2000

Maurine Elg v. Boyd Fitzgerald and Valley View Riding Stables : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

MAURINE ELG,

Plaintiff and Appellant,

vs.

BOYD FITZGERALD and VALLEY VIEW RIDING STABLES,

Defendants and Respondents.

Case No. 14169

BRIEF OF RESPONDENTS

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

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STATEMENT OF NATURE OF CASE

The statement of the nature of the case is adequate as stated in plaintiff-appellant's Brief.

DISPOSITION IN LOWER COURT

Defendants-respondents disagree with statements made by plaintiff-appellant in her Brief as to the disposition in the lower court in that the court did in fact allow final argument at the conclusion of the trial, although said final argument was not recorded by the court recorder, and plaintiff-appellant's statement that no final argument was allowed was in error.

RELIEF SOUGHT ON APPEAL

Defendants-respondents seek sustainment of the lower court's judgment of no cause of action.

STATEMENT OF FACTS

Defendants-respondents add the following facts:

Pursuant to the testimony of Ronald Burke, a group of people had purchased tickets for a hayride and commenced arriving for a cocktail party at about 6:30 or 6:45 p.m. (Tr. 87: 7-16). The plaintiff-appellant, MAURINE ELG, seated herself in the middle of the wagon, with her back against someone else's back. (Tr. 69: 8-15). That the horses were moving slowly at a walk. (Tr. 74: 7-9; Tr. 92: 1-14; Tr. 177: 9-17).

ARGUMENT

POINT I

THE TRIAL COURT PROPERLY GRANTED JUDGMENT OF NO CAUSE OF ACTION AS AGAINST PLAINTIFF-APPELLANT.

It is this writer's opinion that it is totally improper to set forth matters which are held in chambers without a court reporter, as set forth by appellant in her first paragraph of Point I. However, since appellant has seen fit to mention the pre-trial conference, it is this writer's recollection that the court made a request from appellant's attorney as to whether he intended to rely on the doctrine of res ipsa loquitur, and appellant's counsel advised the court that he did not intend to rely on said doctrine, but that he intended to show specific negligence, and then outlined to the court what that negligence was. Counsel for the appellant in his Complaint does not plead res ipsa loquitur and did not during any part of the trial ever request the court to consider res ipsa loquitur, and if counsel for appellant believed the doctrine no longer existed in the state of Utah, that was his error, and at no time did respondents' counsel and/or the court advise appellant's counsel that there was no such

doctrine in the state of Utah, and by any research of the subject, appellant's counsel would have been aware that said doctrine did exist.

It is necessary that the appellant either in writing or a request to the court at trial make specific her request that the doctrine of res ipsa loquitur be considered. The requirement that this be done was applied by the Utah Supreme Court in the following case: Joseph vs. W. H. Groves and Latter Day Saints Hospital, 10 Utah 2d 94 384 P. 2d 935:

> "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."

There is nothing in the record or the pleadings which would indicate to respondents' counsel and/or the court that the plaintiff-appellant intended to rely on anything but specific acts of negligence, and in fact that was all appellant did rely upon until the time of her Brief on Appeal.

In the case of Wightman vs. Mountain Fuel Supply Company, 5 Utah 2d 373, 302 P. 2d 471 472, the court set forth the necessary elements which must be present to invoke the doctrine of res ipsa loquitur:

> "(1) That the accident was of a kind which, in the ordinary course of events, would not have happened had due care been observed; (2) That it happened irrespective of any participation by the plaintiff; (3) That the cause thereof was something under the management or control of the defendant or for which it is responsible."

Based on the above definition, the evidence must show that the causation of the injury did not occur by the conduct of the plaintiff, third persons, or some other causation factors.

From the testimony of the witnesses of appellant, there was no showing of any negligence on the part of defendants-respondents. There

was only one witness, Eva Goins, who was watching the entire proceedings sitting on the seat by the driver. (Tr. 187: 26). Eva Goins was an employee of the Eagles (Tr. 186: 9-11), and testified that a guitar player who had been employed by the Eagles to play to the group was standing and said guitar player started to fall off the wagon at the point where the railing broke. (Tr. 189: 5-21).

In other words, even if the doctrine of res ipsa loquitur was considered, the no cause of action should be sustained on the basis that respondents' evidence no longer warranted the application of the doctrine due to the fact that a third party was the causation factor which caused injuries to appellant.

POINT II

THE COURT PROPERLY FOUND THAT APPELLANT FAILED TO ESTABLISH NEGLIGENCE AGAINST RESPONDENTS.

It would appear from appellant's Point II and her statements from witnesses, we arrive that an accident occurred, and from said testimony that is basically all that can be arrived at, each witness having an entirely different idea as to what happened.

As set forth in the testimony of Eva Goins, her explanation was that the guitar player fell and caused the railing to break, which basically was the only logical explanation of any witness.

In Zoccolillo vs. Oregon Short Line R. Company, 53 Utah 39 177 P. 201, a passenger sought to recover from injuries allegedly suffered because the

defendant carrier permitted the car in which she was riding to become unreasonably cold, the court stated:

> "It is fundamental that negligence is neither inferred nor presumed merely because a passenger was injured. Nor is negligence presumed as a matter of law. In that regard, negligence which constitutes a wrong, like fraud, must be established. It may, however, always be inferred from other facts and particularly in cases between carrier and passenger, where a collision or derailment has occurred. It may be inferred from such occurrence, and where no explanation is offered in such a case the inference may be so strong as not only to justify, but to compel, a finding of negligence, which is the ultimate fact to be established. The circumstances surrounding the happenings of an accident, even on a railroad, may, however, easily be such that, while they may justify a finding of negligence, yet may not compel such a finding. In that regard, there is no difference in principle between a case where the maxim of res ipsa loquitur applies and where it does not; that is, an inference may arise from one or from a series of facts in any kind of a case which, if unexplained, may not only justify, but may also require, a finding of the ultimate fact of negligence. The only difference between an ordinary case and a case between carrier and passenger consists in the quantum of proof the plaintiff must adduce in order to make a prima facie case. True, courts in applying the maxim of res ipsa loquitur very frequently speak of the presumption which arises, etc. By reading the decision it, however, becomes clear that at least most writers refer to the presumption so called merely as an inference of fact, and not as a presumption requiring the court to direct a verdict, even though no explanation is offered."

Nowhere can this writer find any law which states that the burden of proof shifts, as appellant has alleged, and in this regard, in Angerman Co. Inc. vs. Edgemon et ux, 76 Utah 394, 290 P. 169, the Utah Supreme Court stated:

> "The effect of the maxim (res ipsa loquitur) is evidentiary and that where if applies negligence, which is the ultimate fact to be established, may be inferred from a particular occurrence or accident. In some cases, the inference may be so strong where no explanation is offered, as not only to justify, but to compel a finding of negligence; but ordinarily all that is meant by the maxim is that proof of the facts embraced within

the statement of the rule affords reasonable evidence from which the jury, or the court, if the case be tried without a jury, may, in the absence of explanation by the defendant, infer that the injury arose from the defendant's want of care."

The court sitting as a fact finder could determine that there was no negligence on the part of defendants-respondents and the accident occurred by the act of a third party.

As stated in Joseph vs. W. H. Groves and Latter Day Saints Hospital, supra, the Utah Supreme Court states:

"What the parties are entitled to and the law seeks to afford is an opportunity for one claiming a grievance which would justify legal redress to present it to a court or jury and to have a fair trial. When this is done and the verdict and judgment are entered, all presumptions are in favor of their validity."

CONCLUSION

It is respectfully submitted that the decision of the District Court should be affirmed.

Respectfully submitted,

NOLAN J. OLSEN
Attorney for Defendants and Respondents