. App. 2d 800, 20 Cal. Rptr. 572 (1962); Bullock v. Benjamin Moore & Co. 392 S.W. 2d 10 (Mo. 1965); Peoples Drug Stores v. Windham, 178 Md. 172, 12 A2d 532 (1940); Mainford v. Giannestras, 111 N.E. 2d 692 (Ohio 1951);

In the Mainfort case the Ohio Court stated:

> "It is true that the doctrine of assumption of risk applies only with respect to the hazard of a situation already existing. If one has full knowledge of an open and visible condition, appreciates the dangers incident thereto, and voluntarily acts with reference thereto, he assumes the risks of the attendant dangers. It is a matter of full knowledge and intelligent acquiescence. But a person cannot voluntarily act with reference to a condition or situation created by the negligence of another unless that negligence has previously occurred; he cannot assume the risks of a condition created

by subsequent negligence."
111 N.E. 2d at 692.

The idea that a person cannot assume the risk of a third person's subsequent negligence is further supported in the Bullock case, supra, wherein the Missouri Court stated:

> " . . . one's knowledge of a general condition from which the danger arose does not necessarily constitute knowledge and appreciation of the danger of injury (citations omitted) . . . the mere knowledge of the fact that an injury might result . . . is not sufficient."
> 392 S.W. 2d at 14.

In the instant case plaintiff was a passenger in a car stalled on the highway. It was the middle of the night and subzero weather. Defendant claims that plaintiff assumed the risk of injury by remaining in the stalled car. Plaintiff testified she was not aware of any specific danger to her from remaining in the car (Tr. 66, 67, 68). She testified she was tired and her main concern was keeping warm (Tr. 66, 67). The jury found defendant was negligent in colliding with the stalled cars. Therefore, to have assumed the risk of injury from the collision, plaintiff would have had to assume defendant would drive negligently, collide with the stopped car, and that such collision would injure her. These assumptions are clearly not required by law. Bullock v. Benjamin Moore & Co., supra, and cases cited supra, Pages 5 & 6.

As this court stated in Clay v. Dunford, supra:

> "Plaintiff must have looked, must have seen, and must have known of the danger voluntarily subjecting himself thereto and consenting that if injury result he who may have negligently exposed him thereto should be relieved of any liability therefore."
> 232 P2d at 1076.

There is no evidence which would show that plaintiff in the instant case looked, saw and realized the danger of colli-

sion by a negligently operated vehicle, or that she in any manner actually realized that she was in danger of injury. She certainly did not consider relieving a third party from liability for injuries she might subsequently receive due to the third party's negligence. Defendant claims plaintiff should have realized the danger since it was obvious, but failure to discover a danger is not a proper part of the defense of assumption of risk as this court stated in Clay v. Dunford, supra:

> "Failure to exercise ordinary care to discover the danger is not properly a matter of assumption of risk, but of the defense of contributory negligence."
> 239 P2d at 1077.

In the Clay case, this court held it to be error to instruct the jury on assumption of risk when there was no evidence of actual subjective knowledge on the part of plaintiff, and a subsequent acquiescence to the possibility of injury. This court has consistently found it reversable error to wrongfully instruct a jury on assumption of risk, as when there is no evidence of the required elements. Clay v. Dunford, supra; Johnson v. Maynard, supra; Ferguson v. Jongsma, supra; Hindmarsch v. O. P. Skaggs Foodilner, supra.

It is submitted that the doctrine of assumption of risk is not applicable to this case since no evidence appears in the record on which the court could justify an instruction embodying its doctrine. There is no evidence of subjective knowledge, of appreciation of the danger or of consent. Thus the court erred in instructing the jury on assumption of risk in the absence of any evidence on which the jury could determine that Mrs. Calahan had in fact assumed the risk of injury. The only purpose the instruction could have was to confuse the jury and prejudice plaintiff's right to a fair and impartial determination of her rights.

POINT II

THE COURT ERRED IN INSTRUCTING THE JURY ON "UNAVOIDABLE ACCIDENT" OVER THE OBJECTION OF PLAINTIFF.

a. There was no evidence presented in the case upon which a jury could base a verdict of unavoidable accident.

It is undisputed evidence that the collision took place about one mile west of Chris' on State Road 39, and involved the Wood vehicle and two other cars which were stopped on the road and partially blocking the westbound travel lane (Tr. 16, 18, 20, 22, 28, 34), and that the weather was extremely cold and there was patchy fog (Tr. 13, 18, 29, 47, 65, 85).

Based on the evidence the trial court instructed the jury as follows, over the objection of plaintiff:

> "No. 20. The law recognizes unavoidable accidents. An unavoidable accident is one which occurs in such a manner that it cannot justly be said to have been proximately caused by negligence as those terms are herein defined. In the event a party is damaged by an unavoidable accident, he has no right to recover, since the law requires that a person be injured by the fault or negligence of another as a prerequisite to any right to recover damages."

The cases are uniform to the effect that it is error to instruct on the doctrine of unavoidable accidents in the absence of affirmative evidence to show that the accident was in fact unavoidable. The instruction may not be given where the evidence leaves it to conjecture or surmise. In an ordinary case where, as here, plaintiff charges negligence and the defendant enters a general denial and charges contributory negligence, an instruction on unavoidable accidents is not proper. The cases and test writers are uniform in this holding. Huffman v. City of Hot Springs, 237 Ar. 757, 375 S.W. 2d, 795

(1964); Rabe v. Lee, 239 S.W. 2d, 254 (Okla. 1954); Williams v. Burrell, 43 Ohio App. 341, 182 N.E. 889 (1953); Johnson v. Macias 193 F. 2d 475 (5th Cir., 1952).

In the Williams case, supra, the Ohio court stated:

> "The court may charge upon the subject of unavoidable accident only when this matter is raised by the pleadings, or when the defense and the evidence in the trial clearly tend to show or infer that the accident was one which was clearly unavoidable . . . where the evidence in the case clearly shows negligence, there is no place in the court's charge for a charge of unavoidable accident and the case is solely one as to who was negligent."
> 182 N.E. at 890.

Thus where there is evidence that someone was negligent and the question is "who was negligent?", the court is in error to instruct on unavoidable accident. This is the idea expressed by the Texas Court in Rabe v. Lee, supra, wherein the court stated:

> 'Under the circumstances . . . either one or both of the drivers of the two cars would be guilty of negligence . . . all of the evidence tended to show one or the other driver guilty of negligence. There was no evidence that the act of a third person or something other than the negligence of the driver of the two cars caused the collision. Under such circumstances the question of unavoidable accident was not in the case."
> 239 S.W. 2d.

There is no evidence in the present case that would show that anything other than negligence of one of the parties was responsible for the collision. When such is the case, it has been held that giving of an instruction on unavoidable accident is reversable error. Grey v. Woods, 84 Ariz. 87, 324 P2d 220 (1958). Plaintiff urges therefore that giving an instruction on unavoidable accident in the present case was not based

on any evidence in the case and was therefore error.

b. No issue of unavoidable accident was raised by the pleadings or otherwise.

There is a split of authority on the question of whether or not the defense of unavoidable accident must be specifically pleaded, even though there might be evidence on which such a charge might be based. We believe the weight of authority as well as the better rule is to the effect that it must be specifically pleaded.

Blashfield Cyclopedia of Automobile and Practice, Volume 10C Section 6698 states:

> "A party is not entitled to an instruction on the theory of unavoidable accident in the absence of any evidence on which to base it, or upon pleadings not raising the the issue such as where both parties charge negligence in their pleadings."

Frazier v. Stellinger, 52 Cal. App. 2d, 564, 126 P. 2d 653 (1942); Harper v. Hall, 76 Ga. App. 441, 46 S.E. 2d 201 (1948); Ault v. Whittemore, 73 Ga. App. 10, 35 S.E. 2d 526 (1945); Aura v. Karschner, 32 Ohio 492, 168 N.E. 237 (1929); Southland Greyhound Lines v. Dennison, 62 S.W. 2d 500 (Civ. App. 1933).

In the present case, the pleadings did not raise the issue of unavoidable accident. Plaintiff alleged she was injured due to the negligence of defendant. Defendant denied negligence and alleged plaintiff was contributorily negligent. The issue of unavoidable accident was not mentioned during trial and no evidence was presented on it. The issue did not enter the trial until the jury was instructed. Plaintiff therefore urges that it was prejudicial error to instruct the jury on unavoidable accident since it was not an issue at trial, and its submission could only serve the purpose of confusing the jury and prejudicing plaintiff's rights.

POINT III

THE COURT ERRED IN SUBMITTING, OVER THE OBJECTION OF THE PLAINTIFF, THE ISSUE OF CONTRIBUTORY NEGLIGENCE TO THE JURY.

Interrogatory number two presented the issue of plaintiff's contributory negligence to the jury.

The cases are uniform to the effect that it is error to instruct the jury on the issue of contributory negligence when there is no evidence to justify finding the plaintiff contributorily negligent. Brakah v. Holdebrand, 134 Col. 197, 301 P.2d 347 (1956); Dean v. Martz 329 S.W. 2nd 371, (Ky. 1959); City of Phoenix v. Brown, 88 Ariz. 60, 352 P2d 754 (1960); Vallier v. Fosburg, 365 P.2d 1960 (Okla. 1961); Davis v. Laird, 108 Ga. App. 729, 134 S.E. 2d 467 (1963); Smith v. Bishop, 32 Ill. 2d 380, 205 N.E. 2d 461 (1965).

Defendant charged that it was a breach of duty for plaintiff to remain in the stopped car. Plaintiff admitted remaining in the car, but denied that such conduct was contributory negligence. Plaintiff was not imputed with any negligence of the driver of the car since the general rule is that a guest passenger is not imputed with the negligence of the driver of a vehicle. Evans vs. Pennsylvania R.R. Co., 255 F.2d 205 (3rd Cir., 1958); Bailey v. Brannin, 279 F.2d 344 (3rd Cir., 1960); Hudson v. Union Pacific R.R. Co., 120 Utah 245, 233 P.2d 357 (1951); Therefore, any negligence of plaintiff would have to be based upon her remaining in the stalled car.

Plaintiff claims that she was within her rights and acting prudently by remaining in the car. In her testimony, plaintiff admitted that there is a general danger any time a car is stopped in the road (Tr. 66). Plaintiff, however, further testified that due to the extreme temperatures outside, the fact that

the weather was bad, and that the only alternative to sitting in the car, was standing in the road, she felt safe in the car (Tr. 66, 67, 68). There were cars passing on the left of the vehicle (Tr. 7, 19, 25, 42, 55, 65). It was therefore reasonable for plaintiff to assume subsequent traffic would also pass on the left. Plaintiff testified she was not worried about an accident. This is reasonable since the cars had their lights on (Tr. 7, 11, 18, 21, 24, 42, 55). Plaintiff had no reason to assume that the defendant in coming down the road would fail to see the lights of the stalled cars and would collide with them rather than passing on the left as other cars had done. The only way plaintiff's position could become dangerous was by the subsequent negligence of a driver approaching the stalled vehicles.

In Moreno v. Los Angeles Transfer Co., 44 Cal. App. 551, 186 P. 800 (1920) the California court stated:

> "The plaintiff Moreno was not required either under the common law or any statutory enactment of this state to refrain from occupying a position that could only become a place of danger by reason of the negligence of another . . . contributory negligence cannot be predicated upon an omission to assume that another will violate the law."
> 186 P. at 802.

The idea that one cannot be guilty of contributory negligence for failing to assume another might violate the law or fail in their duty is followed by the Alabama court in Pollard v. Stewart, 27 Ala. 116, 158 So. 203 (1936). In the Pollard case, a motorist stalled his car on a railroad crossing. He didn't see a train coming so he remained in the car and tried to start it. He was injured when a train struck the car. Defendant argued that it was contributory negligence for plaintiff to remain in the car when he should have realized that being stalled on a railroad track was dangerous. The law required a train

on approaching a crossing to slow down and sound a whistle as a safety warning. The defendant's train which struck plaintiff failed to do so. The question arose whether it was contributory negligence to fail to keep a lookout for coming trains and to remove himself from the car. The court held that plaintiff was not contributorily negligent for staying in the car and stated:

> "It was the right of the plaintiff to continue to try to start his car until warned of the danger to his life and limb . . . he had a right to assume . . . defendant would act with due care and would observe the mandates of the law . . . there was no duty resting on plaintiff to anticipate the capability of defendants servants . . . he had a right to rely upon an observance of the law by defendants servants."
> 168 So. at 204.

Such a right to rely on observance of the law by others is well recognized. Foreman v. Western Union Telegraph Co., 228 Ky. 332, 145 S.W. 2d 1079 (1929); Goldstein v. Priver, 64 Cal. App. 249, 221 P. 393 (1923); Ford v. Tremont Lumber Co., 123 La. 742, 49 So. 492 (1909); Stout v. Lewis, 11 La. App. 503, 123 So. 346 (1929); Hasie v. Alabama and V. Ry. Co., 78 Miss. 413, 28 So. 941 (1900); McCulloch v. Horton, 102 Mont. 135, 56 P.2d 1344 (1937).

In Vallier v. Fosbury, supra, the court held that a passenger was not contributorily negligent for failing to anticipate danger. The court stated:

> "Our examination of the record reveals no evidence from which it may be inferred or presumed that plaintiff was contributorily negligent. She had no warning of approaching danger . . ."
> 365 P.2d at 162.

In the instant case, the jury was allowed to find plain-

tiff contributorily negligent for remaining in the car when, to quote defendant, "to do so exposed her to an unreasonable risk of injury to herself." Interrogatory No. 2. Remaining in the car was not in itself dangerous, and plaintiff's position would only be dangerous subsequent to defendant's negligence. As in the Pollard case, supra. Plaintiff had no reason to assume defendant would operate his truck negligently, she had no reason to anticipate injury from Wood's negligence and hence could not be guilty of contributory negligence for remaining seated in the car when being so seated was dangerous only if some third person negligently collided with the stalled car.

The courts are uniform in refusing to find a person guilty of contributory negligence by a plaintiff when plaintiff's only act has been to remain seated in a stalled or parked car. Pollard v. Stewart, supra; Remmenya v. Selk, 150 Neb. 401, 34 N. W. 2d 757 (1948); Allen v. Clark, 148 Neb. 627, 28 N.W. 2d 439 (1947); Fingeret v. Mann, 319 Pa. 262, 175 A 674 (1935); Vallier v. Fosburg, supra.

The Remmenya case, supra, is very similar to the instant case. The trial court allowed the jury to decide the issue of whether plaintiff was contributorily negligent for remaining in the car stopped on the highway. In granting a new trial for the error of submitting contributory negligence to the jury, the court stated:

> "Was the plaintiff's conduct in remaining in the car for a minute or thereabouts after it was parked and just prior to the accident such that under the circumstances here disclosed it would justify a jury in finding that she was guilty of contributory negligence? . . . we think not."
>
> 34 N.W. 26 at 764.

In Allen v. Clark, supra, the Nebraska court rules that

remaining in a car stalled in a traffic lane is not sufficient evidence to present the question of contributory negligence to the jury. The defendant had charged, as in the present case, the plaintiff was guilty of contributory negligence because he remained in the stalled car in a traffic lane when he should have known that it was dangerous and alighted from the car. The Nebraska Supreme Court held that in the above circumstances there was not enough evidence to present the issue of contributory negligence to the jury. The Court stated:

> "This court finds that there was no evidence showing any negligence on the part of the plaintiff. This court has repeatedly said that where contributory negligence is pleaded as a defense, but there is no evidence to support such a defense, it is prejudicial error to submit such issue to the jury."
> 28 N.W. 2d at 444.

Therefore, a mere showing that plaintiff remained in a car which was stopped or stalled in a traveled traffic lane and the allegation of defendant that to so remain is dangerous, is not sufficient evidence to allow the issue of contributory negligence to go to the jury.

In Fingeret v. Mann, the Pennsylvania Supreme Court had this mae problem before it.

The court stated:

> "We are convinced, however, that the trial judge was in error in instructing the jury that they might properly find Mrs. Fingeret guilty of contributory negligence. She was a guest in the car, and it is well settled that the negligence of the driver is not to be imputed to a guest . . . There is no evidence in the case from which any breach of duty on her part could be inferred."
> 178 A. at 675.

Mrs. Fingeret had been a passenger in a car which was struck while stopped on the highway.

The factual situation in the Andrews v. Stark, 193 Wash. 204, 74 P2d 999 (1938), is nearly identical to the facts involved in the present case. However, the driver of the stalled car and the pushing car were involved rather than a passenger. The court in that case upheld the trial court in its conclusion that there was no negligence on the part of the mentioned drivers, but that the proximate cause of the accident was the reckless and careless driving of the driver who had failed to observe or stop for the stalled vehicles.

Therefore, under the cases discussed above, plaintiff had no duty to assume that the defendant would drive negligently. Defendant failed to show that any conduct of plaintiff in any manner breached a duty owed to the public, generally or to defendant specifically. The record fails to show evidence on which a charge of contributory negligence could be based. We respectfully urge the court that it is error to charge the jury on contributory negligence, merely because defendant alleged it in his pleadings. Based upon the cases cited the factual situation involved, and the record, there is insufficient evidence that plaintiff breached any duty at all. The plaintiff submits that it was prejudicial error for the court to submit the question of contributory negligence to the jury.

CONCLUSION

It is submitted that the court's instructions given to the jury on assumption of risk, unavoidable accident and contributory negligence constituted an error which was prejudicial to the rights of the plaintiff. This submission is based upon the laws as set forth as related to a guest passenger and the factual situation presented.

Respectfully submitted,
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