1992

JONATHAN JONES, Plaintiff and Appellant, vs. W. CHARLES BARNEY, Defendant and Appellee : Brief of Appellant

Utah Court of Appeals

Leonard E. McGee; Goiochea Law Offices- West Valley; Attorneys for the Appellant.
J. Kent Holland; Anderson & Holland; Attorney for Appellee.

IN THE COURT OF APPEALS OF THE STATE OF UTAH

JONATHAN JONES, Plaintiff/Appellant, vs. W. CHARLES BARNEY, Defendant/Appellee	:	BRIEF OF APPELLANT Appeal #920874-CA ~~Civil~~ No. ~~920396~~ 910904369 Category 15

BRIEF OF APPELLANT

APPEAL FROM THE JUDGMENT OF THE THIRD JUDICIAL DISTRICT COURT
OF SALT LAKE COUNTY, STATE OF UTAH
THE HONORABLE HOMER WILKINSON

LEONARD E. McGEE
GOICOECHEA LAW OFFICES - WEST VALLEY
Attorneys for Appellant
The Harmon Building
3540 South 4000 West, Suite 100
West Valley City, Utah 84120
Telephone: (801)964-8228

Kent Holland
HOLLAND & ANDERSON
Attorneys for Appellee
623 East 100 South
Salt Lake City, Utah 84111
Telephone: (801)

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The Harmon Building
3540 South 4000 West, Suite 100
West Valley City, Utah 84120
Telephone: (801)964-8228

Kent Holland
HOLLAND & ANDERSON
Attorneys for Appellee
623 East 100 South
Salt Lake City, Utah 84111
Telephone: (801)

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TABLE OF AUTHORITIES

The plaintiff/appellant, Jonathon Jones, pursuant to Rule 24(a) of the Utah Rules of Appellate Procedure, submits the following Brief.

JURISDICTION

This appeal was originally filed with the Utah Supreme Court but, on December 24, 1992, was poured-over by that Court to the Utah Court of Appeals. This Court has jurisdiction to decide this appeal pursuant to Utah Code Ann. §78-2a-2 (h). This is an appeal from a final Order of Dismissal of the Third Judicial District Court in and for Salt Lake County, State of Utah, the Honorable Homer Wilkinson presiding. The Order of Dismissal entered by the trial court granted summary judgment in favor of the defendant and dismissed the plaintiff's claims as against the defendant with prejudice.

STATEMENT OF ISSUE

The following issues are presented to this court for review:

1. Did the court err in ruling that the Plaintiff's claim is barred by the Doctrine of Assumption of the Risk or should the issue be decided by the jury?

2. Did the court err in ruling that the plaintiff's claim is barred because the defendant did not intend to injure the plaintiff or is such a question of fact to be decided by the jury?

3. Did the court err in ruling that the plaintiff's claim is barred because the defendant did not violate any safety rule?

DETERMINATIVE CONSTITUTIONAL AND STATUTORY AUTHORITY

Utah Code Annotated §78-27-37, (1953), as amended;

Utah Code Annotated §78-27-38, (1953), as amended.

STATEMENT OF THE CASE

A. Nature of the Case.

This is an action for reckless, intentional and negligent conduct against the defendant, which conduct in the course of a softball game, caused injury to the plaintiff.

B. Course of Proceedings.

After some discovery, and a Motion for Summary Judgment by the defendant, the lower court granted the defendant's Motion for Summary Judgment and dismissed the plaintiff's claim. No oral argument was heard by the trial court on the defendant's Motion for Summary Judgment.

C. Statement of Facts.

1. Appellant was the first batter in an amateur L.D.S. church softball game.

2. Appellant hit the first ball softly into the infield towards the pitchers mound.

3. Appellee, who was playing second base on the opposing team, relaxed when he saw the ball hit towards the pitcher but, when the ball rolled between the pitchers legs, ran towards the ball, caught it barehanded with his right hand and threw it sidearm to first base.

4. The ball was thrown wide of the first baseman and struck the appellant on the left side of his face when the appellant was past first base.

5. It is disputed as to how far beyond the first base bag the

appellant was when he was struck by the ball.

6. As a result of the blow to his face by the ball, the appellant suffered severe fractures of his facial bones and the orbit of his left eye, resulting in permanent blindness in his left eye.

SUMMARY OF ARGUMENT

The defendant's reckless or negligent conduct caused injury to the plaintiff. The plaintiff's assumption of the risk, if any, in playing softball, does not preclude his being awarded damages against the defendant, but merely is a factor for the trier of fact to take into consideration when apportioning negligence.

Similarly, the fact that the defendant may not have acted intentionally in injuring the plaintiff or may not violated a safety rule while playing the game likewise does not preclude the plaintiff from proving that the defendant was negligent.

ARGUMENT

POINT I

APPELLANT'S CLAIM IS NOT BARRED BY THE DOCTRINE OF "ASSUMPTION OF RISK"

Utah Code Annotated §§78-27-37 and -38 (1953), as amended, are the two statutes which codify Utah's comparative negligence standards. In U.C.A. §78-27-37 (2), "fault" is defined as meaning "any actionable breach of legal duty, act or omission proximately causing or contributing to injury or damages sustained by a person seeking recovery, including, but not limited to, negligence in all its degrees, contributory negligence, assumption of risk . . ."

(Emphasis added). U.C.A. §78-27-38 states that "The fault of a person seeking recovery shall not alone bar recovery by that person." (Emphasis added).

In his memorandum to the trial court, the defendant/appellee claimed that the doctrine of "assumption of the risk" acts as a complete bar to the plaintiff/appellant. However, in Jacobsen Construction v. Structo-Lite Engineering, 619 P.2d 306 (Utah 1980), the Utah Supreme Court stated that:

> Under the circumstances in this case, the term "assumption of the risk" meant the voluntary, yet unreasonable, encounter of a known, appreciated risk. The complete bar to recovery which such conduct once constituted in a negligence action has been abolished by the Utah comparative negligence statute to avoid the harshness visited upon plaintiffs as a result of the all-or-nothing nature of the former rule of law.

Id. at 309 (Emphasis added)

At the trial court, the appellee cited the Utah case of Moore v. Burton Lumber & Hardware Co., 631 P.2d 865 (Utah 1981), as his authority for the proposition that "assumption of the risk" is a complete bar to a plaintiffs recovery. However, in Moore, the Utah Supreme Court stated that:

> The complete bar to recovery in an action for negligence, which assumption of the risk has been historically, has been lifted by the Utah comparative negligence statute to avoid the harshness visited upon plaintiffs as a result of the all-or-nothing nature of the former rule of law.

Id. at 878 (Emphasis added)

The appellee, and the trial court, misread and misapplied Moore. Instead of a complete bar to a plaintiff's recovery,

assumption of the risk is merely one factor that the trier of fact takes into account when determining comparative negligence on a special verdict form.

Utah's Comparative Negligence statute (U.C.A. §78-27-38) makes clear that any assumption of the risk by the plaintiff does not completely bar that person's recovery. In any event, the fault of one of the parties is an issue for the trier of fact to determine.

The trial court erred in granting Summary Judgment to the appellee on the grounds that assumption of the risk is a complete bar to a plaintiff's claim. It simply is not a complete bar, but just one factor for the trier of fact to take into account during its deliberations on comparative fault.

POINT II

APPELLANT'S CLAIM IS NOT BARRED EVEN THOUGH THE APPELLEE MAY NOT HAVE INTENDED AN INJURY TO THE APPELLANT

In his memorandum to the trial court, the appellee claimed that, because he did not intend to harm the appellant, the appellants claim should be barred. While the appellee is correct in his assertion that "some courts have held than an injury inflicted in the course of an athletic competition can be maintained if a participant intentionally injures an opponent", the courts have also held that the plaintiff may maintain an action if the defendants conduct is deliberate, willful or done with a reckless disregard for the safety of other players. At the trial court, the defendant relied upon the Illinois Court of Appeals case of Nabozny v. Barnhill, 334 N.E. 2d 258 (Ill. App. 1975), in

support of his position.

In Nabozny, the plaintiff was injured when kicked in the head by an opposing player during a soccer game. At the end of the plaintiff's case, the court granted the defendant's motion for a directed verdict. The plaintiff appealed, contending that the trial court had erred in granting the directed verdict and that the plaintiff's participation in the game did not prohibit the establishment of a prima facie case of negligence. In overturning the trial court, the Illinois Court of Appeals stated that:

> It is our opinion that a player is liable for injury in a tort action if his conduct is such that it is either deliberate, willful or with a reckless disregard to the safety of the other player so as to cause injury to that player, the same being a question of fact to be decided by a jury.

Id. at 261. (Emphasis added)

Accordingly, whether or not the defendant was acting deliberately, willfully or with a reckless disregard for the safety of the plaintiff is a question for the trier of fact to decide. The trial court erred in granting appellee's Motion for Summary Judgment based on this theory.

POINT III

APPELLANT'S CLAIM IS NOT BARRED BECAUSE THE APPELLEE MAY NOT HAVE VIOLATED A SAFETY RULE

Appellee claims that, because he may not have violated a safety rule, the appellants claim is barred. However, the case cited by the appellee to the trial court, Nabozny, supra, does not stand for that proposition.

Nabozny says that the violation of a safety rule may be the basis of a claim, not that the non-violation of a safety rule bars such a claim. That is, it does not stand for the proposition that a violation of a safety rule by a plaintiff is required for a plaintiff to be able to maintain a claim in a sports case. The appellee and the trial court misread and misapplied Nabozny on the issue of whether or not a violation of a safety rule is required in order for a plaintiff to maintain a cause of action in a sports related accident.

In any event, there is no evidence in the record which supports the appellees position that he did not violate a safety rule.

The trial court erred in granting appellee's Motion for Summary Judgment based on the fact that the appellee had not violated some safety rule.

In the absence of case law to the contrary, the appellant should be able to maintain a cause of action even if there has been no violation of a safety rule by the appellee.

CONCLUSION

This Court should reverse the trial court's Summary Judgment in favor of the appellee and remand the case for reinstatement of the appellee's cause of action.

DATED this 15th day of March, 1993.

GOICOECHEA LAW OFFICE - WEST VALLEY
Attorneys for Appellant

By: _____
LEONARD E. McGEE

CERTIFICATE OF MAILING

I hereby certify that true and correct copies of the foregoing BRIEF OF APPELLANT JONATHON JONES (Jones v. Barney) was mailed, via First Class U.S. Mail, postage prepaid, this 15th day of March, 1993 to the following:

Kent Holland
HOLLAND & ANDERSON
Attorneys for Appellee
623 East 100 South
Salt Lake City, Utah 84111

Danielle Davis

files/plead/jones.bri

ADDENDUM

Utah Code Annotated §78-27-37, (1953), as amended

Definitions

As used in §§ 78-27-37 through 78-27-43:

(1) "Defendant" means any person not immune from suit who is claimed to be liable because of fault to any person seeking recovery.

(2) "Fault" means any actionable breach of legal duty, act or omission proximately causing or contributing to injury or damages sustained by a person seeking recovery, including, but not limited to, negligence in all its degrees, contributory negligence, assumption of the risk, strict liability, breach of express or implied warranty of a product, products liability, and misuse, modification or abuse of a product.

(3) "Person seeking recovery" means any person seeking damages or reimbursement on its own behalf, or on behalf of another for whom it is authorized to act as legal representative.

Utah Code Annotated §78-27-38, (1953), as amended

Comparative Negligence

The fault of a person seeking recovery shall not alone bar recovery by that person. He may recover from any defendant or group of defendants whose fault exceeds his own. However, no defendant is liable to any person seeking recovery for any amount in excess of the proportion of fault attributable to that defendant.