1967

Duane Southwick v. S.S. Mullen, Inc., a Washington Corporation : Appellant's Brief

IN THE SUPREME COURT OF THE STATE OF UTAH

DUANE SOUTHWICK,
Plaintiff and Appellant,

vs.

S. S. MULLEN, INC., A Washington Corporation,
Defendant and Respondent.

No. 10797

APPELLANT'S BRIEF

Appeal from Judgment of the Third District Court for Salt Lake County
Honorable Bryant H. Croft, Judge

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AUTHORITIES CITED

CASES CITED

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PRELIMINARY STATEMENT

The parties will be referred to as in the court below.

STATEMENT OF THE KIND OF CASE

This is an action brought by plaintiff for personal injuries received while viewing the demolition of Stillman Bridge conducted by defendant.

DISPOSITION IN THE LOWER COURT

The case was tried to the court sitting with a jury. From a verdict of No Cause of Action and judgment for defendant, plaintiff appeals.

RELIEF SOUGHT ON APPEAL

Plaintiff seeks reversal and a new trial.

STATEMENT OF FACTS

Plaintiff filed a complaint against defendant for injuries received when he was hit on the left wrist by debris from demolition of Stillman Bridge at approximately 4:10 P.M. on the 29th day of November, 1963. Plaintiff alleged that defendant conducted said demolition and that at the time and place it "was solely in control of and responsible for operating a dangerous instrumentality, to wit: In using explosives for blasting work; that defendant is absolutely liable to plaintiff for injuries resulting from said use of said dangerous instrumentality." (R.1-3).

Plaintiff was viewing the demolition of Stillman Bridge as a newsman employed by KCPX Television, assigned to take moving pictures of said demolition. (R.249, 250). Plaintiff had been employed as a newsman for approximately five months prior to the incident in question. (R.249). This was the first blasting operation covered by plaintiff, and he testified that he had

never had any training or experience in blasting prior to this assignment. (R.250).

Plaintiff and two other newsmen, Mike Miller and Jeff Jordan, at the time of the blast were located in the vicinity of two automobiles which were parked up an incline, the station wagon facing down the incline, and the other automobile facing up the incline on the north side of the canyon, nearly due west from Stillman Bridge. (Ex. P-2). The estimated distance of said newsmen from Stillman Bridge varied according to the testimony of plaintiff's witnesses from 300 to 400 yards. (R. 198, 229, 255, 256).

Jeff Jordan and Mike Miller arrived at the scene of the blast earlier than did plaintiff. They testified that they came earlier for the purpose of conducting a taped interview with the powder foreman, which proved to be unsuccessful on account of a breakdown in equipment. (R. 196). After the interview proved unsuccessful, Jeff Jordan and Mike Miller proceeded to the area near the shack, estimated to be approximately 200 yards due west of the bridge. (R. 256). The shack was where the detonation of the charge was made by Don Noe, one of the assistants on the job, and also where at least one other newsman stayed to attempt to get pictures of the blast. The testimony of Jeff Jordan and Mike Miller was that both at the time of the unsuccessful interview in the vicinity of the bridge and later in the vicinity of the shack there were discussions held between them and other newsmen and

the powder foreman as to the procedure to be followed. At the conversation near the shack, both Jordan and Miller testified that they were informed that the area close to the shack was unsafe, whereupon they made inquiry concerning a specific location some 150 yards farther west from the shack and were informed by the powder foreman that this was all right, at which time they then took their station wagon to this place. (R. 197, 228).

There was no evidence disputing plaintiff's testimony that he was not present at the conferences held at the bridge and the shack with the powder foreman. The only person he talked to before arriving at the scene was Chauncey Powis, the representative of the State Road Commission. There was some discussion at that time concerning signals. However, plaintiff's testimony is undisputed that he was not present at the time of any discussion concerning the location of the newsmen at the time of the blast. Plaintiff testified that he arrived on U.S. Highway 40, parked his car, and was given a ride by a fellow newsman, Dave Novelle, to the area where Mike Miller and Jeff Jordan had already parked the car and were setting up the equipment. (R. 252, 253).

Plaintiff testified that as soon as he arrived, he made inquiry from Miller and Jordan if this was where they were going to set up to film the blast and if it was safe, to which he received the reply that they were going to film the blast from this position and that

they had been told it was safe. (R. 253). Plaintiff, Jordan, and Miller all testified that the other newsman, Dave Novelle, left this area and apparently went up to Highway 40.

The three newsmen then proceeded to set up their equipment and to look about to find out where the signal for the blast would come from so that they could be ready to start filming. They testified as to their positions about the automobiles as shown on the diagram, (Ex. P-2), plaintiff at the northwest corner of the station wagon, Miller at the right-hand door of the station wagon with the door open, and Jordan in an open area to the south and west of the station wagon. (R. 201, 202, 232, 254, 255). They testified that they did not see any signal and that the blast came as a surprise; that rocks and debris were thrown past their position and that one rock shattered the windshield of the station wagon. (R. 203, 204). Plaintiff testified that his arms were propped on the top of the station wagon ready to film the blast when it occurred. (R. 258). He did hear a voice in the distance but did not know what the voice said. (R. 258). He stated that he attempted to take cover behind the station wagon but that his left wrist was hit by a rock before he could do this. (R. 258).

The evidence was conflicting as to what the newsmen were told would be the signal for the blast. Miller and Jordan claimed that they were told that it would be the waving of a red flag and three blasts of a whistle.

However, witnesses for the defendant denied that whistles were to be used and claimed that it would be an arm and voice signal relayed back and forth between the powder foreman and the detonator. The powder foreman, George Anderson, testified concerning the conference with the newsmen in the area of the shack, stating that Jordan and Miller were from 40 to 60 feet away from him at the time when he was giving these instructions generally to all. (R. 357). Anderson claimed that he informed Jordan and Miller that they were not in a safe place, and he volunteered to take them with him up to the highway where they would be safe and be able to get some good pictures, but that they refused and stated that they would take their chances and get behind the cars. (R. 349).

Concerning the testimony of the powder foreman, George Anderson, and in view of the fact that his testimony is crucial concerning the question as to the knowledge of defendant S. S. Mullen, Inc., of persons in an area of danger at the time of the blasting operation, it is deemed helpful to quote testimony of Anderson both in his deposition and on direct and cross-examination.

First, concerning Anderson's knowledge as to whether or not the newsmen were in a safe area: (Dep. 18, 19, 22, 31).

> "A Well, we made sure that everything was wired up and we made sure we loaded heavy enough to bring it down. We made sure we had out flagman out and the traffic was

stopped and everybody we figured was in safety except them two guys standing out in the open. I have no authority to force them off the job." (Dep. 18, 19).

* * *

"Q Then at the time that you gave the signal you saw that these newsmen were standing behind the car and—

A Not behind. Off to the side of it here.

Q Were they in what you might call an exposed position?

A That's right.

Q And you nevertheless gave the signal to fire?

A That's right." (Dep. 22).

* * *

"Q You wouldn't have stood by that car?

A No, I wouldn't, and if I wouldn't stand by it, nobody else has got any business standing by it." (Dep. 31).

Next, concerning certain testimony about Anderson's knowledge of the funneling effect of the debris down the canyon from the way in which the shots were delayed: (Dep. 8, 23, 24, 26).

"A * * * They said, 'We will be safe here. We can get behind the car. I said "That car ain't going to do you much good if something comes down here.' I said, 'It's delayed.' They said, 'We'll stay right here.' " (Dep. 8).

* * *

"Q How about the area down here where the newsmen were?

A It was delayed down the canyon, and I told them it wasn't safe.

Q It was what?

A The ground shots were delayed down the canyon toward them.

Q Well, what do you mean by that?

A I mean that you used delays, 1, 2, 3, 4. The 1's go first, the milliseconds, twenty-five milliseconds between each delay.

Q What does that have to do with the safety of that position?

A Well, if you were going to—you want that to go that way you will put your 1's out here in this row, 2's in this row back here, 3's back here and son on. So this here No. 1 goes first, 2, and then your 3's and so on.

MR. MARTINEAU: So that material and debris will go in the direction of the first charges, right?

THE WITNESS: That's right. They go first.

Q (By Mr. Black) What you are telling me, then, is you had the charges so fixed that the westernmost charges would go first?

A Yes.

Q And as a result all of the debris would be blown due west?

A The majority of it would go due west which didn't go straight up.

Q And as I understand it due west is down sort of a canyon area?

A Down in the canyon where we was building the new road down in the bottom of the canyon.

Q So in effect that situation would sort of concentrate and create kind of a funnel where all of the shot would go?

A That's right.

Q And you were well aware of this situation?

A That's right." (Dep. 23, 24).

* * *

"Q Did you tell them why it was unsafe?

A I told them the concrete would fly.

Q Did you tell them why it would fly in that direction?

Q Because it's going to go to the least resistance.

Q Did you tell them it was going to be all funneled down that canyon?

A I told them we were shooting toward the canyon." (Dep. 26).

Since Anderson was available at the time of trial and testified, the deposition was not used as originally planned, and Anderson testified concerning these items on direct examination as follows (R. 349, 351):

"Q Did you feel that they would be safe if they were behind the cars?

A Yes. If they were behind the cars, I thought they would be safe." (R. 349).

* * *

"Q At the time you signalled to Noe, was there any one in a position of danger as far as you could tell down below you?

A No.

Q What about the newsmen?

A If they stayed behind their cars they would have been safe, I figure." (R. 351).

And on cross-examination as follows (R. 354, 355, 356, 359-363, 367, 368):

"Q Now, Mr. Anderson, at the time that the deposition was taken, you didn't think at that time that these newsmen would have been safe behind the car, did you?

A Oh, I didn't think they would be in too much danger. No place is safe when they are shooting concrete.

Q My question on page 25:

'Did you tell them that that would be all right behind the car?

A No, I didn't. I says, "You are on your own, then. If you won't move, I can't move you.' "

A That's right.

Q And you didn't know whether they would be safe behind that car, did you?

A I figured they would be safe. I didn't know; nobody knows.

Q Now at the time we took the deposition, Mr. Anderson, didn't you tell me that this charge had been set up in such a way that the force of the debris flying would be concentrated to the west and funneled down that canyon?

A Down to the ground from the top. The bottom would be shot out and the top would be delayed over.

Q You told me it would be delayed.

A Not funneled, so it would come down the canyon there and fall off the piers underneath it." (R. 354).

* * *

"Q All right. I am looking at page 24, my question,

'And as I understand it due west is down sort of a canyon area?

A Down the canyon where we was building the new road down in the bottom of the canyon.

Q So in effect that situation would sort of concentrate and create kind of a funnel where all of the shot would go?

A That's right.

Q And you were well aware of this situation?

A That's right.

Were those your answers to the questions at that time

A That's right. That's right.

Q Now, Mr. Anderson, at the very time that

you gave the signal for that shot, you knew that these men were in an area of danger, didn't you?

A Not if they stayed behind their cars.

Q I'm not talking about that. I'm talking about the time you gave the signal, you knew they were in an area of danger, didn't you?

A No, I didn't know there was an area of danger. There is a danger any time you shoot anything. There is a danger within that two or three thousand yards. You have no control when it goes.

Q Didn't you tell me in this deposition you knew they were in an area of danger when you gave the signal?

A No, I didn't tell you they were in a dangerous area.

Q Do you deny it?

A No, I don't deny it. I don't remember telling you.

Q Page 26:

'Q Then as I understand it, you went ahead and made that shot knowing that these two men were still there in a position that you thought was unsafe?

A Yes. They said they would get behind the car.

Q As far as you were concerned it was their own risk?

A That's right.'

A That's right. They wouldn't come out, so they took their own chances." (R. 355, 356).

* * *

" * * * Now you testified at the time of the deposition that you told these men that —that this debris would be funneled down the canyon, didn't you?

A I told these men?

Q Yes.

A No, not that I remember telling them.

Q All right, page—page 26, line 21:

'Q As far as you were concerned it was their own risk?

A That's right.

Q Did you tell them why it was unsafe?

A I told them the concrete would fly.

Q Did you tell them why it would fly that direction?

A Because it's going to go to the least resistance.

Q Did you tell them it was going to be all funneled down canyon?

A A told them we were shooting toward the canyon.'

A But I didn't say—

Q Were those your answers to these questions at that time?

A Yes." (R. 359, 360).

* * *

"Q (By Mr. Black) Now I believe you have testified in response to Mr. Martineau's questions that you figured that these men would be safe if they got behind that car; is that right?

A That's right.

Q Would you have been — would you have stayed in that position behind the car?

A Well, I was—if I was going to do the shooting—yes.

Q Your answer is, you would?

A I would if I was going to do the shooting. As a spectator no.

Q Can you tell me the difference?

A The difference is, if I am shooting, I get down on the ground; and as a spectator, I would get to where I felt myself was safe and told where it was safe.

Q Did you tell these men to get down on the ground?

A No, I didn't.

Q You anticipated, did you not, these men would have to get some kind of a view of that bridge in order to accomplish the things they were there for?

A That's why I wanted to take them up on the highway.

Q My question was, you knew they had to look at the thing they had to photograph?

A I never cared whether they got pictures. I wasn't interested in the pictures they got.

Q I am not asking what you were interested in. You knew they were up there and they would have to look at what they saw, didn't you?

A If they get any pictures, they generally do.

Q Now on page 31 of this deposition, line 13:

'Q You wouldn't have stood by that car?

A No I wouldn't, and if I wouldn't stand by it, nobody else has got any business standing by it.'

A That's right. I would have laid down on the ground.

Q Were those your answers to those questions?

A That's right." (R. 360, 361).

* * *

"Q (Mr. Black) Now on this business of whether or not these charges—this charge was directed by this delayed procedure—we have gone into this before and I want to call your attention to page 23 of the deposition. I'm asking you about the area where the newsmen were.

'A It was delayed'—

This is line 8.

'A It was delayed down the canyon, and I told them it wasn't safe.

Q It was what?

A The ground shots were delayed down the canyon toward them.

Q Well, what do you mean by that?

A I mean that you used delays: 1, 2, 3, 4, 5. The 1's go first, the milliseconds, twenty-five milliseconds between each delay.

Q What does that have to do with the safety of that position?

A Well, if you were going to—you want that way, you will put your 1's out here in this row, 2's in this row back here, 3's back here and so on, so this here No. 1 goes first, 2, and then your 3's and so on.

Question by me at line 26:

'What you are telling me, then, is you had the charges so fixed that the westernmost charges would go first?

A Yes.

Q. And as a result all of the debris would be blown due west?

A The majority of it would go due west which didn't go straight up.

Q And as I understand it, due west is down sort of a canyon area?

A Down the canyon where we was building the new road, down in the bottom of the canyon.

Q So in effect that situation would sort of concentrate and create kind of a funnel where all of the shot would go?

A That's right.

Q And you were well aware of this situation?

A That's right.'

Were those your answers to those questions?

A Thats' right.

Q And are those your answers to those questions today?

A On them delays, I would like to explain it.

Q All right. Are these your answers to these questions today?

A That's right." (R. 361-363).

* * *

Q Mr. Anderson, we talked at some length where these men were at the time that you gave the signal for the shot, and I refer you to page 22 of this deposition, line 4:

'Q Then at the time that you gave the signal you saw that these newsmen were standing behind the car and—

A Not behind. Off to the side of it here.

Q Were they in what you might call an exposed position?

A That's right.

Q And you nevertheless gave the signal to fire?

A That's right.

Now were those your answers to those questions? Would you read that? Go ahead.

(Whereupon a document was handed to the witness).

A They weren't off—off behind it. They were

off to kind of the side of the car. It was parked, and it was kind of to the side of the car.

Q All right, now, do you want to change your testimony today to say that they were in an exposed position? Is that what you want to do, or do you want to stand on this deposition? (Indicating).

A Well, they weren't in any exposed position when I shot, because they were standing off to the side of the car there. (Indicating).

Q Well, you are—

A The car was between them and the shot.

'Q Were ~~you~~ THEY in what you might call an exposed position?

A That's right.'

Do you want to change that answer?

A No, I don't want to change it.

Q All right. Now—and again talking about whether or not you thought they were in a safe position, at page 18 at the bottom:

'A —'

You are talking about what you generally did—what precautions you made.

'A Well, we made sure that everything was wired up and we made sure we loaded heavy enough to bring it down. We made sure we had out flagmen out and the traffic was stopped, and everybody, we figured, was in safety except them two guys standing out in the

open. I have no authority to force them off the job.'

Q Was that your answer at that time?

A That's right. I have no authority to move them off, and I told them that.

Q I am talking about the entire answer.

A That's right." (R. 367, 368).

Plaintiff's contention is that from the above testimony of Anderson in his deposition, direct and cross-examination, all reasonable men would agree that Anderson knew that the three newsmen were in an area of danger at the very time that he gave the signal to detonate the blast.

The area of dispute as to where the newsmen were located at the time of the blast can be seen on defendant's Exhibit C, which indicates a cross for the position of the shack, a triangle for the position where Anderson and other witnesses for defendant claim that the cars were, and the two squares showing where the plaintiff's witnesses claim that the two cars were at the time of the blast. The X with the circle around it is where Anderson claims that he was at the time he gave the signal for the blast. The square at the head of the culvert is the location of defendant's witnesses Deaton and Powis at the time of the blast, both having testified that at the time of the blast they retreated into the mouth of the pipe. The witness Junger, who was in charge of the operation for S. S. Mullen, Inc., testified that he had the cars stopped from 800 to 1,000 feet east

of Stillman Bridge on U. S. Highway 40, (R. 315) and approximately a quarter of a mile to the west of the bridge. (R. 322, 323).

Plaintiff testified that with the camera equipment that he used, he could have moved 150 to 200 yards farther from the bridge than he was and still have obtained adequate pictures of the blast. (R. 304, 305).

The pretrial order (R. 33-35), stated in part as follows (R. 34):

> "THE COURT: Briefly, the undisputed facts show that defendant was engaged in the demolition of the Stillman Bridge located at or near the mouth of Parley's Canyon. During the course of such demolition, the defendant used explosives and as a result of said explosives certain rocks and debris were broken loose, part of which came down upon the plaintiff wherein he received the injuries of which he complains.
>
> "There remains an issue of fact in this case as to whether or not this activity took place in a remote area. If such activity took place in an area not regarded as remote, the rule of absolute liability of the plaintiff would apply. On the other hand, if it is determined that the activity took place in an area which is remote, then plaintiff is required to prove that the defendant's conduct was not that of a reasonable prudent man under the circumstances."

The court submitted the case to the jury on negligence on the part of defendant in setting off the explosion at a time when defendant should have reasonably foreseen that plaintiff might be injured (Instruction

No. 19, R. 88); contributory negligence in failing to keep a proper lookout for dangers in the area reasonably to be anticipated; failing to keep a proper lookout for his own safety; failing to avoid positioning himself in a position of obvious danger; and failing to take appropriate action to avoid injury to himself after having an opportunity to do so (Instruction No. 20, R. 89); liability based on a finding that defendant should reasonably foresee that others might be injured (Instruction No. 22, R. 91); and the defense of assumption of risk (Instruction No. 21, R. 90).

Plaintiff requested a directed verdict on liability in his Requested Instruction No. 2 (R. 44) and by motion made at the close of the evidence. (R. 388-400).

Plaintiff requested the case submitted to the jury on a directed verdict, or in the alternative on the theory of absolute liability if the jury should find that defendant should have reasonably foreseen that others might be injured by the use of the dynamite (R. 45) with the allowable defenses of voluntary assumption of risk and contributory wilful or reckless misconduct. (R. 48, 49).

The jury returned a verdict of No Cause of Action (R. 98, 99). Plaintiff thereafter filed a motion for judgment notwithstanding the verdict and in the alternative for a new trial (R. 103), which was denied. (R. 104).

ARGUMENT

POINT I

THE EVIDENCE REQUIRED A DIRECTED FINDING OF LIABILITY.

Plaintiff moved the court for a directed verdict on liability. This motion should have been granted.

A. AS A MATTER OF LAW, DEFENDANT KNEW OF PLAINTIFF'S PRECARIOUS POSITION AT THE TIME OF THE BLAST.

The case of *Robison v. Robison* (1964) 16 Utah 2d 2, 394 P.2d 876, has established the law in Utah as to the rule of absolute liability in blasting cases. The court laid down the following rule at page 4:

> "Whether dynamite is such a dangerous instrumentality depends upon the circumstances. Used in a crowded city, it of course would be; whereas, using it on a remote area where there is little or no possibility of injury to others, it would not. In doubtful situations between those extremes, the problem must be resolved by the answer to the question as to *whether the user should reasonably foresee that others might be injured.*" (Italics ours).

It can be seen from the above that when the evidence establishes that the person conducting the blasting knows that there are others who might be injured in the area and such others are injured, then liability is established. The evidence is such in the case at bar that all reasonable men must find that defendant knew

that Duane Southwick was in an area of danger. Accordingly, it must follow that defendant is responsible under the rule of absolute liability for the damages caused to plaintiff by the blasting operation. At this point the burden is thrown on defendant to prove the defense of assumption of risk by a preponderance of the evidence.

Reviewing the testimony of the powder foreman, George Anderson, and using the rule reaffirmed in the case of *Alvarado v. Tucker, et al.,* (1954) 2 Utah 2d 16, 268 P.2d 986, that:

> "Testimony of a witness on his direct examination is no stronger than as modified or left by his further examination or by his cross-examination"

the court must find as a matter of law that the defendant, through its powder foreman, knew that others might be injured by the blast. Accordingly, liability is established. As shown by the quoted portions of Anderson's testimony in his deposition, he volunteered time and again that the newsmen were in a position of danger at the time that he gave the signal for the blast. In his testimony at trial, he tried to change his testimony, stating that he thought they would be safe if they would stay behind the car. Also, he attempted to retreat from his voluntary statement in the deposition concerning the funneling effect, which he stated made the area in which the newsmen were located that much more dangerous. According to the rule in the *Alvarado* case, supra, Anderson cannot keep changing his testimony to help his employer.

The conclusion is inescapable that he knew of the danger to these newsmen at the time that he gave the signal for the detonation. *In such a situation it is error for the court to give the question to the jury as to whether or not defendant should have reasonably foreseen that others might be injured.*

B. DEFENDANT FAILED TO PRODUCE EVIDENCE OF ASSUMPTION OF RISK.

Assumption of risk being an affirmative defense, defendant has the burden of proving it by a preponderance of the evidence. This defendant failed to do. The Utah law has been well established that in order for the defense of assumption of risk to be applicable, the plaintiff must know and appreciate the hazard involved and freely and voluntarily consent to assume it. These elements have been clearly set forth in the cases of *Johnson v. Maynard,* (1959) 9 Utah 2d 268, 342 P.2d 884, and *Jacques v. Farrimond* (1963) 14 Utah 2d 166, 380 P.2d 133. The nature of assumption of risk is stated in *Restatement of Torts 2d,,* par. 496(b), where it is stated in part:

> "The basis of assumption of risk is the plaintiff's consent to accept the risk and look out for himself. Therefore he will not be found, in the absence of an express agreement which is clearly so to be construed, to assume any risk unless he has knowledge of its existence. This means that he must not only be aware of the facts which create the danger, but must also appreciate the danger itself and the nature, character and extent which make it unreasonable. * * *

"The standard to be applied is a subjective one, of what the particular plaintiff in fact sees, knows, understands and appreciates."

There was no evidence to justify a finding that plaintiff knew and appreciated the risk and voluntarily assumed it. The evidence shows that the three newsmen were 350 to 400 yards from the site of the blast. The evidence is undisputed that plaintiff was not involved in any discussions with the powder foreman concerning the location of the newsmen. Jordan and Miller denied that they told plaintiff anything at all about being in an area of danger. *There isn't a jot of evidence that plaintiff had been given any kind of warning at all, either that he was in a position of danger or that the explosion was about to take place.* The evidence is undisputed that this was the first demolition that plaintiff had ever covered and that he had no experience or training in demolition work. Accordingly, plaintiff is in the same position as motorists who were stopped some 800 to 1,000 feet to the east of Stillman Bridge and a quarter of a mile west of Stillman Bridge to wait for the blast. Plaintiff came late to the situs and found the newsmen already in position. Certainly plaintiff, as a person inexperienced with explosives, could assume that the newsmen were out of the area where debris and rocks could be expected to fall. Plaintiff further testified that he could just as easily have taken his pictures from 200 yards farther away, inasmuch as he had the camera equipment to do it. Why would plaintiff want to risk his life merely to get pictures for

the T.V. station? It can be pointed out that plaintiff was not paid flight pay or jump pay for gathering news. At any rate, there is no evidence that plaintiff knew any more about this blasting operation than any other spectator in the area.

Defendant has the burden of proving assumption of risk by a preponderance of the evidence, and a jury finding could not be based on mere speculation, conjecture, or guesswork.

C. EVEN IF ASSUMPTION OF RISK WAS A JURY QUESTION, PLAINTIFF WAS ENTITLED TO A DIRECTION OF LIABILITY, SUBJECT TO THE DEFENSE OF ASSUMPTION OF RISK.

The court submitted to the jury both the question as to whether defendant should reasonably foresee that others might be injured and whether plaintiff was guilty of assumption of risk. The jury finding could have been based either on finding that defendant should not have reasonably foreseen that others might be injured, or that plaintiff assumed the risk.

As has been heretofore pointed out, defendant's powder foreman testified that he knew that the men, where plaintiff was located, might be injured by the blast. Defendant is legally bound by this testimony. Accordingly, plaintiff was entitled to have the jury directed on this point. Plaintiff was prejudiced by the court's failing to do this, for the reason that the jury

verdict could have been based on a negative finding as to this proposition.

Plaintiff's motion for a directed verdict included a motion to direct the jury as to liability under the doctrine of absolute liability, even if the court correctly felt that assumption of risk was a jury question. A motion for a directed verdict is a separate motion to each of the questions submitted to the jury. See *Giguere v. E. D. & A. C. Whiting Co., et al.,* (Vt. 1935) 107 Vt. 151, 177 At. 313, 98 A.L.R. 196. Since plaintiff was prejudiced by the court's refusal to direct the jury on the issue of liability, even if there was a jury question on assumption of risk, then plaintiff should be entitled to a new trial.

POINT II

THE COURT COMMITTED REVERSIBLE ERROR IN SUBMITTING NEGLIGENCE AND CONTRIBUTORY NEGLIGENCE TO THE JURY.

Plaintiff pleaded the doctrine of absolute liability in his complaint. He did not plead the theory of negligence. The pretrial order stated that only in the event that the court should rule as a matter of law that the doctrine of absolute liability did not apply in this case, should the theory of negligence be presented to the jury. The court failed to follow the pretrial order in this regard. Instead, the trial court submitted a hybrid conglomeration of negligence and absolute liability

theories. Plaintiff should not have been forced to go to the jury on a theory that he did not plead nor want. Plaintiff was entitled to go to the jury on the clean-cut issue of liability of a person using a dangerous instrumentality on the theory of absolute liability with its proper defenses. This the court refused plaintiff. It goes without saying that pleadings are entirely useless if a party cannot plead and prove his case according to his theory. The court in the customary introductory instruction (R. 77) told the jury in part as follows:

> "The basis of the claim of plaintiff for damages is that the defendant was negligent in setting off the explosion when and as it did, and that as a proximate cause of said negligence, the injury to plaintiff resulted. * * * In addition to defendant's denial of negligence, defendant alleges that the plaintiff, himself, was negligent and that his negligence was either the sole proximate cause or the contributing proximate cause, of the injury to the plaintiff, and that he therefore, in either event, would not be entitled to recover."

Compare plaintiff's requested Instruction No. 1 (R. 43).

Thus, the court gave plaintiff a burden which plaintiff should not have been saddled with, the burden of proving neglect on the part of defendant. The court also gave defendant a defense that it was not entitled to, the defense of contributory negligence. Throughout the entire set of instructions are laced the theories of negligence and contributory negligence. Plaintiff sought

to avoid having these confusions introduced into the case, inasmuch as defendant was using a dangerous instrumentality which resulted in injury to plaintiff. Plaintiff was not required to prove negligence but merely that defendant should have reasonably foreseen that *some one* might be injured by the blasting operation. Opening the door for defendant to confuse the case with its claims of contributory negligence and imposing upon plaintiff the burden of proving negligence greatly prejudiced plaintiff in this case. Contributory negligence is not a defense to a claim of absolute liability against a person using a dangerous instrumentality. ***Prosser on Torts, 2d Ed.,*** par. 60, p. 341. Plaintiff sought to go to the jury on the sole basis of absolute liability, and this the court did not allow. Plaintiff should be entitled to a new trial so that he can go to the jury on the proper legal theory which was pleaded and proved.

A reference to Instruction No. 20 (R. 89) can well illustrate the type of confusion that was inserted into the case by the trial court. Instruction No. 20 reads in part as follows:

> "The defendant's claim of negligence on the part of plaintiff is based upon the following alleged facts: (a) to keep a proper lookout for dangers in the area reasonably to be anticipated, and (b) keep a proper lookout for his own safety, and (c) avoid positioning himself in a place of obvious danger, and (d) take appropriate action to avoid injury to himself after having an opportunity to do so.

> "Thus, even if you find the two propositions in Instruction No. 19 in favor of the plaintiff, he may nevertheless be barred from recovery by contributory negligence. * * * "

From the above, plaintiff could be barred from recovery merely by getting up that morning, going to work, and eventually proceeding to the place where he attempted to film the demolition. It is stated at 53 Am. Jur. "Trial," par. 574, at p. 453:

> "Both the plaintiff and the defendant are entitled to have issues of fact presented by the pleadings submitted to the jury without the introduction of extraneous matter which may mislead them or divert their minds from a consideration of the evidence pertinent to the real issues. No instruction should be given by the court either on its own motion or at the request of counsel which tenders an issue that is not presented by the pleadings or supported by the evidence, or which deviates therefrom in any material respect."

Maertins v. Kaiser Foundation Hospital, a corporation, et al., (1958) 162 Cal.App.2d 661, 328 P.2d 494, 75 A.L.R.2d 807, held that it was error to instruct on the defense of contributory negligence in a malpractice action where this defense was not pleaded:

> "Where a defense is neither raised by the pleadings nor on the trial, it is error to instruct the jury on it."

See also: *Davis v. Midvale City*, 56 Utah 1, 189 P. 74, and *Verdi v. Helper State Bank*, 57 Utah 502, 196 P. 225.

Defendant should not have been allowed to inject this confusion into this case when plaintiff did not even plead negligence. The prejudice to plaintiff is obvious.

CONCLUSION

A new trial is required to correct the injustices done to plaintiff in the trial of this case. The evidence required a finding as a matter of law that defendant knew that plaintiff was in an area of danger, and accordingly the jury should have been directed on liability. Defendant produced no evidence that plaintiff voluntarily assumed a risk of which he knew and appreciated the danger. Even if assumption of risk was a jury question, plaintiff was prejudiced by having the question as to liability submitted to the jury in the face of the testimony of defendant's powder foreman admitting his knowledge of plaintiff's position in an area of danger at the time that he gave the signal for the blast.

Plaintiff should have been entitled to go to the jury on the legal theory which he pleaded, absolute liability. The court injected confusion and prejudicial error into the case by making a hybrid action out of a clear-cut absolute liability action which was pleaded and proved by plaintiff. Submitting negligence and contributory negligence to the jury and lacing the instructions with these theories prejudiced plaintiff.

Plaintiff should be entitled to a new trial so that he can go to the jury on his theory and so that the jury

can be properly directed as to a finding of liability. In the spirit of the special concurrence in the recent case of *Cornwell v. Barton,* January 24, 1967, the alternative of a new trial should be favored over a final disposition perpetuating the injustices dealt to plaintiff in this case.

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