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Henry Hayward v. J. R. Downing and J. Wayne Eldredge and Lynn D. Wright v. J. R. Downing and J. Wayne Eldredge : Brief of Respondent

Utah Supreme Court

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In the Supreme Court of the State of Utah

HENRY HAYWARD,

Plaintiff and Respondent,

vs.

J. R. DOWNING and J. WAYNE
ELDREDGE,

Defendants and Appellants,

and

LYNN D. WRIGHT, a Minor, by JESSE
WRIGHT, his Guardian ad litem,

Plaintiff and Respondent,

vs.

J. R. DOWNING and J. WAYNE
ELDREDGE,

Defendants and Appellants.

Case No.
7216

Case No.
7217

RESPONDENT'S BRIEF

Appeal from the District Court of the Third Judicial
District In and For Salt Lake County, State of Utah

Honorable Roald A. Hogenson, Judge

FILED

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I N D E X

	Page
ARGUMENT	3-18
1. The Jury Was Not Adequately Instructed on the Defense of Assumption of Risk	3-6
2. The Jury Was Not Adequately Instructed on the Defense of Contributory Negligence	6-8
3. The Jury Was Not Adequately Instructed on the Question of "Express" Consent or Permission, the Law of the Case	8-11
4. The Court Failed to Give Any Emphasis to the Denials of Plaintiffs' Contention	11-14
5. The Court Abused Its Discretion in Not Sub- mitting the Special Interrogatory To Test the General Verdict	14-16
6. The Suggestion by Way of Argument of An At- tractive Nuisance was Prejudicial	16-18
STATEMENT OF THE CASE	1-3

INDEX TO AUTHORITIES

Edwards v. So. R. R. Company, 169 So. 715, 106 A. L. R. 1133 (Ala.)	4
Hayward v. Downing and Wright v. Downing, 189 Pac. (2nd) 442	8
Jensen v. Utah Railway Company, 72 Utah 366, 270 Pac. 349	17
Kerby v. Oregon Short Line R. R. Company, (Idaho) 264 Pac. 377	16, 17
Kuchenmeister v. L. A. & S. L. R. R. Company, 52 Ut. 116, 172 Pac. 725	4
U. C. A. Sec. 104-25-2 1943	14

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STATEMENT OF THE CASE

The above cases were by stipulation of the parties, consolidated for appeal. Both cases have previously been

before this court and were decided on the 5th day of February, 1948 and entitled *Hayward vs. Downing and Wright vs. Downing*, 189 Pac. (2nd) 442. The facts in the cases at bar, so far as plaintiffs' cases are concerned, are in all respects the same as the facts in the cases previously decided by this court. In the previous trial the court granted the defendant's motion for a non-suit, the defendants not presenting any evidence. In the cases at bar the defendants presented their evidence, which in certain respects contradicted the evidence of the plaintiffs. The plaintiffs contended that they had been given permission by the defendant Downing to sit upon the platform in question. The defendant Downing denies that he ever gave such permission and certain other witnesses were introduced on behalf of the defendants to the effect that patrons were not allowed to sit upon the platform and that at the time of the accident in question the plaintiffs and others were scuffling and wrestling upon the platform. The jury, in deciding the cases at bar, apparently was unimpressed with the denial and other evidence of the defendants and found the issues against them and in favor of plaintiffs.

For the purpose of this appeal it is not necessary to elaborate upon the evidence, the plaintiff's evidence having been fully set forth in the prior appeal of this matter and the defendants contention being fully set forth in their brief in the matter now before the court. The defendants have assigned eight statements of errors upon which they rely for a reversal of the judgment entered in these cases. Both cases were consolidated for the purpose of trial and the jury made and entered its separate verdict for each of

the plaintiffs, making and entering a judgment in the sum of \$3,000.00 for Lynn D. Wright, one of the plaintiffs and a judgment in the sum of \$1,000.00 for Henry Hayward, the other plaintiff. It will be noted by an examination of the appellants brief that although they assigned eight statements of errors upon which they rely for a reversal of the judgment entered herein, they have classified the errors under six divisions in their brief and the respondent's will confine their reply to appellant's brief in the same order and under the same headings as set forth in respondent's brief.

A R G U M E N T

1. THE JURY WAS NOT ADEQUATELY INSTRUCTED ON THE DEFENSE OF ASSUMPTION OF RISK.

It is the claim and contention of the appellants that the court was in error in failing to give certain of its requests, particularly its requests for instruction Nos. 8 (Tr. 67), 9 (Tr. 68), 10 (Tr. 69), and 11 (Tr. 70) all of which requested instructions are set forth in full at pages 12 and 13 of appellant's brief. Generally assumption of risk is applied to cases involving the relationship of master and servant. This is so because ordinarily the servant knows and appreciates the dangers involved in his work and is as well aware of them as the master and having such knowledge, and if he does the work with full appreciation of the dangers involved, he is said to have assumed the risk. It is conceivable that the doctrine of assumption of risk might be applied

to cases not involving the relationship of master and servant. We agree with the statement of this court in the case of *Kuchenmeister vs. L. A. & S. L. R. R. Company*, 52 Ut. 116, 172 Pac. 725, to the effect that there is a clear distinction between contributory negligence and assumption of risk. An examination of the facts of that case will indicate that the defendant had provided the plaintiff with a reasonably safe place in which he could have been safely carried to his destination and that he of his own volition and through *intelligent* choice, left the place where he was safe and chose one that was extremely dangerous, being well aware of the dangers involved.

This court however, merely discussed assumption of risk in that case but does not say that it applies to the plaintiff in the case, the case finally going off on another theory. But it will be noted from the facts that the plaintiff was well aware of the dangerous position he was placing himself in by leaving the place of safety, and had not the case involved other matters the court might well have said that the plaintiff in that case assumed the risk.

The case of *Edwards vs. So. R. R. Company*, 169 So. 715, 106 A. L. R. 1133 (Ala.) cited by the appellants at page 16 of their brief, states the rule of assumption of risk to be,

“that it must be confined to cases where the plaintiff knew and appreciated the dangers assumed, and with such knowledge and appreciation voluntarily put himself in the way of it.”

The appellants state at page 11 of their brief in an attempt to bring themselves within the above quoted rule, that it can

reasonably be inferred that the plaintiffs were conscious of the possible hazards of sitting on the platform particularly because some weeks before the accident the floor of the platform had "bent a little."

Assuming for the purpose of argument that the platform had bent some weeks before, didn't the plaintiffs have the right to assume that any weakened condition in the platform had been remedied by the defendants, particularly when the defendants were continually consenting to and permitting the boys to sit upon the platform? There is not a scintilla of evidence in the entire record that the plaintiffs knew or appreciated any danger whatsoever in connection with the platform. In fact, the record is undisputed that the boys did not know that there was any danger connected with their sitting upon the platform. The burden was upon the defendants to explain how the platform collapsed. This they did not do. Further, the burden was upon the defendants to show that the plaintiffs knew that the platform was dangerous at the time of the accident in question. This also the defendants failed to show. Certainly the plaintiffs after having obtained permission to sit upon the platform had a right to assume that it was safe. How the defendants can argue that the doctrine of assumption of risk is applicable to this case is beyond comprehension. There is absolutely no evidence in the record at all that the plaintiffs knew or appreciated the danger of the platform or that the same was dangerous. And if the same had been dangerous and the defendants knew of the dangerous condition then it would have been their duty to have warned the plaintiffs of the dangerous condition. The testimony quoted on Page

11 and 12 of the appellant's brief is the testimony appellants reply upon to show that the plaintiffs knew and appreciated the dangers involved in their sitting upon the platform. The testimony therein set forth is merely opinion testimony, it being merely the opinion of one of the defendant's witnesses, a mere conclusion which the witness drew from the condition which existed at the defendants place of business.

It would have been gross error for the court to have instructed the jury on the question of assumption of risk when there was no testimony whatsoever upon which to base such an instruction.

2. THE JURY WAS NOT ADEQUATELY INSTRUCTED ON THE DEFENSE OF CONTRIBUTORY NEGLIGENCE.

Under the above statement of error the defendants contend that the court erred in failing to give its instruction No. 3 (Tr. 62) and in modifying its instruction No. 4 (Tr. 63) and in giving instruction No. 7 (Tr. 50) all of which instructions are set forth on page 17 and 18 of the appellants brief.

Defendants request No. 3 is as follows:

"You are instructed that, if you find that the plaintiff by his acts or conduct other than merely sitting upon the platform caused, or in any manner, no matter how slight, contributed to the accident, he cannot recover and your verdict must be in favor of the defendants NO CAUSE OF ACTION."

The above request of course is not a proper statement of the law and the defendants cannot complain of the refusal of the court to give the same.

Suppose that the plaintiffs pursuant to the permission given them by the defendants, were merely in the process of getting upon the platform and had to stand upon the same before they could sit down and in moving around to get in a position of sitting, the platform collapsed, then according to the above instruction plaintiffs could not recover which, of course is not the law.

The court modified defendants request No. 4 in its instruction No. 7 by adding "and that such conduct on the part of plaintiff was what a reasonably prudent person would not have done under the facts and circumstances then and there existing." The defendant's question the above language contending at page 19 of their brief, that it permits the jury to measure the plaintiffs conduct under the rule of conduct of that of a reasonably prudent person and further contending that it allows them to go beyond the permission granted them. Apparently it is the defendants contention that the plaintiffs should not have acted as reasonably prudent persons while upon the platform but should have acted like an unreasonably person. That is the only conclusion that can be drawn from defendants argument in this connection. The instruction as given by the court clearly informs the jury that if the plaintiffs scuffled or wrestled on the platform and didn't act like a reasonable person would and that such conduct in any way contributed to the giving away of the platform, then the plaintiffs could not recover. What more could the defendants ask in this respect?

It is elementary that boys of the age of the plaintiffs herein, to-wit, 16 years of age, are not held to that same

standard of care as an adult but are only required to exercise that degree of care which boys of similiar age, experience and intelligence exercise under the same or similiar circumstances. The instruction as given by the court is much more favorable to the defendants than the law requires.

Defendants requested instruction No. 4 (Tr. 63), set forth at page 18 of appellants brief, does not set forth any rule or standard of conduct and it would have been error for the trial court to have given the same without limiting it in someway to what a reasonably prudent person would have done. The plaintiffs deny that they were wrestling and scuffling in any manner and the jury from its verdict was inclined to believe them and to disbelieve the testimony given by defendants.

3. THE JURY WAS NOT ADEQUATELY INSTRUCTED ON THE QUESTION OF "EXPRESS" CONSENT OR PERMISSION, THE LAW OF THE CASE.

The defendants complain here that the court did not fully instruct the jury in accordance with the opinion of this court rendered in the prior appeal of the matter. This court held in the prior appeal of this matter of *Hayward vs. Downing* and *Wright vs. Downing*, 189 Pac. (2nd) 442, and at Tr. 11 herein, "Our holding is limited strictly to the facts of this case—where an invitee as to one part of the premises, receives permission to go upon another part of the premises in furtherance of the object or purpose for which he was originally invited upon the premises (in this case, to view the wrestling matches) he becomes an in-

vitee as to such second part of the premises. As to other and different fact situations, we express no opinion." Nowhere in the law, as expressed by this court in the prior appeal of this matter, is the phrase "express consent" or "express permission" discussed. The court did, in discussing the facts of this case, state that one of the defendants had expressly consented to the plaintiffs sitting upon the platform, but in discussing the law of the case, the court merely states that where the plaintiff has permission to go to another part of the premises in furtherance of the object or purpose for which he was originally invited, that he then becomes an invitee as to the other part of the premises.

Defendants, in their discussion of this matter are making a mountain out of a mole hill. They are grasping for any little thing they can in hopes of aiding their futile cause. Plaintiff's evidence is clear that they obtained the permission of the defendant Downing, to sit upon the platform and to there view the wrestling matches. To now argue, in view of that testimony, that the court meant that the jury must be instructed that they received "express" permission, is obviously an attempt upon the part of the defendants to read something in to the prior decision of this court. Permission can only mean one thing and that is, that the plaintiffs were permitted or authorized to sit upon the platform and does not mean that the defendants directed them to sit there but that they acquiesced in plaintiff's request that they be permitted to sit upon the platform in pursuance of the invitation to witness the wrestling matches. The court continually, throughout its instructions to the jury, informed the jury that the jury must find by a preponderance

of the evidence that the plaintiffs had permission to sit upon the platform before the plaintiffs could be considered invitees of the defendant so far as the platform was concerned. In instruction No. 2 the court used the word permission once, in Instruction No. 4 twice, in Instruction No. 5, twice, once in Instruction No. 6 and twice in Instruction No. 7.

It is interesting to note that the defendants complain of the courts Instruction No. 7. An examination of this instruction (Tr. 50) and which is fully set forth at page 20 of defendants brief, is the same as defendants request for Instruction No. 5 (Tr. 34) and is the only request made by the defendants in which they requested the use of the phrase "express" permission. If the court had, in each of its instructions, stated that the plaintiffs had to have "express" permission it would have been error because the court then would have been over-emphasizing the issue of permission. It is obvious from a reading of the prior opinion, that this court did not mean that express permission had to be given—whatever express permission means.—The only requirement that this court made in its decision was that the plaintiffs have permission to go to some other part of the premises in furtherance of the object of the invitation.

Defendants also complain that the court erred in refusing to grant their request No. 7 (Tr. 66), and fully set forth at page 21 of their brief. An examination of that request would indicate that it is contrary to the opinion of this court. The defendants there request the court to instruct the jury that before the plaintiffs can recover, they must show that they were directed by the defendants to sit

where the accident occurred. This, of course, is not the law. This court merely held, in its prior decision, that all that was necessary was permission in furtherance of the object of the invitation. If the plaintiffs were required to prove that they were directed to sit upon the platform before they could recover, then, of course, the plaintiffs would not be within the definition of "invitee" as set forth by this court in its prior opinion of this matter.

4. THE COURT FAILED TO GIVE ANY EMPHASIS TO THE DENIALS OF PLAINTIFFS' CONTENTION.

The defendants complain that the court erred in refusing to give their Instruction No. 8 (Tr. 37) fully set forth at page 22 of their brief and complain that the court erred in giving its Instruction No. 6 (Tr. 49). It is the defendants contention that the failure to give Instruction No. 8 and the giving of Instruction No. 6, prejudiced them by not emphasizing the defendants' evidence that no permission was given the plaintiffs. The matter of permission was discussed in Statement of Error No. 3 and it is obvious from an examination of Instruction Nos. 2, 4, 5, 6, and 7 that the court continually instructed the jury that permission from the defendants was necessary before the plaintiffs could recover.

In Instruction No. 1, the court told the jury that the defendants deny that they had given plaintiffs permission to sit upon platform. In Instruction No. 6 the court, in effect, states that the defendants deny permission was

given, and further in Instruction No. 7 the court instructed the jury that before plaintiffs can recover they must show that "express permission" was given.

The defendants claim that the instructions given by the court do not state the legal effect of the want of permission. An examination of the instructions however will indicate that the contention of the defendants is incorrect. In all of the instructions the court clearly stated to the jury that it was necessary for plaintiffs to have permission in order to recover.

Defendants complain that the court erred in failing to give their requested Instruction No. 8. An examination of the request will show that the matters set forth in the request were fully covered in the court's Instruction No. 6. In the requested Instruction No. 8, the defendants wanted the court to instruct that if they (the jury) believed from the evidence that the alcove or platform was constructed for some other purpose than for patrons to sit or stand on and that plaintiffs were not given permission to sit there, then plaintiffs couldn't recover.

It was not contended anywhere in the pleading nor during the trial of the matter that the platform was constructed for the purpose of seating or standing patrons, but it was clear from the evidence that the plaintiffs did have permission to sit upon the platform and to there view the wrestling matches and according to this court's ruling in the prior decision of this matter, where plaintiffs were given permission to go upon another part of the premises

in furtherance of their invitation, then they were invitees as to that portion of the premises and the defendants owed them the duty of exercising reasonable care to see that that portion of the premises was in a reasonable safe condition.

The requested instruction contains three separate and distinct matters and the first portion of the instruction would have been misleading to the jury and would no doubt, have prejudiced the plaintiff's case if it had been given because, and, as stated before, there was no contention that the platform was constructed as a sitting place.

The defendants further complain of the court's Instruction No. 6. An examination of that instruction (Tr. 49) with defendants requested Instruction No. 6 (Tr. 35) will indicate that the two are identical except that the court added the words "in the exercise of ordinary care he could see." The defendants do not complain of the courts adding the above phrase. They complain of the courts having given Instruction No. 6, notwithstanding that they requested it. Instruction No. 6 covers everything that the defendants requested in Instruction No. 8 and says again that plaintiffs must have permission before they can recover.

No where in defendants requests do they request the court to emphasize the fact that they deny that they gave permission and the defendants have not pointed out in their brief how the court could have more fully instructed the jury as to the necessity of permission and their denial of it than the court has already done.

5. THE COURT ABUSED ITS DISCRETION IN NOT SUBMITTING THE SPECIAL INTERROGATORY TO TEST THE GENERAL VERDICT.

The defendants requested the court in their Instruction No. 12, (Tr. 71) to submit to the jury a special interrogatory which the defendants claim would test the general verdict as rendered by the jury. The defendants were frank enough at page 25 of their brief to quote Section 104-25-2 U. C. A. 1943 which leaves the matter of special interrogatories to the sound discretion of the trial court, but, contend the defendants, the failure of the trial court in the instant case to give their special interrogatory was prejudicial error.

Let us examine the special interrogatory which is as follows:

“You are instructed that in connection with your general verdict in this case, whether it be for the plaintiff or whether it be for the defendants, that you are required to answer the following question or interrogatory:

“Question: Did either one of the defendants tell the plaintiff or his companions that he, the said plaintiff, or his companions, might sit on the platform or alcove on the night the accident occurred?

“Answer:

“The foregoing interrogatory shall be answered either yes or no, and 6 of the jurors concurring may make answer to the interrogatory by the foreman.”

The question which is set forth above is contrary to the law of this case as decided by this court in its prior

opinion; is contrary to the evidence and is absolutely contrary to the defendants contention as set forth in their brief on this appeal.

In the first place, there was nothing in the evidence to indicate that "either one" of the defendants told the plaintiffs or their companions that they might sit on the platform. The evidence is conclusive that the defendant Downing was the only one of the defendants to give permission and as the court repeatedly stated in its instruction, before plaintiffs could recover they had to show permission and this matter is fully covered and particularly in Instruction No. 7. All through defendants brief they contend that the holding of this court in its prior opinion of this matter was that the plaintiffs must have "express permission" then in their special interrogatory they wanted the trial court to submit to the jury the question "Did either one of the defendants tell the plaintiffs or his companions." The question would, according to defendants if it had of been submitted to the jury, have been contrary to this court's prior decision in not using the phrase "express permission."

Instruction No. 7, and many instructions before, all told the jury that they must find permission before plaintiffs could recover. To have submitted the interrogatory as requested by defendants would not have added anything of value to the jury's verdict because the jury had to find permission before they could find for plaintiffs. As defendants contend, the jury of course, must find that permission was given before they could return a verdict for the plaintiffs and this was the controlling fact in the whole case.

The court emphasizing over and over again that permission was necessary was to the plaintiff's harm and to the defendant's advantage.

6. THE SUGGESTION BY WAY OF ARGUMENT OF AN ATTRACTIVE NUISANCE WAS PREJUDICIAL.

The defendants here contend that the conduct on the part of one of plaintiff's attorneys in arguing "that it was negligence on the part of the defendants to permit the opening on the wall known as the alcove, to remain there as an inducement for boys of the age of fourteen years or thereabouts to sit." It is the defendant's contention that this argument upon the part of counsel puts before the jury the doctrine of "attractive nuisance." The defendants rely upon the case of *Kerby vs. Oregon Short Line Railroad Company*, (Idaho) 264 Pacific 377. In that case the court held:

"An attorney should confine his arguments to the issues and the evidence adduced, and to inferences which can legitimately be drawn therefrom, and not go outside the record in an effort to prejudice the rights of the opposing party."

The remark by counsel certainly is a legitimate inference that can be drawn and adduced from the evidence in this case. Any platform or raise above the usual seats which would give a person sitting there a better view of the wrestling matches would certainly be an inducement to a person to want to sit there and particularly would it be an inducement to younger persons.

As was disclosed by the evidence in this matter, the platform was not only an inducement to plaintiffs but was to persons of mature ages.

The defendants further complain that the court should have instructed the jury that the matter suggested in counsel's argument was not an element in the case and that the jury should disregard it.

See what the court told the jury (Tr. 385) where the court stated to the jury that the issues in the case were set forth in the instructions and that the jury were the sole judges of the facts. What more could the court have told the jury? The doctrine of "attractive nuisance" was not involved in this case and the remark made by counsel for plaintiff does not raise the doctrine or attempt to bring the case at bar within it. It is merely a statement of an inference which could reasonably be drawn from the facts and especially in this case. There was nothing in the statement made by Mr. Tanner, one of the attorneys for plaintiffs, that would or could in any way mislead the jury. The defendants rely on the case of *Jensen vs. Utah Railway Company*, 72 Ut. 366, 270 Pac. 349, in which case the court held that counsel are required to accept the charge as given by the court and yield obedience to it and are not permitted to argue against it. There is nothing in the argument as made by Mr. Tanner which is against the instructions as given by the court and as was held in the case of *Kerby vs. Oregon Short Line* (supra) and which the defendants rely upon, an attorney is allowed to argue inferences which legitimately can be adduced from the evidence. As was

stated above, the platform or alcove being high above where the wrestling matches took place and being a perfect place to view the matches, would be an inducement to anyone to want to sit there, and this certainly is all that was meant in Mr. Tanner's argument.

We respectfully submit that the lower court did not err in any of the particulars as claimed by the defendants and that the verdict of the jury should be sustained.

Respectfully submitted

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