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257
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

BETTY KURTZ, Appellant,	)	Filed March 14, 1977
v.	)	
IOWA-ILLINOIS GAS & ELECTRIC CO., Appellee.	)	60 2-58091

Appeal from Linn District Court - Harold D. Vietor, Judge.

Plaintiff appeals from adverse judgment which denied her damages resulting from defendant's negligence through the doctrine of imputed contributory negligence. Affirmed.

Ralph E. Laird, Laird & Laird, of Waverly, and Simmons, Perrine, Albright & Ellwood, of Cedar Rapids, for appellant.

John K. von Lackum, Wadsworth, Elderkin, Pirnie & Von Lackum, of Cedar Rapids, for appellee.

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

ALLBEE, C.J.

This appeal is from an adverse judgment in a damage action that arose out of a fire which gutted the Royale Ballroom in Fairfax, Iowa on November 29, 1967. Plaintiff, Betty Kurtz, and her husband, James, on October 14, 1969, brought an action for $424,100 damages alleging that they were the owners of the ballroom and its destruction was due to the negligence of defendant's employees in installing natural gas in the building. A procedural quagmire ensued.

Defendant first answered generally but later amended its answer to allege the contributory negligence of James. Subsequently, plaintiff moved to sever the issues of liability and damages pursuant to rule 186, Rules of Civil Procedure, which was sustained. Upon trial of the liability issue in the spring of 1971, defendant's and James's negligence were submitted to the jury, but no issue of the imputation of James's negligence to Betty was raised by the instructions. The jury, by means of special interrogatories, found both defendant and James negligent. Additionally, the jury found that Betty had a specific property interest in the ballroom, although it was not identified. Judgment was entered against James alone on April 12, 1971. Apparently all parties believed that this judgment ended the controversy and no appeal was ever taken.

Nearly three years later, in February 1974, Betty filed a motion alleging that she had received judgment in her favor at the first trial and requested a hearing to determine her damages. Defendant contended that the verdict in the first trial was against Betty, or alternatively that James's negligence should be imputed to Betty as a matter of law. Trial court ruled that another trial was necessary to determine "the remaining factual issues".

Trial commenced in January, 1975. Instructions on the imputation of James's negligence to Betty under the theories of joint venture and principle-agent were submitted. Plaintiff timely objected that the issue of imputed contributory negligence was not a proper issue in this trial and defendant had not specifically pled imputed contributory negligence. The jury found an agency relationship, the effect of which imputed James's negligence to Betty. She appeals the resulting judgment against her. We affirm.

I. Plaintiff reasserts that the issue of imputed contributory negligence was improperly submitted in the second trial (1) either because the first trial resolved the issue favorably to her (2) or due to the fact that the defendant failed to specifically plead imputed contributory negligence in his answer. Defendant counters by asserting that imputed contributory negligence was tried with plaintiff's consent in the second trial or the issue was resolved unfavorably to her in the first trial giving rise to the doctrine of res judicata.

In attempting to resolve these procedural issues, we have been crippled by the meager record presented by the parties. The appendix contains but a few of the pleadings and no testimonial excerpts from either trial. Likewise, no transcript of either trial has been filed. We have examined and re-examined voluminous court files in a fruitless attempt to determine the exact occurrences which led to these rather unusual proceedings.

It is Betty's burden as the appellant to present a record sufficient to enable us to consider her claimed errors. Enslow v. Miner, 231 Iowa 590, 1 N.W.2d 700 (1942);

rule 341(b), Rules of Civil Procedure. In absence of record to the contrary, it is presumed the trial court proceedings and orders were proper. Enslow v. Miner, supra. The parties in the first trial may have stipulated to delaying the resolution of the issue of imputed contributory negligence to a later proceeding or the issue may have been retried by consent. See In Re Estate of Millers, 159 N.W.2d 441, 446 (Iowa 1968). We will not reverse a trial judge by speculation. Plaintiff's assigned procedural errors are not justiciable. Enslow v. Miller, supra; Ross v. Automobile Ins. Co., 228 Iowa 668, 667-678, 292 N.W. 813 (1940).

II. Betty also asserts that the doctrine of imputed contributory negligence resulting per se from a legal relationship alone should be abolished. Plaintiff, in written brief, has directed our attention to the position taken by the Restatement, Second, Torts § 495 on imputed contributory negligence:

> A plaintiff is barred from recovery if the negligence of a third person is a legally contributing cause of his harm, and the plaintiff has been negligent in failing to control the conduct of such person.

Counsel also has cited several Minnesota cases abolishing the doctrine of imputed contributory negligence in automobile negligence cases. See Piersen v. Edstrom, 174 N.W.2d 712 (Minn. 1970); Weber v. Stokely-Van Camp, Inc. 144 N.W.2d 540 (Minn. 1966).

We have, however, reluctantly determined that this issue also is incapable of judicial resolution with this barren record. Plaintiff's relevant objection to the imputed contributory negligence instructions was:

> That it is the belief of plaintiff that the law of Iowa would be declared by the Iowa Supreme Court to be that a plaintiff's contributory negligence is not imputable to a co-plaintiff *in the circumstances as shown by the evidence in this case.* Although there is no decision at this time to the knowledge of the plaintiff which directly declares this to be the law of Iowa, it is nevertheless the law of several other states, including our adjoining state of Minnesota, and it is declared to be the better rule by a majority of legal writers on the subject. The Iowa Supreme Court has arrived at similar and analogous rulings in the past, including Stewart v. Pilgram and Handelman v. Brown. And it is believed that if presented with this issue directly it would follow the reasoning of the legal writers on the subject and the Supreme Court of Minnesota in the case of Pierson v. Edstrom, 174 N.W.2d 712, and rule that the contributory negligence of one plaintiff will not be imputed to an innocent co-plaintiff *under the circumstances disclosed by the evidence in this case.* And that although the law may be that a -- that the negligence of a co-defendant is imputed to another co-defendant, in order to impose legal liability for plaintiff's injuries the converse is not true and the reasoning which justifies the imputation of negligence does not exist when the conduct of plaintiffs is being examined and the imposition of the doctrine is made to preclude the recovery of damages by an injured plaintiff. Therefore we urge upon this Honorable Court to recognize the distinction, the rationale of the distinction and on that basis to refuse to invoke the doctrine of joint venture as a defensive measure and an affirmative defense to prevent recovery by plaintiff by reason of the negligence of James H. Kurtz. (Emphasis added.)

Despite the objection's length, it is apparent the objection is general, rather than specific. See Madison Silos, Division of Martin Marietta Corp. v. Wassom, 215 N.W.2d 494, 500-501 (Iowa 1974); Briney v. Tri-State Mutual Grain Dealers Fire Ins. Co., 254 Iowa 673, 688-690, 117 N.W.2d 889 (1963). In fact, the objection is merely equivalent to stating 'this is not the law'. See State v. Buchanan, 207 N.W.2d 784, 787 (Iowa 1973); Briney v. Tri-State Mutual Grain Dealers Fire Ins. Co., supra. The objection does not alert us nor could it alert trial court that plaintiff wanted

the Restatement model considered and adopted. Madison Silos, Division of Martin Marietta Corp. v. Wassom, supra; Froman v. Penin, 213 N.W.2d 684, 689-690 (Iowa 1973). Instead the objection seems to urge total abolition of the doctrine, far surpassing the Restatement position. Suffice it to say we do not believe that if presented with the issue our Supreme Court would totally abolish the doctrine of imputed contributory negligence even though it might adopt the Restatement position. Trial court correctly overruled plaintiff's objections on these grounds.

Additionally, the objection continually makes reference that the doctrine of imputed contributory negligence is inapplicable "in the circumstances as shown by the evidence in this case". Yet, as earlier lamented, we know absolutely nothing concerning the underlying facts of this case. See Noble v. Edberg, 250 Iowa 1231, 1237, 98 N.W.2d 741 (1959). For all we can discern, Betty may have been in Maine on the date of the fire or she may have directed every movement which James made that day. In absence of any knowledge of the evidentiary facts of this case, plaintiff's objection is meaningless to us. See Noble v. Edberg, supra. Plaintiff is asserting defects in the instructions on appeal which have not been preserved or properly presented. Maier v. Illinois Cent. R. Co., 234 N.W.2d 388, 393 (Iowa 1975); rule 196, Rules of Civil Procedure.

Even if we should give plaintiff the benefit of the doubt and assume her objection preserved the issue whether the Restatement position should be adopted, the matter still is incapable of resolution. Because of the dearth of facts, plaintiff has, in effect, asked us to determine the law

of imputed contributory negligence in the abstract. Even if we should overlook the obvious flaws of this type of appellate litigation and resolve this issue, we would be unable to determine whether the outcome would be favorable to Betty's position in light of the facts. See Mihalovich v. Appanoose County, 217 N.W.2d 564, 569 (Iowa 1974); Thorp Credit Inc. v. Barr, 200 N.W.2d 535, 537 (Iowa 1972), cert. denied, 410 U.S. 919 (1973). Thus, we could not determine whether the case should be affirmed or reversed and remanded for a new trial. Plaintiff's approach comes dangerously close to asking us for an advisory opinion on the law of imputed contributory negligence. See Nitta v. Kuda, 249 Iowa 853, 858, 89 N.W.2d 149 (1958).

Plaintiff has failed to preserve error and present it in a manner capable of appellate resolution. Trial court's judgment hereby is affirmed.