

1954

Maxine D. Lindsay v. Eccles Hotel Company : Brief of Appellant

Utah Supreme Court

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Recommended Citation

Brief of Appellant, *Lindsay v. Eccles Hotel Co.*, No. 8251 (Utah Supreme Court, 1954).
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Case No. 8251

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IN THE

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SUPREME COURT MAY 6 1955

OF THE STATE OF UTAH

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MAXINE D. LINDSAY,

Appellant,

vs.

ECCLES HOTEL COMPANY, a corpora-
tion, doing business under the trade name
and style of Hotel Ben Lomond,

Respondent.

Appellant's Brief

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Case No. 8251
IN THE
SUPREME COURT
OF THE STATE OF UTAH

MAXINE D. LINDSAY,

Appellant,

vs.

ECCLES HOTEL COMPANY, a corporation,
doing business under the trade name
and style of Hotel Ben Lomond,

Respondent.

STATEMENT OF FACTS

On June 22, 1948, Appellant was a patron in the Coffee Shop of the Respondent Hotel Company (Appellant's Deposition 3, 4; Deposition of Lillian McGahy 4). The floor of the shop was of tile construction, which was slippery when wet (Tr. 12, 17, 18). The weather was dry outside (Dep. Lillian McGahy 6) and the floor was dry when Appellant came in and was seated (Dep. Lillian McGahy 5, 10).

The table at which Appellant and her companion were seated was near the rear or east end of the Coffee Shop on the south side, near the door to the kitchen (Appellant's Dep. 4, 5, 6; Dep. Lillian McGahy 4 and Affidavit attached) and near the station where waitresses filled glasses and pitchers with water and ice (Affidavit attached to Dep. of Lillian McGahy).

A long counter was at the front of the Shop (Appellant's Dep. 5) on the south side, and waitresses attending patrons at the counter and at other tables walked up and down the aisle past Appellant's table (Appellant's Dep. 13) with servings of food and water (Appellant's Dep. 13, 14).

Between the time Appellant was seated and the time she left her table water had been spilled on the floor (Dep. Lillian McGahy 4, 5, 9) about a foot from the chair on which she had been seated (Dep. Lillian McGahy 6). It was the dinner hour, the waitresses were rushed, and the Hostess Lillian McGahy was helping the waitresses (Dep. Lillian McGahy 8, 10, 11).

On leaving her table, after finishing her refreshment, she started to walk toward the cashier to pay her check (Appellant's Dep. 10). As she did so, she slipped on some water on the floor (Dep. Lillian McGahy 4, 5, 10) of the aisle (Appellant's Dep. 10), between two rows of tables (Appellant's Dep. 10) somewhat north and west of where she had been sitting (Appellant's Dep. 10), her white shoe (Appellant's Dep. 3, 4) making a white mark (Appellant's Dep. 10; Dep. Lillian McGahy 4, 9) about six inches long (Appellant's Dep. 11; Dep. Lillian McGahy 10), and where her heel had been in and had slipped through the water (Dep. Lillian McGahy 4, 9) and sustained the injuries complained of.

Appellant's amended complaint alleged negligence on the part of the Respondent: (1) In placing water or other slippery substance on the floor, or in causing the same to be on the floor, and in allowing or permitting it to remain thereon in such condition as to cause it to be dangerous to persons walking over and upon it (Para-

graph 4 (a), Tr. 002); (2) In failing to give plaintiff and other persons any signal or warning of the slippery or dangerous condition of the floor at the time (Paragraph 4 (b), Tr. 002); (3) In failing, after Respondent knew or should have known of the dangerous condition of the floor when wet, to remove the water or other substance therefrom or to take such other necessary action to remove or obviate the dangerous condition of the floor when wet, by covering the floor with rubber mats or by the use of other means (See Amendment to Amended Complaint, Tr. 008).

Respondent in its answer denied liability generally and specifically, and alleged that if there were any water or substance spilled on the floor it had no knowledge of such fact prior to the time Appellant claimed to have slipped thereon, and alleged contributory negligence (Tr. 003).

After a number of stipulated continuances the case was set for trial on April 14, 1954, and counsel for both parties were informed by the Court that no further continuances would be granted under any circumstances and that the case would be tried or dismissed on that date. The case was tried before the jury and submitted.

Appellant was unable to attend the trial because of her physical condition and her deposition was ordered published and admitted in evidence (Tr. 004). The deposition of one witness, Lillian McGahy, a resident of the State of California, was also published and admitted in evidence after portions of it had been ordered corrected or deleted (Tr. 009). The following portions of her deposition were ruled inadmissible or changed by the trial

court; and counsel for Appellant and Respondent have stipulated that these are the portions so ruled upon:

Page 4, line 24, changed from "her" to "a".

Page 5, lines 11 and 12 deleted.

Page 6, lines 24 to 32, inclusive, deleted.

Page 7, lines 1 to 6, inclusive, deleted.

Affidavit attached to the Deposition (referred to as plaintiff's Exhibit One) deleted.

The jury was unable to reach a decision and was discharged (Tr. 007). At the conclusion of Appellant's case Respondent made a motion for a directed verdict which was overruled. At the conclusion of Respondent's case the Respondent's motion was renewed and ruling reserved by the Court (Tr. 006). On or about the 22nd day of April, 1954, Respondent served a "Motion for Judgment Notwithstanding the Discharge of the Jury" upon Appellant which motion was thereafter argued and submitted. On May 7, 1954, the Respondent's Motion was granted by the Court (Tr. 010).

Subsequent to the accident Appellant's mind became affected somewhat and in her deposition (Tr. 004) she testified that the name of her companion on the date of the accident was a Mrs. Davidson (Appellant's Dep. 3, 9, 15, 16) whom her attorneys could not find. At the time of the trial, Appellant's health was such that her doctor would not permit her to testify, so that the case was tried as to her testimony on her deposition. Two days before the trial her attorneys discovered that the companion she had called "Mrs. Davidson" in her deposition was in fact a Mrs. Everetsen who, as it turned out, was at that time residing in Salt Lake City but was too ill to attend Court and testify.

Appellant filed a Motion to Reconsider and Set Aside Respondent's "Motion for Judgment Notwithstanding the Discharge of the Jury"; and to Impanel a New Jury and Set Case for Trial; or, in the alternative, Motion for New Trial (Tr. 011). In support of her motion, Appellant obtained and filed with the trial Court an Affidavit from the person identified as "Mrs. Everetsen" (Eleanor McFarlane Everetsen) previously called "Mrs. Davidson" by the Appellant. The Affidavit is dated May 14, 1954, shortly after the trial of the case, and was attached to and made a part of Appellant's Motion to Reconsider, and Appellant's alternative Motion for a New Trial. In that Affidavit, offered to the trial court as newly discovered evidence, the proposed witness said under oath:

"* * * that she is acquainted with Maxine D. Lindsay, plaintiff above-named; that she was with the said Maxine D. Lindsay on the 22nd day of June, 1948, in the Hotel Ben Lomond Coffee Shop when the said Maxine D. Lindsay slipped and fell to the floor; that she, affiant, saw a waitress spill water on the floor in the aisle near the table at which they sat; that neither said waitress nor anyone else wiped it up; that it did not occur to her at the time to invite the attention of the said Maxine D. Lindsay to the spilled water; that later when she and the said Maxine D. Lindsay started to leave said Coffee Shop she, affiant, saw the said Maxine D. Lindsay slip on the wet floor and fall to the floor; that she saw water still remaining on the floor after she helped the said Maxine D. Lindsay up from the floor;

"That when the said Maxine D. Lindsay fell to the floor she fell very heavily; that her feet seemed to fly out from under her; and that she fell instantly and abruptly to the floor.

“That affiant was ill and unable to attend court at the time of the trial of said cause, although requested so to do by one of plaintiff’s attorneys on each of the two days immediately prior to the trial of said cause on April 14th, 1954.”

Notwithstanding that Affidavit and the basic facts therein set forth, pertinent to the real issue of the case, the trial court on July 20, 1954 (Tr. 012) denied Appellant’s motion to reconsider and denied Appellant’s alternative motion for a new trial.

STATEMENT OF POINTS

1. ERROR OF THE COURT IN GRANTING DEFENDANT’S MOTION FOR JUDGMENT NOTWITHSTANDING THE DISCHARGE OF THE JURY.
2. THAT THE GRANTING OF DEFENDANT’S MOTION WAS CONTRARY TO LAW.
3. REFUSAL OF THE COURT TO ADMIT IN EVIDENCE THE SWORN AFFIDAVIT OF LILLIAN McGAHY, “EXHIBIT ONE” OF THE DEPOSITION OF LILLIAN McGAHY, AND IN STRIKING PARTS OF THE DEPOSITION FROM THE EVIDENCE.
4. REFUSAL OF THE COURT TO GRANT PLAINTIFF’S MOTION TO RECONSIDER AND SET ASIDE DEFENDANT’S “MOTION FOR JUDGMENT NOTWITHSTANDING DISCHARGE OF THE JURY”; AND TO IMPANEL A NEW JURY AND SET CASE FOR TRIAL; OR, IN THE ALTERNATIVE, MOTION FOR NEW TRIAL.
5. ERRORS IN LAW.

ARGUMENT

So that the Court will be able to grasp readily the issues on this appeal, Appellant states the theory of her case, before discussing the several points which support that theory.

It is Appellant's theory of the case, divided into two parts:

A. That it was negligence for Respondent to fail to place rubber or other mats on its floor to protect patrons from falling, when it knew or should have known its floor was slippery when wet and knew or should have known that water or other substances were frequently or occasionally spilled thereon.

B. That the Respondent was negligent in spilling water on the floor and not wiping it up, when Respondent knew or should have known that its floor was slippery when wet.

Appellant will address the same argument generally to

Point 1. ERROR OF THE COURT IN GRANTING DEFENDANT'S MOTION FOR JUDGMENT NOTWITHSTANDING THE DISCHARGE OF THE JURY.

Point 2. THAT THE GRANTING OF DEFENDANT'S MOTION WAS CONTRARY TO LAW.
and

Point 5. ERRORS IN LAW.

We think this case comes squarely within the decision of this Court in:

Erickson v. Walgreen Drug Co., et al,
_____ U. _____, 232 P. (2) 210.

See also *W. T. Grant Co. vs. Karren*,
190 F. (2) 710.

In applying the law of the *Walgreen* case, consider the facts in this one: The floor was of ceramic tile which was slippery when wet. Appellant was a patron seated at a table at the rear of the Coffee Shop near the kitchen door where waitresses filled glasses and pitchers of water. When she was seated there was no water on the floor. Between that time and the time she rose to leave water had been spilled on the floor about a foot from the chair on which she had been seated. On leaving her place at the table Appellant slipped and fell to the floor. There was a visible mark on the floor where a heel had been in, slipped through the water. It was not raining outside and had not been raining that day. In her deposition the Hostess Lillian McGahy was asked how long the water had been on the floor. She answered: "Evidently just at that time a girl passed through perhaps had spilled some. I can't remember." (Dep. Lillian McGahy 5). The answer was stricken by the trial court; erroneously, we contend. There was no other source for the water. It was the dinner hour, the waitresses were rushed, and the Hostess Lillian McGahy was helping the waitresses. No one saw the quantity of water before the fall, but the testimony of the Hostess Lillian McGahy was that she saw water on the floor when she came back from the kitchen as she was coming through the kitchen door at the same time she saw Appellant sitting on the floor (Dep. Lillian McGahy 9). She did not remember observing whether or not Appellant's dress was wet (Dep. Lillian McGahy 9) so that the quantity of water then observed was what was left after Appellant's heel had passed through it and after she had fallen

to the floor on or near the water, and after an undefined portion of it had evidently been displaced or absorbed by Appellant's clothing in the fall. There still remained visible "about three tablespoonfuls" of water (Dep. Lillian McGahy 10). That amount of water on a hard-surfaced floor is a considerable quantity.

In addition, we can now prove positively, by the proposed witness Mrs. Everetsen, that a waitress did spill the water, and thereby remove the last vestige of doubt, if any there ever were, as to the source of the water and the responsibility of the Respondent for its being there and for its remaining there. In view of this additional evidence, if not before, Appellant should have her day in court and have a jury pass upon her cause.

Certainly, under this state of facts the question was one for the jury, as held in the Walgreen Drug Co. case, *supra*, and should have been re-submitted by the trial court after the first jury disagreed.

Point 3. REFUSAL OF THE COURT TO ADMIT IN EVIDENCE THE SWORN AFFIDAVIT OF LILLIAN McGAHY, "EXHIBIT ONE" OF THE DEPOSITION OF LILLIAN McGAHY, AND IN STRIKING PARTS OF THE DEPOSITION FROM THE EVIDENCE.

The affidavit of Lillian McGahy relating to the accident was obtained on or about the 18th day of February, 1949. Thereafter she disappeared from the scene and was ultimately located in California. She had become a hostile witness. She not only refused to return to Utah to testify but refused to appear for the purposes of taking her deposition until compelled to do so.

A comparison of the affidavit and the deposition shows many variances as to facts. It is our contention that the jury should have had both of them in their deliberations. The affidavit, it will be observed, clearly shows the practice of the waitresses, and the source of the water. That affidavit was made when the facts were fresh in the memory of the affiant. It is true that Appellant's associate counsel in California did not pursue this comparison for impeachment purposes as far as he should have but we submit that he made the affidavit a part of the deposition for that purpose. Respondent's attorney in California could have availed himself of unlimited examination on both the affidavit and the deposition.

We have made an extensive search in an attempt to find cases on a similar situation, but have been unable to find any. We are compelled to submit this point based upon this brief statement.

Point 4. REFUSAL OF THE COURT TO GRANT PLAINTIFF'S MOTION TO RECONSIDER AND SET ASIDE DEFENDANT'S "MOTION FOR JUDGMENT NOTWITHSTANDING THE DISCHARGE OF THE JURY"; AND TO IMPANEL A NEW JURY AND SET CASE FOR TRIAL; OR, IN THE ALTERNATIVE, MOTION FOR A NEW TRIAL.

Appellant's Motion for a New Trial was based primarily upon the supporting Affidavit of one Eleanor McFarlane Everetsen and should have been granted. It is admitted that it is discretionary with the trial court as to whether a new trial shall be granted and that his ruling will be upset only for an abuse of discretion. The requirement of the statute is as follows: (Rule 59 (4))

“Newly discovered evidence, material for the party making the application, which he could not, with reasonable diligence, have discovered and produced at the trial.”

A reading of the affidavit will show that the evidence therein contained was not cumulative nor of the same general nature as the evidence adduced at the trial. The evidence as to how the water got on the floor is material, primary and direct, particularly in view of the Court’s subsequent granting of Respondent’s motion after having allowed the case to go to the jury.

The only question on this point is whether Appellant used reasonable diligence in discovering the evidence and producing it at the trial.

Again, we call attention to the fact that the identity of the witness was not known to Appellant’s attorneys until two days before the trial. It must be borne in mind that Appellant’s mind had become affected as a result of the accident and she could not be held to a strict accountability for her conduct or memory. Counsel spent time and effort in trying to locate a “Mrs. Davidson” but naturally were unsuccessful. When the true name of the witness was made known to Appellant’s attorneys they undertook to find her and finally located her in Salt Lake City. By that time the jury had been called, the trial date definitely fixed, and the trial about to begin. Counsel talked to her husband by telephone during each of two days immediately preceding the trial and were informed by her husband that she was ill in bed and could not possibly appear.

The Court had previously emphatically stated that there would be no more continuances of the case and that

it would either be tried or dismissed on that date so that counsel did not feel justified in requesting another continuance and thereby incurring the ill will of the Court, particularly when counsel did not know whether the testimony of Mrs. Everetsen would be material or merely cumulative. Moreover, to have made a motion for a further continuance would have been a futile thing, and such a motion would have been denied by the trial court. He had expressed definite impatience in stating that no more continuances would be granted; and would not have called off the jury at that late date. Of this, counsel for Appellant was then, and are now convinced.

It is difficult for Appellant to ascertain what more could have been done to satisfy the requirement of due diligence than was done under the particular facts and circumstances of this case. Hindsight might now suggest a different course of action; but under stress of trial, Appellant's counsel used their best judgment. That judgment might have been erroneous, but certainly there was no lack of due diligence.

CONCLUSION

In conclusion, Appellant submits that the trial court erred in not submitting this cause again to a jury; and submit that Appellant's motion for new trial should have been granted.

Respectfully submitted,

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