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MAR 26 1932
AND FILED

IN THE

Supreme Court of Appeals of Virginia

AT RICHMOND.

HARVEY L. JONES

vs.

MILDRED CATHERINE HANBURY

BRIEF ON BEHALF OF THE PLAINTIFF IN ERROR.

FOREMAN, PENDER & DYER,
Attorneys for the Plaintiff in Error.

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This cause falls in that class of cases in which a guest is taking against her host in a gratuitous pleasure accommodation that action which has been recently described by this court as action that "Shocks one's sense of justice," Boggs v. Plybon, 160 South Eastern, (Va. 1931) 77.

Counsel for appellee in his reply brief has raised certain questions of fact in his restatement contrary to appellant's reading of the evidence. This reply of appellant will be directed first to pointing out the apparent discrepancies and clarifying the facts upon which the issues are to be decided.

The allegations in appellee's brief to which attention is asked particularly are as follows:

a. The speed of the several cars involved, viz: forty-five miles per hour for appellant's car and thirty-five miles per hour for the car being passed on the road.

b. The lapse of time involved in the sequence of events.

c. The distances covered at the stated rates of speed and time involved.

Appellee's statement to the contrary notwithstanding, there is with one exception no positive statement in the record from which any rates of speed, lapse of time, or distance can be ascertained. Miss Hanbury stated that the crash came three or four seconds after Jones took hold of the wheel. See Record page 23. All other statements thereto were at best the most speculative conjecture. The most that can be said of the speed of the Chevrolet car being passed, was that it was going at some rate of speed less than the spurt of speed undertaken by Miss Hanbury in her effort to pass. See Record page 28 where she stated that she was speeding up to pass the Chevrolet. The speed of the Ford car driven by Miss Hanbury is based entirely on an estimate, and attention is called to the fact that in making her estimate, she, four months after the occurrence, carefully placed her speed while passing traffic going in the same direction, at the lawful rate prescribed by statute, to-wit: forty to forty-five miles per hour.

The crest of the hill which obscured the road is definitely placed by appellee's witness, Leet, at less than eighty steps from the place of the accident. See Record pag 16 where he states the point eighty steps from the accident was just past the top of the hill.

ARGUMENT.

FIRST ASSIGNMENT OF ERROR.

Appellee attempts to brush aside the second assignment of error by the statement that his cause of action was properly stated in the bill of particulars. Attention of the court is respectfully called to the fact that the office of a bill of particulars is to clarify the action declared on, and is in no wise a part of the declaration or considered as a pleading. See Campbell Company v. George Angus & Company, 91 Va. 438. See also 49 C. J. 804, §1186 as follows: "A bill of particulars cannot broaden the issue presented by the declaration or complaint." Here appellee has declared on an allegation of careless driving of the appellant Jones, an entirely different action from

that shown by the evidence, viz: the alleged negligent grabbing of the steering wheel, or interfering with the driver. In complete answer to appellee's declaration on the driving of appellant Jones, the court is referred to the statement of appellee at the top of page 8 of his brief, that Jones acted properly, and according to his best judgment under the circumstances.

The cases seem to be in complete accord on this point. In the case of Trout Brook Ice and Feed Company v. Hartford Electric Light Company (Conn. 1904) 59 Atl. 405, the declaration charged negligence in rapid driving and striking plaintiff's horses. The case proved at the trial was the slow approach of the automobile and failure to stop upon seeing the horses badly frightened. Verdict for the plaintiff was set aside, the court using the following language in so doing:

> "The complaint correctly described the result of defendant's acts. Its acts, however, which alone constituted its wrong as the court has found it, are not alleged even in essence. * * * It therefore follows that the plaintiff, having set out one cause of action has had judgment for another." See also Smiley v. Kenney (Kansas 1921) 228 South Western 857, and Zimwich v. Coman, (N. Dak. 1931) 234 N. W. 69.

Also see Richmond etc. v. Bowles, 92Va.738, 24 S.E.388

It is therefore earnestly contended that the cause of action herein pleaded was not proved in the trial and appellant's motion to strike out appellee's evidence should have been sustained by the court below.

SECOND ASSIGNMENT OF ERROR.

Appellee's attenuated argument based on the feet per second traveled at the estimated speed condemns itself. The space of five seconds is allowed appellant Jones or appellee Hanbury from the grabbing of the wheel to the accident to formulate their judgment and put into execution the plan of escape. Almost any action is excusable in so short a space of time in the face of the great danger here presented.

Appellee has admitted top of page 8 of his brief, that appellant Jones, having taken the wheel, exercised his best judgment and acted therein as an ordinarily prudent man would have acted when confronted with danger.

Therefore the only point left under this assignment of error is whether or not a danger was presented justifying any interference on the part of appellant Jones. This danger did exist as is fully shown by the record. The approaching car from the north was obstructed from Miss Hanbury's vision, as she stated that when she did finally see the car, only the top was visible. Record page 24. Miss Hanbury was in and fully realized the danger at the time Jones grabbed the wheel. See record bottom of page 28 where she said:

> "I can't say I got scared at all until *I knew what was going to happen and he caught the wheel."*

The predicament optimistically referred to in appellee's brief as a "pseudo predicament" was therefore as follows:

Appellee driving northbound at forty to forty-five miles per hour or faster at a point in the road where oncoming cars were for some of the distance obscured, was in the act of passing another car and was in such a position that a turn to the right would have struck the car to the right. Record page 28. A large Packard sedan southbound suddenly appeared in the roadway making a head-on collision imminent. The existence of this danger is made to appear positively from the fact that a collision did occur in *from three to four seconds* following the realization of the danger. Record page 23.

Faced then by this predicament, this impending danger, the weakness and fright of appellee Miss Hanbury and perhaps laboring under considerable excitement himself, appellant Jones' action was clearly such as would have been taken by any ordinarily prudent man

under the same or similar circumstances. He was the stronger and more self-reliant of the two, he realized the danger and made every effort to avoid the collision and save himself and his guest from harm.

Although appellee's brief "readily admits" the propriety of appellant Jones' actions after taking hold of the wheel, comment thereon at this point is deemed in order. The first effort of Jones was to try and avoid the accident by getting on the right side of the road and out of the way of the oncoming car. This was quickly shown to be impossible. A turn to the right would have struck the Chevrolet. Record page 28. Miss Hanbury was not operating the brake, and stopping or slowing up in time to drop behind the Chevrolet, was therefore impossible. Record page 28. Passing the Chevrolet was likewise impossible without superhuman skill and reckless daring. Appellee's brief shows with a mathematical nicety a possible forty-eight and thirty-five hundredths feet clearance which might have been available had Miss Hanbury kept her foot on the accelerator. This she did not do. See Record page 28. Using appellee's measure of speed, the forty-eight and thirty-five hundredths feet of clearance meant an allowance of time of less than three-quarters of a second. Therefore the only alternative was that which appellant Jones took, viz: a sharp turn to the left in the hope that he could get onto the wide shoulder, or into the ditch, and avoid the accident.

AUTHORITIES.

The first case cited by appellee's brief, White v. Parks (1928) Maryland reported in 140 Atlantic at page 70, is not applicable, as the grabbing of the wheel by the defendant therein was not the negligence upon which the case was decided. In that case plaintiff had never driven any automobile before and was out for instruction. The defendant's negligence there consisted in not grabbing the wheel sooner, not in the act of interfering. At page 74 of the Atlantic Reporter, the following language appears:

> "There was proof tending to show that the instructor was also negligent, with respect to his inexperienced pupil in not using care in watching her driving at a dangerous point for a learner, and in not *being ready to interfere* as quickly as the occasion arose, and that if he had been reasonably careful under the circumstances he would have been able to have *taken control of the steering wheel in time* to save the appellee from injury." (Itallics supplied.)

The second case cited, Hooks v. Orton (Texas-1930) reported in 30 South Western (2nd) at page 681, is likewise not applicable to the instant case. There the negligence with which defendant was charged was not the taking of the wheel so much as it was her action after taking the wheel in taking a dangerous route. Even then her action was not held to be negligence by the court, which used the following language in reversing the case:

> No person will be held responsible for his acts or omissions which occur when through no fault of his own, his mind is in such a state of fright or terror as to render him incapable of acting with ordinary care and prudence."

This it may here be said is the law of this State. See Michie's Digest Volume Seven, page 668, paragraph 35, and the many cases there cited.

See also 45 Corpus Jurus, page 992, (quoted in Hooks v. Orton, Supra):

> "There can be no recovery if defendant after being aware of the plaintiff's peril, did what an ordinarily prudent person would have done under the same or similar circumstances to avoid the injury."

This case comes directly within the rule laid down in the case of Boggs v. Plybon decided by this court after the instant case was tried below and reported in 160 South Eastern at page 77. Plaintiff below was the

invited guest of appellant Jones, riding to Washington for her pleasure and joining in the operation of the car as she had done many times theretofore. Defendant Jones therefore owed her no further duty as a guest than not to expose her wantonly or unreasonably to danger. She assumed in accepting the hospitality of defendant Jones all ordinary risks of the trip and the danger in which she put herself was surely such a risk. It cannot be said that Jones in his effort to save himself, his guest and his car from injury, knowingly or wantonly added anything to the perils of the venture.

It is therefore respectfully submitted that the verdict in this case is within the rule of this court and the statute defining the rule of decision, clearly wrong and should be set aside for the failure of the evidence to disclose any negligence whatsoever on the part of defendant Jones as alleged in the notice of motion herein, for the reason that plaintiff herself is shown to have been guilty of all the negligence appearing in the case, and for the reason that as a guest of defendant Jones, she has not by Jones been exposed wantonly or recklessly to danger.

For the reasons we have heretofore set out, we therefore ask that the judgment of the lower court be set aside and judgment entered in this court for appellant, Harvey L. Jones.

Respectfully submitted,

FOREMAN, PENDER & DYER,

Counsel.