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Thomas P. Sprunt v. The Denver and Rio Grande Western Railroad Co. : Petition for Rehearing and Brief in Support Thereof

Utah Supreme Court

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Case No. 8957

IN THE SUPREME COURT

of the

STATE OF UTAH

FILED

23 1959

Clark, Supreme Court, Utah

THOMAS P. SPRUNT,

Plaintiff,

vs.

THE DENVER AND RIO GRANDE WEST-
ERN RAILROAD COMPANY, a corporation,

Defendant.

**PETITION FOR REHEARING AND
BRIEF IN SUPPORT THEREOF**

C. C. PATTERSON,

Attorney for Plaintiff.

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IN THE SUPREME COURT
of the
STATE OF UTAH

THOMAS P. SPRUNT,

Plaintiff,

vs.

THE DENVER AND RIO GRANDE WEST-
ERN RAILROAD COMPANY, a corporation,

Defendant.

PETITION FOR REHEARING AND BRIEF
IN SUPPORT THEREOF

Comes now the plaintiff in the above-entitled cause and respectfully petitions this Honorable Court for rehearing in this cause for the following reasons and upon the following grounds:

I.

The Court erred in holding that the facts as found by it did not constitute the defense of assumption of risk as a matter of law.

II.

The Court erred in holding that the evidence found by the Court did present a jury question on the problem of contributory negligence.

BRIEF IN SUPPORT OF PETITION FOR REHEARING

The problem herein presented is a simple problem in point of fact. As the Court has already indicated, it may be posed as follows:

“May the identical facts which formerly constituted the defense in law of assumption of risk be used in lieu of such defense as a basis for a partial defense of contributory negligence?”

This problem in times past and prior to the 1939 amendment, 45 *U.S.C.A.*, Sec. 54, was in fact a very important one. The Court found it easy to define academically what constituted contributory negligence and what constituted assumption of risk. The problem arose when these academic principles were applied to a specific set of facts. The Court in *Tiller v. Atlantic Coast Line Railroad Co.*, 318 *U. S.* 54, 87 *L. Ed.* 610, found that the Federal Code Annotated and the United States Code Annotated devoted over thirty (30) pages, each in fine print, merely to the citation and a brief summary of the reported decision on this problem and that in addition that the number of unreported and settled cases in which the defense was involved ran into the thousands. The Court further found that the difficulty actually was that of distinguishing between contributory negligence and assumption of risk. The Court stated after reviewing these facts:

“In the disposition of cases, the question of plaintiff's assumption of risk has frequently been treated simply as another way of appraising defendant's negligence as was done by the Court

in the instant case. The purpose of the 1939 amendment was to eliminate this confusion to simply the administration of the act by complete elimination of the defense of assumption of risk in all its phases.”

Immediately after the passing of the Act, the carrier shifted to a new approach, namely, that of non-negligence. The gist of this defense was that the railroad was not negligent—a type of “last clear chance” doctrine, if a man knowingly entered into property that he knew was defective. This defense was found to lack validity as was indicated by a number of decisions cited in plaintiff’s main brief.

Now, we see a new approach, namely, that while the defense of non-negligence is no longer available and will not be considered as a defense because of the facts upon which non-negligence was predicated actually constituted the defense of assumption of risk, that the facts which formerly constituted assumption of risk now constitute contributory negligence. The question involved herein is whether or not such a contention and such a proposed defense is available to the carrier.

It is submitted that if this be true then the Courts and the parties before the Courts are put back on the same old “merry-go-round” that the 1939 amendment attempted to prevent. Indeed, the injured worker is in worse shape because the doctrine of contributory negligence is hereby expanded to include assumption of risk—a defense that was theoretically outlawed. Its effectiveness is vividly pointed out in the instant case when plaintiff’s recovery was so viciously cut. We submit that in so holding that the Court ruled contrary to the de-

cisions in the Federal Courts and that in so doing we respectfully submit the Court erred.

In examining this problem, we must recognize that Federal law governs as did Judge Crockett in the case of *Maxfield v. D. & R. G., Utah*, decided October 23, 1958, 330 P. 2d 1018, when he stated at page 1019:

“However, the instant case is not controlled by those decisions, nor does the instant case affect the law of our state. It was brought under the Federal Employers’ Liability Act, 45 U.S.C.A., 51 et seq., and federal law is applicable, as recognized in *Kirchgestner v. Denver R.G.W.R. Co.*”

For convenience, our views will be presented under the two points of argument heretofore stated.

ARGUMENT

I.

THE COURT ERRED IN HOLDING THAT THE EVIDENCE FOUND BY IT DID NOT CONSTITUTE THE DEFENSE OF ASSUMPTION OF RISK AS A MATTER OF LAW.

The case of *Tiller v. Atlantic Coast Line Railroad Company*, 87 L. Ed. 610, 318 U. S. 54, is, of course, the leading decision on this particular problem. In view of the fact that it was fully discussed in the petitioner’s original brief, there is no particular point in rehashing it. However, it is believed that there are two excerpts that are of vital importance in this matter.

In Justice Black’s principal decision, he says:

“ * * We hold that every vestige of the

doctrine of assumption of risk was obliterated from the law by the 1939 amendment, and that Congress, by abolishing the defense of assumption of risk in that statute did not mean to leave open the identical defense for the master by changing its name to "non-negligence." As this Court said in facing the hazy margin between negligence and assumption of risk as involved in the Safety Appliance Act of (March 2,) 1893, 45 USCA § 1, "Unless great care be taken, the servant's rights will be sacrificed by simply charging him with assumption of risk under another name;" and no such result can be permitted here."

It will be noted that the language specifically faces the problem of the "hazy margin between negligence and assumption of risk," and cites the former case of *Schlmemmer v. Buffalo R & T Railroad Co.*, 205 U. S. 1, 51 L. Ed. 681, with approval.

The concurring opinion of Mr. Justice Frankfurter therefore, is of great interest because he concurred in the decision of Justice Black and amplified that particular statement when he wrote:

"But an employee cannot be charged with contributory negligence simply because he assumes the risk."

In the facts at issue here, the Supreme Court has found that the plaintiff was injured when in attempting to board one of the moving cars in his customary manner he got a hold with his left hand but missed with his right because he had stepped into a hole, slipped, causing him to lose his balance and fall. The Court further found that the plaintiff had known that the terrain adjacent to the track was rough and pit marked with

holes but that the hole was obscured on the day in question by snow.

The Court did not find but it is implicit in the facts that the plaintiff did not know of the existence or the presence of the hole in which he slipped until after he fell because he could not see it by virtue of the snow. Consequently, the fact of knowledge on the part of the plaintiff is not present in this case. *The only question, therefore, is the question as to whether constructive knowledge of the existence of this exact hole was provided for him by virtue of his six months knowledge previously that the terrain was rough and pit marked with holes.*

The Federal Courts and decisions on this problem have long recognized that there is a distinction between the defense of assumption of risk and of contributory negligence. See *Knowles v. Southern Railway, Virginia*, 12 S. E. 2d 821, *McClain v. Charleston & W. C. Railway Co., South Carolina*, 4 S. E. 2d 280.

The case of *Thomas v. Union Railway Company*, 6th Circuit, 216 F. 2d 18, has by all odds the closest facts to the case at bar. In that case, the plaintiff sustained injuries while carrying out his duties as an employee of the railroad. While walking along the concrete floor of the roundhouse, he slipped and fell because his foot came in contact with pin grease that had been left on the concrete through the negligence of the railroad. There can be no question as to what the Court found as a fact, that the plaintiff knew or should have known of the existence of the grease on the floor; that such neglect on the part of the railroad was well known to

the plaintiff and others. The Trial Court found for the defendant and the plaintiff appealed. It would seem, therefore, that when the Court reversed the District Court and sent the case back for new trial that if these facts were susceptible of the proof of negligence, the Court would have said so. On the rationale of the decision in the instant case and paraphrasing the language of Justice Wade in the instant decision, the Court could very well have said that:

“It would appear not to be unreasonable to conclude that a reasonably prudent person with knowledge of the fact that grease was on the floor would take precautions to ascertain whether he was standing in or near sufficiently firm ground to avoid falling.”

It will be observed, however, that nowhere does the Court make such a statement and, yet, in view of the fact that this case would have to be retried, it would appear self-evident that if this were in fact negligence the Court should and would have so advised and guided the Trial Court in its future conduct.

The specific problem of contributory negligence was raised in *Johnson v. Erie Railroad Company, New York, 1st Circuit, 236 F. 2d 352*. The plaintiff was injured while working in a railway mail car between two other cars standing on a spur track. The impact caused by the engine coupling onto the cars without warning caused plaintiff to lose his balance and fall. The Court specifically instructed upon contributory negligence and in that regard raised the question as to what, if anything, he did contribute to his injury. Part of the difficulty in this case was attributed to the fact that he had had

a previous injury and he knew that any knock or jar would aggravate his condition. However, the Court of Appeals held that the effect of its posing of the question of contributory negligence forced the jury to consider assumption of risk and in so doing a new trial was required.

The only case that would appear to give the defendant any comfort is that of *Murray v. New York, New Haven & Hartford Railroad Company*, 2d Circuit, 255 F. 2d 42. In that case, the Court discusses the difference between assumption of risk and contributory negligence and concluded that in the particular case involved, contributory negligence lay. However, an examination of the decision indicates that the basis for the opinion that contributory negligence lay, arose from the fact that the plaintiff was accused of a violation of a company rule.

Violation of a rule is a fact that has always been outside the doctrine of assumption of risk. See *Owens v. U. P.*, *Washington*, 63 *Supreme Court* 1271, 319 *U. S.* 715, 87 *L. Ed.* 1683. Again, the violation of a rule does not constitute assumption of risk but is at most contributory negligence leading to division of damages. *Cross v. Spokane and P & S Railway Co.*, 291 *P.* 336, 157 *Washington* 428. *Certiorari denied*, 51 *Supreme Court* 345, 283 *U. S.* 821, 75 *L. Ed.* 1436.

It will be seen that the *Murray* case had in addition to the facts that established assumption of risk an additional fact that had never been classified as assumption of risk but on the contrary had always been classified as negligence or contributory negligence. Where, it

might be asked, is the additional fact that takes the case at bar out of assumption of risk and into the realm of contributory negligence?

It is believed that the Supreme Court of the United States has already answered this question. In *Pryor v. Alega Williams*, 1920, 65 L. Ed. 120, the Court had before it an action under the F. E. L. A. where negligence was charged against the defendant as receiver of the Wabash Railroad Company. The plaintiff was engaged in tearing down a bridge. There was a defect in the claw bar which he was directed to use and said defect caused the bar to slip. He lost his balance and fell to the ground some twelve (12) feet below. The Trial Court found that the defect in the claw bar was so obvious that the most cursory and superficial inspection would have disclosed it to the plaintiff. The defendant charged assumption of risk and contributory negligence. A jury verdict was entered in favor of the plaintiff for \$5,000.00; however, the Trial Court reversed the judgment and denied a Motion for Rehearing. The Supreme Court of Missouri, on appeal, held that the facts involved did not constitute assumption of risk but did, if anything, amount to contributory negligence and that such negligence under the Federal statutes worked a reduction in damages and not a defeat of the action. The Supreme Court of the United States reversed, finding that the facts constituted assumption of risk and not contributory negligence.

The effect of this decision is that when an employee is injured by reason of defects in a claw bar which he is using and which an ordinary prudent employee would

not have used because of those defects that the employee is guilty of assumption of risk as a matter of law and not of contributory negligence.

If it is assumption of risk and not contributory negligence for a person to use a defective bar where the defects were so obvious that a cursory examination would have indicated them, can it be otherwise here for a man to fail to observe a defect in the ground covered by snow which would have been found according to the Supreme Court decision in the event he had made the examination as an ordinary prudent person would have made. However, if there is any last lingering doubt as to whether this constitutes assumption of risk, it is believed that they are dispelled by two cases. One from the Supreme Court of Minnesota, *Jacobson v. Chicago & Northwestern Railroad*, 22 N. W. 2d 455, where the Court held at page 459:

“In determining whether plaintiff was guilty of contributory negligence and whether, as defendant claims, his contributory negligence was the sole proximate cause of the accident, it is our plain duty to lay out of mind any question of whether he was guilty of assumption of risk, because that defense was entirely obliterated by the 1939 amendment of the act. *Crawford v. D. M. & I. R. Ry. Co.*, 220 Minn. 225, 19 N. W. 2d 384. The defense of assumption of risk is not to be let in under the label of contributory negligence. *Tiller v. Atlantic Coast Line R. Co.*, 318 U. S. 54, 63 S. Ct. 444, 87 L. Ed. 610, 143 A.L.R. 967, *supra*. See, *Maloney v. Cunard Steamship Co., Ltd.*, 217 N. Y. 278, 111 N. E. 835.”

Finally, in the case of *Southern Pacific Company v.*

Allen, Texas, 106 S. W. 2d 441, the Court had before it the identical argument to that at bar, namely, that the facts which constituted assumption of risk may also constitute contributory negligence and even though the one is barred the other may be presented to the jury notwithstanding that both the instructions of assumption or risk and contributory negligence are based on the identical facts. The Court disposed of this matter at page 446 as follows:

“If, in cases where the same facts which would make out the defense of assumed risk (were such defense not abolished) would also constitute the defense of contributory negligence, the latter defense should be allowed to prevail, the humane and beneficent purpose of Congress would in a large number of cases be rendered abortive. Therefore, as a statute should be so construed as to accomplish its evident intention and purpose, we are of the opinion that the act, in abolishing the defense of assumed risk, did away with any other defense, though of a different name, which would be constituted by identically the same facts which go to establish that of assumed risk.”

No case was cited by the Court in support of its position that the two different defenses may arise and be predicated upon the identical statement of fact. The defendant did in its brief, as page 20, cite the case of *L & M Railroad Company v. Morrill*, Alabama, 99 S. 297, in support of this position. However, an examination of the case clearly indicates that the case does not support the position assigned it by the defendant. In that case the Court said that if it found one set of facts that the jury would be warranted in finding assumption

of risk, that, if on the other hand, they found a second set of facts that it would be justified at finding contributory negligence. Nowhere did the Supreme Court of Alabama say that the jury would be warranted in finding both from the identical statement of facts.

ARGUMENT

II.

THE COURT ERRED IN HOLDING THAT THE EVIDENCE FOUND BY THE COURT DID PRESENT A JURY QUESTION ON THAT PROBLEM OF CONTRIBUTORY NEGLIGENCE.

The plaintiff was on these unfit and dangerous premises because he was required to do so by reason of his employment. He did not have a choice in selection and while he went voluntarily, it must be recognized that he went voluntarily because he desired to continue his employment.

The mere fact that a servant is aware that he is exposing himself to danger does not make his guilty of contributory negligence. *Toone v. J. O. O'Neill Construction Company, Utah*, 121 P. 10; *Neitzke v. Kraft-Phenix Dairies, Inc.*, 214 Wisconsin 441, 253 N. W. 579; *Kaumans v. White Star Gas & Oil Company*, 63 P. 2d 231; *Schirra v. D. L. & W. Ry. Co.*, 103 Fed. Supp. 812.

Plaintiff desires to cite but one case in support of its position to the effect that the facts herein do not constitute contributory negligence of any kind on the

part of the plaintiff. That case is the case of *Schrader v. Kriesel, Minn.*, 1950, 45 N. W. 2d 395. This appeal arose out of a tort action wherein the plaintiffs, husband and wife, were suing the defendant, a used car dealer, for injury sustained by the wife while walking upon the premises of the defendant. The plaintiff wife had been on the premises of the defendant before. She had observed the surface of the lot previous to the date of injury and knew in advance that the surface was rough although she did not see the rut which caused the fall on the day in question because the ruts were covered with snow. She further stated that on her previous visits she had made similar observations although upon her previous visits conditions were not as bad as they were on the night of the accident. Only one of the three questions raised on appeal is relevant to this problem, and that question was:

“Was the plaintiff contributorily negligent?”

The Supreme Court held that it was a jury question but that the jury question was whether or not the plaintiff had assumed the risk of injury upon entering the property of the used car dealer and not whether she was guilty of contributory negligence or not.

It is difficult to see how a case could be much closer on the facts than the instant case with the Schrader case. In both cases, the party knew or had reason to know or believe that the surface was rough. In both cases, the ground was covered with snow so that the ruts, holes or unevenness was obscured from their

view. In the one case, it is held to be assumption of risk and not contributory negligence. It is submitted that there is no factual or legal basis for the predication of the conclusion that a negligence question arose in this case to be submitted to the jury, and, we respectfully suggest that the Court erred in so holding.

Respectfully submitted,

C. C. PATTERSON, .

Attorney for Plaintiff.