

1954

# Mary Ramirez v. Ogden City : Brief of Appellant

Utah Supreme Court

Follow this and additional works at: [https://digitalcommons.law.byu.edu/uofu\\_sc1](https://digitalcommons.law.byu.edu/uofu_sc1)



Part of the [Law Commons](#)

Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errors.

Wallace, Adams & Peterson; Attorneys for Appellant;

---

## Recommended Citation

Brief of Appellant, *Ramirez v. Ogden City*, No. 8233 (Utah Supreme Court, 1954).  
[https://digitalcommons.law.byu.edu/uofu\\_sc1/2255](https://digitalcommons.law.byu.edu/uofu_sc1/2255)

This Brief of Appellant is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs (pre-1965) by an authorized administrator of BYU Law Digital Commons. For more information, please contact [hunterlawlibrary@byu.edu](mailto:hunterlawlibrary@byu.edu).

RECEIVED

Case No. 8233

DEC 8 1956

Law Library  
U. of U.

IN THE  
SUPREME COURT  
OF THE STATE OF UTAH

---

MARY RAMIREZ,

Appellant,

vs.

OGDEN CITY, a municipal  
corporation of the  
State of Utah,

Respondent.

---

APPELLANT'S BRIEF

---

WALLACE, ADAMS & PETERSON  
Attorneys for Appellant.

## TABLE OF CONTENTS

	Page
Statement of the Case . . . . .	1
Statement of Facts . . . . .	2
Statement of Points:	
A. That the trial court erred in dismissing appellant's amended complaint with prej- udice. . . . .	9
B. That the judgment of dismissal was against the facts and the law. . . . .	9
C. That the relationship of landlord and tenant existed between the respondent and the Havana Club at the time of accident . . . . .	9
D. That the respondent was engaged in a proprietary function . . . . .	9
E. Even though the operation of Community Center was a governmental function in general, it was proprietary as to appel- lant at time and place and under circum- stances of appellant's injury. . . . .	9
Argument . . . . .	9
Authorities Cited:	
Burbidge vs. Utah Light and Traction Co. (Utah 1922), 211 P. 691. . . . .	13
Burton vs. Salt Lake City, 253 P. 443. . . . .	22
Chafor vs. City of Long Beach, 163 P. 670. . . . .	20

	Page
Davis vs. Provo City, 265 P.(2) 415 . . . . .	14
Engles vs. City of New York, 6 N.Y. Supp. 2nd, 436 . . . . .	20
Griffin vs. Salt Lake City, 176 P.(2) 156 . .	22
Harris vs. City of Bremerton, 147 P. 638 . .	13
Lowe vs. Salt Lake City, 13 Utah 91, 44 P.1050 . . . . .	10
Lunt vs. Post Printing and Publishing Company 110 P. 203 (Colorado 1910) . . . . .	12
Pincock vs. McCoy, 281 P. 371 (1929) . . . .	11
Rhodes vs. City of Palo Alto, 223 P.(2) 639.	18
Sanders vs. City of Long Beach, 129 P.(2) 511 . . . . .	20
Worden vs. New Bedford, 131 Mass. 23, 41. Am. Rep. 185 . . . . .	15

#### Texts Cited:

Restatement of Torts, Section 356 . . . . .	14
51 C.J.S., Section 159, page 766 . . . . .	15
51 C.J.S., Section 156, page 762 . . . . .	15
Thompson on Real Property, Vol. 3, Page 14, Section 1022 . . . . .	16
37 Am. Jur., page 667 . . . . .	17
37 Am. Jur., page 732 . . . . .	17

	Page
McQuillan on Municipal Corporations, Vol. 1, Section 302 . . . . .	18
Conclusion. . . . .	22

Case No. 8233

IN THE  
SUPREME COURT  
OF THE STATE OF UTAH

---

MARY RAMIREZ,

Appellant,

vs.

OGDEN CITY, a municipal  
corporation of the  
State of Utah,

Respondent.

---

STATEMENT OF THE CASE

This appeal is taken from a judgment of dismissal of appellant's amended complaint with prejudice by the lower court (Tr. 038). The issues were determined by the trial court at a pre-trial conference. Thereafter at the time of trial certain facts were stipulated to be true and contentions of the parties discussed and settled. Thereupon the cause was submitted to the

Court upon the pre-trial order (Tr. 030) and upon stipulated facts (Tr. 043) and upon the respondent's answers to appellant's interrogatories (Tr. 014).

### STATEMENT OF FACTS

Agreed facts, as stated in numbered paragraphs in the pre-trial order are as follows:

1. That the Respondent is a municipal corporation of the State of Utah.
2. That Ogden City owns the land upon which is located the premises wherein the appellant was injured.
3. That on the eighth day of March, 1952, at approximately nine o'clock p.m., the appellant attended a social function being held in the Community Center, which is the property owned by Ogden City mentioned in 2 above.
4. That while in the ladies' powder room of the Community Center Building, the appellant's dress brushed against an unprotected gas space heater and caught fire, inflicting injuries upon her person.
5. That on at least three occasions prior to

March 8, 1952, other groups had had access to the

Community Center Building and had paid to the director a sum of money for the use thereof.

6. That the appellant is obligated to Doctor Grua, a medical doctor, in the sum of \$500.00 for services rendered her in treating her for injuries which she received and about which she complains in this action and that said sum is a reasonable sum for the services rendered.

7. That the appellant obligated herself to pay to the Dee Hospital the sum of \$150.00 for blood transfusions furnished her in the necessary care and treatment of her as a result of injuries she received and about which she complains in this action.

8. That pre-trial Exhibit 1 is a correct summary of the disbursements, salaries, operating expenses, repairs, maintenance, and revenues as shown by the books and records of the Director of Finance of Ogden City for the years 1948 to and including 1953.

9. That on March 8, 1952, the Havana Club held a function in the Community Center Building and paid to the director thereof the sum of fifteen dollars,



and that said Havana Club charged those who participated in a dance which they were sponsoring seventy-five cents per person.

10. That pre-trial Exhibit 2 is a photograph of the gas heater against which appellant's clothing was ignited and of which she complains in this lawsuit.

11. That Mrs. Buelah Jones was at the time of injuries complained of herein the director of the Community Center Building and was in the employ of the respondent and that her duties were to direct recreational activity at the Community Center Building.

12. That from on and about September 1, 1946, to May 1, 1952, the Community Center Building was under the general management of a board of directors which had been elected at open mass meeting of the members of the public who had occasion to use said Community Center Building and that all activities in connection with that building were directed by that board; that prior to March 8, 1952, and at all times material to the matters involved in this lawsuit certain men served at the invitation of Commissioner Thomas East

as advisors to the board of directors elected as aforesaid.

13. That from September 3, 1946, to November 1, 1946, the snack bar and concession was rented by Ogden City to a third party and charged therefor rental at the rate of \$101.00 per month; that thereafter the concession and snack bar was rented to another person at a rate of \$50.00 per month and that the relationship as above set forth was terminated prior to the year 1948.

14. That appellant filed with the respondent timely a claim in the amount of \$75,000.00 and that more than ninety days elapsed thereafter before the filing of this suit.

15. That all funds received by the director of the Community Center Building were expended under the direction of the board of directors elected as set forth in 12 above.

Further facts, not disputed, are as follows:

The premises known as the Community Center came to Ogden City by deed on October 4, 1939. (Interroga-

tory 1). Between that date and November 20, 1944, barracks buildings were moved onto the premises and there readied for occupancy. On November 20, 1944, Ogden City entered into a lease with the United Service Organization for the said premises for a period from date until cessation of hostilities with Germany plus six months, which period ended in the fall of 1946 (Int. 11).

In August 1946, Tom East, a city commissioner of Ogden City, called a mass meeting of citizens, at which meeting a board of directors was created by a resolution of said citizens, and advisors to assist the board of directors were informally nominated by Mr. East, said commissioner of parks, to serve on a voluntary basis (Int. 12).

The commissioner of parks to Ogden City, Mr. East, in calling said meeting and in appointing said advisors, was "acting for himself alone without the concurrence of the Ogden City Commission". (Int. 5).

Said board fixed its own policy, was atonomous to itself. It never received instructions nor directions

from Ogden City concerning the manner in which it operated said Center.

The premises were returned to Ogden City in the fall of 1946. Said board, created as above set out, had from September 1, 1946, until after the accident herein complained of, "the direct and active management, supervision, operation and control of said Community Center".

Both under the lease with the United Service Organization and its arrangement with said board of directors, Ogden City annually contributed money for the maintenance and operation of said Community Center (Int. 7 and 15).

From the time the premises were returned to Ogden City by the United Service Organization in the fall of 1946 until after the time of the injury herein complained of, Franklin Richards, the Director of Parks and Public Property for Ogden City, had charge of the maintenance of said Community Center (Int. 6).

Beulah Jones became the director of said Community Center on or about September, 1951, and con-

tinued thereafter as such director until after the time of the injury herein complained of. She received her salary from Ogden City, but was under the direction and supervision of said board (Int. 6 & 7).

On March 8, 1952, and on at least four other occasions the Havana Club, an organization of Spanish speaking people, rented a portion of said Community Center premises for the purpose of holding a dance. On March 8th, 1952, and said four other occasions, said Havana Club paid to the director the sum of \$15.00 for the use of said premises, for which an entry of "hall rental" was made by the director in her report to the said Ogden City (Exhibit 4).

The Havana Club charged those who participated in the dance the sum of seventy-five cents per person, which the appellant intended to pay upon entering the portion of the building where the dance was held. In said Community Center there is but one ladies' rest room, to which the appellant and her sister-in-law went directly upon entering said Community Center Building.

The Exhibits 2 and 3 are a picture and diagram of said premises. While standing before a mirror the appellant's dress brushed against the small defective gas stove, situated in part underneath the only mirror in said rest room, and was ignited; and she suffered the injuries complained of.

#### STATEMENT OF POINTS

- A. That the trial court erred in dismissing appellant's amended complaint with prejudice.
- B. That the judgment of dismissal was against the facts and the law.
- C. That the relationship of landlord and tenant existed between the respondent and the Havana Club at the time of accident.
- D. That the respondent was engaged in a proprietary function.
- E. Even though the operation of Community Center was a governmental function in general, it was proprietary as to appellant at time and place and under circumstances of appellant's injury.

#### ARGUMENT

It is appellant's contention:

1. That a landlord-tenant relationship existed at the time of the injury between the respondent Ogden City Corporation and the Havana Club and that said Havana Club was either a lessee directly from Ogden City or a sub-lessee through the Board of Directors of the Community Center. That in either relationship Ogden City is responsible to the Appellant as a landlord under the authority of

Lowe vs. Salt Lake City, 13 Utah 91,  
44 P. 1050.

That case was an action for damages for personal injuries. The defendant rented a portion of the City Hall to the Legislature as a legislative chamber for holding its session in 1889, received rent for the use thereof. It was found that the Legislature was rightfully there. The defendant was the owner and occupant of the premises at the time of the accident. The plaintiff was a member of the Legislature, and was rightfully on the premises, attending a night session. There was an outhouse in the rear of the premises. It was locked up with a key in some office in the building. Plaintiff went out in the dark, there being no

light in the yard, got off the pathway leading to the outhouse and fell into an open hatchway and was injured. The jury returned a verdict for the plaintiff. Defendant conceded that the plaintiff had the right to go to the outhouse but said he was restricted to the pathway and when he turned off it he was a trespasser and could not recover. The court held, among other things, that the yard was appurtenant to the hall, and, in the absense of any restrictions, the members of the Legislature had a right to make a proper use thereof; and that plaintiff's use was not unlawful. In part the Court said:

"We think that the leaving of the hatchway in an unguarded and unprotected condition by the defendant, as shown by the evidence, and the failure to have any light in the yard by which its condition could be seen, was such negligence as rendered it liable for any injury which was caused thereby."

The Supreme Court of Idaho, in the case of

Pincock vs. McCoy, 281 P. 371

distinguished that case from the Lowe case upon the ground that the plaintiff in the Idaho case was a police officer who was upon the premises in question



as a mere licensee. In referring to the Lowe case, supra, the Idaho Court said:

"Specially commended to our attention by appellant is the case of Lowe vs. Salt Lake City 13 U. 91, 44 P. 1050, 57 Am. St. Rep. 708, an examination of which discloses that it was decided upon the principal of landlord and tenant, not applicable here; the court stating that the defendant, by invitation, induced the respondent to come upon the premises, knowing their dangerous condition and was therefore liable for the injury." (Under-scoring ours.)

The rule laid down in the Lowe case, supra, was referred to with approval in the case of

Lunt vs. Post Printing and Publishing Company,  
110 P. 203

in this language:

"\* \* \* It will be noticed that the rule itself, as announced in the case of Bennett vs. Railroad Co., supra, and in other cases cited by plaintiff (Atlanta Cottonseed Oil Mills vs. Coffee, 80 Ga. 145, 4 S.E. 759, 12 Am. St. Rep. 244; Beck vs. Carter, 68 N.Y. 283, 23 Am. Rep. 175; Lowe vs. Salt Lake City 13 U. 91, 44 P. 1050, 57 Am. St. Rep. 708; Learoyd vs. Godfrey, 138 Mass. 315; Beehler vs. Daniels 18 R.I. 563, 29 Atl. 6, 27 L.R.A. 512, 49 Am. St. Rep. 790; Hart vs. Cole, 156 Mass. 475, 31 N.E. 644, 16 L.R.A. 577), bases the question of recovery primarily upon the fact that an invitation, express or implied, was given to the injured party, by which invitation he was induced, or lead, or lured, or enticed by the defend-

ant upon the premises where the injury occurred." (Underscoring ours.)

The Court distinguished the Lunt case from the Lowe case, supra, in that the plaintiff Lunt was a fireman who died from inhaling fumes in a building which was on fire, the Court holding that the plaintiff was a mere licensee.

The Lowe case, supra, was cited with approval in the case of

Harris vs. City of Bremerton 147 P. 638

which was an action for personal injuries from falling into an open space between the two floats constituting a public municipal dock, in which the Supreme Court of Washington held that the City's negligence was for the jury, and this, notwithstanding the fact that the plaintiff paid no fee for landing his launch at the wharf.

The rule in the Lowe case was also recognized in the case of

Burbidge vs. Utah Light and Traction Co.  
211 P. 691

In the recent decision of the Utah Supreme Court

in the case of

Davis vs. Provo City, 265 P.(2) 415

the Court analyzed the relationship between Provo City, Brigham Young University and the plaintiff and referred to Section 356 of the Restatement of Torts in the following language:

"In the Restatement of Torts sec. 356, the general concept in such circumstances is summarized: 'Except as stated in secs. 357-362, a lessor of land is not liable for bodily harm caused to his lessee or others upon the land with the consent of the lessee or a sublessee by any dangerous condition whether natural or artificial which existed when the lessee took possession.' Further, the lease may be created by words or other conduct expressing consent to the lessee's possession. Sec. 355 (a). The only applicable exception listed is at sec. 395: 'A lessor who leases land for a purpose which involves the admission of a large number of persons as patrons of his lessee, is subject to liability for bodily harm caused to them by an artificial condition existing when the lessee took possession, if the lessor (a) knew or should have known of the condition and realized or should have realized the unreasonable risk to them involved therein, and (b) had reason to expect that the lessee would admit his patrons before the land was put in reasonably safe condition for their reception.' This doctrine is applicable irrespective of whether such person pays for his admission or is admitted free of charge. sec. 359 (c), and irrespective of whether the lease

is for rent or other valuable consideration or is a free gift, Sec. 359 (d)." (Under-scoring ours.)

A like result was reached in

Worden vs. New Bedford 131 Mass. 23,  
41 Am. Rep. 185.

Furthermore, it is apparent from the circumstances of this case that there was a tenancy at will between Ogden City and the Board operating the Community Center. As hereinafter stated, the United Service Organization leased the premises from Ogden City; and thereafter the Board which operated the Community Center continued the same type of operation without a formal lease. But whether or not the City had previously leased to the United Service Organization a tenancy at will arose between the Board and the defendant City. In

51 C.J.S. Section 159, 766

as to "mere permissive occupancy" the rule is stated:

"A permissive occupation of real estate, where no rent is reserved or paid and no time is agreed on to limit the occupation, is a tenancy at will."

In the same volume, at page 762, section 156, it is

stated:

"The tenant at will is in possession by right with the consent of the landlord either express or implied. \* \* \* His estate is a leasehold."

(See note 15 where it is indicated that the words "lease", "lessor", and "lessee" include in appropriate instances tenancies at will and parties to such tenancies.

Commonwealth vs. Goldberg 64 N.E.(2) 438, 319 Mass. 7, and cases therein cited.)

See Thompson on Real Property, Volume 3, page 14, Section 1022.

2. That the respondent Ogden City was engaged in a proprietary function at the Community Center at the time and place in question for the following reasons:

a. Ogden City has never assumed control over said premises from the time it came into existence.

b. That the functions of said Community Center were under the direct control of the United Service Organization while leased to them and thereafter under the control of the Board of Directors mentioned above.

c. A leasing of said premises to the United Service Organization was a proprietary function and the same lack of governmental control is evidenced in

the arrangement with the Board. That Ogden City did not consider the operation of the Community Center as a governmental function is borne out by the fact that it did not assume responsibility for operating said Center and did not legally delegate such responsibility even if it could do so. Article I of the Ogden City Charter provides in part as follows:

"All powers of the City shall be exercised as prescribed by this Charter, or if not herein prescribed, then as prescribed by ordinance."

We have made a search and have been unable to find any ordinance relating to the operation of the Community Center by the City. That such is the case is also borne out by the answers to the interrogatories on file herein.

While it is true that a so-called Board of Directors was set up as previously outlined herein, this Board was not acting as an arm of the City or under any expressed power derived therefrom. The limit of the power to legally create such a Board is set out in

37 Am. Jur., page 667, et seq.

See also Delegation by Municipality, 37 Am. Jur., page 732.

As concisely put in

McQuillan on Municipal Corporations  
Volume 1, Section 382:

"Therefore the principle is fundamental and of universal application. The public powers conferred upon a municipal corporation and its officers and agents cannot be surrendered or delegated to others."

The City's contention the operation of the Center was a governmental function is at variance with the rule prohibiting the delegation of authority and the facts in this case. If, therefore, the City could not delegate the power certainly Commissioner East could not have done so.

3. Even if the operation of the so-called Community Center were held to be a governmental function in general, the function became and was proprietary as to the appellant at the time and place and under the circumstances of appellant's injury.

That the City may be engaged in a governmental and proprietary activity at the same time and place is borne out by the following case:

Rhodes vs. City of Palo Alto 223 P.(2) 639.

In that case the Community Center was situated in a

public park, included a theatre, soft ball park, play ground and other facilities. The parking lot was available to any of the persons using the facilities. The plaintiff drove to the parking lot to park her car, she walked toward the auditorium, stepped into a hole in the pavement, causing her to fall, resulting in the injuries sued for.

Defendant claimed (1) that the community theatre and parking lot were governmental functions because they benefitted the public welfare; (2) that the operation of the parking lot was a governmental function even if the operation of the community theatre was a proprietary one; (3) also that the community theatre was donated by a philanthropist who expressed the expectation that it would advance the interests of adults in recreation activities; and (4) that the theatre was administered by the City recreation department. The court in analyzing these conditions stated (page 642):

"True, it was maintained for the benefit of the community in the sense that it afforded the populace a meeting place for many forms of amusement and instruction. But in all



these respects it differed no whit from any other auditorium or assembly hall built and maintained by private capital for the same purposes."

The verdict for the plaintiff was affirmed.

Two cases cited in the Rhodes case, supra, were:

Chafor vs. City of Long Beach 163 P. 670

Sanders vs. City of Long Beach 129 P.(2) 511.

The Chafor case was decided prior to the enactment of the Public Liability Act of California, but that act was not a factor in the decision reached in any one of the three cases cited above.

A like holding is found in

Engles vs. City of New York, 6 N.Y. Supp. 2nd, page 436

where an action was brought against the municipality for injuries sustained by the plaintiff on alighting from an elevator to visit a pay patient in the hospital. The verdict for the plaintiff was affirmed on appeal, the Court pointing out that although the operation of Kings County Hospital was certainly a governmental function costing the City about three million dollars while receipts were slightly over one hundred thousand

dollars, the City, while furnishing hospitalization to plaintiff's sister, was engaged in an enterprise for gain and as a consequence thereof owed certain duties to the patient and her visitors. The jury found among other facts that plaintiff sustained her injury while visiting her sister who was paying for the service, that as to that patient the hospital was being conducted for profit and that at the time of the accident so far as plaintiff was concerned the City was not rendering a public or governmental service but was exercising its proprietary or corporate powers and said at page 438:

"No one will contend that if a city conducts an activity for profit, that it is performing a governmental function. That the city enjoys both powers - proprietary or private and governmental or public. It may exercise those two powers under the same roof - at one institution."

An analysis of the several Utah cases brought against the municipal corporations reveals that in all of the cases where the rulings were adverse to the plaintiffs, the city was engaged in its usual governmental functions such as enforcing police regulations,

preventing crime, preserving public health, preventing fires, etc. In the two cases in which rulings were found in favor of the plaintiffs

Burton vs. Salt Lake City, 253 P. 443

Griffin vs. Salt Lake City, 176 P.(2) 156

the existence of other facts lead the Court to the conclusion that the municipality in those cases was engaged in proprietary functions. The appellant contends that the facts in the present case are readily distinguishable from all of the other Utah cases and within the scope of the Griffin case, supra.

### CONCLUSION

We respectfully submit that the Court erred in dismissing appellant's amended complaint with prejudice, and that the cause should be remanded to the lower court for trial under appropriate instructions.

Respectfully submitted,

WALLACE, ADAMS & PETERSON  
Attorneys for Appellant