

1958

Ruth Ethel Drury Marshall et al v. George T. Tayler : Brief of Appellant

Utah Supreme Court

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Recommended Citation

Brief of Appellant, *Marshall v. Tayler*, No. 8792 (Utah Supreme Court, 1958).
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IN THE SUPREME COURT
of the
STATE OF UTAH

FILED

APR 11 1958

RUTH ETHEL DRURY
MARSHALL, et al.,

Plaintiff and Respondents,

vs.

GEORGE T. TAYLER,

Defendant and Appellant.

Clerk, Supreme Court, Utah

Case No. 8792

BRIEF OF APPELLANT

HANSON, BALDWIN AND ALLEN,
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BRIEF OF APPELLANT

STATEMENT OF THE CASE

Ruth Ethel Drury Marshall brought action against the defendant, George T. Tayler, sounding in tort; Fern Drury Tayler through intervention sought recovery for personal injuries to herself resulting from the same alleged tortious act of the defendant.

Fern Drury Tayler was during all times with which we are here concerned the *wife* of the defendant.

From an adverse verdict in the Court below

defendant brings his cause to this Honorable Court on appeal.

STATEMENT OF FACTS

We will be concerned here with five principal persons: (1) the wife, Fern Drury Tayler; (2) the wife's sister, Ruth Drury Marshall; (3) the wife's sister's husband, Leland Marshall; (4) the wife's mother, Ethel G. Drury; (5) the defendant, George T. Tayler. For purpose of clarity we shall refer to them in this brief as the wife, sister, brother-in-law, mother and defendant.

The wife testified that she and defendant were married at Gallup, New Mexico on March 2, 1951; (Tr. 152), that she lived with him as man and wife for five years (Tr. 153). However, the wife lived at the home of her folks while the defendant occupied a hotel room whereat she said she saw him from the time she got off work until late at night. (Tr. 154). She visited with him almost nightly during the five year period but she never did attempt to establish a residence for herself and defendant (Tr. 154); although at one time he had an apartment (Tr. 154). The wife had never had an altercation with the defendant (Tr. 155), and she knew that the defendant always evaded anything unpleasant (Tr. 158).

At a family gathering sometime near the

middle of August, 1956, there was an altercation and certain remarks made for which the defendant was chastised by the sister and the mother and thereupon the defendant "opened the door and walked out." (Tr. 176, 177, 178). The defendant had a reputation for being one to evade unpleasantness (Tr. 158; lines 6, 7, 8, Tr. 281; Tr. 274; Tr. 141). Defendant thereafter went to Grand County to establish residence and secure a divorce (Tr. 168). We make the above recitation for the purpose of acquainting this Court with the relationship as it existed between the wife and the defendant.

The following facts go directly to the issue.

On September 11, 1956, the wife, sister, brother-in-law, and the mother left Salt Lake City in the brother-in-law's automobile at about 7:00 p.m. (Tr. 111). Their destination was either Thompson or Moab, Utah (Tr. 111); they were looking for the defendant (Tr. 139). The party arrived at Thompson sometime between twelve and twelve-thirty midnight (Tr. 112). Defendant's car was parked at a motel there (Tr. 112). The party registered into a unit at the motel (Tr. 112).

Before retiring and at that late hour the wife and the brother-in-law went to the defendant's motel unit, tried the screen door which was locked, called to the defendant and attempted to have a conversation with him. They received no response from

defendant. Plaintiff's testimony and that of their witnesses was to the effect that no commotion was occasioned during this attempted interview with defendant. Failing their purpose the party then retired for the night, the wife, sister and mother to the motel unit, the brother-in-law to a bed made down in his station wagon. The brother-in-law removed only his shoes and laid on top of the covers (Tr. 113-119). The defendant testified that he saw from his room the brother-in-law's car drive up to the motel; that the wife and brother-in-law pounded on his door and tried to break it down and caused considerable disturbance for some thirty minutes (Tr. 292, 293), which male occupants of another unit complained of the terrible noise being carried on (Tr. 293).

Defendant then waited in his motel until 2 or 2:15 A.M. and at that time when a truck was passing by went from his room to his car; entered the car, locked the doors and started the motor (Tr. 293, 294).

The plaintiffs, who had disrobed only to the extent of removing dresses, shoes and stockings, were awakened by a door slamming (Tr. 159): they arose and ran out to defendant's car. The wife ran to the left side and called to the brother-in-law (Tr. 160). The sister ran to the right side (Tr. 260). The wife took ahold of the door handle on

the left side (Tr. 161); the sister took ahold of the door handle on the right side (Tr. 260). Both plaintiffs testified that they spoke to the defendant at this time but that the defendant did not answer them (Tr. 161 and 260, 261). The defendant testified that he asked both women to get off the car (Tr. 350).

The defendant backed his car up to obtain clearance and then drove forward through the gas station onto the highway. There is some testimony in the record [denied by defendant] that he “weaved” the car when backing and there is a conflict in the evidence as to the speed at which defendant drove away. Both plaintiffs fell or were thrown to the ground and were injured.

Plaintiffs’ complaints allege the act of defendant was willful and intentional and the pre-trial order limited the issue to an intentional injury (Tr. 12). However, plaintiffs abandoned the theory of intentional injury and ill will (Tr. 155, 156) and at the trial’s conclusion the Court, over defendant’s objection, granted plaintiffs’ motion to amend the pre-trial order to include negligence (Tr. 371). The pre-trial judge had earlier denied such motion (Tr. 26) as had the trial judge (Tr. 27, 28).

We think this to be a fair statement of the case sufficient for the purposes of this appeal.

STATEMENT OF POINTS

POINT I.

PLAINTIFFS HAVING PLACED THEMSELVES IN A POSITION OF PERIL ASSUMED THE RISK OF INJURY.

POINT II.

PLAINTIFFS TRESPASSED UPON DEFENDANT'S MOTOR VEHICLE AND DEFENDANT OWED PLAINTIFFS ONLY THE DUTY OF NOT WILLFULLY OR WANTONLY INJURING THEM.

POINT III.

THE COURT ERRED IN REFUSING DEFENDANT'S MOTION FOR DIRECTED VERDICT OF NO CAUSE OF ACTION.

POINT IV.

THE COURT ERRED IN GRANTING PLAINTIFF'S MOTION TO SUBMIT THE ISSUE OF ORDINARY NEGLIGENCE TO THE JURY.

POINT V.

A WIFE HAS NO CAUSE OF ACTION AGAINST HER HUSBAND FOR A NON-INTENTIONAL INJURY INFLICTED BY THE HUSBAND DURING COVERTURE.

ARGUMENT

POINT I.

PLAINTIFFS HAVING PLACED THEMSELVES IN A POSITION OF PERIL ASSUMED THE RISK OF INJURY.

When a plaintiff brings himself within the operation of the maxim, *volenti non fit injuria*, he

cannot recover. *Westborough Country Club v. Palmer*, C.A. Mo., 204 F.2d 143. In *Smith v. Mining Company*, 27 Utah 307, 325, 75 Pac. 749, this Court said:

“Mr. Thompson, in his Commentaries on the law of Negligence, vol. 1, sec. 185, says: ‘Where a person, by his own deliberate act, brings an injury upon himself, he can not make it the ground of recovering damages against another, where he is not impelled thereto by some imminent danger, or by some exciting or exasperating circumstances, for which that other is responsible. The principle that a person can not make his own wrong or his voluntary act, whether wrongful or not, the ground of recovering damages from another, has found an expression in the maxim, “Volenti non fit injuria.”’ ”

The applicability of the doctrine of assumption of risk is based upon the knowledge and appreciation of a danger and the voluntary occupation of a position of danger in disregard of the use of ordinary care.

There is no conflict in the evidence to the fact that plaintiffs ran, one to each side of defendant's automobile, and held on to the door handles thereof. The wife on the left side (Tr. 161); the sister, on the right side (Tr. 260). The plaintiffs must have had knowledge of the danger and certainly they voluntarily exposed themselves to it. The facts in this case meet every test laid down by this Court

in *Clay v. Dunford*, 121 Utah 177, 239 P.2d 1075, for the application of the doctrine of assumption of risk. In *Clay v. Dunford* this Court said:

“The defense of assumption of risk as a legal concept requires that the plaintiff must have looked, must have seen and must have known of a danger, voluntarily subjecting himself thereto and consenting that if injury result, he who may have negligently exposed him thereto should be relieved of any liability therefor. It has been said that ‘knowledge of the risk is the watchword of * * * assumption of risk’”. * * *

POINT II.

PLAINTIFFS TRESPASSED UPON DEFENDANT’S MOTOR VEHICLE AND DEFENDANT OWED PLAINTIFFS ONLY THE DUTY OF NOT WILLFULLY OR WANTONLY INJURING THEM.

Plaintiffs trespassed upon defendant’s automobile — this fact cannot be disputed. “Under ordinary circumstances there is no liability for injury to trespassers whether the trespass is committed on land or on personal property.” 65 *C.J.S.*, Negligence, Sec. 24, p. 440. “A motorist owes no duty to a trespasser whose presence is unknown; and, *when the trespasser’s presence is known, the operator owes him only the duty not willfully or wantonly to injure him.*” (Emphasis ours). 60 *C.J.S.*, Motor Vehicles, Sec. 401, p. 1020.

We direct the Court’s attention to the special

verdicts in these causes wherein the jury found defendant negligent in not using due care (Tr. 83, 86). For a discussion of the accepted meanings of "willfulness and wantonness" see the remarks of Mr. Justice Straup, in *Jensen v. Denver and R.G.R. Co.*, 44 Utah 100, 138 P. 1185, 1188, 1189. Under a somewhat similar fact situation to the cause at bar, *Byers v. Gunn*, Florida, 81 So.2d 723, that Court declared that where a girl sat on an automobile fender after being refused admittance into the automobile by friend, and the friend started to drive off, and the girl fell off the fender and was hurt, girl's status at time was that of trespasser. The defendant in this cause locked the car doors and thus refused plaintiff's admittance to his automobile. While persisting to attach themselves to the automobile, plaintiffs trespassed. Viewing the facts in this case in a light most favorable to the plaintiffs, we respectfully contend that there is no showing of willfulness or wantonness on the part of the defendant such as would support the verdict in plaintiffs' favor.

"The demarcation between ordinary negligence, and willful and wanton disregard, is that in the latter the actor was fully aware of the danger and should have realized its probable consequences, yet deliberately avoided all precaution to prevent disaster. A failure to act in prevention of accident is but simple negligence; a mentally active restraint from

such action is willful. Omitting to weigh consequences is simple negligence; refusing to weigh them is willful. *Performance of a dangerous act willfully, under certain circumstances, as in an emergency, is permissible, and will not subject the actor to liability * * ** (Emphasis ours)."

Pettingell v. Molde (Colo. 1954), 271 P.2d 1038, 1042.

The Court's attention is directed to the following colloquy between the trial judge and counsel for plaintiffs:

The Court: If you want to show he had an ill will toward them and hurt them intentionally, you can go into that. * * *

Mr. Cassity: I do not intend to show he had any ill will Your Honor.

POINT III.

THE COURT ERRED IN REFUSING DEFENDANT'S MOTION FOR DIRECTED VERDICT OF NO CAUSE OF ACTION.

At the conclusion of the trial the defendant made the following motion to the Court:

MR. HANSON: Comes now the defendant and moves the Court to direct a verdict of no cause of action in favor of the defendant and against both of the plaintiffs on the following grounds:

(1) That the evidence conclusively shows, as a matter of law, that the plaintiffs in seizing the defendant's car, committed an assault upon him, and that his actions there-

after were motivated solely by the desire to escape plaintiffs and their associate Marshall, and the evidence conclusively shows that in attempting to escape, the defendant did not use unreasonable force.

(2) That if plaintiffs' action in seizing the door handles to the defendant's car, did not amount to an assault upon the defendant, then their status, in seizing the handles of said car, was that of trespassers, and the defendant's only duty toward them was not to wilfully injure them; that the evidence is conclusive that he did not attempt to, or did not wilfully injure them, but that his actions were motivated solely by the desire to escape a possible harm or danger to himself.

The evidence also conclusively shows that the plaintiffs could have released the handles of his car any time after it started to move, and thereby could have avoided further danger or injury to themselves.

That if the case was submitted to the jury on negligence we contend the only issue that could possibly be here, was that of intentional acts on the part of the plaintiffs, in seizing and clinging to the car, but if submitted to the jury on negligence, it is the contention of the defendant, that plaintiffs were contributorily negligent, as a matter of law, in failing to release the handles of the car, and, further, that they assumed the risk, as a matter of law, in continuing to hold on to said door handles until they were forced to release it, by the movement of the car, or the actual driving of the car by defendant. [Tr. 369, 370].

The Court denied the motion (Tr. 370). The evidence conclusively shows [there is no conflict] plaintiffs assumed the risk of injury to themselves as a matter of law; and, plaintiffs were contributorily negligent as a matter of law. Plaintiffs readily admit that they voluntarily attached themselves to defendant's automobile by seizing onto the door handles on each side of the vehicle. Each plaintiff could have avoided injury to herself by (a) not taking hold of the door handle: (b) by releasing her hold.

“It has been a rule of law from time immemorial, and is not likely to be changed in all time to come, that there can be no recovery for an injury caused by the mutual default of both parties. When it can be shown that it would not have happened except for the culpable negligence of the party injured, concurring with that of the other party, no action can be maintained.” 1 *Thomp. Comm. Neg.* section 186; *Wharton, Neg.* Section 73; 2 *Jaggard on Torts*, 960; *Ray, Neg. Imp. Dut. Pass.* 669, 670.

Railroad Co. v. Aspell, 23 Pa. St. 147, 62 Am. Dec. 323; *Smith v. Mining Co.* (1904), 27 Utah 307, 325, 75 Pac. 749.

In this case the jury found that defendant was guilty of negligence in the operation of his automobile and they charged defendant with all the consequences of the accident regardless of plaintiff's conduct. That they had no right to do. If plaintiffs

had exercised that ordinary care, prudence, and foresight which the law requires of everyone for their own safety, the accident could not have happened.

“A plaintiff who does not observe the standards of due care the law imposes upon him cannot recover.” [*Jensen v. Logan City*, 89 Utah 347, 57 P.2d 78; *Pollari v. Salt Lake City*, 111 Utah 25, 176 P.2d 111.]

The facts of this case bring it within the rule stated by this Court in *Cooper v. Evans*, 1 Utah 2d 68, 262 P.2d 278:

“Contributory negligence would * * * be a question of law where the evidence showed, with such certainty that reasonable minds could not differ thereon, that the conduct in question * * * failed to meet the standard of due care.”

There is no conflict in the evidence that the car first backed up (Tr. 120, 121), stopped (Tr. 121, 122), then went forward (Tr. 122); that the plaintiffs fell from the car *after* it proceeded forward (Tr. 162, 263). Common knowledge and experience tells us that there had to be a period of time when, after backing, the car was immobile and that plaintiffs could have released their holds while the car was standing still.

In *Morris v. Farnsworth Motel*, 123 Utah 289, 259 P. 2d 297, this Court said, in part:

“* * * Dr. Morris appears to be confronted with two horns of a dilemma, either (a) the room was sufficiently lighted so that

he could and should by the exercise of ordinary, reasonable care and observation for his own safety see the chair and avoid walking into it, or (b) the room, or the portion thereof in question, was so dark that he could not see an object such as a chair, in which event due care would have required him to turn on a light.

“As to alternative (a), the statement of the proposition answers itself. An object the size of a chair is something which one using ordinary care ought to see; and that he should heed it, the Doctor’s unfortunate experience painfully demonstrated. * * *

“* * * But upon mature reflection, rational minds will be of one accord as to where the responsibility lies. Whether Dr. Morris chooses alternative (a) above, that the room was light, or (b) that it, or a portion thereof, was dark, we see no escape for him: we believe all reasonable minds would conclude that he was guilty of contributory negligence.

* * * although we are sensitive of the duty of courts to safeguard the rights of citizens to have grievances fully tried on the merits to courts and juries under proper circumstances, this does not lead to the necessity or desirability of such submission where, taking the evidence and all fair inferences therefrom most favorable to a plaintiff, all reasonable minds must yet conclude that his own lack of due care proximately contributed to cause his injury. * * *

The facts in the instant case, it appears to the writer, point to an even more clear case of con-

tributory negligence on the part of plaintiffs here.

In *Wold v. Ogden City*, 123 Utah 270, 258 P.2d 453, the plaintiff exposed himself to an obvious danger, this Court declared:

“ * * the right to have a jury pass upon issues of fact does not include the right to have a cause submitted to a jury in the hope of a verdict where the facts undisputably show that the plaintiff is not entitled to relief. * * *”*

And

“ * * where it is clear that any person of normal intelligence in his position must have understood the danger, the issue must be decided by the court.”*

In *Knox v. Snow*, 119 Utah 522, 229 P.2d 874, this Court opined that:

“A reasonable person makes some observations along the path he chooses to follow.”

And found plaintiff to have been contributorily negligent as a matter of law for having neglected to use the care required of a prudent man.

POINT IV.

THE COURT ERRED IN GRANTING PLAINTIFF'S MOTION TO SUBMIT THE ISSUE OF ORDINARY NEGLIGENCE TO THE JURY.

It cannot be said that plaintiffs did not trespass upon defendant's automobile. As we have pointed out in our Point II of this brief, the defendant owed to plaintiffs, as trespassers, only the duty of

not wilfully or wantonly causing them injury. The record fails to disclose and wilful, wanton, intentional or malicious act on the part of defendant. The *jury found* that the acts of the defendant in injuring the plaintiff Marshall were *not* activated by malice; and, that the actions of the defendant in injuring the plaintiff Tayler were not motivated by malice (Tr. 84, 86). Malice in law is the *intentional* doing of a wrongful act without just cause or excuse. "Wilfullness" implies an act done *intentionally* and designedly; "wantonness" implies action without regard to the rights of others, a conscious failure to observe care, a conscious invasion of the rights of others, *wilful*, unrestrained action. Black's Law Dictionary, Fourth Edition.

We submit an act done without malice is not "wilful" or "intentional"; a "not-wilful" act cannot be "wanton" in the eyes of the law.

POINT V.

A WIFE HAS NO CAUSE OF ACTION AGAINST HER HUSBAND FOR A NON-INTENTIONAL INJURY INFLICTED BY THE HUSBAND DURING COVERTURE.

We are familiar with the ruling of this Court in *Taylor v. Patten*, 2 Utah 2d 404, 275 P.2d 696, wherein Mr. Justice Wade wrote "* * * under our statutes a wife may recover from her husband for *intentionally* inflicted injuries. * * *" The jury in

our cause found only that the defendant was “negligent in not using due care” and that the injury to the plaintiff wife was not motivated by malice (R. 86). There was no *intentional* injury inflicted upon the wife by the defendant husband in this cause. Mr. Justice Crockett in his concurring opinion said, “* * * the plaintiff may sue the defendant for an alleged *intentional* personal injury committed during the interlocutory period; * * *

” and, went on to carefully point out certain considerations which “* * * may well be deemed to be of sufficient importance to lead to the conclusions that such suits should not be maintainable during coverture. * * *” The Justice declared: “* * * If such suits can be maintained, widespread insurance coverage, particularly in automobile cases, poses a great temptation for collusion, *which it should not be the policy of the law to encourage. * * **” (Emphasis ours). This statement is in complete accord with the general weight of authority. We feel that to further relax the common law rule in this jurisdiction would indeed create an undesirable situation and it is our considered opinion that the Legislature, in conferring equality of right to sue, did not confer a right of action never possessed by husband or wife at common law. *Conley v. Conley*, 92 Mont. 425, 15 P.2d 922, 925.

The case at bar is clearly distinguishable in its fact situation from *Taylor v. Patten*, *supra*, in that

(a) the injuries to the wife were clearly not *intentionally* inflicted; and, (b) the parties were married and not divorced on September 12, 1956, the date of the accident. The parties' divorce decree was entered *October 16, 1956* (Tr. 290).

This Court in *Taylor v. Patten*, *supra*, in its main opinion, the concurring opinion and in the dissenting opinion exhaustively reviews the authorities on this issue. We would not belabor the Court with those authorities of which the Court is fully cognizant. However, since the reporting of *Taylor v. Patten*, there has been published an exhaustive annotation, 43 ALR 2d 634, wherein the "Summary" opens with the following declaration:

"The relatively great amount of litigation in which the question of the right of one spouse to bring an action against the other for personal injuries has been raised, is due, in large part, to the widespread enactment of married women's statutes relieving wives from many of the disabilities imposed upon them by the common law. The argument has been, and continues to be, made that these enactments, most of which, either in terms or by implication, permit a married woman to sue and be sued as if she were single, have the effect of abrogating the rule of spousal disability. In what must now be referred to as a dwindling majority of jurisdictions this argument has been rejected by the courts, and in one jurisdiction — Illinois — the argument, after having been accepted by the courts, was re-

jected by the legislature, which amended the Illinois married women's statute to specifically bar actions by one spouse against the other for torts occurring during coverture.

* * *

“In the case of a spouse's post-divorce suit for personal injuries caused by the other spouse during coverture, the courts are agreed that the spousal disability rule operates to bar the suit.”

* * * *Abbott v. Abbott* (1877) 67 Me. 304, 24 Am Rep 27 * * *.

* * * *Callow v. Thomas* (1948) 322 Mass. 550, 78 NE2d 637, 2 ALR2d 632.

* * * *Bandfield v. Bandfield* (1898) 117 Mich. 80, 75 NW 287, 40 LRA 757, 72 Am St Rep 550.

* * * *Strom v. Strom* (1906) 98 Minn. 427, 107 NW 1047, 6 LRA NS 191, 116 Am St Rep 387.

* * * *Nickerson v. Nickerson* (1886) 65 Tex. 281; *Lunt v. Lunt* (1938, Tex. Civ App) 121 SW2d 445, error dismd (recognizing rule).

* * * *Schultz v. Christopher* (1911) 65 Wash. 496, 118 P. 629, 38 LRA NS 780.

* * * *Phillips v. Barnett* (1876) LR 1 QB Div 436.

The majority view denies the right of action. The states appear divided 31 to 17 with Utah aligned with the minority on the authority of *Taylor v. Patten*. We do not read *Taylor v. Patten* as completely abrogating the common-law rule of spousal

disability, or as authorization for civil action based upon simple negligence during coverture.

Concluding, we would call the Court's attention to the case of *Romero v. Romero* (1954), 58 N.M. 201, 269 P.2d 748, wherein that Court in its unanimous opinion holds:

“It appears to have been the purpose of the act of 1897 (19-606 supra.) [married woman statute] to give the wife a remedy to sue alone for actionable wrongs which formerly could not be independently redressed. It removed the common law procedural barrier that a wife must join with her husband in all actions for or against her, but, *we are of opinion, and so hold, that it did not create a substantive right of action against her husband for a tort committed against her.* This view is not only supported by the decision of the United States Supreme Court in *Thompson v. Thompson*, 218 U.S. 611, 31 S. Ct. 111, 54 L. Ed. 1180, but is in accord with the general weight of authority as is reflected by decisions of thirty sister states and the territories of Alaska and Hawaii. * * *” (Emphasis added).

CONCLUSION

The evidence shows that the wife, sister, mother and brother-in-law descended upon the defendant in force in the middle of the night for no other purpose, they say, than to have a talk with him. With some apprehension as to the motives of this group

the defendant attempted to fold his tent like the Arabs and silently steal away. Defendant's attempt to maintain the peace and the status quo was frustrated through the assault and trespass of plaintiffs upon him; the intentional acts of the plaintiffs resulted in what they should have known could well occur, personal injury to themselves; a regrettable but understandable happenstance often known to occur under such circumstances.

The verdict should be set aside and plaintiffs sent hence with naught.

Respectfully submitted,

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