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Pleading of Contributory Negligence in Indiana

PROCEDURE

PLEADING OF CONTRIBUTORY NEGLIGENCE IN INDIANA.

Plaintiff was injured by the alleged negligence of the defendant in driving his automobile into plaintiff, a pedestrian, who was crossing a street. The trial court granted the defendant leave to amend his answer by interlineation, setting up the defense of contributory negligence. This was done at the conclusion of the evidence and after the witnesses had departed. On appeal, the Appellate Court held that this was not an abuse of discretion by the trial court, and that the defense of contributory negligence could be proved under a specific denial.[1] *Holt v. Basore*, 77 N.E.2d 903 (Ind. App. 1948).

Because of continued legislative action in the field of court procedure in which the Rules of the Supreme Court have vitality, several problems arise in regard to the pleading and proof of contributory negligence in actions for personal injuries; actions for property damage; and actions joining these two.

Indiana has had a variety of rules in regard to pleading and proving contributory negligence. Prior to legislative regulation in the field, the plaintiff both in actions for personal injuries and in those for property damage, was required to plead and prove, either by direct averment or by the statement of the facts and circumstances under which the injury occurred, that the plaintiff was without negligence.[2] This rule remained in effect until 1899, when the legislature enacted a statute concerning actions for personal injury or death. That statute requires the defendant to prove as a defense the plaintiff's contributory negligence where the cause of action is based on personal injury or death.[3] However,

1. The judgment was reversed and a new trial ordered because of error in refusing to give an instruction tendered by the plaintiff, on another point.
2. Evansville & C. R. Co. v. Hiatt, 17 Ind. 102 (1861); Lake Erie & W. R. Co. v. Hancock, 15 Ind. App. 104, 43 N.E. 659 (1896). Cf. Wabash, St. L. & P. R. Co. v. Johnson, 96 Ind. 40 (1884). Thus, contributory negligence had to be negatived in plaintiff's complaint.
3. Ind. Stat. Ann. (Burns Repl. 1946) §2-1025. "In all actions for damages brought on account of the alleged negligence of any person . . . for causing personal injuries, or the death of any person, it shall not be necessary for the plaintiff in such action

following the passage of this statute, in actions to recover damages for injuries to property only, it was held that the plaintiff must plead and prove that he was not guilty of negligence contributing to the injury, since the foregoing statute did not apply.[4] But further legislative regulation has occurred. By an act of 1937, a plaintiff may unite a cause of action for injuries to person and a cause of action for damage to property.[5] And in 1943, the legislature further provided that in actions charging ". . . negligence as the cause of personal injuries or death, and also as the cause of damage to personal property, *or as causing such damage alone* . . . the burden of pleading and proof upon the issue of the plaintiff's or decedent's contributory negligence shall rest upon the defendant in such action."[6] Thus, the legislature attempted to place the burden of pleading and proof of contributory negligence on the defendant in a combined action for personal injuries and property damage and, by the use of the italicized words, to provide the same rule in a cause of action for property damage alone. This would place the burden on the defendant in all actions where contributory negligence is a factor.[7]

Since the instant case was an action for personal injuries, the burden of pleading and proving contributory negligence was on the defendant. The plaintiff assumed that the defendant must specially plead this defense. The basis of the plaintiff's assumption was that §2-305,[8] which does not prescribe the pleading device to be used by the defendant, was

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to allege or prove the want of contributory negligence on the part of the plaintiff. . . . Contributory negligence on the part of the plaintiff shall be a matter of defense, and such defense may be proved under the answer of general denial." See Heiny v. Pennsylvania R. Co., 221 Ind. 367, 47 N.E.2d 145 (1943).

4. Keltner v. Patton, 204 Ind. 550, 185 N.E. 270 (1933); Gagle v. Heath, 114 Ind. App. 566, 53 N.E.2d 547 (1944).
5. Ind. Stat. Ann. (Burns Repl. 1946) §2-304.
6. [Italics added] Ind. Stat. Ann. (Burns Repl. 1946) §2-305. It is clear that this section does not in any way affect §2-1025 since §2-305 deals only with property damage and combined actions while §2-1025 affects personal injury actions only.
7. For convenience in judicial administration one rule is desirable. " . . .there should be clearly one rule as to contributory negligence." Gavit, "New Federal Rules and Indiana Procedure," 13 Ind. L. J. 195, 216 (1938). See also 1 Works' "Indiana Practice," §13.42 (Lowe's Rev. 1947).
8. Supra n.6. The plaintiff apparently sought to avoid §2-1025 which specifically provides that the defense of contributory negligence can be proved under a general denial. See n.3, supra.

controlling. The defendant contended that that section applied only to those cases where actions for personal injuries and property damage are joined. The court found it unnecessary to determine this point, deciding that Rule 1-3 of the Supreme Court Rules[9] governed the case, and that since prior to the adoption of Rule 1-3, "contributory negligence in a personal injury action was provable under a general denial, it continues to be so provable."[10] In so holding the court stated that the superior authority for making rules of court practice lies in the Supreme Court, not in the legislature, by reason of statute[11] and inherent power.[12] Since at the time of the enactment of §2-305, the rule of the Supreme Court was in force, the "legislative enactment in conflict therewith would necessarily be ineffective."[13]

In resting its conclusion on the supremacy of the Supreme Court in procedural rule-making rather than construing §2-305[14] the court left unanswered what it will do when a

9. " . . .all defenses shall be provable under a specific denial or statement of no information, which were heretofore available under an answer or reply in general denial. . . . "

10. Obviously the court meant that evidence of contributory negligence could be introduced under the defendant's specific denial as well as under an affirmative pleading, since Rule 1-3 eliminates the device of a general denial in such a case.

11. Ind. Stat. Ann. (Burns Repl. 1946) §2-4718. "All statutes relating to practice and procedure in any of the courts of this state shall have, and remain in, force and effect only as herein provided. The Supreme Court shall have the power to adopt, amend, and rescind rules of court which shall govern and control practice and procedure in all the courts of this state; such rules to be promulgated and to take effect under such rules as the Supreme Court shall adopt, and thereafter all laws in conflict therewith shall be of no further force and effect. . . . "

12. Preface to Rules of Supreme Court: "Pursuant to its inherent rule-making power and the authority vested in it by the General Assembly, the Supreme Court of Indiana hereby adopts the following rules of court."

13. 77 N.E.2d 903, 904 (Ind.App. 1948). There seems to be ample authority for this proposition. State ex rel. Fostus v. Johnson, 69 N.E. 2d 592 (Ind. 1946); Seagram and Sons v. Board, 220 Ind. 604, 45 N.E.2d 491 (1943); Gray v. McLaughlin, 191 Ind. 190, 131 N.E. 518 (1921). See 1 Gavit, "Indiana Pleading and Practice," §21(9): "It should be held that the Supreme Court takes precedence over a conflicting legislative rule in the same field." See also Ridgely, "The Indiana Rule-Making Act," 18 Ind. L. J. 1 (1937); Note, "The Rule-Making Power," 22 Ind. L. J. 284 (1947), for a collation of cases dealing with the permissible extent of legislative regulation of judicial procedure in Indiana.

14. Supra n.6. It should be noted that the court could have based its conclusion on Ind. Stat. Ann. (Burns Repl. 1946) §2-1025 which seems to be more clearly relevant than §2-305 and which is in harmony with Rule 1-3.

plaintiff joins a cause of action for personal injuries and property damage or brings an action for property damage only under §§2-304 and 2-305, where the defendant attempts to introduce evidence of contributory negligence under a denial.[15] It is difficult to see how §2-305 can be interpreted so as not to conflict with Rule 1-1 of the Supreme Court Rules. The latter states that ". . . all other rules of procedure and practice applicable to trial courts adopted by statutory enactment and in effect on June 21, 1937 . . . shall continue in full force and effect, except as herein otherwise provided." By implication and under §2-4718,[16] statutory enactments relating to court procedure adopted after June 21, 1937, are of no effect. There is also a conflict with Rule 1-3 since prior to the passage of §2-305 the burden of pleading and proof of absence of contributory negligence was on the plaintiff in an action for property damage only, and hence contributory negligence was not "heretofore"[17] provable under a general denial. Thus, although §2-305 does not in terms purport to change the procedural device to be used in raising the question of contributory negligence, this conflict exists because the statute places the burden of proof of contributory negligence on the defendant and necessarily the defendant must use some procedural device in pleading the plaintiff's negligence. It is mere tautology to state that this device must differ from that used where the plaintiff had the onus of raising the question. Apparently, therefore, §2-305 conflicts with two Rules of the Supreme Court where an action for property damage only is concerned.

In a combined action for personal injuries and property damage, the situation is even more confused. A plaintiff may join the actions under §2-304 since that section was passed prior to June 21, 1937, and has not been superseded by any of the Supreme Court Rules. But if §2-305, the 1943 act, is invalid because of conflict with the Rules of the Supreme Court, the trial courts are faced with the problem of having the burden of pleading and proving the absence of contribu-

15. The defendant can avoid this problem by the use of an affirmative answer alleging the plaintiff's contributory negligence. However, in so doing, defendant may prejudice himself by erroneously assuming the burden of proof, if §2-305 is indeed invalid because of a conflict with the Rules of the Supreme Court.

16. Supra n.11.

17. Supra n.9.

tory negligence on the plaintiff in regard to the property damage, while the burden is on the defendant in regard to the personal injuries,[18] where both causes of action are alleged to arise out of the same act of negligence.

It is apparent that great difficulty would be encountered in trying to resolve these questions without further pronouncement from the rule-making authority. It is therefore submitted that the Supreme Court should, under its rule-making power, promulgate a rule resolving the anomalous situation resulting from the principal case.

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18. This result seems inescapable if §2-305 is invalid, since §2-1025, placing the burden on the defendant in personal injury actions alone, is in harmony with and assimilated into the Supreme Court Rules; and the previous rule, leaving the burden on the defendant in property damage actions, would remain in force.