

1954

Mary Ramirez v. Ogden City : Brief of Respondent

Utah Supreme Court

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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.

Respondent's Brief

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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 FACTS

Inasmuch as appellant's statement of facts omits substantially all of the uncontroverted facts on which the Trial Court very properly based its judgment, the respondent is compelled to amplify the statement. Also, because the appellant's statement is not in chronological order and in some important aspects is highly formalized and requires reference to the record for completeness, it has occurred to the respondent that a chronological narrative statement of the facts might be of some assistance to the Court. For this reason and because the facts are relatively brief the respondent ventures upon a restatement of the facts even at the risk of some repetition.

The record comes to this Court in three independent parts, each part separately paged. For the purpose of differentiating we shall refer in our statement to the Clerk's files of the pleadings, interrogatories and answers, etc., as the "Record" abbreviated as "R". The reports "Transcript of Proceedings" will be referred to as the "Transcript" (T); and the deposition of the plaintiff-appellant as the "Deposition" (Dep.).

In this action the appellant sued the respondent city for personal injuries received when appellant's rayon net dress caught fire when it brushed against a hot stove in the "Ladies Powder Room" of the Ogden Community Center, a public recreational facility maintained by Ogden City. The controlling facts were stipulated at a pre-trial conference upon which the pre-trial order was based and at a subsequent further pre-trial conference held by stipulation and it was agreed by the parties that a law question only was presented to the Court for decision. (T. 4) The matter was submitted to the Court upon the agreed and uncontroverted facts and the Court then entered judgment for the respondent city, no cause of action upon the ground that under the facts it appeared as a matter of law that the defendant city operated the premises involved as a governmental function for public recreation and was therefore not liable for negligence or nuisance, if any, committed or maintained by its agents or servants in the premises. (R. 038-039) This appeal is from that judgment.

It must be noted that the appellant propounded interrogatories to the respondent city, which so far as competent were answered under oath. (R. 014; 019) It was stipulated that the facts stated in the answers were

not challenged by the appellant and might be considered as a part of the basis for any motion for judgment made by respondent. (T. 4-5) Similarly, the appellant's deposition was submitted in evidence as a pre-trial exhibit. (T. 5) The facts as stipulated or admitted to be unchallenged are briefly outlined as follows:

Ogden City is a Municipal Corporation of the State of Utah. (R. 030) The City acquired the premises in question on October 4, 1939, by deeds from Weber County which provide that the property "is to be used exclusively as a community recreational center." During the war the buildings (which were surplus Army barracks placed thereon by the Army) were operated by the U. S. O. as a recreational center for Negro troops. Under date of November 20, 1944, the City leased the premises to the U. S. O. for a term to end six (6) months after the cessation of hostility with Germany. (R. 019) The premises were surrendered by the U. S. O. in the late Summer or Fall of 1946. At about that time a mass meeting of the inhabitants of Ogden interested in the operation of the center as a public recreational facility was convened and elected a "Board of Directors" for the Center and City Commissioner Thomas East designated certain other citizens to act as "advisors" to this unofficial board of directors. To this board of directors there was entrusted the active direction and management of the Community Center as a public recreational facility. In so acting Commissioner East had no authority from the Ogden City Board of Commissioners. (R. 031; 022-024) This board voluntarily assumed to assist and direct the operation of the Center as a public service rendered without obligation for the

benefit of the inhabitants of Ogden City. It had no legal authority, but directed the Director of the Center and its affairs only by common consent. No instructions as to the management were given to the board by anyone. This situation continued up to the time of the accident involved. (Ibid.)

Except during the period when the Community Center was leased to the U. S. O. it has always been operated "as a public recreational center, and all persons have had full leave and license to use the same at their wish and convenience as a public park or recreational facility, and the same has never been closed to anyone." (R. 020-021) The Center was available at all times to all of the people, who were free to go and use it whenever they wanted to do so, and the appellant understood that she was free to use the facilities there. (Dep. 20-21)

From September 3, 1946 to November 1, 1946, the "snack bar" concession was granted by the City to a third party for a monthly consideration of One Hundred One and 00/100 Dollars (101.00). Thereafter the snack bar concession was granted to another person for a consideration of Fifty and 00/100 Dollars (\$50.00) per month, but this relationship was terminated prior to the year 1948. (R. 031-032)

Beginning sometime prior to 1948 the City received no revenue whatsoever from the operation of the Center, as disclosed by the financial statement of the City's Director of Finance (Exhibit 1) which was stipulated to be a correct statement. (R. 031) It is most important to note that the City charged nothing and received nothing for the use of the Center which was available

to the public generally for use without charge as a public recreational facility. At the same time the City was spending some \$5,963.30 to \$7,349.63 annually out of public taxes to maintain the premises as a public recreational facility. (R. 024; 031-032) There is absolutely nothing in the record anywhere to indicate that the City operated the Center as a business or for profit or in competition with any private business whatsoever or that it could possibly have been operated in the same manner by any private enterprise. Nor is there any evidence either admitted or proffered that the City leased the premises (and particularly the "powder room", where the accident occurred) to the Havana Club or to anyone else. It is true that the Director of Recreation at the Center granted that club permission to give a *public dance* on another part of the premises and that she received Fifteen and 00/100 Dollars (\$15.00) from the club which she noted as "hall rental", but (1) this was entirely outside of her duties as a director of recreation, which were confined to the direction of recreational activity at the Community Center (R. 031); (2) the arrangement was neither authorized nor ratified by the City Commission, which alone has legal power to lease public property; (3) the money was never received by the City nor was any report thereof made to any city official until report was made in response to inquiry in the course of the investigation of appellant's claim; (4) the money was directly expended for recreational items under the general direction of the unofficial board of directors, and (5) the arrangement did not in any way affect the status or the powder room in which the accident occurred, which was in another

wing of the building, and was as always open to *all* female members of the general public. (R. 022-026; R. 024A; 031-032; Exhibit 1; Exhibit 4)

Moreover, there is nothing in the record to show that any attempt was made to grant the Havana Club the exclusive use of any portion of the Community Center or that any member of the public desiring access to any part of the Center would or could have been excluded therefrom. It is true also that the Havana Club charged those who participated in its public dance 75c per person, but, of course, liability on the City cannot be predicated on charges made by the Havana Club. It is also true that the Havana Club had contributed to the Director on three previous occasions during a five months period in connection with its use of a portion of the Center for a dance. On the other hand the City was expending monthly a sum in excess of \$575.00 for the maintenance and operation of the Center as a part of its public parks and recreational system. (Exhibit 1)

The sums paid or contributed by the Havana Club to the Director, as well as other donations and the proceeds of other charitable fund raising activities conducted under the direction of the unofficial Board of Directors as shown by Exhibit 4, were expended largely for miscellaneous recreational items such as dominoes, ping pong sets, checkers, etc., which were made available for use by the public at the Center without charge of any kind. (T. 12-13)

On the night of the accident the appellant came to the Community Center, intending to attend the dance which was to be held in the south wing of the Center by

the Havana Club. She went directly to the powder room situated in the north wing and there the accident occurred. It is not contended that she or anyone else was ever charged for the use of the powder room or that its use was restricted to patrons of the dance sponsored by the Havana Club.

At the further pre-trial hearing held at the time originally set for the trial the appellant conceded that she had no evidence to submit in addition to that already in the record in connection with the pre-trial to show that the City was engaged in a proprietary function and it was upon this record that the motion of the defendant City for no cause of action and for dismissal with prejudice was granted.

RESPONDENT'S STATEMENT OF POINTS

POINT 1.

IN OWNING, MAINTAINING AND OPERATING THE WALL AVENUE COMMUNITY CENTER THE RESPONDENT CITY WAS FULFILLING A GOVERNMENTAL FUNCTION IN PROVIDING RECREATIONAL FACILITIES, AND IS NOT LIABLE FOR APPELLANT'S INJURIES SUFFERED THEREIN.

POINT 2.

THE CITY DID NOT LEASE THE PREMISES TO ANYONE.

POINT 3.

EVEN IF THE CITY HAD LEASED THE PREMISES, STILL IT IS NOT LIABLE, AS IT WAS, NEVERTHELESS, FULFILLING A GOVERNMENTAL FUNCTION.

POINT 4.

THE CITY WAS NOT FULFILLING A PROPRIETARY FUNCTION AS TO APPELLANT.

POINT 5.

THE AUTHORITIES RELIED ON BY APPELLANT ARE EITHER NOT IN POINT OR REPRESENT A MINORITY VIEW CONTRARY TO THE ESTABLISHED LAW OF UTAH.

ARGUMENT

POINT 1.

IN OWNING, MAINTAINING AND OPERATING THE WALL AVENUE COMMUNITY CENTER THE RESPONDENT CITY WAS FULFILLING A GOVERNMENTAL FUNCTION IN PROVIDING RECREATIONAL FACILITIES, AND IS NOT LIABLE FOR APPELLANT'S INJURIES SUFFERED THEREIN.

Although the City interposed other defenses such as a denial of negligence or nuisance committed and a plea of contributory negligence and assumption of risk the City's motion made at the close of the pre-trial conference and the further stipulation of facts was based solely upon the ground that under all of the facts stipulated or offered to be proved there was no showing that the City was engaged in a proprietary function in maintaining and operating the Community Center, but on the contrary under the facts as a matter of law the City was fulfilling a governmental function in providing recreational facilities and is therefore not liable for appellant's injuries suffered therein.

Under Section 11-2-1, Utah Code Annotated, 1953, the governing bodies of municipalities have since 1923 been authorized by the Legislature to designate and set apart for use as playgrounds, athletic fields, gymnasiums, swimming pools, *indoor recreation centers*, or other recreational facilities, any lands or *buildings* owned by the municipality and to equip, maintain, operate and supervise the same, employing such recreation directors, etc., as the governing body may deem proper. It is now the settled law of Utah, beyond any question, that the providing of public recreational facilities by a municipality is a governmental function where operated for the common good of all without the element of special corporate benefit or pecuniary profit and where the enterprise was not in competition with private business or was one which could not likely be operated as successfully in private ownership as in municipal ownership. It is equally well settled by the law of Utah that municipalities, when acting in furtherance of their governmental functions, are immune from suit and are not liable for damages which may be caused by the negligence or nuisance committed by their officers or employees.

Davis v. Provo City Corporation, Utah,
265 Pac. 2d 415;

Alder v. Salt Lake City, 64 Utah 568, 231 Pac.
1102;

Husband v. Salt Lake City, 92 Utah 449, 69 Pac.
2d 491.

It is perhaps proper to observe at this point that the burden is on the plaintiff-appellant to allege and prove that the operation of the facility in question is conducted in a proprietary and not a governmental capacity.

Orlando v. City of Brockton, (Mass., 1936), 3 N.E.
2d 794;

Lemieux v. City of St. Albans, 28 Atl. 2d 373;

Huffman v. City of Columbus, (Ohio, 1943), 51
N.E. 2d 410.

The tests as announced in the Alder and Davis Cases, supra, are (1) whether the act or operation is for the common good of all, without the element of special corporate benefit or pecuniary profit, and (2) whether the enterprise was in competition with private business and one which would likely be operated as successfully in private ownership as in municipal ownership.

In the Davis case, supra, the Court clearly announces that the great weight of judicial authority is that the maintenance of facilities for recreation is a public and governmental function, inasmuch as parks and playgrounds are generally not operated by private corporations and there appears to have developed some duty on the part of the City to provide for parks and playgrounds. It is obvious that the same is equally true of a community recreational center operated by the city for the unrestricted use and benefit of all the public equally. The law makes no distinction between indoor recreational facilities such as ping pong, checkers or basketball and outdoor recreational facilities such as coasting or running or reclining on the green grass of a park.

It is clearly established that if the primary purpose of any operation is governmental in nature, the fact that the city may charge some small admission or derive some incidental benefit or income therefrom does not change the operation to a proprietary function. As this court very properly said in the cases of

Burton v. Salt Lake City, 69 Utah 186, 253 Pac.
443,

and

Griffin v. Salt Lake City, 111 Utah 94, 176 Pac.
2d 156,

the mere fact that a fee is exacted or a charge made is not conclusive against the City.

Under the undisputed facts in this case, it is very clear that there is no evidence that the City was engaged in a proprietary function, but on the contrary the evidence establishes the City was engaged in a governmental function. It is agreed that from 1946 to the present time the Center has always been operated "as a public recreational center, and all persons have had full leave and license to use the same at their wish and convenience as a public park or recreational facility, and the same has never been closed to anyone." It is agreed that the City for approximately five (5) years prior to the accident had never charged and had never received one single dollar for use of this facility, as shown by Exhibit 1. At the same time the City as shown by Exhibit 1 was spending many thousands of dollars annually to maintain the Center for the recreation of the public. Even while the same was leased to the U.S.O. for the recreation of the military, the City was making some contributions to the maintenance of this facility as a public service. See answer to Interrogatory 15 (R. 024). It is not shown that even years before the accident the City received any income or rental from the U.S.O. The only money the City ever received was in 1946 and the fore-

part of 1947 when a very small return was received from the snack bar concession. However, it is clear that these receipts are so remote in time that they can have no bearing on the nature of the operation on the date of the accident some five (5) years or more later.

To apply the tests announced by this Court then, it should be very obvious indeed that under the undisputed facts the City was maintaining and operating the premises for the common good of all without the element of special corporate benefit or pecuniary profit and it is equally obvious that this enterprise was not in competition with private business and clearly was not one which could likely be operated as successfully in private ownership as in municipal ownership. What private business ever has or could operate a recreational or amusement center over a period of five (5) years without any return whatsoever and without attempting to get any return while it was spending an average of approximately \$6,500.00 each year in the maintenance and operation of the center? This is no business enterprise under any stretch of the imagination. It is 100% governmental and philanthropic and absolutely without any purpose of corporate benefit or pecuniary profit. Even a private philanthropic institution rarely is able to make a free facility available indefinitely at an annual cost of \$6,500.00, and any business which attempted it would be in bankruptcy forthwith. Such a function could not be operated successfully in private ownership or as a private business for profit.

Appellant in her brief argues that because no official action was taken by the City to assume and exercise actual control over the day-to-day operation of the

Community Center it could not have been acting in a governmental capacity and had to be acting in a proprietary capacity and refers to the provision of the Council-Manager Charter of Ogden City providing that the powers of the City shall be exercised as prescribed by the Charter, or if not as therein prescribed, then as prescribed by ordinance. This argument seems utterly irrelevant. It could be applied with equal force in arguing that the City had to be acting in a governmental capacity. In effect it says that because the City did not act at all it was acting in a proprietary capacity. If it did not act at all, it, of course, was not acting in either a governmental or proprietary function and it would not, of course, be responsible for any independent acts done either by an unofficial board of directors elected by the public or by the acts of an officer beyond the scope of his authority.

In this connection perhaps a word or two should be said about the unofficial board of directors. It must be remembered that it was elected by members of the public using the Center and that there are no minutes of the City Commission or later of the City Council authorizing its election or authorizing any delegation of municipal power to this board. It is apparent from all of the facts that what happened was that the City upon making this recreational facility available to the general public determined that it could spend so much money to maintain and heat the building, etc., and to hire a director of recreational activities, and that the citizens in the area then decided to organize in a cooperative way to assist in outlining the recreational program and to provide themselves with supplementary recreational facilities which

the City did not furnish, such as checkers and ping pong games. It is apparent that Commissioner East gave the citizens so organized rather full latitude in the way they used the facilities which the City made available to the public. After the accident when an investigation was made it became apparent that they had extended their activities into various charitable and fund raising activities for the purpose of supplementing the City's facilities. All of this, however, is something which was never authorized by the governing body of the City and none of the money raised by the citizens through their cooperative efforts was ever paid into the City Treasury. So far as appears none of the officers of the City had any knowledge or information of these fund raising activities.

Certainly it received none of the funds and did not profit therefrom in any way. The City's employee in charge of directing recreational activity assumed to handle the funds raised by the citizens through their cooperative efforts, but she obviously did not consider that they were city funds for she never paid them into the treasury and never accounted for them to the City until requested to do so in the investigation of this accident. It should also be noted that there is no showing whatsoever in this case that any person had to pay admission to use the facilities of the Wall Avenue Community Center, and particularly the ladies powder room therein. It may be that reservations of certain parts of the building were made for certain organizations, but there is no showing that such reservations gave exclusive occupancy thereof to the person or organization which reserved it. In fact as near as can be ascertained the reservation of a portion of the hall by a particular organization was com-

parable to a reservation of a certain section or certain tables of a park for a particular organization or family. These reservations help to prevent congestion in having multiple recreational activities which might overload the capacity of the facility, but such reservations can confer no right to the exclusive use of a public recreational facility any more than the grant of a right to conduct a public parade on a public street could give the private grantees the right to exclude others entirely from the public street.

The fact that the Havana Club may have charged or intended to charge admission to the dance which it was sponsoring at the Center is equally irrelevant. That was the act of the Havana Club and not of the City and the City neither received nor intended to receive any of the money. Apparently the purpose in charging admissions was to defray the cost of the orchestra, etc., but even if the Havana Club hoped to make a profit, that would not affect the character of the City's operation any more than the maintenance of Liberty Park would be converted into a proprietary function because some church conducted a fund raising picnic on the park for its own purposes. One might as well say that the City constructs and repairs streets in the exercise of a proprietary function merely because it grants a license to a farmer to peddle vegetables on the street. The argument made in this case is equally unsound and illogical.

Even if the City should be charged with responsibility for the acts of the unofficial cooperative board of directors or of the Havana Club in charging admissions to its dance, still it is entirely obvious that the overall

picture is one of a governmental rather than a proprietary function. The amounts received and expended by the citizens cooperative group were insignificant as compared with the amounts which the City itself spent in the maintenance of the Center as a public recreational facility, so that it is abundantly apparent that the City's operation was for the common good without the element of special corporate benefit or pecuniary profit and was an enterprise clearly not in competition with any private business or one which could likely be operated as successfully in private ownership as in public ownership. As has above been indicated, the receipt of some incidental income is immaterial where the primary purpose is governmental. In

Kilbourn v. City of Seattle, (Wash., 1953), 261
Pac. 2d 407,

It was held that the granting by the City of a concession to operate a refreshment stand in a city for a percentage of the gross profits, under which the City received \$40,000.00, and which was merely incidental to the primary park purpose where the annual operating cost was more than a million dollars, did not make the operation a proprietary function. In

Orlando v. City of Brockton, (Mass., 1936), 3 N.E.
2d 794,

it was held that the sale of surplus products of a city poor farm does not change the operation to one of proprietary character and it is observed that where a comparatively insignificant income or benefit to the city incidentally results from performance of a public duty the dominating public character of the undertaking is

not thereby changed, and the city does not thereby become liable for negligence of its officers or employees in the performance of such duty. In the case of

Kelley v. Boston, 186 Mass. 165, 71 N.E. 299, 66 L.R.A. 422,

a dual function was involved. The city building housed the water department which was a proprietary function and other strictly governmental executive offices. It was held that the city was not liable for an employee's negligence in the maintenance of the building where the water department paid no rent to the city, and that the fact that the city derived an incidental gain from the water department whose offices were housed in the building did not convert the governmental function of maintenance of a public building into a proprietary function. The principal purpose and function controlled.

In the case of

Wilson vs. District of Columbia 179 Fed. 2d 44,

it was held that the District of Columbia exercised a governmental and not a proprietary function in maintaining the municipal building, a part of which it allowed the War Department to occupy for a proportionate share of the expenses, and part of which was also used, rent free, for a cafeteria for the convenience of city employees even though the proprietor of the cafeteria was engaged in business for profit. The case at Bar is even stronger in favor of the City's position for here there is no showing that the City even knew that any other organization was charging for functions held on the premises.

Crone vs. City of El Cajon (California), 24 Pac. 2d 846,

the defendant city had for several years operated a swimming pool during the summer months for the pleasure of its citizens. A small fee was charged for its use, but their total did not pay the cost of operation. It was held that the charging of fees did not under the circumstances convert the operation into one of a proprietary capacity and that the city was immune from liability for negligence in the operation of the pool.

In the case of

Kellar vs. City of Los Angeles (California, 1919),
178 Pac. 505,

cited with approval by this Court in the *Burton* case, supra, the plaintiff, a child, paid the defendant city \$3.75 a week for board, lodging and care at the city's summer recreation camp. The camp was conducted pursuant to Charter power, to "establish, own, equip, maintain, conduct and operate parks, playgrounds, gymnasiums and also any and all buildings which are necessary or convenient to the health, morals, education or wealfare of the inhabitants of the city, or for their amusement, recreation, entertainment or benefit". While at the camp the plaintiff was injured and he sued the city alleging negligence. The California Supreme Court held that children's recreation centers maintained by a city for the general use of the children of the city, where so conducted as to partake in no degree of the nature of a private business, do not differ substantially from a public park, and second, that the small charge made to help defray the costs does not change the character of the operation which is one of a governmental function.

Again the case of

Day vs. City of Berlin 157 Fed 2d 323,
is particularly interesting here. It was there held that
a city maintaining in its city hall a women's lounge and
lavoratory, in which there were one free and two pay
toilets, was engaged in a public or governmental func-
tion, and was not liable to one injured on her way to the
lounge intending to use a pay toilet. The following cases
also support the general proposition here advanced:

Prickett vs. City of Hillsboro (Illinois), 55 N.E.
2d 306;

Gebhardt vs. Village of LaGrange Park (Ill
inois), 188 N.E. 372;

Johnson vs. Board of Road Commissioners
(Michigan), 235 N. W. 221;

Beakey vs. Town of Bellirica (Mass.), 85 N.E.
2d 620;

Curran vs. Boston 24 N.E. 781; 8 L.R.A. 243;

Rome vs. London and Lancaster Indemnity
Co. 156 Southern 64; 169 Southern 132;

Fournier vs. City of Berlin (Vermont), 26 Atl.
2d 366, 140 A.L.R. 1045;

Morgan vs. Shelbyville 121 S.W. 617;

Hannon vs. Waterbury (Connecticut) 136 Atl.
876; 57 A.L.R. 402;

Wold vs. Portland 112 Pac. 2d 469; 133 A.L.R.
1207.

It is respectfully submitted that on this record there
is no proof that the Respondent Ogden City was en-
gaged in a proprietary function. The evidence con-

clusively shows the city was engaged in a governmental function. The city therefore not liable in this action and the judgment of the Court was proper and should be affirmed.

POINT 2.

THE CITY DID NOT LEASE THE PREMISES TO ANYONE.

The appellant in the forefront of her brief argues that a landlord-tenant relationship existed between Ogden City and the Havana Club and attempts to predicate liability on that claimed relationship. This argument fails to hold water for several reasons, the first of which was that there was no such landlord-tenant relationship. The City did not lease the premises to the Havana Club or to anyone else. True, the members of the Havana Club had the right to use a portion of the premises that evening for a public dance, but the right to use the premises they enjoyed independent of any lease with all other members of the public, and not as lessee.

Furthermore, there is absolutely no showing that the employee of the City at the premises, the Director of Recreational Activities, had any authority in behalf of the City to lease the premises to the Havana Club or to anyone else. Her duties under the agreed record were merely to direct recreational activities. Even if her action in granting license and permission to the Havana Club to conduct a dance in the south wing of the premises were to be construed as a lease, the act was entirely beyond the scope of her authority and no landlord-tenant relationship between the City and the Havana

Club could be predicated thereon. Again her action in granting the Havana Club permission or license to use the premises for a dance was not a lease. A lease is "a species of contract for the possession and profits of lands and tenements either for life or for a certain period of time, or during the pleasure of the parties". Bouvier's Law Dictionary.

As indicated, Ogden City could enter into a contract only through its governing body and there is no evidence that it did so. Furthermore, there is nothing in the record to show that possession of any part of the premises rather than mere permission to enter and use the same as members of the public was here involved.

Moreover, the arrangement was obviously made not for the use or benefit of the City but for the benefit of the independent cooperative group of citizens represented by the unofficial board of directors for it is agreed that the money contributed by the Havana Club on the occasion was expended under their direction. The City received no consideration at all for the claimed lease contract. One could as logically contend that New York City operates the Brooklyn Bridge in a proprietary capacity because a con-man sold the bridge to a visiting innocent.

POINT 3.

EVEN IF THE CITY HAD LEASED THE PREMISES, STILL IT IS NOT LIABLE, AS IT WAS, NEVERTHELESS, FULFILLING A GOVERNMENTAL FUNCTION.

In her argument that the claimed relationship of landlord and tenant removes governmental immunity

enjoyed by municipalities in Utah, as elsewhere, from this kind of an action, the appellant cites and relies on the cases of

Davis vs. Provo City and Brigham Young University (Utah), 265 Pac. 2d 415;

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

Pincock vs. McCoy (Idaho) 281 Pac. 371;

Lunt vs. Post Printing and Publishing Company 110 Pac. 203;

Harris vs. City of Bremerton 147 Pac. 638;

Burbidge vs. Utah Light and Traction Company 211 Pac. 691.

None of these cases are in point. In none of these cases, except the *Davis* case, was the defense of governmental immunity raised or discussed and indeed in several of them no governmental unit was involved. In the *Davis* case the language quoted and relied on by the appellant here was used by this court only with respect to the claimed liability of the defendant Brigham Young University and was restricted to that application. The question of the landlord-tenant relationship between the University and Provo City was not involved at all in the court's discussion of the governmental immunity of that City and the case thereof does not support the appellant's argument.

Moreover, in none of the other cases was there any defense of governmental immunity interposed and those points were not considered by the courts in any way. It is, of course, a general rule recognized by this court that a case in which a particular point is not raised or considered by the court is not authority for a point

which perhaps could have been raised. See

21 CJS "Courts", Section 209, Page 380.
In the Massachusetts case of

Worden vs. New Bedford 41 American Reports
185,

the defendant city was actually engaged in renting rooms in its city hall for profit and for activities which had no relationship whatsoever with municipal affairs and was collecting the rentals therefrom. The court there very properly recognized the distinction between governmental and proprietary activities and hold the city under these particular facts involved to be engaged in a proprietary activity.

Moreover, it is to be noticed that under the agreed facts the Havana Club was given leave to use the premises for a public dance. A dance is, of course, a proper recreational activity. Even if the City were to be held to have leased the premises to the Havana Club for this particular purpose it would be a proper exercise of its governmental function in that it may use such agencies and procedures for the accomplishment of its governmental recreation purpose and the occasional charging of a small fee does not make the activity proprietary as has been shown by the authorities hereinbefore cited. The activity was still one for public recreation and the City's part therein was still a governmental function even if it had leased the premises to the Havana Club (which it did not) and even if it had received a consideration for such lease (which it did not).

In this connection it should be recalled that there is nothing in the record to show that the Havana Club

intended to operate its dance for other than purely recreational purposes or that it had the making money as even a secondary purpose in sponsoring the public dance in question. It, of course, had no right to any governmental immunity for itself, but if it is to be assumed that it was acting as an agency of or for the City, then the function was governmental and the City was immune.

It must also be carefully noted that the arrangement with the Havana Club, whatever its character, did not in any way involve the powder room in the north wing, the place where the accident happened. The powder room was always available without charge to all members of the public, and those coming to attend the dance sponsored by the Havana Club had access thereto as members of the public and not by reason of any arrangement with the Havana Club. This is made abundantly clear from the fact that the appellant went directly to the powder room without ever having purchased any ticket from the Havana Club or made any other arrangements with it. (Dep. 6 and 7)

In any event the occasional leasing of the south wing could not in any way convert the overall operation of the Community Center, and especially the operation of the powder room in the north wing, into a proprietary function. The cases cited under Point 1 of this brief make that abundantly clear. The City is not liable and the judgment of dismissal was properly entered.

POINT 4.

THE CITY WAS NOT FULFILLING A PROPRIETARY FUNCTION AS TO APPELLANT.

The appellant in her brief argues that even though the operation of the Community Center was a govern-

mental function in general, it was proprietary as to appellant at the time and place and under the circumstances of the appellant's injuries. It is submitted that this argument has no valid basis either in fact or in law.

Under the agreed facts the appellant was not engaged in any business transaction with the City. At the time in question she paid the City nothing for the use of any of the City's facilities and did not contemplate paying the City anything for the use of those facilities either in the powder room or elsewhere. She entered the premises as of right as any other member of the public could have done to use the comfort and recreational facilities which the City made available to the public as a governmental function. Under her own sworn testimony she knew that she was absolutely free to do so.

From the facts it is apparent that the City's role in the maintenance of the Community Center was indivisible. It was at a cost of \$6,000.00 or \$7,000.00 a year maintaining a public recreational facility for which it charged and received absolutely nothing. The City carried on no other function on the premises in question. Its relationship with the plaintiff-appellant was the same as with every other inhabitant, namely it was a sovereign exercising a governmental function for the health and general welfare of its inhabitants.

Under the Utah cases and the cases from other jurisdictions hereinbefore cited it is apparent that the great weight of authority is that the test of a governmental as against a proprietary function is "what is the principal purpose of the activity involvd", The fact

that the City may charge admission or derive other incidental income is immaterial if the principal purpose is governmental. This, we believe, is the general rule.

Under this rule it is clear that with respect to the plaintiff, as with respect to other inhabitants, the City was acting in its governmental capacity and that this would be true even if it should be considered, by some stretch of the imagination, that the City derived an incidental benefit from the activities of the unofficial board of directors or of the Havana Club in raising money by various devices to furnish to the inhabitants supplementary recreational facilities such as checkers, ping ping games, etc. It can, of course, be assumed that anything that benefits the inhabitants of the City benefits the City itself, but that is not a benefit in the City's corporate or proprietary capacity and these incidental benefits could not under the law change the City's function as regards the plaintiff who, at the time she was injured, had not yet even entered upon the activities conducted by th Havana Club or the unofficial board of directors.

The primary purpose of the City's activity controls, and the function is either governmental or proprietary as determined by this primary purpose. In this case the primary purpose of the City is clearly governmental as to the applicant as well as to all other inhabitants. Among the cases heretofore cited, which are particularly cogent in this consideration, are the cases of *Orlando vs. the City Brockton*; *Beakey vs. Town of Bellirica*; *Keller vs. City of Los Angeles*, and *Day vs. City of Berlin*, *supra*.

POINT 5.

THE AUTHORITIES RELIED ON BY APPELLANT ARE EITHER NOT IN POINT OR REPRESENT A MINORITY VIEW CONTRARY TO THE ESTABLISHED LAW OF UTAH.

Some of the authorities relied on by the appellant here have already been distinguished in the discussion under Point 3 of this brief. It is respondent's conviction that the other authorities cited by appellant are equally distinguishable. In the California cases cited by the appellant,

Rhodes vs. City of Palo Alto 223 Pac. 2d 639;
Sanders vs. City of Long Beach 129 Pac. 2d 511,
and

Chafor vs. City of Long Beach 163 Pac. 670,
California Statutes are involved which apparently to some extent remove governmental immunity from the cities. The Chafor case was apparently decided before the California Municipal Liability Act in question, but in that case the California Court concluded that a "public assembly and convention hall" constructed under statute authorizing cities to construct and maintain such halls, which further provided that money derived from use or hire should be deposited in the treasury to the credit of a public hall fund and any surplus might be used for general municipal purposes, was not a building maintained for a governmental purpose. This is quite another thing from holding that a community recreation center is not maintained for a governmental purpose and the decision of the California Court as to the convention hall seems proper under the facts there which are not the facts here.

The purpose was different. It is common knowledge that municipal convention halls are used generally for business and "Chamber of Commerce" promotions primarily and to attract conventions and resultant business to the city. It is apparent too that the hall was there constructed for hire which is contrary to the fact here. The *Chafor* case is not in point.

The *Rhodes* case follows the *Chafor* case and applies the same doctrine of a convention or meeting hall to a community theater. Declining to find as a fact that the community theater was a recreational facility the court commented that "no matter where located nor by what agency administered the building retains its essential quality as a public meeting place." It is no different in that respect from the Long Beach Auditorium in the *Chafor* case. In the case at Bar, of course, the stipulated facts are that the Community Center is a recreational facility and in the *Davis* case and other Utah cases cited, Utah is firmly committed to the doctrine that public recreation is a governmental function.

The *Sanders* case was another municipal auditorium case and not a case of a recreational facility. The last two cases, moreover, were decided under the Municipal Liability Law of California. Although it is not clear it must be confessed that the court in those cases particularly considered the significance of the Act.

The case of

Engles vs. New York 6 N.Y. Supplement 2d 436, relied on by appellant likewise is not in point. In that case the city itself was charging and receiving substantial sums and these charges included a charge for the hospital care of the patient whom the plaintiff was visit-

ing. Moreover, the city received some \$100,000.00 revenue from the hospital facility which was not merely incidental to the operation but was an essential and integral part of the operation of the hospital as a whole. In the case at Bar the City has charged and received absolutely nothing. Even if the Engles case were not distinguishable, it is against the great weight of authority as disclosed by the decisions cited in the first section of this brief.

The Utah cases of *Burton vs. Salt Lake City* and *Griffin vs. Salt Lake City*, also cited by appellant, are clearly not in point here. The Burton case was decided on pleadings which with great thoroughness and particularity alleged that the defendant city was there in a proprietary function for profit and in competition with private business and in a business of a nature which could just as easily have been successfully conducted by private enterprise. In the case at bar the agreed facts show that the city operated a free public recreational facility without charge and which was a facility of a kind which was not in competition with private business and could not be successfully carried on as a private business in the same manner as it was carried on by the City.

In the Griffin case the City charged more than a nominal price for admission; State and Federal tax was paid on admission; no one could get in except by paying and a net operating profit was made. The facts of that case clearly are entirely different from the one at Bar. In fact, none of the elements existing in the Griffin case exist in the case at Bar.

CONCLUSION

It is submitted that under the agreed facts the City of Ogden in this case was, as a matter of law, engaged in the governmental function of providing public recreation and that as such it is immune from suit for the negligence or nuisance, if any, committed by its officers or agents. It follows therefore that the judgment of the trial court that appellant has no cause of action against the respondent city should be affirmed.

Respectfully submitted,

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