WIGHTMAN v. CONSOL. RAIL CORP

On February 19, 1989, at approximately 12:05 a.m., the decedent, Michelle Wightman, was driving her mother's 1985 Ford southwest on Remington Avenue approaching a railroad crossing in the city of Sandusky. A short distance to the east of the crossing, a train owned and operated by CRC was stopped for repairs on the tracks closest to Michelle. When she got to the crossing, the gates were down and the red lights were flashing. Michelle proceeded to drive around the gates and began to cross the railroad tracks when another train owned by CRC that was traveling westbound on a second set of tracks appeared from behind the stopped train and struck Michelle's car, killing her and her passenger instantly.

On September 12, 1989, Michelle's mother, appellee Darlene Wightman, acting both in her capacity as administrator of Michelle's estate and individually, brought suit against CRC and the train's engineer, appellant Louis Nelson. The complaint set forth two causes of action. The first cause of action contained four counts of negligence (re: for permitting stopped train to obstruct view of oncoming second trains, for operating train at high rate of speed, for the crews failing to take reasonable measures to protect motorists, & for Nelson's failing to reduce speed or notifying other crew of his approach). The appellees also contend that these acts and omissions constitute an intentional, wanton and reckless disregard for human life and the safety of the public. NOTE: under Ohio state law if such conduct was found to be true, the law bars appellants from avoiding liability because of any alleged acts or omissions on the part of the decedent. For this, the appellees requested a minimum of $79,500 in compensatory damages.

The complaint's second cause of action set was a personal claim for property damage (re: loss of her automobile) because of appellants' negligence. For this cause of action, appellee requested compensatory damages in excess of $1,000 and as well as punitive damages in excess of $25,000.

During the trial, the jury entered a verdict in favor of the estate of the decedent in the amount of $1,000,000. By its response, the jury: (1) found that the $1,000,000, exclusive of funeral and burial expenses, would compensate the estate of the decedent without regard to the negligence of either party; (2) apportioned the negligence of the parties to the accident as sixty percent to appellant CRC and forty percent to the decedent; (3) found that appellant CRC "authorized, participated in, or ratified actions or omissions of an agent or servant that demonstrated `malice' * * * and that such malice was, by clear and convincing evidence a proximate cause of the accident"; and (4) found that appellant CRC should be liable for punitive damages.

In entering judgment, the court ruled in favor of the estate of Michelle Wightman in the amount of the jury's verdict of $1,000,000 in compensatory damages, but awarded no punitive damages.

Thereafter both parties filed a notice of appeal.

Issue: Is D liable for PL's injuries when both parties are partly responsible? Whether the trial court erred in its refusal to award punitive damages?

In its first assignment of error appellant asserts that the trial court erred by failing to direct a verdict in its favor at the close of the evidence. In support of this assignment of error appellant argues that when the decedent proceeded around the gates and across the railroad tracks, she violated both state and municipal law governing motorists' conduct at railroad crossings, as well as a common-law duty to look and listen, and such violations constituted negligence *per se.* Appellant also argues that the evidence demonstrates that the decedent intentionally violated these laws and the crossing warnings and that had she not done so the accident would not have occurred and, therefore, the sole cause of the accident was the decedent's own negligence.

(NOTE from the Prof: In 1980, Ohio moved away from the Common Law contributory negligence standard, and statutorily adopted the comparative negligence standard. Comparative negligence allows for a person to recover damages as reduced by the person's own percentage of negligence. In Ohio, if a party is more than 50 percent at fault, recovery is not allowed.)

Under Ohio law, comparative negligence does not bar recovery in an action predicated upon the willful, wanton or reckless conduct of a defendant. Thus, in a civil action for tort or wrongful death, a finding by the jury that a plaintiff (or plaintiff's decedent) was comparatively negligent will not defeat or diminish the recovery of damages where the defendant's intentional tort, committed with actual malice, proximately caused the injury.

Appellees responded to this by pointing out case law in Ohio has consistently held that the jury's finding that appellant CRC acted with malice and that that malice was a proximate cause of the accident removes all issues of negligence from the case and, therefore, the trial court properly found that the decedent's estate was entitled to recover the full amount of the compensatory damages assessed by the jury.

In their second cross-assignment of error appellees assert that the trial court erred in refusing to award punitive damages, attorney fees and costs to Darlene Wightman on her property damage claim. Appellees argue that, while the amount of punitive damages to be awarded lies within the discretion of the trial court, it was not within the court's discretion to fail to award any punitive damages when the jury expressly found that they are to be assessed. Appellees argue further that once the finder of fact determines that punitive damages may be recovered, an award of attorney fees and costs is also warranted.

In response, appellant argues that the trial court properly denied an award of punitive damages because there is no verdict or judgment on Darlene Wightman's property damage claim and punitive damages are not recoverable in a wrongful death action; that while appellant did stipulate at trial as to the value of the car, it did not stipulate as to the issue of liability, since the question of Darlene's comparative negligence was at issue; and that the issue of their liability for the damage to Darlene Wightman's car was never submitted to the jury and no judgment was entered in her favor on that claim.

It is not disputed that punitive damages are not recoverable in a wrongful death action. The recovery of punitive damages in tort actions, however, is provided for if: a) The actions or omissions of that defendant demonstrate malice, aggravated or egregious fraud, oppression, or insult, and b) The plaintiff in question has adduced proof of actual damages that resulted from such actions or omissions.

On consideration whereof, this court finds that the decision of the Erie County Court of Common Pleas is affirmed in part and reversed in part. The decision of that court denying appellee, Darlene Wightman, any award of punitive damages is reversed and this case is remanded to the trial court for determination as to the amount of punitive damages to which appellee, Darlene Wightman, is entitled in accordance with this opinion and for disposition of all remaining matters.

NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION v. ALDEN LEEDS, INC.

Alden Leeds stores, ships, and repackages swimming pool chemicals. Mark Epstein (Mark) is the president of Alden Leeds and his brother, Steven Epstein (Steven), is the vice president. The company has its principal place of business in Kearny. It processes dry chlorine into tablet form at a different site in South Kearny. The company packages those tablets for sale and distributes them in plastic containers labeled with silk screening equipment at the Kearny location. On any given day, twenty-one different chemicals that present a variety of hazards were stored at the Kearny facility. Alden Leeds listed both the chemicals stored and the individual hazards attendant to each in a Right-to-Know statement filed with the DEP.

On Saturday, April 10, 1993, a fire of unknown origin occurred at the Kearny facility while it was closed for the Easter holiday. There were no security guards or other personnel at the Kearny site that day. Jesus Urriola, an operations manager at Spectra-Serv located 300 feet north of the Alden Leeds Kearny site, saw smoke coming from Alden Leeds's property at approximately 11:30 a.m. He tried to call the fire and police departments for ten or fifteen minutes; the Kearny Fire Department arrived on the scene four or five minutes after the call. The burglar alarm system at Alden Leeds began sounding at 12:02 p.m., but there was no response to that alarm. The Kearny Fire Department notified the DEP of the fire at 12:27 or 12:28 p.m. and reported that the fire had burned through the roof in a building containing "hazardous chemicals," causing the release of an "unknown gas."

At approximately 12:30 p.m., while Steven Epstein was driving to the Kearny facility, he saw smoke coming from the direction of Alden Leeds. A toll record shows that he exited the New Jersey Turnpike at exit 15E (a Kearny exit) at 12:37 p.m. When Steven arrived on the scene at approximately 12:39 p.m., he noticed that the gate to the property was open and there were firefighters present. He could not immediately tell whether the fire was at the Alden Leeds site or on neighboring property.

Steven eventually discovered that an Alden Leeds building, designated "Building One," was on fire. That structure housed offices, the art department, inventory, the liquid filling and silk screening operations, and employee locker rooms. Steven located and questioned the fire chief. Steven attempted to gain access to the building to determine exactly what was on fire so that he could advise the firefighters and call the DEP, but the fire chief refused and informed him that the DEP had already been called.

Approximately ten minutes later, the fire chief permitted Steven to enter the building. Steven informed the chief that the ceiling under which the firefighters were working was wooden and that the second floor housed heavy machinery. Steven then called the DEP to report the fire; he responded to all questions asked of him by the person answering the telephone. Alden Leeds's phone records show that Steven called the DEP at 12:57 p.m. and the DEP records indicate that the call was received at 12:58. It is unclear from the record whether the DEP operator asked Steven about the presence of hazardous chemicals. Steven recalls that the operator asked what was on fire and that he indicated polyethylene bottles and silk screening equipment. DEP records show that a fire was reported and that machinery and polyethylene bottles were threatened. The tape recording of this conversation was inaudible. Steven testified that it was not until at least one-half hour after his call to the DEP that the fire reached the chlorine stored in the building.

DEP Emergency Response Specialist Bruce Doyle arrived on the scene shortly after 1:30 that afternoon. According to his analysis of the smoke from the fire, chlorine contaminants were being released into the atmosphere at a level of .5 parts per million. The DEP investigation of the fire revealed atmospheric chlorine levels between .1 and .3 parts per million in the western end of Hudson County. Doyle testified that different agencies establish an unacceptable level of chlorine in the atmosphere at between .5 and 1 part per million.

At the time the fire apparently started, Mark Epstein was shopping with his family in Nanuet, New York. At approximately 12:30 p.m., Mark's wife called her home from her car phone and was informed of the fire. Phone records show that at 12:44 Mark called the Kearny police from his wife's car phone. The police informed him that the DEP had been called and that Steven was on the scene.

The fire caused $9 million in damages to the Alden Leeds property and the release of chlorine gas and other by-products into the atmosphere. The DEP informed people downwind of the fire that they should remain indoors with their windows closed. The fire also necessitated the closing of the Turnpike, Route 1/9, the Lincoln Highway, the Pulaski Skyway, and Route 280. The DEP halted service on the PATH and Amtrak trains in that area. A number of people went to local hospitals complaining of respiratory problems.

The DEP assessed two civil administrative penalties against Alden Leeds that are relevant to this appeal. First, the DEP found that Alden Leeds "did cause, suffer, allow or permit chlorine and calcium chloride resulting from a fire to be emitted into the outdoor atmosphere in quantities which resulted in air pollution." Second, the DEP found that Alden Leeds "caused the release of an air contaminant(s) chlorine and calcium chloride resulting from a fire, in a quantity or concentration which posed a potential threat to public health, welfare or the environment or may have reasonably resulted in citizen complaints. The DEP assessed penalties for each offense in the amount of $6,500

The Commissioner of the DEP concluded that the regulation imposes strict liability. He concluded that although a nexus between Alden Leeds and the release of pollution into the atmosphere is required, the nexus can be established on the sole basis of knowing storage of highly reactive chemicals on the premises. The Appellate Division reversed the Commissioner's decision in an unpublished opinion. Finding that the APCA imposed strict liability, the appellate panel concluded that the storage of chemicals was not a sufficient causal nexus.

Issue: Whether the Air Pollution Control Act of 1954, impose strict liability for civil penalties on the owner or operator of a chemical facility that releases toxins into the atmosphere because of a fire of unknown origin on its premises

We hold that the APCA imposes strict liability and that knowingly storing chemicals that are highly reactive to heat and water satisfies the causal nexus.

The relevant provision of the Air Pollution Control Act of 1954, reads: "Notwithstanding compliance with other subchapters of this chapter, no person shall cause, suffer, allow or permit to be emitted into the outdoor atmosphere substances in quantities which shall result in air pollution as defined herein."

The DEP argues that pursuant to its authority under the APCA to adopt regulations to combat air pollution, it promulgated a strict liability regulation prohibiting the release of harmful toxins into the air regardless of fault.

We agree with the Appellate Division and the Commissioner of the DEP that the APCA and regulations promulgated pursuant to it impose strict liability.

An actor who chooses to store dangerous chemicals should be responsible for the release of those chemicals into the air. That Alden Leeds lawfully and properly stored chemicals does not alter that conclusion.

The risks attendant to the storage of dangerous substances counsel in favor of precautions to prevent their release. Alden Leeds took no such precautions. On the day of the fire, there was no one stationed at the plant to alert the authorities as soon as a fire or other unforeseen calamity erupted. Nor was there any other early warning system in place. A burglar or smoke alarm sounded, but there was no response to that alarm. The law imposes a duty upon those who store hazardous substances to ensure that the substances on their property do not escape in a manner harmful to the public. Alden Leeds failed to meet that burden.

Although Alden Leeds was not found responsible for the fire, the company's facility caused a release of air pollutants. The required nexus is satisfied by the knowing storage of hazardous chemicals. Regardless of what started the fire, it was the knowing storage of chemicals by Alden Leeds that caused the release of air contaminants once the fire reached the chemicals.

We affirm that part of the Appellate Division's judgment holding that the APCA imposes strict liability and that a causal nexus must exist between Alden Leeds and the release of hazardous chemical pollution into the atmosphere.

Long TRUONG, et al. v. Cu Van NGUYEN, et al.

This is a wrongful death action arising out of the collision of two personal watercraft on Coyote Lake in Gilroy, California. The operation of personal watercraft, along with other water activities, is permitted on the lake. On the day of the accident, the lake had posted a 35 mph speed limit and a counterclockwise traffic pattern. There was a single boat launch ramp on the west side of the lake. At the time of the accident, there were 30 to 35 vessels on the water, which was considered to be moderate activity. The weather was fair and visibility was good. There was a moderate wind, which made the lake a bit choppy.

On the afternoon of June 1, 2003, Anthony, Rachael and friends gathered at a Coyote Lake picnic area. Anthony owned a 1995 Polaris SLX personal watercraft (Polaris), which can carry a driver and one passenger,[2] both in seated positions. Anthony and Rachael went for a ride on the Polaris. At the time of the incident, Anthony was operating the Polaris, and Rachael was sitting in front of him, as a passenger.

That same afternoon, Cu Van, Chuong, their family members and their friends were at Coyote Lake to operate personal watercraft. Chuong, the son of Cu Van, owned two personal watercraft, including the 2003 Yamaha WaveRunner GP1300R (Yamaha) that was involved in the accident. The Yamaha, like the Polaris, can carry two people (a driver and a passenger), both in seated positions. The Yamaha driver operates it from a sitting position and controls speed through a trigger throttle lever on the right handle bar. The Yamaha has a "visibility spout" that generates a 10-foot spray of water to make it more visible to others in the area of operation.

Chuong taught Cu Van how to operate personal watercraft in 2001 and Cu Van had experience operating such vessels prior to the incident. On the date of the accident, Cu Van was not aware of any mechanical defects with the Yamaha; both the speedometer and the visibility spout were working. Cu Van did not ingest any alcohol or drugs and did not have any health problems on the date of the incident.

Cu Van felt very comfortable operating both of Chuong's personal watercraft on June 1, 2003. He went out on the personal watercraft four or five times that day. Each session lasted no longer than 15 minutes since operating personal watercraft requires physical exertion and is tiring. At the time of the accident, Cu Van was operating the Yamaha and was alone on the craft.

Around 4 p.m., the Yamaha and the Polaris collided near the middle of Coyote Lake, resulting in the death of Rachael, along with injury to Anthony and property damage to both watercraft. At the time of the collision, Cu Van was traveling about 25 mph and following the posted traffic pattern; Anthony and Rachael were traveling five to 10 miles per hour. Anthony followed the traffic pattern around the lake, then cut across the lake to circle back to the point where he had started. Cu Van claims Anthony violated the posted traffic pattern. According to the ranger's report, Rachael was injured when the Yamaha rode up over the starboard stern of the Polaris and impacted her torso, forcing her into the steering column.

Plaintiffs named Cu Van, Chuong, and Anthony as defendants.[3] The complaint contains causes of action for wrongful death on a negligence theory against Cu Van, survivorship [4] against all three defendants, negligence and negligence per [5] se against Cu Van, negligence per se against Anthony, and negligent entrustment against Chuong.

On July 29, 2005, Defendants moved for summary judgment of all the claims against them. Defendants asserted that the doctrine of primary assumption of risk applies to the recreational activity of riding personal watercraft and is a complete bar to the causes of action in the Plaintiffs' complaint. They argued that the risk of collision with another personal watercraft is inherent in the activity of using personal watercraft and that Plaintiffs' decedent assumed that risk. Moreover, Defendants claimed that there were no triable issues of material fact that their conduct was intentional or so reckless as to be outside the range of ordinary activity involved in operating a personal watercraft, and that they owed no duty to protect Rachael from risks inherent in the activity. Defendants argued that the Harbors and Navigations Code section and the regulations Plaintiffs relied on as the basis for their negligence per se claims did not trump the common law primary assumption of the risk doctrine. Finally, Defendants contended that in addition to the

“insurmountable hurdle of Cu Van having no duty” to Rachael, there was no evidence Chuong negligently entrusted the Yamaha to Cu Van. Defendants did not move for summary adjudication in the alternative.

Plaintiffs argued that the primary assumption of risk doctrine does not apply to this case because Rachael was not engaged in a covered sporting activity since she was merely a passenger on the Polaris and Anthony had taken her out for a simple ride around the lake. Plaintiffs also argued that Defendants were not engaged in an activity covered by the doctrine. Plaintiffs stated that, although a personal watercraft may be used for sporting purposes, the situation here was distinguishable because the watercraft were not being used for sport, but instead for casual ride around the lake.

The court granted the motion for summary judgment. The court found that as a matter of law, the doctrine of primary assumption of risk applied and provided a complete defense to the negligence and negligence per se causes of action against Cu Van. The court explained that Rachael, as a passenger, was a participant in the sporting activity of riding a personal watercraft and therefore assumed the risks inherent in the activity. The court found further that Plaintiffs had not alleged that Defendants acted in a manner that increased Rachael's risk of injury above and beyond that inherent in the sport. The court held that the negligence per se claims against Cu Van were also barred by the primary assumption of risk doctrine.

The court found that Chuong had satisfied his burden of proving that Plaintiffs could not show that Chuong had negligently entrusted the Yamaha to Cu Van and that Plaintiffs had failed to raise a triable issue of material fact with regard to the negligent entrustment claim. (Note from the Prof: California is a comparative negligence state)

Issue: Whether the trial court erred in granting summary judgment because the primary assumption of risk doctrine does not apply in this case because Rachael was a passenger on the personal watercraft and was not engaged in an active sporting activity at the time of the accident?

We conclude the court properly granted summary judgment of the claims against Cu Van because the doctrine of primary assumption of risk applies and is a complete defense. We also affirm the trial court's grant of summary judgment of the negligent entrustment claim against Chuong.

(NOTE from the Prof: This is an excellent and relatively easy explanation of the how an appeals court handles summary judgment.) We review an order granting summary judgment de novo, considering all the evidence set forth in the moving and opposition papers, except that to which objections have been made and sustained. In undertaking our independent review of the present case, we apply the same three-step analysis used by the trial court. First, we identify the issues framed by the pleadings. Second, we determine whether the moving party has established facts justifying judgment in its favor. Finally, in most cases, if the moving party has carried its initial burden, we decide whether the opposing party has demonstrated the existence of a triable issue of material fact.

A motion for summary judgment “shall be granted if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” To show a complete defense, the defendant must present admissible evidence of each essential element of the defense upon which it bears the burden of proof at trial. Once the defendant makes this showing, the burden shifts to the plaintiff to show that a genuine issue of material fact exists as to that cause of action, element, or defense. There is a genuine issue of material fact if, and only if, the evidence would allow a reasonable trier of fact (re: the jury) to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof.

The California Supreme Court examined the question “whether the primary assumption of risk doctrine should apply to noncontact sports, such as golf.” the court explained: “Generally, one owes a duty of ordinary care not to cause an unreasonable risk of harm to others. The existence of a duty is not an immutable fact of nature, but rather an expression of policy considerations providing legal protection. Thus, the existence and scope of a defendant's duty is a question for the court's resolution. When a sports participant is injured, the considerations of policy and duty necessarily become intertwined with the question of whether the injured person can be said to have assumed the risk. Thus, the primary

assumption of the risk doctrine applies to golf and that being struck by a carelessly hit ball is an inherent risk of the sport.

The court summarized the applicable rule, stating: "We considered the duty of care that should govern the liability of sports participants. We recognized that careless conduct by co-participants is an inherent risk in many sports, and that holding participants liable for resulting injuries would discourage vigorous competition. Accordingly, those involved in a sporting activity do not have a duty to reduce the risk of harm that is inherent in the sport itself. They do, however, have a duty not to increase that inherent risk. Thus, sports participants have a limited duty of care to their co-participants, breached only if they intentionally injure them or 'engage in conduct that is so reckless as to be totally outside the range of the ordinary activity involved in the sport.' This application of the primary assumption of risk doctrine recognizes that by choosing to participate, individuals assume that level of risk inherent in the sport."

In secondary assumption of the risk cases, the issue is resolved by applying the doctrine of comparative fault and the plaintiff's decision to face the risk would not operate as a complete bar to recovery. In such cases, the plaintiff's knowing and voluntary acceptance of the risk functions as a form of comparative negligence.

Plaintiffs argue that Rachael was merely a passenger on the Polaris and that the assumption of risk doctrine therefore does not apply. We are not persuaded that the activity Rachael engaged in was benign and conclude that the primary assumption of risk doctrine applies to the activity of riding personal watercraft, regardless of whether the rider is operating the vessel.

As noted previously, in determining whether the primary assumption of risk doctrine applies in a particular case we examine the nature of the activity or sport in which the defendant was engaged and the relationship of the defendant and the plaintiff to that activity or sport.

In our view, the record supports the conclusion that riding as a passenger on a personal watercraft it meets this test because it "is done for enjoyment or thrill, requires physical exertion as well as elements of skill, and involves a challenge containing a potential risk of injury."

Our conclusion that the assumption of the risk doctrine applies to the negligence cause of action against Cu Van and relieved him of any duty to Rachael undercuts Plaintiffs claim of negligent entrustment. If Cu Van was not negligent because he had no duty to Rachael, then Chuong cannot be negligent in entrusting the vessel to Cu Van.

We conclude the court did not err when it granted summary judgment of the negligent entrustment cause of action against Chuong. The summary judgment is affirmed.