

**IN THE DISTRICT COURT OF BROWN COUNTY, NEBRASKA**

**RICHARD C. STRAND,**  
Plaintiff,

vs.

**ROBERT ALBERTS,**  
Defendant.

Case No. 6795

**ORDER DENYING MOTION  
FOR NEW TRIAL**

**DATE OF HEARING:** October 13, 1999.

**DATE OF DECISION:** November 22, 1999.

**APPEARANCES:**

For plaintiff:

Robert W. Mullin without plaintiff.

For defendant:

Jeffrey H. Jacobsen without defendant.

**SUBJECT OF ORDER:** Defendant's motion for new trial.

**FINDINGS:** The court finds and concludes that:

**MENTION OF INSURANCE**

1. The Nebraska Supreme Court recently restated, in *Stumpf v. Nintendo of America, Inc.*, 257 Neb. 920, \_\_\_ N.W.2d \_\_\_ (1999), that not every casual or inadvertant mention of insurance in the course of a trial will necessitate a mistrial. Such necessity depends upon the facts and circumstances peculiar to the case. The Court also stated that any reference to insurance where its presence or absence is tangential to the facts at issue should be carefully scrutinized.

2. The testimony upon which the defendant relies was that of Ryan Welke, which included the following:

**MULLIN:** Exhibit Number 4 contains nine paragraphs, but the center photograph on the top row depicts the bin and the tractor and the grinder and the truck, and there's an individual standing in the back of the truck, and Mr. Strand was asked, in his testimony, who that was, and he thought it was you; is that right?

**WELKE:** Yeah, it's me.

**MULLIN:** Now, what is the – what's the purpose of this picture; do you recall?

**WELKE:** Insurance, I think. You mean who took it, or whatever?

**MULLIN:** Well, what I was trying to find out is what were you trying to show in the picture?

3. The hearing held by the court in the absence of the jury shortly after the reference was made discloses certain facts and supports several conclusions.

a. Ryan Welke is the defendant's son-in-law.

(1) The plaintiff called Welke as an adverse witness.

(2) The plaintiff's counsel had no advance opportunity to discuss trial testimony with the witness, and the only previous discussion had been at the deposition of the witness.

b. Welke was called to testify on proper matters.

(1) He was called as an agent of defendant and his testimony was offered as admissions against the interest of defendant.

(2) He admitted that no warnings were given to plaintiff by Welke or by defendant in Welke's presence.

(3) He testified the truck, as set up for this work, was dangerous and that it would be foreseeable to have someone slip and fall off of the truck.

(4) Welke further testified that he used the tractor in question on many occasions including a number of times in the same activity as that employed at the time of the accident and was not aware that the safety shield was missing.

c. Welke stated that he had been cautioned by the defendant's counsel not to mention insurance, but that he was nervous on the witness stand and did not understand the question.

d. Although the question was somewhat ambiguous, it did not call for the particular response made by Welke. The question was clearly not one calculated to draw a response concerning insurance.

e. Welke did not specify the insured or insurance to which he referred.

f. The plaintiff's attorney did not dwell on or emphasize the response, and essentially clarified the question so that the proper and intended response could be achieved.

4. The situation in this case differs substantially from those in *Stumpf v. Nintendo of America, Inc.*, *supra*, and in *Patterson v. Swarr, May, Smith & Anderson*, 238 Neb. 911, 473 N.W.2d 94 (1991), in that the references in those cases were intentionally introduced, albeit claiming a proper alternate purpose. Here, the reference was not made intentionally.

5. This case more closely resembles the situation in *Lange Bldg. & Farm Supply v. Open Circle "R"*, 216 Neb. 1, 342 N.W.2d 360 (1983).

a. In that case, during cross-examination of the owner's president, the builder's counsel received answers introducing insurance which were unsolicited by the builder's counsel and which were not responsive to the questions asked. The Nebraska Supreme Court did not regard this situation to require a mistrial or a new trial.

b. Here, the plaintiff's counsel did not propound a question soliciting a response about insurance. Although the question could have been more clearly phrased, the insurance response was volunteered and was not directly responsive.

6. The court concludes that the evidence in this case did not suggest a decision on an improper basis and that the inadvertent mention of some unspecified "insurance" did not unfairly prejudice the defendant.

#### REFUSAL TO INSTRUCT ON ASSUMPTION OF RISK

7. Paragraph 3 of the defendant's answer refers to "the injury sustained by the plaintiff . . . due to and caused by the plaintiff's own *negligence*" followed by specifications of such negligence. The defendant's contention that such answer also pleads an assumption of risk defense disregards the difference between the two defenses. Moreover, the language itself gives no clue that an assumption of risk defense is alleged.

8. Assumption of risk, when imposed to defeat recovery, is an affirmative defense and the burden is on the defendant to establish the defense. *Talle v. Nebraska Dept. Of Social Services*, 249 Neb. 20, 541 N.W.2d 30 (1995). That requires the defendant to both plead and prove the defense. *First Nat'l Bank v. Benedict Consol. Indus.*, 224 Neb. 860, 402 N.W.2d 259 (1987). The court may not submit a defense which has not been included in the answer. Consequently, the defendant's contention regarding the necessity of a new trial on this ground clearly fails.

#### AMENDMENT OF ANSWER

9. The defendant's request to amend his answer in the few days before trial, and which was renewed at trial, would have resulted in significant prejudice to the plaintiff.

a. The plaintiff's entire trial preparation was based on the only pleaded defense, i.e. contributory negligence.

b. The requested amendment would have added a second defense. This necessarily "change[s] substantially the . . . defense . . . ." NEB. REV. STAT. § 25-852 (Reissue 1995).

c. Contrary to the defendant's argument, the contemplated addition of assumption of risk introduces new and different factual and legal issues. Under Nebraska jurisprudence, the requirement that the plaintiff knew of the immediate and specific danger involved distinguishes assumption of the risk from contributory negligence. Contributory negligence does not require that the plaintiff "have anticipated the exact risk which occurred . . . ." *Schmidt v. Omaha Pub. Power Dist.*, 245 Neb. 776, 515 N.W2d 756 (1994).

#### CAUSATION

10. The defendant properly cites the rule that an allegation of negligence is insufficient where the plaintiff asks the jury to guess the cause of an accident. *Richardson v. Ames Avenue Corp.*, 247 Neb. 128, 525 N.W.2d 212 (1995); *Swoboda v. Mercer Mgmt. Co.*, 251 Neb. 347, 557 N.W.2d 629 (1997).

11. The plaintiff testified that he could not remember how the accident happened or how he happened to come in contact with the power take-off. The accident may have happened due to a slip, stumble, trip, or fall. The defendant contends that the law required the plaintiff to prove exactly how the accident happened. The defendant concludes that the jury had no choice but to guess the cause of the accident.

12. However, the plaintiff introduced evidence that the defendant's negligence was a proximate cause of the accident.

a. The plaintiff introduced evidence tending to show that the accident would not have occurred "but for" defendant's conduct in providing the tractor without the shield.

b. The evidence also supports the jury's conclusion that the injury, i.e. contact with the PTO shaft, was the natural and probable result of the defendant's negligence.

c. The evidence also tends to negate the existence of any efficient intervening cause. An "efficient intervening cause" has been defined as the new and independent conduct of a third person,

which itself is a proximate cause of the injury in question and breaks the causal connection between the original conduct and the injury. *Tapp v. Blackmore Ranch*, 254 Neb. 40, 575 N.W.2d 341 (1998). None of the alternative theories of the precise means that the plaintiff came into contact with the PTO shaft would have constituted an efficient intervening cause. Consequently, the plaintiff did not have to disprove the alternative hypotheses.

d. The evidence supports all three basic requirements of proximate cause. *World Radio Laboratories, Inc. v. Coopers & Lybrand*, 251 Neb. 261, 557 N.W.2d 1 (1996). The defendant erroneously attempts to place a greater burden on the plaintiff.

13. The defendant bore the burden of proving that the plaintiff was negligent and that the plaintiff's own negligence was a proximate cause of the accident.

a. Where reasonable minds may draw different conclusions and inferences regarding the negligence of the plaintiff and the negligence of the defendant such that the plaintiff's negligence could be found to be less than 50 percent of the total negligence of all persons against whom recovery is sought, the apportionment of fault must be submitted to the jury. Only where the evidence and the reasonable inferences therefrom are such that a reasonable person could reach only one conclusion, that the plaintiff's negligence equaled or exceeded the defendant's, does the apportionment of negligence become a question of law for the court. *Traphagan v. Mid-America Traffic Marking*, 251 Neb. 143, 555 N.W.2d 778 (1996).

b. The determination of causation is ordinarily a question for the trier of fact. *Tapp v. Blackmore Ranch*, 254 Neb. 40, 575 N.W.2d 341 (1998).

c. The jury's verdict shows that the defendant met his burden. The jury properly considered the defendant's contentions regarding the cause of the accident and sufficient evidence supports the jury's conclusions. This court declines to invade the province of the jury.

#### INSTRUCTION NO. 10

14. The defendant contends that Instruction No. 10 should have omitted any element of damages for future pain and suffering.

a. Loss of enjoyment of life is an element or component of pain and suffering and of disability. *Talle v. Nebraska Dept. of Social Serv.*, 249 Neb. 20, 541 N.W.2d 30 (1995); *Anderson/Couvillon v. Nebraska Dept. of Social Serv.*, 248 Neb. 651, 538 N.W.2d 732 (1995).

b. Where there is a permanent physical injury, a plaintiff is entitled to recover for future pain and suffering. *LeMieux v. Sanderson*, 180 Neb. 311, 142 N.W.2d 557 (1956).

15. The orthopedic surgeon testified that plaintiff had lost 30% of the use of his left arm on a permanent basis. Other witnesses testified about plaintiff's inability to do daily work with his left arm. That evidence, coupled with the plaintiff's own testimony, raises at least an inference that the plaintiff's other life activities would continue to be detrimentally affected by the permanent injury.

16. The jury was properly instructed to assess the loss of enjoyment of life as part of the pain and suffering due to that permanent injury. The jury, not the court, properly decides the weight to be accorded such evidence.

17. None of the defendant's claims support the granting of a new trial. The defendant's motion must be denied.

**ORDER:** IT IS THEREFORE ORDERED AND ADJUDGED that:

1. The defendant's motion for new trial is denied.
2. Pursuant to the defendant's request at the time of hearing on the motion, supersedeas bond is set in the amount of \$350,000.00.

Entered: November 22, 1999.

If checked, the Court Clerk shall:

- : Mail a copy of this order to all counsel of record and to any pro se parties.  
Done on \_\_\_\_\_, 19\_\_\_\_ by \_\_\_\_\_.
- 9 Enter judgment on the judgment record.  
Done on \_\_\_\_\_, 19\_\_\_\_ by \_\_\_\_\_.
- 9 Mail postcard/notice required by § 25-1301.01 within 3 days.  
Done on \_\_\_\_\_, 19\_\_\_\_ by \_\_\_\_\_.
- : Note the decision on the trial docket as: [date from order] Signed "Order Denying Motion For New Trial" entered denying motion for new trial and setting supersedeas bond in the amount of \$350,000.  
Done on \_\_\_\_\_, 19\_\_\_\_ by \_\_\_\_\_.

Mailed to:

BY THE COURT:

\_\_\_\_\_  
William B. Cassel  
District Judge