81-LW-4140 (10th)

Frances Beal, et al., Plaintiffs-Appellants,

v.

Cardinal Container Corporation, Defendant-Appellee.

No. 81AP-548.
10th District Court of Appeals of Ohio, Franklin County.
Decided on December 22, 1981.

BARKAN & NEFF CO., L.P.A., MR. PAUL R. MANCUSO, of Counsel, 50 West Broad Street, Suite 1515, Columbus, Ohio 43216, For Plaintiffs-Appellants.

FROST, FREYTAG & HUNTER, MR. DANIEL R. FREYTAG, 370 South Fifth Street, Columbus, Ohio 43215, For Defendant-Appellee.

DECISION

WHITESIDE, J.

Plaintiffs appeal from a judgment of the Franklin County Court of Common Pleas and raise a single assignment of error contending that the court erred in granting defendant's motion for summary judgment predicated upon a deposition of plaintiff Frances Beal.

Plaintiff Frances Beal was employed by Sequin-Thomas Company, either as an employee or a subcontractor, to fulfill the contractual obligation of Sequin-Thomas to clean the office and restroom area at a warehouse operated by defendant Cardinal Container Corporation. One restroom was so located that plaintiff Frances Beal had to walk through the warehouse area, which she did not clean, in order to have access to that restroom to clean it. There were, however, two separate entrances from the office area to the warehouse area, which plaintiff could use.

On January 7, 1979, plaintiff Frances Beal's husband accompanied her to her work, which she commenced at approximately 8 a.m. by cleaning an adjacent area. She then proceeded to the office area of defendant's warehouse. After cleaning the offices, she elected to enter the warehouse by the door from the office area rather than through another door which was down a hallway. (Tr. 48.) When she entered the warehouse, with her husband following behind her because she walked faster and knew the area better, she discovered that the light was not on. There was no light switch, however, adjacent to the door which she entered, so she proceeded through the warehouse toward the location of a light switch adjacent to the restroom which she was going to clean. The evidence does not reveal whether or not there was a light switch adjacent to the other available entrance into the warehouse area.

To gain access to the restroom from the warehouse area, it was necessary to open a big overhead door after first walking through the warehouse area from the office area. However, before Frances Beal reached the light switch, she stepped onto a cart with ball-bearing wheels, which moved causing her to fall backward and sustain injuries, including a broken wrist.

The trial court sustained the motion for summary judgment by a decision which merely stated the conclusion that the motion was sustained, without setting forth any reasons therefor.

Defendant had raised two contentions in support of its motion: (1) that plaintiff Frances Beal assumed the risk by walking through the unlighted warehouse; and (2) that she was contributorily negligent in walking through the unlighted warehouse and stepping onto the cart. The trial court failed to give any reason for its decision, necessitating a determination of whether either of defendant's contentions justifies the trial court's action.

Plaintiffs first contend that there is a genuine issue of fact as to whether plaintiff Frances Beal assumed the risk of injury since there was no alternative course for her to utilize in order to perform her assigned task of cleaning the

restroom in question. Since upon motion for summary judgment the evidence must be construed most strongly in favor of plaintiff, we agree. Assumption of risk is predicated upon venturesomeness and precludes recovery by one who creates a condition "obviously dangerous to himself by voluntarily exposing himself to a hazard created by another." See the fourth paragraph of the syllabus of Masters v. N.Y. Central Rd. Co. (1947), 147 Ohio St. 293. However, there is no assumption of risk where the assumption is not voluntary in that the injured party has been left with no reasonable alternative but to subject himself to the dangerous condition in order to carry out an act which he has a right or duty to perform. In this case, reasonable minds could reach different conclusions upon the evidence in the record at this time construed most strongly in favor of plaintiffs, as to whether plaintiff Frances Beal was required to walk through the warehouse area and whether she had an alternative course to do so. Thus, reasonable minds could reach different conclusions as to whether plaintiff Frances Beal assumed the risk of the injury which she sustained.

Contributory negligence, however, presents a different issue. Assumption of risk is predicated upon venturesomeness while contributory negligence is based on carelessness, being an act or omission on the part of plaintiff proximately contributing to her injuries, which amounts to a failure to exercise ordinary care for her own safety. See Cincinnati Traction Co. v. Forrest (1905), 73 Ohio St. 1.

Defendant relies upon the step-in-the-dark rule of contributory negligence. However, that rule merely raises an inference of negligence on the part of the plaintiff, and a factual issue as to negligence may arise if other evidence tends to disprove such inference. See Posin v. A. B. C. Motor Court Hotel (1976), 45 Ohio St. 2d 271. Here, plaintiff Frances Beal was familiar with the premises and testified that her act of walking through the warehouse to the light switch was no different than walking through one's living room in the middle of the night. (Tr. 51.)

There was, however, other evidence of negligence on the part of plaintiff Frances Beal. She closed the door behind her as she entered the warehouse, cutting off a possible source of light, neglected to use a lighter she had in her pocket, did not wait for her eyes to adjust to the darkness, and walked at a fast pace. More importantly, she was aware something was in front of her and intentionally stepped onto it, even though she was aware that carts were sometimes in the warehouse but she had not encountered one at this particular location previously. She testified (deposition 63-64):

"Q. And, as I also understand it, it was so dark that you were unable to see this cart on the floor?

"A. Yes.

"Q. And you stepped up onto the cart, and since it is on wheels, it slipped out from under you; is that right?

"A. Yes.

"Q. And you say the cart is about six inches high?

"A. Yes.

"Q. So you would have had to step up six inches onto the cart?

"A. I didn't realize what I was stepping up on. I didn't even have any idea there was anything there. I felt an object there and I put my foot up.

"Q. You felt an object with your foot first?

"A. I felt something and I put my foot up.

"Q. So I have got this right, you felt something with your foot in front of you on the path, is that right?

"A. I was aware that something was there. * * *

"* * *

"Q. And then as a result of knowing this, you raised your foot up and stepped up on the article?

"A. I was probably thinking I was stepping over something.

"Q. Okay. But you did raise your foot up and either stepped upon or over or attempted to step over the article; is that right?

"A. That is right, yes."

Later, she testified with respect to an earlier admission that she knew the carts were scattered throughout the warehouse but had never encountered one in her path (Deposition, page 69-70):

"Q. But you were aware that those objects were in that warehouse and could be scattered throughout the warehouse?

"A. I was aware that they had them, but I just never gave them any attention.

"Q. Okay. How fast were you walking at the time you bumped into this cart?

"A. Well, to be honest with you, that is why-one of the reasons why I go before my husband, he is kind of slow.

"Q. So you wanted to move a little faster?

"A. And I move pretty fast.

"Q. Were you moving pretty fast on January 7th?

"A. I believe I was.

"Q. Were you watching in front of you when you were walking, or was it so dark that that did not matter?

"A. I was just used to the path, I know the path.

"Q. So you are walking-

"A. I know right where I am going.

"Q. So you are walking by feel more than sight then?

"A. Yes, more by feel. But I never had any obstacle there other than for feel, and I was just walking."

Construing this testimony of plaintiff Frances Beal most strongly in her favor, reasonable minds cannot conclude otherwise than that she was negligent in the manner of proceeding through the warehouse. Not only was she walking in the dark through an area in which she knew pushcarts and other obstacles were sometimes scattered although she had not encountered them previously, but she was walking rapidly, and when she was aware that there was something in her path she stepped up onto it without pausing, even though she knew that sometimes pushcarts with wheels were scattered throughout the warehouse area. Construing the evidence most strongly in favor of plaintiffs, but taking all of the circumstances into consideration, reasonable minds could only conclude that plaintiff Frances Beal was contributorily negligent.

Plaintiff further contends that application of contributory negligence to this case is improper in light of the new comparative negligence statute, R.C. 2315.19, which became effective June 20, 1980.

Plaintiffs did not raise the issue of comparative negligence in the trial court, and it ordinarily is inappropriate to raise such an issue for the first time on appeal. However, defendant also relies upon a recent decision of this court in the unreported decision in Wirth v. South Central Power, No. 80AP-713, rendered March 24, 1981 (1981 Decisions, page 648), in which Judge Norris, speaking for the court, stated in part at page 652:

> "Plaintiffs argue that R.C. 2315.19 should be applied retrospectively if it can be established that the statute is remedial in nature and does not affect substantive rights. R.C. 1.48 makes no distinction between statutes involving substantive rights and those addressing remedial matters-it declares that all statutes are to be given prospective operation unless the General Assembly expressly attempts to give them retrospective application. * * *
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> "But here, it is conceded by both parties that the General Assembly expressed no intent about whether R.C. 2315.19, should be given retro-spective or prospective application. In such an event, we are compelled to hold that the statute will be applied prospectively to causes of action arising after the effective date of the statute.
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> "In so holding, we are following the majority (and apparently unanimous) view expressed by appellate courts in those states where the rule of comparative negligence has been adopted by statute to replace contributory negligence, and where those statutes are silent as to whether they should be given prospective or retrospective effect. [Citations omitted.]"

Plaintiffs concede for the purposes of this case that R.C. 2315.19 applies only prospectively but contend that it is remedial and procedural in nature and, thus, applies to proceedings commenced after its effective date, relying upon the first paragraph of the syllabus of Denicola v. Providence Hospital (1979), 57 Ohio St. 2d 115. Plaintiffs thus distinguish Wirth, supra, since it was commenced prior to the effective date of R.C. 2315.19.

Although comparative negligence was first enacted as a general principle by R.C. 2315.19, effective June 20, 1980, this was not its first application in Ohio jurisprudence since R.C. 4973.09 [originally enacted in 1908 (99 Ohio Laws 25)] adopts comparative negligence in actions for personal injury brought by a railroad employee against a railroad company predicated upon negligence. Thus, comparative n gligence has been to a limited extent a doctrine of Ohio negligence law for some 72 years prior to the adoption of R.C. 2315.19, adopting comparative negligence as the general rule in negligence cases.

As would be expected, the precise issue confronting us was raised with respect to R.C. 4973.09 (then G. C. 9018), as to whether it applied to a cause of action existing upon its effective date where the action was thereafter commenced. In Hill v. Pere-Marquette Rd. Co. (1912), 20 Ohio Circuit Court, N. S., the Circuit Court for Lucas County expressly held that, even though the statute provided that it would apply to all actions brought after its passage, it could not be applied to causes of action which existed upon its effective date because it was substantive in nature, stating in part at page 238:

> "* * * If the railroad company immediately after the injury had a good defense under the then existing law by reason of the negligence of Hill having contributed directly to his death, the right to that defense was a vested right which could not thereafter be taken away by statute. * * *"

Hill was affirmed without opinion by the Supreme Court in Hill v. Pere-Marquette Rd. Co. (1913), 88 Ohio St. 599. The very language of present R.C. 2315.19(A)(1) tends to mandate a similar conclusion since it states:

> "In negligence actions, the contributory negligence of a person does not bar the person or his legal representative from recovering damages that have directly and proximately resulted from the negligence of one or more other persons, if the contributory negligence of the person bringing the action was no greater than the combined negligence of all other persons from whom recovery is sought. * * *"

In other jurisdictions which have considered the issue, different conclusions have been reached depending upon whether comparative negligence is adopted by statute or judicial decision. Where adopted by statute it is generally held

that the new comparative negligence statute has no application to a cause of action in existence at the time of adoption of the new statute even though the action be commenced later, at least in the absence of an express statutory provision for application under such circumstances. See Annotation, "Retrospective Application of State Statute Substituting Rule of Comparative Negligence for that of Contributory Negligence," 37 A.L.R. 3d 1438.

On the other hand, where comparative negligence has been adopted by judicial decision, it has generally been held that it applies to all claims then existing whether or not an action has yet been brought. See Annotation, "Judicial Adoption of Comparative Negligence Doctrine as Applicable Retrospectively," 78 A.L.R. 3d 421. The obvious explanation for this distinction is that, where comparative negligence has been adopted by judicial decision, the court adopting the doctrine has in effect held that the common law of the state involved recognizes comparative negligence rather than contributory negligence as the proper doctrine to be applied, which would be applicable to all claims since there has been no change in common law, even though a prior decision has been overruled. In other words, the theory under such circumstances is that the court has merely corrected an error in a prior decision, not that the court for just reason has determined to impose a different rule in the future than was imposed in the past. In cases of legislative adoption of comparative negligence, however, it is generally recognized that there is a change in the law to be applied. It is recognized both by statute and judicial decision under such circumstances that contributory negligence constituted a bar to recovery prior to the effective date of the statute, but that the statute effected a change so that such bar no longer exists.

Although the words "prospectively" and "retrospectively" cause considerable confusion under many circumstances, it is generally held to be the law of Ohio that only prospective application is involved where a change in a procedural rule is applied in a pending proceeding. This was the essential holding of Denicola, supra. On the other hand, the word "retrospective" has sometimes been utilized to describe an application of a new or changed procedural rule to a pending proceeding. However, application of a new procedural rule in a proceeding commenced after the effective date of the new rule can only be prospective.

Whether application be prospective or retrospective depends not only upon time involved but also upon the nature of that to which the rule is being applied. Different situations require different conclusions, and a new rule may at the same time be applied both prospectively from a procedural standpoint and retrospectively from a substantive standpoint. That is the situation in this case, R.C. 2315.19 being applied prospectively from a procedural standpoint (this action having been commenced after its effective date), but retrospectively from a substantive standpoint (the claim for relief having arisen and substantive rights established prior to enactment of R.C. 2315.19).

The basic issue, therefore, is whether the defense of contributory negligence creates a substantive right of the defendant which cannot properly be taken away by statute. In keeping with the majority of the jurisdictions, we conclude that it is.

Defendant's claimed negligence and plaintiff Frances Beal's injury occurred prior to the effective date of R.C. 2315.19. At that time, defendant had a right not to pay anything to plaintiffs and not to be liable to them because of plaintiff Frances Beal's contributory negligence. At the same time, plaintiff Frances Beal had no right of recovery from defendant, being precluded therefrom by her own negligence, even though defendant may also have been negligent. In other words, under the circumstances existing prior to June 20, 1980, defendant had a right to be free from any liability to plaintiffs as a result of Frances Beal's fall in January 1979 at defendant's premises. A right not to be liable to another person is substantive in nature, not procedural. The difference between not being liable and paying nothing and being liable to a limited extent and paying perhaps a substantial sum differ not with respect to procedure but, rather, with respect to basic outcome, the rights of the parties. Substantive law deals with the rights of persons; whereas, procedural law deals with the means by which such rights are enforced. The difference between comparative negligence and contributory negligence is not a matter of a means of enforcing a right but, rather, goes to the very existence of the right. Where the doctrine of contributory negligence is applicable, a plaintiff who is negligent has no right of recovery, even though the defendant may also be negligent, and, conversely, the defendant has no liability to the plaintiff. The doctrine of comparative negligence, on the other hand, confers a right upon the plaintiff to recovery to the extent that the defendant's negligence is greater than that of the plaintiff and, correspondingly, imposes liability upon the defendant.

The definition of substantive law is consistent with Denicola, supra, footnote 2 of which states: "Substantive law is that which creates duties, rights and obligations, while procedural law describes the methods of enforcement of rights or of obtaining redress." As we have indicated, freedom from liability because of negligence of the other party constitutes a right, not a method of enforcing a right. Under prior law, when contributorily negligent, a plaintiff had no right to any recovery. Comparative negligence, on the other hand, creates a right in a plaintiff who is contributorily negligent to

recovery from a defendant who is more negligent than the plaintiff. Thus, R.C. 2315.19 creates a new substantive right and cannot be applied to claims for relief or causes of action which were in existence at the time it took effect. Plaintiffs' assignment of error is not well taken.

For the foregoing reasons, plaintiffs' assignment of error is overruled, and the judgment of the Franklin County Court of Common Pleas is affirmed.

Judgment affirmed.

REILLY and MOYER, JJ., concur.