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Howell Ujifusa v. National Housewares, Inc. : Appellant's Brief

IN THE SUPREME COURT
of the
STATE OF UTAH

HOWELL UJIFUSA,
Plaintiff and Respondent,

- vs -

NATIONAL HOUSEWARES, INC.,
Defendant and Appellant.

Case No.
11901

APPELLANT'S BRIEF

Appeal from the Third Judicial District
Court for the County of Salt Lake,
Honorable Aldon J. Anderson, *Judge*

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STATEMENT OF THE NATURE OF THE CASE

This is an action by plaintiff to recover damages for personal injuries sustained by him as a result of an accident while riding on a snowmobile operated by defendant's employee David Bigler.

DISPOSITION IN THE LOWER COURT

The case was tried to a jury which returned a verdict in favor of the plaintiff and against the defendant in the amount of $10,000.00 general damages and $194.63 special damages.

RELIEF SOUGHT ON APPEAL

Defendant seeks a reversal of the judgment below.

STATEMENT OF FACTS

The facts out of which this case arises are relatively simple and substantially without dispute.

Plaintiff is a commercial photographer. (R. 128, 129) Shortly before December 20, 1966, he was contacted by one Rex Woodruff, an advertising man, to take movies of people in a snowmobile at Alta, for use in advertising or promotional material. (R. 130) On the afternoon of December 20, Woodruff picked plaintiff up at his place of business, and they then picked up David Bigler, vice president of defendant National Housewares, at its office on Vine Street, and then proceeded to Alta in Woodruff's car. (R. 131) Bigler had a snowmobile on a trailer, which he removed. (R. 131) Plaintiff had never previously been on a snowmobile. (R. 131)

Plaintiff rode on the snowmobile with Bigler up the mountain in search of an appropriate place to take pictures. Bigler was in front and drove. Plaintiff sat behind him, straddling the seat. They followed a trail up the mountain. After locating a suitable place to take pictures, they started down the hill following the same trail. Near the bottom, they had an accident. There was a hump or bump in the road. As the snowmobile passed over it, the machine left the ground, and when it came down, plaintiff sustained injury, although the machine did not turn over or upset. (R. 132-134, 156)

With the assistance of other members of the party, plaintiff went over to the car and rested for twenty to thirty minutes. He then went back up the hill on the

snowmobile, took some photographs, came down the hill on the snowmobile, took some more photographs, and then came home. (R. 134)

Prior to this time, plaintiff had been a skier and had done a lot of skiing. He had skied at Alta and was familiar with the terrain. He knew that the roads up the mountain were not paved. He knew that they would be taking a trail, or unimproved road, which would have irregularities in it and would not be smooth. (R. 150, 151)

Plaintiff had no opinion as to the speed of the snowmobile. (R. 156) He did not feel that the speed was excessive and made no complaint to Bigler about the manner of operation. (R. 157) As above noted, the snowmobile remained upright after the accident. (R. 156)

Rex Woodruff observed the snowmobile coming down the trail, and its speed appeared to him to be normal. He estimated that the snowmobile traveled about ten to twelve feet in the air. (R. 159)

Bigler testified that he was familiar with the trail and had been over it before. (R. 167) The hump or bump on which the accident occurred was created by blockage of the road so automobiles would not go on the service road. It was newly created since the last time that he had passed over the trail. He had noticed it on the trip up the mountain and had driven around the edge of it. (R. 167) On the return trip, the machine was traveling about fifteen to twenty miles per hour. He intended to drive over the hump coming down. However, he did not intend to jump the machine. (R. 168)

He explained that with this machine, the operator cannot go over a bump going uphill because this would raise so much of the tread off the surface that the machine would lose traction and "spin out." However, coming downhill, it is normal operation to go over bumps which are less than two feet in height. (R. 182)

The same route was followed on the second trip up the mountain. However, in light of the previous experience, Bigler operated the machine at only five miles per hour on the return trip and did not leave the ground when he passed over the same bump. (R. 168, 169)

Later, efforts were made to take pictures jumping the machine over the bump. For this purpose, the machine was operated at its maximum speed of approximately 35 miles per hour. In order to get satisfactory jump pictures, it was necessary to build up the hump and enlarge it. Even then, the machine would jump only about twelve feet, and this without a passenger. (R. 172, 173)

On the evening of the accident, the plaintiff saw Dr. Robert Lamb. (R. 122) He saw Dr. Lamb again the next day and, although Dr. Lamb recommended hospitalization, plaintiff elected to wear a back brace and remain at work. Dr. Lamb saw him for purposes of treatment on only two other occasions, January 4 and February 4, 1967. (R. 123) X-rays depicted "minimal degenerative changes" which Dr. Lamb characterized as of the "lowest scale of severity." There was no cord or nerve damage. (R. 124) Degenerative changes go on

in everyone as part of the aging process. He anticipated that the plaintiff would be able to adjust to this difficulty and to live a normal life. (R. 126)

Plaintiff did not lose any days from work, although for a period of about ten days after the accident, he had to lie down occasionally, and had to give up some outside work. (R. 142, 143) No evidence was offered as to what loss of profit, if any, he sustained as a result of this. Thereafter, for a period of approximately nine weeks, he hired an extra employee to assist with the work of moving heavy equipment in doing outside work. (R. 143) The total cost of this was $540.00. (Ex. 14) This was the only evidence establishing with any degree of certainty, any loss of income as a result of the accident.

After both parties had rested, defendant made a motion for directed verdict, which was denied. (R. 175) The case was submitted to the jury on the issues of negligence on the part of defendant, contributory negligence on the part of the plaintiff, and damages. Defendant submitted requests for instructions, both on the issues of contributory negligence and assumption of risk. (R. 32, 33) In a colloquy between the court and counsel for the defendant, the court indicated that he had some question as to whether the issue of contributory negligence should be submitted to the jury. Counsel for the defendant indicated that he also had a doubt on that point, but thought that the issue of assumption of risk should definitely be submitted to the jury. (R. 178) How-

ever, for reasons not indicated in the record, the court elected to submit to the jury the issue of contributory negligence rather than assumption of risk.

ARGUMENT

POINT I

THE COURT ERRED IN DENYING DEFENDANT'S MOTION FOR DIRECTED VERDICT AND REFUSING DEFENDANT'S REQUEST FOR A PEREMPTORY INSTRUCTION.

POINT II

THE COURT ERRED IN REFUSING TO SUBMIT TO THE JURY THE ISSUE OF ASSUMPTION OF RISK ON THE PART OF THE PLAINTIFF.

The bases of defendant's contention that the court should have directed a verdict in its favor are that there was no evidence of negligence on the part of the defendant which caused or contributed to cause the accident, and that as a matter of law, plaintiff assumed the risk. Since the doctrine of assumption of risk is also the essence of our Point II, and since, as we shall point out, there is a certain inter-relationship between the claims of no negligence on the part of defendant and assumption of risk on the part of plaintiff, we discuss the two points together.

About the only evidence plaintiff has upon which to rely, to establish negligence upon the part of the defendant is the fact that an accident occurred. It is axiomatic, however, that the mere occurrence of an accident is not in and of itself any evidence of negligence. There is no evidence from which the jury could find that Bigler

operated the snowmobile at an excessive or dangerous rate of speed. Plaintiff himself testified that he felt that the speed was reasonable, that he had no concern about it, and made no protest concerning it. Rex Woodruff also testified that the speed on the descent appeared to him to be normal. No expert evidence was offered tending to establish that the normal safe speed was anything different from the speed at which Bigler operated the machine.

On the issue of proper lookout, the evidence shows without dispute that Bigler saw the bump or hump and was aware of it, both going up and coming down the hill. He cannot, therefore, be said to be guilty of negligence in that regard.

He elected to proceed over the bump, believing that he could do so without jumping the machine. His judgment proved to be mistaken, but a mere mistake in judgment is not negligence.

He did not lose control of the machine, but held it in an upright position until it came to rest.

There is no evidence that Bigler was skylarking, showing off, attempting to give the plaintiff a thrill, or doing anything other than proceeding in a business-like manner to move up and down the mountain to accomplish the objective in which all members of the party were interested.

Although there has been considerable recent literature concerning the hazards of snowmobile operation in gen-

eral and the risks inherent in it, our research has discovered no reported case involving injuries to passengers on snowmobiles. The case, therefore, must be decided on basic principles of negligence law. We submit that there is a complete lack of evidence upon which to base a finding that Bigler departed from the standard of reasonable care in his operation of the snowmobile.

Turning to the doctrine of assumption of risk, we note that this term has been used by the courts in varying ways and to mean varying things. Primarily, however, it means that because the plaintiff has consented to the risk, the defendant has no duty toward him. See 2 *Harper and James, The Law of Torts, Section* 21.1, page 1162:

> "* * * 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. . . ."

and *op.cit.,* page 1163:

> "The term assumption of risk in its primary sense refers to risks that are incidental to a relationship of free association between plaintiff and defendant, that is to say, one which either is at liberty to take or leave as he will. In such a case defendant's duty toward plaintiff is limited. It does not extend to the use of care to make the

> conditions of the relationship reasonably safe — at most the duty is one of care to make these conditions as safe as they appear to be and it may fall short of that. If these risks are fully comprehended, or perfectly obvious, or of the kind which plaintiff and not defendant must look out for, then plaintiff will be held to have assumed them by voluntarily entering into the relationship which entails them. . . ."

It has been said by this court in several cases that knowledge or comprehension of the risk by the plaintiff is the watchword of assumption of risk. However, as pointed out in Harper and James, this is not always true. See 2 *Harper and James, The Law of Torts,* Section 21.2, page 1168:

> "It is sometimes said that knowledge or comprehension of the risk by plaintiff is the watchword of assumption of risk. In many types of situations this is true; in others it is not. Unless the limitations which should be put on such a statement are fully appreciated, it may be very misleading. There may be assumption of a specific risk of which the plaintiff is completely ignorant. . . ."

and also, page 1170:

> ". . . It seems fairly safe to say, however, that there are at least some situations whose dangers are so obvious, so customary, and so commonly known that a defendant need give no warning of them. Here again a plaintiff may assume a risk that he does not in fact comprehend. . . ."

The same authors further observe that voluntary participants in lawful games and sports assume the risk of

injury at the hands of their fellow participants. See page 1181.

Similar language is used by Prosser:

> ". . . In its simplest and primary sense, it means that the plaintiff has given his express consent to relieve the defendant of an obligation of conduct toward him, and to take his chance of injury from a known risk. The result is that the defendant is simply under no legal duty to protect the plaintiff. A second, and closely related meaning, is that the plaintiff, with knowledge of the risk, has entered voluntarily into some relation with the defendant which necessarily involves it, and so is regarded as tacitly or impliedly agreeing to take his own chances. . . ." *Prosser on Torts, Second Edition,* Section 55, page 303.

And, at page 307 the same author says:

> ". . . *By entering freely and voluntarily into any relation or situation which presents obvious danger, the plaintiff may be taken to accept it,* and to agree that he will look out for himself, and relieve the defendant of responsibility. *Those who participate* or sit as spectators *at sports and amusements* assume all the obvious risks of being hurt by roller coasters, flying balls, fireworks explosions, or the struggles of the contestants. *'The timorous may stay at home.' . . . The consent is found in going ahead with full knowledge of the risk.*" (Emphasis ours.)

See further, page 310:

> "At the same time, it is evident that in all such cases an objective standard must be applied, and that the *plaintiff cannot be heard to say that he*

> *did not comprehend a risk which must have been obvious to him.* As in the case of negligence itself, *there are certain risks which anyone of adult age must be taken to appreciate*: . . ." (Emphasis ours)

Very similar language is found in the *Restatement of the Law of Torts Second,* in comment "c" under Section 496A.

While this court has been reticent to apply the doctrine of assumption of risk to automobile type cases, it has recognized its place in cases involving sports, either as a participant or spectator, where the hazard is of a type which should be perceived by a person of ordinary experience and prudence.

In *Hamilton vs. Salt Lake City Corporation,* 120 Utah 647, 237 P.2d 841, the plaintiff was held to have assumed the risk of being struck by a foul ball while attending a baseball game.

In *Tannehill vs. Terry,* 11 Utah 2d 368, 359 P.2d 911, this court held that it was not error to submit the issue of assumption of risk to the jury in a case where the plaintiff was struck in the face by a golf club by the defendant. In that case, the plaintiff had no more knowl edge of the game of golf than did the plaintiff here of snowmobiling.

In *Harrop vs. Beckman,* 15 Utah 2d 78, 387 P.2d 554, this court recognized that the doctrine would be applicable to the risks incident to water skiing. The doctrine was not applied in that case, since it did not apply to the negligence of the defendant, the operator of another

boat who collided with the plaintiff after the plaintiff lost her water skis and was dislodged from the boat which was towing her.

The most recent expression from this court on this subject is found in *Foster vs. Steed,* 459 P.2d 1021, where it said:

> "Where the trial court has refused to submit the issues to the jury, and has ruled on them as a matter of law, his action can properly be sustained only if the evidence compels findings in accordance with his ruling. . . . *Accordingly, if under any reasonable view of the evidence, and the inferences that fairly may be derived therefrom, the jury could remain unconvinced on such issues, the* directed verdict was wrong *and the issues should have been submitted to the jury.*" (Emphasis ours.)

It was accordingly held that the issues of contributory negligence and assumption of risk should have been submitted to the jury, and not determined by the court as a matter of law. We submit that if plaintiff was not guilty of assumption of risk as a matter of law, there was at the very least substantial evidence upon which a jury could have found as a matter of fact that he was guilty of assumption of risk. He had skied at Alta and was familiar with its terrain. He was aware that the trail over which he would travel was not a smooth one, and that it would have irregularities in it. The nature of the machine was open and apparent. (See exhibits 15, 16, 17, and 18.) Plaintiff was aware that the machine would necessarily pass over depressions, bumps,

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CORRECTION TO APPELLANT'S BRIEF

The following case was decided by this court after Appellant's Brief was printed and filed, and is cited in support of Points I and II of Appellant's Brief. It should follow immediately after the quotation from Foster vs. Steed at the middle of page 12:

Calahan vs. Wood, Ut.2d , 465 P.2d 169.

rises, and irregularities in its path, and as a reasonable person must have known that when it did so, it would quite probably leave the ground and travel for some distance through the air. He must have been equally mindful that when it returned to the ground, there would be some impact to the rider, and, of course, any vertical impact to the spine carries some risk of injury. These risks the plaintiff must be deemed to have known, understood and voluntarily assumed.

POINT III

THE DAMAGES AWARDED BY THE JURY WERE EXCESSIVE.

As has been pointed out in our statement of facts, the injury sustained by the plaintiff did not require him to be hospitalized and, in fact, it was necessary for him to see his doctor only on four occasions, the last of which was approximately six weeks after the injury occurred. It was not necessary for him to take any time away from his work. He demonstrated no loss of income as a result of his injury, except the cost of hiring an assistant for a couple of months during the time that plaintiff was unable to do heavy lifting. His expense for medical care was minimal, and his doctor characterized his injury as "minimal" and of the "lowest scale of severity."

In the face of this evidence, the jury awarded the plaintiff $10,000.00 general damages, in addition to his special damages. Defendant contends that this award for general damages is excessive and either should have been reduced, or a new trial granted.

We recognize that decisions in other cases are of limited value in appraising the adequacy or excessiveness of a jury award. As said by this court in *Duffy vs. Union Pacific Railroad Company,* 118 Utah 82, 218 P.2d 1080:

> "Previously decided cases are of little value in fixing present day standards or in assisting courts in determining excessive awards. Both the court and jury are required to deal with many unknown factors and a good guess is about the best that can be hoped for. The permissible minimum and maximum limits within which a jury may operate for a given injury are presently far apart and must continue to be widespread so long as pain and suffering must be measured by money standards. . . ."

However, we believe that the cases hereinafter cited are sufficiently similar on their facts and sufficiently analogous to the case at bar to be of some value to the court in passing upon our contention here. In the case of *Shepard vs. Payne,* 60 Utah 140, 206 P. 1098, this court held a $10,000.00 verdict excessive and ordered a reduction to $7,500.00. This court there said:

> "While we do not regard the verdict as the result of passion and prejudice, we are convinced that it is excessive, and therefore unjust to the defendant. Great latitude is necessarily allowed to a jury in assessing damages for personal injuries. A plaintiff who is entitled to damages should be fully compensated. No verdict is right which fails to compensate; none is right which more than compensates. The trial judge should not in this case have granted a new trial, but, in the exercise of

> his discretion, he should have required plaintiff to remit part of the judgment, and, in the event of refusal, should have granted the motion for a new trial. . . ."

In the above-quoted case of *Duffy vs. Union Pacific Railroad Company,* an FELA case, the jury returned a verdict of $12,500.00 for personal injuries, reduced by the amount of $3,500.00 for plaintiff's contributory negligence, making a net verdict of $9,000.00 In that case, the plaintiff had to undergo surgery and was hospitalized for a period of thirteen days. He lost approximately $1,300.00 in lost wages, leaving a gross award for general damages of $11,200.00 In holding that amount excessive and in ordering a remittitur of $4,000.00, this court said:

> "We must assume that the jury awarded plaintiff the sum of $1,300 for loss of wages, which were his only established special damages, and this leaves the sum of $11,200 for general damages. When we get in this domain reasonable minds might differ as to what amount is excessive. However, there must be a limit beyond which a reasonable jury cannot go and the limit must be determined on the gross amount of the verdict and not the net amount. Conceding that jurors in different states and counties have different monetary standards and different ideas as to the value of pain and suffering; that present day costs of living are comparatively high; that the purchasing power of the dollar has decreased to approximately one-half of what it was some ten years ago; that we are seemingly in an inflationary spiral; and, that by all reasonable standards verdicts should be larger than they were at that

> period; we are, nevertheless, of the opinion in this case that the damages awarded by the jury have no foundation in fact, and are so grossly excessive and exorbitant as to convince the members of this Court that the verdict is far in excess of what a reasonable jury could determine as the maximum amount awardable for this type of injury. For these reasons it appears to us to have been given under the influence of passion and prejudice."

In *Stamp vs. Union Pacific Railroad Company,* 5 Utah 2d 397, 303 P.2d 279, plaintiff sustained an injury to his eye, which required him to be in the hospital for four days and to lose eleven days from work. The jury awarded $12,500.00 damages and deducted $2,500.00 on account of plaintiff's contributory negligence, leaving a net verdict of $10,000.00. In holding this award excessive and ordering a remittitur of $4,000.00, this court said:

> "In our opinion it cannot be justly denied that the injuries suffered by the plaintiff in Duffy v. Union Pacific R. Co. were of much longer duration and well calculated to result in more permanent disability. Duffy, like Stamp, suffered extreme pain; he was off work three and one-half months compared to the 13 days that plaintiff in this case was off.
>
> * * *
>
> "We are of the opinion that the award made by the jury has no basis in fact. Such an award is so excessive as to be shocking to one's conscience and to clearly indicate passion or prejudice, and it abundantly appears that there is no evidence to support or justify the verdict. The trial court

abused its discretion in refusing to grant a new trial or in ordering a remittitur."

Similar reasoning was followed in the case of *Ruf vs. Association for World Travel Exchange,* 10 Utah 2d 249, 351 P.2d 623. We also invite attention to the case of *Lodder vs. Western Pacific Railroad Company,* 123 Utah 316, 259 P.2d 589. In the opinion in that case, there are collected decisions from this court wherein remittiturs ranging from 25 per cent up to 50 per cent have been ordered or approved. Under the criteria heretofore established by this court, the award of general damages in this case is excessive and a remittitur should be ordered or a new trial granted.

CONCLUSION

Plaintiff failed to prove any negligence on the part of the defendant and the evidence shows that plaintiff assumed the risk as a matter of law, and the verdict and judgment should be set aside with directions to enter judgment in favor of the defendant, no cause of action. Alternatively, the judgment should be reversed and remanded for a new trial with directions to submit the issue of assumption of risk to the jury. The verdict is excessive and if the judgment on liability is permitted to stand, a remittitur should be ordered.

Respectfully submitted,

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