

2000

Maurine Elg v. Boyd Fitzgerald and Vally View Riding Stables : Reply Brief

Utah Supreme Court

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Nolan J. Olsen; Attorney for Respondents.

Stephen G. Morgan; Morgan, Scalley, Lunt, and Kimble; Attorney for Appellant.

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IN THE SUPREME COURT OF THE STATE OF UTAH

SEP 17 1976

BRIGHAM YOUNG UNIVERSITY
J. Reuben Clark Law School

MAURINE ELG,

Plaintiff and Appellant,

vs.

BOYD FITZGERALD and VALLEY
VIEW RIDING STABLES,

Defendants and Respondents.

Case No. 14169

APPELLANT'S REPLY BRIEF ON APPEAL

APPEAL FROM A JUDGMENT OF THE THIRD DISTRICT COURT
OF SALT LAKE COUNTY, HONORABLE G. HAL TAYLOR, JUDGE

STEPHEN G. MORGAN
MORGAN, SCALLEY, LUNT &
KIMBLE

345 South State Street, Suite 200
Salt Lake City, Utah 84111

*Attorney for Plaintiff and
Appellant*

NOLAN J. OLSEN

8138 South State Street
Midvale, Utah 84047

*Attorney for Defendants and
Respondents*

FILED

JAN 9 - 1976

Clerk, Supreme Court, Utah

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Case No.
14169

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Thus, the opinion of counsel for the defendant-respondent is contrary to the opinion of the United States Supreme Court.

Appellant, in her Brief, attempted to advise the Supreme Court of the statements of the trial judge in chambers prior to trial and Appellant submits that such evidence can be received as long as "it does not contradict the record, but explains it." In her Brief, Appellant argues that the trial judge told Appellant's counsel that he would not apply the doctrine of res ipsa loquitur to this case because he did not believe it was still the law in the State of Utah. To the contrary, Respondent argues that the trial judge inquired as to whether Appellant intended to rely on the doctrine of res ipsa loquitur and that counsel for Appellant advised the court that he did not. Now, which position "does not contradict the record, but explains it"?

The record reveals that counsel for Respondent argued in his Motion to Dismiss as follows:

"We admit it was an unfortunate accident, but res ipsa doesn't apply in this instance. The plaintiff has proved nothing except res ipsa." (Emphasis added) (Tr. 163: 16-18)

Now where did counsel for Respondent get the idea that "res ipsa didn't apply to this case?" The answer is obvious. He was merely paraphrasing the statement of the trial judge in chambers that he would not apply res ipsa to this case.

POINT II

THE COMPLAINT IS SUFFICIENT TO APPRISE RESPONDENT OF APPELLANT'S INTENTION TO RELY ON THE DOCTRINE OF RES IPSA LOQUITUR.

Next, Respondent argues that Appellant did not plead *res ipsa loquitur* in her Complaint and did not make specific her request that the doctrine be considered at the time of trial. Respondent cites Joseph v. W. H. Groves' Latter Day Saints Hospital, 10 Utah 2d 94, 348 P. 2d 935 as follows:

"We think one who wishes to rely on that doctrine, as well as specifically assigned acts of negligence, must so plead, either by separate count or proper allegation to the effect that the negligence to be inferred from the general situation caused the injury, thereby notifying the other party that he intends to rely on the doctrine of *res ipsa loquitur*." (Emphasis added)

The above citation does not appear in the Joseph case. That counsel for Respondent would attempt to argue a citation which does not appear in the case cited is either unethical or very sloppy work. Nevertheless, even the language cited by Respondent's counsel, wherever it came from, provides that a plaintiff may satisfy the pleading requirement by a proper allegation "to the effect that the negligence to be inferred from the general situation caused the injury" and such an allegation is adequate notification to the other party that the plaintiff intends to rely on the doctrine of *res ipsa loquitur*.

In plaintiff's Complaint the following allegation was made:

"On or about October 6, 1973 at approximately 8:00 o'clock p.m., defendant Boyd F. Fitzgerald and defendant Valley View Riding Stables by and through one

of their agents, employees or servants negligently allowed approximately 29 people to board a haywagon which was unsafe and in poor condition and thereafter negligently drove said haywagon in such a manner as to cause almost all of the people on said wagon to be thrown off of the wagon to the ground."

In light of the general policy to allow pleadings to allege facts and not specific, technical causes of action, the Complaint filed herein contains sufficient indications of reliance on the situation as well as specific acts of the defendants and the plaintiff is not precluded from relying on the doctrine of res ipsa loquitur in addition to specific acts of negligence alleged. The purpose of such general or situational allegations is to place the defendant on notice of the plaintiff's intention to so rely on res ipsa. In this case, not only do the pleadings allege that defendant was negligent in allowing 29 people to become involved in such a dangerous situation, but counsel for the plaintiff also made it perfectly clear in chambers and in every other way possible that it was his intention to rely upon the doctrine of res ipsa in addition to specific acts of negligence, such as the driving of defendant's agent, or the maintenance of the vehicle by the defendant or his agents, etc.

The notice aspect of pleadings has been enunciated in this court in Loos v. Mountain Fuel Supply Co., 99 Ut. 496, 108 P. 254, where pleadings were required to "put the defendant on notice that the plaintiff is going to rely on the situation itself to furnish any inference or negligence." Loos,

supra, at 259. Loos was later explained by this court in Capitol Electric Co. v. Campbell, 217 P. 2d 392, at 396-397, where the court said:

"In the case of Loos v. Mountain Fuel Supply Co., 99 Utah 496, 108 P. 254, we allowed a recasting of the pleadings to make more certain the issue of res ipsa loquitur. But in that case, we reversed the judgment because of error in instructing on the issues raised by allegations of specific negligence and refusal to instruct on the issue of res ipsa loquitur when there was no evidence to support such allegations of specific negligence, but there was evidence to support the issue of res ipsa loquitur. In short, when we reversed for error, we permitted a new trial and allowed amendments."

This shows the serious nature of refusal to recognize res ipsa by the trial court, and the Supreme Court's willingness to construe pleadings liberally.

Once the evidence supports submission under the general res ipsa doctrine, the court should consider it (assuming some notice has been timely given to the defendant). This position has been taken by this court in Joseph v. W. H. Groves Latter Day Saints Hospital, supra, where the issue was the trial court's refusal to include res ipsa. The court stated:

" . . . under proper circumstances neither the failure to expressly plead res ipsa loquitur, nor the fact that specific acts of negligence are proved, would preclude the submission of the case on that doctrine, [now] we proceed to consider the most fundamental proposition: Whether the evidence here would have justified submission of the case upon that theory."

The face of the pleading contains a general allegation of negligence attributable to the situation (hay ride) in paragraph 4, which states:

" . . . defendant . . . negligently
allowed approximately 29 people to
board a haywagon which was unsafe
. . . "

The specific acts alleged were also in this paragraph:

" . . . and thereafter negligently
drive said haywagon in such a manner
as to cause almost all of the people
on said wagon to be thrown off of the
wagon to the ground."

POINT III

ONCE APPELLANT HAS ESTABLISHED A CASE OF RES IPSA LOQUITUR, THE BURDEN IS CAST UPON THE RESPONDENT TO MAKE PROOF OF WHAT HAPPENED.

Counsel for Respondent also states that "nowhere can this writer (counsel for Respondent) find any law which states that the burden of proof shifts, as Appellant has alleged." In Lund v. Phillips Petroleum Company, 351 P. 2d 952, 10 Ut. 2d 276 (1960), the Utah Supreme Court answered this charge as follows:

"This argument practically ignores the purpose of the doctrine of res ipsa loquitur, namely, to permit one who suffers injury from something under the control of another, which ordinarily would not cause the injury except for the other's negligence, to present his grievance to a court or jury on the basis of the reasonable inferences to be drawn from such facts; and cast the burden upon the other to make proof of what happened." (Emphasis added)

POINT IV

RESPONDENT HAD CONTROL OF THE SITUATION AND WAS RESPONSIBLE FOR THE INSTRUMENTALITY (HAYWAGON) WHICH CAUSED THE APPELLANT'S INJURY.

Finally, Respondent argues that "the only logical explanation of any witness" as to what caused the accident was that of Eva Gains, whose explanation was "that the guitar player fell and caused the railing to break."

It is submitted again that if the haywagon was so unstable that if one man lost his balance and fell that it would cause everyone else to fall off of the haywagon that the Respondent was negligent in inviting people to use his haywagon for a hayride when it was not safe to be used for such a purpose. It is also submitted that if there was some danger in allowing the man to stand that the driver of the haywagon, who was sitting almost next to the man, had a duty to warn him of the instability of the haywagon and the reasonable consequences of what might foreseeably happen if he fell. No such warning was given. (Tr. 193: 14-29)

In regard to the necessary "control over the instrumentality which caused the injury," the Utah Supreme Court in Wightman v. Mountain Fuel Supply Co., 302 P. 2d 471, 5 Ut. 2d 373 (1956), has made the following observations:

" . . . it would seem more accurate to appraise the situation in terms of the defendants' responsibility for the

instrumentality, its condition or function, rather than merely its control"

In the subject case, the Defendant-Respondent had a "responsibility" to provide a haywagon for the hayride to paying customers that was in good "condition" and would "function" in such a way that in the normal course of events which were likely to be encountered on a typical hayride and would not result in dumping some 29 passengers into the roadway causing serious injury to the Plaintiff-Appellant. The Respondent had "control" over the haywagon, that the accident occurred without any participation of the Appellant or other riders and it was the kind of accident which, in the ordinary course of events, would not have happened had due care been observed by Respondent. Under such facts and proof, the Appellant should be entitled to a recovery for the serious injuries she suffered.

CONCLUSION

It is respectfully submitted that the decision of the district court should be reversed and the case remanded for a new trial.

Respectfully submitted,

MORGAN, SCALLEY, LUNT & KIMBLE

STEPHEN G. MORGAN
Attorney for Plaintiff-Appellant

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