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Recent Cases

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DEFENSES—PLAINTIFF'S EVIDENCE AS BASIS FOR DEFENDANT'S INSTRUCTIONS—CONSISTENCY WITH DEFENDANT'S OWN EVIDENCE UNNECESSARY

Tomlin v. Alford[1]

Plaintiff, a soft-drink delivery man, alleged that he received an injury when he fell from a ledge located in the basement of a grocery store operated by the defendant. Plaintiff testified that he passed along the ledge to pick up two cases of empty bottles, and that upon his return he tripped over some empty bottles which had been placed on the ledge in the interim by one of defendant's employees. Defendant alleged, and his evidence indicated, that none of his employees were in the area at, or just before, the time of the alleged accident. Defendant's fifth instruction told the jury that if they found that no employee of the defendant was present at, or just before, the time of the accident, the verdict should be in favor of the defendant. This instruction was based on, and consistent with, defendant's evidence and theory of the case. Defendant's fourth instruction, however, told the jury that even if they found defendant's employee was in the area at the time of the accident, if they further found that plaintiff failed to exercise a reasonable lookout for bottles on the ledge, and this failure contributed to his injury, then the verdict should also be in favor of the defendant. This contributory negligence instruction was based on plaintiff's testimony during cross-examination that he did not look to see where he was stepping. The trial resulted in a verdict for the defendant. The plaintiff appealed on the ground that defendant's instruction on contributory negligence assumed that defendant's employee had placed some bottles on the ledge, and was therefore inconsistent with defendant's evidence that none of defendant's employees were in the area at the time of the accident. The Supreme Court of Missouri held that the defendant may submit inconsistent defenses to the jury even though one of the defenses is based upon the plaintiff's evidence and is inconsistent with the defendant's evidence and theory of the case.

The Missouri rules allow the defendant to plead both a general denial and contributory negligence.[2] If the defendant does not affirmatively plead contributory negligence, that defense is lost.[3] The plaintiff in the principal case did not contend that the evidence was insufficient to support an instruction on the issue of contributory negligence. He contended, instead, that the defendant could not submit to the jury the issue of contributory negligence, even though it was supported by

1. 351 S.W.2d 705 (Mo. 1961).
2. § 509.110, RSMo 1959; Mo. R. Civ. P. 55.12.
3. § 509.090, RSMo 1959; Mo. R. Civ. P. 55.10.

the evidence in the case, when that evidence was inconsistent with the defendant's own evidence.

The general rule, commonly called the "most favorable evidence rule," is that either side is entitled to the benefit of any evidence it introduces and also the benefit of any favorable inferences which may arise from the evidence introduced by the opposing party.[4] As to plaintiffs, this rule is subject to the qualification that the defendant's evidence may not be used when it is contrary to the plaintiff's own evidence and theory of the case.[5] Thus it has been held that a plaintiff who submits his case alleging the excessive speed of defendant's streetcar as an act of primary negligence, may not also submit his case on a humanitarian theory predicated upon defendant's evidence of slow speed.[6] Two previous Missouri cases have held that this exception to the most favorable evidence rule, denying use of an adversary's evidence which is contrary to the party's own evidence, applied to the defendant as well as to the plaintiff.[7]

Confining the holding in *Tomlin* to the facts presented, the rule stated by the case is that the defendant, in submitting the issue of contributory negligence, may take advantage of evidence introduced by the plaintiff even though this evidence is contrary to that introduced by the defendant. This holding obviously conflicts with the two cases mentioned in the preceding paragraph,[8] and in reaching its decision the court specifically overruled those cases.

Two questions need to be examined in order to evaluate the holding of the principal case: (1) What reason underlies the rule that a plaintiff may not take advantage of defendant's evidence which is contrary to his own evidence; and (2) what reason, if any, is there for applying a different rule as to a defendant?

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4. Barr v. Missouri Pac. Ry. Co., 37 S.W.2d 927 (Mo. 1931).

5. Elliott v. Wescoat, 336 S.W.2d 649 (Mo. 1960); Dilallo v. Lynch, 340 Mo. 82, 101 S.W.2d 7 (1936).

6. Elkin v. St. Louis Pub. Serv. Co., 335 Mo. 951, 74 S.W.2d 600 (1934).

7. Rucker v. Alton Ry. Co., 343 Mo. 929, 123 S.W.2d 24 (1938); Picarella v. Great Atl. & Pac. Tea Co., 316 S.W.2d 642 (St. L. Ct. App. 1958). *Rucker* was a wrongful death action arising from a railroad crossing collision between a truck driven by the decedent and defendant's train. The defendant railroad submitted a contributory negligence instruction based upon the plaintiff's evidence that the decedent had failed to stop before crossing the track. This was contrary to the testimony of the defendant's engineer that the decedent had stopped his truck before making the crossing. The court held that submitting an instruction on contributory negligence for failure to stop was error for two reasons: (1) It was beyond the pleadings and did not constitute contributory negligence as a matter of law; and (2) it was inconsistent with the defendant's evidence. In *Picarella* the plaintiff was injured by a bottle which she said fell through a hole in a shopping cart. The defendant store submitted a contributory negligence instruction based upon plaintiff's testimony from which it could be inferred that she saw or should have seen the hole in the shopping cart near which she placed the bottle. This evidence was inconsistent with the testimony of defendant's manager to the effect that the hole was too small for the bottle to fall through. The court followed the *Rucker* case and held that the contributory negligence instruction should not have been given, because the defendant may not avail himself of the plaintiff's evidence where it is contrary to his own evidence and theory of the case.

8. *Supra* note 7.

The rationale for the rule as to plaintiffs is set out in the *Behen* case.[9] The court pointed out that a contrary rule would allow the plaintiff to ask the jury to believe as untrue that which his own sworn testimony indicated was true.[10] This reasoning is related to the rule that a party is bound by his own testimony.[11] Whether or not this rationale is sound seems largely academic in Missouri because of the repeated affirmance of the rule by the courts.

If one accepts the proposition that a plaintiff is bound by his evidence, in that he may not take advantage of the defendant's evidence which is contrary thereto, the question remains whether we should apply the same rule to a defendant. Phrased in the terms of the *Behen* case, the question would be whether the defendant should be allowed to ask the jury to disbelieve the truth of his own evidence. In support of the proposition that he should not is the fact that his evidence was introduced under oath, as was that of the plaintiff. As was pointed out in the overruled *Picarella* case, in Missouri the defendant bears the same burden of proof on the issue of contributory negligence as the plaintiff bears on the issue of primary negligence, and should be subject to the same limitations in meeting this burden.[12]

The reason given in the principal case for applying less severe restrictions upon the defendant's use of his adversary's evidence is grounded upon the different roles of the defendant and the plaintiff in a law suit. The court points out: "The plaintiff goes into court voluntarily. In a negligence suit he seeks a money judgment. Defendant, in court without his consent, cannot dismiss and start anew; he must plead and submit each and every submissible defense available to him, lest they be forever lost."[13]

In the opinion of this writer, while all of these points are valid distinctions between the position of a defendant and that of a plaintiff, none of them seems to lend much support for the proposition that a defendant should be allowed to ask the jury to believe as true that which the sworn testimony adduced on his behalf indicated was untrue. However, in spite of the lack of philosophical reasoning, the decision itself is clear: the defendant may take advantage of the plaintiff's evidence in establishing contributory negligence, even though this evidence is contrary to that introduced by the defendant.

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9. Behen v. St. Louis Transit Co., 186 Mo. 430, 85 S.W. 346 (1904).

10. The court said:

> Whilst it is true that a plaintiff's case is sometimes made out or aided by the defendant's evidence, and also that a jury may believe part of a witness' testimony and disbelieve another part, yet, before the plaintiff in this case can avail himself of the defendant's testimony to the effect that the deceased was attempting to leave the car while it was moving, he will have to confess that all of the evidence adduced in his behalf was untrue, and that the statement in his petition that the car had stopped and was standing still when the attempt to alight was made was also untrue, and that only that part of the defendant's testimony that suited the plaintiff's case was worthy of belief. A party will not be allowed to take such a position.

Id. at 348-49.

11. For a discussion of the rule that a party is bound by his own testimony see MCCORMICK, EVIDENCE 513-16 (1954).

12. Picarella v. Great Atl. & Pac. Tea Co., *supra* note 7.

13. Tomlin v. Alford, *supra* note 1, at 710.

CONTRIBUTORY NEGLIGENCE—CO-OWNERSHIP OF AUTOMOBILE BY HUSBAND AND WIFE—IMPUTING HUSBAND'S NEGLIGENCE TO WIFE

Roddy v. Francis[1]

Plaintiff and her husband were joint owners of an automobile. While riding in it on a Sunday afternoon pleasure drive, plaintiff's husband suggested that they take a look at some spruce trees he had seen advertised, with a view toward purchasing the trees to plant on property jointly owned by them. They had inspected the trees and were homeward bound when their car, driven by plaintiff's husband, collided with the rear of defendant's car as it was stopped in the highway, waiting to make a left turn. In a suit between the plaintiff wife and the defendant driver of the second car, the trial court held, in part, that the case was submissible to the jury upon the theory of primary negligence. On appeal to the St. Louis Court of Appeals, *held*: reversed. As to a theory of primary negligence, the husband's contributory negligence, if any, was imputable to his co-owning wife on the basis of joint enterprise.

By analogy to the field of partnerships and joint business ventures, American courts have fashioned the doctrine of "joint enterprise," whereby, as between two persons engaged in the joint enterprise, one will be vicariously responsible for the conduct of the other, within the scope of the enterprise.[2] The doctrine has been applied almost exclusively in automobile cases, and has usually been invoked in actions between a passenger in one car and the driver of another car as a means of establishing the plaintiff-passenger's contributory negligence.[3] Upon occasion, the doctrine has also been used in a reverse manner, to impose liability upon the passenger.[4] When the action is between a passenger and driver in the same car, however, the doctrine is normally refused application.[5]

As a general rule, the existence of a joint enterprise requires two elements: (a) a common purpose in carrying out some activity; and (b) a mutual "right of control over the other members in directing that activity."[6] Unfortunately, however, enough courts have deviated from this general pattern that the area is surrounded by "considerable confusion,"[7] and the "general rule" may, in many jurisdictions,

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1. 349 S.W.2d 488 (St. L. Ct. App. 1961).
2. PROSSER, TORTS § 65 (2d ed. 1955); James, *Vicarious Liability*, 28 TULANE L. REV. 161, 210 (1954). See also McCombs v. Ellsberry, 337 Mo. 491, 85 S.W.2d 135 (1935).
3. PROSSER, *op. cit. supra* note 2, § 65; James, *supra* note 2, at 210; Weintraub, *Joint Enterprise in Automobile Law*, 16 CORNELL L.Q. 320 (1931).
4. Crescent Motor Co. v. Stone, 211 Ala. 516, 101 So. 49 (1924); Howard v. Zimmerman, 120 Kan. 77, 242 Pac. 131 (1926); Adams v. Swift, 172 Mass. 521, 52 N.E. 1068 (1899); Cowart v. Lewis, 151 Miss. 221, 117 So. 531 (1928); Seiden v. Reimer, 190 App. Div. 713, 180 N.Y.S. 345, *aff'd without opinion*, 232 N.Y. 593, 134 N.E. 585 (1920); Straffus v. Barclay, 147 Tex. 600, 219 S.W.2d 65 (1949); Fox v. Lavender, 89 Utah 115, 56 P.2d 1049 (1936). See generally 1 BAYLOR L. REV. 492 (1949).
5. PROSSER, *op. cit. supra* note 2, at 367.
6. Weintraub, *supra* note 3, at 325.
7. PROSSER, *op. cit. supra* note 2, at 364.

be a rule for textbook purposes only. Thus, courts have occasionally failed to stress the need for a mutual right to control, and have apparently imposed liability upon a mere showing of common purpose.[8] This view has been condemned as, in effect, a restoration of the discarded doctrine of pure imputed negligence.[9] On the other hand, some courts, in requiring the existence of a common purpose, have stated that the purpose must be a financial or business one,[10] further confusing the area.

Missouri decisions revelant to the present discussion can best be analyzed by separating them into two classes. The first of these began its development in *Tannehill v. Kansas City, C. & S. R.R. Co.*,[11] decided by the Missouri Supreme Court in 1919. In that case, decedent was killed in an accident at a railroad crossing. He and his brother, who was driving, were co-owners of the automobile in which they were riding, and were returning from a business or pleasure trip ("the record . . . not disclosing which"). In holding that the driver's contributory negligence was imputable to the co-owning decedent, thus barring a recovery against the railroad company by the curator of the deceased's minor children, the court stated:

> Here, then, whether decedent and his brother were in their jouney . . . upon either pleasure or business bent, they were neither master and servant, employé and employer, guest nor passenger of the other. They owned the car jointly, they were upon a joint enterprise, either of business or pleasure, and neither had any more or any less, control of the car at the time than the other. In such a case, it seems clear that the negligence of one part owner of the car, when engaged in a joint enterprise, is imputable to the other.[12]

The second line of Missouri cases in this area originated only a year later, in *Corn v. Kansas City, C. C. & S. J. Ry. Co.*[13] There a husband and wife, driving to a train depot to pick up their daughter, were involved in a collision with defendant's streetcar. The automobile was owned by the husband alone. In refusing to impute the husband driver's contributory negligence to the plaintiff wife, the court said:

> The argument that she and her husband were engaged in a jont enterprise in going to get their daughter at the Union Station . . . is untenable. If this were the law, every time a man took his family out driving in his car, he doing the driving, for their mutual pleasure, there would be such a joint enterprise as to make the husband the agent of every member of the family, and make his negligence imputable to them. None of the authorities cited by defendant sustain . . . this point.
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> In the principal case relied on by [defendant], Tannehill v. K.C.

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8. See, *e.g.*, Caliando v. Huck, 84 F. Supp. 598 (D. Fla. 1949); Hanser v. Youngs, 212 Mich. 508, 180 N.W. 409 (1920); Otis v. Kolsky, 94 Pa. Super. 548 (1928).

9. PROSSER, *op. cit. supra* note 2, at 366; Weintraub, *supra* note 3, at 332.

10. See, *e.g.*, Jessup v. Davis, 115 Neb. 1, 211 N.W. 190 (1926); Robison v. Oregon-Washington Ry. & Nav. Co., 90 Ore. 490, 176 Pac. 594 (1918).

11. 279 Mo. 158, 213 S.W. 818 (1919).

12. *Id.* at 172, 213 S.W. at 822.

13. 228 S.W. 78 (Mo. 1920).

> C. & S. Ry. Co. . . , two partners were using the automobile, which was jointly owned, *on a business trip in which both were interested as partners* . . . . It is clear that case can have no bearing upon this.[14] (Emphasis added.)

As is obvious, the *Corn* case is not a little misleading in its basis for decision. The court indulged in the unwarranted assumption that *Tannehill* involved a business trip, while at the same time failing to emphasize adequately the lack of co-ownership in the situation before it. This might lead one to conclude that the court was asserting that in every case the common purpose must be a business one. In reality, however, the case is probably far better rationalized as holding simply that, *in the absence of other circumstances,* a mere pleasure trip is not sufficient to constitute a joint enterprise; or, stated in another way, that a non-business trip alone will not give rise to any inference of a mutual right to control. Since Missouri courts have long held that negligence will not be imputed between spouses solely upon the basis of the marital relationship,[15] this seems a supportable result.

Taken together, the *Tannehill* and *Corn* cases, and their progeny, appear to stand for the following proposition: In the absence of joint ownership, a mere pleasure trip by husband and wife will be simply that and nothing more;[16] but, if the element of joint ownership is present, that factor will serve to convert what would otherwise be a pleasure trip into a "joint enterprise."[17] As the *Roddy* case falls within the latter category, its result appears to be in accord with the Missouri law on the matter.

This raises a rather interesting and fundamental question. Just what is there in the nature of a joint title that should so inevitably call for the imputation of negligence between a husband and wife? Why, as a matter of fact, impute a spouse's negligence or contributory negligence at all, at least in the absence of an actual agency or partnership?

In answering these questions, it becomes evident that the result in the *Roddy* case may be subject to valid criticism. To begin with, any attempt to find a mutual right to control through the element of joint ownership alone would seem in large measure a matter of fiction. In reality, a co-owning wife riding with her spouse rarely if ever has the opportunity or ability to exercise any more control over his actions than if she were not a co-owner. The situation is most cer-

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14. *Id.* at 82.

15. *E.g.,* Borrson v. Missouri-Kansas-Texas Ry. Co., 161 S.W.2d 227 (Mo. 1942); Oster v. Chicago & A. R.R. Co., 256 S.W. 826 (K.C. Ct. App. 1923); Munger v. City of Sedalia, 66 Mo. App. 629 (K.C. Ct. App. 1896).

16. Greenwood v. Bridgeways, Inc., 243 S.W.2d 111 (St. L. Ct. App. 1951) (husband and wife driving to store to buy locker for their child's toys); Silsby v. Hinchey, 107 S.W.2d 812 (St. L. Ct. App. 1937) (husband and wife on way to church supper); Pettitt v. Kansas City, 267 S.W. 954 (K.C. Ct. App. 1925) (husband and wife on way to a dance).

17. Perrin v. Wells, 22 S.W.2d 863 (St. L. Ct. App. 1930). The situation in this case was somewhat stronger than in either *Tannehill* or *Roddy*. Here, not only was the car jointly owned, but the husband was driving the wife to her place of work. "[H]er earnings that day would swell their joint funds, and to that extent they were on a joint venture . . . ." *Id.* at 865.

tainly not that of the ordinary agency relationship; the co-owning wife has no real power to command obedience. True, as a theoretical matter, joint ownership may give an equal legal right to operate the vehicle. But it is difficult to conclude from this that there exists any actual ability to control a co-owning spouse who is already behind the wheel. Legal fictions, of course, are a time honored and oft-used means of giving effect to public policy. One might well ask, however, what public policy this fiction serves.[18]

Furthermore, if a driver is noticeably negligent in his operation of the car, a failure by the passenger to take reasonable steps for self-protection—normally an admonishment of the driver—will constitute contributory negligence under a completely separate rule.[19] Could not this rule alone sufficiently and more logically cover the area?

Finally, it should be pointed out that *Roddy* and its companion cases may lead to unexpected and undesirable ends. If the doctrine as expounded there may be used to impute one spouse's contributory negligence to the other, may it not also be used to impute actionable negligence itself? As previously indicated, the doctrine of joint enterprise has sometimes been used for this purpose.[20] Such a result would mean that the husband and wife might be held as joint tort-feasors, thus subjecting to judgment creditors not only their individual properties but their joint or entirety property as well. Surely this would be an undesirable consequence of merely being joint owners of an automobile.

Basing their reasoning upon at least some of these arguments, a few courts have declined to find a joint enterprise in situations similar to that in the *Roddy* case. *Jenks v. Veeder Contracting Co.*,[21] a New York decision, is perhaps the foremost of these. There the husband and wife were traveling to Florida in their jointly owned automobile. While the husband was driving, the car collided with defendant's truck. The husband, as administrator, brought an action for the wrongful death of the wife. The court refused to impute the husband's contributory negligence, saying:

> Parties having equal title to a motor vehicle cannot be permitted to contend for the wheel in moving traffic and hence the imputation of negligence to the joint owner present upon the theory of domination or control is untenable when applied to the facts in this case.
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> The realities of the actual operation of vehicles on highways cannot be entirely overlooked in dealing with the rights and obligations of those present with the driver.[22]

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18. For a discussion in accord with the above text, see PROSSER, *op. cit. supra* note 2, § 65, at 367.

19. Pence v. Kansas City Laundry Serv. Co., 332 Mo. 930, 59 S.W.2d 633 (1933); Corn v. Kansas City, C.C. & S.J. Ry. Co., *supra* note 13.

20. Cases cited note 4 *supra.*

21. 177 Misc. 240, 30 N.Y.S.2d 278 (1941), *modified on other grounds,* 264 App. Div. 979, 37 N.Y.S.2d 230 (1942), *appeal denied,* 289 N.Y. 787, 46 N.E.2d 848 (1943). See also Sherman v. Korff, 353 Mich. 387, 91 N.W.2d 485 (1958); Blevins v. Phillips, 218 Ore. 121, 343 P.2d 1110 (1959).

22. Jenks v. Veeder Contracting Co., *supra* note 21, at 243, 30 N.Y.S.2d at 281.

This position is a relatively new and untried one. Whether Missouri courts would ever follow it is questionable, in view of their past decisions.[23] Nevertheless, the argument has merit. At the very least, it seems to recognize the realities of modern living. At the same time, it serves to limit the theory of "joint enterprise" to application in areas where there is more reason to place the risk of mishap upon the enterprise itself.

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23. Prosser has said that the concept of joint enterprise liability "is too firmly established in American law to be at all likely to be discarded." PROSSER, *op. cit. supra* note 2, at 367.