1956

Mamie J. Tempest v. James K. Richardson and Wilma L. Richardson : Brief of Appellant

Utah Supreme Court

Gustin, Richards & Mattsson; Attorneys for Appellant;

Case No. 8466

IN THE SUPREME COURT
of the
STATE OF UTAH

MAMIE J. TEMPEST,
Plaintiff and Appellant,

— vs. —

JAMES K. RICHARDSON and WILMA L. RICHARDSON, his wife,
Defendants and Respondents.

BRIEF OF APPELLANT

Appeal From The District Court of the Third Judicial District in and for the County of Salt Lake
HONORABLE A. H. ELLETT, *Judge*

GUSTIN, RICHARDS & MATTSSON
Attorneys for Appellant

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STATEMENT OF FACTS

A summary judgment in favor of the defendants and each of them was entered in this case on November 10, 1955 (Tr. 7). The summary judgment was granted upon a motion which was based upon the pleadings and deposition of the plaintiff (Tr. 5).

Plaintiff's complaint alleges that the plaintiff was a guest in the home of the defendants at 1754 Oakridge Drive, Salt Lake City, Utah. The plaintiff asked to be directed to the lavatory in said home and was carelessly

and negligently directed by the defendant Wilma L. Richardson toward a door which, unknown to the plaintiff, but well known to the defendants, opened not into the lavatory but onto a stairway leading to the basement of said home; that the door to which plaintiff's attention was directed was constructed and maintained in a negligent manner creating a hidden trap unknown to the plaintiff but known to the defendants (Tr. 1-2).

Defendants set forth the defense that the complaint failed to state a claim against the defendants. They further alleged that the plaintiff was a guest insofar as the dining room, living room, kitchen and bathroom of said home were concerned but was not a guest of the defendants insofar as the remaining portions of said home were concerned; that the defendants were not negligent and that if plaintiff suffered injury or damage the same was caused or proximately contributed to by the negligent acts or omissions of the plaintiff (Tr. 3).

The references to the testimony given by plaintiff on her deposition will be referred to by the page numbers of the deposition which is marked Transcript page 11.

Mrs. Tempest in her deposition testified that she had known the Richardsons for a long time and considered them good friends. There is confusion as to whether she had been in this particular house before the evening of August 12, 1954, but if so, it had only been upon one or two occasions (D. 2-4).

On August 12, 1954 Mrs. Tempest arrived at the Richardsons' home about 5 or 5:30 P.M. and went into the living room and then out onto the patio (D. 6). The floor plan of the home as described by Mrs. Tempest is as indicated in defendant's Exhibit 1 attached to the deposition (D. 7-12). About 7:00 o'clock they went into the dining room for dinner. Around 9:30 Mrs. Tempest went into the kitchen with Mrs. Richardson and after a short time in the kitchen Mrs. Tempest walked into the utility area and while walking across that area said: "I am going to the lavatory." Mrs. Richardson answered: "The light is on." (Tr. 13-14). When Mrs. Tempest reached the hall she saw that there was a door open and a light shining out into the hall, but she did not remember of any light being on in the hall itself. Mrs. Tempest walked down the hall to the lighted door or room, looked in and did not see the lavatory but saw a door right next to the den or bedroom, which door was closed (Tr. 14). She did not see any other light in the utility area and did not see the bathroom. Mrs. Tempest had walked past the bathroom when she went into the utility area but did not know it was there and saw the light shining from the room into the hallway. There was plenty of light in the hallway so that she could see her way (Tr. 15). After she had looked into the den or bedroom and did not see the lavatory she opened the door next to it with her right hand and walked forward and immediately fell. The door swung in, but there was no light on and she did not see the stairway. There is no landing inside the doorway leading to the stairway and the first step down is right

next to the hall floor so that there is a sheer straight drop down the stairs (Tr. 16-17). As she did not see the bathroom she does not know whether there was a light on or not (Tr. 20).

STATEMENT OF POINTS

1. THERE IS A GENUINE ISSUE AS TO A MATERIAL FACT.

(a) DEFENDANTS WERE NEGLIGENT AND THEIR NEGLIGENCE WAS THE PROXIMATE CAUSE OF INJURY TO PLAINTIFF.

(b) PLAINTIFF WAS NOT NEGLIGENT.

ARGUMENT

1. THERE IS A GENUINE ISSUE AS TO A MATERIAL FACT.

(a) DEFENDANTS WERE NEGLIGENT AND THEIR NEGLIGENCE WAS THE PROXIMATE CAUSE OF INJURY TO PLAINTIFF.

The only question involved is whether after consideration of the pleadings and deposition of the plaintiff there is or is not a genuine issue as to a material fact. There is no dispute in this case but that plaintiff while in defendant's home was a social guest and is considered a licensee. *McHenry v. Howells, et al.*, (Ore.) 272 P. 2d 210 (1954).

Plaintiff being a licensee, the defendants owed her the duty to use reasonable care not to injure her through

any act of negligence on their part and to warn her of dangerous conditions which they knew but which they could not reasonably assume that she knew or by a reasonable use of her faculties would observe. *Deacy v. McDonnell, et al.* (Conn.) 38 Atl. 2d 181 (1944).

Restatement of the Law of Torts, Sec. 342, Page 932.

> "DANGEROUS CONDITIONS KNOWN TO POSSESSOR. A Possessor of land is subject to liability for bodily harm caused to gratuitous licensees by a natural or artificial condition thereon if, but only if, he
>
> (a) knows of the condition and realizes that it involves an unreasonable risk to them and has reason to believe that they will not discover the condition or realize the risk, and
>
> (b) invites or permits them to enter or remain upon the land, without exercising reasonable care
>
> (i) to make the condition reasonable safe, or
>
> (ii) to warn them of the condition and the risk involved therein."

With this premise established and which we do not believe will be questioned, we come to the question whether under the pleadings and the testimony given by plaintiff it could be said that no reasonable person could find that the defendants or either one of them were not negligent and that their negligence was not the proximate cause of plaintiff's injuries.

In this case Mrs. Tempest was not familiar with the premises and after leaving the kitchen where she and Mrs. Richardson had been together Mrs. Tempest proceeded some distance across the utility room. As she was so proceeding she told Mrs. Richardson that she was going to the lavatory and Mrs. Richardson stated that the light was on. No statement or warning was given to Mrs. Tempest regarding the cellar stairway.

The evidence does not disclose whether Mrs. Richardson knew that Mrs. Tempest had already passed the lavatory, if in fact she had, nor does the evidence disclose that Mrs. Richardson was aware that the light was on in the den or bedroom, that being the room right next to the door to the cellar steps.

We can, however, assume that Mrs. Richardson was familiar with her own home and knew that if one had proceeded across the utility room to the hall that they would not observe the bathroom which was recessed off the utility room. If she knew the light was on in the bedroom or den then she knew or should have known that a person reaching the hallway would be attracted thereto and finding that it was not the bathroom might try the door adjacent thereto which opened onto a stairway leading to the basement. Mrs. Richardson did know that the door to the stairs opened inward and that the step dropped immediately down, there being no platform flush with the hall floor and that one taking a step forward through the door would immediately descend downward.

Under such circumstances can it be said that no reasonable person would not come to the conclusion that Mrs. Richardson was negligent in not warning Mrs. Tempest of the stairway? If, in fact, Mrs. Richardson knew how far Mrs. Tempest had passed across the utility area would not this have a bearing on the situation? If so, we have a material fact which must be determined. The same conclusion would be true concerning the question as to whether or not Mrs. Richardson knew that the light was on in the bedroom and that the door was open so that Mrs. Tempest might be attracted thereto.

In the case of *Wardhaugh v. Weisfield's, Inc.* (Wash.) 264 P. 2d 870 (Dec. 1953) the defendant had constructed a ramp in its store in such a manner that it looked as though it were level. The Court held that such deceptive condition may be considered as negligence.

In this case if plaintiff had attempted to go to the lavatory without instructions and had received injuries the question would be entirely different. However, plaintiff was instructed that the light was on. She proceeded to the lighted room as instructed which turned out to be a den or bedroom rather than a bathroom and she had no warning that the door next thereto guarded a dangerous stairway leading to the basement.

In the case of *Hamblet v. Buffalo Library Garage Co., Inc.,* 225 N. Y. Supp. 716, a person on the premises was instructed how to reach the lavatory and the Court

held that plaintiff had the right, to a certain extent, to rely upon instructions and to govern his conduct accordingly.

In the case of *Deacy v. McDonnell, et al.,* supra, where the plaintiff went to visit her sister who was a servant in the home of the defendants and it became time for plaintiff to leave, the servants of the defendant failed to turn on the light so that plaintiff might discover the step down to the porch and by reason thereof she fell. The Court held:

> "It was for the trial court to determine as a question of fact whether the situation was or was not one in which the servants could not reasonably assume that the plaintiff knew or by the reasonable use of her senses would discover the step down to the porch and which, therefore, fell within the principle under which an owner is bound to take precautions to protect a licensee of whose presence he knows against a dangerous condition upon the premises. It could reasonably reach the conclusions that it was the servants' duty either to turn on the lights or warn her of the danger created by the step and that, for their breach of that duty, the defendants are responsible. These conclusions are sufficient to sustain the ruling that there was a breach of the duty which the defendants owed the plaintiff."

In addition to the facts testified to in plaintiff's deposition, it appears to us that there are material facts that would have to be determined before the Court could say that there was no negligence on behalf of the defend-

ants or either one of them. A very material fact would be whether or not Mrs. Richardson knew at the time she advised Mrs. Tempest that the light was on that Mrs. Tempest had already passed the entrance to the bathroom and was in the hallway. Another fact would be whether or not Mrs. Richardson knew that the light was on in the den or bedroom. These two facts are very important for the reason that if Mrs. Richardson answered both of these questions in the affirmative she knew or should have known that Mrs. Tempest would then have been misguided and led to the bedroom rather than the bathroom. We also know that Mrs. Richardson was aware or should have been aware of the type of stairway just adjacent to the door to the den or bedroom. She knew that the door opened inwardly. Under such circumstances she had a duty to warn Mrs. Tempest of the stairway or to direct Mrs. Tempest's attention to the fact that she had passed the bathroom.

The case of *Young et al. v. Felornia et al.*, ... Utah ....., 244 P. 2d 862 (1952) involved a dispute of grazing rights in the State of Utah. An appeal was taken by the defendants from a summary judgment. The motion of summary judgment was based upon the pleadings and a stipulation and the issues established by the court in its pretrial order. The Court held after quoting Rule 56 (c) U.R.C.P. as follows:

> "Under this rule, it is clear that if there is any genuine issue as to any material fact, the motion should be denied."

(b) PLAINTIFF WAS NOT NEGLIGENT.

Is an individual negligent who opens a door which opens away from him and takes a step forward at the same time even though the room or space that he steps forward into is dark? Does not one have the right to assume that where a door opens inwardly that there will be a floor beyond, not just a vacant space and if there is a stairway on the other side of the door there will be a first step or platform which will be level with the floor?

In the present case the facts would not warrant the finding of negligence or contributory negligence on the part of the plaintiff.

Plaintiff had been directed to the bathroom. She was advised that the light was on. When plaintiff discovered that the room was not a bathroom, was she not justified in trying the door next to it? Would not a reasonable and prudent person open a door and take a step forward in order to turn on the light? Certainly we would not say that a reasonable and prudent person under such circumstances would push the door wide open and stand back rather than take a hold of the door and move forward as the door opened, nor would an ordinarily reasonable person anticipate and expect that if he should take a step forward in the darkness that he would be immediately precipitated down a flight of stairs.

The case of *Ray v. Consolidated Freightways,* ..... Utah ....., 289 P. 2d 196 (1955) was a case involving the

destruction of a truck and trailer claimed to have been caused by another truck and trailer approaching on the highway. The Court states:

> "Therefore, if there is any reasonable basis, either because of the lack of evidence, or from the evidence and the fair inferences to be derived therefrom, taken in the light most favorable to the plaintiff, upon which any reasonable mind could conclude that it was not convinced by a preponderance of the evidence either (a) that the plaintiff was guilty of contributory negligence or (b) that such negligence proximately contributed to cause the injury, then the refusal of the trial court to find plaintiff contributorily negligent must be sustained."

From this expression this Court has indicated that if reasonable minds could differ as to whether or not the acts heretofore referred to constitute contributory negligence, then the matter would be a question for a jury to determine and certainly would not permit the entry of a judgment of dismissal or summary judgment.

In the case of *Rogalski v. Phillips Petroleum Co.*, 3 Utah 2d 203, 282 P. 2d 304, the plaintiff while steam cleaning his employer's truck fell into a vat containing caustic soda. The Court in discussing the question of contributory negligence held as follows:

> "It has been frequently announced by this court that contributory negligence is a question for the jury unless all reasonable men must draw the same conclusion from the facts as they are shown. Shafer v. Keeley Ice Cream Co., 65 Utah

46, 234 P. 300, 38 A.L.R. 1523; Lowe v. Salt Lake City, 13 Utah 91, 44 P. 1050, 57 Am. St. Rep. 708; Baker v. Decker, 117 Utah 15, 212 P. 2d 679. As was said in Linden v. Anchor Min. Co., 20 Utah 134, 58 P. 355, 358:

> " 'Where there is uncertainty as to the existence of either negligence or contributory negligence, the question is not one of law, but of fact, and to be settled by a jury; and this, whether the uncertainty arises from a conflict in the testimony, or because, the facts being undisputed, fair-minded men will honestly draw different conclusions from them.' "

The case of *Nielson v. Mauchley,* 115 Utah 68, 202 P. 2d 547 (1949) involved an intersection accident. The Court states:

> " 'Each case must turn upon its own facts. Contributory negligence as a matter of law, can only be found where reasonable minds cannot but conclude that a reasonable careful and prudent person situated as was plaintiff would not have acted as he did. The situations where a court will so declare are rare. * * *"

In the case of *Knight v. Southern Pac. Co.,* 52 Utah 42, 172 P. 689 (1918) brought for the recovery of the negligent killing of certain horses the defendant set up the defense of contributory negligence and the Court held in discussing contributory negligence as follows:

> "While it is true, and this court has so held in cases too numerous to cite here, that the question of contributory negligence on the part of the plaintiff, like that of original negligence on the

part of the defendant, is ordinarily a question of fact for the jury, and can only in rare instances be disposed of as a question of law, yet it is also true that this court, in common with other courts, has also very frequently held that, where the evidence is undisputed and is not conflicting, and is such that reasonable men may not deduce conflicting inferences therefrom or arrive at different conclusions, then the question of necessity is purely one of law to be determined by the court."

The Washington Supreme Court in the case of *Wardhaugh v. Weisfield's, Inc.,* supra, states:

"The issue of contributory negligence should not be taken from the jury unless the acts done were so palpably negligent as to preclude the possibility of a difference of opinion. McBeath v. Northern Pac. R. Co., 32 Wash. 2d 910, 204 P. 2d 248."

"Nor is contributory negligence chargeable to one who was deceived by appearances calculated to deceive an ordinarily prudent person. Brandenburg v. Pacific Gas & Electric Co., 28 Cal. 2d 282, 169 P. 2d 909; Bradley v. Allis Hotel Co., 153 Kan. 166, 109 P. 2d 165; Rue v. Wendland, 226 Minn. 449, 33 N.W. 2d 593; Manley v. Haus, 113 Vt. 217, 32 A. 2d 668."

38 *Am. Jur.,* Section 184, Page 861.

"As it generally is expressed, a plaintiff will not be held to have been guilty of contributory negligence if it appears that he had no knowledge or means of knowledge of the danger, and conversely, he will be deemed to have been guilty if

it is shown that he knew or reasonably should have known of the peril and might have avoided it by the exercise of ordinary care."

This statement is cited with approval in the case of *Martin v. Jones,* ..... Utah ....., 253 P. 349 and in the case of *Knox v. Snow,* ..... Utah ....., 229 P. 2d 874.

In conclusion, we respectfully submit that there are material questions of fact to be determined before it can be stated that Mr. or Mrs. Richardson were not negligent, and from the evidence introduced it cannot be said, as a matter of law, that the plaintiff was negligent, and the court erred in entering its summary judgment.

Respectfully submitted,

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