Michigan Law Review

Volume 37 | Issue 7

1939

NEGLIGENCE - CONTRIBUTORY NEGLIGENCE - LAST CLEAR CHANCE DOCTRINE APPLIED TO THE PLAINTIFF - NECESSITY OF ACTUAL KNOWLEDGE OF DANGER

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NEGLIGENCE — CONTRIBUTORY NEGLIGENCE — LAST CLEAR CHANCE DOCTRINE APPLIED TO THE PLAINTIFF — NECESSITY OF ACTUAL KNOWLEDGE OF DANGER — The plaintiff was injured in a collision of the automobile in which she was riding, driven by her husband, and one driven by the defendant. The defendant, as an affirmative defense, alleged that as he was about to enter the intersection, his car skidded and went out of control; and that both the plaintiff and her husband saw the dangerous situation in sufficient time to have avoided the accident. The court instructed the jury that if the plaintiff or her husband saw, or by the exercise of reasonable diligence could have seen, that the defendant was in a place of danger and that by the exercise of reasonable diligence on their part they could have avoided injuring him, and that they failed to exercise such diligence, then the plaintiff could not recover. *Held*, this instruction was erroneous. A defendant may be entitled to the application of the last clear chance doctrine, but before it can apply there must be actual knowledge of the dangerous situation of the other person. The duty to avoid one who has negligently placed himself in a situation of danger arises only when his position

is actually known, not when it ought, in the exercise of reasonable diligence, to have been known. *Rew v. Dorn*, (Ore. 1938) 85 P. (2d) 1031.

The Oregon Supreme Court has consistently adhered to the doctrine of "discovered peril" in connection with the application of the rule of last clear chance.[1] Only when a defendant actually knew of the dangerous situation of the plaintiff at a time when, by exercising ordinary diligence, he could have avoided injuring him, can a plaintiff have the benefit of the doctrine.[2] The court in the principal case, however, indicates that in a proper case, it would apply the doctrine to the plaintiff and relieve the defendant from the effects of his negligence.[3] Quoting from a previous Oregon decision in *Marshall v. Olson*,[4] the court declared, "The last clear chance doctrine is not to be invoked exclusively against a defendant, but it may affect a plaintiff as well. . . ." This statement was quite unnecessary to the decision of the *Marshall* case, inasmuch as an instruction to that effect was held to be rightly refused on the ground that the plaintiff was not in a position to control the car in which she was riding at the time of the accident. The statement in the *Marshall* opinion was based upon the case of *Vizacchero v. Rhode Island Co.*[5] There is no ground in the Rhode Island case for a holding that last clear chance should be applied to the plaintiff; the case holds that the plaintiff cannot recover because the contributory negligence of her intestate was the proximate cause of his death. Thus it would appear that, through a rather loose use of language, some courts have confused contributory negligence and the application of the last clear chance doctrine for the benefit of the defendant. "Last clear chance," which was developed to relieve a plaintiff from the harsh effects of contributory negligence, is to be used in the place of a rule of contributory negligence. It is submitted that the subject of contributory negligence and the last clear chance doctrine are sufficiently complicated without going another step and applying last clear chance to the plaintiff. Ordinary rules of contributory negligence will take care of a situation of this

[1] Smith v. Southern Pac. Co., 58 Ore. 22, 113 P. 41 (1911); Plinkiewisch v. Portland Ry., Light & Power Co., 58 Ore. 499, 115 P. 151 (1911); Provo v. Spokane P. S. Ry., 87 Ore. 467, 170 P. 522 (1918); Richardson v. Portland Ry., Light & Power Co., 70 Ore. 330, 151 P. 749 (1914); Emmons v. Southern Pac. Co., 97 Ore. 263, 191 P. 333 (1920); Morser v. Southern Pac. Co., 110 Ore. 9, 222 P. 736 (1924); Dorfman v. Portland Electric Power Co., 132 Ore. 648, 286 P. 991 (1930), and the various cases which these cite.

[2] This rule is followed by a number of courts in this country. The courts of a majority of the states and those of England, however, do not require that the defendant have actual knowledge of the danger in which the plaintiff has placed himself, but hold that the doctrine of last clear chance will be applied to relieve the plaintiff from the effect of his contributory negligence when the defendant, in the exercise of reasonable care should have discovered the position of the plaintiff in time to have avoided the injury. HARPER, TORTS, 305 (1933); James, "Last Clear Chance: A Transitional Doctrine," 47 YALE L. J. 710 (1938); 92 A. L. R. 101 (1934).

[3] McNamara v. Rainey Luggage Corp., 139 Va. 197, 123 S. E. 515 (1924). This case is a direct holding that the doctrine of last clear chance may be applied for the benefit of the defendant. It has been consistently followed in Virginia.

[4] 102 Ore. 502 at 511, 202 P. 736 (1922).

[5] 26 R. I. 392, 59 A. 105 (1904).

sort.[6] In this case the application of the last clear chance doctrine for the "benefit" of the defendant imposes upon him the burden of proving actual discovery by the plaintiff, while without it he would merely have to show contributory negligence in order to defeat the plaintiff's action.

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[6] Chr. Heurich Brewing Co. v. McGavin, (App. D. C. 1926) 16 F. (2d) 334; Spear v. United Railroads, 16 Cal. App. 637, 117 P. 956 (1911); Potter v. Back Country Transp. Co., 33 Cal. App. 24, 164 P. 342 (1917); Dover v. Archambeault, 57 Cal. App. 659, 208 P. 178 (1922). In these cases instructions on the subject of contributory negligence were upheld, but the courts refused those which attempted to apply the last clear chance doctrine to the plaintiff.