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

Utah Supreme Court

Hurd, Bayle & Hurd; Wallace R. Laughnor; Counsel for Defendant and Respondent;

IN THE SUPREME COURT
of the
STATE OF UTAH

LEO I. TANNEHILL,
Plaintiff and Appellant,

vs.

LEWIS N. TERRY,
Defendant and Respondent.

No. 9154

BRIEF OF RESPONDENT

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STATEMENT OF THE CASE

The appellant in his brief has made a statement of facts which is considered to be sufficient, generally speaking, for the purpose of this appeal. However, we have marshalled additional pertinent facts which we respectfully invite the court's attention to and desire that they be considered as a supplement to the appellant's statement.

Plaintiff had watched the defendant hit one practice ball

(Tr. 7). He was also familiar with the fact that when a person strikes a golf ball with a golf club that there is a backswing and follow-through (Tr. 17 & 18). When plaintiff stepped forward to hit a ball he was immediately told by defendant that he was not holding the club properly and was told to stand aside and watch the defendant show him how to swing (Tr. 21). Defendant told plaintiff to observe the angle of the club as it came down in his hands and the angle of his body (Tr. 21). He stood off to the side of the defendant and watched the defendant raise the club and observed defendant's backswing, immediately prior to being struck (Tr. 23). Plaintiff did nothing when he saw the defendant begin to swing the club and in fact admitted watching the defendant's action but did not move from the time he noticed defendant addressing the ball until he was struck by the club (Tr. 23 & 39).

STATEMENT OF POINTS

POINT I

THE COURT DID NOT ERR IN SUBMITTING THE QUESTION OF ASSUMPTION OF RISK TO THE JURY.

POINT II

THE TRIAL COURT DID NOT ERR IN ITS INSTRUCTION ON ASSUMPTION OF RISK AS APPLIED TO THE FACTS OF THIS CASE, AND SUCH INSTRUCTION WAS NOT PREJUDICIAL TO THE PLAINTIFF.

ARGUMENT

POINT I

THE COURT DID NOT ERR IN SUBMITTING THE QUESTION OF ASSUMPTION OF RISK TO THE JURY.

On page four of plaintiff's brief, he admits receiving a warning from the defendant and subsequent to this warning, the defendant addressed the ball for some time before swinging the club. Plaintiff further admits that he is familiar with the way a golf club is swung and that he himself has done so (Tr. 17). Plaintiff stood back and watched the defendant address the ball and then swing the club without taking any precautions for his own safety (Tr. 23 and 39). It is submitted that the plaintiff, by standing near the defendant and at all times watching him, could not help but have full knowledge that the defendant was going to swing the club. He also testified to knowing the way a golf club is swung from watching others, and admitted that on this very day and immediately prior to the accident, he had observed the defendant swing the club. Plaintiff could not help but have been aware of the simple fact that if he stood too close to the defendant while the defendant was swinging the golf club, that he very likely would be struck by the club. This is purely a case of voluntary exposure to obvious danger, which was and should have been perfectly apparent to the plaintiff. We accordingly cannot agree with plaintiff's statement on page five of his brief wherein he says:

> "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."

This court, in the case of Clay vs. Dunford, 121 Utah 177, 239 Pac. 2d 1075, has said otherwise:

> "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 violaton of some duty owing to the plaintiff, . . .* " (Italics ours).

Thus, we respectfully submit, that this court has clearly held that there may be an assumption of risk although the defendant does owe a duty to the plaintiff.

Plaintiff further argues on page five of his brief:

> "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 is not a correct statement of the law and such reasoning is obviously fallacious. It would eliminate the defense of contributory negligence where the plaintiff negligently exposed himself to danger without any intent. The authorities opposing plaintiff's reasoning are too numerous to mention.

A careful review of Clay vs. Dunford, Supra, will reveal facts clearly distinguishing that case from the present case concerning the application of the doctrine of assumption of risk. In the Clay case, the plaintiff not only did not see the defendant's vehicle but was walking with his back toward the vehicle. He was also not in a position on the roadway that would normally have been dangerous. In the present case, plaintiff admittedly looked and saw the defendant in a position preparing to swing and then watched him swing the golf club

(Tr. 23, 38, & 39). The peril was obvious to anyone who looked and saw, as did the plaintiff. Plaintiff also admitted that he watched the defendant swing at one ball and had watched other golfers swing at golf balls as well as having done so himself on occasion (Tr. 17, 18, 20, 21, 23, 38 and 39). Therefore, unlike the Clay case, our instant plaintiff did look, and did see, and accordingly the peril was obvious. The same distinguishing features are present in the instant case when compared with the case of Johnson vs. Maynard, 9 Utah 2d 268, 342 Pac. 2d 884, cited in plaintiff's brief. In the Johnson case, the plaintiff admittedly did not see the oncoming emergency vehicle and therefore could not be charged with assuming a risk when she was completely unaware of its presence.

The plaintiff has cited the case of Brady vs. Kane, 111 Southern 2d 472, as "a case very similar to the one at bar . . . " A review of the facts in the Brady case will readily disclose the lack of similarity. In that case, the plaintiff was one of a golf foursome. The players were on the tee, after having played several holes, and the plaintiff was standing behind the person preparing to drive the ball. Testimony was to the effect that the plaintiff was to be the second man to drive. While the first driver was addressing the ball the defendant, standing behind the other members of the foursome, and without warning, made a practice swing, striking the plaintiff in the head. The facts clearly show that plaintiff was watching the person preparing to drive and was looking down the fairway. He had his back turned to the defendant when the injury occurred. We respectfully submit that there is no similarity of facts whatsoever inasmuch as the plaintiff in the instant case has admitted observing the movements of the defendant

before he swung the club. He was also warned by the defendant to stand back and observe his movements, while he prepared to further demonstrate how to properly swing a golf club. In the Brady case, the court further said:

> "A member of a golfing foursome assumes certain obvious and ordinary risks of the sport by participating therein with knowledge of its normal dangers . . . "

This clearly demonstrates that anyone familiar with the sport must realize that you canot stand within club's distance of the person about to swing without assuming the risk of being struck by the club. Such is true of other sports, including baseball, tennis, or hockey, etc.

In our instant case, the plaintiff, after having been warned to step back, apparently chose a position so close to the defendant that he must have known there was a very great probability that he would be struck with the club when the defendant proceeded with his demonstration.

We see little point in belaboring this court with a lengthy discussion concerning plaintiff's argument in his brief wherein he apparently denies that there can be an assumption of risk doctrine applied where the defendant is negligent, for the reason that plaintiff's own authorities do not support him in that respect. In the cited case of Rogers vs. Los Angeles Transit Lines, 45 Cal. 2d 414, 289 Pac. 2d 226, the court said:

> "While a person, if fully informed, may assume the risk even though the dangerous condition is caused by the *negligence of others.*" (Italics ours).

The court then cited Prescott vs. Ralph's Grocery Company,

42 Cal. 2d 158, 265 Pac. 2d 904, and quoting from that case stated:

> "The plaintiff does not assume the risk of any negligence which he has no reason to anticipate, but once he is fully informed of it, it is well settled that the risks arising from such negligence may be assumed."

See also Prosser on Torts, page 385.

The case of Garcia vs. San Gabriel Ready Mix Company, 155 Cal. Appeal 2d 568, 318 Pac. 2d 145, cited by the plaintiff, is of little help as the facts in that case indicated that the plaintiff could understand but very little English and the defendant's employee could not understand the plaintiff's language and as a result plaintiff obviously did not understand the risk or danger involved through his conversations with the workman. The Supreme Court of California in the case of Prescott vs. Ralph's Grocery Company, supra, further said:

> "As we have seen, the elements of assumption of risk are a person's knowledge and appreciation of the danger involved and his voluntary acceptance of the risk. It follows that a person, if he is fully informed, may assume a risk even though the dangerous condition is caused by the negligence of others. Indeed, the cases in which this defense is applied, usually involve dangerous conditions created by the negligence of another."

Suffice it to say, this court does recognize the doctrine of assumption of risk when applied to appropriate facts where defendant's negligence or lack of due care has created a dangerous situation which plaintiff could have, but voluntarily and deliberately fails to avoid and thereby asumes the risk of being injured.

We therefore respectfully submit that in our instant case the trail court properly submitted assumption of risk to the jury.

POINT II

THE TRIAL COURT DID NOT ERR IN ITS INSTRUCTION ON ASSUMPTION OF RISK AS APPLIED TO THE FACTS OF THIS CASE, AND SUCH INSTRUCTION WAS NOT PREJUDICIAL TO THE PLAINTIFF.

Defendant respectfully submits that the court's instruction on assumption of risk was a correct statement of the law as applied to the factual situation herein and was in no way prejudicial to the plaintiff. The undisputed evidence clearly shows that the plaintiff saw the defendant about to swing the club, as the defendant took some time to address the ball. Plaintiff admitted having been told to stand back and observe the defendant and his actions. He admits that he did stand back and stood observing the defendant address the ball and swing the club. He apparently did nothing to remove himself from the obvious condition of peril in which he voluntarily placed himself. His own testimony clearly shows that he was aware of the conditions as they existed, and stood by and watched the defendant swing the club which thereafter struck him in the head. We respectfully submit that under these circumstances, the court's instruction fairly and adequately covered the factual situation and there has been no showing in plaintiff's brief that such instruction was in any manner prejudicial to plaintiff or his cause.

As this court recently said in the case of Ferguson vs. Jongsma, 350 Pac. 2d 404, decided March 22, 1960, speaking through Mr. Justice Wade:

> "If the instruction is based on a factual situation which would support a finding of contributory negligence but the instruction erroneously called it assumption of risk, this alone would not be prejudicial error."

In the aforementioned Instruction No. 8, the trial court correctly set forth the law as it applied to our instant factual situation. The court said in effect that if plaintiff knew of the dangerous conduct of the defendant, or that he should have known of such from the perfectly obvious conduct of the defendant, and that plaintiff with this knowledge voluntarily placed himself or remained in the position of danger, then plaintiff assumed the risk and if the jury so found, then he would not be entitled to recover from the defendant any damage caused to him without intention on the part of the defendant.

We are unable to visualize a more appropriate factual situation than the one at hand to apply the doctrine of assumption of risk. Certainly plaintiff cannot contend that he didn't have knowledge of the dangerous situation as it then existed any more than a person sitting as a spectator in the grandstand at a baseball game could say that no risk had been assumed after being struck by a ball hit by one of the batters in the game. The facts unequivocally show that the instant plaintiff voluntarily and deliberately failed to avoid the situation and certainly thereby assumed the risk of any injury he may have sustained when struck by the golf club. The mere fact that plaintiff failed to take any action to duck or step aside indicates

that he accepted the obvious, and thereby brought himself within an area where this doctrine would be applicable. At any rate, under both the doctrine of contributory negligence and assumption of risk, *whether the plaintiff failed to use due care for his own safety or he deliberately assumed the risk of injury in the face of known danger,* was a jury question (italics ours). See Ferguson vs. Jongsma, supra. Also, Esernia vs. Overland Moving Company, 1949, 115 Utah 519, 205 Pac. 2d 621.

Plaintiff undoubtedly contends that he didn't know that defendant intended to swing the club and only that he thought defendant would merely make a backswing. The evidence fails to support this contention, particularly when defendant testified: "Leo, will you get out of the way. I am going to hit the ball" (Tr. 44). Thus it became a jury question as to what occurred and the trial court properly submitted the case to the jury on both theories of contributory negligence and assumption of risk insofar as the affirmative defense aspect of the case was concerned. We accordingly respectfully submit that the court was not in error in its Instruction No. 8 as given to the jury.

CONCLUSION

We respectfully and earnestly contend that the trial court lawfully and properly submitted the defense of asumption of risk to the jury and that the instruction to the jury in that respect was proper and not prejudicial to the plaintiff. We further submit that the verdict in favor of the defendant and against

the plaintiff "No Cause of Action" should be affirmed on this appeal.

Respectfully submitted,

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