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167-422

IN THE

Supreme Court of Appeals of Virginia

AT RICHMOND

GEORGE EDWARD PICKETT KENT

v.

ANNE MILLER, AN INFANT, ETC.

REPLY BRIEF OF PLAINTIFF IN ERROR

PARRISH, BUTCHER AND PARRISH.

THE WILLIAM BYRD PRESS, INC., PRINTERS
RICHMOND, VIRGINIA

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In our petition for a writ of error, which we have adopted as our brief, we have set forth the grounds upon which, in our opinion, this Court should reverse the judgment of the lower Court, and have given and argued the reasons for these contentions. We shall not burden this Court with restating in this brief the argument contained in our petition for a writ of error. We do, however, rely upon the grounds stated in such petition and upon the correctness of the principles therein contended for.

FACTS

In their brief, counsel for defendant-in-error have inadvertently misstated some of the facts. At top of page 3 of the brief of the defendant in error is found the following, "The plaintiff got in the automobile with Mr. and Mrs. Kent and defendant closed the door of the car and they started home". On page 39 of the record is found Miss Miller's own version of this phase of the matter:

> "Q Miss Miller, about what time was it that you left the Club house?
> "A It was a little after 12:00.
> "Q That would be the morning of January 25th then?
> "A Yes.
> "Q Who was it that you stopped at the door to talk to as you went out the door?
> "A Clarence Armstrong.
> "Q Is he here?
> "A Yes.
> "Q Where were Mr. Kent and Miss Wright at that time?
> "A They were in the car.
> "Q They had already gotten into the car?
> "A Yes.

And again on Page 48, on cross-examination, Miss Miller testified as follows:

> "Q Tell me just what occurred when you decided to leave?

"A Lillian came back to the table and Kent said, 'If you are ready to go, I am ready' and we left.

"Q And they went first, I believe you said.

"A Yes.

"Q Went ahead of you?

"A Yes.

"Q And then you went out and you got into the car and they were already in the car and you got in your right hand side, is that correct?

"A Yes."

It is respectfully submitted that there is no evidence in the plaintiff's own story of this phase of the matter which would justify counsel's statement that defendant closed the door of the car.

As to this phase of the matter, Mr. Kent himself testified as follows: (R. p. 86)

"A We left around midnight before the crowd —before the Club closed. We wanted to get back early and we all left together. I helped the ladies in the car, Miss Wright first and Miss Miller, slammed the door got underneath the wheel from the left side and departed."

Under the plaintiff's own version of this phase of the matter, she herself must have shut the door and she is bound by her own statement.

There is absolutely no evidence in the record tending to prove that the door was improperly latched. In the trial Court's opinion, is found the following:

"The door may have been incorrectly latched

> or she may have been thrown or fallen in some other manner."

As stated in our petition for a writ of error, it is clear that the jury was permitted to speculate as to whether or not the plaintiff was thrown from the car because of the door being incorrectly latched or in some other manner. A verdict in Virginia cannot be based upon speculation. In this connection it is well to remember that the road over which the parties involved travelled from the Riverside Club to the point of the accident was quite a bumpy road and it is common knowledge that the door of a car improperly latched, while travelling over a bumpy road, will be noisy, and yet there is no evidence in the record tending to show that any one in the car had any intimation that the door was improperly latched, if such was the case.

On Page 7 of the brief of defendant-in-error is found the following statement:

> "The jury knew and this Honorable Court Court knows that persons do not threaten to jump or jump from fast moving automobiles without provocation or reason. It is not mere 'heedlessness, inattention, inadvertence that causes persons to become so frightened and fearful of their own safety".

There is no evidence that the plaintiff at any time *threatened* to jump from the car. According to her testimony she asked the defendant to slow up or to please let her get out.

THIS COURT SHOULD REVERSE THE JUDGMENT OF THE TRIAL COURT AND ENTER JUDGMENT FOR THE DEFENDANT (IN THE COURT BELOW) IN THIS COURT

The reasons why this Court should enter final judgment for the defendant are:

1. The plaintiff has failed to prove gross negligence on the part of the defendant. This question has been discussed by us on Pages 10, 11, 12, 13 and 14 of the record.

2. A verdict cannot be based upon speculation or conjecture. This question is discussed on Pages 15 and 16 of the record.

3. The plaintiff's story is incredible. This question is discussed on Pages 16 and 17 of the record.

We shall not burden the Court with a restatement of our argument on these three questions, but respectfully submit that any one of the three principles contended for is sufficient ground for the reversal by this Court of the judgment of the lower Court and the entry of final judgment for the defendant herein.

THE COURT SHOULD REVERSE THE JUDGMENT OF THE LOWER COURT AND AWARD A NEW TRIAL

The assignments of error numbered 4, 5, 6, 7, 8 and 9 deal with either the improper granting of plaintiff's instruction over objection by defendant, or the refusal to grant proper instructions offered by defendant. We shall not reargue all of these assignments of error, since the erroneous ruling of the lower Court in respect

to any one of these assignments of error, would entitle defendant to a new trial and since the granting of plaintiff's instruction No. 4, over objection of defendant, is so apparently erroneous, we shall confine our remarks in this brief to assignment of error No. 6.

To clarify this discussion, we again quote Instruction No. 4 (granted):

> "The Court instructions the jury that where one by his own negligence creates an emergency or puts another in a dilemma whereby such other is force to make a sudden choice of two or more courses that even though such other chooses the unwise course, the law by reason of the emergency existing excuses such other for such unwise choice if such unwise choice would have been chosen by a reasonably prudent person under the circumstances."

There is not a scintilla of evidence that the plaintiff made any choice whatsoever, but according to her own testimony, she was involuntarily thrown from the defendant's automobile. Under this Instruction No. 4, the jury was permitted to consider whether or not the plaintiff was, under the circumstances, justified in jumping from the car because of an emergency, while this is diametrically opposed to the plaintiff's own version of how the accident occurred. Miss Miller (R. p. 38) described the accident as follows:

> "Still he didn't pay any attention to me and he went around this sharp curve and didn't pay any attention to where he was going or what he was

doing and we went around this sharp curve and the door came open and I fell out."

In this connection we beg to quote from Page 12 of the brief of the defendant-in-error, Miss Miller:

"THE PLAINTIFF DID NOT JUMP OUT OF THE CAR."

"The plaintiff as a witness under oath denied that she jumped out of the car and the jury accepted her statement as true and it is encumbent upon this Honorable Court to likewise accept it as true."

In this connection the Court's attention is respectfully called to Page 2 of the petition for a writ of error, where there is set forth the basis of the plaintiff's case, as made out by her pleadings. Her bill of particulars has the following to say:

"2. That the defendant drove his car at an excessive rate of speed, taking several sharp curves at such rate of speed and that plaintiff was protesting at the time that he took the last curve while she was in the car that he took so fast that it threw her towards the door, which opened, throwing her out; * * *"

Hence it will be seen that the Court below permitted the case to go to the jury upon an entirely different theory than that which was adopted by the plaintiff in her pleadings and upon which she based her right to recover.

CONCLUSION

We believe that we have covered, in our petition for a writ of error every phase of the matter discussed in the brief of the defendant-in-error. We respectfully invite the Court's attention to the discussion as set forth in our said petition. It is respectfully submitted that the reversal of the judgment of the lower Court and the entry of a final judgment for the defendant in this Court would be in accord with the former decisions of this Court governing "guest cases", and such action by this Court is respectfully requested. Should this Court, however, disagree with us in this respect, it is requested that the judgment of the lower Court be reversed and a new trial awarded upon any one of the grounds set forth in assignments of error 4, 5, 6, 7, 8 and 9.

Respectfully submitted,

PARRISH, BUTCHER AND PARRISH.