Denver Law Review

Volume 32 | Issue 7 Article 5

January 1955

Torts

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'53, 137-10-20; further that prior to the 1953 revision of the Colorado Statutes, Sec. 255 of said Chapter 227 of the 1937 Session Laws contained the word "hereafter" providing among other things that before any purchaser of land *hereafter* sold for taxes receives a tax deed, the County Treasurer shall send notice to parties in interest, not more than five months and at least three months before the time of issuance of the tax deed. The Court points out that in the 1953 revision the word "hereafter" was omitted, but in any event the revision was not in effect on the date application was made by plaintiff for a deed and the land was sold for 1931 taxes and tax certificate issued in 1932, prior to the 1937 amendment now part of 137-10-28.

The Court said that it was obvious that its decision must be that the property was sold for taxes prior to 1937 amendment of 137-10-28; that the records showed that the assessed valuation was less than $100 and that no notice was required to be given prior to the issuance of the tax deed.

TORTS

By RICHARD D. HALL *of the Denver Bar*

Many interesting and significant decisions in the field of torts have been handed down by the Colorado Supreme Court during the past year. The most important of these cases, in my opinion, are the following:

(1) IMPUTATION OF NEGLIGENCE

In *Moore v. Skiles*, 130 Colo. ...., 274 P. 2d 311, the plaintiff, a passenger in a truck owned jointly by her and her husband, was injured when the husband drove the truck into a collision with the defendant's car. The plaintiff, Mrs. Moore, and her husband were returning home after an evening with friends.

The trial court, over the objection of plaintiff's counsel, instructed the jury that if it found "that the accident would not have occurred but for the combined negligence of both drivers, then the plaintiff can not recover for the damages which she claims to have suffered . . ." The jury returned a verdict in favor of the defendant, and the appeal followed. The Colorado Supreme Court, after noting the general rule that the negligence of a driver is not to be imputed to a passenger in the car, *Colorado and Southern Railway Company v. Thomas*, 33 Colo. 517, 81 P. 801; *Parker v. Ullom*, 84 Colo. 433, 271 P. 187; *Phillips v. Denver City Tramway Company*, 53 Colo. 458, 128 P. 460, then proceeded to hold that the case at bar fell within a well recognized exception. Thus, where the passenger by reason of joint ownership of the vehicle was in a position to exercise control over the driver, and was physically present in the automobile, which was being used for a common purpose, the negligence of the driver, if any, was imputed to the joint owner

riding as a passenger. The Supreme Court approved the above instruction and affirmed the judgment.

(2) DOG BITE LIABILITY

Traditionally, liability for injuries inflicted by a dog required proof of prior knowledge by the owner of the dog's vicious propensities, and in most cases proof was required of at least one prior incident involving injury to some other person. However, in *Barger v. Jimerson,* 130 Colo. ...., 276 P. 2d 744, the Court affirmed a judgment for $4,773.00 against the owner of a dog which attacked and severely injured a Mrs. Jimerson, but was not proved to have bitten any other person. The Court repeated the general rule that the owner must have had notice before such accident of the vicious propensities of his dog, but held that proof as to its vicious appearance and barking and constant confinement behind a fence was sufficient proof as to knowledge by the owner of such fact. Upon proof of such knowledge, the owner was held to keep the dog at his own peril.

(3) RES IPSA LOQUITUR

In *LaRoco v. Fernandez,* 130 Colo. ...., 277 P. 2d 232, the deceased, while driving his car behind the automobile of the one defendant, Fernandez, was killed when the Fernandez car sideswiped the oncoming car of the second defendant, Lannan, which then struck the deceased's car. In their answers each defendant denied being negligent himself, but admitted that the other defendant was negligent. In their opening statements, counsel for each defendant stated that their evidence would show that the other defendant was over the center line and therefore negligent.

The plaintiff's evidence failed to indicate which of the two defendants was across the center line at the time of the first impact, and accordingly the trial court granted the motion of each defendant for dismissal at the close of the plaintiff's case. The Supreme Court stated that "in a proper case a judgment may be entered for or against a plaintiff as a result of admissions by counsel in the opening statement," and noted that the same was true as to pleadings. The Court then concluded that under the pleadings and opening statements a jury question was presented without specifically discussing the point that in this case the "admissions" in question were not true admissions against the interests of the defendants making them, but were more in the nature of allegations by each defendant against the other defendant who had an adverse interest. The Court also, at the conclusion of the decision, stated that "the circumstances as to the accident speak for themselves, and therefore the doctrine of *res ipsa loquitur* is applicable." This appears to be the first application in Colorado of such rule to a case where control of the circumstances surrounding the accident was not wholly within the power of the defendant against whom the rule was asserted. We may expect to see this case cited frequently in future litigation where the plaintiff is

obviously an innocent party but there is substantial doubt as to which of several defendants is responsible.

(4) TORT LIABILITY OF ASSOCIATION MEMBERS

In *Thomas v. Dunne,* 130 Colo. ...., 279 P. 2d 427, the Supreme Court considered a judgment which had been entered in favor of a plaintiff who had been injured during a meeting of the Al Kaly Temple, an unincorporated association with 1,753 members at the time of the trial. Upon a jury verdict, judgment had been entered by the trial court against the association and also against eleven individual members of the association, none of which individuals were proven to have taken an active part in the events which resulted in the injury to the plaintiff. The Supreme Court held that the individual defendants were named as representatives of the class consisting of the entire membership, and held that the provision in the old Code of Civil Procedure which limited such a judgment to one against the joint property of the association itself was still in effect. Thus, the judgment against the Al Kaly Temple was affirmed and the judgments against the individual defendant members were reversed.

(5) UNAVOIDABLE ACCIDENT

In *Union Pacific Railroad Company v. Shupe,* 131 Colo. ...., 280 P. 2d 1115, plaintiff's truck stalled on a railroad crossing about dusk, where it was struck by defendant's train. There was conflicting testimony as to visibility and as to the opportunity to see the lighted fuse set by the plaintiff.

On appeal a judgment in favor of the plaintiff on a jury verdict was reversed for failure of the trial court to give an instruction on "unavoidable accident" tendered to the Court by counsel for the defendant. The Supreme Court noted that the evidence raised such an issue, and in answer to the assertion that such defense was not pleaded and therefore could not be injected into the case at the time the instructions were being prepared, stated, "while it is the usual practice to plead unavoidable accident as an affirmative defense, the fact still remains that unavoidable accident is but a denial of negligence, and in this case where the pleadings disclosed that there were mutual denials of negligence, the issue is in the case."

(6) LAST CLEAR CHANCE

The doctrine of last clear chance as developed by a large number of decisions of our Supreme Court, has been a doctrine normally pleaded by the plaintiff in reply to the defense of contributory negligence as alleged by the defendant in his answer. In the case of *Rein v. Jarvis,* 131 Colo. ...., 281 P. 2d 1019, the DEFENDANT in his answer alleged, among other things, that the plaintiff had the last clear chance to avoid the collision which was the basis of the suit. Judgment was entered by the trial court in favor of the plaintiff upon a jury verdict and defendant cited as error the re-

fusal of the trial court to give an instruction tendered by the defendant as to the doctrine of last clear chance as alleged in his answer.

The Court stated in its opinion that last clear chance was a doctrine available to a plaintiff when such plaintiff is met with a defense of contributory negligence. The Court then went on to state that if the doctrine could be invoked by *defendant,* it would be a confusing method of charging plaintiff with contributory negligence. In other words, before the occasion could arise where the doctrine could be invoked, the plaintiff already would be barred by his contributory negligence. The judgment in favor of the plaintiff was affirmed.

(7) FALSE ARREST

The case of *Hart v. Herzig,* 131 Colo. ...., 283 P. 2d 177, is interesting in holding that where an invalid summons was served upon the plaintiff for alleged violation of the Game and Fish Law, and the plaintiff in accordance with such summons appeared in Justice Court, there was no false arrest giving rise to a tort cause of action. The Court in its opinion made clear that there must be an intention to take a person into custody before there can be a false arrest, and that a notification or command to a person to appear at a later date before a magistrate does not put such a person under arrest any more than a witness is under arrest when served with a subpoena. The judgment in favor of plaintiff was reversed on the above and other grounds.

(8) PROOF OF NOTICE OF UNSAFE CONDITION OF FLOOR

The case of *F. W. Woolworth Company v. Peet,* 131 Colo. ...., 284 P. 2d 659, involved a claim by the plaintiff for injuries received from a fall in the defendant's store resulting from her slipping on some excrement in an aisle. There was no evidence introduced as to when or how the substance got onto the floor. Under this state of the evidence, the Supreme Court reversed a judgment in favor of the plaintiff on a jury verdict, stating that as a matter of law the plaintiff had proven no negligence on the part of the defendant store as there was no evidence that the substance had been on the floor for an unreasonable period of time. This case was not new as to this doctrine, but strengthens the law on this point as found in the prior cases of *Atkinson v. Ives,* 127 Colo. 243, 255 P. 2d 749, and *Denver Dry Goods Co. v. Pender,* 128 Colo. 281, 262 P. 2d 257.

(9) DEFINITION OF GUEST UNDER GUEST ACT

In *Hollenbach v. Fairbanks,* 132 Colo. ...., 287 P. 2d 53, the Court had before it the issue as to whether the deceased wife of the plaintiff was a guest at the time of the fatal accident. The deceased at such time was riding with the defendant's wife, who was on her way to town to get an angle iron for use by the plaintiff on his truck, and for which he had agreed to later reimburse the defendant. After reviewing the rather involved fact situation, the

Supreme Court held that the deceased was a guest within the meaning of the Guest Act as there was no proof that the benefit conferred upon the defendant was sufficiently real, tangible, and substantial as to serve as an inducing cause for the transportation. The Court in this case followed such doctrine as originally enunciated in *Klatka v. Barker,* 124 Colo. 588, 239 P. 2d 607.

(10 NECESSITY OF ELECTION IN PRODUCTS LIABILITY CASES

Although the case of *American Furniture Company v. Veazie,* 131 Colo. ...., 281 P. 2d 803, might also be considered as within the field of sales, such decision established an important rule of law on an issue frequently arising under the law of torts. In this case, a gas kitchen range, sold by the defendant store to the plaintiff and later checked on two occasions by the defendant's service man, exploded approximately four months after its sale with resulting injury to the plaintiff.

The plaintiff in her complaint alleged a claim for relief based on breach of an implied warranty of fitness, and also claim for relief based upon negligence. The trial court submitted both claims to the jury under three forms of verdict, the jury returning a verdict in favor of the plaintiff on both of the claims despite the instruction to return but one form of verdict. The Supreme Court in reversing the judgment in favor of the plaintiff held that there was no implied warranty in this case because the stove was sold under its trade name, and also held that there was no evidence before the court of any negligence on the part of the defendant store which was a proximate cause of the explosion. Of more general interest was the statement of the Supreme Court that the trial court should have required the plaintiff to elect which of the two causes of action would be submitted to the jury, as it was apparent that the plaintiff was not entitled to recover on both theories for one injury.

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RAYMOND J. TURNER, Managing Editor.