

SUPREME COURT OF OKLAHOMA

S. H. Kress & Co. v. Maddox

201 Okla. 190 (1949) · Decided March 8, 1949

SUMMARY

The Oklahoma Supreme Court affirmed a jury verdict awarding Jennie Maddox damages for injuries sustained when she fell on an allegedly oily floor in S. H. Kress & Company’s store. The court held that evidence of the store’s floor condition shortly before the accident was admissible, that assumption of risk was not at issue because it had not been pleaded or supported by evidence of knowledge of the danger, and that the verdict against the corporation was not inconsistent with a verdict favoring its manager. The court also rejected a challenge based on alleged juror misconduct.

CASE DETAILS

COURT	Supreme Court of Oklahoma
WRITING FOR THE COURT	Gibson, J.
JURISDICTION	Oklahoma
DECIDED	March 8, 1949
DISPOSITION	affirmed
PROCEDURAL POSTURE	S. H. Kress & Co. appealed from a jury verdict awarding Jennie Maddox damages for personal injuries sustained in a fall on the floor of the company's store.
STANDARD OF REVIEW	The court reviewed evidentiary admissibility, jury instructions, the sufficiency of the evidence to withstand demurrer and support submission to the jury, the effect of inconsistent verdicts, and the denial of a mistrial for legal error and whether the challenged rulings constituted error under the circumstances.
PRECEDENTIAL VALUE	Published Oklahoma Supreme Court opinion
PARTIES	S. H. Kress & Co. v. Jennie Maddox

TOPICS

- premises liability
- personal injury
- evidence
- contributory negligence
- assumption of risk

PRACTICE AREAS

QUESTIONS PRESENTED

1. Whether testimony concerning the heavily oiled condition of the store floor observed shortly before the accident was admissible to show the floor's condition at the time of the fall.
2. Whether the jury instruction on contributory negligence was reversible error because it placed the burden of proof on the defendant without expressly stating that the plaintiff's evidence could also be considered.
3. Whether the evidence raised assumption of risk so that the defendant was entitled to an instruction on that defense despite not pleading it.
4. Whether the evidence was sufficient to submit negligence to the jury and withstand the defendant's demurrer to the evidence and request for a directed verdict.
5. Whether the verdict for store manager M. Q. Davis required a verdict for the corporate defendant.
6. Whether the trial court erred in denying a mistrial based on alleged unauthorized inspection of the premises and advocacy by a juror.

HOLDINGS

1. Evidence of the condition of the place where an injury occurred, observed a reasonable time before the occurrence, is admissible when its character and timing fairly support an inference that the condition existed at the time of the accident; the weight of such evidence is for the jury.
2. An instruction on contributory negligence is not erroneous merely because the court did not on its own motion advise the jury that the plaintiff's evidence could be considered on that issue, when the defendant failed to make a proper and timely request or call the omission to the trial court's attention.
3. Assumption of risk requires knowledge and appreciation of the danger; where the defendant did not plead assumption of risk and the evidence does not show that the plaintiff knew or was chargeable with knowledge of the danger, the defendant is not entitled to an instruction on that defense.
4. Because competent evidence supported an issue of negligence, the trial court properly overruled the defendant's demurrer to the evidence and refused to direct a verdict for the defendant.
5. A verdict in favor of an employee does not necessarily require a verdict for the corporate employer when the employer's liability may arise from negligent acts of other employees who were not joined as defendants or from the corporation's own or vice-principal liability.
6. The trial court did not err in refusing a mistrial where the claim that a juror had made an unauthorized inspection of the premises was based only on speculation and was unsupported by evidence.

KEY QUOTATIONS

"The limitation on the admission of such evidence is that it must be such, in character and point of time, as to justify the inference that the place was in a bad condition at the time of the accident." (191)

“Knowledge and appreciation of the danger is an essential of the defense of assumption of risk and, hence, the doctrine does not apply unless the one alleged to have assumed the risk can be found to have known or to have been charged with knowledge of the danger.” (192)

“The plaintiff was an invitee upon the premises of the defendant. The defendant owed to her the duty to maintain the premises in a reasonably safe condition.” (192)

FACTUAL BACKGROUND

Jennie Maddox fell on the floor while shopping in S. H. Kress & Co.'s merchandise store in Ardmore, Oklahoma. Witnesses testified that, during the latter part of August and no more than an hour before learning of Maddox's fall, the store floor was heavily oiled, with puddles of oil, while a worker spread the oil. Maddox was an invitee, and the evidence also showed that other employees, rather than only the store manager M. Q. Davis, may have performed the allegedly negligent acts.

PROCEDURAL HISTORY

Maddox sued S. H. Kress & Co. and store manager M. Q. Davis for injuries from a fall in the store. The jury returned a verdict against the corporation and in favor of Davis. The corporation appealed, challenging evidentiary rulings, jury instructions, the denial of a directed verdict, the effect of the verdict in favor of Davis, and the denial of a mistrial based on alleged juror misconduct. The Supreme Court of Oklahoma affirmed.

DISPOSITION

affirmed

CASES CITED

- English v. Thomas, 48 Okla. 247, 149 P. 906
- Great Western Coal & Coke Co. v. Cunningham, 43 Okla. 417, 143 P. 26
- G. A. Nichols Co. v. Lockhart, 191 Okla. 296, 129 P.2d 599
- Cities Service Oil Co. v. Jamison, 189 Okla. 445, 117 P.2d 776
- S. S. Kresge Co. v. Holland, 158 F.2d 495
- Holmes v. Ginter Restaurant Co., 54 F.2d 876
- Chicago, R. I. & P. Ry. Co. v. Brooks, 57 Okla. 163, 156 P. 362
- Chicago, R. I. & P. Ry. Co. v. Pedigo, Adm'r, 123 Okla. 213, 252 P. 1095

OPINION

GIBSON, J.

GIBSON, J. This action was brought by Jennie Maddox, as plaintiff, against S. H. Kress & Company, a corporation, owner and operator of merchandise store in the city of Ardmore, Okla*191homa, and M. Q. Davis, its manager, to recover damages for personal injuries sustained

as the result of a fall upon the floor of defendant's store while shopping there. Trial was had to a jury which returned a verdict for plaintiff against the defendant corporation.

The defendant corporation appeals. For reversal defendant presents five propositions, as follows: that the trial court erred (1) in the admission of testimony; (2) in his instruction on contributory negligence; (3) in overruling defendant's demurrer to the evidence and refusing to instruct the jury to return a verdict in favor of defendant; (4) in refusing to instruct the jury to return a verdict in favor of defendant since the jury returned a verdict in favor of codefendant M. Q. Davis; and (5) in refusing to give defendant a mistrial because of the alleged misconduct of juror Ben G. Hunter.

In support of the first proposition it is contended that the admission of the testimony of witnesses Mr. and Mrs. Henry is error. They testified that they were shoppers in the store during the latter part of August; that the floor was heavily oiled, in fact, covered with oil, and there were puddles of oil on the floor; that a negro boy was spreading the oil out with a kind of apparatus; that on the same day and not more than an hour after they were in the store they heard that some one had fallen therein and that the newspaper, *Ardmoreite*, of that evening or the following evening, disclosed that Mrs. Maddox was the one who fell.

It is urged that this evidence is too remote in point of time and that it concerns a character of condition which is not within the rule that permits evidence of a condition within such time as will fairly tend to show the condition existing at the time of the accident.

The court's attention is called to *English v. Thomas*, 48 Okla. 247, 149 P. 906, and other cases stating the rule, and emphasis is placed upon the fact that conditions there in contemplation were represented by a break in a step, rail or something of a permanent nature which would continue and therefore different from the condition of the floor herein which was temporary in its nature.

The distinction sought to be made goes more to the weight of the evidence than its admissibility where it is pertinent to the issue because the governing principle is the same. In *Great Western Coal & Coke Co. v. Cunningham*, 43 Okla. 417, 143 P. 26, one of the cases cited and relied on, the court said: "The limitation on the admission of such evidence is that it must be such, in character and point of time, as to justify the inference that the place was in a bad condition at the time of the accident." And in the syllabus we held: "Evidence of the condition of the place where the injury occurred, a reasonable time before the occurrence, is admissible as tending to show its condition at the time of the occurrence, especially where it is further shown that those conditions have not since changed." By reason of its nature the condition testified to was admissible as tending to show the condition existing at the time of the fall and the weight thereof was a question for the jury to be considered along with the other evidence pertinent thereto.

Under the second proposition it is contended that the court erred in his instruction on contributory negligence and in refusing to give defendant's requested instruction on assumption of risk.

Defendant pleaded contributory negligence but did not plead assumption of risk. It is urged that plaintiff's evidence was sufficient to raise both issues independently of such pleas.

The instruction of the court on contributory negligence is complained of because therein the court declared the burden of proof was upon defendant without advising the jury that the evidence of the plaintiff might be considered in arriving at its conclusion upon such issue. No requested instruction on such issue was submitted by the defendant nor was the court's attention directed to the incompleteness of the instruction in the respect urged.

In such situation the defendant is not in position to charge error in the omission. In *G. A. Nichols Co. v. Lockhart*, 191 Okla. 296, 129 P. 2d 599, in the third paragraph of the syllabus, there is declared: "An instruction on the issue of contributory negligence, in the absence of proper and timely request of counsel, is not erroneous merely because the court failed on its own motion to advise the jury that the evidence of the plaintiff might be considered in arriving at its conclusion on the issue." Defendant recognizes, on authority of *Cities Service Oil Co. v. Jamison*, 189 Okla. 445, 117 P. 2d 776, that, not having pleaded assumption of risk, it is not entitled to an instruction thereon unless such issue is raised by the evidence.

In this connection it is urged that the evidence shows that plaintiff had been in the store many times; the store was well lighted and the condition of the floor easily ascertainable with the exercise of ordinary care; that there is no testimony that plaintiff ever looked to see the condition of the floor; and that it appears that at the time of the fall the plaintiff was carrying with her right hand a cloth bag with articles of merchandise therein, and with her left hand a purse and parasol.

And concerning the effect it is said: "Such evidence alone, in our opinion, is sufficient to raise the question of contributory negligence and assumption of risk." Knowledge and appreciation of the danger is an essential of the defense of assumption of risk and, hence, the doctrine does not apply unless the one alleged to have assumed the risk can be found to have known or to have been charged with knowledge of the danger.

38 Am. Jur. p. 847, sec. 173. In substance, the argument is based upon the alleged duty of the plaintiff to observe the condition of the floor. In absence of something that could be held to have challenged her attention to the condition of the floor, of which there is no evidence, no such duty obtained.

The plaintiff was an invitee upon the premises of the defendant. The defendant owed to her the duty to maintain the premises in a reasonably safe condition. The plaintiff, in absence of knowledge to the contrary, had the right to assume that the floor was suitable and safe for her to walk upon. *S. S. Kresge Co. v. Holland*, 158 Fed. 2d 495; *Holmes v. Ginter Restaurant Co.*, 54 Fed.

2d 876. The evidence relied on does not raise the issue of assumption of risk, and therefore it was not error to refuse the instruction requested. Defendant's third proposition is that the court erred in overruling defendant's demurrer to plaintiff's evidence and in refusing to instruct the jury to return a verdict for defendant.

In view of our holding that there was competent evidence on the issue of negligence, which presented an issue for the jury, it follows that the proposition is without merit. When the jury returned its verdict which was against the defendant but in favor of codefendant M. Q. Davis, defendant moved the court to instruct a verdict for defendant, and the refusal of the court to so do is urged as error on authority of *Chicago, R. I. & P. Ry.*

Co. v. Brooks et al., 57 Okla. 163, 156 P. 362, wherein it was held: "Where a railroad company is joined as a codefendant, on the theory of *res-pondeat superior*, with one of its em-employees in an action to recover damages for the death of one whose death is alleged to have been caused by a wrongful act of such employee a verdict rendered on the trial of the case in favor of the employee and against the plaintiff on the issue of the alleged wrongful act of the employee is equivalent to a finding in favor of the railroad on that issue, and a verdict against the *193railroad on that issue will not be permitted to stand." In the instant case the liability of the defendant corporation is not necessarily dependent upon the negligence of defendant Davis.

It appears that other employees of the defendant corporation who are not parties to the action performed the alleged negligent acts. In such situation the case comes within the rule announced in *Chicago, R. I. & P. Ry. Co. v. Pedigo*, Adm'r, 123 Okla. 213, 252 P. 1095, as follows: "A verdict for an employee of the railroad company who is joined with the latter in an action for tort does not relieve the master from liability as vice principal, where the evidence is such that the jury may have concluded that the negligence of another employee, who was not joined in the action, was the proximate cause of the injury." As its last contention the defendant submits as error the refusal of the trial court to grant a mistrial by reason of the misconduct of Ben G. Hunter, a juror.

During the trial Hunter interrogated a witness for defendant as follows: "Q. When was the last time you applied any of that floor.dressing? A. This past Saturday night. Q. It has got a kinda oily appearance like this other stuff you use as a floor sweep? A. No, sir. Q. That smell there today is from that fluid put on there last Saturday night? A. I guess so, sir, I don't know of anything else it could be." Defendant states that there can be no question but that the juror had been in the store during the course of the trial; had observed the floor and the condition of the floor; that he had not been directed to do so by the trial court; that he was not accompanied by the other jurors; that he obtained information which he considered favorable to the plaintiff and unfavorable to the defendant; that he cross-examined defendant's witness in regard to these facts; and assumed the position of an advocate on behalf of plaintiff and against the defendant.

The entire argument of the defendant is based upon the presumption, for there is no proof, that the juror made an unauthorized inspection of the premises. The jury was selected on the day the trial was begun and concluded. There is no evidence that the juror, after being called as such to try the case, had an opportunity to visit the premises or was ever separated from the remainder of the jury.

Under the circumstances, it is as reasonable to suppose that this line of questioning by the juror was the result of a visit to the store before reporting for jury duty and being accepted as a juror in this case as it is to conclude that the juror had made an unauthorized inspection of the scene of the accident.

The refusal to declare a mistrial was not error. Affirmed.