1953

Alton H. Davis v. Provo City Corporation, Brigham Young University et al : Brief of Respondent

Utah Supreme Court

Clair M. Aldrich; Attorney for Respondent;

In the Supreme Court of the State of Utah

ALTON H. DAVIS, by and through his Guardian, George A. Davis,
Appellant,

vs.

PROVO CITY CORPORATION, BRIGHAM YOUNG UNIVERSITY, a corporation, and ROBERT S. CLARK,
Respondents.

CASE NO. 7905

BRIEF OF RESPONDENT

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BRIEF OF RESPONDENT PROVO CITY

STATEMENT OF FACTS

This case is before the Supreme Court to test whether or not appellant's complaint states a cause of action upon which relief can be had. The facts set forth in appellant's brief, insofar as they are consistent with those contained in the complaint, should be admitted by defendant Provo City for all purposes incidental to a determination of that question. It may be noted, however, that defendant Provo City would controvert substantially all of the alleged facts upon a trial on the merits.

POINTS RELIED UPON

POINT 1

APPELLANT'S COMPLAINT FAILS TO STATE A CAUSE OF ACTION BASED ON NEGLIGENCE AGAINST RESPONDENT PROVO CITY.

POINT 2

APPELLANT'S COMPLAINT FAILS TO STATE A CAUSE OF ACTION BASED UPON THE DOCTRINE OF ATTRACTIVE NUISANCE AGAINST RESPONDENT PROVO CITY.

ARGUMENT

POINT 1

The Utah Statutes provide that every claim against a city for damages or injury from negligence of the city in respect to any street, alley, etc., shall within thirty days after the happening of such injury or damage be presented to the Board of Commissioners. **Utah Code Annotated, 1943, Title 15-7-76.**

Appellant's complaint alleges that the injury occurred on December 7, 1951, and that the claim for damages was filed with the city on the 8th day of January, 1952. Obviously, therefore, it appears on the face of the complaint that the claim was not presented within the time required by law. Failure to present such claim to the governing body of the city within the time specified in Title 15-7-76 shall be a sufficient bar. **Utah Code Annotated, 1943, Title 15-7-77.** Presentation of claim within time fixed by law is a condition precedent to bringing action against a town. **Hurley v. Town of Bingham, 63 Utah 589, 228 P. 213; Nelson**

v. Logan City (Utah), 135 P. (2) 259; Peterson v. Salt Lake City (Utah), 221 P. (2) 591; White v. Heber City (Utah), 26 P. (2) 333; Sehy v. Salt Lake City, 41 Utah 535, 126 P. 691.

It is impossible to escape the conclusion, from the facts alleged in appellant's complaint, that negligence chargeable to the city, if any, arose in respect of a street. However, appellant does not argue that aspect of the case, but seems to rest only upon the question of general negligence on the part of the city relating to a coasting area, not in respect of a street.

Parks, playgrounds, coasting areas, etc., provided by a city for the general enjoyment of its citizens, constitute a public or governmental function, as distinguished from a proprietary undertaking. In connection with such governmental function a municipality may not be held liable for negligence of its servants or agents. **Alder v. Salt Lake City, 64 Utah 568, 231 P. 1102;** Principle reaffirmed in **Husband v. Salt Lake City (Utah), 69 P. (2) 491, 494. Niblock v. Salt Lake City, 100 Utah 573, 111 P. (2) 800.** See also, **Abbott v. City of Des Moines, 298 N. W. 649.** The action of the municipality in designating a street or area for coasting was solely for the common enjoyment of the inhabitants of the city, and was entirely without the element of special corporate benefit or pecuniary profit. There is no allegation that any charge or fee was imposed or intended. **McQuillin-Municipal Corporation, 3rd Edition, Vol. 18, Pages 194, 195, 196,** states:

> "The doctrine exempting a Municipal Corporation from private action for torts resulting from the performance of its governmental functions, steadily adhered to by the most recent judicial decisions . . . .

> is based on the familiar reason that the undertaking is not to promote the private interests of the municipality as a corporate entity, but rather for the public benefit, and in the performance of such obligation the municipality is a mere public agent, either of the state or of the local community."

See also the list of authorities therein collected, including **Burton v. Salt Lake City, 69 Utah 186, 253 P. 443.** The cases cited by the appellant do not reflect the law as shown by the more recent decisions of the Supreme Court of Utah, nor by the weight of authority from other jurisdictions.

Moreover, even conceding that there was negligence chargeable to defendant Provo City, plaintiff's complaint is still fatally defective, for the complaint shows that negligence, if any, on the part of said defendant was not a proximate cause of the injury complained of. An entirely different party or person, not connected in any way with either Provo City or defendant Brigham Young University, is shown to have been the moving factor without which the accident in question would not have taken place. See **Davis v. Mellen, 55 Utah 9, 189 P. 920.**

POINT 2

Appellant's complaint fails to state a cause of action against Provo City based on the Doctrine of attractive nuisance.

The difference between attractive nuisance and negligence is that in attractive nuisance the wrongfulness is in doing the act at all, while negligence arises from the mere failure to exercise ordinary or reasonable care in the performance of the act. See **Husband v. Salt Lake city, supra.**

It has been said that nuisance arises from an absolute duty not to do, while negligence involves requisite care in the doing.

Appellant does not allege or contend that Provo City had an absolute duty to refrain from designating the coasting area in question. The claim is based upon the alleged fact that the city did "willfully and negligently fail to take any steps to guard or protect the children against injury." **Appellant's Complaint.** There is no allegation that the city, aside from indicating that the hill could be used for coasting, did anything except place a "saw horse" at the bottom of the hill. There is no claim that the "saw horse" was of itself a dangerous instrumentality, or that the child was injured while playing with the "saw horse."

By merely designating an existing street or roadway as a coasting area, has the city created an attractive nuisance? We think not. While we have been unable to find a Utah case directly deciding the question, the Supreme Court of Washington, in **Gerritson v. City of Seatle, 2 P. (2) 1092,** held as a matter of law, that the closing of a street as a playground for children was not a nuisance.

Moreover, in seeking to charge the city with liability for injury due to attractive nuisance, notice thereof, either actual or constructive, is required. **McQuillan, Municipal Corporations, 3rd Edition, Volume 18, Page 275** and cases there collected. From appellant's complaint it appears that the injury complained of was sustained on about the same day that the coasting area was allegedly designated by the city. The complaint does not even allege that the city had actual or constructive notice of any hidden danger or that the coasting area itself could prove a dangerous instrumentality. We think appellant's claim must fail for this reason also.

CONCLUSION

It is manifest that the appellant's complaint does not state a cause of action against respondent Provo City upon which any relief could be obtained and that the decision of the lower court should be affirmed.

Respectfully submitted,

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Provo City