BLAKEMORE *v.* STEVENS.

4-3333

Opinion delivered February 5, 1934.

1. NEGLIGENCE—DEFINITION.—Negligence is the failure to observe, for the protection of another, that degree of care, precaution and vigilance which the circumstances justly demand, whereby such person suffers injury.

2. AUTOMOBILES—NEGLIGENCE—JURY QUESTION.—Whether a motorist was negligent in cutting the front wheels of his automobile to the left without warning thereby injuring deceased who was assisting in extricating the car from the mud, *held* a question for the jury.
3. AUTOMOBILES—PERSONAL INJURY—CONTRIBUTORY NEGLIGENCE.—Whether deceased, standing beside defendant's automobile pursuant to request to assist defendant in extricating his automobile, and injured when defendant backed his car over him *held* for the jury under the circumstances.
4. DAMAGES—PAIN AND SUFFERING.—An award of $2,250 for deceased's pain and suffering from December 30th to March 12th, caused by injury to the sacroiliac joint *held* not excessive under the evidence.

Appeal from Mississippi Circuit Court, Chickasawba District; *Neil Killough,* Judge; affirmed.

STATEMENT BY THE COURT.

Originally, this suit was instituted by A. W. Stevens against appellant, N. H. Blakemore, to compensate a personal injury received on September 30, 1932. On March 20, 1933, A. W. Stevens died, and the cause was revived in the name of Lillie Stevens as administratrix. The complaint alleged that A. W. Stevens was invited by appellant to assist in pushing his car out of a mire, and that, while thus engaged, appellant negligently cut the front wheels of said car into a position to strike him, thereby knocking him down and passing over and upon his foot and leg, whereby he was permanently injured to his damage in the sum of $5,000. Appellant answered and denied negligence in cutting the wheels of the car and alleged affirmatively that A. W. Stevens was injured through his own fault and was thereby guilty of contributory negligence. Thereafter the complaint was amended by the administratrix, but alleged no additional act of negligence, but prayed judgment for $10,000.

The jury was warranted in finding the following facts from the testimony introduced: On the night of September 30, 1932, A. W. Stevens and his wife attended a night football game in the city of Blytheville. Appellant invited Mr. Stevens and his wife to ride home with him in his coupe automobile, which invitation was accepted. While going from the football field towards their home, the car ran into a soft and muddy place and

the car was stalled. Mr. Stevens and wife got out of the car to assist other friends in extricating the automobile. Appellant endeavored to get the car out of the mire by its own power, but was unable to do so. Thereupon, a number of friends stationed themselves about the car for the purpose of pushing in an endeavor to dislodge it. Mr. Stevens was stationed on the right-hand side of the car about its door or entrance to the body. A number of people were stationed at the front end to push. At this juncture appellant turned the power of the car into action for the purpose of assisting those engaged in pushing the car backwards. As the car started moving backwards under its power and the power of those pushing, appellant, without warning, cut the steering wheel to the left, thereby throwing his right front wheel from under the right front fender, and the car in its backward motion ran over and upon A. W. Stevens. Mr. Stevens was knocked down by the impact. Immediately thereafter he was carried to his home where he was visited by his family physician. To alleviate his pain, the family physician administered a hypodermic of morphine that night. The next day Mr. Stevens was carried to a hospital, and an X-ray picture of his hips and back was made which disclosed that the sacroiliac joint on the right side was separated. Mr. Stevens suffered excruciating pain for some days and was confined to his bed until about November 14, 1932. Sometime in December Mr. Stevens resumed his work as a barber for short periods of time, but not his regular employment. He was required to use a cane in walking at all times after his injury up to his death. On March 12, 1933, he suffered an abdominal trouble, which afterwards was diagnosed as diverticulum. The jury found as a fact that this disease caused his death in a Memphis hospital on March 20, and not the injury here complained of. The instructions given by the court are not complained of, other than it is contended that there is no testimony to warrant a submission of the cause to the jury, therefore, it will not be necessary to here set them out.

The jury returned a verdict in favor of appellee for $3,000 for loss of time and pain and suffering endured by Mr. Stevens between September 30, 1932, and March 12, 1933, and this appeal is prosecuted to reverse this judgment.

Reid, Evrard & Henderson, for appellant.

Harrison, Smith & Taylor, for appellee.

JOHNSON, C. J., (after stating the facts). There are but two questions argued in briefs for determination. First, that appellant was guilty of no negligence in cutting the wheels of his car at the time of the injury, and that A. W. Stevens was guilty of contributory negligence in failing to get out of danger.

Negligence is the failure to observe, for the protection of the interest of another person, that degree of care, precaution and vigilance which the circumstances justly demand whereby such other persons suffers injury. *St. L. I. M. & S. Ry. Co.* v. *Secht,* 38 Ark. 357; *Railroad Co.* v. *Lewis,* 60 Ark. 409, 30 S. W. 765; *Missouri & North Arkansas Ry. Co.* v. *Clayton,* 97 Ark. 347, 133 S. W. 1124.

It will be seen from the statement of facts that the jury was warranted in finding that appellant was negligent in cutting the front wheels of his car at the time and under the circumstances then existing without giving timely warning thereof to the deceased, Stevens. Appellant admitted, when testifying in his own behalf, that he knew Mr. Stevens was stationed on the right-hand side of his car in a position to assist in extricating the car from the mire. In the exercise of ordinary care, appellant should have known that the cutting of the front wheels at the time and under the circumstances might do injury to those assisting him in extricating the car. There is no testimony indicating that Mr. Stevens was guilty of contributory negligence in being at the place he was at the time he was injured. The fact is, he was invited by appellant to assist in pushing his car out of the mire. It would, indeed, be a strange doctrine which would hold him guilty of contributory negligence in doing the thing he was requested to do. We therefore conclude that the trial court was correct in submitting the

issue of appellant's negligence to the jury, and certainly no reversible error was committed in submitting the question of contributory negligence.

It is next contended that the verdict is excessive. The jury found as a matter of fact that Mr. Stevens' death was caused from diverticulum. Therefore the only elements of damages considered by the jury in the award were for pain and suffering from September 30, 1932, until March 12, 1933, and his diminished earnings during this period of time. The jury awarded damages in the sum of $3,000. It was stipulated by counsel that Mr. Stevens' doctor's bill and hospital expenses attendant upon the car injury was $167.03. Also Mr. Stevens lost from his work twenty-three weeks, and the testimony shows that he was capable of earning $25 per week. These items, when added, aggregate approximately $750. The jury therefore awarded Mr. Stevens estate $2,250 for pain and suffering. Practically the uncontradicted testimony shows that Mr. Stevens was confined to his bed for six weeks after the injury; a part of which time he suffered excruciating pain; thereafter and until his death he was required to wear a sacroiliac support; he was never able to walk without the assistance of a cane. We are unwilling to say that the jury's award is excessive.

Therefore the judgment will be affirmed.