

C

JARVIS v. JENKINS

Tex.Civ.App. 1967.

Court of Civil Appeals of Texas.Waco.

Harry P. JARVIS, Appellant,

v.

John H. JENKINS, Appellee.

No. 4606.

June 15, 1967.

Rehearing Denied July 6, 1967.

Action for necessities furnished defendant's wife. The County Civil Court at Law, Harris County, Madison Rayburn, J., rendered judgment for plaintiff, and defendant appealed. The Court of Civil Appeals, McDonald, C.J., held that where plaintiff alleged that he advanced \$175.38 in money to defendant's wife for airplane ticket and proof showed that he purchased ticket with credit card and later paid ticket out in three monthly payments, there was no such material variance between pleading and proof as would preclude judgment for plaintiff. The Court further held that evidence that wife was separated from defendant, that she was ill and went to Virginia to visit her mother and to go to hospital and get medical attention established that airplane ticket was a necessity for which plaintiff was entitled to recover from defendant.

Affirmed.

West Headnotes

[1] Husband and Wife 205 ⚡229.6[205](#) Husband and Wife[205VI](#) Actions[205k228](#) Pleading[205k229.6](#) k. Issues, Proof and Variance.**Most Cited Cases**

(Formerly 205k229(6))

Where plaintiff, seeking to recover from defendant necessities furnished defendant's wife, alleged that he advanced \$175.38 in money for airplane ticket and proof showed that he purchased ticket with credit card and later paid ticket out in three monthly pay-

ments, there was no such material variance between pleading and proof as would preclude judgment for plaintiff.

[2] Husband and Wife 205 ⚡232.3[205](#) Husband and Wife[205VI](#) Actions[205k231](#) Evidence[205k232.3](#) k. Weight and Sufficiency. **Most****Cited Cases**

(Formerly 205k232(3))

Evidence in action for necessities furnished defendant's wife, including disclosure that wife was separated from defendant, that she was ill and went to Virginia to visit her mother and to go to hospital and get medical attention established that \$175.38 airplane ticket paid for by plaintiff was a "necessity" for which plaintiff was entitled to recover from defendant.

***384** Harry P. Jarvis, Houston, for appellant.
Joe B. Fleming, Houston, for appellee.

OPINION

McDONALD, Chief Justice.

This is an appeal by defendant Jarvis from a judgment against him for necessities furnished his wife.

Plaintiff Jenkins sued defendant Jarvis, alleging he furnished defendant's wife \$325.38 for necessities. Defendant answered by general denial. Trial was before the court without a jury which, after hearing, rendered judgment for plaintiff for \$225.38.

Defendant appeals, contending:

- 1) The trial court erred in granting plaintiff judgment because there was a material variance between the pleadings and proof.
- 2) There was no proof the ticket purchased for defendant's wife was a necessity.

The evidence showed defendant and his wife were separated and that a divorce suit was pending between them. Plaintiff was an attorney for defendant's wife. Plaintiff gave defendant's wife a check for \$50. which check was cashed at Weingarten's Gro-

cery. Such cancelled check is in evidence, and there is evidence that it was given for defendant's wife to buy food and groceries with. It is in evidence that plaintiff bought an airline ticket for \$175.38 for defendant's wife to go to Virginia and visit her mother and get medical care.

[1] Defendant contends that because plaintiff alleged he 'advanced \$175.38 in money for the airline ticket,' and the proof showed he purchased the ticket with a credit card, and later paid the ticket out in 3 monthly payments, that the 'allegata and probata' do not conform, and that a material variance in pleading and proof exists, which precludes judgment for plaintiff. The proof showed plaintiff paid for the airline ticket for defendant's wife in the amount of \$175.38, and we think that sufficient.

[2] Defendant further contends there was no proof the ticket purchased for his wife was a necessity. The evidence is that defendant's wife was separated from him; that she was ill; that she went to Virginia to visit her mother and go to a hospital and get medical attention. We think from the record the trial judge had a right to conclude the \$175.38 airline ticket was a necessity.

Defendant's points and contentions are overruled.

Affirmed.

Tex.Civ.App. 1967.
Jarvis v. Jenkins
417 S.W.2d 383

END OF DOCUMENT