

1958

Patricia Jo Morley et al v. Elberteen Rodberg : Brief of Respondent

Utah Supreme Court

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Davis and Bayles; Attorneys for Respondent;

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In the Supreme Court of the State of Utah

PATRICIA JO MORLEY, JANICE LEE
MORLEY, by and through MAX L. MOR-
LEY, their guardian ad litem, and ELISA
RUTH LEON, by and through ALFRED
LEON, her guardian ad litem,

Plaintiffs,

—VS.—

ELBERTEEN RODBERG,

Defendant.

BRIEF OF RESPONDENT
ELBERTEEN RODBERG

DAVIS and BAYLES

*Attorneys for Respondent
Elberteem Rodberg*

FILED

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In the Supreme Court of the State of Utah

PATRICIA JO MORLEY, JANICE LEE
MORLEY, by and through MAX L.
MORLEY, their guardian ad litem, and
ELISA RUTH LEON, by and through
ALFRED LEON, her guardian ad litem,

Plaintiffs,

vs.

ELBERTEEN RODBERG,

Defendant.

Case

No. 8738

BRIEF OF RESPONDENT

(Numbers in parenthesis refer to pages of the record.)

PRELIMINARY STATEMENT

On September 14, 1956, Harold B. Kesler, doing business as Kesler's Auto Repair, was driving a 1947 Pontiac automobile west on Burton Avenue in South Salt Lake City. He was accompanied by the owner, Elberteen Rodberg. Three infant children, Patricia Jo Morley, age 3, Janice Lee Morley, age 2, and Elisa Ruth Leon, age 3, walked out onto the public street and were struck and injured by the automobile which Kesler was driving. The plaintiffs, through their fathers as guardians ad litem, sued both Kesler and Mrs. Rodberg. The suit was brought

against Kesler on the theory that he was making a roadtest at the direction of Mrs. Rodberg, and was her agent or servant, and against Mrs. Rodberg on the theory that she was the principal herein and on the theory that the brakes on Mrs. Rodberg's automobile were in a defective condition, which she knew or should have known.

The allegations of Principal and Agent and negligence were denied by both Defendants.

The jury returned a verdict in favor of the Defendant Mrs. Rodberg and against the three plaintiffs.

The jury did find for the Plaintiffs and against the Defendant Kesler in the total amount of \$6,523.45.

This appeal is taken by the three plaintiffs upon the grounds that Kesler, the driver, was negligent, and that he was the agent and servant of the owner Rodberg as a matter of law and claims error in submitting the question of agency to the jury. Plaintiffs also contend that Mrs. Rodberg, because of the alleged condition of the brakes on her automobile, was negligent as a matter of law and Plaintiffs also contend that the court erroneously gave certain instructions and refused to give others.

STATEMENT OF FACTS

This accident occurred at approximately 5:30 p.m. in the public street in front of 227 East Burton Avenue when the west-bound Pontiac automobile, driven by Kesler, and accompanied by Mrs. Rodberg, ran into the three children.

Kesler owns and operates a repair shop in this vicinity. He had done the repair work on Mrs. Rodberg's automobile for the past two years (335). On the afternoon in question, Mrs. Rodberg took her automobile to Kesler's garage because she had a "miss" in the engine (329). Kesler came out in front of his

shop where the car was parked, listened to the engine, lifted up the hood of the automobile, tightened a wire and the engine seemed to run better. However, he said, (330):

"Well, I'll run it around the block and see if it runs better now." So Kesler got into the automobile, while Mrs. Rodberg waited by herself in front of the garage. Seeing Mrs. Rodberg standing there, Kesler then said,

"You might as well ride around with me and see how it runs." Whereupon, Mrs. Rodberg went around to the right side, got into the automobile, taking the seat beside Mr. Kesler, who was driving. Since this was the normal course of dealing that Mrs. Rodberg had had with Kesler for more than two years, there was no discussion of a specific contract for repairs.

After Kesler had driven approximately one mile, during which time he stopped and started the auto and used the brakes on two or more occasions, and slowed the automobile down and speeded it up, in order to road test it, the accident referred to occurred (331, 332).

Kesler admitted that he did not need Mrs. Rodberg in the automobile to tell him when the engine was "missing" but stated that (by her being present) "She can give me the idea on it" (406, 407). Mrs. Rodberg is a seamstress, 55 years of age, with 35 years driving experience, who drives to and from work each day and takes an occasional trip in her automobile (328, 361). She testified that she was not familiar with the mechanical operation of an automobile, and that she was "glad that I had found Mr. Kesler, somebody that I felt I could depend on" to keep her automobile in good repair (342).

When Mr. Kesler decided to road test the car, Mrs. Rodberg planned to await his return and she, as owner, at that time relinquished all right of control of the automobile to him. He subsequently invited her to ride with him while he tested it,

becoming, in effect, his guest. Mrs. Rodberg's presence in the auto was fortuitous, and the result of a last minute impulse by Kesler to have her accompany him.

Mrs. Rodberg testified that Kesler could stop the auto and get out, if he so desired, during any part of this road test (350). There is no testimony that shows Kesler was subject to the control and direction of Mrs. Rodberg at any time (348).

Testimony was given at the trial that the late afternoon sun might have obscured Kesler's vision as he drove west on Burton Avenue (416).

Mrs. Rodberg stated that when she saw the three infant children walk out into the road, paying no attention to the approaching auto, that she screamed to Kesler to "Watch out for the children". Further, that "he looked around and, you know, I guess he was trying to find them, to see what I was hollering about, I don't know. But he looked around for a minute first, and then he applied the brakes" (341, 342).

Defendant Kesler went to great lengths at the trial to contend that defective brakes on the Rodberg automobile, at the time of the accident, were the sole cause of the injuries to the children. However, the testimony of other witnesses of Kesler's comments, made by him shortly after the accident, indicate that he simply did not see the three infant children in time to stop, irregardless of the condition of the brakes on the automobile.

Officer Laub, who investigated the mishap minutes after it occurred, stated on direct examination that when he asked Defendant Kesler what had happened, that Kesler said:

"The light was in my eyes. The sunlight was in my eyes and I couldn't see them". It was only afterward, when Officer Laub asked Kesler how he had attempted to stop that Kesler stated

he had "hit" the brakes and that he had had to pump them twice to get them to hold. He did not state that defective brakes were the cause of the accident (142).

On cross-examination, Officer Laub again testified concerning Kesler's explanation of the accident as follows:

"I think he stated that the sun was in his eyes and that he didn't see them, and he said that when Mrs. Rodberg called out to him he then put his foot, he then hit the brakes" (152).

Mr. Faircloth, an eye witness to the accident, testified on direct examination that, right after the accident, Kesler jumped out of the auto and started up onto the lawn and said, "Oh, Lord, I didn't see them" (162).

In neither instance did Kesler exclaim that the brakes wouldn't hold nor that the auto had struck the children because of defective brakes.

Mr. Max Morley, father of the two Morley children who were injured, testified that he arrived home shortly after the children were injured and that when he asked Kesler how the accident occurred, Kesler replied:

"I didn't see them. I just couldn't stop," and he repeated it several times (206).

Alfred Leon, father of the Leon child who was injured testified that Kesler came to visit him two or three days after the accident. On re-direct examination, when asked what was said by Kesler, Leon replied: "Well, he came over to tell us that he was sorry that he had hit the little girl, but that he didn't see them. He says the only thing he remembers is trying to stop and the next thing he knew he seen the kids fly all over" (188).

On recross examination, Mr. Leon reiterated that he definitely remembered that Kesler said, during that visit to the Leon

home, that he, Kesler, did not see the children. Further, that this was all he remembered Kesler saying during the visit (189).

The same Mr. Morley, who is a mechanic also, and who advised the court that he was an expert on brakes stated that brakes, such as were on Mrs. Rodberg's automobile, would have braking power if the pedal could be pushed to within one inch of the floor, although the power might not be fully effective, but added, after being questioned by the court further concerning effective braking pressure that there would be braking pressure in such an instance, but not complete (210, 211).

Mr. Beecher, who as Kesler's witness, testified as an expert on brakes, and who explained several hypothetical cases of brakes, presumed to be similar to those on the Rodberg auto, stated on direct examination:

"Brakes such as this probably wouldn't bother the driver for normal driving. He probably wouldn't know the difference. In normal stops, the brakes aren't called upon to do much work. That is, stops that we encounter in our daily driving. Very seldom, at least very seldom should we have to make an emergency stop and there is a decided difference in the amount of energy a set of brakes must dissipate in making an emergency stop and in making a controlled stop. A controlled stop would be like stopping for a red light, or stopping for another car stopped close in front of us. These brakes, I would judge, may be adequate under those conditions, and probably would be. The driver would notice no change in pedal, the brakes could be adjusted adequately to give a full brake pedal and under normal braking operations, would not notice any problem at all in stopping the car . . ." I would say that these brakes could act normal under normal driving and under normal control fast

stops but under an emergency stop they could show up as faulty brakes" (428, 429).

When asked whether anyone driving a car with brakes like those on the Rodberg auto should have known that there was some defect from the operation of the brakes, or with reasonable observation and knowledge about braking and braking conditions could have ascertained that there was something wrong, Mr. Beecher said:

"I would question it. In fact I would be willing to say that many cars are on our highways right now with brakes just like this and the drivers don't know it . . ." (429).

The same witness, when asked if these defects on the brakes would have been apparent if anyone had inspected the car to examine the brakes to see if they were all right, stated that such defects would not have been apparent without removing the wheels (431). He added that only an adjustment of the brakes would show any defects, and that "None of the defects that I have mentioned here would be shown by brake pedal position" (432).

Mrs. Rodberg testified that, approximately an hour after the accident, Mr. Kesler, accompanied by Mrs. Rodberg, used her auto to take her from the scene of the accident to her home, and that she then drove him on to his place (339). Nothing seemed wrong with the brakes at that time (364). Kesler testified that, four days following the accident, the engine on Mrs. Rodberg's automobile wouldn't run, and that he repaired it for her (387). Mr. Kesler stated that on October 1st, 17 days after the accident, the engine on her auto quit again. After the repair work was finished on the engine (389, 390), Mr. Kesler checked the brakes extensively and notified Mrs. Rodberg that they should be repaired. This was the first notice Mrs. Rodberg had

from her garageman that the brakes needed repairs. The court pointed out that this was more than two weeks after the accident and, because of the time element, it was not relevant to the accident of September 14 (374, 375).

Mrs. Winnie M. Lambert, a fellow employee of Mrs. Rodberg's, rode to and from work with Mrs. Rodberg for several months immediately prior to the mishap of September. She testified that on two occasions, between September 4th and September 14th, 1956, while en route with Mrs. Rodberg in her auto, to or from work two emergency situations arose, in traffic, which required Mrs. Rodberg to stop her auto very suddenly, and that she had done so with no apparent difficulty (369).

Mrs. Colleen Hammill, Mrs. Rodberg's daughter, testified that she had driven her mother's auto "15 or 20 times" in the months preceding the accident of September 14, and that she had never had any trouble with the brakes on the automobile (365).

STATEMENT OF POINTS

POINT I.

A GARAGE OWNER AND OPERATOR, MR. KESLER, IN DRIVING AND TESTING MRS. RODBERG'S CAR WAS AN INDEPENDENT CONTACTOR AS A MATTER OF LAW AND NOT THE AGENT OF MRS. RODBERG.

POINT II.

THE DEFENDANT MRS. RODBERG WAS NOT NEGLIGENT IN ANY MANNER WHATSOEVER.

ARGUMENT

POINT I.

A GARAGE OWNER AND OPERATOR, MR. KESLER, IN DRIVING AND TESTING MRS. RODBERG'S CAR WAS

AN INDEPENDENT CONTACTOR AS A MATTER OF LAW AND NOT THE AGENT OF MRS. RODBERG.

Plaintiffs complain that the court's refusal to give their requested Instruction No. 6 was error. This complaint is ill-founded. The court's refusal to give such requested instruction was proper. In fact, the instruction is not a proper statement of the law and it would have been reversible error for the court to give such instruction.

PLAINTIFFS' REQUESTED INSTRUCTION NO. 6 (60)

"The acts and omissions of an agent are, in contemplation of law, the acts and omissions of his principal.

"In this connection, you are instructed that since the defendant Rodberg was the owner of the automobile and an occupant in said automobile, she is legally responsible for any negligent acts or omissions by the defendant, Kesler. As a result, if you should find Kesler responsible to plaintiffs in accordance with these instructions, you must also find Rodberg responsible to plaintiffs and assess damages against both Kesler and Rodberg jointly, in accordance with these instructions."

The portion of the requested instruction that is in italics shows that part of the instruction which is not the law of the State of Utah nor of most other states. Such does not comply with *Fox v. Lavender*, 56 P. 2d 1049, 89 Utah 115, 109 A.L.R. 105, cited by plaintiffs. Plaintiffs' own citation from the case shows that the strongest law in Utah, as set out in the Fox case, is merely a presumption of agency. However, the Fox case explains the presumptions mentioned therein as being "rebuttable" presumptions, and states that:

"... the burden of proving the ultimate fact of agency remains throughout with the plaintiff, . . ."

Most of the cases cited by plaintiffs in support of their argument, that the mere presence of an automobile owner in the car being driven by another, as a matter of law, makes the owner the principal of the operator, are cases which do not support their contention. Take for example the first two cases cited by plaintiffs after *Fox v. Lavender*, supra. *Anderson v. Hardman*, 313 P. 2d 459, 6 Utah 2d. 305. In this case the question of agency was submitted to and determined by a jury, and the court said at page 308 of 6 Utah 2d,

“We think the verdict and judgment are fully supported by the evidence.”

This case did not consider the question a matter of law.

Bell v. Jacobs (Pa.) 104 A. 587 is another case where the question of agency was submitted to the jury for determination and does not appear from the case nor the facts stated therein to have been considered by the Pennsylvania court as a matter of law. In fact there appears no contention in either case that the driver of the car was an independent contractor.

In the instant case it appears from the evidence that Kesler was the owner and operator of a garage. He was not an employee of the garage as appears in most cases that have gone before the courts. There can be no question but what Kesler, as a garage owner and operator, was an independent contractor and remained such while out testing the automobile of a customer who had been going to him for automobile repair services for more than two years. The most that could be said in plaintiffs' favor is that there was a presumption that Kesler remained an independent contractor during the test of the automobile. This then would make two conflicting presumptions:

First: A presumption that the garage owner and operator

was presumed to remain in control of the automobile he was testing throughout the test.

Second: The presumption which plaintiffs have argued in their brief, that Kesler was Mrs. Rodberg's agent.

Under such circumstances the procedure most favorable to the plaintiffs would have been the procedure followed by the court to submit the question of agency to the jury. If the question of agency or independent contractor should have been submitted to a jury, it was submitted here under proper instructions.

However, the garage owner and operator was an independent contractor as a matter of law, and the instructions to the jury should have so stated.

In *Zeeb v. Bahnmaier* 103 Kan. 599, 176 P. 326, 2 A.L.R. 883, a case in which the owner of an automobile was riding with his son who was driving the automobile, the court said,

“Unless some rational theory of principal and agent, or of master and servant, supported by substantial evidence, can connect the father with the act or delict of the son, the father is no more liable than a stranger. And this principle holds true whether the father is present or absent when the tort of the son is committed.”

In *Hartley v. Miller*, 165 Mich. 115, 130 N.W. 336, 33 LRA NS 81, the owner of a car was sitting beside the driver, the driver had borrowed the car and was in complete control, the court gave a directed verdict in favor of the owner, and plaintiff appealed. The appellate court affirmed the directed verdict in favor of the owner in stating that an automobile is not a dangerous instrumentality, and that under such circumstances there was no agency. In other words, the court held as a matter of law the driver was not the owner's agent merely because of the presence of the owner.

The facts in the case before the court show conclusively that Kesler, the garage owner and operator, was in control of the car and Mrs. Rodberg, the owner, was an invited guest to go along with him at his own suggestion. When he took the car out to test it he invited Mrs. Rodberg to go with him (348, 349).

In *Menge v. Manthey*, 227 N.W. 938, 200 Wis. 485, a garageman took full charge of moving a wrecked car while the owner was present. It was held the garageman was an independent contractor and that damage caused by accident in moving the car was the garageman's liability and not the owner's.

Fox v. Lavender, 56 P. 2d 1049, 89 Utah 115, 109 A.L.R. 105 supports the contention of Mrs. Rodberg that mere ownership and presence in the car being driven by another, is not sufficient, as a matter of law, to hold the owner liable.

In support of Mrs. Rodberg's contention that the cause of this accident was the failure of Kesler to keep a proper lookout, and to drive more carefully under the existing conditions, Mrs. Rodberg refers to Officer Laub's testimony (143) that Kesler advised him shortly after the accident that he did not see the children until Mrs. Rodberg called out to him. Kesler testified (384) that the sun bothered him, and he lowered the sun visor (as he turned west onto Burton Avenue from Third East Street).

Officer Laub testified (151) that all four wheels on the Rodberg car, according to the skid marks on the street, "braked" when Kesler engaged the brakes in an effort to stop. Officer Laub, when asked by the court (156, 157), testified that when he tested the brakes on the Rodberg automobile soon after the accident, that the pedal took hold for him on the *first* application. He reiterated this on being further questioned by the court.

Plaintiffs, in their brief, claim, without qualification, that Kesler was driving too fast and that the brakes on Mrs. Rodberg's auto were defective at the time of the accident. The record indicates that this statement is clearly erroneous, as is pointed out immediately below and also on pages 6, 12, 16 and 17 of this brief.

Officer Laub stated (154) that the posted speed limit for Burton Avenue, at the site of the accident, was 25 miles per hour.

Both Mrs. Rodberg and Kesler testified that the speed of the Rodberg auto immediately prior to the accident was 20-25 miles per hour (352, 398).

Mr. Beecher, the brake expert, made some statements concerning the skid mark distances at certain given speeds of an auto. He stated that, at 20 miles per hour, the skid mark distance would be 20 feet; that at 40 miles per hour, the skid mark distance would be 80-82 feet (424); that at 30 miles per hour, the skid marks would be 45 feet (432). The evidence given by Officer Laub and Mr. Kesler was that the skid marks of Mrs. Rodberg's auto in the instant case measured 41 feet, 6 inches.

The following cases support the contentions of Mrs. Rodberg:

1. That Instruction No. 6 requested by plaintiffs is clearly erroneous and is not a correct statement of law. Accordingly was properly refused by the court;

2. That to hold an owner-occupant of an auto liable for the negligence of the driver, plaintiffs have the burden of proving that the owner-occupant:

- (a) Had authority to control or direct the negligent driver, or

- (b) Was actively engaged in the control and direction of the driving of such auto.

In *Davis v. Spindler* (1952) Nebraska, 56 N.W. 2d. 107, the court stated:

“Where the owner as a matter of law is shown to be a guest therein, in the absence of evidence of retention or assumption of any right of control over the driver, the contributory negligence of the latter will not be imputed to the owner in an action to recover for his wrongful death against a third person.”

In *Schweidler v. Caruso* (1955) Wisconsin, 69 N.W. 2d. 611, the owner sought damages against a third person as well as the driver. The owner and a friend had started on a fishing trip together. The court considered that while ordinarily the ownership of an auto may raise a presumption sufficient to justify an inference that the driver was the owner's agent, yet an owner may be a guest in his own auto. The court held there was no joint enterprise nor an agency relationship but rather a bailor-bailee relation.

In *Masan v. Farmers Mutual Automobile Insurance Co.* (1949) Wisconsin, 40 N.W. 2nd. 391, the owner-occupant of a car, returning from a dance had asked a friend to do the driving before the accident occurred. The court held the owner had not assumed the risk of the driver's negligence where it was not of such duration that the owner was bound either to observe it, and act for his own protection, or to assume any risk.

In *Peterson v. Schneider* (1951) Nebraska, 47 N.W. 2d. 863, the owner and two others were on a hunting trip and each drove a part of the time, pursuant to an arrangement of convenience. The court held that where there was no evidence that the occupants

were on a joint enterprise or that any relationship existed between the owner and the driver which gave the owner authority to direct or assist in the operation and management of the car, the driver's contributory negligence will not be imputed to the owner-occupant.

In *Archer v. Aristocrat Ice Cream Company* (1953) Georgia 74 S.E. 2d. 470, the co-owner, a deputy sheriff, was present in an automobile which the sheriff was driving. The court held that the driver was in complete control of its operation and the court held that the driver's negligence was not imputable to the deputy in an action against a third person.

In *Caldwell v. Miller* (1943) California 141 P. 2d 745, the owner-occupant and the driver of the automobile were accompanied by girls in search of amusement when the accident occurred. The court held the driver was not acting as the owner's "agent" so as to render the owner liable for the girls' injuries resulting from an accident caused by the driver.

In *Fox v. Kannisky* (1942) Wisconsin, 2 N.W. 2d. 199, the wife, who was the owner-occupant was permitted to recover from a third person for injuries sustained upon proof that she had relinquished all right of control of the automobile to her husband who was driving.

POINT II.

THE DEFENDANT, MRS. RODBERG, WAS NOT NEGLIGENT IN ANY MANNER WHATSOEVER.

The evidence is overwhelming that the sole proximate cause of plaintiffs' injuries was because Kesler drove into a bright sunlight without being able to see what was in the street in front of him.

An eyewitness, Faircloth (162, 163, 167, 168, 174), Mrs. Rodberg (341, 342, 356) and Kesler himself (384), all testified concerning the bright glare of the afternoon sunlight into which Kesler drove Mrs. Rodberg's auto, turning from south (on Third East) to a west direction (on Burton Ave.) while being, at the same time, primarily concerned with the road test which he, Kesler, was making with Mrs. Rodberg's auto. Leon and Morley testified (188, 189, 206) Kesler said he did not see the children.

Officer Laub (152) also testified that Kesler told him the same thing, concerning the sunlight, and not seeing the children, which the other witnesses testified to.

The court has continually emphasized the duty imposed by law upon a driver to see what is in front of him for the protection, health and safety of both himself and others. *Baker v. Savas*, 172 P. 672, 52 U. 262; *Wilcox v. Wunderlich*, 272 P. 207, 73 U. 1; *Van Cleave v. Lynch*, 166 P. 2d 244, 109 U. 149, *Spackman v. Carson*, 216 P. 2d 640, 117 U. 390, *Covington v. Carpenter*, 294 P. 2d 788, 4 U. 2d 378, *Fretz v. Anderson*, 300 P. 2d 642, 5 U. 2d 290, *Robison v. Willden*, 310 P. 2d 521, 6 U. 2d 231.

Plaintiffs complain that the condition of the brakes did not comply with the statute. There is no evidence whatsoever for such contention.

Officer Laub (140) further testified there were alternately heavy, light, and heavy brake burns of a distance of 41 feet, 6 inches which were "All connected and definitely a part of the brake skid marks which were left by the vehicle at this time" (the time of the accident).

Mr. Beecher testified (433) that the braking distance of an auto, once the brakes locked, would be the same whether it had good brakes or poor brakes. Also that a person having an auto with the type of brakes found on the Rodberg auto (two weeks

after the accident) may have no notice of the condition of the brakes, and certainly not under normal driving conditions (405, 421, 436).

In addition to Defendant Rodberg's objections, the court (374, 375), twice commented that the condition of the brakes (two weeks after the accident) were not relevant to the time of the accident, but permitted the testimony to go in.

All of the foregoing conclusively show that there is no evidence of improper brake functioning on the Rodberg car at the time of the accident; that there is no evidence that Mrs. Rodberg knew or should have known of any improper condition of the brakes. Further, there is no evidence that the condition of the brakes proximately caused or contributed to any of the injuries complained of by plaintiffs. In fact, all of the conduct of Mrs. Rodberg and the condition of the brakes on her auto come within the orbit of *Alvarado v. Tucker*, 2 U. 2d 16, 268 P. 2d 986.

There is nothing appearing in the evidence indicating any negligence whatsoever on the part of Mrs. Rodberg. Despite the fact there is no evidence indicating that Mrs. Rodberg might have been negligent in regard to the brakes, the court submitted the question to the jury with great over-emphasis upon the question of brakes.

In Instruction No. 4 (34) the court said:

"You are likewise instructed that it was Kesler's duty, and that of the other defendant, Rodberg, to operate an automobile that had brakes that were in such condition that they were reasonably safe for the operation of said automobile and if you find that either of

the defendants knew, or should have known, of any defective and unsafe condition of said brakes and that they operated the automobile thereafter, when said brakes were not reasonably safe for the operation of said automobile under the circumstances, then such operation would be negligent."

In Instruction No. 5 (36) the court said:

"You are, however, instructed that if you find by a preponderance of the evidence that Mrs. Rodberg had defective brakes and that she knew of the same, or with the exercise of reasonable diligence could have ascertained such fact, then she could be responsible to the plaintiffs without showing any relationship of principal and agent between her and Kesler."

In Instruction No. 7 (39 and 40) the court said:

"You are instructed that if you find from all the evidence that defendant Kesler acted as a reasonable prudent man would have acted under similar circumstances and if you find that the 1947 Pontiac owned by the defendant Elberteen Rodberg had defective brakes and that the defective brakes contributed to proximately cause the alleged injury and damages to the plaintiffs and that the defendant Rodberg knew, should have known, or with reasonable inspection could have ascertained the defective brake condition and failed to correct and repair the same and failed to advise defendant Kesler of said condition, he being ignorant of their condition, then you must assess damages, if any, against the defendant Rodberg only and not against defendant Kesler.

If, on the other hand, you find by a preponderance of the evidence that the defendant Kesler knew, or in

the exercise of reasonable care should have ascertained, that said brakes were defective and he continued to operate the automobile under such conditions and the defective condition of the brakes was the proximate cause of his inability to stop the automobile, if such you find to be the fact, then you would find that the defendant Kesler was negligent and your verdict in such instance should be against him and in favor of the plaintiffs.

You are further instructed that if you find by a preponderance of the evidence that both Mrs. Rodberg and Kesler knew of the defective condition of the brakes, or in the exercise of reasonable care they could have ascertained that said brakes were defective and that they continued to operate the automobile under such conditions, and if you find that the defective condition of the brakes was the proximate cause of the happening of the incident in question, then and under those circumstances your verdict would be in favor of the plaintiffs and against both defendants."

These instructions are more favorable to the plaintiffs than should have been allowed. Under such circumstances plaintiffs have nothing to complain of in regard to the decision of the jury in behalf of Mrs. Rodberg. *White v. Pinney* 108 P. 2d 249, 99 U. 484.

CONCLUSION

We respectfully submit that under the facts of the case the court should have determined as a matter of law that Kesler was an independent contractor, that Mrs. Rodberg was not liable for any of the damages arising out of the accident, that the damages and injuries arising from the accident occurred solely be-

cause of the negligence of the defendant Kesler. That in any event, the instructions requested by plaintiffs, which were refused, were not correct statements of the law. The instructions, as given by the court, actually favored plaintiffs over Mrs. Rodberg. The decision of the jury should be affirmed.

Respectively Submitted,

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