

1948

La Vora Spendlove v. Paul Shewchuck, Matilda Shewchuck and Mary Shewchuck, dba American Window Cleaning Co. : Brief of Appellants

Utah Supreme Court

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Ira A. Huggins; Attorney for Defendants and Appellants;`

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IN THE
SUPREME COURT
OF THE
State of Utah

LA VORA SPENDLOVE,

Plaintiff and Respondent,

vs.

PAUL SHEWCHUCK, MATILDA SHEW-
CHUCK and MARY SHEWCHUCK, doing
business as AMERICAN WINDOW CLEAN-
ING COMPANY,

Defendants and Appellants.

No. 7185

APPELLANTS' BRIEF

Appeal from Second District Court,
Weber County, Utah

Honorable John A. Hendricks, Judge

IRA A. HUGGINS

Attorney for Defendants and Appellants

FILED
JUL 28 1948
SUPREME COURT, UTAH

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STATEMENT OF THE CASE

This action was brought by plaintiff against the defendants for damages alleged to have resulted to her from a broken upper femur of the left leg suffered on the 3rd day of January, 1947, while she was walking south on the sidewalk on the west side of Washington Boulevard in Ogden, Utah, near the center of the block between 23rd and 24th Streets. She alleged that the employee of the defendants, doing business as American Window Cleaning Company, was washing windows at Taylor-Wright Company (which was actually the Princess Shop, adjoining Taylor-Wrights on the north), and that as she passed him on the sidewalk, he projected the handle of a brush being used by him while washing windows out over a portion of the sidewalk and between her legs so that she became entangled with it, causing her to fall to the sidewalk,

breaking her left leg between the knee and hip. Plaintiff alleges defendants were negligent, reckless, and careless, because of which she suffered the injuries complained of and she claims damages in the sum of \$15,000.00 general and \$4,260.00 special (Pages 010-012, Bill of Exceptions) as follows: medical care and hospitalization, \$750.00; damage to clothing, \$10.00; care of her children, \$500.00. She also claimed that she had been unable to secure help at her home and that it had been necessary for her husband to remain at home to wait upon her to her damage in the sum of \$1000.00, and loss of income from chickens in the sum of \$2,000.00. In her original complaint plaintiff brought suit against Paul Shewchuck only, doing business as American Window Cleaning Company, setting forth the same facts, alleging the same general damage, but alleging special damages in the sum of \$770.00 (Pages 001-003, Bill of Exceptions.) In her Amended and Supplemental Complaint she included Paul Shewchuck's wife, Matilda, and daughter, Mary (Pages 001-002, Bill of exceptions); and the Amended and Supplemental Complaint was filed after the cause was fully at issue upon her original complaint (Pages 001-003, Bill of Exceptions), the answer of the defendant, Paul Shewchuck (Pages 006 and 007, Bill of Exceptions), and Plaintiff's reply (Page 009, Bill of Exceptions). The reply consisted of a general denial of the affirmative defense contained in the answer, and no reply was filed to the answer to the amended and supplemental complaint, which was filed without leave of court. A general and special demurrer was filed to the original complaint and overruled (Pages 004 and 005, Bill of Exceptions). In his answer Paul Shewchuck denied generally and specially the main allegations of the complaint and affirmatively alleged negligence, carelessness and recklessness on the part of the plaintiff (Pages 006 and 007, Bill of Exceptions). Separate general demurrers were filed by each of the defendants to the amended and supplemental complaint (Pages 017-019, Bill of Exceptions) and were overruled. Separate answers were filed by each of the defendants (Pages 014, 021 and 023, Bill of Exceptions). The answer of the defendant, Paul Shewchuck,

was substantially the same as his original answer, and the answers of the two added defendants contained general denials of the material allegations of the amended and supplemental complaint and an affirmative defense that they were in no way connected with the American Window Cleaning Company. The case was tried to a jury and submitted on special interrogatories by the court (Page 039, Bill of exceptions) on the 23rd day of January, 1948.

At the commencement of the trial and upon motion of the plaintiff the cause was dismissed as to the defendants, Matilda and Mary Shewchuck. A verdict was reached, awarding plaintiff general damages in the sum of \$5,000.00 and special damages in the sum of \$1,658.65 against the defendant, Paul Shewchuck, and judgment on the verdict was entered accordingly (Page 040, Bill of Exceptions).

On the day of the accident the defendant, Paul Shewchuck, was admittedly not present but was in the hospital for an operation. His employee, Archie Hood, Jr., a colored man, was cleaning windows at the Princess Shop, where the accident occurred.

A brief resume of the evidence is as follows: Plaintiff on the day in question was in Ogden shopping. She had made a purchase at Mode-O'Day Shop, some distance north of the scene of the accident, and proceeded south, headed for Penneys on the corner of 24th Street and Washington Boulevard (Page 50, Bill of Exceptions). It was about noon; the weather was fair and dry (Pages 43 and 111, Bill of Exceptions). The sidewalk was 19 feet and a few inches wide (Page 185, Bill of Exceptions). There were very few people on the sidewalk, around a couple or three going south and around a couple or three going north (Page 192, 193 Bill of Exceptions). As she approached the Princess Shop and at quite some distance to the north, she noticed the colored man washing the windows at the south side of the Princess Shop (Pages 50 and 106, Bill of Exceptions). She noticed he was wiping the windows with

a long-handled wiper. She did not know exactly where she was walking except "where an ordinary person would walk" (Page 50, Bill of Exceptions); that as she approached the colored man brought the brush or wiper down, protruding the to her; (and as she turned to the east, her back was to him). She testified that (while she didn't see it as she passed) the colored man brought the brush or wiper down, protruding the handle out across the sidewalk and between her legs; that she tripped over it, falling to the pavement and knocking the wiper out of his hands (Pages 51 and 72, Bill of Exceptions); and, as heretofore stated, the upper femur of her left leg was broken about an inch below the hip joint (Pages 5 and 15, Bill of Exceptions). The plaintiff was hospitalized for about two weeks, during which time she suffered some distension of the abdomen, the cause of which was not definitely determined (Pages 5-15, Bill of Exceptions). She was put to bed at her home "for quite a few days" (Page 7, Bill of Exceptions). A Smith Peterson nail was used in the bone fragments, pinning them together. She made a satisfactory recovery (Page 6, Bill of Exceptions). There was some slight impairment in the use of her leg sideways. Otherwise, she was completely recovered (Pages 11, 12, 15 and 24, Bill of Exceptions). Plaintiff suffered from chronic asthma (Page 10, Bill of Exceptions). With the exception of a short period of time immediately following the accident, that was probably not adversely affected (Page 11, Bill of Exceptions). Plaintiff's doctor bill was \$155.00 (Page 200, Bill of Exceptions), with an additional \$15.00 and \$5.00 (Page 62, Bill of Exceptions). She hired a hospital bed for \$9.50 (Page 63, Bill of Exceptions). Her hospital bill was \$97.50 (Page 63, Bill of Exceptions). She claimed costs of laundry at \$125.00, although she kept no record of the same (Page 62, Bill of Exceptions); outlay for medicines \$130.00, with no record kept (Pages 62, 74, 76 and 79, Bill of Exceptions); expenses of laboratory technician, \$8.00 (Page 63, Bill of Exceptions); crutches, \$2.50 to \$3.00; and ambulance to take her home \$5.00 (Page 144, Bill of Exceptions). Plaintiff's husband, Leland Spendlove, who was employed by Ogden City

previously at 82c an hour, (Pages 145 and 146, Bill of Exceptions) laid off his work and remained at home, where he waited on the plaintiff and took care of their little boy, 7 years old, and about 300 chickens. He remained at home six and one-half months (Page 146, Bill of Exceptions) without making any effort to obtain the services of anyone to look after his wife (Pages 152-161, Bill of Exceptions). Evidence concerning the production of eggs in the Spendlove flock was admitted (Pages 68, 69, 70, 71, 159 and 160, Bill of Exceptions) but was neither submitted to the jury by special interrogatory or otherwise, nor was it withdrawn from them. Plaintiff testified that she was unable to get around except on crutches and then very limitedly for some months (Page 64, Bill of Exceptions). Defendant Paul Shewchuck testified that on or about March 1, 1947, less than two months after the accident, he went to her home to purchase eggs, and she was walking without the aid of crutches or any other support (Pages 181 and 182, Bill of Exceptions).

A description of the premises where the accident occurred may be found on Pages 104, 105, 186 and 187 of the Bill of Exceptions. The length of the window north and south being washed by defendant's agent was forty-three and one-fourth inches. Height of the window itself was six feet two inches. Below this window for a distance of between one and two feet was solid wall. There was a marquee extending back from the sidewalk and around a glass island in the center. There was a cardboard partition extending part of the distance through the glassed-in island in the marquee. The front of the island extended out parallel with the windows on the south and north side. There was a window on the north side, the same size as the window on the south which was being washed by defendant's agent. Arthur Williams, Manager of the Princess Shop, testified that he was in the window on the north side at the time of the accident. He testified that the plaintiff entered the marquee, apparently on the north side, and went around, coming out on the south side, or else she had been in the Princess Shop. He testified definitely to seeing

her leaving the store or marquee on the south entrance (Page 165, Bill of Exceptions) and that "she was in a rapid hurry" (Page 165, Bill of Exceptions). Plaintiff denied entering the marquee.

The court submitted special interrogatories to the jury who gave answers thereto as follows:

"The Jury should answer the following interrogatories, and from your answers to said interrogatories you will make up your verdict:

1. Was the Defendant guilty of negligence on the third day of January, 1947, that proximately caused the plaintiff to suffer injuries at said time?

Answer: 'Yes.'

If you answer the above question in the negative, then you should return a verdict of No Cause of Action.

If you answer the question in the affirmative, then you should answer this question:

2. Was the Plaintiff, LaVora Spendlove, guilty of contributory negligence that proximately caused the injuries which she received on the third day of January, 1947?

Answer: 'No.'

If you answer this last question in the affirmative, then your verdict should be No Cause of Action; but if you answer it in the negative then you should answer the following questions:

3. What amount of earnings and subsistence, if any, did the plaintiff suffer loss of by reason of said accident and injuries?

'\$1,000.00.'

4. What amount of obligations as to doctor, hospital and medical bills did plaintiff suffer, if any, by reason of

said accident and injuries?

'\$523.65.'

5. What amount of obligations did the plaintiff incur for the care of her child by reason of said accident and injuries?

'\$135.00.'

6. What amount of general damages, if any, did the plaintiff suffer by reason of said accident and injuries?

'\$5,000.00.'

(Signed) "ARNOLD N. CROUCH
Foreman."

whereupon judgment was entered upon the verdict against the defendant, Paul Shewchuck, in the sum of \$1,685.85 special damages "to cover **loss of earnings and subsistence** and obligations as to hospital, medical and doctor bills" and \$5,000.00 general damages.

ASSIGNMENTS OF ERRORS

Defendant and appellant makes and assigns the following errors upon which he relies for a reversal of the judgment appealed from and as a basis for a direction from this court to the Trial Court to make and enter a judgment as prayed for by defendants:

1. The Trial Court erred in overruling defendants' general demurrer (Pages 005, 020, Bill of Exceptions).

2. The Trial Court erred in failing to withdraw from the jury evidence concerning a pretended loss to plaintiff in the operation of her chickens (Pages 148 and 149, Bill of Exceptions).

3. The Trial Court erred in overruling the defendants' objection to evidence concerning the earnings or salary of the witness, Leland Spendlove (Pages 145, 224 and 225, Bill of Exceptions).

4. The Trial Court erred in submitting special interrogatory No. 3 to the jury (Pages 235, 236, Bill of Exceptions).

5. The Trial Court erred in submitting Special Interrogatory No. 4 to the Jury (Page 236, Bill of Exceptions).

6. The Trial Court erred in its failure and refusal to give defendants' Requested Instruction No. 1.

7. The Trial Court erred in its failure and refusal to give defendants' Requested Instruction No. 2.

8. The Trial Court erred in its failure and refusal to give defendants' Requested Instruction No. 3.

9. The Trial Court erred in its failure and refusal to give defendants' Requested Instruction No. 4.

10. The court erred in submitting to the jury Instruction No. 5.

11. The court erred in submitting to the jury Instruction No. 8.

12. The court erred in submitting to the jury Instruction No. 10.

13. The court erred in submitting to the jury Instruction No. 11.

14. The court erred in submitting to the jury Instruction No. 12.

15. The Trial Court erred in entering the judgment on the verdict.

THE QUESTIONS INVOLVED

I

The Trial Court's refusal to sustain defendants' demurrer to amended and supplemental complaint and to direct a verdict for defendants and against plaintiff. A discussion of this involves Assignments of Error Nos. 1, 6, and 15.

II

The admission of evidence concerning the earnings or salary of Leland Spendlove, husband of plaintiff, and not assigned to plaintiff. This involves a discussion of Assignments of Error Nos. 3, part of 4, (relating to special interrogatory No. 3), and 9.

III

The Trial Court's refusal to properly instruct the jury upon contributory negligence. This involves a discussion of defendants' Assignments of Error Nos. 7, 8, 10, 11, 12, 13 and 14.

IV

Whether plaintiff's evidence with respect to her loss for medicines and laundry was so vague and indefinite and her evidence with respect to loss on chickens was so vague and speculative that the same should all have been withdrawn from the jury completely. This involves a discussion of Assignments of Error Nos. 2 and 5.

Since the Assignments of Error overlap and run together in some instances, we will discuss them so far as possible in the order grouped above.

DEFENDANTS' DEMURRER TO PLAINTIFF'S COMPLAINT SHOULD HAVE BEEN SUSTAINED. FAILING IN THAT DEFENDANT'S REQUESTED INSTRUCTION NO. 1 SHOULD HAVE BEEN GIVEN AND A VERDICT DIRECTED IN HIS FAVOR AND AGAINST PLAINTIFF, OR THE TRIAL COURT SHOULD HAVE REFUSED TO ENTER A JUDGMENT ON THE VERDICT FOR THE REASONS THAT

- A. Plaintiff does not plead a cause of action.
- B. She failed to prove a cause of action, and
- C. Regardless of the verdict of the jury, under the facts pleaded and the evidence offered she had no cause of action.

Paragraph 3 of the complaint reads in part as follows:

“That on the aforesaid 3rd day of January, 1947, this plaintiff was walking along said sidewalk on the west side of Washington Boulevard in Ogden, Utah, in front of the aforesaid Taylor-Wright Company; that the defendants then and there, through their agents and employees, were cleaning the windows of the said Taylor-Wright Company; that one of said agents was standing on the sidewalk with his face toward the windows and his back toward pedestrian traffic and was using a long-handled mop or window cleaner in the operation of cleaning said windows.* That as the plaintiff approached the point where the agent of the defendants was cleaning said windows, said employee had the window cleaner with the long handle extended vertically into the air parallel with the window, but as the plaintiff reached a point even with the said employee, the said agent carelessly, recklessly and negligently, without looking and without any regard for the safety of pedestrians using the sidewalk, and particularly for the safety of this plaintiff, suddenly pulled said long-handled window cleaner down without turning around and negligently, recklessly, carelessly and suddenly thrust the handle of said window cleaner across the sidewalk so as to suddenly project the said handle between the legs of the plaintiff and trip her so that she fell to the paved sidewalk with great force.”

The paragraph quoted is the charging part of the complaint. Plaintiff pleads facts apparently observed by her and known to her at the time of and prior to the accident. In other words, she has stated in effect that she saw the defendants' agent washing a window at the time and place given, using a dangerous instrumentality (a brush with a long handle) and the effect of the pleading is to admit, and we think she does admit that having seen or observed the work being done by defendants' agent and the instrumentality with which he was doing the work, and having observed that his back was turned

to her so that she could see him but that he could not see her in that position, yet she walked so closely to him in full knowledge of the peril of her position that she tripped over the handle, which she had already perceived him using. At no place in the complaint, neither factually or by conclusion, does she even infer that she used any degree of care after having observed the condition of peril she was about to place herself in, to avoid the results which actually occurred. The charging part of her pleading shows, in other words, that she observed a condition of peril, knew it existed and made no effort to avoid walking into it. The complaint does not at any place in the least, even by inference negative contributory negligence on her part but actually in effect pleads contributory negligence on her part, and thus defeated the statement of a cause of action. *Birsch v. Citizens Elec. Co.* 36 Mont. 574, 93 P. 940. Therefore defendants' demurrer should have been sustained.

Plaintiff's evidence clearly shows contributory negligence on her part as a matter of law. She stated in effect that she was on a shopping tour. It was near noon, and her husband and two young children were at home. She intended going into Penneys, apparently to make a purchase, before going home to fix their noon-day meal. The above facts indicate strongly that she was in a hurry and the evidence proves that she was. The witness Glen Williams testified that "she was in a rapid hurry." She testified she did not know just what portion of the sidewalk she occupied but said she was walking "where an ordinary person would walk." The sidewalk was dry, the weather was good, and she had a parcel and a purse or bag in her arms. She further testified that even before she came to the north side of the Princess Shop and just after she left the Mode-O'Day Shop to the north she saw Archie Hood washing the window at the south of the Princess Shop, using a long-handled brush, and his back was turned to her, so that for a considerable distance before she reached the point of impact she saw and must have realized the peril she would be placed in unless she continued to watch his movements and detoured sufficiently to avoid colliding with him or the brush. She admitted on cross

examination that the sidewalk was likely nine or ten feet wide. (It was actually nineteen feet some inches wide). So that from her own evidence there was ample room on the sidewalk which was not in the least congested, (but very little pedestrian traffic), to walk to the east far enough to avoid colliding with the defendants' agent and thus assure her safety. Instead of doing that, she testified that as she reached a point back of the colored man, she turned out of the way a little bit, apparently to the east, which would place her back admittedly toward the colored man's back and close enough to him that when the handle came down she tripped over it and fell. All of the damage she testified to resulted from that fall.

Looking at the case in its worst light against the defendant (and for the sake of the argument, admitting that his agent might have been negligent, (which we do not), the plaintiff in her own complaint and in her own testimony shows clearly that she was guilty of contributory negligence, which occurred at least concurrently with any negligence of the defendant's agent, if there was any. Our conclusion may be different if the doctrine of comparative negligence had been adopted in this state, but since the doctrine of contributory negligence has been adopted instead thereof, the rule we think is very succinctly stated in 114 A. L. R. in a note beginning on Page 830, as follows:

"A fundamental doctrine of the common law is that while defendants' negligence subjects him to a liability to the plaintiff, yet if the plaintiff's negligence also proximately contributed, although in slight degree, to the injury, there is no right of recovery whatever. * "The negligence of the plaintiff, which will defeat recovery, must be such as directly contributes to the injury—It must be a proximate cause of the injury." So that while the fact that the plaintiff's negligence was slight or negligible as compared with that of the defendant will not defeat the rule.

"Thus it is said that to warrant the application of the doctrine of contributory negligence 'the plaintiff's negli-

gence must have entered into and formed a part of the efficient cause of the injury, and if it operated only remotely and not proximately to cause the damages, the plaintiff is not barred of redress, and hence a recovery should be allowed if it appears that the plaintiff's negligent act or omission was prior in time to **AND NOT MUTUAL WITH THE ACTS OF THE DEFENDANT.** (Caps ours)' * In order to defeat his action the plaintiff's conduct must have contributed to the injury in such a way that if he had not been at fault, he would have escaped injury entirely."

For further discussion of the general rule see 38 Am. Jur. XII Contributory Negligence, Sec. 174 Pg. 848.

The distinction between the doctrine of comparative negligence and the doctrine of contributory negligence is no doubt clear to this court, but for the sake of convenience and to assist in the presentation of this case we shall restate that distinction as contained in the note in 114 A. L. R. supra.

"(1) Doctrine of Comparative Negligence. Even though the plaintiff was negligent and even though his negligence concurrently with the defendant's negligence proximately caused his injury, he may recover if the degree of his negligence was slight as compared with that of the defendants.

"(2) Doctrine of Contributory Negligence as Limited by or in its relation to the Doctrine of Proximate Cause.—While the contributory negligence of the plaintiff, however slight, will defeat his right to recover if it was the proximate **or the concurrent cause of his injury**, it will not defeat that recovery if it merely remotely caused or contributed to the injury. It will be observed, therefore, that recovery is permitted under the former doctrine because the degree of plaintiff's negligence was slight as compared with that of the defendant, although having a direct and proximate casual connection with the injury, and under the latter because plaintiff's negligence did not have that direct

and proximate and casual connection necessary for the application of the doctrine barring recovery. In other words, recovery is permitted in the one instance in spite of the doctrine of contributory negligence and in the other in conformity therewith."

The authority continues on.

"The rule first referred to is in derogation of the latter rule, and except as adopted by statute, it has been generally repudiated in most jurisdictions, whereas the latter prevails in every jurisdiction where the doctrine of contributory negligence prevails as an integral part of that doctrine."

We fail to find any statute in this state adopting the rule of comparative negligence. As a matter of fact, this court commonly, generally and, we believe, universally, has adopted the doctrine of contributory negligence and repudiated the doctrine of comparative negligence, the leading case perhaps being *Myers v. San Pedro L. A. & S. L. R. Co.*, 39 Utah 198, 116 Pac. 119.

Under that theory defendants' Requested Instruction No. 3 should have been presented to the jury, since we think it correctly states the law under the doctrine of contributory negligence. The instruction submitted on contributory negligence is No. 8, which, as used among lawyers, perhaps correctly states the abstract definition of contributory negligence but makes no application of the rule in such form that a jury of lay persons could properly understand the same and apply it in the light of the evidence in this case. The states, including the United States, which have adopted the contributory negligence rule as well as the ones which have adopted the comparative negligence rule are collected and shown on Pages 836 and 837 of the above-numbered volume of A. L. R.

The contributory negligence rule is followed apparently in all states, including Utah, which have not adopted the rule of comparative negligence. In the Ohio case of *Bartson v. Craig*,

121 Ohio, S. T. 371, 169 NE, 291, the Supreme Court of that state said:

"Negligence on the part of the plaintiff if it concur with the negligence of the defendant to directly cause the accident and consequent injury will defeat recovery by the plaintiff. Whatever the degree, even though slight, in comparison to the negligence of the defendant, if the fault of the plaintiff was operative, the plaintiff is concluded regardless of the degree in which it was operative. Plaintiff's negligence directly causing or contributing to cause his injuries does warrant a finding against him upon his claim for damages, and that is true regardless of the degree or extent and hence, if it directly contributes in the slightest degree to cause the injury, it being a part of the direct cause, recovery by the plaintiff is not authorized."

Plaintiff's testimony should be viewed least favorably to her. *Morton v. Mooney*, 97 Montana 1, 33 Pac. (2) 262. In that case the court laid down the rule as follows:

"*He is not entitled to recover if he be the plaintiff unless that portion of his testimony which is least favorable to his contention is of such a character as to authorize a recovery in his behalf."

and cites *Putnam v. Putnam*, 86 Mont., 135, 282 Pac. 855; *Lasby v. Burgess*, 88 Mont. 49, 289 Pac., 1028; *Merritt v. Tague*, 94 Mont. 595, 23 Pac. (2) 340.

Plaintiff had reason to apprehend danger as she saw defendants' agent working with a long-handled brush and failed to take any precaution against it, giving rise to a legal presumption of contributory negligence. *Hughey v. Fergus County*, 98 Mont. 98, 37 Pac. (2), 1035; *Mullens v. City of Butte*, 93 Mont. 601, 20 Pac. (2), 626; *Nielson v. Missoula Creamery Company*, 59 Mont. 270, 196 Pac. 357.

In the *Hughey v. Fergus County* case *Supra*, the Supreme Court of Montana said in part,

"When, therefore, a plaintiff asserts the right of recovery on the ground of culpable negligence of the defendant, he is bound to show that he exercised his intelligence to discover and avoid the danger which he alleges was brought about by the negligence of the defendant." (Sherris v. Northern Pacific Railway Company, 55 Mont. 189, 175 Pac. 269.)

and

"When the circumstances attending the injury, as detailed by the plaintiff's evidence, raise a presumption that he was not, at the time, in the exercise of due care, he has failed to make out a case for the jury. The burden is then upon him, and if he fails to introduce other evidence to remove this presumption, he is properly nonsuited." (George v. Northern Pacific Ry. Co., 59 Mont. 162, 196 Pac. 869, 870). Otherwise stated, the rule is that when plaintiff's own case presents evidence which, unexplained, makes out prima facie contributory negligence upon his part, there must be further evidence exculpating him or he cannot recover. Olsen v. City of Butte, 86 Mont. 240, 283 Pac. 222, 70 A. L. R. 1352."

The court further said:

"In view of the nature of the evidence as outlined, it cannot be said that the plaintiff was not negligent, or that he had no reason to apprehend danger, nor yet that his negligence did not directly contribute to his injury as a proximate cause thereof. But one reasonable conclusion can be reached from the facts, and that conclusion is that, had the plaintiff exercised that degree of care which an ordinarily prudent man, possessed of the knowledge which the plaintiff said he had, would have exercised in the circumstances, he would not have suffered the injury of which he complains."

It has been held that the negligence of a railway corporation in failing to whistle or ring the bell as the train approaches

the crossing is excused by negligence on the part of a person about to cross in not using his senses to discover the danger. *Carlson v. Chicago, etc. Ry. Co.*, 96 Minn. 504, 113 Am. St. Rep. 655.

In *Jensen v. Logan City*, 57 Pac. (2) 708, in discussing this rule this court, speaking through Honorable Justice Wolfe, said on Page 715, the reason is that plaintiff is not relieved from the necessity of

“establishing the allegations of his complaint by evidence of such facts and conduct on his part free from inferences that may reasonably be drawn therefrom tending to show that he was not without negligence in connection with the acts complained of.”

and citing *Riley v. Good*, 142 Ore. 155, 18 Pac. (2) 222.

In *Pollari v. Salt Lake City*, a very recent case, reported in 176 Pac. (2) at 111, where plaintiff sued Salt Lake City for damages resulting from injury sustained in stepping in a hole or slipping and falling on a defective sidewalk, this court held, where plaintiff said “she did not see the defective condition of the sidewalk before she fell” that

“The evidence shows that it was light enough so that the plaintiff could see the ice and so that in the very short time between her fall and the arrival of Mr. Baker to assist her, she was able to see the hole, the difference in elevation and the presence or absence of snow.”

and in explaining the rule on contributory negligence the court said, again speaking through the Honorable Justice Wolfe:

“Plaintiff cannot recover where he himself did not observe the standards of law imposed upon him”,

and citing *Jensen v. Logan City*, *Supra*; *Riley v. Good*, *supra*.

Based upon these standards, defendants' demurrer should have been sustained, since upon plaintiff's complaint itself she brings herself within the rule negating by her own admissions the

absence of contributory negligence on her part which proximately caused or concurrently contributed to the accident complained of. The court having refused to sustain the demurrer, then based upon plaintiff's evidence in the light of the foregoing rules, the jury should have been instructed, according to defendants' Request No. 1, to bring in a verdict for plaintiff and against the defendant.

TESTIMONY OF PLAINTIFF'S WITNESSES:

Ray Clawson said plaintiff was standing approximately 4 feet from the building line when he arrived. (Page 40, Bill of Exceptions.)

Jack Biddulph stated the weather was good; there was no storm; the sidewalk was bare, and there was no wind. (Page 40-44, Bill of Exceptions.)

Harold P. Stone, who arrived immediately after the accident and before plaintiff had arisen (he helped her up), testified that she was sitting either in the foyer in front of or adjacent to Taylor-Wrights (adjoining the Princess Shop) up against the building off the sidewalk. (Page 47, Bill of Exceptions.)

Plaintiff herself testified there was no snow and the sidewalk was perfectly dry, (Page 50, Bill of Exceptions.) She saw how the defendants' agent was manipulating the long-handled brush or wiper (Page 51, Bill of Exceptions); that he was facing the window with his back to her (Page 52, Bill of Exceptions). Her only precaution was, as she stated it, "I turned out a little bit" (Page 50, Bill of Exceptions), which then placed her in a position where she could not see him and knowing that he could not see her. She testified that as she started to pass Mr. Hood, the brush was up and ready to be brought down (Page 72, Bill of Exceptions). Common intelligence should have told her that as the brush came down, the handle would to some extent protrude out, creating a hazard. She testified that she fell out toward the southeast and on her left hip, (Pages 52, 112, Bill of Exceptions). She further testified that she came straight up the street so that she was in full view of Mr. Hood all of the

time (Pages 106, 107 and 108, Bill of Exceptions). She did not know upon what part of the sidewalk she was walking, but she turned a little bit east. She observed that the handle on the brush was about six feet long (Page 109, Bill of Exceptions.) She testified that she had not arisen before Mr. Stone helped her up; that she was seated when Mr. Stone came up approximately where she fell (Page 110, Bill of Exceptions). We think all of plaintiff's testimony is rife with contributory negligence, which proximately and concurrently contributed to her injuries. Certainly she gets no consolation from defendants' testimony. Glen Arthur Williams testified to seeing her in the foyer of the Princess Shop, going around the glassed-in island to the south side thereof and going out on to the sidewalk just immediately before the accident, and that "She was in a rapid hurry," (Page 165, Bill of Exceptions). He saw her just after the accident, sitting up against the wall of the building, and that the sidewalk here was eighteen or nineteen feet wide from the building wall to the curb (Page 167, Bill of Exceptions). All of the walls forming the foyer around the glassed-in island, as well as the walls of the said island, except for a distance of between one and two feet from the pavement, were of glass (so that if plaintiff went into the foyer and around the island, as he testified she did, she could at all times see Mr. Hood washing the window at the south and east corner); that the window was only four or five feet wide (Pages 171, 172, Bill of Exceptions). (It was actually 43-1/4 inches wide, (Page 187, Bill of Exceptions). The defendant, Paul Shewchuck, testified that he had instructed Mr. Hood in the proper and safe way to use the equipment to wash windows (Pages 177, 178, Bill of Exceptions). (The court refused to accept testimony as to whether Mr. Hood generally used the equipment according to instructions, (Page 179, Bill of Exceptions). He further testified that the sidewalk at the place of the accident was nineteen feet and a few inches wide (Page 185, Bill of Exceptions).

Archie Hood testified that he was washing the windows in question on the occasion of the accident. He had been in the employ of the defendant twenty to twenty-one months (Page

190, Bill of Exceptions). He said, "When I got out here to the sidewalk, I looked north and south to see if I saw anybody. Question—Had you looked both ways? Answer: Yes, sir, both ways." That the people he saw coming from the north were north of the Princess Shop. Those coming from the south were going into Taylor-Wrights (Pages 192, 193, Bill of Exceptions). He further stated he wanted to keep clear and that was why he looked in both directions before starting to wash the windows (Page 193, Bill of Exceptions). He said he knew he had time to wash the windows before any people then in view reached him. He was standing with his right foot eleven and one-half inches from the wall. The handle he was using was six feet three inches long. He took the brush in his hand, without the handle, to brush the window from the height to which he could reach to the bottom; that while he was using the handle, it "couldn't be no farther than just past my leg" (Page 194, Bill of Exceptions) not more than twenty-four inches from the wall (Page 195, Bill of Exceptions). His bucket and other utensils were left back at the rear of the foyer. He further testified that when plaintiff fell, she was lying between three and three and one-half feet from the wall. She was lying diagonally on the sidewalk, and that there was a little rise in the sidewalk extending out at the juncture of Taylor-Wrights and the Princess Shop about where she fell. He did not see her or know she was there before she hit his stick, (Page 198, Bill of Exceptions), so that whatever view one may take of the evidence, whether, as plaintiff testified, she was coming down the street from north to south, or, as Mr. Williams testified, that she was coming out of the foyer to the Princess Shop, she was nevertheless in a position at all times to watch and observe the actions of Mr. Hood; and she admits that she did watch and observe his actions at all times until she got right to him, and the only precaution she then took, if any, was to turn "a little bit to the east", which placed her back toward his back, so that neither could see the other.

The only fair conclusion which can be reached is that she was walking much too close to the window where she saw a

man working in full view, or if she came out of the foyer of the Princess Shop, she turned the corner rapidly and sharply on to the sidewalk, and in either event so close to Mr. Hood that she ran into the end of the handle and fell. Apparently he had no opportunity to avoid the accident. He took every precaution, looking both ways for pedestrian traffic and keeping the handle of the brush very close to the building and to himself. Had plaintiff exercised the degree of care that an ordinarily prudent person would have exercised under all of the circumstances and in full view of the peril or danger that her intelligence should have warned her of, she would have stepped out of the way to the east far enough to make sure that she would avoid the collision, all of the time observing the motions of the workman and the position of the brush handle. Had she done this, no injuries would have been suffered by her, and the jury should have been instructed to bring in a verdict against her, as set forth in defendants' Request No. 1. Failing in that, the court should have instructed the jury properly on the law of contributory negligence, as requested by Defendants' Request Nos. 2 and 3 and not as it did (simply giving an abstract definition of the term "contributory negligence"). See 38 Am. Juris., Negligence, Sections 366 and 367. *Birmingham R. Light and P. Co. v. Bynum*, 139 Ala. 389, 36 Southern, 736. In the last cited case it was held error to refuse to give the following requested instruction,

"If the plaintiff was guilty of negligence which proximately contributed even in the slightest degree to his injury, the jury must return a verdict for the defendant," the court said,

"It is certainly the law that any want of care, however slight, on the part of the plaintiff, if it contributed proximately to produce the injury, will defeat the action." See also *Riley v. Good*, supra, where an instruction almost verbatim with defendants' Request No. 3 was upheld.

II

THE TRIAL COURT SHOULD HAVE EXCLUDED EVI-

DENCE OF THE EARNINGS OF LELAND SPENDLOVE,
PLAINTIFF'S HUSBAND.

A. Utah has no community property law.

B. Plaintiff could not recover for her husband's loss of salary, even if he justified that loss.

C. No justification was shown for plaintiff's husband's loss of salary.

It will be noted that the theory upon which the loss claimed by Leland Spendlove, so far as the complaint is concerned, is as follows:

"That plaintiff has been unable to secure help at her home and that it has been necessary for her husband to wait upon her and to take care of the household duties to the plaintiff's damage in the sum of \$1,000.00" (Bill of Exceptions, Page 012).

When asked what effort he had made to obtain the services of someone to take care of Mrs. Spendlive so that he could remain at work, he answered, "I didn't try myself after the wife came home. She called on the telephone." Asked again whether he tried to get anyone to come to the home, he answered "No." (Pages 150 and 159, Bill of Exceptions). Beginning about the middle of February, he testified, his wife was getting around the house with crutches (Page 159, Bill of Exceptions.) The evidence shows that plaintiff gradually recovered from the time she was taken home and during most of the time got around the house and that the two-year old child of the parties was being taken care of by plaintiff's sister, Mrs. Marjorie Koldewyn, and for which the jury granted her \$135.00. Asked again "And you didn't make any effort to get anyone to take care of her and you didn't return to work until July 14, 1947" answer, "That's right." (Page 159, Bill of Exceptions). He testified to hearing Mrs. Spendlove make telephone calls; that he did not remember hearing her make any inquiry as to what it would cost to have a woman come into the home to take care

of her (Page 160, Bill of Exceptions). The only testimony of LaVora Spendlove concerning her efforts to obtain help is found on Page 163 Bill of Exceptions, where she testified to calling an employment agency. She did not testify that she attempted to get anyone to come to her home but said she inquired of someone (there being no showing who) that she was told that the wage scale for ordinary household labor jobs was 75c per hour.

The uncertainty created in the minds of the jurors may perhaps be well evidenced by the uncertainty in the minds of counsel and the court as shown on Page 225, Bill of Exceptions, where counsel for plaintiff, after having shown that Leland Spendlove remained away from work approximately six and one-half months; that he was being paid 82c per hour or approximately \$160.00 per month (Page 146, Bill of Exceptions) asked leave to amend his complaint to show that the reasonable value of the services performed for her care was 75c per hour, based on the average day. The motion was not granted, but the court made the following significant statement, "Well, the difficulty now is what could the jury find as to the number of hours?" Nothing further was done about it, but the jury allowed the sum of \$1,000.00. The confusion in their minds is further shown by the conversation between the foreman of the jury and the court, as found on Page 244, Bill of Exceptions. Apparently they were thinking of loss of wages to Leland Spendlove. The court, in answer to a question from the foreman of the jury, said, "Did you mean if you dismiss against one or the other, the other could bring a suit?" Foreman of the Jury: "Yes." The Court: "Not unless they appealed to the Supreme Court and the Supreme Court said that your decision was unfair or not according to law." Whether the jury had in mind the question of Leland Spendlove's wages or the uncertainty concerning the chickens testified to or the uncertainty concerning the amount of damage for medicines and laundry or all of them cannot be told, but certainly some confusion existed, and there appears ample reason for the confusion and uncertainty.

In answer to Special Interrogatory No. 3 "What amount of earnings and subsistence, if any, did the plaintiff suffer loss of by reason of such injuries," the Jury answered \$1,000.00, there is no evidence that plaintiff was ever employed, lost any earnings, had her earning power depreciated or that she lost any subsistence by reason of the injuries. Therefore, it must be presumed that the \$1,000.00 granted by the jury was taken irrespective of proof or anything else from plaintiff's complaint, wherein she claimed her husband lost \$1,000.00 in wages. Plaintiff was confined to her bed approximately one month, (Page 142, Bill of Exceptions.) He testified that he was employed in the Ogden City Street Department. Objection was made to his earnings and the objection overruled, (Page 145, Bill of Exceptions.) He testified to earning 82c per hour, over the objections of the defendants; that his earnings were \$80.00 to \$85.00 for a two-week period, which would amount to \$160.00 per month or thereabouts, or \$1,040.00, (Page 146, Bill of Exceptions.) No assignment of these wages is claimed or shown. No evidence was offered as to the reasonable value of the services rendered plaintiff by her husband. Under Section 40-2-4, Utah Code Annotated, 1943, plaintiff would have been entitled to a judgment for her own loss of earnings had she sustained any. That action could not be maintained by the husband. Neither can the wife during the life and mental capacity of the husband recover for his loss of earnings. The damages recoverable in this class of case are compensatory only, and under the rule a person whose interests of personality have been tortiously invaded is entitled to recover damages for past or prospective

- A. Bodily harm and emotional distress.
- B. Loss of earning capacity or earnings.
- C. Reasonable medical and other expenses.
- D. Resulting harm to property or business.

Restatement of the Law, Torts, Section 924 of Chapter 47. Loss of earning capacity means just what it says, amount of earn-

ings which the injured party has been prevented from acquiring or "the amount which he probably could have earned in work for which he was fitted up to the time of the trial." Under Comment on Clause C of the same Section, Page 637, it is stated,

"However, there can be no recovery for services for which a third person may recover."

The wages of Mr. Spendlove could be recovered, as heretofore stated, only by himself, which would be equally true, we think, of his loss of wages. It cannot be said that Mrs. Spendlove would be legally entitled to collect her husband's wages. In the event of his death, they would be recovered only by his administrator or executor. Under Section 693, Topic 2, Torts, Restatement of the Law, it is said,

"Under statutes permitting the wife to recover all damages suffered as a result of the defendant's tortious conduct, including the value of her services, such an item of damages is not recoverable by the husband."

The converse should be true that the wife cannot recover for loss suffered by the husband. Under Section 695 it is stated,

"Although a husband is entitled to recover for loss of his wife's services and society and any expense which he incurs, as a result of illness or bodily harm caused to her by the tortious conduct of another, a wife is not entitled to recover under similar circumstances. The wife is not, nor has she ever been entitled to the services of her husband. * The husband is still legally bound to provide support for her, and the tortfeasor is liable to the husband for any loss of earning power which he may suffer. This the husband himself may recover, and were his wife permitted to recover for the loss of support, a double recovery would result."

Compensatory damages are discussed fully in Chapter 3, Vol. 15, Am. Jur., beginning on Page 397. An injured person, as stated in Section 27, 15 Am. Jur., Page 420, "Is bound to

protect himself if he can do so with reasonable exertion or the trifling expense and can recover from the delinquent party only such damages as he could not with reasonable effort have avoided."

Setting forth a long list of cases under Note 13, we think, therefore, that

1. Defendants' objection to plaintiff's testimony concerning loss of husband's wages should have been sustained, and

2. Failing in that, all evidence concerning the same should have been withdrawn from the jury as proposed in defendants' Request No. 4.

III

The Assignments of Error under Questions Involved No. 3 have been considered and presented along with Question No. 1.

IV

PLAINTIFF'S EVIDENCE WITH RESPECT TO LOSS FOR MEDICINES AND LAUNDRY WAS SO VAGUE AND INDEFINITE AND HER EVIDENCE WITH RESPECT TO LOSS ON CHICKENS WAS SO VAGUE AND SPECULATIVE THAT THE SAME SHOULD ALL HAVE BEEN WITHDRAWN FROM THE JURY COMPLETELY.

Considerable evidence was offered concerning the production of the chickens claimed by plaintiff and her husband (Pages 68 to 71, 90 to 100, 113 to 115, and 118, Bill of Exceptions.) Discussion was had by the court and counsel concerning the speculative nature of this testimony and the uncertainty of it, but nothing was done about it. It was neither presented to the jury by special interrogatory, nor was it withdrawn from them, (Pages 148 and 149, Bill of Exceptions). No record was kept by plaintiff concerning the costs of medicines purchased which she estimated at \$130.00 (Page 62 and 74-85 incl., Bill of Exceptions) and costs of laundry, which she estimated at \$125.00

(Page 62 and 87-90 incl., Bill of Exceptions). These items we think so vague and uncertain that they should not have been permitted to go to the jury.

It is stated in 15 Am. Jur., Section 356, Page 795,

“As a rule, however, actual or compensatory damages are not to be presumed but must be proved. To warrant their recovery the actual detriment occasioned must be shown by competent evidence and with reasonable certainty for the recovery is limited to such damages as are established by the evidence. * The evidence must afford data, facts and circumstances reasonably certain from which the jury may find the actual loss, and the plaintiff must show by a preponderance of the evidence the damages caused by the injury complained of. * It has been said that the amount of loss is as much a fact to be proved as the fact of loss. * Damages cannot be found from mere speculative and conjectural evidence.”

A careful reading of the testimony of the plaintiff will show that her estimate of the costs of medicine and of having her laundry done were nothing but mere guesses. There was not a fact stated upon which a definite amount could be reached in either event. The same was true with respect to her chickens. The verdict does not set forth what amounts were allowed her for those items.

We respectfully submit, therefore, that the judgment appealed from should be reversed.

Respectfully submitted,
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Attorney for Defendants and Appellants.