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Glendora Jackson v. Arthur Larron Colston and Mary A. Zupo, doing business as Posture-Form Studio : Brief of Respondents

Utah Supreme Court

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IN THE SUPREME COURT
of the State of Utah

GLENDORA JACKSON,

Plaintiff and Appellant,

vs.

ARTHUR LARRON COLSTON and
MARY A. ZUPO, doing business
as POSTURE-FORM STUDIO,

Defendants and Respondents.

Case No. 7199

RESPONDENTS' BRIEF

Appeal from the Third Judicial District Court,
in and for Salt Lake County, Utah

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and Respondents*

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ARTHUR LARRON COLSTON and

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Defendants and Respondents.

RESPONDENTS' BRIEF

STATEMENT

In order to present more clearly the real issue involved in this appeal, we add to appellant's general "Statement of Facts" the following:

Plaintiff alleged in her complaint (Tr. 3) that she was "severely burned in and about the left ankle and left foot and in and about the right foot; that large, open sores and lesions developed as a result of said burns * * * * *." *The plaintiff testified at length as to the taking of treatments but did not testify at any time or in any way that she experienced any burn or pain or even discomfort during the treatments.*

The whole case of plaintiff is predicated upon a statement alleged to have been made by defendant Mary Zupo to the plaintiff on August 1, 1943, related by the plaintiff in the following words. She said, referring to Mary Zupo (Tr. 89), "Oh, yes, they had burned me, and she was sorry." The defendant Mary Zupo was not a doctor or a nurse but really a layman in the treatment and use of the lamps. The plaintiff testified, among other things, that the lamps were placed 36 inches away from her ankle (Tr. 78, 79), and that she, the plaintiff, never removed her shoes or stockings during any treatment. The plaintiff also testified (Tr. 83) that the heels and toes were open, but the ankle didn't break open until about the middle of May. The hole in the heel was almost a complete split around the heel, and the toe was like the flesh had been pried open (Tr. 84). Dr. Plumb, an expert witness on electricity, light and heat, examined the lamps admittedly used by the defendant and testified (Tr. 258, 259, 263) that the use of the lamps in the way they were used could not produce a burn upon the plaintiff's leg.

The Court directed a verdict for the defendants on the ground that the evidence did not show that the plaintiff was burned, or that the use of the lamps was the proximate cause of the burn, and on the further ground that under the evidence, the submission of the case to the jury would leave the jury to speculate as to what did cause the sore and the splitting and breaking out of the flesh around the plaintiff's ankle and heel and toe.

ARGUMENT

Counsel for appellant take the position that the doctrine of *res ipsa loquitur* is applicable here. We challenge this position on the ground that the plaintiff and the defendant together were using these lamps. The plaintiff was conscious and free to move her foot and was required to cooperate with the defendants in the placing of the lamps with respect to plaintiff's foot and the duration and manner of the use of the lamps. The plaintiff did not testify that the lamps burned her or that she suffered any burns at all. Counsel seek to come in under the purported statement of Mary Zupo, the operator, as plaintiff says Mary used the words, "Oh, yes, they had burned me, and she was sorry." Certainly Mary Zupo was not qualified as an expert to testify to the burn as a fact. An unsworn extra-judicial statement is of no greater effect.

On the question of what is meant by exclusive control, we direct the Court's attention to the following cases:

Clark et ux vs. City of Bremerton, Washington,
97 Pac. (2d) 112.

Stanolind Oil & Gas Co., vs. Bunce, Wyoming, 62
Pac. (2d) 1297.

In this case the Court stated at page 1301:

"Of similar import are the essentials of the doctrine as well phrased by Dean Wigmore, 5 Wigmore on Evidence (2d Ed.) 498, Sec. 2509, thus:

‘(1) The apparatus must be such that in the ordinary instance no injurious operation is to be expected unless from a careless construction, inspection, or user; (2) Both inspection and user must have been at the time of the injury in the control of the party charged; (3) The injurious occurrence or condition must have happened irrespective of any *voluntary* action at the time by the party injured.’

“And the learned author supplements this statement:

‘It may be added that the particular force and justice of the presumption, regarded as a rule throwing upon the party charged the duty of producing evidence, consists in the circumstance that the chief evidence of the true cause, whether culpable or innocent, is practically accessible to him but inaccessible to the injured person.’ ”

Honea et al vs. City Dairy, Inc., 140 P. (2d) 369.
Morrison vs. LeTourneau Co. of Georgia, 138 F. (2d) 339.

The Court here at page 341 stated:

“It is urged that the pilot, LeTourneau, was not licensed to carry passengers, and that he violated the Federal regulations and statute in that the pilot had only a private pilot’s license and was not authorized to take passengers aloft, and that this constituted negligence per se. This contention of appellant overlooks the further requisite that the violation of the statute must be the proximate cause of the injury. The evidence here wholly fails to show the proximate cause of the injury, but leaves this important issue entirely

to conjecture and speculation.”

Brooks vs. Utah Hotel Co., 159 P. (2d) 127; 108 U. 220.

We challenge this claim on the further ground that the purported statement of Mary Zupo, a mere layman, is not and cannot be considered an admission of the defendants that they injured or caused the injury to the plaintiff's ankle. We again point out that the plaintiff never testified that she *was burned*, and the purported statement cannot be held as an admission or as evidence that the defendants had burned the ankle of the plaintiff. The statement does not refer to the ankle and does not refer to any treatment, and lacks in time and certainty so that there is no evidence of the cause of the plaintiff's injury before the Court. The evidence showed at one time an ulcerated condition of the ankle. The evidence also showed split heel and split toe and cracked flesh about the foot which was never exposed to the heat and was always protected from the heat by the shoe and the stocking.

The Court and the jury were then left to speculate as to what did cause the sores and ulcerations on the plaintiff's foot and ankle, and the Court was right in refusing to submit the question of other possible causes to the jury and leave them to so speculate.

The position of the appellant is challenged further on the ground that under the undisputed evidence—and the plaintiff made no effort of any kind to dispute the testimony of Dr. Plumb—it was utterly impossible for

these lamps—the only lamps used—placed as they were and used as they were—to cause any burn of any kind upon the plaintiff's foot. Dr. Plumb testified, after examining the two lamps involved (Exhibits 3 and 4, Tr. 255), as follows:

“Q. (by Mr. Coray): I ask you to look also at this lamp, Dr. Plumb, on which I now have my hand, and ask you if you have ever seen and examined this lamp?

A. I have examined both lamps today and tested them.

THE COURT: They might to avoid confusion, they might be marked as exhibits even though they are not left here and placed in the exhibit room; they might be withdrawn.

MR. CORAY: We have no objection.

THE COURT: If that is marked Exhibit “3” and that is marked Exhibit “4” then the record will have some means of identifying the two exhibits.

MR. CORAY: That is agreeable, Your Honor.

May the record show Miss Zupo identified the lamps, Exhibit “3” now marked, as being the lamp on the second table, and Exhibit “4” being the lamp used on the third table.

THE COURT: I assume no objection to that.

MR. HANSON: If that is the fact,—you folks didn't offer them.

THE COURT: The record will show.

(Thereupon defendants' Exhibits “3” and “4” are marked for identification.)

Q. (by Mr. Coray): Now, Doctor, I ask you to state if you will, what your examination of Exhibit "3" consisted, that is what you did in the course of your examination of it?

A. I measured its power input, and roughly its power output, its electro magnetic control; it is not a lamp.

Q. Will you state whether or not you took the object apart and examined the interior?

A. I took it all apart and examined the inside to be sure it was in good working order.

Q. Will you tell the Court and Jury what is contained inside of this object?

A. There is an annular coil of wire which has a small iron core sticking out toward the glass and when that is put on a lighting circuit, 120 v. lighting circuit it consumes about 100 watts and makes a magnet.

Q. I see. Now, Doctor, does an object of that type have any heating power, any burning power whatsoever?

A. Yes, it has a slight amount of what is called infra-red radiation of heat and that amount would be less than 25 watts.

Q. So that I might understand you then, is the amount of heat, or burning, or sensation which is derived from that about equivalent to a 25 watt globe?

A. Or less.

Q. I see,—and what about the magnetic effect that is produced by that object, what can you tell about that, Doctor?

A. It will pick up small nails, hairpins, pins and things of that sort.

Q. Do the magnetic forces which emanate from that lamp when it is running at full power, have any detrimental effect on the human body?

MR. HANSON: If you know.

A. Say that again please.

Q. If you know, do you know whether the magnetic forces which emanate from that lamp have any effect on the human body?

A. I know they do not.

* * * *

Q. (by Mr. Coray): Will you explain your reason for your conclusion in that regard, Doctor?

A. The total magnetic flux comes out of that generator there, that coil would be less than the total magnetic lines through a person's body standing close to it, than the normal lines of force traveling through their body from the north pole to the south pole of this earth.

Q. Am I to understand then, Doctor, from your testimony there are magnetic lines of force running from the north pole to the south pole that continuously go through a person's body on this earth?

A. All the time, day and night.

Q. And am I to understand the magnetic force exerted in Exhibit "3" is less than the magnetic powers from the north to south pole?

A. True.

Q. Doctor, from your examination of that object, which we have called Exhibit "3", I ask you to assume the following set of facts:

That over a period of approximately one month a patient is placed, we will say touching the glass portion of this object, Exhibit "3", for a period of approximately ten minutes on about five or six—make it about eleven occasions, and the lamp is turned on, or the object is turned on with its full force and power, could, or do you have an opinion whether or not Exhibit "3" could cause a burn upon that person?

A. My opinion is no.

Q. And will you tell us the reason for that opinion, please, Doctor?

A. In the first place the magnetism would not burn.

Q. Is there any other possibility of a burn resulting from it?

A. And I told you before there is only a small amount of heat comes out of that, less than 25 watts, and 25 watts two or three inches from a person's body would not burn them.

Q. Now, from your examination, Doctor, is there anything between the coil contained in Exhibit "3" and the glass which appears on the front of it?

A. No, except a small piece of iron.

Q. What is this that renders the inside invisible from the outside?

A. A piece of paper, asbestos—by the way

I think it is asbestos paper which could keep heat from going into a person's body.

Q. Have you operated and turned this lamp on, Doctor?

A. Yes, and measured the power.

Q. After the lamp has been running for a period of time, say fifteen minutes, is that ample to maintain its maximum heat?

A. Yes.

Q. I will ask you to state whether or not it is perceptible for a human hand or a person's body in feeling the heat from the outside?

A. If you wanted to hold it there twenty or thirty minutes you will feel a slight amount of warmth, nothing more than a slight amount of warmth.

* * * *

Q. (by Mr. Coray): Then, Doctor, I call your attention to Exhibit "4", which I believe you also examined?

A. Yes.

Q. And will you tell us what Exhibit "4" is please, Doctor?

A. It is an ordinary infra-red heat lamp.

Q. Did you make measurements as to the—

A. Input.

Q. —input and output energy of that?

A. At the normal voltage that is here in the building the input—or any here in town—the input on that is not over 240 watts, and it has a

controller on so you can turn that down to much less than that.

Q. The maximum intake is 240 watts?

A. Maximum.

Q. Yes.

A. And with the controller you can turn that down to about 100 watts.

Q. How does that controller work to control voltage?

A. Resistance rheostat in the back of the lamp with an adjustable handle on it.

Q. Now, Doctor, how does this lamp, Exhibit "4", compare with other devices that we are commonly familiar with, can you give us any comparison so we can understand about how much power that is?

A. I have brought along a few lamps, I have put on the table; the first one at the west is the largest one, that is 1000 watts.

* * * *

Q. Now, I ask you, Doctor, if you are able to compare the amount of energy heat which comes out of Exhibit "4" with the amount of energy that comes out of the sun as felt on this earth?

A. The amount of energy which in the summer time shines on your body as infra-red radiation from the sun, if you are outdoors, would be more than the amount of that energy that comes

Q. By that you mean Exhibit "4"?
out of that unit there.

A. Yes.

Q. So then am I to understand, Doctor, that you are more likely to suffer a burn from having been in the sunlight on a summer day for ten minutes, than you are to be under the lamp Exhibit "4" for the same period of time?

A. Correct.

Q. Now, Doctor, I ask you to assume the following facts: That a woman goes to a studio for treatment, that for over a period of approximately one month, on eleven separate occasions, she is placed under this lamp, Exhibit "4", with the lamp at a distance of approximately two feet from her body and with the rays of the lamp shining directly on the top of her ankles,—and I ask you to assume that in all, except the last one or two of those eleven trips, she wore her shoes and on all occasions she wore stockings which were not removed, and those treatments took place never oftener than every other day, and some at intervals of four or five days between them.

Do you have an opinion whether or not this lamp, Exhibit "4" could cause a burn upon the flesh or person of that lady?

A. I would say a normal person's flesh could not be burned especially when you consider the shoe and the stockings which are both non-conductors, tending to stop the radiation from coming in."

The mere statement claimed by the plaintiff, Mrs. Jackson, to have been made by the defendant Zupo, as she testified: "Oh, yes, they had burned me, and she

was sorry," is not, in the face of the physical facts as to the location and use of the lamps by the defendant and the testimony of Dr. Plumb, which stands wholly undisputed, *substantial evidence*. This is especially true when it is considered that defendant Zupo was wholly without sufficient medical training to recognize a burn by the lamp, if in fact there was any burn. We direct the Court's attention to the case of *Haarstritch vs. Oregon Short Line*, 70 Utah, 552, 262 Pac. 100, at page 562, the Court said:

"The most pointed evidence on the part of the plaintiff as to when the freight car came into view is that of the witness Howlett, who testified that he first saw the car when it reached the center of the street railway track and that the automobile was then within 15 or 20 feet of the crossing. It only need be stated here that the testimony of Mr. Howlett in that respect flies in the face of uncontroverted physical facts and therefore is not substantial evidence."

With this as the only testimony before it, the jury (as to the use of the lamps and this being wholly undenied) could but only speculate as to what did cause the sores and ulcers on the plaintiff's ankle and foot, and such evidence could under no possible theory sustain a verdict or finding that the use of the lamps was the proximate cause of the injury. Under such circumstances, the Court could only direct a verdict for the defendants, and it would have been a clear error to have submitted the case to the jury for speculation. We direct

the Court's attention in support of this proposition to the following Utah cases:

Reid vs. Railroad, 39 Utah 617.

In this case the Court said at page 621:

“It is a familiar rule that where the undisputed evidence of the plaintiff, from which the existence of an essential fact is sought to be inferred, points with equal force to two things, one of which renders the defendant liable and the other not, the plaintiff must fail. So in this case, in order to entitle respondent to recover it was essential for her to show by a preponderance of the evidence that the cow entered upon the right of way through the broken down fence. This the respondent failed to do.”

Richards vs. Railroad Company, 41 Utah 99.

In this case the Court considered to what extent, from the fact that a train struck the horses found killed on the tract, negligence could be inferred, and whether the inference followed from the mere killing that the engineer had an opportunity to stop the train, and there was, therefore, negligence, and then stated at page 109:

“No doubt negligence may be inferred, but there must be some fact or facts from which the inference may be deduced. But, assuming that respondent could rely upon the inferences referred to for the purpose of making out a *prima facie* case of negligence, were not those inferences fully met and overthrown by positive and unchallenged evidence produced on behalf of appellant?

“If this be true, then this case comes squarely within the rule announced by this court in the case of *Christensen v. Railroad Co.*, 35 Utah, 137, 99 Pac. 676, 20 L.R.A. (N.S.) 255, 18 Ann. Cas. 1159.

In that case the rule is stated in the seventh head-note thus:

‘Inferential evidence of negligence is overcome by defendant’s undisputed testimony showing that there was no negligence; and, where plaintiff’s case rests entirely on such inferential evidence, the case must be taken from the jury.’

“In *Goss v. N.P. Ry. Co.*, 48 Or. 439, 87 Pac. 149, the rule is stated in the following language:

‘Where the evidence of negligence is entirely inferential, and the testimony for the defendant is clear and undisputed to the effect that there was no negligence, the plaintiff’s case is overcome as a matter of law, and it becomes the duty of the judge to take the case from the jury.’ ”

The appellant asked the Court to infer that the use of the lamp caused the ulcer and splitting of plaintiff’s heel and toe, which were always protected and never exposed to the lamp.

Haarstritch vs. O. S. L., 70 Utah 552.

The case of *Peterson vs. Richards*, 73 Utah 59, 272 Pac. 229, is clearly distinguished. In that case there was no question as to the crushing of the hand of plain-

tiff. There was no question of proximate cause. The only question was as to whether the injury occurred in the operating room. Here the existence of an ankle ulcer is proven, the cause is not shown, and the Court refused to ask the jury to speculate as to the cause.

We respectfully submit that there was no error in the ruling of the Court and that the judgment of the trial Court should be in all respects affirmed.

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and Respondents*