151-746

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IN THE

SPECIAL COURT OF APPEALS OF VIRGINIA

AT RICHMOND

COLONNA'S SHIPYARD, INCORPORATED,
a Virginia Corporation,
Plaintiff in Error,

v. Record No. 443

J. F. DUNN,
Defendant in Error.

B. A. BANKS,
KELSEY AND JETT,
Counsel for Defendant in Error.

REPLY TO ADDITIONAL REPLY BRIEF OF PLAINTIFF IN ERROR.

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I. INTRODUCTION.

The parties will be called plaintiff and defendant as they were in the trial court and as they have been in the previous briefs filed in this case.

NOTE:—Figures in parentheses refer to pages of the record, thus: (1-10), pages 1 to 10. In couplets divided by fraction line, refer to pages and lines, thus: 44/3-6, page 44, lines 3 to 6.

DEFENDANT'S INACCURATE STATEMENTS POINTED OUT BY QUOTATIONS FROM RECORD.

The reply brief of Plaintiff in Error to the Additional Reply Brief of the Defendant in Error is not at all responsive to the query of the court, and is confined largely to discussion of the evidence involving questions of contributory negligence and the assumption of risk, subjects extraneous to the court's inquiry.

On pages 28-29 of our additional brief replying to the Court's query, we pointed out that the defendant had made many inaccurate statements dealing with important facts, and which statements were gratuitous assumptions upon the part of defendant's counsel and unsupported by the record. Since counsel takes issue with us as to these inaccurate statements and devotes 14 pages of their brief in reiteration of these unsupported assertions we herewith quote the testimony of witnesses in support of our contention

Defendant's mis-statement page 2.

"After the cord had been delivered to the plaintiff."

There is not a scintilla of evidence in the record to support this statement. That Dunn did not join the "gang" until after 6 P. M., of the night of the accident and that all of the cords (four in number) were already installed, connected and in use prior to his coming on board the ship at the hour indicated, is shown by the testimony of the following witnesses:

JOINED FORCE AFTER LIGHT INSTALLED AND IN USE ON SHIP

Chapel (41/21)
"A. He went on at 6 o'clock at night, I remember."

Holland (117/1-5)

Q. Do you remember giving any cords to Mr. Dunn on this occasion?

A. Oh, I think I gave him cords several different times.

Q. I mean on this occasion?

A. On this occasion I could not say whether Mr. Dunn got it or his helper.

It is clear from Holland's testimony that Dunn rarely used electric cords in connection with his employment as an acetylene welder as his torch furnished sufficient light while in use. That Holland did not give cords to Dunn is further shown by the fact that although he had been employed as a welder for approximately four years Holland could not say positively that he gave Dunn any cords but thought he did "several different times."

IT SEEMS TO US THAT THE FOLLOWING TESTIMONY OF WITNESSES CONCLUSIVELY AND CONVINCINGLY DISPOSES OF THE CONJECTURAL EFFORT OF DEFENDANT'S COUNSEL TO READ INTO THE RECORD THAT "THE CORD WAS DELIVERED TO THE PLAINTIFF."

Torch Furnishes Plaintiff With Sufficient Light.

Nixon (72/12-16)

Q. Is it or not necessary to have electric light when you use an acetylene torch?

A. No, Sir.

Q. The torch itself furnishes the necessary light?

A. Furnishes plenty of light to work by, yes, sir.

Only Few Seconds At Boiler Box Where Cord Was Hanging.

(79/3-5)

Q. So, he had only been to that boiler box a few seconds when he was hurt?

A. Yes, Sir.

Light in Place When Attempted To Use

Chapel (43/3-5)

Q. Can you state whether or not the light was hanging down when he climbed up, or whether he moved it up?

A. It was hanging there when he got on the stage, yes sir.

Again

NIXON (77/32-34)

Q. I understood you to say the light was hanging up there when he moved there?

A. Yes Sir.

Glare Prevents Seeing Worn Insulation On Cord

NIXON (77/36-46)

Q. From the position in which Mr. Dunn was standing, can you tell me whether with the light between him and the cord, he could distinctly see the cord, see the cord just above the socket?

A. Well, no sir, I could'nt say that he could.

Q. Suppose you take this light and illustrate to the jury just why he couldn't see the cord?

A. Well, if you was to take a light like that and it was shining real bright after you are looking down in a place like that, after awhile, you look up at the cord, of course that cord is blind-

ing to you, and if you would take hold you could not judge whether you was taking hold of the broken place in the wire, because it is a little higher than his head. He had to reach up to get hold of it.

Defendant's mis-statement Page 3

"Candles were secured from the storeroom and brought to the work place of the plaintiff, and by the plaintiff himself despite the fact that the plaintiff had these candles at his command and despite the fact that the plaintiff himself stated that he desired candles because he was afraid of electricity, yet, nevertheless, he failed to use the candles and continued to use electric cords."

Under the above mis-statement counsel re-argues the third assignment of error or Assumption of Risk which assignment is fully discussed on pages 50-55 inclusive of our original brief and fully argued both in the lower court and at the February term of this court. We pointed out that Witness Oliver was in fact contradicted by their own witness and foreman of the plant when he testified that he did not go for candles himself or with anyone else and therefore Oliver was mistaken when he said Hinckleman and Dunn came thru the shop and because McDonald and Brent got the candles after the accident. The following testimony indisputably shows that plaintiff received no warning, did not go for any candles and that candles were only brought on the ship after the accident.

WHO AND WHEN CANDLES RECEIVED

McDonald (54/30-38)

Q. Who got the candles?
A. Me and the boy Brent.
Q. When did you get them?
A. Right after the accident.

NO CANDLES ON BOAT PRIOR TO ACCIDENT.

Again (57/23-30)

Q. You say you went to get some candles after the accident?

A. Yes, Sir, after the accident.

Q. How many did you get?

A. Two dozen, I think.

Q. Who did you get them from?

A. Me, and Brent went up there and got them from the watchman.

Nixon (80/43-45)

Q. And there were candles there when this accident occured?

A. I can't say whether there was candles there when he got hurt or not, but there was not any candles in use at the time he got hurt, but we used candles after he got hurt."

Defendant's mis-statement page 5.

"Were not kept out for any great length of time."

THESE CORDS WERE CARRIED FROM JOB TO JOB AND WERE OUT INDEFINITELY WITHOUT ANY SEMBLANCE OF ANY INSPECTION IS ESTABLISHED BY THE TESTIMONY OF THE FOLLOWING WITNESSES:

Holland (120/24-33)

Q. Can you state whether or not any one of those cords was out of your custody as long as a month prior to the accident?

A. They hardly ever stay that long.

Q. Would you say it was out of your cus-- tody as long as two weeks?

A. I would not say, because I don't know. I would not say anything I don't know.

Q. But you know the men carry the cords from one part of the work to the other?

A. They do, yes, sir.

Defendant's mis-statement page 6.

"The particular cord was never identified."

CORD WAS IDENTIFIED

Notwithstanding the fact that witness Nixon directed Holland's attention specifically to the cord which shocked the plaintiff the defendant failed to produce the cord in court for examination by the court or jury and offered no explanation why the cord was not produced and it is a purely gratuitous assumption upon the part of counsel to argue that the reason the cord was not produced was because it was never identified.

Nixon (88/32-37)

A. I taken the cords up myself, most of the cords myself, and turned them in to Mr. Holland. When I turned them in, I says, "Mr. Holland, some of these cords is in bad condition." *"I said the one Jack got hurt on is here.* He said, "throw them up there in a pile and I will look them over. So I laid them up in a pile and he gave me checks for them." (Italics ours)

Defendant's mis-statement Page 6 and 7.

"After the cord was turned over to the plaintiff in good condition."

"It was in perfect condition when delivered to the plaintiff."

WE HAVE ALREADY POINTED OUT CONCLUSIVELY THAT NO CORD WAS AT ANY TIME DELIVERED TO THE PLAINTIFF AND THAT THE CORDS WERE ALREADY ON THE

SHIP WHEN HE JOINED THE FORCE AND IF GRASPING A CORD FOR THE FIRST TIME INSTALLED TO FURNISH ARTIFICIAL LIGHT TO FINISH A RUSH JOB ON A SHIP 12 O' CLOCK AT NIGHT AND RECEIVING A SHOCK BE TERMED "DELIVERED" IT WAS DELIVERY OF INSTANTANEOUS NATURE AND INFLICTING INSTANT DAMAGE. AT NO TIME PRIOR TO THE ACCIDENT DID THE PLAINTIFF HANDLE THIS OR ANY OTHER CORD.

Defendant's mis-statement page 7.

"It was the custom of the defendant's plant when there was any trouble with a cord for the person using the cord to report the trouble to the electrician and return the cord for repairs."

COUNSEL ARGUES THAT THE HABITUAL NEGLIGENCE OF ITS ELECTRICIAN HOLLAND IN FAILING TO PERFORM THE NON-ASSIGNABLE DUTY OF THE MASTER TO INSPECT AT FREQUENTLY REASONABLE INTERVALS ELECTRICAL APPLIANCES CREATED A CUSTOM. WE CHALLENGE COUNSEL TO POINT OUT A SINGLE WORD IN THE ENTIRE RECORD WHERE ANY WITNESS TESTIFIED A CUSTOM EXISTED AT THE PLANT TO REPORT TO THE ELECRICIAN WHENEVER A CORD WAS DEFECTIVE.

COUNSEL ALSO ARGUE BECAUSE NIXON WHEN BRINGING BACK MOST OF THE CORDS FROM THE SHIP AFTER THE WORK WAS COMPLETED AND DIRECTING HOLLAND'S ATTENTION TO THE DEFECTIVE CORD WHICH SHOCKED THE PLAINTIFF THAT THIS CONSTITUTED A CUSTOM. IF AN EMPLOYEE WORKING DURING DAY-

LIGHT SHOULD BE SO FORTUNATE AS TO DISCOVER WORN INSULATION ON A CORD AND PROMPTED BY THE INSTINCT OF SELF-PRESERVATION RETURNS THE CORD TO THE ELECTRICIAN WE FAIL TO SEE HOW THIS CREATES ANY SEMBLANCE OF ANY CUSTOM RELIEVING THE EMPLOYER FROM PERFORMING THE NON-ASSIGNABLE DUTY TO INSPECT AND MAINTAIN ELECTRICAL APPLIANCES IN A SAFE CONDITION.

Defendant's mis-statement Page 7

"That candles were furnished to the plaintiff."

SEE RECORD QUOTED IN REPLY TO DEFENDANT'S MIS-STATEMENT ON "PAGE 3."

Defendant's mis-statement page 9

"He had control over the cord, was the man who was using the cord."

"After the cord had been delivered to him in good condition."

AS HEREIN POINTED OUT THESE STATEMENTS ARE MERELY ASSERTIONS OF COUNSEL AND NOT SUPPORTED BY THE RECORD.

Defendant's mis-statement Page 13.

"The condition of the cord came about by reason of its use by the plaintiff."

UNCONTRADICTED EVIDENCE SHOWS PLAINTIFF WAS USING HIS TORCH AND DID NOT HAVE ANY OCCASION TO USE CORD UNTIL WITHIN A FEW SECONDS OF THE ACCIDENT.

Defendant's mis-statement page 14-18-20.

"Because the cord was in perfect condition when delivered to Dunn."

"Dunn constantly using the cord."

"And it was the duty of the plaintiff under the defendant's method of conducting its business in reference to these cords to repair the defects he necessarily had to inspect."

THE ABOVE STATEMENTS ARE MERELY RE-ITERATION OF GRATUITOUS ASSUMPTIONS. THAT NO DUTY RESTED ON DUNN TO INSPECT THE CORDS IS ESTABLISHED BY HOLLAND'S OWN ADMISSIONS THAT IT WAS HIS DUTY (119/4-9) AND NOT THE DUTY OF A WELDER (119/39-43). THAT IT WAS THE ELECTRICIAN'S DUTY IS ALSO SHOWN BY THE TESTIMONY OF FOREMAN HINCKLEMAN WHO ASSIGNED AS A REASON FOR HIS NOT INSPECTING THE CORDS ABOUT 4 HOURS PRIOR TO THE ACCIDENT WHILE ON BOARD ASSISTING NIXON IN EXTRACTING A BROKEN GLOBE FROM A SOCKET, AND AT THE TIME WHEN HE CLAIMS TO HAVE WARNED THE MEN NOT TO USE THE CORD (WHICH WARNING WAS DENIED BY ALL OF THE MEN EXCEPT NIXON SEE ORIGINAL BRIEF PAGES 56-59) HE WAS "DEATHLY SCARED OF ELECTRICITY AND THAT IT WAS (107/10-16) THE ELECTRICIAN'S JOB.

THE DEFENDANT'S DISCUSSION OF PLAINTIFF'S BRIEF.

The defendant in discussing plaintiff's brief absolutely fails to refer to what we consider one of the strongest and most complete answers to the question now before the Court:-

That the entire question of inspection of the drop cord involved in this case and the non-assignable duty to provide the plaintiff with a reasonably safe place to work were specifically dealt with in the pleadings, the testimony of defendant's witnesses and the instructions of the Court, and therefore, of necessity fully considered by the jury in rendering their verdict for the plaintiff, which we feel under the authorities cited is conclusive of the issue.

The defendant likewise entirely misses the purpose for which many of the electrical cases were cited, namely: That the inspection of a drop cord of the kind used by the plaintiff, or the want of inspection of this drop cord, was a question for the jury to determne. In each of these cases it is specifically stated that **it was a question for the jury,** and counsel's discussion of the facts in each case has entirely no bearing on the principles of law governing submission of the question here involved for determination of the jury.

On the other hand their discussion of the facts in the cases cited in direct answer to the Court's query as an abstract proposition of law is likewise, we submit, not to the point, for they nowhere deny that the principles of law there laid down as to inspection are not controlling of the duty of inspection of a drop cord of the kind used by the plaintiff at the time of the accident. Their only argument is that there is a distinction between the facts in the cases cited and the case at bar.

In their forty-five page brief last filed they still decline to come out in the open and discuss the question squarely on the query of the Court but continue their argument on an alleged custom in an endeavor to shift the burden of inspection from the defendant to the plaintiff. They cite a great deal of

testimony much of it not in point, but we again insist that they absolutely and completely fail to cite any testimony of the witnesses in this case, **because there is none,** substantiating their statement that "it was the custom at the defendant's yard when there was any trouble with a cord for the person using the cord to report the trouble to the electrician and return the cord for repairs," other than the attempted and strained explanation of electrician Holland **while on cross-examination** to explain his failure to perform his master's non-assignable duty and a portion of Nixon's testimony as to returning the cords, clearly when the work on this vessel had been completed, all of which is insufficient to establish custom.

We feel we are not stating it too strongly to say that to us it is absolutely absurd to believe that this Court will seriously construe the testimony of Holland, even fortified as counsel have endeavored by fragmentary statements of other witnesses, into a fixed method of doing business **known to the plaintiff in this case.** The defense that counsel are now trying to assert is entirely foreign to this case. This is shown by the fact that there is not one single reference to defendant's method of conducting its business as a defense in this action in its pleadings or instructions, nor is it referred to or assigned in its petition for a writ of error to this Court. As we have before stated it is an afterthought and only has the effect of confusing the issue now before the Court. We are further moved to make this statement because the Court has asked for argument only on a specific query and counsel for defendant are attempting to re-argue the entire case, which has heretofore been fully argued.

PLAINTIFF'S AUTHORITIES IN POINT.

We do not need to again discuss the authorities cited by the plaintiff as they speak for themselves. **They deal with drop cords** not stationary lights as contended by counsel for the defendant. **They are a direct affirmative answer to the Court's query.**

CASES CITED BY DEFENDANT ARE NOT IN POINT.

Counsel for the defendant add nothing new to their discussion of the authorities cited by them nor do they give additional citations of authorities in their last brief. We have fully discussed each case cited by them in our previous brief. We think there is nothing in what they have added to call for further discussion.

ADMIRALTY PRINCIPLES OF LAW GOVERN THIS CASE.

There is another determinative point in this case, which we overlooked in emphasizing in our previous brief. In addition to the fact that there is no such rule of law as the common or simple tool doctrine in admiralty, which governs this case in its last analysis, the defense of so called custom or method of doing business is not sufficient to relieve the master of his non-assignable duty of furnishing the servant a safe place to work. This is clearly shown by Judge Waddill's decision in the ANGLO-PATAGONIAN, 228 Federal Reporter, 1014, affirmed 235 Federal Reporter, 92. There the accident was caused while the vessel was in dry dock by her anchor giving away and falling on the workmen below. The vessel owner set up as a defense that the anchor was fastened in the accustomed manner. The Court, however, brushes aside this defense and held that the vessel should

have taken no chances but seen that a safe course was adopted.

CONCLUSION

We submit that in the consideration of this case by this Court this plaintiff is entitled to every presumption in favor of the correctness of the judgment of the lower Court and in order to warrant a reversal arror must affiirmatively appear from the record. We feel confident that no error was committed by the lower Court; that we have answered fully and completely the query of this Court as to the duty of inspection and that this plaintiff is entitled to have his judgment in all respects affirmed.

Respectfully submitted,

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Counsel for Plaintiff in Error.