1988

Dennis R. Cook v. Christiansen Bros. Inc., Montmorency, Hayes & Talbot Architects, Inc., MHT Architects, Inc., and Halverson Plumbing & Heating, Inc. : Brief of Respondent

Utah Supreme Court

Raymond M. Berry; Joy L. Sanders; Snow, Christiansen and Martineau;
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Jack C. Helgesen; Helgesen and Waterfall; Attorney for Appellant.

IN THE SUPREME COURT OF THE STATE OF UTAH

DENNIS R. COOK, Plaintiff-Appellant,	)	
vs.	)	Case No. 860511
CHRISTIANSEN BROTHERS, INC., a Utah corporation; MONTMORENCY HAYES AND TALBOT ARCHITECTS, INC., a Utah corporation; MHT ARCHITECTS, INC., a Utah corporation; and HALVERSON PLUMBING AND HEATING, INC.,	)	Priority No. 13(b)
Defendants-Respondents.	)	

88-0126-CA

BRIEF OF RESPONDENT CHRISTIANSEN BROTHERS, INC.

APPEAL FROM SUMMARY JUDGMENT, SEPTEMBER 3, 1986
SECOND JUDICIAL DISTRICT COURT, WEBER COUNTY
HONORABLE DAVID ROTH, DISTRICT JUDGE

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Plaintiff-Appellant,

vs.

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LIST OF ALL PARTIES

Plaintiff-Appellant:	Dennis R. Cook
Defendants-Respondents:	Christiansen Brothers, Inc.; Montmorency, Hayes and Talbot Architects, Inc.; MHT Architects, Inc.; Halverson Plumbing and Heating, Inc.
Third-Party Plaintiff:	Montmorency, Hayes and Talbot Architects, Inc.
Third-Party Defendant:	Van Boerum and Frank Associates, Inc.

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STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

Whether the trial court correctly ruled as a matter of law that the design and construction of the drinking fountain was not the proximate cause of plaintiff's injuries.

STATEMENT OF THE CASE

Plaintiff brought suit for personal injuries received in a fall at his place of employment alleging that negligent design and construction in the placement of a water fountain proximately caused his injuries.

Defendant Montmorency Hayes and Talbot Architects, Inc., filed a third-party complaint against Van Boerum and Frank Associates.

Defendant MHT Architects was dismissed from the action on the ground that it was not a proper party.

After taking plaintiff's deposition, defendants moved for summary judgment arguing that the design, construction and placement of the water fountain did not proximately cause plaintiff's fall and injuries. The Honorable David Roth granted judgment in favor of defendants as a matter of law. Plaintiff appeals from that judgment.

STATEMENT OF FACTS

Plaintiff was working as the assistant manager of Sears Automotive Center on November 21, 1981, when he slipped and fell receiving injuries. Plaintiff alleges his injuries were the proximate result of negligent design and construction in the placement of a drinking fountain in the automotive shop. [R.1.]

The water fountain was approximately 18 inches away from a 12 inch by 12 inch hole in the floor used as a waste oil drain. [R.96, page 5.]

When asked to describe the area in which he fell, plaintiff testified in his deposition:

> A: The general area where the fountain was at there is a normally a couple of waste oil containers.
>
> Q: Would you please describe those.

A: They are about 3 1/2, 4 feet tall and they have a bucket built on top that you catch the oil in. And they have a petcock on the bottom and they slide the oil containers over the hole and open the petcock.

But as I mentioned, the oil containers did seep. They did leak. And there was oil by the hole and around the fountain. There was always oil normally in the shop--the racks, hydraulic racks do leak some too and there is oil around the racks.

[R.96, page 21, lines 1-13.]

When asked if the floor was slippery, plaintiff testified in his deposition:

A: Well, a floor in any shop--it doesn't matter where it's at--is always slick. It doesn't matter where you are, the least bit of oil or antifreeze is slick. It doesn't really matter what part of the shop you are in there is always something on the floor.

Q: And you always have something slippery then on your boots, then I guess?

A: Yes, I would say so. That's almost a part of the automotive environment. There is always oil.

[R.96, page 16, lines 19-25, page 17, lines 1 and 2.]

At the time of his fall, plaintiff was walking to the water fountain to get a drink. Another worker said something and plaintiff turned losing his footing. One foot slid toward the drain hole and plaintiff fell backward into the fountain.

[R.96, page 7.]

When asked what caused his fall, plaintiff testified in his deposition:

A: I don't know for sure whether it was the oil on the floor or whether it was just my turning around when the gentleman said something to me. I know it's the oil that caused the problem when I lost my footing when I turned.

[R.96, page 21, lines 1-4.]

Plaintiff testified that he would have been in the vicinity of his fall sometime during the day even if the water fountain had not been located there:

Q: So even if the drinking fountain hadn't been in the location that it was, you still would have been in the vicinity of that oil during the day; is that correct?

A: I would say so, yeah. But everybody is.

Q: Okay.

A: There is always a certain amount of oil on the floor.

[R.96, page 56, lines 1-7.]

Plaintiff opposed defendants' motion for summary judgment by filing an affidavit stating:

3. The injury would not have happened but for the fact that the drinking fountain and oil drain were placed so close to each other than an accident was inevitable.

4. I believe the poor placement of the drnking fountain next to the oil drain was the principal cause for my injury.

[R. 148.]

SUMMARY OF ARGUMENT

The design, construction and placement of the water fountain in the Sears Automotive Center did not proximately cause plaintiff's injuries. Plaintiff testified the entire shop floor was covered with a certain amount of oil and that he would have been in the vicinity of his fall that day even if the water fountain had not been there.

ARGUMENT

THE DESIGN, CONSTRUCTION AND PLACEMENT OF THE WATER FOUNTAIN AT THE SEARS AUTOMOTIVE CENTER WAS NOT THE PROXIMATE CAUSE OF PLAINTIFF'S FALL AND INJURIES.

Plaintiff admits that the entire shop floor was slippery with oil and antifreeze spills, that the soles of his shoes were coated with slippery material and that he would have been in the vicinity of the oil drain hole the day he fell regardless of whether the drinking fountain had been located nearby. Thus, under the plaintiff's own version of the facts, the fountain's position did not contribute to his fall.

Even assuming that the fountain was negligently placed in the vicinity of the oil drain hole, negligence without more does not create liability. Plaintiff must also show that defendants' negligence proximately caused the injuries complained of. Proximate cause is:

> [T]hat cause which, in natural and continuous sequence, (unbroken by an efficient intervening cause), produces the injury and without which the result would not have occurred. It is the efficient cause--the one that necessarily sets in operation the factors that accomplish the injury.

Mitchell v. Pearson Enterprises, 697 P.2d 240, 245-46 (Utah 1985).

In Mitchell, Donald P. Mitchell was shot and killed in his hotel room at the Hilton Hotel in Salt Lake City, Utah. The police developed three theories as to what occurred: (1) Mitchell surprised a burglar who had entered the room with a pass key and the burglar shot Mitchell to avoid recognition and apprehension; (2) A robbery had taken place, the robber entering the room either with a pass key or surprising Mitchell in the elevator or hallway; (3) Mitchell had been executed gangland style, the killer gaining entrance to the room with a pass key or having accosted Mitchell in the hallway or elevator. The trial court granted summary judgment in favor of Pearson Enterprises, the operator of the Salt Lake Hilton. This Court affirmed stating that even if the hotel was negligent in providing security, there was no evidence that established a direct causal connection between the alleged negligence and the shooting.

In the case at hand the water fountain's location in the vicinity of plaintiff's fall is not even a cause let alone a

proximate cause of plaintiff's fall. The presence of the water fountain did not "produce the injury." Plaintiff testified that he would have been in the area of the oil drain hole in any event. Thus, just as in Mitchell there is no evidence establishing a direct causal link between the water fountain and plaintiff's fall. The evidence must do more than merely raise a conjecture as to the cause of injury. The jury may not be allowed to speculate on proximate cause. When evidence leaves it to conjecture, which of two possible causes resulted in injury and the defendant is liable for only one of those causes, plaintiff's claim fails as a matter of law. Sumison v. Streator-Smith, Inc., 103 U. 44, 132 P.2d 680 (1943).

In Sumison, plaintiffs hired a tow truck to tow their disabled vehicle. The tow truck driver failed to use an arm signal to notify traffic that he was merging from his parked position into a lane of traffic. Road conditions were slippery. A coal truck slid into the tow truck damaging plaintiffs vehicle. The trial court granted defendant's motion for nonsuit at the close of plaintiffs' evidence. This Court affirmed finding that although an arm signal might have prevented the accident, it was just as likely that the coal truck driver either saw the tow truck and elected to proceed or did not see it and would not have seen an arm signal. This Court stated:

> The evidence must, however, do more than merely raise a conjecture or show a probability as to the cause of the injury, and no recovery can be had if the evidence leaves it to conjecture which of two probable causes resulted in the injury, where defendant was liable for only one of them. . . . While deductions may be based on probabilities, the evidence must do more than merely raise a conjecture or show a probability. Where there are probabilities the other way equally or more potent the deductions are mere guesses and the jury should not be permitted to speculate. The rule is well established in this jurisdiction that where "the proximate cause of the injury is left to conjecture, the plaintiff must fail as a matter of law."

Id. at 683 (citations omitted).

Plaintiff in the case at hand, is asking the court to allow a jury to speculate on whether he would have slipped and fallen if the water fountain had not been nearby. The law does not allow such speculation.

Plaintiff filed his affidavit in opposition to the motion for summary judgment stating "I believe the poor placement of the drinking fountain next to the oil drain was the principal cause for my injury". (Emphasis added.) The affidavit, however, does not comply with the requirements of Rule 56(e), Utah Rules of Civil Procedure. Such an affidavit must be made on personal knowledge and set forth facts that would be admissible in evidence and show affiant's competence to testify on the matters referred to. Walker v. Rocky Mountain Recreation Corp., 29 U.2d 274, 508 P.2d 538 (1973). Affiant's beliefs and opinions would be inadmissible testimony at trial.

Therefore, the trial court properly disregarded plaintiff's affidavit.

CONCLUSION

As a matter of law, the design, construction and placement of the water fountain was not a proximate cause of plaintiff's injuries and summary judgment in favor of defendants should be affirmed.

DATED this 18th day of February, 1987.

SNOW, CHRISTENSEN & MARTINEAU

By _____
Raymond M. Berry
Joy L. Sanders

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CERTIFICATE OF SERVICE

I hereby certify that I served four true and correct copies of the foregoing Brief of Respondent Christiansen Brothers, Inc. upon the following parties by causing the same to be mailed first class, postage prepaid, on the 18 day of February, 1987:

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