Darlene Ann Gurley And Winston Joe Gurley, Plaintiffs Vs. Country Side Village Homes, Inc. And Mahlon N. Zimmerman, Defendants,Civil Action - Law, C.P. Franklin County Branch,No. A.D. 1996 - 177

Gurley v. Country Side Homes

ADA - negligence per se - assumption of risk

Facts: Plaintiff went to defendant's business. She uses a motorized wheelchair but there was no access ramp for it; instead, she had to use cane and walk into building. Inside, she sat down on a chair which could not hold her weight; it collapsed and plaintiff was injured.

1. There is no private cause of action under the Americans with Disabilities Act (ADA) for damages; a private action can be brought only for injunctive relief. Plaintiff's claim under the ADA is dismissed.

2. Plaintiff is not entitled to instruction on negligence per se on basis that defendant violated the ADA. The purpose of the ADA is to ensure equal access to facilities to individuals with disabilities, not to protect them from harm from a collapsing chair on the premises. Plaintiff must seek redress under regular tort law.

3. Defendant seeks instruction on assumption of risk because plaintiff recognized before sitting down that chair might not hold her. To be entitled to the instruction, defendant must show that plaintiff understood the specific danger which caused her injury, appreciated its nature, yet voluntarily chose to encounter it ("type 3" assumption of risk).

4. Pennsylvania Supreme Court has not completely abolished "type 3" assumption of risk but has continued it in a modified form: the doctrine must be applied by the court as part of the duty analysis, and not as part of the case to be determined by the jury. This approach serves the public policy behind the doctrine while at the same time alleviating the difficulty on instructing the jury on voluntariness, knowledge, and scope of the risk.

5. Assumption of risk as an affirmative defense is retained only in cases involving express assumption of risk, strict products liability, and in cases where assumption of risk is specially preserved by statute.

6. This court will decide at the close of plaintiff's case, upon a motion for nonsuit filed by defendant, whether plaintiff assumed the risk of injury when she sat in the chair. If this court finds she did, it will the dismiss the case; if it finds she did not, the case will proceed to the jury on a comparative negligence theory.

Charles E. Ganley, Esquire, Attorney for Plaintiffs
John N. Keller, Esquire, Attorney for Defendants

OPINION AND ORDER

Walker, P.J., November 20, 1998:

Factual and Procedural Background

This case involves injuries sustained by Plaintiff Darlene Ann Gurley on July 18, 1994. On that day, Mrs. Gurley and her husband,

Winston Joe Gurley, went to the business premises of Defendant Country Side Village Homes ("Country Side"). Country Side is in the business of selling modular homes. The Gurleys went to Country Side's office located on 2023 Lincoln Way East in Chambersburg, Franklin County, to discuss the purchase of a home. Mrs. Gurley is a very large person who generally uses a motorized wheelchair to get around. The Gurleys allege that upon arrival at Country Side's premises, there was no access ramp to the building for her wheelchair. Instead, she had to use her four-pronged cane to climb the steps and enter the building. The Gurleys were taken into an office inside the building, where two chairs were present. Mrs. Gurley did not physically fit into one of them. The Gurleys allege that an employee of Country Side, Mr. Kennedy, offered her the other chair. The Gurleys further allege that when Mrs. Gurley questioned the safety of that chair, Mr. Kenney told her that "it should be all right." (Amended complaint, § 19). Country Side, in its new matter, alleges that Mrs. Gurley sat on the chair in question on her own initiative and not upon the suggestion or invitation of Country Side's employee. (New Matter, § 91).

Mrs. Gurley sat on the chair in question for approximately five minutes when it collapsed underneath her. Mrs. Gurley alleges she incurred serious injuries from the collapse of the chair. On August 7, 1996, plaintiffs filed a complaint, followed by an amended complaint filed on March 11, 1997. The amended complaint alleges in Count I that Country Side breached its duty of care to the Gurleys as their business invitees by failing to provide access to their building for a wheelchair and by providing Mrs. Gurley with an unsafe chair. Count II alleges the same against Defendant Mahlon Zimmerman, who is a corporate officer of Country Side, based on the theory of the piercing of the corporate veil. Count III alleges a claim for loss of consortium by Mr. Gurley. Count IV of the complaint alleges that defendant violated Title III of the Americans with Disabilities Act ("ADA"). Under all counts, plaintiffs demand that judgment be entered in their favor in excess of $25,000 as well as punitive damages, interest and costs of the suit.

At the pre-trial conference held in this matter, the parties raised several issues. On October 22, 1998, oral argument was held on these issues, which are the subject of this opinion. At the time of argument, plaintiffs withdrew the issue of whether Defendant

Zimmerman can be personally liable under the theory of "piercing the corporate veil."

Discussion

1. Private Cause of Action Under the ADA

The first issue raised by the parties is whether plaintiffs have a cause of action under the ADA. Plaintiffs allege that Country Side violated Title III of the ADA, which governs public accommodations. 42 U.S.C.S. § 12181 *et seq.* A public accommodation includes, among other things, a "service establishment" such as the sales office of Country Side. 42 U.S.C.S. § 12181 (7)(F). The ADA provides that

> no individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation.
>
> 42 U.S.C.S. § 12182 (a).

Plaintiffs argue that Country Side has violated this section of the ADA by not providing wheelchair access to their facility. Plaintiffs further allege that the failure to provide such access in violation of the ADA caused Mrs. Gurley to incur injuries for which she seeks compensatory as well as punitive damages and the costs of the suit. However, it appears to this court that no private cause of action for such damages is available under the ADA.

The section of the ADA dealing with enforcement provides in relevant part:

> (a) **In general**. (1) Availability of remedies and procedures. The remedies and procedures set forth in section 204(a) of the Civil Rights Act of 1964 (42 U.S.C. 2000a-3(a)) are the remedies and procedures this title provides to any person who is being subjected to discrimination on the basis of disability in violation of this title or who has reasonable grounds for believing that such person is about to be subjected to

> discrimination in violation of section 303 [42 U.S.C. § 12183]
>
> . . .
>
> (2) Injunctive relief. In case of violations of sections 302(b)(2)(A)(iv) and [section] 303(a) [42 U.S.C. §§ 12182(b)(2)(A)(iv) and 12183(a)], injunctive relief shall include an order to alter facilities to make such facilities readily accessible to and usable by individuals with disabilities to the extent required by this title. . . .
>
> 42 U.S.C.S. §12188.

The language of this section makes it clear that the only remedies and procedures the legislature has made available to a private plaintiff who has been discriminated against on the basis of disability are those set forth in section 204(a) of the Civil Rights Act of 1964. That section permits a person to seek only *injunctive* relief. 42 U.S.C.A. 2000a-3(a)[1]. The regulation implementing the ADA provides the same:

> **§36.501 Private suits.**
>
> (a) General. Any person who is being subjected to discrimination on the basis of disability in violation of the Act or this part or who has reasonable grounds for believing that such person is about to be subjected to discrimination in violation of section 303 of the Act or subpart D of this part may institute a civil action for preventive relief, including an application for a permanent or temporary injunction, restraining order, or other order.
>
> 36 CFR § 36.501.

[1] § 2000a-3(a) provides as follows:

> Whenever any person has engaged [in] or there are reasonable grounds to believe that person is about to engage in any act or practice prohibited [under the Act], a civil action for preventive relief, including an application for permanent or temporary injunction, restraining order, or other order, may be instituted by the aggrieved and . . . the court may, in its discretion permit the Attorney General to intervene in such civil action if he certifies that the case is of general public importance. Upon application of the complainant . . . the court may appoint an attorney for such complainant and may authorize the commencement of the civil action without the payment of fees, costs, or security.

permanent or temporary injunction, restraining order, or other order.

36 CFR § 36.501.

The regulation does not provide for any other relief to a private plaintiff.

Thus, it is clear that if a plaintiff institutes a private cause of action for a violation of the ADA, such plaintiff is permitted only to seek injunctive relief, not monetary damages. The statute does provides for the recovery of monetary damages, but *only* in a suit brought by the Attorney General:

(b) Enforcement by the Attorney General.

(1)(A) . . .

(B) Potential violation. If the Attorney General has reasonable cause to believe that --

(I) any person or group of persons is engaged in a pattern or practice of discrimination under this title; or

(ii) any person or group of persons has been discriminated against under this title and such discrimination raises an issue of general public importance, the Attorney General may commence a civil action in the appropriate United States district court.

(2) Authority of court. In a civil action under paragraph (1)(B), the court --

(A) may grant any equitable relief that such court considers to be appropriate . . .

(B) may award such other relief as the court considers to be appropriate, *including monetary damages to persons aggrieved when requested by the Attorney General*; and

(C) may, to vindicate the public interest, assess a civil penalty against the entity . . .

42 U.S.C.S. §12188 (emphasis added).

Punitive damages can never be awarded for a violation of the ADA. *See* Americans with Disabilities Act Handbook, published by the United States Equal Employment Opportunity Commission and the Department of Justice (1992), at p. III-160. Although it appears that no cases exist on this issue in the Third Circuit, other district courts have dismissed private causes of action which sought to recover only monetary damages for violations of Title III of the ADA. *See A.R. v. Kogan,* 964 F.Supp. 269, 271 (N.D. Ill, 1997); *Howard v. Cherry Hills Cutters, Inc.*, 935 F.Supp. 1148, 1149 (D. Colo. 1996).

In the underlying case, plaintiffs in their complaint are seeking only monetary damages, not injunctive relief. Such cause of action is not available under the ADA. Therefore, this court will dismiss plaintiffs' claim under the ADA.

2. Negligence Per Se

The next issue raises the question of whether plaintiffs are entitled to an instruction on negligence per se because defendant is alleged to have violated the ADA. The instruction sought by plaintiff informs the jury that if it would find that defendant has violated the ADA, it must find defendant negligent as a matter of law. *See* Pa. SSJI (Civ.) 3.30.

It appears that a violation of a federal statute or regulation can give rise to a claim of negligence per se. *See* 2 Summary of Pennsylvania Jurisprudence 2d § 20:71, *citing Berkebile v. Brantly Helicopter Corp.*, 219 Pa. Super. 479, 281 A.2d 707 (1971) (violation of FAA standards was negligence per se). However, the mere violation of a statute does not entitle a party to an instruction on negligence per se. In order for such instruction to be warranted, it must be shown that (1) the intent of the statute is exclusively or in part to protect an interest of the other party as an individual; (2) the interest invaded is one which the enactment is intended to protect; (3) the statute was designed to prevent the hazard which did result in the invasion of the interest; and (4) the violation is the legal cause of the invasion. 2 Summ. Pa. Jur. 2d §20:67.

The requirement that the interest invaded is one which the statute is intended to protect can be illustrated by the situation where statutes and regulations exist which require milk cooperatives to inspect dairy

farms. Such statutes and regulations have the purpose of assuring the sanitation of milk production, and do not impose a duty for the benefit of a person who was injured while working on the farm. Thus, such injured worker is not entitled to an instruction on negligence per se based on the fact that the farm violated the inspection statutes. *See* 2 Summ. Pa. Jur. 2d § 20:68, *citing Johnson v. Baker*, 346 Pa. Super. 183, 499 A.2d 372 (1985).

In the underlying case, plaintiffs argue that defendant violated Title III of the ADA and that the ADA intended to protect her from injuries Mrs. Gurley incurred. Plaintiffs argue that if defendant had not violated the ADA by not providing a wheelchair ramp, Mrs. Gurley would have been able to enter the facility in her motorized wheelchair and would not have had to sit on the chair which then collapsed.

The purpose of Title III of the ADA has been set forth by the legislature as follows:

> **(b) Purpose.** It is the purpose of this Act --
>
> (1) to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities;
>
> (2) to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities;
>
> (3) to ensure that the Federal Government plays a central role in enforcing the standards established in this Act on behalf of individuals with disabilities;
>
> (4) to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities.
>
> 42 U.S.C.S. § 12101.

The purpose of the ADA is to ensure equal access to facilities, accommodations, goods and services to individuals with disabilities. 42 U.S.C.S. § 12182. It is *not* the purpose of the ADA to protect individuals with disabilities from harm on the premises once they

have gained access, such as injuries from a collapsing chair. This court finds the relationship between defendant's alleged violation of the ADA and plaintiff's injuries to be too extenuated to say that it falls within the interests protected by the ADA. Plaintiff must seek redress for her injuries pursuant to regular tort law, not the ADA.

In addition, this court finds that the alleged violation of the ADA cannot be said to be the legal cause of the invasion of plaintiff's interest protected by the ADA. In order to be the legal cause of plaintiff's harm, it must be shown that the violation of the statute is a substantial factor in bringing about the injury. Pa. SSJI (Civ.) 3.30 (subcommittee note). The causation alleged by plaintiffs - that Mrs. Gurley had to sit on the unstable chair because she could not bring her wheelchair in - is too extenuated to say that the violation of the ADA was a substantial factor in bringing about her injuries. Therefore, plaintiff is not entitled to an instruction on negligence per se.

3. Assumption of Risk

Defendant has requested this court to instruct the jury on assumption of risk. This request is based on defendant's claim that during Mrs. Gurley's deposition, she testified that she had told the Country Side employee that she did not like the way the chair looked. She furthermore testified that the reason she did not like the chair was because her son and his wife had similar chairs which had a tendency to bend down. Defendant submitted excerpts from Mrs. Gurley's deposition to support its argument. It is defendant's position that Mrs. Gurley recognized that the chair would not be stable and feared it would not hold her, but that she sat down on it anyway, thereby assuming the risk that it would collapse.

Under the doctrine of assumption of risk defendant must show that plaintiff understood the specific danger which caused plaintiff's injury, and appreciated its nature and extent, yet voluntarily chose to encounter it. If plaintiff assumed the risk, she may not recover anything for the injuries incurred. Pa. SSJI (Civ.) 3.04. The doctrine has been in turmoil for the past several years. The Pennsylvania Supreme Court has pointed out that its complexity makes it extremely difficult for juries to apply and that it may have lost the reason for its existence when the comparative negligence statute was adopted. *See Rutter v. Northeastern Beaver County School District*, 496 Pa. 590,

437 A.2d 1198 (1981). Recently, the Pennsylvania Supreme Court again wrestled with assumption of risk in *Howell v. Clyde*, 533 Pa. 151, 620 A.2d 1107 (1993). *Howell* appears to be the leading case on the status of assumption of risk, even though it was only a plurality opinion.

The Supreme Court differentiated four different categories of assumption of risk. First, assumption of risk can be seen from the perspective of a duty analysis. If it is shown at trial that the plaintiff voluntarily encountered a known risk, the duty owed to plaintiff by defendant is obviated, and thus defendant is not liable to plaintiff. *Howell*, 533 Pa. at 158. Under the second category, the jury must determine whether the plaintiff's negligence in causing his own injuries was greater than defendant's negligence. If so, the plaintiff cannot recover. *Id*, at 159. A third analysis is called "type four" assumption of risk. In this category, plaintiff may not recover when "the plaintiff's conduct in voluntarily encountering a known risk is itself unreasonable, and amounts to contributory negligence." *Id*, at 159-160. Lastly, there is a category which includes "type 2 or 3" assumption of risk. "Type 2" assumption of risk involves the situation where "the plaintiff has entered voluntarily into some relation with the defendant which he knows to involve the risk, and so is regarded as tacitly or impliedly agreeing to relieve the defendant of responsibility, and take his own chances." *Id*, at 160. An example of this type of assumption of risk is the situation where a spectator at a baseball game is hit by a baseball. The plaintiff cannot recover for his injuries because he assumed the risk that he could be hit. "Type 3" assumption of risk involves the situation where "the plaintiff, aware of a risk created by the negligence of the defendant, proceeds or continues voluntarily to encounter it." *Id*.

The *Howell* Court unambiguously held that "type 4" assumption of risk must be abolished in Pennsylvania because "it plainly conflicts with the legislative policy underlying the comparative negligence act." *Id*, at 161. However, it found that "type 2" and "type 3" assumption of risk have a separate basis for existence apart from comparative negligence. The theory underlying those types of assumption of risk is the public policy that one who chooses to take risks may not later seek money damages if those risks materialized. *Id*, at 161. Because the Supreme Court wanted to preserve this public policy that plaintiffs may not recover for "self-inflicted

injuries," it did not completely abolish the doctrine of assumption of risk. Instead, the Supreme Court decided to continue it in a "modified form:"

> Because it is desirable to preserve the public policy behind assumption of risk types 2 and 3, but to the extent possible, remove the difficulties of application of the doctrine and the conflicts which exist with our comparative negligence statute, to the extent that an assumption of risk analysis is appropriate in any given case, *it shall be applied by the court as part of the duty analysis, and not as part of the case to be determined by the jury*. This approach preserves the public policy behind the doctrine while at the same time alleviating the difficulty of instructing a jury on voluntariness, knowledge, and scope of the risk.
>
> Under this approach the court may determine that no duty exists only if reasonable minds could not disagree that the plaintiff deliberately and with the awareness of specific risks inherent in the activity nonetheless engaged in the activity that produced his injury. Under those facts, the court would determine that the defendant, as a matter of law, owed plaintiff no duty of care.
>
> If, on the other hand, the court is not able to make this determination and a nonsuit is denied, then the case would proceed to the jury on a comparative negligence theory.
>
> *Id*, at 162-163 (emphasis added).

The Supreme Court made an exception to this rule and retained the doctrine of assumption of risk as an affirmative defense (to be decided by the jury) in cases involving express assumption of risk, strict products liability, and cases in which assumption of risk is specifically preserved by statute. *Id*, at 162, n. 10.

The Superior Court has followed this directive by the Supreme Court and has held, on several occasions, that the question of whether a litigant has assumed the risk is a question of law and not a matter for jury determination. If the court cannot make such a finding as matter of law, the jury must be charged only on comparative negligence. *See Struble v. Valley Forge Military Academy*, 445 Pa.

Super. 224, 665 A.2d 4 (1995); *Hardy v. Southland Corp.*, 435 Pa. Super. 237, 645 A.2d 237 (1994). Similarly, the subcommittee note to the standardized jury instruction on assumption of risk recommends, on the basis of the above stated authority, that no instruction on assumption of risk be given, but rather that it be weighed as a factor in determining whether defendant owed a duty to plaintiff and whether plaintiff's contributory negligence was responsible for the injury. Subcommittee note, Pa. SSJI (Civ.) 3.04.

The underlying case involves "type 3" assumption of risk. Defendant alleges that plaintiff was aware of a risk created by defendant's negligence, namely that the chair available to her in defendant's office was unstable, yet she nevertheless proceeded to sit on it. Thus, in light of all the authority cited above, this court must apply the doctrine of assumption of risk in its modified form set forth by the Supreme Court. Therefore, the decision whether assumption of risk exists will not go to the jury but must be made by this court at the close of plaintiffs' case. Upon defendant's motion for nonsuit, this court must determine whether reasonable minds could not disagree that Mrs. Gurley deliberately and with the awareness of specific risks inherent in the activity nonetheless engaged in the activity that produced her injury. If this court finds that Mrs. Gurley did assume the risk of sitting on a chair which may collapse, this court will determine that Country Side, as a matter of law, owed Mrs. Gurley no duty of care and will dismiss the case. If, on the other hand, this court is not able to make the determination that Mrs. Gurley assumed the risk and a nonsuit is denied, then the case will proceed to the jury on a comparative negligence theory. Thus, defendant's request that the jury be instructed on assumption of risk is denied.

4. Contributory Negligence

Defendant furthermore requests this court to give the jury an instruction on contributory negligence. Defendant argues that Mrs. Gurley had a duty to exercise reasonable care for her own protection. *See* Pa. SSJI (Civ.) 3.03. Defendant further argues that the fact that Mrs. Gurley testified at her deposition that she feared the chair would not hold her but she nevertheless proceeded to sit on it clearly supports an instruction for contributory negligence.

Plaintiff argues that defendant is not entitled to such instruction and refers to the case of *Downing v. Shaffer*, 246 Pa. Super. 512, 371

A.2d 953 (1977). That case involved the "choice of ways" rule, which provides that "where a person, having a choice of two ways, one of which is perfectly safe, and the other which is subject to risks and dangers, voluntarily chooses the latter and is injured, he is guilty of contributory negligence and cannot recover." *Downing*, 246 Pa. Super. at 518. In order to warrant such instruction on contributory negligence, there must be evidence that there was a safe course, a dangerous course, and facts which put a reasonable person on notice of the danger or actual knowledge of the danger. *Id*, at 519. Plaintiffs argue that there is no evidence that a safer course existed, because Mrs. Gurley could not remain standing due to her disability and therefore had no choice but to sit down on the only remaining, unstable chair.

First, this court is uncertain that the facts of the case fit the situation in which the "choice of ways" rule applies. It is generally applied in slip and fall cases. *See* Pa. SSJI (Civ.) 3.03, subcommittee note. However, even if the rule applies, this court disagrees with plaintiffs that there is no evidence of a safer course. If the evidence at trial shows that plaintiff recognized the danger of sitting on the chair in defendant's office, this court will be inclined to give the contributory negligence instruction because plaintiff could have asked defendant's employee for a different chair from elsewhere in the building.

Furthermore, under the directive of the *Howell* Court and if the evidence presented at trial warrants it, this court will give an instruction on comparative negligence if the case is not dismissed after defendant's motion for nonsuit on the basis of assumption of risk. Thus, this court will reserve its ruling on the instruction on contributory negligence until the close of the case.

ORDER OF COURT

November 20, 1998, upon consideration of the issues raised by the parties and the letter submitted by them, this court enters the following order:

1. This court finds that no private cause of action for damages exists under Title III of the American with Disabilities Act (ADA) and therefore Count IV of plaintiff's amended complaint is dismissed.

2. This court finds that the ADA was not intended to protect plaintiff from the harm she incurred and therefore plaintiff is not entitled to an instruction on negligence per se on the basis of defendant's alleged violation of the ADA.

3. Defendant is not entitled to an instruction on assumption of risk by plaintiff. Rather, this court must determine at the close of plaintiff's case whether reasonable minds could not differ on the question of whether plaintiff assumed the risk. If the court makes such determination, the case against defendant will be dismissed. If the court cannot make such determination, the case will go to the jury on an instruction of comparative negligence.

4. This court will reserve ruling on whether it will give an instruction on contributory negligence after hearing all the evidence at trial.