McMAHON v. McNABB.

4-2810

Opinion delivered January 23, 1933.

1. AUTOMOBILES—INSTRUCTION IGNORING CONTRIBUTORY NEGLIGENCE. —An instruction to return a verdict for a guest if the driver of a motor car was negligent, or if his negligence was the proximate cause of the injury, was erroneous in ignoring the defense of contributory negligence upon which there was a conflict of testimony.

2. AUTOMOBILES—DUTY OF MOTORIST TOWARD GUEST.—It was error to instruct that a motorist is required to furnish "safe transportation" to a guest, his duty being to use ordinary care.

Appeal from Johnson Circuit Court; *J. Sam Wood,* Judge on exchange; reversed.

STATEMENT BY THE COURT.

This appeal is prosecuted from a judgment for damages for personal injury received in an automobile collision in the city of Fort Smith, while appellee was riding with appellant as an invited guest.

It appears from the testimony that appellee was riding on the back seat of appellant's car by invitation from Coal Hill to Fort Smith; that, at the intersection of North 7th and A streets in Fort Smith, he was injured by a collision with a taxicab of the Black & White Taxicab Company, said taxicab striking the car in which he was riding.

Appellee alleged that the collision and his injuries were due to the negligence of appellant.

Appellant answered denying all of the material allegations of the complaint and alleging as a defense assumed risk and the contributory negligence of the appellee.

It appears from the evidence that the collision occurred at the intersection of 7th and A streets in the city of Fort Smith, the testimony being in conflict as to whether appellant entered the intersection of the streets before the taxi came into it, the appellant claiming that he did so and one or two witnesses testifying that the taxi seemed from 20 to 50 feet away from the intersection as appellant was coming into it.

The testimony was also in conflict as to whether appellee took any care about his own safety or admonished the appellant that he should be careful about his driving and not drive so fast, ending with the final request that appellant stop the car and let him get out as otherwise he would get them all killed. Appellee stated that this remonstrance was made, and it looked like at the time that appellant was driving 45 miles an hour.

He also said that appellant answered stating that he had plenty of insurance, to which he replied that he didn't care how much insurance he carried, that he didn't want to be killed. Appellant denied that any such conversation occurred, and the young man riding on the back seat with appellee also denied that such statement was made.

Appellant insisted that he drove into the intersection ahead of the taxicab and was run into by it when he had gotten over to the northwest corner of the intersection, nearly across the street.

Other testimony relative to the injuries suffered by the appellee and the amount of damages was adduced during the trial.

The court instructed the jury, several of the instructions given for appellee being excepted to and the error in giving them is complained of here.

Hardin & Barton and *Reynolds & Maze,* for appellant.

Patterson & Patterson and *Starbird & Starbird,* for appellee.

KIRBY, J., (after stating the facts). It is insisted that the court erred in the giving of certain instructions requested for the plaintiff Nos. 1, 2, 3, 4 and 5, it being contended that said instructions were erroneous in directing the jury to find in appellee's favor, if they found the facts as stated therein, without consideration at all or mention of the appellant's alleged defense of contributory negligence.

In instruction No. 4 the jury were told that, if they found the defendant was negligent or that his negligence was the proximate cause of plaintiff's injuries, "then it is your duty to return a verdict for the plaintiff." Objection was made specially to this instruction for the reason that it directed a verdict for the plaintiff without taking into consideration any issue of defense. There was a plea of contributory negligence, and the testimony was in conflict thereon. The court should not therefore have instructed the jury that they might find for the

plaintiff, and that it was their duty to do so without consideration of such issue, and erred in so doing. *Herring* v. *Bolinger,* 181 Ark. 925, 29 S. W. (2d) 676; *Newell Cons. Co.* v. *Lindahl,* 181 Ark. 272, 25 S. W. (2d) 1052; *Temple Cotton Oil Co.* v. *Skinner,* 176 Ark. 17, 2 S. W. (2d) 676; *Garrison Co.* v. *Lawson,* 171 Ark. 1122, 287 S. W. 396; *Wisconsin-Arkansas Lbr. Co.* v. *Hall,* 170 Ark. 576, 280 S. W. 363; *National Gas & Fuel Co.* v. *Lyle,* 174 Ark. 146, 294 S. W. 395. This instruction also uses the words "safe transportation," when under the law the driver of an automobile is only bound to the use of ordinary care in the transportation of the passengers in his car and is not bound as an insurer for the safety of persons riding therein whether by sufferance or invitation.

Instruction No. 9 is objected to as assuming that defendant was negligent and allows the jury to find against the defendant even if the taxicab driver was negligent, etc., omitting entirely the issue whether the plaintiff himself was guilty of contributory negligence.

It was insisted in the oral argument that the specific objections to the instructions had not been properly made and should not be allowed for the reason that they were permitted to be written out by the trial court after the instructions were read to the jury, thereby depriving plaintiff of any knowledge of such objections before the conclusion of the trial and preventing him from consenting to or meeting such objections if he cared to do so and thus avoiding the errors, if any. The objections were permitted to be made however by the court, doubtless because he thought the instructions were not subject to the objections and that they were entitled to be given without regard to said specific objections. It is not complained that the objections were not made general or specific, as shown in the bill of exceptions, but only of the practice in permitting them to be made after the case had gone to the jury, which the bill of exceptions does not show was done.

Because of the errors already pointed out, it is not necessary to pass upon the question of the excessiveness of the verdict for damages, nor upon the admissibility of the testimony of certain witnesses as experts about nervous disorders, who did not claim to be qualified as experts to give opinions thereon, as these things will not likely occur upon the new trial.

For the errors designated the judgment is reversed, and the cause remanded for a new trial.