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Leo A. Bird v. Clover Leaf-Harris Dairy : Brief of Appellant

Utah Supreme Court

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IN THE
SUPREME COURT
OF THE STATE OF UTAH

LEO A. BIRD,

Plaintiff and Respondent,

vs.

CLOVER LEAF-HARRIS DAIRY,

Defendant and Appellant.

Appellant's Brief

THATCHER & YOUNG,

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Appellant.*

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SUPREME COURT
OF THE STATE OF UTAH

LEO A. BIRD,
Plaintiff and Respondent,

vs.

CLOVER LEAF-HARRIS DAIRY,
Defendant and Appellant.

APPELLANT'S BRIEF

STATEMENT

Defendant is the owner of a creamery plant at 723 South State Street, Salt Lake City, Utah. It consists of several separate and disconnected buildings. The main building faces State Street, which is the processing plant, executive offices, etc., and is the place where all of the business is transacted. The buildings in the rear are adjuncts to the business. The first one back of the main building is a one story, brick building extending North and South from the South end of the lot to about the center. Immediately to the East is a two story building facing North (the building involved in this suit). The ground floor is used as a garage for company delivery trucks. The upper floor is used for storage purposes. Parallel to this building immediately to the North and facing South is another building known as the machine shops. The area

at times placed in the offending cars. Offenders were approached and told to remove their cars. Sometimes the cars were removed by the plant manager. Ample space was provided for them in the parking lot.

The plant manager, pursuant to rules, made regular periodical inspection of all of the buildings and had done so for the last ten years. The last inspection preceding the accident was made about two months before March 6, 1939. At that time Mr. Galligher, the local manager, Mr. Myers, a company representative, and Mr. Johnson, the plant foreman, made a complete tour of all the buildings. They inspected the roof of the garage building, went over it thoroughly, looked for leaks or cracks, inspected the walls, floors, electrical wiring, looked for evidences of cracks or weaknesses in the walls and inspected the cement pillars. They discovered nothing to indicate anything unusual about the building or to suggest any inherent weaknesses. They saw no cracks in the wall.

None of the officers or employees of the company knew of anything in or about the building, or the canopy, suggesting inherent weaknesses or need of repairs or replacements.

When snow accumulated on the roof and canopy, men were sent to remove the same. As many as four men have frequently stood on the canopy and roof and shoveled heavy snow without any indication of weakness or excessive strain.

On March 6, 1939, there was a small amount of snow and ice on the roof, not over two (2) inches, and not sufficient to require cleaning.

Leo Montell Bird, plaintiff's son, was not an employee.

He was employed by the Milk Producers to take samples of their individual milk as delivered, in order to provide a means of checking with the company tests. His work was confined exclusively to the main building, where he came each morning, took his position near the scales and put a sample of each producer's milk in a separate bottle reserved for that purpose. It required about four hours each day for him to complete his samples. He had been thus employed for about one and one-half (1-½) years. However, his employment extended to various creameries and dairies in Salt Lake City, Utah. He did not carry his samples, so it was not necessary to use a car in his employment. He usually came on a bicycle, but occasionally his father would allow him the use of his car, usually on Sundays or at vacation periods. The car in question was a new Studebaker. None of the company officers knew this car and they paid little or no attention to his coming or going. Mr. Johnson, the plant foreman, sometimes saw him come on his bicycle, which he frequently put in the garage. Sometimes he came in a coupe which he parked in the space reserved adjacent to the West wall of the brick building to the West of the garage. On March 6, 1939, he drove his father's new 1938 Studebaker car and placed the same under the canopy at the extreme Western end immediately in front of the double doors which were closed. He did not obtain permission from anyone to park there. No company official or employee saw him drive his car there, nor did they know that this car belonged to him, nor did they observe the car there on the day of the accident, nor had they ever seen this car parked there before, although Mr. Bird claims to have parked it there several times. There is nothing to suggest that even had an employee seen the car, that he would have known it belonged

to Mr. Bird. It might have belonged to some company official who might have the right to place it there. There was a truck and four (4) passenger cars under the East canopy but none, other than plaintiff's car, under the West canopy. As before noted, those on the East did not directly obstruct the opening into the garage, and cars or trucks were sometimes left there temporarily for repairs.

On March 6, 1939, at about Eleven A. M., the West canopy and brick wall in the second story fell. This caused a heavy suction and the East canopy raised and then it fell, pulling the entire upper wall down. Whether the canopy fell before the wall or the wall before the canopy, is not known. No warning noises were heard and no opportunity was afforded to remove any of the cars before the crash. No one knew what caused the accident, or how it happened. Reinforced concrete and brick are recognized as good building materials. Canopies in front of buildings are very common, and there was nothing in the form of construction of either to suggest weaknesses or strain, and the company was very careful in the inspection of its buildings. The canopy was constructed by the same contractor about one and one-half ($1\frac{1}{2}$) years after the building was completed. The steel supporting rods were about eighteen (18) feet long, fastened to the reinforced concrete piers.

There is no contention that defendant, or any of its agents, saw anything about the construction of the building or the canopy suggesting any inherent weakness, nor that there was anything which could have been observed that would have suggested weakness or strain in or about the building.

The car was damaged to the extent of Six Hundred Thirty Three and 77/100 Dollars (\$633.77).

Upon the foregoing evidence, all of which is undisputed, the trial court, sitting without a jury, made findings and entered judgment in favor of plaintiff.

ASSIGNMENT OF ERRORS

Seven (7) errors have been assigned as follows:

1. Error in overruling defendant's demurrer.
2. Error in denying defendant's motion for a non suit.
3. Error in entering judgment in favor of plaintiff.
4. Error in making a conclusion of law,
 "That the defendant's negligent acts or omission proximately causing damage to plaintiff's property, and that plaintiff recover damages for plaintiff and is entitled to judgment".
5. Error in making that part of finding number Three (3),
 "For the purpose of going to work at defendant's dairy"

and also,

"a place where others had parked their automobiles".

6. Error in making its finding number Four (4)
 "and while the plaintiff's automobile was parked by the aforesaid wall with the consent and permission of the defendant"

also,

"that defendant knew, or should have known, of the

unsafe and unsound condition of said wall and that the damages to plaintiff's automobile were proximately caused as a result of the careless and negligent maintenance of said walls in an unsound and unsafe and dangerous condition"

also,

"and which was an instrumentality peculiarly exclusive and completely within the control and management of the said defendant".

7. Error in failing to make findings, conclusions and enter judgment in favor of defendant.

ARGUMENT

Plaintiff, both by pleading and proof, attempted to bring himself within the Res Ipsa Loquitur doctrine. The trial court evidently decided this case on that theory. We believe we can argue all our assignments under this one general heading, as all questions involved both in the complaint, the findings, conclusion and judgment are of necessity involved in this question.

Before embarking on a discussion of this subject, it is important to make some preliminary observations. It is, of course, axiomatic that one coming on others premises may be either:

- A. Trespasser
- B. Licensee
- C. Invitee

and that the duty owed by the owner is measured by this relationship.

Before discussing or applying the so called *Res Ipsa Loquitur* doctrine, we must first determine the legal status of the parties *as it applies to the automobile in question*.

If the boy, Leo Montell Bird, had himself been injured while in the main building, there could be no denial of the fact that he was an invitee, but that is not this case. No injury was sustained to the boy while in a place where he was invited. Rather, an injury happened to an automobile which was placed where it had no right to be. This fact must not be overlooked. Merely because the defendant permitted him to come to its plant each day to take samples of milk and, to that extent, made him an invitee while in the plant does not mean that it invited him to drive his car in the rear and park the same where he had no right and, that by parking it there, the same relation was created with respect to the automobile. We say that by placing this car at the point indicated he was a trespasser with respect to the duty the defendant owed the owner in caring for the car, notwithstanding he was himself an invitee while engaged in his occupation in the main building; that if he was not a trespasser in placing the car at the point indicated, he was at most a mere licensee and under no circumstances was he an invitee. He generally came on a bicycle, so it cannot be said that the use of a car was in any sense a part of the invitation to come and sample milk. The defendant invited him to enter its main building each day and take samples of producer's milk. It did not invite him to drive an automobile in its back yard and, certainly, it never invited him to park the same immediately in front of its garage doors at a place where it did not even permit its own officers or employees to park. It provided parking space for anyone who

had occasion to visit the plant for legitimate purposes, if their employment was such as to be inconsistent with parking their automobiles in the public street.

Plaintiff argues that because he had done this before, somehow he received a license to continue so to do. The difficulty with plaintiff's position rests in the fact that he failed to show any consent, express or implied, by any officer of the defendant company, which could bind the defendant. Plaintiff does not contend that the boy made a regular habit of parking there, or that he asked permission of anyone, irrespective of whether he had authority to give such consent to park there. He does not contend that any officer of the company saw him park there, or knew that this particular car was driven by the boy. He merely argues that, because some employees were at times permitted to park their cars under the East canopy, although in direct violation of company orders, therefore, he had a right to drive this car under the West canopy directly in front of the entrance doors to the garage, thereby obstructing ingress to or egress from the building and that, because he placed it there without the knowledge or consent of any official of the company and in direct violation of its rules and regulations and at a place where anyone would know or readily perceive it ought not to be placed; and that, notwithstanding the company had provided ample parking places for cars, yet because someone did not box the boy's ears and order him to get the car out, irrespective of the authority of such person, that somehow the defendant company owed the same duty toward the protection of the car that it owed the boy while lawfully in the building sampling milk. This seems to be a strange conception of the law.

Suppose, for argument sake, some employee did see Mr. Leo Montell Bird drive the car there, although this is denied and not proved, would such knowledge on the part of some mere employee, without protest on his part, be sufficient to create implied consent on the part of the defending company? Would it not be incumbent upon plaintiff to show that officers of the company who had authority to expressly bind it knew of such condition and impliedly consented thereto? No such attempt was made to bind the company in this case. Suppose that someone did see a Studebaker car standing in front of this garage, but he did not know who owned the car or who drove it there. Would that fact be sufficient to authorize a finding that the defendant had impliedly invited this boy to park his car in that vicinity?

The mere statement of the facts demonstrate the utter absurdity of the position. Had this boy been driving this particular automobile over a period of years and had he placed the same regularly at this position, there might be some merit to his contention, but here the evidence showed that the boy usually rode a bicycle; that he had on previous occasions driven an old Ford car which he parked in the place allotted, and that this was a new Studebaker car which his father had permitted him to drive on a few occasions, generally on a Sunday. There was no showing that any officer of this company ever saw him drive this car. Does, therefore, the mere presence of this Studebaker car at the point indicated, whether known to some employee or not, charge the defendant company with the responsibility of protecting this car against all hazards? What is its responsibility? It is well established that a person may be an invitee as to one part of the building, yet a trespass-

ser as to some other part? The subject is discussed in the following case:

Loney vs Laramie Auto Company
255 Pac. 350

While in this case the court held that plaintiff was an invitee with respect to the place of injury, yet the court recognizes the rule and says:

“The liability of the keeper of premises and the right of protection of an invitee may, of course, be a limited one and cannot go beyond the invitation. There are many cases to that effect, many of them holding that an invitee goes beyond the scope of, and violates, the invitation when he goes into some part of the premises where he is not invited, and where the purpose of his visit do not warrant him to go. The duty to protect an invitee is necessarily coextensive with the invitation, though no further.”

See also the following cases discussing the same rule:

Kinsman vs Barton and Company
251 Pac. 563

Gavin vs O'Connor
122 Atl. 842-30 A. L. R. 1383

Robinson vs Leighton
119 Atl. 809 - 30 A. L. R. 1326

Landers vs Brooks
154 Northeastern 265 - 49 A. L. R. 562

Butnick vs J. & M., Inc.
59 P. 2nd 750

Dobbie vs Pacific Gas & Electric Co.
273 Pac. 630

The courts sometimes refer to the situation as that of exceeding the bounds of permission to enter upon the owner's premises. See, for instance,

Hickman vs Sisters of Charity

106 P. 2nd 593

That is precisely what we claim in this case. While the boy had the right to enter the main building and (it might be well argued) that he had the right to park his car at places provided for parking, yet he certainly exceeded the bounds of any invitation, express or implied, when, without permission and in violation of company rules, he put his car at the point in question.

The question of who are invitees is discussed in 45 C. J. commencing at Page 809, Section 220 and continues to Page 788. It is, of course, impracticable to cite the cases or to quote from the text. However, we specifically call the court's attention to Page 812 wherein the author discusses "circumstances not amounting to an invitation" in the following language:

"Use of premises without the owner's knowledge or occasional use in disregard of the owner's apparent intentions, cannot give the user the status of an invitee. Neither does the mere fact that a certain use of property is confined to the user give rise to an implication of an invitation to make such use of it".

In 45 C. J., Page 788, Section 194, the author discusses who are licensees and shows the distinction between a licensee and an invitee.

What then was the duty which the defendant, as owner of the premises, owed to the plaintiff, the owner of the automobile placed as it was in front of the company garage? This duty depends upon whether the relationship is that of trespasser, licensee or invitee. The cases are legion which discuss this duty and differentiate between the three situations. This court, in accord with many other states, holds that where the person is an invitee, the owner or occupant of the premises owes him a duty of reasonable or ordinary care to keep premises in a safe and suitable condition so that he will not be unnecessarily or unreasonably exposed to danger.

Winteroad vs Christensen
68 Utah 546
251 Pac. 360

Quinn vs Utah Gas & Coke Company
42 Utah 113
129 Pac. 362

On the other hand, it is universally held that the owner of premises is not an insurer of the safety of its invitees. It is equally well settled that as to a licensee, the owner or occupant of land owes only the duty of not wilfully or wantonly injuring him.

Garner vs Pacific Coast Coal Company
100 P. 2nd, 32

Dobbie vs Pacific Gas & Electric Company
273 Pac. 630

Borgnis vs California Oregon Power Company
258 Pac. 630

Buttnick vs J. & M., Inc.
59 Po. 2nd, 750

Schock vs Ringling Brothers
105 P. 2nd, 838

Holm vs Investment & Securities Company
79 P. 2nd, 708

Kines vs Lang
57 A. L. R. 1022

On the other hand, if there is any distinction between the duty owed to a trespasser and that of a licensee, the duty would be still less toward a trespasser.

Jensen vs Utah Railway Company
72 Utah 366
270 Pac. 349

lays down the rule that the only duty owed a trespasser is to use care after the presence of the trespasser is actually discovered. The subject is annotated in

89 A. L. R. at Page 757

and the note refers to previous annotations.

From the foregoing authorities, it is clear, we think, that the duty resting upon the defendant in this case is dependent on the status of the plaintiff's property but, in no event, does the defendant owe a greater duty even toward an invitee than that of reasonable care.

Our first assignment of error challenges the sufficiency of plaintiff's complaint. We contend that the court erred in

overruling our demurrer for the reason that plaintiff's complaint fails to allege facts sufficient to show that the automobile in question was placed at the point indicated at the invitation, express or implied, of the defendant and, if it does not allege facts sufficient to create the relationship of invitee, then the complaint does not state a cause of action because it shows no breach of duty toward a licensee or trespasser.

Assignment Number Two attacks the ruling of the court in denying defendant's motion for a nonsuit. This matter may be reserved for further consideration in connection with the doctrine of *Res Ipsa Loquitur*. However, at this point, we call the court's attention to the fact that the plaintiff's evidence failed to show that the defendant owed the plaintiff, or his automobile the duty of an invitee. The most that can be said of the evidence presented by the plaintiff was that in placing the car at the point in question, the relationship was either that of a trespasser or, at most, a mere licensee, and, if such was the relationship, how can it be argued that there was any evidence, even under the *Res Ipsa Loquitur* doctrine, to even suggest a wilfull or wanton act on the part of the defendant? We contend that when the plaintiff rested without offering evidence sufficient in law to show the status of an invitee, that the court should have granted the motion for a non suit.

DOCTRINE OF RES IPSA LOQUITUR

Counsel contends, and the court seemed to have adopted his contention, that under the doctrine of *Res Ipsa Loquitur*

the court was justified in inferring negligence. The last case to be decided by this court on the subject is that of

White vs Pinney
108 P. 2nd, 249

in which Mr. Justice Larson very carefully reviews the authorities and discusses this rule. It is our belief that this case effectively disposes of this question and demonstrates why a judgment should have been entered in favor of the defendant. As stated by him,

“The doctrine of *Res Ipsa Loquitur* is that when a thing which causes injury is shown to be under the exclusive control of the defendant and the injury is such as in the ordinary course of things does not occur if the one having such control uses proper care, the happening of the accident is evidence sufficient to justify an inference that defendant did not exercise due and proper care, the effect of the doctrine being evidentiary. Where plaintiff has made out a prima facie case for recovery for injury caused by alleged neglect of defendant, defendant may escape liability by showing that defendant *exercised all the care commensurate with the damages to be apprehended, which careful and prudent men would have exercised under the circumstances*. Where plaintiff has made out a prima facie case for recovery under *Res Ipsa Loquitur* doctrine, the burden of going forward with the evidence shifts to the defendant to show that he was not guilty of negligence.”

In this case, the plaintiff merely proved the ownership of the automobile, the ownership of the premises by defendant, the nature of the boy's employment, the placing of the car at

the point indicated, the falling of the wall, the resulting damage, and then rested. If he made out a prima facie case under the theory of this doctrine, against whom did he make out a prima facie case? Did he make out such a case in favor of a trespasser or a licensee, or even an invitee? Is there any presumption under this doctrine that the defendant acted wilfully or wantonly, as is required to recover in case of a trespasser or licensee? Did the plaintiff make out a prima facie case that the defendant failed to exercise reasonable care in not discovering the weakness in the wall, or, putting it another way, did the happening of the event justify an inference that the building was weak, that the defendant knew, or ought to have known, it was weak or, in case of a licensee, that it wilfully and wantonly injured the plaintiff's property? However this may be, as we understand the doctrine, if plaintiff did make out a prima facie case from which a court might infer liability as against either an invitee, licensee or trespasser, then it became the duty of the defendant to go forward and make explanation. This the defendant did and the evidence is not in any way disputed. What, then, did the defendant prove? It was proved:

1. That the building was constructed twenty years ago by a building contractor and it was constructed out of reinforced concrete and brick, the usual and proper method of building buildings.
2. That the building was in a good state of repair and that there were no patent defects which would be discovered by an inspection.

thereby clearly distinguishing the situation from that presented to the court in the case of *Winterroad vs Christensen*,

cited *supra*, where the court calls attention to the fact that the board in the platform which gave way was decomposed and its condition could clearly be seen by inspection, and the court uses the following language:

“The particular fact of controlling importance is whether from the circumstances it can be fairly inferred that a reasonable inspection by defendant would have discovered the defect.”

3. That within two months prior to the accident, the defendant inspected the building and found nothing to indicate any weakness or anything to suggest a dangerous condition.
4. That the canopy was properly and securely braced and supported by steel rods extending from the top of the building.
5. That the defendant removed the snow off the roof whenever there was any appreciable accumulation; and that on the day of the accident there was only a small amount of snow on the roof.
6. That the defendant, or its officers or employees, did not know what caused the accident.

As above noted, none of these facts are disputed. What then is the situation? Assume that the plaintiff has made out a *prima facie* case under this evidentiary rule, but the defendant then goes forward and proves by clear and convincing evidence facts which in law would exonerate it from any liability. Can the court disregard those facts which are in no way disputed and still infer a breach of duty? Here again we de-

sire, even at the expense of repetition, to remind the court that the defendant is not an insurer of the safety of its guests. Neither is it an insurer that its building will not fall. It is merely required to show, even as against an invitee, that it exercised reasonable care for the safety of its guests and, if it discharges this obligation, even though an accident happens and even though the same cannot be explained, can a court, after a full explanation, infer *not the fact that the building was weak, not the fact that the building fell, but the further fact that the defendant knowingly maintained upon its premises a building which was in an unsafe or dangerous condition*, or that there were facts which could be discovered by reasonable care from which the owner could have learned of the unsafe or dangerous condition? Therein it seems to us is the vice of the court's ruling and the danger of a literal application of the doctrine of Res Ipsa Loquitur. By resorting to this evidentiary presumption, the court has in effect said, notwithstanding you have made full explanation; notwithstanding your evidence stands uncontradicted; and, notwithstanding the fact that this building was properly constructed, was in an apparently safe condition, was not an old delapidated building; and, notwithstanding the fact that you made regular inspections and did not discover its dangerous condition, yet, I hold that, because the building fell, therefore, it was inherently weak and you should have known it and you are liable, not because you knew or should have known of the dangerous condition, but you are liable because the building, having fallen, must have been in a dangerous and unsafe condition. Is this not akin to holding that the owner of premises is an absolute guarantor of the safety of persons upon the premises, irrespective of the relationship? Is it not an application of the doctrine of main-

taining a dangerous instrumentality upon ones premises? Does it not in effect amount to a holding that if a building falls, and the cause thereof cannot be satisfactorily explained as being due to some catastrophe, that the owner is liable for the consequences? Does it not amount to this, that the so called rule of Res Ipsa Loquitur, which is only a presumptive evidentiary rule, change itself into a rule of absolute liability and become a rule of substantive law, rather than evidence? Why, may I ask, should the application of this doctrine enlarge the liability of an owner or occupant of property? If this judgment can be sustained, then we say that, as a result of this fiction, the owner of property becomes an insurer; that no matter how careful one may be in employing competent men to erect a building, and no matter how careful he may subsequently be in keeping the building in proper repair and in making inspection, yet he is at all times liable to any person who may be on his property, should the building collapse, even though he did not nor, by the exercise of reasonable diligence, could not have known that the building was weak or inherently dangerous.

We do not think it necessary or proper to cite the many cases involving this doctrine. We admit its application in proper cases. We think it is salutary in requiring defendant to go forward and make satisfactory explanation, but we do not think citation of cases will be very helpful with respect to these particular facts. In fact, we have searched diligently through the books but have not been able to find a case which supports the position of the plaintiff.

We cite the following cases without further discussion:

Zoccolillo vs Oregon Short Line
177 Pac. 201

Paul vs Salt Lake Railway Company
95 Pac. 363

Denver vs Spencer
82 Pac. 59

Kennedy vs Hawkins
102 Pac. 733

Nucek vs Weaver
54 P. 2nd, 768

wherein the court uses the following language:

“Where presumption of negligence of defendant arises from the happening of an accident defendant assumes the burden of advancing evidence *not to satisfactorily account for the accident and to show the actual cause of injury, but merely to rebut inference that he has failed to use due care.*”

Lyman vs Knickerbocker Theatre Company
5 F. 2nd, 538

Pickwick Corporation vs Messinger
36 P. 2nd, 168

Assignment of Error Number Four attacks the conclusion of law that the defendant's negligent acts or omissions caused the damage. Wherein is there any evidence of negligent acts on the part of the defendant? What acts or omissions did the defendant do?

We also attack that part of finding Number Three, Assignment Five, where the court found that the boy parked the

car at a place where others had parked their automobiles. There is no evidence that others parked their cars at the point in front of the garage door where the boy parked his but, even though there is such evidence that the company permitted employees to do this, does this justify a guest doing the same thing?

Also we challenge that part of finding Number Four where the court found that the automobile was parked with the consent and permission of defendant and that defendant know, or should have known, of the unsafe and unsound condition of said wall. Here again we repeat what we have said before that to make such a finding is equivalent to the court refusing to believe uncontradicted testimony. There may be an inference that the wall was unsafe but there certainly can be no inference that the defendant knew, or should have known, the unsafe condition.

We submit that the complaint does not state a cause of action; that the court should have granted defendant's motion for a non suit; that, in any event, those portions of the findings attacked can find no support in the evidence that the judgment cannot be supported from the findings or the law applicable thereto; that the cause should be reversed with instructions to dismiss the complaint.

Respectfully submitted,

THATCHER & YOUNG,

*Attorneys for Defendant and
Appellant.*