Indiana Law Journal

Volume 5 | Issue 7 Article 11

4-1930

Motion to make More Specific-Res Gestae-Continuance-Proof of Insurance

MOTION TO MAKE MORE SPECIFIC—RES GESTAE—CONTINUANCE—PROOF OF INSURANCE—Plaintiff filed a complaint in two paragraphs alleging that defendant approached the car in which plaintiff's daughter was riding in the same direction at a dangerous and reckless rate of speed and without warning purposely, recklessly, and carelessly tried to pass such car while it was on a narrow fill, and because of a curve in the road and dust defendant did not have a clear view of the road for 500 feet when he tried to pass, and as a result plaintiff's car was struck and thrown down an embankment, causing the death of plaintiff's daughter. In the second paragraph plaintiff alleged that defendant, in trying to pass plaintiff's car, crowded in so far and forced plaintiff's car so far to the right as to cause the car's wheels to slip off the embankment and cause the driver to lose control while trying to regain the roadbed. Defendant's demurrer and motion to make more specific were overruled and this is assigned as error. There are three more assignments of error: (1) The court's action in allowing plaintiff's attorney to comment on the fact that defendant was injured; (2) the refusal of the court to discharge the jury on the illness of a juror; (3) the admission of evidence that, before the

accident, plaintiff's car and another car were forced into a ditch by defendant, and when defendant failed to pass he followed plaintiff's car so closely thereafter that he could see little girls looking out of the back window of plaintiff's car. *Held*: Judgment affirmed. *Flamion v. Davis*, Appellate Court of Indiana, December 12, 1929, 169 N. E. 60.

1. Each paragraph was sufficient to apprise defendant of the charge against him and to show that defendant's negligence was the proximate cause of the injury, and the evidentiary facts which defendant sought to have embraced in the complaint were unnecessary. The rule is that only where the facts on which the conclusion in the pleading is based do not sufficiently appear from the pleading is it error to overrule a motion to make more specific; it was not reversible error therefore to overrule both the demurrer and the motion to make more specific. Burns' Ann. St. 1926, Sec. 360; *Indiana Mfg. Co. v. Coughlin*, 65 Ind. App. 268.

2. Generally it is not competent to prove that defendant is insured, nor is it competent for counsel to comment on the fact to the jury. *Vandalia Coal Co. v. Price*, 178 Ind. 546; *Inland Steel Co. v. Gillespie*, 181 Ind. 633; *Norris v. West*, 78 Ind. App. 391. But where, as in the principal case, defendant voluntarily testifies that he carried insurance, he can not later complain when plaintiff comments thereon and where the verdict is fully supported by the evidence. *Louisville N. A. & C. Ry. Co. v. Miller*, 141 Ind. 533; *In re Darrow*, 92 N. E. 369.

3. The evidence offered was not too remote. It was competent, as part of the *res gestae*, helping to explain the conduct and motives of the parties at the time of the accident. *Res gestae* includes the surrounding facts of a transaction as well to explain the act done as for showing a motive for the transaction; circumstances which are contemporaneous with the main fact under consideration or so nearly related to it as to illustrate its character and the state of mind, sentiments, or dispositions of the actors are parts of the *res gestae*. *Bolds v. Woods*, 9 Ind. App. 657; *Daywitt v. Daywitt*, 63 Ind. App. 454; *O'Conner v. Gilloxy*, 170 Ind. 428.

4. It was not error to continue the case for a week instead of discharging the jury because of a juror's illness. While the illness of a juror may be ground for discharge, if the illness is only temporary it is proper to wait a reasonable time for his recovery. 17 Am. & Eng. Ency. of Law (2nd Ed.) 1251.

The case is clearly sound on all the points involved.

R. C. H.