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CLERK SUPREME COURT

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IN THE COURT OF APPEALS OF IOWA

JACK E. MILLS,

Appellee,

vs.

HELEN V. LYON,

Appellant.

Filed March 29, 1978

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2-60021

Appeal from Tama District Court - John L. Hyland, Judge.

Defendant appeals from adverse judgment in personal injury action, alleging error in trial court's ruling on motion for directed verdict and instructions to the jury.

Affirmed.

John B. Grier, of Cartwright, Druker & Ryden, of Marshalltown, counsel for appellant.

Herbert R. Bennett, of McCarville, Bennett, Beisser & Ferguson, of Fort Dodge, counsel for appellee.

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

CARTER, J.

Defendant appeals from judgment on a jury verdict for plaintiff in an automobile injury action. Plaintiff was injured while riding as a passenger in a motor vehicle which was involved in a collision with defendant's motor vehicle. A prior appeal in this case is reported at 240 N.W.2d 189 (Iowa 1976).

Defendant argues two assignments of error: (1) that the negligence of the driver of the motor vehicle in which plaintiff was riding (which negligence was established by the jury's answer to a special interrogatory) should have been imputed to plaintiff as a matter of law; and (2) that instruction 21 on the issue of imputed negligence was erroneous. We reject both contentions and affirm the trial court.

I. Was plaintiff's driver's negligence imputed to him as a matter of law? Defendant urges that we should hold the driver's negligence is imputed to plaintiff on two grounds. First, it is asserted that since admittedly plaintiff was riding in his own car at the time of the collision the driver's negligence (as found by the jury) is imputed to plaintiff and bars his recovery. As authority for this contention defendant relies upon Phillips v. Foster, 252 Iowa 1075, 109 N.W.2d 604, 608 (1961). Phillips holds the negligence of the driver is imputed to the owner riding in the car unless the owner (upon whom the burden of proof rests) establishes that control "has been surrendered or, because of the factual situation, could not be exercised." We believe that the record in the instant case presents a jury issue as to whether plaintiff surrendered control of his motor vehicle to the driver or was otherwise unable to exercise it. The trial court properly instructed the jury that the burden of proof on this issue was upon plaintiff. A finding in favor of plaintiff on the issue inheres in the jury's verdict.

We do not regard the earlier appeal in this case, reported at 240 N.W.2d 189, to mandate that the issue of joint venture be adopted by the court or submitted to a jury in the absence of support in the evidence. We find no support in the evidence for submission of a theory of imputed negligence based upon joint venture. The elements of joint venture, as stated in Stam v. Cannon, 176 N.W.2d 794, 797-98 (Iowa 1970) and Restatement (Second) of Torts § 491 are simply not present in the instant case; thus there was no error in failing to direct a verdict or give an instruction on imputed negligence based upon joint venture. Defendant's contention that the operator's negligence should have been imputed to plaintiff as a matter of law on a theory of joint venture is without merit.

In addition, we observe that the jury, in finding for the plaintiff, necessarily had to determine that plaintiff had surrendered his right of control to the motor vehicle or was otherwise unable to exercise it. Such determination was required under the trial court's instruction no. 21 and would defeat the basis for imputing the driver's negligence to plaintiff under a joint venture theory as well as an "owner in the car" theory.[1] Thus, failure to inject the additional theory of joint venture, into the case, even if erroneous, was harmless.

II. Instruction No. 21. We find no error in the giving of instruction no. 21, as against the objections which defendant made to it in the trial court. The instruction clearly informed the jury that if the owner was riding in the car (an undisputed fact) the driver's negligence would be imputed to him unless he established that his right of control had been surrendered or could not have been exercised. On the facts of this case, the theory or basis for imputing negligence was not particularly material. The crucial issue was the factual question of whether control was relinquished or could not have been exercised. The court placed the burden on plaintiff to establish this. Thus, the instruction would be prejudicial only if it provided an improper standard for determining whether control had been surrendered or could not have been exercised. Defendant failed to object to the instruction on this ground in the court below.

With respect to the issues on appeal defendant objected to the giving of instruction no. 21 on the grounds that (a) it fails to properly instruct the jury on the issue of joint venture; and (b) it combines the two theories of imputed negligence. For reasons advanced above, joint venture was not a valid issue in the case, so the first ground of the objection is without merit. As to the second ground of the objection, on the facts of the present case, the jury's finding that plaintiff had relinquished or was unable to exercise his right of control renders harmless any confusion which might otherwise exist from combining two doctrines of imputed negligence because this finding would have produced the same result under either doctrine.

We have considered all issues presented and find no basis for reversal.

AFFIRMED.

All judges concur except DONIELSON, J., who dissents.

[1] Defendant argues that if the facts support the finding of a joint venture between the plaintiff and the driver this status mandates that the driver's negligence be imputed to plaintiff as a matter of law, even if plaintiff's right of control had been surrendered or could not be exercised. We believe the "owner in the car" situation would ordinarily carry a stronger right of control based upon status than would the joint venture situation. Yet, it is clear that this right can be surrendered thereby avoiding the imputation of negligence. Because the imputation of negligence based upon joint venture is also grounded upon the right to control the driver (see Stam v. Cannon, 176

DONIELSON, J. (dissenting)

I dissent. Although there is language in the supreme court's opinion dealing with the first appeal which would suggest that the issue of joint venture should have been submitted to the jury, see 240 N.W.2d 189, 191, I agree with the majority that the evidence in this case was insufficient to warrant the submission of the joint venture issue to the jury. However, I cannot subscribe to the views expressed in division II because I find Instruction No. 21 objectionable in that it represents a misstatement of the law because two theories of imputed negligence are combined in the same instruction while neither one is explained accurately.

Instruction No. 21, which was objected to by both parties as a misstatement of the law, states:

> Under the Iowa law the negligence of the driver of an automobile is chargeable to the owner-passenger if said owner-passenger had the right of control in some manner over the means of locomotion. Where the owner is present in the automobile, he is presumed to have the right of control, and the burden of proof is upon him to show by a preponderance of the evidence that his right of control has been surrendered or because of the factual circumstances could not be exercised.
>
> None of the following facts, if you find them to be facts, to-wit: that the driver, Paul Loucks, and the plaintiff, owner-passenger, Jack E. Mills, were going to the same place on the same mission, that they were working for the same employer; that the passenger had more authority in his employment capacity than the driver; or that they took turns driving; or that the plaintiff was the owner of the car is a controlling factor in making this determination, but the evidence concerning such matters should be given such weight, if any, as you think it should be given, together with all the other facts and circumstances disclosed by the evidence in determining whether or not the Plaintiff, Jack E. Mills, had the right of control in some manner over the vehicle in which he and Paul Loucks were traveling.

In the first paragraph of the instruction, the court correctly stated the law as it applies to imputed negligence involving an owner-passenger. Phillips v. Foster, 252 Iowa 1075, 1080-1081, 109 N.W.2d 604 (1961); Everhard v. Thompson, 202 N.W.2d 58, 59-60 (Iowa 1973). However, in the second paragraph, the court listed factors to be considered in determining whether a right of control exists in a joint venture or common enterprise context. Stam v. Cannon, 176 N.W.2d 794, 797-798 (Iowa 1970). Although both owner-passenger liability and joint venture are aspects of imputed negligence doctrine, and both involve the concept of right of control, they serve as different bases for the imputation of negligence and are analytically distinct. See W. Prosser, Law of Torts §§ 69-74 (4th ed. 1971).

I cannot agree with the conclusion reached by the majority that the jury's finding that plaintiff had relinquished or was unable to exercise his right of control renders harmless any confusion which might have been present because both imputed negligence doctrines were explained in the same instruction. The majority seems to conclude that since the jury's finding would have produced the same result under either doctrine of imputed negligence, it makes no difference that both doctrines were presented in a single instruction, notwithstanding the fact that the instruction was confusing and represented a misstatement of the law.

To me, such a view puts the cart before the horse. Although I would concede that the jury's finding regarding the right of control would have produced the same result under either doctrine, that finding was based upon the incorrect and confusing information contained in Instruction No. 21. Because both doctrines were included in this one instruction and because the jury found as it did with respect to the control issue, it is impossible to ascertain whether the jury reached its conclusion on the basis of the joint venture aspects described in the second paragraph which, according to the majority, should not have been before the jury in the first place.

A misstatement of law in a jury instruction constitutes reversible error, Heldenbrand v. Executive Council of Iowa, State, 218 N.W.2d 628, 637 (Iowa 1974), and even confusing and conflicting instructions give rise to such error. Hartwig v. Olson, 261 Iowa 1265, 1278, 158 N.W2d 81 (1968); see Porter v. Iowa Power and Light Co., 217 N.W.2d 221, 236 (Iowa 1974). With these legal principles in mind, I conclude that the instant instruction is deficient in that it is both legally incorrect and confusing because it commingles two distinct theories of imputed negligence in the same instruction while describing neither one accurately. If, as the majority concludes, only an instruction on owner-passenger liability should have been given, that instruction should have been based solely upon the concepts expressed in Phillips v. Foster, supra, and Iowa Uniform Jury Instructions, Vol. I, Civil No. 2.10. Consequently, I would reverse and remand for a new trial.