



IN THE COURT OF APPEALS OF IOWA

JON ORMAN AND SANDRA ORMAN,)

Appellants,)

Filed May 31, 1978

vs.)

THOMAS WILLIAM BIGG,)

Appellee.)

474
2-60597

Appeal from Wapello District Court - Arthur A. McGiverin, Judge.

Defendants appeal jury verdict awarding damages to plaintiff passenger in automobile accident alleging insufficient proof that plaintiff surrendered control, error in allowing plaintiff's testimony regarding his early retirement and excessiveness of verdict. - Affirmed.

Kenneth L. Keith, of Dull, Keith & Beaver, Ottumwa, for Appellants.

W. T. Barnes & Dick R. Schlegel, of Barnes, Schlegel & Walter, Ottumwa,
for Appellee.

Heard by Allbee, C.J., and Donielson, Snell, Oxberger and Carter, JJ.

PER CURIAM

Defendants Jon Orman and Sandra Orman appeal a jury verdict awarding plaintiff Thomas William Bigg \$10,000 in damages for property damage and personal injuries allegedly suffered in an automobile accident. On appeal, defendants assert plaintiff failed to carry his burden of showing that he surrendered control of his automobile to his wife and thus, did not show that his wife's alleged contributory negligence should not be imputed to him within the rule announced in *Phillips v. Foster*, 252 Iowa 1075, 109 N.W.2d 604 (1961). Defendants also allege the trial court erred in allowing plaintiff to testify that an injury he allegedly suffered in the accident was a factor in his early retirement and that the jury verdict was excessive and the result of passion and prejudice.

William Bigg was the owner of and passenger in an automobile driven by his wife that was involved in a collision with a car owned by defendant Sandra Orman and driven by defendant Jon Orman. Both defendant and his wife brought separate actions, which were joined for trial, against defendants for injuries allegedly sustained in the accident. The jury awarded plaintiff \$10,000 on his claim, but awarded defendants \$940 for property damage on their counterclaim against the Biggs. The jury also found in favor of defendants Orman on Mrs. Bigg's claim for personal injuries. From adverse rulings on their motions for judgment notwithstanding the verdict and new trial, defendants appeal.

Defendants' first argument on appeal is that plaintiff failed to sustain his burden of proving that, at the time of the collision, plaintiff had surrendered control of his vehicle to his wife, the non-owner consent driver. In considering whether the trial court erred, we view the evidence in the light most favorable to plaintiff. *Champlin v. Walker*, 249 N.W.2d 839, 840 (Iowa 1977).

In *Stuart v. Pilgrim*, 247 Iowa 709, 720, 74 N.W.2d 212 (1956), the supreme court reversed prior decisions of the court, holding contributory negligence of the consent driver of a motor vehicle is not imputable to the owner as a matter of law because of § 321.493, The Code. *Phillips v. Foster*, 252 Iowa 1075, 109 N.W.2d 604 (1961) then narrowed the court's holding in *Stuart v. Pilgrim*. "Where the owner is present in the car his right of control is presumed, and the burden is upon him to show that it has been surrendered or, because of the factual situation, could not be

exercised." 252 Iowa at 1083. Finally, *Everhard v. Thompson*, 202 N.W.2d 58, 60-1 (Iowa 1972), held the nebulous premise upon which *Phillips v. Foster* was based -- that the owner has the ultimate power to control the driver where he is present, is non-existent where the automobile is jointly owned and therefore the contributory negligence of the driving co-owner is not imputable to the passenger co-owner, merely because of joint ownership, so as to bar an action of the passenger co-owner against a third person. Because Mrs. Bigg was not a joint owner of the automobile, *Phillips v. Foster*, and not *Everhard v. Thompson*, is controlling.

The true test in determining whether or not contributory negligence is imputed to an owner is the right to control and whether or not control has been surrendered. 252 Iowa at 1080. The right to control is an ordinary incident to ownership and where there is a right to control the burden of showing there was no control should be placed upon the one who claims to have surrendered that right. "Where control has been surrendered, contributory negligence cannot be imputed to the owner in the absence of one of the special situations referred to in *Stuart v. Pilgrim*." 252 Iowa at 1083. Where the owner is present in the car he is presumed to have the right to control and the burden of proof is upon him to prove that he did not actually have control. *Phillips v. Foster*, supra.

In the instant case, viewing the evidence in the light most favorable to the verdict and to plaintiff, we find a jury question was created on the issue of whether or not plaintiff surrendered and later regained control of the automobile. The testimony shows that on the afternoon of the accident, Mrs. Gibb drove her husband to work, dropped him off and continued on, to her own job at the hospital. Clearly, the right to control as well as actual control had been surrendered where Mr. Bigg, the owner, was not present in the car. *Phillips*, supra at 1083.

After work, Mrs. Bigg left the hospital and proceeded to the John Deere plant to pick up her husband. Again, she was clearly and singularly in control of the automobile. Mrs. Bigg drove into the driveway of the plant, picked up her husband, turned around and, as she proceeded to pull out of the driveway, she entered the intersection and the collision occurred while she was still driving.

Where the owner is present, unless he is acting under special conditions, he can hardly control the immediate operation of the car relative to starting,

stopping, steering or skidding. Phillips, supra at 1084. The evidence establishes Thomas Bigg was in the car when the accident occurred. However, the evidence does not establish Bigg regained either the right to control or actual control of his vehicle. A question of fact existed and a jury question was properly created on this issue. 252 Iowa at 1085. There is no error.

Defendants' second contention is that the trial court erred in allowing plaintiff to testify without proper foundation that he had been retired by his employer as a result of injuries sustained in the accident. Bigg was asked by his attorney what was the cause of Bigg's retirement. Defendants' attorney objected on the ground the question called for a medical opinion or conclusion without a showing Bigg was qualified to give such a medical opinion. The objection was overruled and Bigg stated he thought his employer listed it as the aftermath of an old stroke and the loss of balance and that they were afraid he would fall into some equipment. He was then asked his own objective feeling to his retirement and whether he thought his leg injuries incurred in the accident were the cause. Defendants again objected on medical foundation grounds.

Initially, we note defendants have seemingly abandoned the grounds urged in the trial court here on appeal. On appeal they argue plaintiff was incompetent to testify as to why John Deere retired him. Because defendants are attempting to argue a new theory on appeal and have abandoned their argument made below, this error is not preserved for appeal. See State v. Coffee, 182 N.W.2d 390, 393 (Iowa 1970). Secondly, even if preserved, plaintiff's answers were not objectionable. Bigg did not testify why his employer retired him, something known only to John Deere. Rather, he testified only as to the way in which he thought his employer listed it and as to his own feelings as to why he was retired.

The final issue argued on appeal is the excessiveness of the damages. Defendants argue the damages awarded were not sustained by the evidence, were contrary to law, and were the result of passion and prejudice. Although the medical expenses and property damage were slight in comparison to the verdict, the testimony when viewed in the light most favorable to plaintiff establishes that Bigg suffered pain in his leg long after the accident. He also missed a week of work due to the accident as well as a day or two a week for the next three or four

months until his retirement. A jury question was created as to the amount of these damages, his pain and suffering and the extent these injuries were attributable to the stroke he suffered eleven or twelve years prior to the accident. We find the damages were neither excessive nor unsupported by the evidence. See Jesse v. Wemer & Wemer Co., 248 Iowa 1002, 1019-20, 82 N.W.2d 82 (1957). See also Starke v. Horak, 260 N.W.2d 406, 408-9 (Iowa 1977), where verdicts for plaintiffs of \$100,000 and \$80,000 were affirmed as being generous but not excessive.

AFFIRMED.