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Verona Wallace v. Cottonwood Mall Shopping Center, Inc. : Brief of Defendant-Respondent

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

VERONA WALLACE,

Plaintiff-Appellant,

vs.

COTTONWOOD MALL SHOPPING CENTER, INC., a corporation,

Defendant-Respondent

Case No. ~~240659~~ 15799

BRIEF OF DEFENDANT - RESPONDENT

An Appeal from the judgment of the District Court of the Third Judicial District, The Honorable Marcellus K. Snow, Judge

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IN THE SUPREME COURT OF THE STATE OF UTAH

VERONA WALLACE, Plaintiff-Appellant, vs. COTTONWOOD MALL SHOPPING CENTER, INC., a corporation, Defendant-Respondent	Case No. 240653

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BRIEF OF RESPONDENT

STATEMENT OF THE CASE

This is an action by the plaintiff for injuries she sustained when she slipped on a foreign substance on the floor of the Cottonwood Mall.

DISPOSITION IN LOWER COURT

This matter was tried to a jury. On March 23, 1978 the jury returned a special verdict finding (1) the defendant Cottonwood Mall 10% (Ten per-cent) negligent, (2) the plaintiff Verona Wallace 10%(Ten-Per-cent) negligent , and (3) other parties, 80% (eighty per-cent) negligent. Based on the jury verdict the trial judge entered a judgement, no cause of action, in favor of the defendant. (R. 125-127).

RELIEF SOUGHT ON APPEAL

Defendant Cottonwood Mall seeks affirmance of the judgement entered below.

STATEMENT OF FACTS

On September 9, 1976 the plaintiff, an employee of one of the tenants of the Cottonwood Mall, in Salt Lake City, Utah , was walking through the common area of the Mall while on her lunch hour. As she walked in a southerly direction in the Mall proper, she slipped on a foreign substance and fell to the floor injuring her arm. The substance was later identified as spilled Orange julius drink. A customer at a nearby food counter testified that he saw a young man, presumably another customer, attempt to clean the spill (but that he did not get it entirely cleaned up) and that approximately two and one-half minutes later he saw the plaintiff slip on the spilled drink and fall to the floor.

The court submitted the case to the jury on a special verdict. In a split decision the jury found the defendant Cottonwood Mall negligent and attributed 10% (ten per-cent) of the negligence to it. The jury unanimously found the plaintiff negligent and attributed 10% (ten per-cent) of the negligence to her.

The jury found "other parties" , presumably the young man who apparently spilled the drink and attempted to clean it up, 80% (eighty per-cent) negligent. The trial judge entered a judgement of no cause of action in favor of the defendant Cottonwood Mall.

ARGUMENT

POINT I

INSTRUCTION NO. 30 IS NOT CONFUSING.

Plaintiff-Appellant claims that Instruction No. 30 is confusing. The portion of the instruction complained of reads as follows:

> "In answering the parts of the damage question, be careful not to include or duplicate in any part amounts included in any other part answered by you."

This instruction is a simple and clear direction by the court to the jury cautioning them not to duplicate items of damage. There is no evidence that the jury was confused by this instruction. It cannot be said that their award did not conform to a reasonable view of the evidence on damages. Indeed if they were confused and in fact did duplicate items of damage this would only serve to increase the award to plaintiff and then defendant not plaintiff would be heard to complain.

More importantly, however, the judge entered a judgement no cause of action in favor of defendant and plaintiff therefore is entitled to no damages and her quarrel with this damage instruction is not relevant.

POINT II

THE JURY FOUND THE PLAINTIFF EQUALLY AS NEGLIGENT AS THE DEFENDANT.

Plaintiff, in her point II argument states that the jury found defendant Cottonwood Mall negligent and that its negligence was a proximate cause of the plaintiffs injuries. This is simply a statement of the jury's findings and the defendant admits that the jury so found. Defendant only points out, however, that the jury found plaintiff equally as negligent as defendant and that her negligence was a proximate cause of her own injuries, and accordingly her negligence, under Utah Code Anotated § 78-27-37 (1953 amended) precludes the plaintiff from recovering.

POINT III

THE INSTRUCTIONS WERE NOT INCONSISTENT IN ANY MANNER AND THERE IS NO EVIDENCE TO SUGGEST THAT THE JURY WAS CONFUSED BY THE INSTRUCTIONS.

Plaintiff's discussion of the courts instructions numbers 9,10,11 and 12 in part III of her argument, does not appear to be an objection to those instructions. These instructions set out the defendants' duty to the plaintiff and plaintiff apparently has no quarrel with them. Plaintiff does however complain of Instruction No. 16. First of all plaintiff is precluded from objecting to Instruction No. 16 since she did not object to that instruction at the trial of this matter. It is the law of this

state and almost every other jurisdiction that a party must make timely exceptions to instructions in order to raise that matter on appeal. In 5 C.J.S. Appeal and Error §1464 (6) it states:

> "Whether correct or erroneous, instructions which have not been properly challenged by objection, exception, assignment of error, or otherwise, must be accepted by the appellate court as the law of the case concerning the matters with which they purport to deal; they are not open to review and error therein is not ground for reversal."

See also Rule 51 Utah Rules of Civil Procedure: Morgan vs. Pistone, 25 Utah 2d 63, 475, P.2d 839 (1970);Straka vs. Voiles, 69 Utah 23, 252 P. 677 (1927).

Furthermore Instruction 16 is a proper statement of the law. That instruction is as follows:

> "You will note that the person whose conduct we set up as a standard is not the extraordinarily cautious individual, nor the exceptionally skillful one, but a person of reasonable and ordinary prudence. While exceptional caution and skill are to be admired and encouraged, the law does not demand them as a general standard of conduct."

Plaintiff states that this instruction was confusing to the jurors but does not tell us how or why it was confusing and there is absolutely no evidence to suggest that it was confusing.

Plaintiff next complains of Instructions No. 20, 21 and 22.

Instruction No. 20 states:

"The Cottonwood Mall is under a duty to those persons using the Mall, to exercise reasonable and ordinary care to see that the premises are safe for the use so intended and that their condition will not expose a user of the Mall to an unreasonable risk of harm. In the exercise of its duty the Cottonwood Mall must use reasonable and ordinary care but under the law it is not an insurer of nor does it guarantee the safety of users of the premises."

Instruction No. 21 states:

"You are instructed that the Cottonwood Mall is subject to liability for the harm caused to the plaintiff by a condition on the floor at the Cottonwood Mall if, but only if, you find from a preponderance of the evidence that:

1. The presence of the substance constituted a dangerous and unsafe condition, and

2. That the defendant Cottonwood Mall by or through its agents had actual notice of the presence of the substance prior to the accident, and thereafter had a reasonable opportunity to remedy the condition and did not do so, or that if the defendant did not know of the presence of the substance causing plaintiff to fall that it had been on the floor so long that the defendant in exercising reasonable care should have known of its presence and thereafter had a reasonable opportunity to remedy the condition and did not do so."

Instruction No. 22 states:

"The defendant Cottonwood Mall may not be held liable for the injuries sustained by the plaintiff, which results from a dangerous condition not caused by the acts of the Cottonwood Mall employees, and of which the Cottonwood Mall had no knowledge, unless that condition existed for such a length of time that if the defendant had exercised ordinary and reasonable care it would have discovered the condition and could have remedied it before the time of the injury."

Defendant submits that plaintiff has no cause to complain of these instructions since plaintiff herself requested similar instructions, which set out essentially the same rules of law as those stated in the courts instructions. Plaintiff's requested instructions No.3 and 4 read as follows:

Plaintiff's requested Instruction No. 3 states:

> "Even though defendant, acting through its servants and agents had no actual notice of the orange julius substance on the floor, if you find from the evidence that the slippery substance remained on the floor for a length of time that defendant in the exercise of reasonable care, could have discovered it, and remedied the condition, you must then find the issues in favor of plaintiff and against defendant and assess damages accordingly."

Plaintiff's requested Instruction No. 4 states:

> "You are further instructed that one who operates a mercentile establishment is not an insurer of the safety of those who enter his door."

Moreover, the instructions of which plaintiff complains set out rules of law that are firmly established in the State of Utah.

In Koer vs. Mayfair Markets , 19 Utah 2d 339, 431 P.2d. 566 (1967), the plaintiff was injured when she slipped on a grape that had been allowed to remain on the floor of defendants store. At the lower court the judge set aside a jury verdict on her behalf and entered a judgement for the defendant notwithstanding the verdict. In affirming the trial court decision the Supreme Court stated:

> "It cannot be disputed that a store owner is obligated to exercise ordinary care to keep the premises reasonably safe for the protection of those patronizing his store..... It is common knowledge that a store owner is not an insurer of the safety of his customers." ..... Therefore in order to find the defendant negligent it must be shown it knew, or in the exercise of reasonable care should have known, of any hazardous condition and had a reasonable opportunity to remedy the same." id at 343.

In Allen vs. Federated Dairy Farms Inc. 538 P.2d 175, (Utah 1975) the plaintiff sued for injuries sustained when he slipped on some cottage cheese on the floor of the defendant Albertson's store. The court granted defendants motion for Summary Judgement and plaintiff appealed. In affirming the trial court the Supreme Court stated:

> "..... It is appropriate to observe that these slip and fall cases have usually been regarded as falling in either one or the other of two different classes.
>
> The first involves some unsafe condition of a temporary nature such as a slippery substance on the floor and usually where it is not known how it got there. In this class of cases it is quite universally held that fault cannot be imputed to the defendant so that liability results therefrom unless two conditions are met: (A) that he had knowledge of the condition, that is, either actual knowledge or constructive knowledge because the condition had existed long enough that he should have discovered it; and (B) that after such knowledge, sufficient time elapsed that in the exercise of reasonable care he should have remedied it." id at 176.

See also Ohlson vs. Safeway Stores Inc., 568 P.2d 753 (Utah 1977); Long vs. Smith Food King Store, 531 P.2d 360 (Utah 1973); Howard vs. Auerbach Company, 20 Utah 2d 355, 437 P.2d, 895 (1968); Lindsey vs. Eccles Hotel Company, 3 Utah 2d 355, 284 P.2d 477 (1955).

Plaintiff next complains that Instruction No. 24 is confusing to the jury, but again simply makes the bald conclusion that it is confusing without stating how it is confusing. Defendant submits that it is a proper statement of the law and that it is a clear and simple statement of the law that could not confuse the jury.

Significantly all of those instructions, No. 20, 21, 22 and 24 of which plaintiff complains set out the duty of defendant in this case. Indeed the jury found the defendant-respondent had breached its duty and found it negligent. How then can plaintiff complain that these instructions were improper and confusing? If the jury was confused by them, then that confusion was resolved in plaintiffs favor by its finding that defendant was negligent. Plaintiff next complains of Instruction No. 25 which states:

> "It was the duty of the plaintiff Verona Wallace to use reasonable care under the circumstances in walking in the area in which she chose to walk to observe and be aware of the existing conditions then and there present and to keep a look out for obstacles or other conditions reasonably to be anticipated."

Plaintiff argues that this instruction places plaintiff in the category of "licensee" rather than "invitee". In reality this instruction simply and properly places on plaintiff the burden of using ordinary care for her own safety. Even though plaintiff was a business invitee she nevertheless had a duty to use due care for her own safety. See Cooper vs. Evans, 1 Utah 2d 68, 262, P.2d 278 (1953). In any event the distinction under the facts of this

case is meaningless. The licensee-invitee distinction has no bearing on a plaintiff's duty to use due care for her own safety, but rather has reference to the nature of the landowners duty to the user of the premises. 62 Am Jur 2d. Premises Liability § 37 - 57. Defendant has already shown that the court properly instructed the jury under the law of the State of Utah with regard to defendants duty under the facts of this case. Again, defendant points out that plaintiff has no cause to complain about the courts instructions regarding defendants duty inasmuch as that issue was resolved by the jury in plaintiff's favor.

POINT IV

THE ANSWERS IN THE SPECIAL VERDICT WERE NOT INCONSISTENT.

Plaintiff asserts, that the answers on the special verdict were inconsistent and argues that the court had a duty to clarify this confusion. Plaintiff suggests that since the jury awarded damages, they intended that plaintiff should have received those amounts and that accordingly they must have been confused (presumably when they answered the questions relating to liability). Plaintiff fails to point out however that the judge instructed the jury to answer the question on the verdict form regarding damages regardless of how they answered the questions regarding liability. The first paragraph in the courts Instruction No. 30 reads as follows:

> "You must answer the damage question no matter how you have answered any of the previous questions in the verdict. By asking you to determine the amount of damages, the court is not indicating, nor is it asking you to indicate that the party whose damages are being determined is entitled to them."

Furthermore plaintiff cannot now complain that the judge failed to clarify or to reinstruct the jury since plaintiff did not make any such request of the trial judge.

Plaintiff argues that the jury was not instructed that the instructions should be considered in their entirity and that specific instructions should be considered along with all others. Plaintiff is totally in error about this as that court did so instruct the jury in Instruction No. 39.

Plaintiff also suggests that the court was in error by not submitting this case on a general verdict. The answer to that argument is that this case was decided under Comparative Negligence and the court was asked and therefore required to submit the case on a special verdict. Utah Code Anotated § 78-27-38 (1953 as amended).

CONCLUSION

Defendant-Respondent, Cottonwood Mall, submits that there is no evidence whatsoever that the jury was confused as regards any of the instructions given to them by the court, and further that all of the instructions complained of by the plaintiff were proper statements of the law and that the judgement entered below should be affirmed.

Respectfully Submitted,

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By _____
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MAILING CERTIFICATE

I hereby certify that on the 18th day of October 1978, I mailed to the following counsel, postage prepaid, a copy of the foregoing brief:

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