

1975

Lulu Black v. V. Pershing Nelson : Brief of Respondent

Utah Supreme Court

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Recommended Citation

Brief of Respondent, *Black v. Nelson*, No. 13470.00 (Utah Supreme Court, 1975).
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1975
IN THE SUPREME COURT
OF THE STATE OF UTAH

LULU BLACK,

Plaintiff-Appellant,

vs.

V. PERSHING NELSON,
RALPH L. SMITH and
GLADYS SMITH, d/b/a
GLADYS' BEAUTY SALON,

Defendants-Respondents.

BRIGHAM YOUNG
UNIVERSITY
J. Reuben Clark Law School

Case No.
13470

BRIEF OF RESPONDENT NELSON

Appeal from the Judgment of the Fourth Judicial
District Court in and for Utah County, State of Utah,
Honorable George E. Ballif, Judge

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FILED

MAY 8 - 1974

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Defendants-Respondents.

Case No.
13470

BRIEF OF RESPONDENT NELSON

NATURE OF CASE

This is an action to recover for personal injuries sustained when plaintiff fell down a flight of stairs on premises owned by the defendant Nelson and leased in part to the defendants Smith.

DISPOSITION IN LOWER COURT

At the conclusion of all of the evidence, the trial court granted the respective motions of both defendants for directed verdicts in their behalf.

RELIEF SOUGHT ON APPEAL

Defendant Nelson seeks affirmance of the judgment of dismissal entered by the trial court in his favor.

STATEMENT OF FACTS

Defendant Nelson, a practicing attorney in Provo, Utah, was the owner of a building located at the corner of University Avenue and 200 North in Provo, Utah. On the date of the accident in question, June 25, 1971, the defendants Smith d/b/a Gladys' Beauty Salon, occupied the southwest corner of the ground floor of the building in question and also used for storage a portion of the basement area. Another tenant also had a right to use the basement storage area.

At the Southeast corner of the building there is a garage for employee parking (Ex. 1). In the southwest portion of the garage there is a large metal-covered service door which allows entrance into the rear of the building (Ex. 2). This door opens inward to a landing area which is approximately 10 feet by 5 feet in diameter (Ex. 4). There is a stairway on the west side of the landing to the basement area, and a rear door to Gladys' Beauty Salon operated by the defendants Smith is situated at the southwest corner of the landing area and opens inward into the salon (Ex. 3). Illumination of the landing area is provided by a light bulb hanging directly over the landing area. The light is activated by a switch on the east side of the door which leads into Gladys' Beauty Salon. The door leading into Gladys' has a sign on it which reads "EMPLOYEES ONLY" (T. 91, Exs. 3 & 25).

During the time the Smiths occupied the premises, Mr. Smith maintained the rear entrance area (T. 93). Defendant Nelson had specifically instructed the Smiths that the latters' patrons were not to use the rear door

(T. 94). Mr. Nelson checked the premises regularly twice a day when he was in town, and if he ever saw the outside rear door open, he would close and lock it (T. 99). Mr. Nelson never had seen anyone use the outside rear door other than employees of the two tenants, Gladys' and Spice Rack, and service personnel (T. 100-101).

The Smiths gave general instructions to their employees that shop patrons were not to use the rear door, and if they saw a patron use the rear door, they specifically instructed them not to do so. The rear door was regularly used only by employees of the shop, suppliers, deliverymen and paid models (T. 358). Mr. Smith understood that it was Mr. Nelson's instructions that the outside rear door was to be kept closed and locked at all times (T. 367).

While there may have been isolated occasions on which Mr. or Mrs. Smith saw a patron use the rear door, there is no evidence in the record that Mr. Nelson ever saw or was aware of the fact that patrons may have occasionally used the rear door.

The outside rear door, which weighs 140 lbs. (T. 375), was hung in such a fashion that when opened, even slightly, and released, it would continue to swing to a full open position (T. 376-377 & Ex. 29). Because of its weight and the off-plumb manner in which it is hung, it has swung open enough times with enough force to mark the south, inside wall of the landing area (T. 376).

On the date of the accident, the plaintiff had an appointment at 2:00 p.m. at Gladys' Beauty Salon to have her hair set. She parked near the front entrance and en-

tered through the front door (T. 245-6). She left the salon for a short period of time to pick up her husband with her car, apparently exiting through the front door (T. 246).

When Mrs. Black returned to the salon, she could not find a parking space on University Avenue and so she drove around the block and parked on First East Street (T. 247). Since she did not want anyone to see her with her hair in rollers, she decided to attempt to enter the salon through the rear door. She had not entered the salon before by that route (T. 247), although she had exited through the rear door on one prior occasion during the previous winter (T. 248).

When Mrs. Black opened the door, it was light in the landing area (T. 301). After she entered and "subconsciously batted" the door shut, it was dark (T. 249). She thought she was as close to the beauty shop door as the outer door, and so attempted to walk toward the beauty shop door. She apparently did not see or notice the stairs when she opened the outer door and walked into the landing area. She saw the rear door of the beauty salon (T. 250), but did not see the "EMPLOYEES ONLY" sign on the door (T. 316), nor the stairs which were within a foot or two of the door (T. 316, Ex. 3).

ARGUMENT

POINT I

PLAINTIFF'S CONDUCT CONSTITUTED NEGLIGENCE AS A MATTER OF LAW

There is no question from the record but that plaintiff knew that patrons of Gladys' Beauty Salon were expected to enter the salon by way of the front door, which was an acknowledged safe entrance (T. 311). Also, there is no question from the record that plaintiff was more concerned with the problem of getting back into the beauty shop and not being seen with curlers in her hair (T. 247) than she was in making reasonable observations for her own safety as she attempted to enter into the beauty salon through its rear entrance. She was apparently in such a hurry that she did not remember the manner in which she closed the outside door after entering into the landing area (T. 305-307), whether or not the light in the landing area was "on" or "off" before closing the door (T. 251), nor did she see that there was an "EMPLOYEES ONLY" sign on the door she intended entering (T. 316), and she did not see the stairs adjacent to the door she intended to enter (Ex. 3).

Plaintiff seems to contend that she was confronted with a sudden emergency situation when she found herself in the unlighted landing area, after having closed the door, which could not have closed by itself (T. 376-377 & Ex. 29). But one cannot avoid the legal requirement of exercising due care for one's own safety by invoking the "sudden emergency" doctrine, if one participates in or con-

tributes to the situation that caused the sudden emergency. As stated in *Zook vs. Bair*, 514 P.2d 923, (Wash. 1973):

"... sudden emergency is appropriate when the emergency is not brought about, in whole or in part, by the negligence of the party seeking to invoke the doctrine. *Tobias v. Rainwater*, 71 Wash. 2d 845, 431 P.2d 156 (1967); *Lee vs. Cotten Bros. Co.*, 1 Wash. App. 202, 460 P.2d 694 (1969); W. Prosser, *Torts*, Section 33 (3d ed. 1964)."

Factually, plaintiff is on the horns of a dilemma. If, as she claims, the landing area was illuminated to the degree that she was unaware that the inside light was not "on" when she opened the exterior door (T. 301), then the area was illuminated sufficiently for her to see the stairs which constituted the entire west side of the landing area and was within a few inches of the door she intended to enter (Ex. 3), and she was negligently inattentive in not seeing what was there to be seen.

On the other hand, if when plaintiff opened the exterior door she could not readily see the stairs adjacent to the rear door of the beauty salon, then she should not have entered the area or closed the outside door before determining if there was a light to turn on and where the switch was located.

Regarding the obligation of seeing what is there to be seen, this court has long required such as an obligation of exercising due care for one's own safety. In *Nuttall vs. Denver & Rio Grande Railway Company*, 98 Utah 383, 99 P.2d 15 (1940), which involved the driver of an automobile which failed to see a train, the court said:

"In this case after giving appellants the benefit of the most favorable construction of the testimony of their own witnesses the conclusion must be reached that the deceased could have seen the train in ample time to have stopped had he looked and if he did look upon seeing the near approaching light it became his duty to bring his automobile to a stop. *His failure to look or to act upon what he saw if he did look bars a recovery here as a matter of law. . .*" (Emphasis added.)

This obligation was reaffirmed in *Benson vs. Denver and Rio Grande Railway Company*, 4 Utah 2d 38, 286 P.2d 790 (1955), wherein the court stated:

"... Since plaintiff testified that if he had seen the train when within 20 feet of it he could have stopped it *compels the conclusion that he either did not look or if he looked he did not heed what he saw* as was said by this court in the Nuttall case, supra:

'... he could not, from the undisputed facts appearing in the record, have used that degree of ordinary care required of him for his own safety.'" (Emphasis added.)

and in *Abdulkadir vs. Western Pacific Railroad Company*, 7 Utah 2d 53, 318 P.2d 339 (1957), the court observed:

"... Where the physical facts and circumstances are such that *he could, by looking or listening, have seen or heard the approach of the train, he cannot be heard to say, that he looked and listened, yet did not see or hear it. Under such circumstances it is but natural to presume that the traveler either did not look and listen, or that he failed to heed what he perceived, and such conduct will generally impute contributory negligence as a matter of law.*" (Emphasis added.)

Also, in *Richards vs. Anderson*, 9 Utah 2d 17, 337 P.2d 59 (1959), summary judgment for the defendant was affirmed by this Court which noted that:

"It is a well settled rule that one may not be heard to say that he did not see what was plain to be seen. He either failed to look, or saw and failed to heed, either of which makes him negligent."

In case somewhat similar to the facts of the instant case, *Whitman vs. W. T. Grant Company*, 16 Utah 2d 81, 395 P.2d 918 (1964), the Court affirmed a summary judgment against Whitman who had delivered merchandise to a department store and in returning to his truck, went through the first door he saw, opened it, turned to close the door behind him and stepped off into an elevator shaft. In its opinion the Court said:

"He appears to have violated a sound and often echoed dictum which arises out of experience and common sense to 'watch where you are going,' when no excuse was shown for his failure to do so."

With respect to the situation of walking into an area which, because of darkness, one cannot see substantial objects, if that be the fact situation, it is well established in this jurisdiction that such conduct constitutes negligence as a matter of law. In *Tempest vs. Richardson*, 5 Utah 2d 174, 299 P.2d 124 (1956), plaintiff, as a social guest attempting to find the bathroom in defendant's home, mistakenly opened a door leading into the basement and fell down an unlighted stairway. The trial court granted defendant's motion for summary judgment and the plaintiff appealed. The Supreme Court affirmed in the following language:

"Had appellant exercised ordinary and reasonable care for her own safety, she would not have opened a door and stepped into a dark and unlighted area with which she was unacquainted without first ascertaining what was beyond the door even though she had not been told that the room to which was going was lighted."

Also, in *Wood vs. Wood*, 8 Utah 2d 278, 333 P.2d 630 (1959), the plaintiff sued to recover for injuries she sustained in falling into an unrailed and unlighted stairwell in the garage portion of defendant's home. Plaintiff had seen the stairway approximately ten months prior to the accident, but temporarily forgot about it at the time of the accident. The trial court entered judgment for defendant and plaintiff appealed. The Supreme Court affirmed on the basis that the facts showed the plaintiff was guilty of contributory negligence as a matter of law. In this regard the Court stated:

"We have discussed the contentions as to defendant's primary negligence merely to indicate our doubts as to its existence. But it is unnecessary to resolve the issue as to whether a jury question existed in that regard because of the view we take of contributory negligence. It supports the trial court's direction of a verdict against the plaintiff, as will presently appear.

Plaintiff says that although she had prior knowledge of the stairwell she could not be charged with negligence as a matter of law for walking into the open stairwell because in the darkness it was a hidden danger in the area where she might reasonably be expected to enter the house because of the implied invitation; and justifies her failure to be aware of it by the fact that her mind was preoccupied by the wedding plans

and that it had been ten months since she had seen it. In that regard she is confronted with a dilemma: she either had in mind the existence of the stairwell or she did not. If she did, she was obliged to guard against the known hazard; if she did not she is met with the principal recently affirmed by this court in the case of *Tempest vs. Richardson* that a guest could not enter heedlessly into the darkness into an unknown area and then complain of damages there encountered."

And in *Henry vs. Washiki Club, Inc.*, 11 Utah 2d 138, 355 P.2d 973 (1960), the plaintiff sued to recover for injuries sustained when he fell down a darkened stairwell while looking for a rest room in the back of defendant's tavern. The trial court granted summary judgment in favor of the defendant which was affirmed by the Supreme Court. The Supreme Court cited the negligent conduct of the plaintiff in the following particulars:

"Instead of inquiring, or observing at the north end of the tavern where the rest rooms were, he went to the south end of the tavern proper, through some swinging doors into a room which he said was so dark he could hardly see at all, and groped his way along for about 25 feet, through another, and fell down a stairway."

It is difficult to determine from plaintiff's testimony whether she contends that the landing area was completely dark, or whether she could see light under the rear door of Gladys' as she attempted to walk toward it. As quoted by plaintiff at page 10 of her brief, it appears from her direct testimony (T. 249, Lines 13-23) that she could see some light from under Gladys' rear door and attempted to walk toward it:

"QUESTION: What did you do when you found yourself in the dark?

ANSWER: Well, by this time I was quite positive that I was just as close to one door as I was to the other, because when I opened the door I could see the passageway to the Beauty Shop door, and I thought I was going in that direction in the dark.

And rather than turn around I just didn't think to turn around and go back to the door that had closed on me. *I didn't know where it was as much as I knew where the lighted door was. And I was going in that direction.*"

However, on cross-examination, plaintiff stated that she could see no light under Gladys' rear door and that it was pitch black when the outer door closed (T. 308, lines 10-23):

"QUESTION: Now, the doorway where Gladys' Beauty Salon, if there is a light on in the area that is past the door, have you had enough experience in this area to know whether or not you could see light underneath the door?

ANSWER: No.

QUESTION: Did you see any light whatsoever underneath the door on the occasion that you fell?

ANSWER: No. It was pitch-black.

QUESTION: And so there was no light whatsoever in the area?

ANSWER: That's right.

QUESTION: It was absolutely pitch-black when you were walking?

ANSWER: Yes."

Under the rule laid down in *Alvarado vs. Tucker*, 2 Utah 2d 16, 268 P.2d 986 (1954), that a witness' testimony is no stronger than as left on cross-examination, the latter version of the plaintiff's conduct must be accepted for the purposes of this appeal.

POINT II

THE DEFENDANT NELSON DID NOT VIOLATE ANY DUTY OWED TO PLAINTIFF.

There is nothing in the record to even suggest that plaintiff, although a business invitee of Gladys' Beauty Salon, had any express invitation of either the defendants Smith or the defendant Nelson to use the rear entrance of the building in patronizing the salon. The large exterior metal door with no indication or advertisement of the business within (Exs. 2 & 15) and the rear interior door bearing the sign "EMPLOYEES ONLY" (Exs. 3 & 25) would, in the absence of any oral invitation, preclude the possibility of a finding by a jury that there was any express invitation to plaintiff to use the rear entrance. And, in fact, plaintiff admits that she never received any express permission to use the rear entrance (T. 311, lines 20-26):

"QUESTION: But you hadn't asked anyone's permission whatsoever, to do that? That is correct, is it not?

ANSWER: That's correct. I never seen anybody ask for permission to go out there.

QUESTION: But you certainly hadn't done, isn't that correct?

ANSWER: That's correct."

The fact that plaintiff was an invitee of the beauty salon did not give her license to use the premises indiscriminately. As stated in *Bird vs. Cloverleaf Dairy*, 102 Utah 330, 125 P.2d 797 (1942):

"We believe plaintiff's case is founded upon a fallacy. *An invitee must use the owner's premises in the usual, ordinary, and customary way.*" (Emphasis added.)

Although plaintiff was admittedly "invited" to use the front entrance to Gladys' Beauty Salon, she was no more than a licensee or trespasser as to the rear portion and entrance of the building. In *Hayward vs. Downing, et al*, 112 Utah 508, 189 P.2d 442 (1948), this Court observed:

"A person may be an invitee as to a part of the premises, and a mere licensee or a trespasser as to other parts of the premises. A common example of this is a store. As a general rule the public is invited to enter the store for the purpose of transacting business. *However, this invitation ordinarily extends only to that part of the store where goods are displayed for sale and business is ordinarily transacted.* Generally, the public is not invited to enter the stockrooms, furnace rooms, and other parts of the store, and if persons go to these parts of the premises they lose their status as invitees and become mere licensees or trespassers. 38 *Am. Jur.* 761, Negligence, Sec. 100. See also *Lawand v. California Products Co.*, 9 Cal. App. 2d 147, 48 P.2d 979." (Emphasis added.)

If plaintiff had no invitation to use the rear portion of the building, defendants had no duty to anticipate her presence there, or to make the premises reasonably safe for her. As stated in *Bird vs. Cloverleaf Dairy, supra*, a

licensee takes the premises as he finds them and the possessor of land is required only to refrain from acts of negligence which may cause injury to him, and none were alleged or proven in the instant case.

Plaintiff contends that on a few prior occasions she had seen patrons and employees of the beauty salon use the rear entrance, and therefore, assumed she had *implied* permission to likewise use the rear entrance. Whether or not such observations created an implied invitation of the Smith defendants to plaintiff to use the rear entrance is immaterial as to the defendant Nelson, since there is no evidence in the record that he had ever seen or had reason to believe that patrons of either Gladys' or his other tenant, the Spice Rack, had or would use the rear entrance. Indeed, the defendant Smith acknowledged that Mr. Nelson had advised him that the outside rear door was to remain closed and locked at all times (T. 376).

Therefore, even if the Court should determine that the question of plaintiff's contributory negligence should have been submitted to the jury, the judgment of dismissal in favor of the defendant Nelson should be affirmed since there is no evidence in the record that the defendant Nelson knew of any circumstances out of which one could conclude that he had granted an express or implied invitation for patrons of his tenants to use the rear entrance to the building; and, in the absence of having granted an express or implied invitation, he had no affirmative duty to make the premises safe for patrons, even assuming, *arguendo*, that they were not.

Although the trial court based its ruling which granted defendants' motions for a directed verdict on the ground that plaintiff was contributorily negligent as a matter of law, and even if the trial court erred in so doing, if the judgment was proper on other grounds, as we believe it was with respect to the defendant Nelson, it should be affirmed in the interest of judicial economy as was noted by the Court in *Rasmussen vs. Davis*, 1 Utah 2d 96, 262 P.2d 488 (1953):

" . . . We feel constrained therefore, to affirm, in the light of our accepted policy of so doing if the conclusion reached, though based on incorrect reasons, is in fact correct for some other reason."

CONCLUSION

The trial court correctly granted defendants' respective motions for a directed verdict at the conclusion of all the evidence since the evidence, taken in the light most favorable to plaintiff, which was her own testimony, was that when she opened the rear exterior door, the area inside was so well illuminated that she was unaware that the artificial light was not on, yet she failed to see the "EMPLOYEES ONLY" sign on the interior door, or the stairway which was adjacent thereto and less than ten feet away. After she closed the exterior door it was "pitch-black," yet she attempted to walk toward a door she could not see.

Further, even if the trial court erred in directing plaintiff's contributory negligence as a matter of law, the judgment of dismissal entered was still proper with respect to the defendant Nelson since plaintiff introduced no evidence during trial from which a jury could have

found that the defendant Nelson either expressly or impliedly invited the plaintiff to use the rear portion of the building in question; and, in the absence of such an invitation, he owed no affirmative duty to the plaintiff to make the premises safe for her, and he was not guilty of any negligent act toward her while she was on the premises.

WHEREFORE, defendant Nelson respectfully prays that the trial court's judgment of dismissal as to him be affirmed and that he be awarded his costs herein.

Respectfully submitted this8..... day of May, 1974.

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MAILING CERTIFICATE

I hereby certify that two (2) copies of this brief were mailed, postage prepaid, to Jackson Howard, Attorney for Plaintiff-Appellant, 120 East 300 North, Provo, Utah and to Ray H. Ivie, Attorney for Defendants-Respondents Smith, 48 North University, Provo, Utah this 8 day of May, 1974.

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BRUCE CLARK, JR. and
KATHA A. V. CLARK, JR.

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