

1949

Maude Baker v. L. Jansen, dba Utah House Cleaning Company : ABrief of Respondent

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/uofu_sc1



Part of the [Law Commons](#)

Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errors.

Gustin & Richards; Brent T. Lynch, Jr.; Attorneys for Plaintiff and Respondent;

Recommended Citation

Brief of Respondent, *Baker v. Jansen*, No. 7239 (Utah Supreme Court, 1949).
https://digitalcommons.law.byu.edu/uofu_sc1/959

This Brief of Respondent is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs (pre-1965) by an authorized administrator of BYU Law Digital Commons. For more information, please contact hunterlawlibrary@byu.edu.

**IN THE SUPREME COURT
of the
STATE OF UTAH**

MAUDE BAKER,

Plaintiff and Respondent,

VS.

L. JANSEN, doing business as UTAH
HOUSE CLEANING COMPANY,

Defendant and Appellant.

RESPONDENT'S BRIEF

FILED

APR 6 - 1960

GUSTIN & RICHARDS,
BRENT T. LYNCH, JR.,

*Attorneys for Plaintiff
and Respondent.*

CLERK, SUPREME COURT, UTAH

INDEX

	Page
STATEMENT OF FACTS	1
ARGUMENT	2
1. The Court Was Correct in Overruling Defendant L. Jansen's General Demurrer to Plaintiff's Amended Complaint	3
2. The Defendant L. Jansen, or His Employees, Were Guilty of Negligence.....	7
3. The Doctrine of Assumption of Risk Is Not Applicable in This Case.....	9
4. The Plaintiff Was Not Guilty of Contributory Negligence as a Matter of Law.....	12
5. The Trial Court Correctly Instructed the Jury as to the Theory and Law of the Case.....	14
6. The Trial Court Did Not Err in Giving Instruction Number 4, Nor Did the Court Err in Instructing the Jury Orally and Then Striking a Part Thereof from Said Written Instruction	17
CONCLUSION	18

TABLE OF CITATIONS

Furkovich v. Bingham Coal & Lumber Co., 45 Utah 89, 143 Pac. 121.....	8
Horne v. Neill, 70 Georgia Appeals 602, 29 S. E. 2d 275.....	9
Kuchenmeister v. Los Angeles & S. L. R. Co., 62 Utah 116, 172 Pac. 725	12
Moore v. Miles, 108 Utah 167, 158 Pac. (2d) 676.....	5
Soule v. Weatherby, et al., 39 Utah 580, 118 Pac. 833.....	4
Sutton v. Otis Elevator Co., 68 Utah 85, 249 Pac. 437.....	16

TEXTS

38 Am. Jur. Section 173, p. 847.....	12
--------------------------------------	----

IN THE SUPREME COURT of the STATE OF UTAH

MAUDE BAKER,

Plaintiff and Respondent,

vs.

L. JANSEN, doing business as UTAH
HOUSE CLEANING COMPANY,

Defendant and Appellant.

Case No.
7239

RESPONDENT'S BRIEF

STATEMENT OF FACTS

Plaintiff, in addition to the Statement of Facts set forth in appellant's brief, submits the following facts:

The plaintiff and respondent in this action is a woman 71 years of age (Tr. p. 107). There is conflict in the evidence as to the condition of the hallway on the morning of the accident. The defendant claims that the hallway was blocked off so that no one could go through the passageway without climbing over the obstruction or moving them (Tr. pp. 123, 132, 139). De-

defendant introduced photographic exhibits 1 through 4 as illustrative of the condition of the hall at the time of the accident. These photographs were taken approximately a week before the trial (Tr. pp. 116-120). Plaintiff's testimony tells a different story as to the condition of the hall and according to her evidence and that of her son, who entered the building immediately after the accident, no such blockade existed and there was plenty of room to walk down the hall (Tr. pp. 96, 100, 191). The plaintiff does not remember observing any burning light hanging from an extension cord directly above the table (Tr. p. 97). There is also conflict in the evidence regarding the position of the drop cloth or canvas used by the defendant, the defendant stating that the canvas had been folded neatly and placed under the table out of the way (Tr. pp. 113, 114). Plaintiff's testimony indicates the drop cloth extended into the passageway in the hall and was ruffled and uneven (Tr. pp. 95, 190).

ARGUMENT

Plaintiff's argument will be divided under the following headings:

1. The court was correct in overruling defendant L. Jansen's general demurrer to plaintiff's amended complaint.
2. The defendant L. Jansen, or his employees, were guilty of negligence.
3. The doctrine of assumption of risk is not applicable in this case.

4. The plaintiff was not guilty of contributory negligence as a matter of law.

5. The trial court correctly instructed the jury as to the theory and law of the case.

6. The trial court did not err in giving instruction Number 4, nor did the court err in instructing the jury orally and then striking a part thereof from said written instruction.

1. THE COURT WAS CORRECT IN OVERRULING DEFENDANT L. JANSEN'S GENERAL DEMURRER TO PLAINTIFF'S AMENDED COMPLAINT.

Plaintiff alleged in her amended complaint that she was a tenant in the apartment house where Jansen was performing certain work and services; that the defendant in performing such services negligently laid or permitted the cloth and covering on the floor to become ruffled and uneven so that people traversing said hallway might catch their feet in the same and fall; that he permitted his tools to be strewn in the hallway so that it would be a hazard to the people walking down said hallway; that he failed to notify individuals using the hall that they should not walk along said passageway, and that he failed to place any barricade to warn people not to walk along said passageway. From these facts it is clear that plaintiff was entitled to use said hallway, and that the defendant owed a duty to her and the other tenants of the apartment house to keep the hallway in

such a condition that it could be traversed in safety or to have blocked the same off so that it could not be used.

Plaintiff further alleges in her amended complaint, that by reason of the negligent acts of defendant, and she being unaware that the hallway should not be used, she proceeded along the same, caught her foot in the cloth, stumbled and was injured. As the court has stated in the case of *Soule v. Weatherby, et al.*, 39 Utah 580, 118 Pac. 833:

“* * * * It is fundamental that, in order to state a good cause of action in any kind of a case, it must be made to appear from the face of the complaint, either by direct allegation or by necessary or unavoidable inference from the facts stated, that there is a primary legal right in the plaintiff, a primary legal duty connected with such right resting on the defendant, and a breach of such duty. When these allegations are supplemented by a statement of the amount claimed and a prayer for judgment, which are formal matters merely, a complete cause as well as right of action is stated upon which the plaintiff is entitled to relief in accordance with the rules of practice and the substantive law relating to the subject-matter.”

The plaintiff in this case has clearly come within these rules.

Defendant states in his brief at page 10 thereof:

“If the complaint could be construed to allege a hazardous condition, plaintiff cannot be heard to say that she was unaware of such con-

dition when it was open and obvious, and she does not allege facts showing a reason for her inability to observe it. It is further apparent that plaintiff did not have to subject herself to the alleged hazard, for, as she states, there was a stairway leading to the first floor at each end of the hallway and plaintiff does not allege that the hallway was hazardous in all of the directions available to her.”

By the above statement defendant has tried to place a strained interpretation upon plaintiff’s amended complaint, but even under defendant’s construction the complaint states a cause of action and does not show contributory negligence as a matter of law. In the case of *Moore v. Miles*, 108 Utah 167, 158 Pac. (2d) 676, this Court held that the question of contributory negligence was properly submitted to the jury. In the *Miles* case plaintiff testified that the west end of the hall was so dark that she could not see the stairs and that as she was walking slowly and feeling ahead with her feet she lost her balance at the first step and fell down the short flight of steps to the doorway. In the *Miles* case there was also another stairway which could have been used. The Court in this regard stated:

“But defendant argues that since plaintiff had a choice of going down the stairway into the lobby, which admittedly was well lighted, or down the west stairway, to the parking lot which plaintiff testified was dark, she was negligent as a matter of law because she chose the unsafe route.”

“A similar situation was presented to the court in *Williams v. City of New York*, 214 N. Y. 259, 108 N.E. 448, 449, and it was there said:

‘Another point urged against the plaintiff grows out of his conduct on the occasion of the accident. He had slipped down on the sidewalk just before he fell the second time and broke his leg. He pursued his way along the icy sidewalk instead of crossing the street to a sidewalk which was entirely clear. This, it is said, was contributory negligence, not merely justifying, but requiring, the nonsuit. It may have been contributory negligence, as a matter of fact, but we think it was a question for the jury. In *Twogood v. Mayor etc.*, of New York, 102 N. Y. 216, 6 N. E. 275, it was held to be a question for the jury whether a plaintiff was chargeable with contributory negligence in venturing upon a walk in an icy condition when she might have avoided all danger by going upon the walk on the other side of the street which was clear and safe.’

In the face of such facts, the court still held in the *Williams* case that the question of contributory negligence was for the jury. A similar case is *Tillotson v. City of Davenport*, 232 Iowa 44, 4 N.W. 2d 365, 366, where the court likewise held that the question of contributory negligence was for the jury. The court said:

‘It is well settled that mere knowledge that a walk is dangerous, unsafe for travel, is not sufficient to establish contributory negligence though there is another way that is safe and convenient, and to defeat recovery it must appear that the traveler knew or as an ordinarily cautious person should have known that it was imprudent to use the walk. *Templin v. City of*

Boone, 127 Iowa 91, 102 N.W. 789; Reynolds v. City of Centerville, 151 Iowa 19, 129 N.W. 949; Gibson v. City of Denison, 153 Iowa 320, 133 N.W. 712, 38 L.R.A., N.S., 644; Travers v. City of Emmetsburg, 190 Iowa 717, 180 N.W. 753; Lundy v. City of Ames, 202 Iowa 100, 209 N.W. 427; Franks v. Sioux City, 229 Iowa 1097, 296 N.W. 224.'

In view of the foregoing authorities, and the long established rule in this jurisdiction, that contributory negligence is a question for a jury, we hold that the issue of contributory negligence was properly submitted to the jury by the trial court."

The condition of the hallway, to the plaintiff in the case at bar, was not more apparent than the darkness of the hall in the Miles case, or the ice on the sidewalk in the Williams case, nor is it the duty of plaintiff to negative contributory negligence in her pleading.

2. THE DEFENDANT L. JANSEN, OR HIS EMPLOYEES, WERE GUILTY OF NEGLIGENCE.

The defendant was bound to use ordinary care in conducting his work to prevent injury from occurring to the plaintiff. Plaintiff as a tenant had a right to the access of this hallway and it was the defendant's duty to either close off the area in which he was working or to keep the passage reasonably safe for the plaintiff while she was using the hall.

The test of the defendant's liability for such negligence is set out in *Furkovich v. Bingham Coal & Lumber Co.*, 45 Utah 89, 143 Pac. 121:

“ ‘But the test of liability is not whether, by the exercise of ordinary prudence, the defendant could or could not have foreseen the precise form in which the injury actually resulted, but he must be held for anything which, after the injury is complete, appears to have been a natural and probable consequence of his act. If the act is one which the party, in the exercise of ordinary care, could have anticipated as likely to result in injury, then he is liable for any injury actually resulting from it, although he could not have anticipated the particular injury which did occur.’ ”

The court further states:

“Where a dangerous condition is easily obviated or rendered harmless, a failure to do one or the other may be considered in determining the question of negligence.”

In this case defendant Jansen could have seen that the drop cloth was smoothly laid so that people traversing the hall would not catch their heels, or that his equipment was properly out of the way, or he could have completely blocked off the hall so that the same could not have been used by the tenants. The defendant is answerable for any foreseeable injury that might occur to tenants using the hallway as a result of the placing of equipment, in failing to keep the drop cloth properly

laid so that it would not become ruffled and uneven, or in failing to take ordinary precautions to keep the tenants from using the particular area. The trial court clearly instructed the jury upon this point in its instruction Number 5 (Tr. p. 32).

The conflict of evidence as to whether or not the defendant did in fact barricade the hallway and place his equipment as he claims, or whether the passageway was left open and the drop cloth or canvas was permitted to extend into the hall in an improper and dangerous condition was properly submitted to the jury and they, as the triers of the fact, believed the plaintiff, and this finding becomes the ultimate fact in this case.

3. THE DOCTRINE OF ASSUMPTION OF RISK IS NOT APPLICABLE IN THIS CASE.

As a general rule the doctrine of assumption of risk is not applicable in a case arising from a tort, but is applied in cases of contract and, particularly, under the Workmens' Compensation Act. This doctrine is well stated in the case of *Horne v. Neill*, 70 Georgia Appeals, 602, 29 S.E. 2d 275, wherein the court states as follows:

“This court held in *Brown v. Rome Machine & Foundry Co.*, 5 Ga. App. 142, 152, 62 S.E. 720, 725: ‘We hope that we have made it clear that assumption of risk is a defense which arises only from the contract that creates the relationship essential to the duty upon the breach of which the plaintiff’s cause of action rests. Theoretically speaking, contributory negligence has no different meaning in actions by the servant

against the master from that which it universally has in suits based on torts. These foundations of liability and of defense, when reduced to final analysis, are but phases of well-recognized common-law principles. If we bear in mind that assumption of risk finds its origin in the law of contract and is governed by the usual canons of construction applicable in the field of contract law, and that contributory negligence finds its origin in the law of torts and is governed by its cardinal canons, and that both defenses may arise from the same set of circumstances, though they do not necessarily do so, we ought to be able to deal with them without confusion.' 'Therefore we are confirmed in our opinion that under the facts of this case the court committed no error in failing to give in charge to the jury the law of assumption of risk as the defendant contends.'"

The defendant did not plead the defense of assumption of risk. Defendant contends that it was not necessary to plead assumption of risk because the elements thereof were proven by plaintiff in her own case. In this connection defendant has quoted from the evidence at great length, both under Point II and Point III in his brief. The plaintiff testified:

- "Q. But it was west of the table so it left a very narrow passageway for you to get between the bucket and the table. Is that correct?
- A. Well, it didn't obstruct the passageway. There was plenty of room. I had no thought of not being able to get through. The walk was wide enough to go through.
- Q. You thought it was wide enough to get through?

A. Oh, there wasn't anything to make me feel that there was no room to get by because there was room to get by (Tr. pp. 96, 97).

* * * *

Q. Mrs. Baker, you said the canvas wasn't folded like it is shown in the Exhibit 1 which Mr. Richards showed you. Is that correct?

A. That's right, it wasn't folded like that.

Q. Did you observe whether it was folded at all?

A. Well, I couldn't say as to that. I know it wasn't smooth, and I had to step over it. It was uneven, and I felt that it was bunched at the end of the table, though, just crumpled up and bunched there, and I did step over with my left foot and caught my right heel in it, and it was held down by the table and didn't give, and it threw me down.

Q. And you observed that condition before you stepped over—

A. I did.

Q. —with your left foot?

A. *Well, I was walking right along the hallway on my way out to go to work as I always do, and I had no hesitancy about it because it seemed perfectly all right, I could step over that.* (Tr. pp. 190, 191).'' (Italics ours)

From the testimony it is apparent that plaintiff did not appreciate any danger or extraordinary hazard in traversing the hallway. For the doctrine of assumption of risk to be applicable, one must have knowledge and appreciation of the danger.

It is stated in 38 *Am. Jur.* p. 847, Sec. 173, "Knowledge and appreciation of the danger is an essential of the defense of assumption of risk." Likewise, in the case of *Kuchenmeister v. Los Angeles & S. L. R. Co.*, 52 Utah 116, 172 P. 725, at page 729, the court states:

"The distinction is also very intelligently discussed and clearly stated by the author in 3 *Labatt Mast. & Serv. Sec.* 1219 et seq. The fundamental element in assumption of risk, where it is not assumed as a matter of contract, as stated in the foregoing quotation, is 'intelligent choice'; that is, the employe, before he may be charged with having assumed the risk, must not only have fully understood and appreciated the danger, but he, in the very face of the danger, must, voluntarily, have assumed the risk of injury. Nothing short of that constitutes intelligent choice."

Neither under the pleadings nor the evidence was defendant entitled to an instruction involving the question of assumption of risk. The defendant also failed to submit to the court a proper request for this defense even if it was proper under the pleadings and the facts of the case. This question we will discuss under our heading number 5.

4. THE PLAINTIFF WAS NOT GUILTY OF CONTRIBUTORY NEGLIGENCE AS A MATTER OF LAW.

Defendant contends that if he was negligent and the passageway was hazardous, the plaintiff was guilty of contributory negligence in failing to have observed the

condition. Plaintiff did testify that she noticed that the cleaning had been started in the hall and that the canvas was rumpled at the end (Tr. p. 93). There is no evidence that after observing these facts she carelessly hurried down the hall or failed to proceed with caution (Tr. p. 190). The only other claim is that there was another exit available, which plaintiff failed to take. This court in the case of *Moore v. Miles*, supra, held that such facts do not constitute contributory negligence as a matter of law, and the question of contributory negligence should be submitted to the jury.

“The next question for consideration is whether plaintiff was guilty of contributory negligence as a matter of law in proceeding down the darkened hallway knowing that the stairway was at the end thereof. In this jurisdiction we are committed to the doctrine that the question of contributory negligence is one for the jury, where as said in *Carpenter v. Syrett*, 99 Utah 208, 104 P. 2d 617, 619, ‘different conclusions may be reasonably drawn by different minds from the same evidence * * *.’ See also, *Olsen v. Hayden Holding Co.*, supra; *Jensen v. Logan City*, 89 Utah 347, 57 P. 2d 708; *Shortino v. Salt Lake & Utah R. R. Co.*, 52 Utah 476, 174 P. 860; *Larkin v. Saltair Beach Co.*, 30 Utah 86, 83 P. 686, 3 L.R.A., N.S., 983, 116 Am. St. Rep. 818; *Hone v. Mammoth Min. Co.*, 27 Utah 168, 75 P. 381; *Smith v. Rio Grande Western Ry. Co.*, 9 Utah 141, 33 P. 626. And from other jurisdictions *L’Heureux v. Hurley*, 117 Conn. 347, 168 A. 8; *Sodekson v. Lynch*, 314 Mass. 161, 49 N.E. 2d 901; *Armstrong v. Yakima Hotel Co.*, 75 Wash. 477, 135 P. 233.”

5. THE TRIAL COURT CORRECTLY INSTRUCTED THE JURY AS TO THE THEORY AND LAW OF THE CASE.

Defendant claims that the court fully instructed the jury as to plaintiff's theory of the case but failed to instruct the jury on defendant's theory of the case as requested. It is true that the court did instruct the jury in accordance with plaintiff's pleadings and, as we contend, in accordance with the evidence introduced. What was defendant's theory? From the pleading there are no specific grounds of contributory negligence alleged, nor did he plead the defense of assumption of risk. The court fully instructed on the question of contributory negligence by its instructions numbers 5, 6 and 8 (Tr. pp. 32-33). Defendant then contends that the court committed error because it did not give defendant's requested instructions numbers 6, 8 and 9. The court was justified in refusing to give instruction number 6 because that instruction does not state the law. The instruction reads as follows:

“You are instructed that Mrs. Baker in traversing the hallway of the apartment was not relieved of the necessity of exercising ordinary care for her own safety. If you find that the defendant's equipment was placed in the hallway in such a manner that it constituted a hazard which plaintiff under the circumstances should have observed and that plaintiff, notwithstanding the fact that other exits were available to her, proceeded to take the hazardous course, then you must find that she assumed the risk of any

injury which she sustained and your verdict shall be in favor of the defendant Jansen, no cause of action.” (Tr. p. 45).

This instruction is erroneous even if the evidence and pleadings were such as to permit it, which we contend they were not, for by the instruction the jury was instructed that if plaintiff observed that the hallway was hazardous and she still continued to take the hazardous course rather than another exit which was available to her their verdict must be in favor of the defendant. Under the law, if the principle of assumption of risk was involved in this case, the question should have been left to the jury to determine whether or not she assumed the risk by going over the hazardous passageway rather than using one of the other exits. Likewise in defendant’s requested instruction number 8 which is as follows:

“If you find that the defendant’s equipment was placed in the hallway in such a manner that it constituted a hazard and that plaintiff observed, or in the exercise of ordinary care should have observed such hazard, then you are instructed that plaintiff was negligent in not taking either the east or south stairways which were available to her and your verdict shall be against the plaintiff and in favor of the defendant Jansen, no cause of action.” (Tr. p. 47).

the jury was instructed that plaintiff was negligent in not taking either the east or south stairways which were available and that the verdict should be against her. This is the very question that should have been

left to the jury to determine. As stated in the case of *Moore v. Miles*, supra, this court held that it was not negligence as a matter of law for the plaintiff to have proceeded down the dark hall, but it was for the jury to determine whether an ordinarily cautious person should have known that it was imprudent to have chosen the unsafe route when another and well lighted stairway was available.

There was no instruction requested by the defendant that would have submitted to the jury the question whether it was negligence for plaintiff to proceed along the hallway to the front stairs rather than to take either the side or back stairs to the next floor. A party cannot claim that the jury was not properly instructed upon a point in question unless the party makes a request to the court for such an instruction, or excepts to the court's failure to instruct on the particular point. *Sutton v. Otis Elevator Co.*, 68 Utah 85, 249 Pac. 437.

Defendant's requested instruction number 9 (Tr. p. 48) was given in part by the court's instructions numbers 5 and 6 (Tr. p. 32). There is no evidence to support the contention that plaintiff was negligent in the manner in which she passed or attempted to pass by or over the equipment, and the court was justified in not including that element in its instructions to the jury. The court did instruct the jury in its instructions numbers 5 and 6 that plaintiff must use ordinary care for her own safety before she was entitled to recover, and then instruction number 8 clearly defined "ordinary care".

6. THE TRIAL COURT DID NOT ERR IN GIVING INSTRUCTION NUMBER 4, NOR DID THE COURT ERR IN INSTRUCTING THE JURY ORALLY AND THEN STRIKING A PART THEREOF FROM SAID WRITTEN INSTRUCTION.

Instruction number 4 as originally given to the jury is set out at length on page 47 of defendant's brief. After the court had read the instructions to the jury and the jury had retired to deliberate (Tr. p. 197), the defendant excepted to instruction number 4 and the whole thereof, "and particularly orally instructing the jury at the end of the said instruction", as indicated in the portion of the instruction number 4 italicized (Tr. p. 198). The record is not clear as to what the defendant meant in his exception by the court having "orally" instructed the jury at the end of said instruction number 4, but when the exception was taken, the court offered to recall the jury and to read instruction number 4 "as deleted" (Tr. p. 198). This offer was refused by the defendant (Tr. p. 199). Instruction number 4 (Tr. p. 32) shows that ink lines were drawn through the italicized portion of the instruction as it is quoted on page 47 of defendants' brief, and this was apparently done after the court had read the entire instruction to the jury, but before handing the instructions to the bailiff for delivery to the jury in the jury room, as the court state, "I thought it would be better not to reread it to them, thereby giving emphasis to it. I struck it from the written one, but if you desire at this time I will recall the

jury and read that to them as it is now written.” (Tr. p. 198).

Defendant now complains about instruction number 4 chiefly on the ground that the instruction indicates absolute liability when considered without the portion deleted by the court. We submit that the instruction as originally written was entirely proper and that where the defendant has particularized in connection with his exception and the court having acted in response thereto, he cannot be heard to complain about the instruction construed without the portion deleted. But, in any event, we do not subscribe to the contention that the instruction as finally given can be construed as defendant claims. The word “if” is used in the instruction and when given full meaning leaves to the jury the determination of whether or not the defendant was negligent as claimed.

CONCLUSION

There being no prejudicial error, the verdict of the jury and the judgment entered thereon should be affirmed.

Respectfully submitted,

GUSTIN & RICHARDS,

BRENT T. LYNCH, JR.

Attorneys for Respondent.