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2ND CIVIL Nos
16002 and 16005

LA 20651

2ND CIVIL Nos. 16002, 16005

In the Supreme Court of the State of California

CHARLES A. SUMMERS, *Plaintiff,*

vs.

HAROLD W. TICE and ERNEST SIMONSON, *Defendants.*

CHARLES A. SUMMERS (plaintiff) and ERNEST SIMONSON (defendant), *Respondents.*

vs.

HAROLD W. TICE (defendant), *Appellant.*

CHARLES A. SUMMERS (plaintiff) and HAROLD W. TICE (defendant), *Respondents.*

vs.

ERNEST SIMONSON (defendant), *Appellant.*

APPEAL FROM SUPERIOR COURT OF LOS ANGELES COUNTY
HON. JOHN A. HOLLAND, JUDGE.

APPLICATION FOR HEARING IN SUPREME COURT AFTER DECISION OF DISTRICT COURT OF APPEAL. FILED

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(defendant),

Respondents,

vs.

ERNEST SIMONSON (defendant),

Appellant.

APPLICATION FOR HEARING IN SUPREME
COURT AFTER DECISION OF DISTRICT
COURT OF APPEAL.

Statement of the Case.

Respondent filed an action in the Superior Court of Los Angeles County for damages for the loss of an eye as a result of being shot while on a hunting expedition.

The action was filed against two members of the hunting expedition and it was alleged that they simultaneously discharged shotguns carelessly and negligently and that as a result thereof, bird shot became lodged in respondent's right eye and upper lip.

Paragraph V of the complaint reads as follows:

"That plaintiff is in doubt as to the person from whom he is entitled to redress and, therefore, has joined both defendants in this action with the intent that the question as to which of the defendants is liable, and to what extent, may be determined by this Court."

The Court found that both defendants were guilty of gross negligence in firing a gun in the general direction of the plaintiff, knowing full well the place where plaintiff was located, and rendered judgment in the sum of \$10,000.00 against the defendants, and each of them.

Both of the defendants appealed from the judgment and the District Court of Appeal ordered that the judgment be reversed as to both defendants and the cause remanded for a new trial upon the following grounds, to wit:

1. That there was no evidence that either defendant had been negligent or had breached any duty owed to plaintiff.

2. That a party who has pleaded and tried his case on one theory cannot adopt a different theory on appeal and raise issues separate and distinct from the cause of action alleged in his complaint.

The opinion of the District Court of Appeal is found in 84 A. C. A. at page 484 and a copy thereof is attached to this application as an appendix.

Statement of Facts.

As it will appear from the opinion of the District Court of Appeal, plaintiff and the defendants went on a hunting expedition, each armed with a shotgun loaded with 7½ shot. They discovered approximately fifty quail and each of them bagged two or three birds. Thereafter, they started hunting out the singles. The defendants were near the base of a hill and the plaintiff was at the top thereof. While located in that position, a bird flew in plaintiff's general direction and the two defendants shot at the bird simultaneously. One pellet of bird shot became lodged in plaintiff's eye. Both defendants were aware of the location of plaintiff.

Grounds for Application.

Respondent, Charles W. Summers, respectfully asks for a hearing in the Supreme Court upon the grounds that such a hearing is necessary in order to secure a settlement of important questions of law, to wit:

1. Where a plaintiff alleges that he is in doubt as to the person from whom he is entitled to redress and, therefore, has joined both defendants in the action with the intent that the question as to which of the defendants is liable and to what extent, may be determined by the trial court, is the trial court entitled to find that both defendants were negligent and, therefore both liable in damages?

2. If the trial court does so find, can it be said that a party who has pleaded and tried his case on one theory adopts a different theory on appeal and raises issues separate and distinct from the cause of action alleged in his complaint?

3. Where an appellant in his brief concedes that he was negligent and that the records so shows, is an appellate court entitled to reverse the judgment against such appellant upon the ground that a finding of negligence was without support?

Argument.

I.

No where in the opinion of the District Court of Appeal is there any authority cited to support the contention that one who pleads that he is in doubt as to the person from whom he is entitled to redress, and, therefore, has joined two defendants with the intent that the question as to which of the defendants is liable and to what extent may be determined by the trial court, is to be precluded from redress against both defendants. Nor is there any authority cited to show that a trial court under such circumstances is unauthorized to find both defendants guilty of negligence and render judgment against both defendants.

The foregoing question has never been decided by any of the higher courts of the State of California, to the knowledge of the writer of this brief and, therefore, no authorities are cited herein, and the writer hereof is convinced that it is necessary for the highest court of this state to give an expression of its opinion on the subject.

In the instant case, it was alleged in the complaint that both defendants negligently and carelessly discharged a deadly weapon and the court was asked to determine which of the defendants, if any, was liable and to what extent. In the humble opinion of the writer of this brief, there is no law to substantiate a contention that under such circumstances the trial court is not entitled

to find both defendants liable, and it would, indeed, be a serious mistake to permit an opinion to stand as the law of the State of California, holding that a trial court is not entitled under such circumstances to find that both defendants were negligent.

Section 379c of the Code of Civil Procedure of the State of California expressly authorizes such a pleading, and *Section 379a* of the same code provides that “judgments may be given against such one or more of the defendants as may be found to be liable, according to their respective liabilities.”

II.

With regard to the alleged adoption of a different theory on appeal, the opinion of the District Court of Appeal reads as follows:

“A party who has pleaded and tried his case on one theory cannot adopt a different theory on appeal and raise an issue separate and distinct from the cause of action alleged in his complaint. (*Ales v. Ryan*, 8 Cal. 2d 82 [64 P. 2d 409]; *Foti v. Morrissey*, 57 Cal. App. 2d 328 [134 P. 2d 51]; *Hanchett v. Wisley*, 107 Cal. App. 230 [290 P. 311].)”

In the case of *Ales v. Ryan*, above mentioned, this Court simply held that where two or more persons have been concerned in the commission of a tort, the injured party may proceed either jointly or severally against such joint tort-feasors who are both jointly and severally liable and although the complaint may allege only joint negligence on the part of the joint tort-feasors, it nevertheless states a complete and separate individual liability against each party so sued on account of the single act of which complaint is presented. Nothing is mentioned in the

opinion, so far as this writer is able to ascertain, concerning the adoption of a theory on appeal different from that alleged in the complaint.

In the case of *Foti v. Morrissey*, above mentioned, it was contended on appeal that the defendant was negligent as a matter of law in failing to travel as close to the righthand curb as practicable. This particular charge of negligent conduct was not advanced at the trial, no evidence was addressed to the point and no instruction as to the law involved was requested or given. The District Court of Appeal held that inasmuch as the contention was presented for the first time upon appeal, it should not be considered for the reason that an appellant will not be allowed to develop issues or theories of the case differing from those upon which it was tried.

In the case of *Hanchett v. Wisley*, above mentioned, a negligence case was tried on the theory that the accident occurred while the employee was acting within the scope of his employment, and it was held that the alleged negligence of the employer's manager in continuing to employ him with knowledge that he had previously driven an automobile while under the influence of intoxicating liquor was not an issue in the case and was separate and distinct from the cause of action alleged in the complaint and, therefore, could not be considered for the first time on appeal.

In the instant case, the trial court, after a careful consideration of the evidence, found both defendants negligent, and further found that as a result of the negligence of both defendants a pellet was caused to be lodged in the eye of respondent, and that both were liable. It was

the theory of the plaintiff in the action that both defendants were liable and that they were in a similar position as two parties throwing lye in the general direction of another, some of which caused the loss of an eye, or of two parties throwing rocks from the roof of a building and striking another party at the foot of the building, in which event counsel for the plaintiff contended, that, it being impossible to ascertain whose rock caused the damage, both parties were liable.

III.

In the brief filed by appellant, Harold W. Tice, we find the following language on page 19:

“While the preponderance of the evidence shows only an accident, yet, because of certain deficiencies of the record as to a determination of the direction in which the shots were fired, immediately before the injury, we have decided not to argue the insufficiency of the evidence of negligence on the part of the defendant Tice, and assuming the lesser is contained within the greater, we can discover no prejudice in the finding of gross negligence, although only at most ordinary negligence is shown.”

In the face of this concession, the District Court of Appeal saw fit to state in its opinion as follows:

“The record in this case is entirely devoid of any evidence to support two important findings in regard to the appellant Tice: one, that Tice was negligent; two, that any act of Tice was the proximate cause of any injury to plaintiff.”

Although the writer of this brief is now, and at all times has been, able and willing to point out in the record the testimony showing the negligence of Harold W. Tice, he certainly was not called upon to do so in the face of the concession in Tice's brief, and he should not now be confronted with a reversal upon the ground that there was no showing of negligence on the part of Tice.

While the appellant Simonson in his brief did raise the contention that no evidence was introduced to prove that Simonson was guilty of negligence, he did not quote from the transcript any of the testimony with regard thereto and did not argue his contention or support it with any points and authorities.

Conclusion.

If the opinion of the District Court of Appeal is permitted to stand, it means that henceforth the law of the State of California will be established as follows, to wit:

1. That a plaintiff who pleads that he is in doubt as to the person from whom he is entitled to redress and, therefore, has joined two defendants in the action with the intent that the question as to which of the defendants is liable and to what extent may be determined by the trial court, is limited to recovery as against one defendant only, and not entitled to recovery against both.

2. That such a plaintiff, in the event he recovers judgment against two defendants, is confronted on appeal with a contention that having tried his case on one theory, he cannot adopt a different theory on appeal and raise

an issue separate and distinct from the cause of action alleged in his complaint, which contention has the sanction of the higher courts of this state.

3. That a plaintiff who has recovered a judgment for negligence, may have a judgment reversed upon the grounds of insufficiency of the evidence to sustain the judgment with respect to negligence, although the sufficiency of the evidence is conceded by the appellant on appeal.

For the foregoing reasons, the respondent, Charles W. Summers, respectfully requests that a hearing be granted by this Honorable Court in the above-entitled matter.

Respectfully submitted,

WERNER O. GRAF,
Attorney for Respondent.

APPENDIX.

Opinion of the District Court of Appeal.

[Civ. Nos. 16002, 16005. Second Dist., Div. One.
Mar. 16, 1948.]

Charles Summers, Respondent, v. Harold W. Tice *et al.*,
Appellants.

Appeals from a judgment of the Superior Court of
Los Angeles County. John A. Holland, Judge pro tem.
Reversed.

Action for damages for personal injuries arising out of
discharge of gun while hunting. Judgment against de-
fendants reversed.

Joseph D. Taylor, Wm. A. Wittman and Gale & Pur-
ciel for Appellants.

Werner O. Graf for Respondent.

BARTLETT, J. pro tem.—On November 20, 1945, plain-
tiff and respondent, Charles A. Summers, and defendants
and appellants, Ernest Simonson and Harold W. Tice,
went on a hunting expedition together on the open range
near Welton, California. Being in pursuit of quail each
of them was appropriately armed with a shotgun loaded
with 7½ shot. The complaint alleged that at a time
when plaintiff was at a point approximately 200 feet from
the defendants, each of them negligently discharged his
gun, with the result that shot was lodged in the respond-
ent's right eye and in his upper lip. The complaint also
contains this allegation (paragraph V): "That plaintiff
is in doubt as to the person from whom he is entitled to
redress and therefore has joined both defendants in this
action with the intent that the question as to which of
the defendants is liable, and to what extent, may be
determined by this Court."

It is further alleged that as a result of the negligence of defendants, and each of them, plaintiff lost his right eye and sustained injuries to his lip and in connection with the operation to his eye, suffered certain special damages. The answers denied the allegations of negligence and the defendant Simonson pleaded contributory negligence on the part of plaintiff. The court then found each defendant guilty of negligence and that the negligence of each defendant was a proximate cause of the injury to plaintiff. No finding whatever was made as to the allegations of paragraph V.

A judgment was then rendered against the defendants, and each of them, for \$10,000. At the time of the trial plaintiff testified:

“ . . . I think about 4 o'clock in the afternoon we came upon a place very similar to this Los Angeles bowl in the contour of the terrain, I would say, and we discovered in there approximately 50 birds, quail, and after we had scattered them and got them, each one of us had two or three birds apiece, we started hunting out the singles, and Mr. Tice and Mr. Simonson were down near the base of the hill, and I walked up in a kind of curved direction toward the top, or in that direction, and I had sat down for a moment, a kind of rest after climbing up the hill, and the birds were coming up my way, I got up and walked I imagine about 25 feet or so from where I was sitting, and I had been looking in a general direction at Mr. Tice and Mr. Simonson, but there was a bird coming that way, and I heard two shots, almost together, simultaneously and I got shot in the eye, in the face.

“Q. Which eye? A. In the right eye, and one in the upper lip, near the center.”

He also testified:

“Q. You say you heard two shots just immediately preceding your injury, were you or were you not looking directly at Mr. Tice and Mr. Simonson at that time?

A. I was looking in their general direction, yes.

“Q. But you don't know which one fired either one of those shots, or both of them, is that it? A. If I had seen a gun pointing toward me I would have turned my head.”

The only other witness called by the plaintiff as to the accident was defendant Simonson under the provisions of section 2055 of the Code of Civil Procedure. He was asked very few questions, and merely testified that just before Summers cried out that he had been hit, Tice had fired one shot and he had fired right after it. The plaintiff then rested.

The defendants and each of them moved for a nonsuit upon the ground, among others, that there was no evidence of negligence on the part of either defendant. In fact there was no evidence in the record that either defendant so much as aimed a gun in plaintiff's direction. Nevertheless, the court denied the motion.

The defendant Tice then testified that at the time referred to in plaintiff's testimony there were just two shots fired and both of them were fired by Simonson. Simonson, again called to the witness stand, testified that three shots were fired, two by himself and one by Tice. He further stated that at the time he shot, the plaintiff was not in sight. There was still no evidence in the record as to either defendant firing in the direction of plaintiff or as to which defendant shot plaintiff in the eye.

Let us first consider the appeal of the defendant Tice. It is his contention that the judgment should be reversed for the reason that there is no finding as to which defendant was guilty of the act which injured the plaintiff although by paragraph V of his complaint the plaintiff himself put the question in issue; that the evidence is insufficient to show that any negligence on the part of Tice was the proximate cause of the injury to plaintiff's eye and that where separate injuries result from the acts of independent tort feasons, the damages must be segregated. Respondent in his brief ignores these contentions and states the following as the sole question involved:

“Where two hunters, in pursuit of a common purpose, in the presence of each other, negligently fire shotguns loaded with identical birdshot, in the general direction of a third hunter, whose presence and whereabouts are known to both, are they jointly and severally liable for the resulting injury, although it cannot be definitely determined whose birdshot actually pierced the third hunter's eye?”

The premise upon which this question is based is wrong in two particulars: first, here three hunters, one of whom was injured, were on a hunting expedition together; and, second, there is no evidence in the record of any negligence on the part of Tice. Respondent states that the question is one for which there seems to be no precise precedent in California and proceeds to cite cases from other jurisdictions. Not one of these cases is in point in a situation such as we have here.

In *Oliver v. Miles*, 144 Miss. 852 [110 So. 666, 50 A.L.R. 357], two hunters fired at partridges across a public highway in reckless disregard of the rights of persons using this road, and a traveler on the highway

was shot. In the absence of proof as to which hunter fired the shot causing the injury to the third person who was not of their party, the court held that the defendants were jointly engaged in the unlawful enterprise of shooting across a highway and were jointly liable.

Benson v. Ross, 143 Mich. 452 [106 N.W. 1120, 114 Am. St. Rep. 675], is the next case he cites. In this case three men acting in concert were shooting at a mark in violation of a city ordinance. The court held that they were joint tort feasons and jointly liable for an injury to a third person.

Reyher v. Mayne, 90 Colo. 586 [10 P. 2d 1109], is another case cited. The plaintiff in this action, a licensed guide and hunter, had been authorized by the owner of the premises to hunt on the border of a lake. In this lake there had been constructed blinds for the use of hunters in one of which the plaintiff was. He had placed 12 live geese as decoys, harnessed and secured along the shore of the lake on both sides of and in front of the blinds. Suddenly the plaintiff heard the fire of guns and observed that his decoy geese were being shot and he arose to protest and himself received in his face and upper body the discharge of a gun held by one of the defendants. There was no doubt but that all of the defendants were trespassers. The land was fenced and posted and on the closed gate which the defendant opened there was a sign "No hunting or trespassing allowed." The question before the court was whether or not it was error to give judgment against both defendants when only one of them had fired the shot that resulted in the bodily injury to the plaintiff. The court held that the destruction of the geese constituted a part of the plaintiff's cause of action and that both of the defendants had

fired at and killed some of these geese and that it was while they were persisting in this unlawful act that the plaintiff was injured; that both were on land where they were without right to be and acting in concert. A judgment against both of them was affirmed.

In *Brown v. Thayer*, 212 Mass. 392 [99 N.E. 237], it was held that the owners of two automobiles, driven at a negligent rate of speed and racing with each other, were jointly and severally liable for the death of a pedestrian who was struck by one of the automobiles. On the road along which this race was taking place was a carriage going in the same direction. One of the automobiles went to the right of the carriage and the other to the left of the carriage, not even leaving the pedestrian a place to dodge. The manner in which they conducted themselves was in express violation of a statute and the court held that where two or more tort feasons by concurrent acts of negligence which although disconnected yet in combination inflict the injury, the plaintiff may sue them jointly. It is noteworthy that the judgment in the case cited, like the judgment in the instant case, did not segregate the damages and upon that ground the judgment was reversed.

The next case which respondent cites was one which might more appropriately be called to our attention by the appellant. This is the case of *Martin v. Farrell*, 66 App. Div. 177 [72 N. Y. S. 934]. Horses belonging to the defendants were placed in a pasture overnight with a horse belonging to the plaintiff. The plaintiff's horse was injured by being kicked by one of the defendant's horses. The court held that the case did not depend upon the ownership of the horses nor as to whether they were known to be vicious, and that in such

a case if both were negligent both were liable although it was not known whose horse had actually committed the act. The court then goes on to say, "The important question of fact herein is whether the defendants and each of them personally or by direction to others pulled the staple of the lock and turned the horses into the lots." The court then held that the evidence was not sufficient to show that one of the defendants either pulled the staple of the lock on the gate or took part in the turning of the horses into the lot, and, inasmuch as his negligence in that regard was not shown, reversed the judgment as to that defendant.

The other two cases referred to in respondent's brief are not such as to give any aid in solving the question involved here. It will be seen that in all of the cases cited by respondent, the defendants were acting in concert in the violation of some statute, were grossly negligent and, as a result of that violation of law, some innocent person, not of their party, was injured.

The following is a quotation from respondent's brief:

"In Volume 4 of *'Restatement of the Law of Torts,'* paragraph 876, page 438, we find the following illustration under the heading 'Persons Acting in Concert':

"'A and B are members of a hunting party. Each of them, in the presence of the other, shoots across a public road at an animal, this being negligent as to persons on the road. A hits the animal. B's bullet strikes C, a traveler on the road. A is liable to C.'"

The illustration given is one cited in the text as an illustration of the rule laid down therein which is as follows:

“876. Persons Acting in Concert.

“For harm resulting to a third person from the tortious conduct of another, a person is liable if he

“(a) orders or induces such conduct, knowing of the conditions under which the act is done or intending the consequences which ensue, or

“(b) knows that the other’s conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself, or

“(c) gives substantial assistance to the other in accomplishing a tortious result and his own conduct, separately considered, constitutes a breach of duty to the third person.”

In commenting on this rule, it is stated in the text on page 436:

“Advice or encouragement to act operates as a moral support to a tortfeasor and if the act encouraged is known to be tortious, it has the same effect upon the liability of the adviser as participation or physical assistance. If the encouragement or assistance is a substantial factor in causing the resulting tort, the one giving it is himself a tortfeasor and is responsible for the consequences of the other’s act.”

The illustration given in respondent’s brief is illustration 3.

Further commenting on this rule, on page 440, we find the following:

“Further, one who assists in doing an act which from his standpoint does not involve elements of undue risk is not liable merely because another with whom he cooperates is negligent (see Illustration 9). Likewise, one who supplies another with the means of committing a tort is not liable if he has no reason to suppose that a tort will be committed (see Illustrations 10 and 11). In none of these cases is the defendant committing a breach of duty to the injured person.

“Illustrations:

“9. A and B hunt together but not in the prosecution of a joint enterprise. It is not negligent to hunt where they are and neither of them has reason to believe that the other will be negligent. Under the unreasonable belief that it is an animal, A shoots at a moving object which proves to be a man. B is not liable for A’s negligent act.”

Under the reasoning of these rules from “Restatement of the Law of Torts,” Tice could not be liable. It is evident that the real test is whether or not the defendant committed any breach of duty to the injured person. There is no evidence that Tice did anything to violate any breach of duty he owed to the plaintiff; that he was negligent in any way; that he had any reason to believe that Simonson would breach any duty he owed to the plaintiff or would be negligent. To uphold plaintiff’s contention we would be forced to hold that if A, B and C go hunting together in a place where they have a right to go and at all times on the expedition the conduct of A is careful, skillful and prudent, but that by the unfore-

seen negligent conduct of B, C is injured, nevertheless, in spite of his own exemplary conduct, A is liable for the injury to C. There is no reason in logic or law for such a holding and no decision to any such effect has been called to our attention.

This contention of respondent's that the defendants are jointly liable, regardless of whose negligence caused the injury to plaintiff, is advanced for the first time on appeal. The complaint is based on an entirely different theory and the case was tried on the issues raised by the complaint and the answer thereto. The complaint definitely did not seek to hold the defendants liable by reason of any joint tort or joint act, or one defendant for damages caused by the other, but was drawn upon the theory that the plaintiff should recover from each defendant on account of his separate tort. That is shown clearly by paragraph V of the complaint, which we have already quoted. The court made no finding in regard to this allegation and its failure to do so led to absurdities in its findings. As examples, take these portions of findings 13 and 14, "that as a direct and proximate result of the *shots* fired by defendants and each of them, a birdshot pellet was caused to and did lodge in plaintiff's right eye. . . . The court finds that said injuries suffered by said plaintiff were the result of the gross negligence of the defendants and each of them."

A party who has pleaded and tried his case on one theory cannot adopt a different theory on appeal and raise an issue separate and distinct from the cause of action alleged in his complaint (*Ales v. Ryan*, 8 Cal. 2d 82 [64 P. 2d 409]; *Foti v. Morrissey*, 57 Cal. App. 2d 328 [134 P. 2d 51]; *Hanchett v. Wisley*, 107 Cal. App. 230 [290 P. 311]).

The record in this case is entirely devoid of any evidence to support two important findings in regard to the appellant Tice: one, that Tice was negligent; two, that any act of Tice was the proximate cause of any injury to plaintiff.

The statements which we have made concerning the appeal of Tice are, in the main, equally applicable to the appeal of Simonson. On the question of the sufficiency of the evidence to justify the findings as to Simonson, there was testimony in the record by the plaintiff and by Tice that at and just before the accident, but two shots were fired, and Tice testified that he did not shoot. This was in conflict with Simonson's testimony that three shots were fired at the critical time, he having fired two of them and Tice one. Tice also testified as to certain statements on the part of Simonson which constituted admissions on the part of Simonson that he fired the shot which injured plaintiff. If we were to accept Tice's testimony that he fired no shot as true and that only two shots were fired then a finding that Simonson was negligent and that his negligence proximately caused the injury could be sustained. However, the court made a specific finding that Tice's testimony, both in regard to not having fired a shot at the time and as to the statements he testified were made by Simonson, was false. Such being the court's findings, there is no evidence left in the record to support the findings as to Simonson either.

The judgment is reversed as to both defendants and the cause is remanded for a new trial.

Doran, Acting P. J., and White, J., concurred.

Received copy of the within for the judge who
tried the case this..... day of April,
A. D. 1948.

EARL LIPPOLD, *County Clerk.*

By....., *Deputy.*

Received three copies of the within for the
Clerk of the District Court this..... day of
April, A. D. 1948.

.....
Clerk of the District Court.

Service of the within and receipt of a copy
thereof is hereby admitted this..... day of
April, A. D. 1948.