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514 P.2d 789 (Colo.App. Div. 1 1973)

Diana Mary VALENCIA also known as Mary Diana Valencia, Plaintiff-Appellant,

v.

NORTHLAND INSURANCE COMPANY, a Colorado corporation, Defendant-Appellee.

No. 72--245.

Court of Appeals of Colorado, First Division

July 10, 1973

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Costello, Kofoed & O'Donnell, David L. Kofoed, Denver, for plaintiff-appellant.

Walberg & Pryor, Irving G. Johnson, Denver, for defendant-appellee.

COYTE, Judge.

Plaintiff was struck and injured by a hit-and-run motorist on September 18, 1970. She seeks recovery under an uninsured motorist clause in an insurance policy issued by defendant to one Mariniano Valencia. The policy provided benefits to the insured, his wife, and his family in the event that any covered individual was injured by an uninsured motorist or a hit-and-run automobile. At the commencement of trial the parties stipulated the sole question to be determined was whether plaintiff was the common-law wife of the insured at the time of the accident and, thereby, entitled to benefits as an individual covered under the insurance policy.

The case was tried to the court, which found that plaintiff failed to establish the existence of a common-law marriage on the date of the accident, or prior thereto, and entered judgment for the defendant. Plaintiff appeals. We affirm.

I.

Plaintiff contends that the evidence adduced at trial proves as a matter of law that a common-law marriage arose prior to the date of the accident. We disagree.

In *Klipfel's Estate v. Klipfel,* 41 Colo. 40, 92 P. 26, quoting from *Taylor v. Taylor,* 10 Colo.App. 303, 50 P. 1049, the court stated the basic requirement for a common-law marriage as follows:

". . . (I)n this state a marriage simply by agreement of the parties, followed by cohabitation as husband and wife, and such other attendant circumstances as are necessary to constitute what is termed a common-law marriage, may be valid and binding. * * * It is also agreed that in cases where the contract or agreement is denied, and cannot be shown, its existence may be proven by, and presumed from Evidence of cohabitation as husband and wife and general repute. . . ."

The court then stated, quoting from *Case v. Case,* 17 Cal. 598:

"Cohabitation, attended with other facts, is merely a circumstance from which marriage in fact may be presumed; but, where facts are proved from which a contrary presumption arises, all former evidence falls, or at least is neutralized."

The record indicates that plaintiff and Mr. Valencia rented an apartment as husband and wife in January or February of

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1970. At that time plaintiff was married to Mr. Vigil, although she had separated from him some time previously. A divorce decree terminating the marriage between plaintiff and Mr. Vigil was entered on July 24, 1970. Both plaintiff and Mr. Valencia testified that they were aware of the prior marriage and the impending divorce when they began living together. Plaintiff testified she agreed to become Mr. Valencia's wife on July 25, 1970, the day after entry of the divorce decree. However on cross-examination she admitted that she was uncertain about the date the decree was entered. Mr. Valencia testified that the agreement to be husband and wife was entered into some time in July. However, the existence of any such agreement was placed in doubt by the testimony of independent witnesses. The police officer who investigated the accident reported that Mr. Valencia referred to plaintiff as his 'girl friend'. The physician who treated plaintiff upon her arrival at the hospital testified that in the course of giving her medical history plaintiff said that she was struck by an automobile while she was walking across the street with her 'boyfriend'. Moreover, plaintiff gave the doctor her maiden name, Diana Trujillo.

Plaintiff presented evidence by several witnesses that she and Mr. Valencia were known in the neighborhood as husband and wife, but most of this testimony covered a period prior to plaintiff's divorce from Vigil during which time plaintiff could not have entered into a valid marriage

contract. *Valdez v. Shaw,* 100 Colo. 101, 66 P.2d 325. The record shows that immediately prior to the accident plaintiff was employed and paid under her maiden name, Diana Trujillo. Subsequent to the accident she applied for employment and filled out a Withholding Exemption Certificate in her maiden name and indicated that she was single. Her immediate supervisor at work testified plaintiff was known as Diana Trujillo from January to March 1971. Plaintiff changed her identification and work records in May 1971.

With the record containing this conflicting evidence, the existence of a marriage between plaintiff and defendant's policyholder at the time of the accident was not established as a matter of law but rather was a question of fact for the trial court as trier of fact. It having resolved the conflicting evidence in favor of defendant, these findings will not be disturbed on review unless manifestly erroneous or actuated by passion or prejudice. *Linley v. Hanson,* 173 Colo. 239, 477 P.2d 453.

II.

Plaintiff assigns as error the court's refusal to admit into evidence copies of her hospital records from Colorado General Hospital made during the time she was a patient in the hospital following her injury. She attempted to identify these records through her doctor. The records contained a notation supposedly made by a nurse who worked at the hospital that plaintiff was released from the hospital to her husband. Defendant objected to the introduction of the records on the ground the copies did not constitute the best evidence, and the court refused to admit them into evidence.

Plaintiff relies upon C.R.C.P. 43(g)(3) to support her argument that the hospital records were improperly excluded. We disagree. These records were not identified by the hospital custodian of the records. Additionally, the notation relied on would be hearsay and inadmissible to prove plaintiff's contention that she was released to her husband.

III.

Plaintiff also contends that the court improperly excluded a letter of reference from the employer for whom she worked from September 1, 1970, to September 18, 1970. Objection was made on the ground that plaintiff had not produced the letter at the pre-trial conference and it was not included in the pre-trial statement

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of exhibits. C.R.C.P. 16(d)(2) authorizes the trial court to exclude exhibits under these circumstances. Such ruling was within the discretion of the trial court, and where that discretion has not been abused it will not be disturbed on review. See *In Re Estate of Gardner, Colo.App.,* 505 P.2d 50.

We have reviewed plaintiff's other errors claimed to have been made in the trial of this case and find them to be without merit.

Judgment affirmed.

SILVERSTEIN, C.J. and PIERCE, J., concur.