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Leo I. Tannehill v. Lewis N. Terry : Brief of Appellant

Utah Supreme Court

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**In the Supreme Court
of the
State of Utah**

FILE
MAR 11 1960

LEO I. TANNEHILL,
Plaintiff and Appellant,

—VS.—

LEWIS N. TERRY,
Defendant and Respondent.

Clerk, Supreme Court, Utah

BRIEF OF APPELLANT

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In the Supreme Court of the State of Utah

LEO I. TANNEHILL,

Plaintiff and Appellant,

—vs.—

LEWIS N. TERRY,

Defendant and Respondent.

} Case No. 9154

BRIEF OF APPELLANT

(The parties will be referred to here as they appeared in the trial court.)

PRELIMINARY STATEMENT

This is an appeal by plaintiff from a judgment upon a verdict of No Cause of Action (R. 62). This action was for personal injuries alleged to have resulted when plaintiff was hit in the head with a golf club negligently swung by defendant.

STATEMENT OF THE CASE

Plaintiff visited defendant at the latter's home in Ogden on Sunday afternoon, May 4, 1958 at approximately 3:30 or 4:00 o'clock. Defendant had just bought a set of golf clubs and had been taking golf lessons (R. 5). Defendant suggested they go to the back of his place and knock a few balls. Defendant had some small, plastic practice balls (R. 5). The defendant's house faced the north and the two went out the south, or back, door on to a platform and then down some steps to a sidewalk which ran east and west. To the south of this sidewalk was grass. Defendant placed a cocoa mat on the grass, placed a ball on it and hit it to the east, or to his left (Tr. 7). Defendant then placed another ball on the mat for plaintiff to hit (Tr. 7). As plaintiff grasped the club defendant told him he was not holding it correctly. He then came over and took the club from plaintiff and defendant proceeded to show plaintiff how to hold the club and position his body (Tr. 8).

The foregoing facts are not in dispute. At this point a dispute arises between the parties. According to defendant, he stated: "Leo, (plaintiff), will you get out of the way, I am going to hit the ball" (Tr. 44). Plaintiff denied that any such warning was given him. He testified that defendant told him to stand off to the left and told him to watch the position of his body and the angle of the club. Plaintiff testified that that is when he was hit (Tr. 8).

Again the parties are in agreement as to what occurred thereafter.

Defendant testified that after he had addressed the ball it took him some time to get in proper position to hit it. He testified "I had been told to keep my head down, I assumed Leo was out of the road because I told him to get out of the road, and I swung and hit him" (Tr. 44). Defendant stated that he did not look to see whether plaintiff actually got out of the way (Tr. 51). He admitted that he did not know where plaintiff was at the time he swung (Tr. 52). Plaintiff was hit on the follow through part of the swing.

Plaintiff fell back on the steps and the next thing he knew someone had raised him up. He was sitting on the sidewalk and blood was coming from his head (Tr. 8). He was given a towel to absorb the flow of blood and was taken to a hospital. The outer table of bone of the front sinus immediately to the left of the nose, was broken through. He also received a subluxated coccyx when he fell against the steps.

The case was submitted to a jury and the jury returned a verdict of No Cause of Action (R. 56). Plaintiff contends the trial court committed error in its instructions to the jury.

STATEMENT OF POINTS RELIED UPON

POINT I.

THE TRIAL COURT ERRED IN SUBMITTING ASSUMPTION OF RISK TO THE JURY.

POINT II.

THE INSTRUCTION ON ASSUMPTION OF RISK WAS AN INACCURATE STATEMENT OF THE LAW ON SAID SUBJECT.

ARGUMENT

POINT I.

THE TRIAL COURT ERRED IN SUBMITTING ASSUMPTION OF RISK TO THE JURY.

The trial court by its Instruction No. 8 (R. 19), submitted the issue of assumption of risk to the jury. It is the contention of plaintiff that this issue should not have been submitted to the jury in a case with the factual situation presented here. The only defense involved here was that of contributory negligence.

Under the facts of this case defendant was under a continuing obligation to be careful in connection with his swinging of the club. This duty was present right up until the time plaintiff was struck. This is not a situation where defendant had no duty toward the plaintiff after he had given his so-called warning. He admitted that he addressed the ball for some space of time and that he did not know where plaintiff was, nor even look to see where he was at the time he swung his club. There is no evidence that the plaintiff consented to this type of conduct or danger.

In 2 *Harper & James, the Law of Torts*, §21.1, p. 1162, the authorities speak of the two distinct types of so-called assumption of risk:

“(1) In its primary sense the plaintiff’s assumption of a risk is only the counterpart of the defendant’s lack of duty to protect the plaintiff from that risk. In such a case plaintiff may not recover for his injury even though he was quite reasonable in encountering the risk that caused it. *Volenti non fit injuria*. (2) A plaintiff may also be said to assume a risk created by defendant’s breach of duty towards him, when he deliberately chooses to encounter that risk. In such a case, except possibly in master and servant cases, plaintiff will be barred from recovery only if he was unreasonable in encountering the risk under the circumstances. This is a form of contributory negligence. Hereafter we shall call this ‘assumption of risk in a secondary sense.’”

We submit that the only real defense of assumption of risk is the first type, that the second type is, and can only be, contributory negligence. Our contention on this is confirmed by the Restatement of the Law of Torts. There is no distinct defense of assumption of risk therein treated. The only place assumption of risk is considered is under the heading of contributory negligence. See 2 *Restatement of the Law of Torts*, § 466. In order for there to be contributory negligence there must not only be an intentional exposure to danger created by defendant’s negligence, but, also, that exposure must be unreasonable. This latter element is not set forth in the court’s instruction on assumption of risk.

The Supreme Court of the State of Utah, in two comparatively recent cases, has rejected the defense of assumption of risk as applicable to the cases being con-

sidered. *Clay v. Dunford*, 120 Utah 177, 239 P.2d 1075 (1952); *Johnson v. Maynard*, 9 Utah 2d 268, 342 P.2d 884 (1959). In discussing the elements of this defense this court, in the *Clay* case, stated:

“The texts referred to by defendant in support of its position that the deceased assumed the risk, do not seem to bear out such position. They say that ‘The doctrine of assumption of risk in an action between persons not master and servant, or not having relations by contract with each other, is confined to cases where the plaintiff not only *knew* and *appreciated* the danger, but *voluntarily put himself in the way of it*,’ and that ‘The essential elements of assumed risk are *knowledge*, actual or implied, by the plaintiff of a *specific* defect or dangerous condition caused by the negligence of the defendant in the violation of some duty owing to the plaintiff, * * * together with the plaintiff’s *appreciation* of the danger to be encountered and his *voluntary exposure* of himself to it.’ They also clearly set forth the distinctions between the doctrines of assumption of risk and contributory negligence.

“The uncontroverted evidence showed that at the time of the accident the deceased was standing on the shoulder of the highway where vehicles ordinarily do not travel, with his back turned to the oncoming truck, completely negating knowledge or appreciation of the specific danger, and negating any intention voluntarily to expose himself to a known danger, — elements which must be established before the defense of assumption of risk is applicable.”

In the *Johnson* case this court stated concerning assumption of risk:

“The fundamental consideration underlying it is that one should not be permitted to knowingly and voluntarily incur an obvious risk of personal harm when he has the ability to avoid doing so, and then hold another responsible for his injury. Its essential elements are: knowledge of a danger and a free and voluntary consent to assume it.

“Under any reasonable view of the evidence here the conduct of the plaintiff would not fall within the requisites of the doctrine of assumption of risk. This was the type of hazard which would exist at practically every intersection where there is much traffic. It is not shown that plaintiff was aware of the particular danger involved in the approach of the defendant’s car, nor that having such knowledge, she nevertheless assumed the risk of such danger and proceeded. The true issue of fact to be determined as to her conduct was the usual one: did she use the care which an ordinary, reasonable and prudent person would have done under the circumstances. That is, was she guilty of contributory negligence.”

Some authorities make the distinction that contributory negligence is carelessness and assumption of risk is venturousness. There certainly is nothing venturous about the plaintiff’s conduct in this case. It was a question of whether or not he exercised ordinary care for his own safety at the time he was hit. In distinguishing between these two defenses, the court, in *Kleppe v. Prawl*, 181 Kan. 590, 313 P. 2d 227, 63 A.L.R. 2d 175, stated as follows:

“While assumption of risk is somewhat akin to contributory negligence, these two doctrines

of law are not synonymous because assumption of risk arises through implied contract of assuming the risk of a known danger; the essence of it is venturousness; it implies intentional exposure to a known danger; it embraces a mental state of willingness; it pertains to the preliminary conduct of getting into a dangerous employment or relation; it means voluntarily incurring the risk of an accident, which may not occur, and which the person assuming the risk may be careful to avoid; it defeats recovery because it is a previous abandonment of the right to complain if an accident occurs. Contributory negligence arises out of a tort; the essence of it is carelessness; it may or may not imply intentional exposure to a known danger; it is a matter of conduct; a contributorily negligent act leads more immediately to a specific accident.

“Another difference is that assumption of risk denies defendant’s negligence while contributory negligence admits defendant’s negligence but denies it is the proximate cause of the accident. 65 CJS Negligence § 117, pp 709-11; 38 Am. Jur., Negligence, § 172, p. 847.”

A case very similar to the one at bar is *Brady v. Kane* (Fla.), 111 So. 2d 472 (1959). In that case plaintiff was hit in the head with a golf club. In rejecting the defense of assumption of risk, the court stated:

“Appellee contended that appellant assumed the risk of the injury which occurred. Viewing the evidence in the light most favorable to the party moved against, that defense was not applicable on the facts as they stood at the close of the plaintiff’s case. Therefore, at the least, the question was one for the jury. ‘Voluntary ex-

posure is the bedrock upon which the doctrine of assumed risk rests. Appreciation of the danger is an essential to the defense of assumption of risk * *.’ *Bartholf v. Baker*, Fla., 1954, 71 So. 2d 480, 483. A member of a golfing foursome assumes certain obvious and ordinary risks of the sport by participating therein with knowledge of its normal dangers, but a player does not assume a risk which cannot reasonably be anticipated, and which may be the result of improper and unauthorized negligent action of another player.”

The defense of assumption of risk is really a misnomer. What it amounts to is either relieving the defendant of a duty of ordinary care toward plaintiff, or it is a failure on the part of the plaintiff to take reasonable care for his own safety. In speaking of this defense, it is stated in 2 *Harper & James, The Law of Torts*, § 21.8, p. 1191:

“The doctrine of assumption of risk, however it is analyzed and defined, is in most of its aspects a defendant’s doctrine which restricts liability and so cuts down the compensation of accident victims. It is a heritage of the extreme individualism of the early industrial revolution. But quite aside from any questions of policy or of substance, the concept of assuming the risk is purely duplicative of other more widely understood concepts, such as scope of duty or contributory negligence. The one exception is to be found perhaps, in those cases where there is an actual agreement. Moreover, the expression has come to stand for two or three distinct notions which are not at all the same, though they often overlap in the sense that they are applicable to the same situation.

“Except for express assumption of risk, therefore, the term and the concept should be abolished. It adds nothing to modern law except confusion. For the most part the policy of individualism it represents is outmoded in accident law; where it is not, that policy can find full scope and far better expression in other language. There is only one thing that can be said for assumption of risk. In the confusion it introduces, it sometimes — ironically and quite capriciously — leads to a relaxation of an overstrict rule in some other field. The aura of disfavor that has come to surround it may occasionally turn out to be the kiss of death to some other bad rule with which it has become associated. We have seen how this may happen with the burden of pleading and proving an exceptional limitation on the scope of defendant’s duty. There may be other instances. But at best this sort of thing is a poor excuse indeed for continuing the confusion of an unfortunate form of words.”

It is submitted that the giving of this instruction was error and that it could only lead to confusion and mislead the jury. This doctrine had no proper place in the case.

POINT II.

THE INSTRUCTION ON ASSUMPTION OF RISK WAS AN INACCURATE STATEMENT OF THE LAW ON SAID SUBJECT.

Even if it were conceded that assumption of risk was properly an issue in the case, the court committed manifest error in the instruction itself. It did not limit this so-called defense to the proposition that plaintiff must know and appreciate the danger. The court per-

mitted this defense to exist in the event that plaintiff knew, or in the exercise of ordinary care should have known that a danger existed in the conduct of defendant. The trial court's Instruction No. 8 (R. 19) embodies this defense, which is defendant's requested Instruction No. 14 (R. 43). The defendant invited this manifest error. The court instructed the jury:

"Instruction No. 8

"There is a legal phrase commonly referred to be the term 'assumption of risk' which is as follows:

"One is said to assume a risk when he voluntarily assents to dangerous conduct and voluntarily exposes himself to that danger, or when he knows, or *in the exercise of ordinary care should know*, that a danger exists in the conduct of another, and voluntarily places himself, or remains, in a position of danger. One who has thus assumed the risk is not entitled to recover for damage caused to him without intention, and which results from the dangerous condition or conduct to which he thus exposed himself." (Italics ours)

If there is anything clear in the law of assumption of risk it is that plaintiff must know and appreciate the danger involved. An instruction almost exactly the same as this was held prejudicial error in *Johnson v. Maynard*, 9 Utah 2d 268, 342 P. 2d 884. In speaking of the instruction in that case the court stated:

"It is further to be observed that the court did not correctly instruct the jury on assumption of risk had it been applicable. In the first portion

of Instruction No. 7 he correctly imposed the requirement that, 'she freely, voluntarily and knowingly manifest * * * her assent to dangerous conduct * * *.' but later in the same instruction explained that it would be applicable if the plaintiff knows, '* * * or in the exercise of ordinary care *would know*, that danger exists * * *.' The latter statement is in error because it would permit a finding of assumption of risk, exonerating the defendant from liability, without actual knowledge of such danger on the part of the plaintiff."

In *Rogers v. Los Angeles Transit Lines*, 45 Cal. 2d 414, 289 P. 2d 226 (1955), it was held that the trial court properly refused to give a request similar to that made by defendant and given in this case. The court stated:

"Transit Lines and Feb claim error in the refusal to give their offered instruction on assumption of risk. Suffice it to say the offered instruction was erroneous in that it advised the jury that plaintiff would assume the risk if in the exercise of ordinary care he would have known and appreciated the danger rather than that he must have knowledge of the danger."

In *Garcia v. San Gabriel Ready Mix*, 155 Cal. App. 2d 568, 318 P. 2d 145 (1957) the court pointed out how important this matter of knowledge is. It there stated:

"However many instructions on assumption of the risk may be given, and however they may be worded, one essential is that the jury be told that a person must know what risk he assumes."

We submit that this instruction was completely erroneous in permitting assumption of risk to be found

under circumstances where plaintiff in the exercise of ordinary care, should have known that a danger existed.

CONCLUSION

We submit that the trial court not only committed error in permitting a jury to pass upon the defense of assumption of risk, but also committed error in its definition of this defense. We submit that the verdict in favor of defendant "No Cause of Action" should be reversed and plaintiff granted a new trial.

Respectfully submitted,

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