1975

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

Utah Supreme Court

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IN THE SUPREME COURT

BRIEF

13969A

OF THE STATE OF UTAH

MAURINE TAYLOR,
Plaintiff-Appellant,

vs.

KEITH O'BRIEN, INC.,
a corporation,
Defendant-Respondent.

Case No.
13969

BRIEF OF PLAINTIFF-APPELLANT MAURINE TAYLOR

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 Plaintiff, Maurine Taylor, commenced this action to recover damages suffered by her when she, as an invitee of the defendant, through the alleged negligence of the defendant fell on the premises of the defendant.

DISPOSITION IN THE LOWER COURT

The case was tried to a jury and a verdict for the plaintiff was returned by the jury. Upon motion by the defendant, the Court set aside the verdict and entered judgment for the defendant notwithstanding the verdict.

NATURE OF RELIEF SOUGHT ON APPEAL

The plaintiff seeks to have the granting of the motion to set aside the verdict reversed and have the judgment on the verdict reinstated.

STATEMENT OF MATERIAL FACTS

The defendant, Keith O'Brien, Inc., operates a general department store on the southeast corner of 21st South and Highland Drive in Salt Lake City. The store caters to the general public. The store has entrance ways from the parking lot immediately east of the store and one on Highland Drive. The Highland Drive entry is recessed through an open corridor of about eight feet until the doors are reached.

At about 11:00 o'clock a.m. on February 4, 1972, the plaintiff entered the store by the entrance from the parking lot. She entered the store to purchase some stockings. She made her purchase of two pairs of stockings and proceeded to leave the store by way of the Highland Drive exit. She opened the exit door, took one step into the vestibule, slipped and fell, the impact being on her knees primarily. Trans. 5, R167.

After the fall, Mrs. Taylor sat on a bench just outside the alcove until she regained her composure. She then went into the store to report the fall. A Mrs. Hill was at a cash register near the exit. Mrs. Taylor told Mrs. Hill of the accident and requested that she, Mrs. Hill, accompany her to examine the vestibule,

which they did. Mrs. Hill agreed with Mrs. Taylor that the vestibule should be swept. Mrs. Hill thereafter called "someone" to come and clean the entrance up which was done. Trans. 27, R189. It was found that a black substance was present on the floor.

The above facts are undisputed.

There seems to be some conflict as to the conversation between Mrs. Hill and Mrs. Taylor, relative to the presence of a broom in the area for the express purpose of keeping the vestibule clean. Trans. 9, R171. Mrs. Hill did not remember the conversation relative to the broom. Evidently the jury believed the version as recited by the plaintiff.

Mr. Beltz, the manager of the store, testified that the instructions were that the area be swept every morning before the store opened. Trans. 46, R207. There is no evidence that the area was swept the morning of the accident. There is no evidence that the grayish-black substance found on the floor was ever analyzed. There is testimony by Mrs. Hill that we feel can be construed as showing that the defendant's employees were aware that the black substance was present after a snow storm and that it was put down by the street department. Trans. 31, 32, R193-194.

ARGUMENT

The sole question presented in this appeal is was the defendant negligent in maintaining its premises and

was there sufficient evidence for the jury to find negligence.

It is apparent from the verdict of the jury that they must have believed the plaintiff's testimony. It is axiomatic that the jury is the sole judge of the facts and the credibility of the witnesses and they were so instructed as to all of the elements of conduct they must find before they could return a verdict for the plaintiff.

The authorities relied upon by the defendant in support of its motions for a directed verdict and for dismissal notwithstanding the verdict are all distinguishable because of one factual element which occurs in each case and that is that the cause of the fall was an article that had been placed upon the floor.

Maxine D. Lindsay v. Eccles Hotel Company, 3 U. 2d 364, 284 P. 2d 477. In this case, the cause of the fall was a small puddle of water on the floor. The water was of unknown origin.

Hampton v. Rowley, 10 U. 2d 169, 350 P.2d 151. The cause of this fall was a small rock on the step of defendant's premises. The placement of the rock was unknown.

Koer v. Mayfair Markets, 19 U. 2d 339, 431 P. 2d 566. A grape in an aisle of the store caused this fall. There was no evidence as to how the grape got there or how long it had been there.

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 the 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 case of *De Weese v. J. C. Penney Company*, 5 U. 2d 116, 297 P. 2d 898, factually is more in point with the case now before the Court.

In the *De Weese* case, there was evidence that a terrazzo entryway became slippery when wet and that defendant had mats which ordinarily were put in place at such times. The law cited in this case we deem to be the law of this case. At page 121 of the Utah citation the Court said:

> "The argument is made that the effect of affirmance of this judgment will be to make stores such as defendant insurers of the safety of their patrons, which argument we reject. The only basis upon which liability can be predicated is negligence. The standard upon which negligence is gauged is that of ordinary, reasonable care under the circumstances, which standard it is peculiarly fitting that juries determine. It is to be borne in mind that we are not holding that the defendant's conduct amounted to negligence as a matter of law. We are only required to determine whether there was any legitimate basis in the evidence upon which reasonable minds could believe that the defendant failed to

meet its standard of reasonable care under the circumstances for the safety of its customers."

We wish to point out that the jury had before it testimony that Mrs. Hill, an employee of the defendant, agreed with the plaintiff that the area needed sweeping and had the corridor swept. The manager of the store was present when it was swept. The implication from all the testimony is that the presence of the "black subtance" was not unusual. There is also testimony that defendant had a broom in the immediate vicinity to be used to keep the area clean.

The defendant did not call any witnesses to testify that it was unusual for the "black substance" to be found in the area. The testimony is that the entranceway was supposed to be swept every day. The person or persons who did the sweeping would know of an unusual condition and could testify as to the usual condition. The defendant also had the opportunity to have the substance found on the floor analyzed. It is probable that such analysis would have determined the origin of the substance. The defendant did not call a witness to testify that the entranceway had been swept the morning of the accident. These avenues of discovery are open to the proprietors but not to the customers.

CONCLUSION

This case was properly submitted to the jury. There was a reasonable basis in the evidence for the jury to determine the defendant was negligent. The granting

of the motion to dismiss notwithstading the verdict should be reversed and judgment entered on the verdict of the jury.

Respectfully submitted,

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