1975

Maurine Taylor v. Keith O'Brien : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

MAURINE TAYLOR,

Plaintiff-Appellant,

vs.

KEITH O'BRIEN, INC.,

Defendant-Respondent.

Case No. 13969

BRIEF OF DEFENDANT-RESPONDENT KEITH O'BRIEN, INC.,

Appeal from the Judgment of the Third Judicial District for Salt Lake County, State of Utah
Honorable Marcellus K. Snow, Judge

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NATURE OF THE CASE

The respondent agrees with the explanation of the nature of the case as provided by the appellant.

DISPOSITION OF THE LOWER COURT

The appellant's statement is essentially correct as to the disposition of the lower court.

NATURE OF RELIEF SOUGHT ON APPEAL

The respondent seeks to have the Judgment Notwithstanding the Verdict granted by the lower Court sustained in its entirety.

STATEMENT OF FACTS

The first three paragraphs of the appellant's Statement of Facts are essentially correct and undisputed. However, it should be noted that the entry way to the respondent's store is level and covered by the building overhang. (R. 183, 289). Additionally, the substance which was found in the entry way was a black, gritty substance. (R. 193). Thereafter, however, additional facts should be included.

Mr. Beltz ,the manager of the respondent's store in question, testified that the maintenance employees were required to maintain and clean the area in question every morning prior to the store opening between 8:30 and 9:30 a.m. (R. 208). There was no evidence produced by either party that the area was in fact swept the morning of the accident or that it was not in fact swept the morning of the accident. Mr. Beltz testified that this was the normal program which was followed. (R. 208).

Upon being advised of the appellant's complaint, Mr. Beltz inspected the entry area of which the appellant complained. At that time, the entrance was found

to be dry, with no signs of any moisture or anything slippery. The area was immediately swept and Mr. Beltz collected and observed approximately one-half (½) cup full of a gritty-type substance. (R. 209).

There was no evidence introduced into the trial as to whether or not there had been a recent snowstorm in the vicinity of the respondent's store.

Mrs. Hill, an employee of the respondent's store in question, indicated that the substance resembled that which is spread by the street department during snowstorms. (R. 193).

There was no evidence introduced at trial as to when the substance was placed in the entry way of the respondent's store, who placed the substance in the entry way of the respondent's store nor how long the substance had been in that area of the respondent's store prior to the alleged incident.

ARGUMENT

POINT I

UNDER THE LAW OF THE STATE OF UTAH, THE LOWER COURT WAS CORRECT IN DETERMINING THE APPELLANT FAILED TO MEET HER BURDEN OF PROOF IN PRODUCING SUFFICIENT EVI-

DENCE TO ESTABLISH LIABILITY ON THE PART OF THE RESPONDENT.

The appellant failed to meet her burden of proof in providing or producing sufficient evidence to the Court below to establish liability on the part of the respondent herein. Under the law of the State of Utah, it is clear that in order to impose liability upon the store owner and in favor of a business invitee, it must first be shown that a dangerous condition in fact existed upon the premises. The mere fact that the appellant fell on the premises of the respondent does not establish in any sense a prima facie case that a dangerous condition existed. The existence of a "dangerous condition" is a requisite element here which appellant has failed to establish. The record is totally insufficient to establish this most necessary element.

Even if a dangerous condition could be shown, it must be also shown that the condition was caused by an act attributable to the owner of the premises or that the owner had actual or constructive knowledge of the existence of the condition and had a reasonable opportunity to remedy same, or that the condition had existed for such a time that the owner reasonably could have discovered and removed it. *Koer v. Mayfair Markets,* 19 Utah 2d 339, 431 P.2d 566; *Lindsay v. Eccles Hotel Co.,* 3 Utah 2d, 364, 284 P.2d 477 (1955); *Hampton v. Rowley Builders Supply,* 10 Utah 2d 169, 350 P.2d 151 (1960); *Sears Roebuck & Company, v. Barkdoll,*

8 Cir., 353 F.2d 101 (1965); *Howard v. Auerbach Company*, 20 Utah 2d 355, 437 P.2d 895 (1968); *Long v. Smith Food Kings Store*, No. 13252 Utah Sup. Ct. (October 4, 1973), 531 P.2d 360.

The plaintiff in *Koer*, Supra, had entered the market at approximately 11:30 a.m. and while shopping in the store slipped on a grape which was on the defendant's floor. The evidence demonstrated that the floor had been swept that morning at approximately 8:00 a.m., approximately three and one-half hours prior to the plaintiff's fall. It was further shown that the defendant's store manager had been called from his office to the cashier's checkstand which required him to pass by the place where the fall ocurred just a few minutes before the incident. It was not shown that he in fact saw the grape there or whether in fact the grape was there at the time he passed by the area. The Court stated that:

> It cannot be disputed that a store owner is obligated to exercise ordinary care to keep the premises reasonably safe for the protection of those patronizing his store. The mere proof of injury within a store, however, does not raise, without more evidence, an inference that the defendant had control or any *notice* of the object causing the injury within the store nor does it presume that he was negligent. It is common knowledge that a store owner is not an insurer of the safety of his customers. (emphasis added) (See also *De Weese v. J. C. Penney Co.*, 5 Utah 2d 116, 297 P.2d 898 (1956)

The Court held that in cases of this nature, in order to find the defendant negligent, it must be shown that the defendant knew, or in the exercise of reasonable care should have known, of any hazardous condition and had a reasonable opportunity to remedy that condition. Judgment Notwithstanding the Verdict was affirmed in favor of the defendant by this Court.

In *Howard v. Auerbach Company*, Supra, this Court affirmed the lower Court's Order of Summary Judgment of No Cause of Action, holding that the store patron could not recover where there was no indication as to who had put some oil on an escalator step within the store upon which the patron allegedly slipped and fell. There was no indication that the oil had been on the steps for such a time that the store people reasonably could have discovered and removed it.

In *Long v. Smith Food Kings Store*, Supra, the plaintiff sued for injuries suffered when he slipped and fell on a piece of pumpkin pie on the floor of the defendant's store. In that case, the Court affirmed the granting of defendant's Motion for Summary Judgment on the ground that upon the undisputed facts the plaintiff could show no basis for recovery. The plaintiff and his wife were shopping in the store when he slipped ad fell on a piece of pumpkin pie in an aisle seven to ten feet away from the aisle where the sample pies were. There was no evidence that any store employee, or in fact that anyone else, saw anything of that nature on

the floor prior to the accident nor was there any evidence to show that anyone else knew of the existence of the condition, how it got there, or how long it had been there. The Court held in *Long*, Supra, that the supermarket was not liable for the injuries suffered by the plaintiff in absence of evidence that any store employee saw anything of that nature on the floor prior to the accident or any evidence as to how the pie got on the floor or how long it lay there prior to the accident.

The Court is confronted in the case at bar with exactly the same situation as is described in the above cited cases. There was no evidence produced at the trial of this matter that the respondent placed the substance in the entry way nor evidence that the respondent knew of its presence. The evidence is to the contrary. Further, there is no evidence as to who in fact was responsible for placing the substance in the entry way nor any evidence as to how long the substance had been there.

There is, however, evidence that in the normal business practice of the respondent, this area was swept and maintained on a daily basis just prior to the opening of the store. This cleaning would have occurred approximately two to three hours prior to the plaintiff's alleged accident. This span of time is almost identical to the situation in *Koer v. Mayfair Markets*, Supra, where this Court held that:

> We just cannot ignore the fact that the grape was only seen after the fall occurred. From these circumstances alone a jury would not be justified in inferring that the grape had been there for such a period of time that, had the defendant exercised reasonable care, it should have known of its presence.

The appellant states in her brief at page 5, that, "the cause of the fall in the case now before the Court was a black substance that seemed to spread on the vestibule. The fair inference is that the substance came in the vestibule when road crews attended to the snow and ice outside the entrance way and it was a condition which was recognized by the defendant and ordinarily guarded against." The record before this Court is totally devoid of evidence sufficient to base this assertion. There was no evidence whatsoever to demonstrate that there was a snowstorm in progress at the time of the incident nor that there was a snowstorm that had occurred immediately prior to the incident. To the contrary, as set forth in the Statement of Facts, the evidence submitted by Mr. Beltz was that the entrance way was totally devoid of any moisture and that it was in fact dry. There absolutely is no evidence in the record which could be construed to indicate that the substance which was found in the vestibule area was "spread" upon the vestibule by employees of the respondent. And there certainly is no evidence in the record before the Court as to how the substance arrived in the area, when it was deposited there, who put it there or that the respondent had any knowledge of its presence. Finally,

and most importantly, there is no evidence which establishes the existence of a "dangerous condition." The law of Utah is clear that the respondent is not an "insurer" of the safety of its business invitees. The mere fact that the appellant fell does not establish that a "dangerous condition" existed. Nor does it establish that the appellant was negligent. *Koer v. Mayfair Markets*, supra.

The appellant goes on to cite the case of *De Weese v. J. C. Penney Co.*, 5 Utah 2d 116, 297 P.2d 898 and asserts that this case is factually more in point with the case now before the Court than those above cited. Quite the contrary is the case. The De Weese case dealt with the question of whether a terrazzo entry way, when it became wet, was a dangerous condition in and of itself. The record was clear in *De Weese*, that the defendant knew of the slippery nature of terrazzo tile when wet and that it kept rubber mats or some abrasive ready for use during inclement weather. Thus, in *De Weese*, the defendant had notice of the condition of which the plaintiff complained *prior* to the accident. *De Weese* is therefore not factually in point with the case now before the Court.

The appellant concludes in her brief that Mrs. Hill the respondent's employee, agreed with the appellant that the entrance way should be swept. From this premise, the appellant leaps to the ultimate conclusion that the existence of the substance in that area was not unusual. This logic is nothing more than speculation which is not supported by any evidence.

CONCLUSION

The lower Court was correct in granting the Judgment Notwithstanding the Verdict. The evidence presented by the appellant was clearly insufficient to establish liability upon the respondent. Under the cases cited herein, it would be incorrect to allow the jury to speculate as to whether a dangerous condition existed, how the substance arrived in the entrance area of the respondent's store, when it was put there and by whom, or that it had been there for such a time that the respondent knew or should have known of its presence and had adequate time within which to sweep the area clean. The appellant has failed to establish liability by a preponderance of the evidence. Therefore, the Judgment Notwithstanding the Verdict should be affirmed.

DATED this 25th day of April, 1975.

Respectfully submitted,

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Attorneys for Defendant-Respondent