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

Utah Supreme Court

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Case No. 8251

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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.

RESPONDENT'S BRIEF

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RESPONDENT'S BRIEF

ADDITIONAL STATEMENT OF FACTS

Respondent deems it advisable to enlarge somewhat on the Statement of Facts set forth in Appellant's Brief. The Coffee Shop in question is located south of and adjacent to the Lobby of the Hotel Ben Lomond. There is an entrance from the street and also an entrance from the Lobby of the Hotel. In the west half of the Coffee Shop there is a counter with revolving stools and the waitresses serve the patrons water from a fountain back of this counter (Tr. 47).

In the rear or east half of the Coffee Shop proper are two rows of tables large enough to accommodate four people to a table. There was no booths and the tables were situated against each wall, with sufficient room between to allow for two chairs on each side. The tables on the north side extended back to the rear wall. The tables on the south side did not extend back to the rear wall. The space thereby left open was where the waitresses obtained water to serve the customers at the tables. There was an aisle approximately four feet wide reserved between the rows of tables which lead to the kitchen at the rear. Entrance to the kitchen was made through two swinging doors at the end of the aisle.

For convenience in operation one waitress was assigned to take care of the customers at the counter; one waitress took care of the customers at the tables on the south side and a third waitress took care of the customers at the tables on the north side.

There was constructed at the rear, on the south side, where no table was placed, a water fountain which consisted of a curved neck. This fountain was used by the two waitresses at the tables. When customers were seated, the waitress went to this fountain, obtained glasses and placed ice therein and then filled them with water to within a inch of the top and placed them on the table for use by the customers. Thereafter the glasses were never touched by the waitresses until after the patron had finished their meals. If additional water was needed during the course of the meal, the waitress filled the glasses from a pitcher at the table.

On the 22nd of June, 1948 appellant and a friend entered the Coffee Shop and were seated by the hostess, Mrs. McGahy, at or near the rear table on the south side. Appellant took a seat near the south wall, that is the seat farthest from the aisle. Her companion took her seat on the opposite side of the table in the same position. (See Plaintiff's Dep. 3 and 4; also, Mr. West's testimony, 23; and Miss Wahlstrom's testimony, 49.) That left the spaces nearest to the aisle unoccupied. Irene Wahlstrom was the waitress assigned to serve them. She testified in behalf of the defendant (Tr. 38 to 65). She stated positively that she did not touch the glasses after they were placed by her on the table (Tr. 46); that she did not spill any water on the floor (Tr. 47); that she did not see any water on the floor; and that she walked up and down the aisle from the kitchen to the table she was serving. She further testified that the floor was cleaned every evening after closing hours; that it had never been waxed to her knowledge (Tr. 51); that during the three years that she had worked there, she never knew of any one slipping on the floor. The floor was covered with what is known as Ceramic tile; it had never been replaced or changed since the hotel was constructed in about 1928. There was no evidence or no contention that the floor was worn or rendered in any way unsafe because of wear.

Mr. Garrison, who has been in the floor covering business for twenty years, testified that Ceramic tile is slippery when wet. He admitted, however, that Ceramic tile is in constant use in showers, entrance ways, lavatories. In fact, he admitted on cross examination that

Ceramic tile was placed in the lavatories in the new City and County Building here in Ogden and that it is being used in new buildings in Ogden and is a type constantly and universally used (Tr. 13).

Mrs. McGahy, the hostess, whose deposition was offered by the plaintiff, testified that this floor was always kept clean, that the management was very particular about that; that there was no polish on the floor. When asked specifically if she had ever slipped on the floor, she answered "well, sometimes, when I was behind the counter or something like that. I had maybe slipped a little bit but never had I fallen or anything like that. We were particular. We tried to keep that so this thing wouldn't happen." (Dep. 7 and 8)

It is to be noted that she stated that she might have slipped while behind the counter but there is no evidence that any waitress or customer ever slipped while using or walking upon the places reserved for use by customers or waitresses. All of the evidence which has been presented to this court states very definitely that plaintiff fell as she arose from her chair so that it is fairly well established that she did not slip in the aisle at all but rather slipped when she was still in the area occupied by the tables.

We think this evidence very important because it is established that if there was any water on the floor, it was at or near the place where the plaintiff was seated and the water could have been spilled, if there was any water so spilled, by the plaintiff herself while seated at

the table as she admitted that she used the glass and drank water during the course of her meal. If any water was in fact spilled on the floor it was a very small amount.

At the conclusion of plaintiff's case, defendant moved for dismissal which was overruled. Defendant then offered its evidence and both sides rested. Defendant again moved the court for a dismissal of the action. The court, in accordance with the new rules, took this Motion under advisement and submitted the case to the jury (Tr. 006). The jury were unable to agree on a verdict and were discharged (Tr. 007).

Thereafter defendant filed its Motion for Judgment notwithstanding the discharge of the jury as provided by Rule 41 (2) B, and the court granted the motion (Tr. 010).

Thereafter plaintiff filed a Motion to reconsider and set aside the ruling of the court or, in the alternative, to grant a new trial. This Motion was based solely upon the affidavit of one Eleanor McFarlane Evertsen (Tr. 011).

Thereafter the court entered a minute entry denying said Motion (Tr. 012).

ARGUMENT

We shall endeavor to answer briefly and in order the Statement of Points set forth on page 6 of Plaintiff's Brief.

POINT 1.

ERROR OF THE COURT IN GRANTING DEFENDANT'S MOTION FOR JUDGMENT NOTWITHSTANDING THE DIS- CHARGE OF THE JURY.

Counsel for Appellant relies upon the decision of this Court in the case of,

Ericksen v. Walgreen Drug Co., Ut.,
232 P. (2d) 210.

A mere reading of this will disclose that the facts are so dissimilar that it seems to us that the case is of little or no assistance.

The Walgreen case involved an entirely different situation. There the tile in question was under an open canopy leading from the sidewalk to the main entrance of the building. The tile had become worn and had lost much of its character designed to prevent slipping. The accident occurred on a rainy day when this area was completely wet. It was also sloping so as to render the same unsafe.

In this case the accident happened on the 22nd day of June, 1948. The weather was dry. Counsel contend that defendant was negligent because it did not place mats in the aisle. There are two answers to this charge: First, there is no evidence that the aisle was slippery and second the evidence is that the plaintiff slipped near where she was sitting and not in the aisle at all. It is of course axiomatic that the defendant is not an insurer of the safety of its guests. It is only required to exercise reasonable care to see that the premises are reasonably

safe. Had the accident occurred during stormy weather and had it appeared that customers entering the building brought in water on their shoes or clothes which fell on the floor, thereby making it slippery, as in the Walgreen case, a different situation might present itself but here the defendant was extra cautious in not allowing or permitting the floor to become wet and there is no contention that the floor was slippery or dangerous when wet.

Respondent relies principally upon the case of,

Jensen v. Kress, 49 P. (2d) 958, 87 Utah 434.

We assert with full confidence that this case is on all fours with the case in question. Mr. Justice Wolfe, in writing the opinion of the court, says:

“There was no evidence as to how the glass got cracked or how long it had been cracked before the plaintiff was cut by it.

“Again, in both cases (ref. to the Quinn case) the cause of the spilled ink or broken glass may have been caused by the customer who was damaged or by another customer, or may have been caused by some representative of the company *without negligence and without negligence and unnoticed when it was done.*

“Again, in the instant case it was just as consistent that the plaintiff herself or some other customer had leaned against the show case and thus split off a piece of glass as if the defendant had done it negligently.”

Again, in commenting on the case of *Ober v. The Golden Rule*, Mr. Justice Wolfe says:

"The case would be parallel to the instant case if it could be shown that the company broke this glass or knew it to be in such condition and allowed it to remain so. Then in each case there would be an act or omission attributable to the company. Under the evidence of this case the breaking may or may not be attributable to the company."

In this case there is no evidence before this court as to

(a) Who spilled the water.

It is just as consistent to assume that the plaintiff spilled the water as it is to assume that some employee of the company spilled it. After the glass of water was placed on her table, no agent or employee of the defendant ever touched the glass. But, on the contrary, the plaintiff drank from the glass during the course of the meal. And

(b) There is no evidence as to how long the water remained on the floor.

The evidence is conclusive that there was no water on the floor when the plaintiff was seated at the table not more than one-half hour before the accident. If there was water on the floor, it may have been placed there within minutes or seconds before the plaintiff slipped. And, assuming, for the sake of argument, that a waitress accidentally did in fact spill the water, there is no evidence that the waitress knew that she had in fact spilled any water and if such was the case, the spilling of the water by a waitress would not be negligence.

Again, reverting to Mr. Justice Wolfe's statement: "or may have been caused by some representative of the company without negligence and unnoticed when it was done," if such was the case, then the defendant would not be liable in the absence of evidence showing that the water had been on the floor for a sufficient length of time to have constituted notice and an opportunity to remedy the situation.

The Jensen case has been cited with approval by many courts and it has never been modified or in any manner criticized by this court.

It is probably unnecessary to cite cases from other jurisdictions. We might however cite the following cases which are in harmony with the Jensen case :

Rosburg v. Montgomery Ward & Co., (Mont.)
99 P. (2d) 979;

Crawford v. Pac. State Sav. & Loan Co. (Cal.) 71
Pac. (2d) 333;

Zampor v. U. S. Smelt. & Refin. Co. (10th Circuit)
206 F. (2d) 171.

While not directly in point, yet we think the case of,

Jordan v Coca Cola Bottling Co., 117 Utah 578,
218 Pac. (2d) 660.

also sustains our position. In this case and the recent case of,

Devine v. Cook, Utah, 279 Pac. (2d) 1073.

both interesting cases involving the law of negligence and especially its causes, that if several inferences may

be deduced from the evidence, one of which inferences may support a conclusion of negligence but the other inference would not support negligence, then the court cannot permit the jury to speculate on the question of negligence.

In our case we re-assert what was stated in the Coca Cola case and in the Devine case that it is just as consistent that the water was spilled, if there was any water spilled on the floor, by some one else as it is to conclude that it was knowingly spilled by a waitress. Therefore, the jury could not speculate on this question.

We assert therefore that the court was clearly right when he granted defendant's Motion for Judgment notwithstanding the Discharge of the jury.

POINT 2.

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

We have fully covered this matter in our discussion under Point 1.

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.

Counsel for plaintiff assert that the witness Lillian McGahy was an adverse witness. We contend that there is absolutely no evidence in this record on appeal from

which such a conclusion could be assumed. True, the record shows that she was ordered by subpoena to testify but the fact of being adverse can not be inferred from this fact but quite apart from that, the affidavit was clearly hearsay evidence. It was not rendered under conditions which would permit its declarations to be a part of the *res gestae*.

Counsel frankly admit that their associate counsel who took the deposition did not attempt to lay any foundation for impeachment nor did he lay any foundation to show that the waitress was in any manner hostile. Counsel say "she had become a hostile witness. She not only refused to return to Utah to testify but refused to appear for the purpose of taking her deposition until compelled to do so." There is no evidence in this record that she refused to return to Utah to testify nor is there any evidence that she refused to appear for the purpose of taking her deposition until compelled to do so but if she did, that did not prove her a hostile witness. Counsel admit that they can find no authority to sustain their position that the court erred in not allowing the affidavit to be introduced in evidence. And in passing it must be noted that the offer of the affidavit was not made for the purpose of impeachment but it is contended by counsel that the statements contained in the affidavit should have been submitted as evidence from which the jury could find negligence. Clearly, as stated by the court in the *Kress v. Jensen* case, declarations of an agent, made long after the happening of the event, are not admissible against the principal in the absence of a showing that the

agent had authority to bind the principal. We pass this matter without further comment.

POINT 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.

Counsel boldly state appellant's Motion for new Trial was based primarily upon the supporting affidavit of one Eleanor McFarlane Evertsen and should have been granted on the theory that it was newly discovered evidence, material for the party making the application *which he could not with reasonable diligence have discovered and produced at the trial*. (See pages 10 and 11 of Appellant's Brief.)

They further state, on page 11, 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 appellants' attorney 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 the two days immediately preceding the trial and were informed by her husband that she was ill in bed and could not possibly appear."

We submit that this statement by counsel is wholly outside the record; that there is no evidence presented to this court to support the foregoing statement.

Counsel further state 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 asking for another continuance and thereby incurring the ill will of the court, particularly when counsel did not know whether the testimony of Mrs. Evertsen *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 that no more continuances would have been granted and would not have called off the jury at that late date. Of this counsel for appellant was then and are now convinced." (Pages 11 and 12, Tr.)

Again, we must remind this court that there is not a scintilla of evidence, transcribed or presented to this court to sustain this statement. It is however interesting to note that this case was filed on the 8th day of June, 1949 and that it was not tried until the 7th of May, 1954, or practically five years after the filing of the complaint.

On the question of diligence, it is further interesting to note:

That plaintiff's counsel failed to explain what diligence was undertaken during this whole five year period to find this witness who admittedly was a friend of the

plaintiff and it is further interesting not note how quickly, after the granting of this motion, plaintiff's counsel were able to locate this witness in Salt Lake City. They admit that this was not newly discovered evidence, that they learned of this witness at least two days before trial but they say they did not know whether her evidence was cumulative or not. What kind of diligence is that?

Then they say that the court had announced that he would grant no further continuances. We have already alluded to the fact that there is no evidence in this record which supports this statement but even if it is true, it seems to us that counsel for plaintiff not only lacked diligence but were guilty of the grossest kind of negligence in not calling the matter to the attention of the trial court.

Even assuming that the trial court had been impatient because of repeated continuances, yet, it seems to us, that counsel was certainly derelict in not asking for a continuance and to impute to the trial court that he would not have listened to their plea had they made a proper showing is to impute to the trial judge motives quite contrary to our experience with the fine judges of the State of Utah.

Counsel admit that this court can not review the action of the trial court in granting or denying a motion for a new trial except only upon a showing of an abuse of discretion. It seems rather difficult to claim or even assert, under the facts of this case, that the trial court was guilty of an abuse of discretion reviewable by this

court in denying their motion, when counsel admit that for at least two days prior to the date of trial they knew of this witness and had apparently made no effort to interview her and certainly never called the matter to the attention of the trial court at a time when they should have done so but chose to rely upon the trial of the case without this testimony, hoping to use it as a means of obtaining a second trial should the verdict be rendered against them. This certainly is not the diligence which is required to support a motion for a new trial and certainly the denial of the motion did not constitute an abuse of discretion.

Respondent contends that the motion for judgment was properly granted and that the denial of the motion for a new trial was properly overruled.

Respectfully submitted,

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