

1958

Paul Ernest Jopes v. Salt Lake County et al : Brief of Respondents Salt Lake County and Joseph Michael Riley

Utah Supreme Court

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MAY 3 1958

Case No. 8702

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IN THE SUPREME COURT
of the
STATE OF UTAH

PAUL ERNEST JOPES,

Plaintiff and Appellant,

vs.

SALT LAKE COUNTY, SALT LAKE
COUNTY RECREATION BOARD,
JUNIOR CHAMBER OF COM-
MERCE OF SALT LAKE CITY,
MEADOW BROOK GOLF CLUB and
JOSEPH MICHAEL RILEY,

Defendants and Respondents.

BRIEF OF RESPONDENTS SALT LAKE COUNTY
AND JOSEPH MICHAEL RILEY

MORETON, CHRISTENSEN & CHRISTENSEN

By: RAY R. CHRISTENSEN

*Attorneys for Salt Lake County
and the defendant Riley.*

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Defendants and Respondents.

Case No. 8702

BRIEF OF RESPONDENTS SALT LAKE COUNTY
AND JOSEPH MICHAEL RILEY

STATEMENT OF FACTS

We cannot agree in full with the statement of facts set forth in appellant's brief, and we submit the following by way of modification and supplementation:

Appellant apparently attempts to leave the impression that Meadow Brook Golf Course is operated by the County in competition with golf courses operated by private enterprise for pecuniary profit. He states on page 2 and again on page 12, of his brief that the course is operated precisely the same as any private

course in the city. We find no evidence in the record to support this statement. In fact there is no evidence in the record as to manner of operation of any other golf course in Salt Lake County.

We believe that it is a matter of such common knowledge that this court can take judicial notice, that the only golf courses in Salt Lake County are those operated by the County itself; or by Salt Lake City, a municipal corporation; or private courses where play and use of the facilities is limited to the members of the private club and their guests. There are no golf courses in Salt Lake County, and so far as we know, there are few if any golf courses in the entire country operated by private enterprise for pecuniary profit, except as such courses may be incidental to a large resort or amusement area such for example as Sun Valley, Idaho or the Broadmoor Hotel in Colorado Springs.

It is apparently suggested in appellant's brief that golf lessons are given by the County. This also is incorrect. Golf lessons are given by the defendant Riley as part of his duties as the professional at the golf course. However, the fees paid for such lessons belong to him, and are part of his compensation for services rendered (Ex. 24-P, par. 4(c)).

Appellant, at page 4 of his brief, refers to the lease agreement between Salt Lake County and Jessie Smith, the operator of the restaurant at the club house. This agreement is evidenced by Ex. 25-P which was offered in evidence by appellant but was not received. Since appellant does not here complain of any error in the

court's failure to receive it in evidence, it is not before this court, on this appeal, for any purpose.

Appellant would have the court believe that because a portion of the club house premises was leased to Mrs. Smith for *her* pecuniary profit, that the operation of the entire golf course became an operation for pecuniary profit. It is common knowledge that in practically all public parks, concessionaires operate rides, games, amusement devices of various types, and refreshment stands on a concession basis for pecuniary profit, from the governmental agency owning and operating the park. This does not make the operation of the park any the less a governmental function.

Appellant also failed to make note of the fact that holding of the Utah Open Golf Tournament at the Meadow Brook Golf Club not only did not financially benefit the County in any way, but actually was a financial detriment. Because the course was being used by the tournament players, the County lost the green fees which otherwise would have been paid by members of the public for the use of the golf course during the period of the tournament. The entry fees for the players, gallery fees paid by spectators, and other income from the tournament did not go to the County, but, after payment of the expenses of the tournament, the excess of the income was divided among the sponsoring organizations (R. 235, 255 to 257, 296).

The right to hold one men's open or amateur tournament on the golf course each year was guaranteed by Riley's contract of employment with the County (Ex.

24-P, R-232, 245). It was in the nature of a further consideration to Riley for his services, since it was in no wise a benefit to the County (R. 232).

The club house itself was built about 1950 by conversion for use as a club house of a building previously erected. The concrete abutements along the passageway where plaintiff fell, and, in fact, along the entire east wall of the club house, were part of the original building, and were left there when the building was converted to a club house (R. 247). None of the defendants in this action had anything whatsoever to do with their placement.

It is undisputed that a score board for use in the Utah Open Tournament, was erected on the outside portion of the east wall of the club house which was opposite to the passageway from the pro-shop to the dining room (R. 260-261). It is also admitted that the score board occluded a portion of the sunlight which otherwise would have passed through the glass bricks into the passageway. However, the evidence is clear and conclusive that there were other sources of light, which made the abutements in the passageway visible to users thereof (R. 248, 271, 294, 300-301, 302-303, 306-308, 313-314).

The defendant Riley testified that there was ample light in the hall with the score boards up (R. 248, 271). Carman Kipp, an officer of the defendant Salt Lake Junior Chamber of Commerce, testified that there was light enough to see where you were going. He testified as follows:

“Q. And, from your observation being in there, could you tell us what that condition of light was?

“A. Well, you could see in there; it wasn’t as bright as outside, but it was light enough to see where you were going. There were various sources of light letting in, and I didn’t have any trouble seeing in there.

“Q. Did you observe whether or not there was light coming into the passageway from the cafe area?

“A. Yes, there was.

“Q. Did you observe whether or not there was light coming into the passageway from the golf club area?

“A. Yes, there was; those two doors, as I recall it, were open during the time that this was all going on during the daytime; all were kept open.” (R. 294)

Edward J. Whitney, another Junior Chamber Officer testified that there was light from both ends of the passageway and that the abutements were clearly visible (R. 300-1).

Kenneth J. Done, Executive Secretary of the Junior Chamber of Commerce, testified that during the running of the tournament he passed through the passageway about twenty-five times a day; that there was nothing unusual about the lighting conditions, and that there was “plenty of light to see by,” and that he saw the abutements (R. 302-3).

Jack Gilbert, an officer of Meadow Brook Golf Club, testified that he traveled through the passageway a dozen

times a day during the tournament; that there was nothing unusual about the lighting conditions; that there was light in the passageway from both ends, and from the adjacent card room, and that he had no difficulty in seeing the abutements when passing through the passageway after dark (R. 306-8).

Sidney Nelsen testified that on the night of the Calcutta Drawing, he traversed the passageway without difficulty (R. 313-314). The night before, plaintiff himself passed through it without difficulty (R. 169, 171).

Although the plaintiff passed through the passageway five or six times prior to the accident, he never noticed the abutements (R. 118, 167, 177). At the time of the accident, he had been inside a sufficient length of time, according to his own testimony, to permit his eyes to become accustomed to the difference between the inside and outside light (R. 184). However, when he was asked directly why he didn't see the abutement, he admitted that he didn't know (R. 178). His exact testimony was as follows:

"Q. And why, if you can tell us, didn't you see these large cement abutements?

"A. That is what I would like to know."
(R. 178)

At no place in his testimony did he claim that he tripped over the abutement because he was unable to see it.

It was stipulated by counsel for the plaintiff that if Glen T. James, Auditor of Salt Lake County, were called as a witness he would testify in accordance with

his answers to interrogatories previously filed. These show that during the years 1954, 1955 and 1956, the gross income from the operation of the Meadow Brook Golf Course to the County was respectively, \$30,579.75, \$32,522.10, and \$36,314.50. During the year 1956, costs of operation were \$50,309.11. For preceding years, detailed records of costs of operation were not available but were estimated to be approximately the same as for 1956 (R. 80). In short, the operation of the golf course resulted in an annual deficit to the County of from about \$14,000 to \$18,000. It was not in anywise a profitable venture to the County.

At the conclusion of the plaintiff's evidence, the defendant Salt Lake County moved for a directed verdict on the following grounds:

1. That as a body politic and governmental unit, Salt Lake County was immune from tort liability for damages for personal injuries (R. 281).

2. Even if Salt Lake County may be liable in tort for damages for personal injuries, the operation of a golf course is a governmental and not a proprietary function, and therefore the doctrine of sovereign immunity applies (R. 282).

3. There was no evidence of any negligence on the part of the defendant Salt Lake County (R. 282).

4. There is no evidence that the accident was caused by any negligence on the part of the defendant Salt Lake County (R. 282).

5. Plaintiff's own evidence showed that as a mat-

ter of law he was guilty of contributory negligence (R. 282).

The defendant J. M. Riley moved for a directed verdict on the grounds that there was no evidence of negligence on his part, that there was no evidence that the accident was caused by any negligence on his part, and that plaintiff was guilty of negligence as a matter of law (R. 282-283).

The court reserved ruling on the motions, but at the conclusion of all of the evidence, the motions were renewed, and after extensive argument to the court, the motions were granted.

STATEMENT OF POINTS TO BE ARGUED

POINT I.

SALT LAKE COUNTY IS AN ARM OF THE STATE AND AS SUCH IS VESTED WITH SOVEREIGN IMMUNITY, AND, IN THE ABSENCE OF PERMISSIVE LEGISLATION, CANNOT BE SUED IN TORT FOR NEGLIGENCE.

POINT II.

EVEN IF SALT LAKE COUNTY IS LIABLE IN TORT FOR PROPRIETARY ACTS, THE OPERATION OF A PUBLIC GOLF COURSE IS A GOVERNMENTAL AND NOT A PROPRIETARY FUNCTION, AND THEREFORE THE DOCTRINE OF SOVEREIGN IMMUNITY APPLIES.

POINT III.

EVEN IF THE OPERATION OF A PUBLIC GOLF COURSE IS DEEMED TO BE A PROPRIETARY FUNCTION, THERE IS NO EVIDENCE OF NEGLIGENCE ON THE PART OF DEFENDANT SALT LAKE COUNTY.

POINT IV.

THERE IS NO EVIDENCE THAT THE ACCIDENT WAS CAUSED BY ANY NEGLIGENCE ON THE PART OF ANY OF THE DEFENDANTS.

POINT V.

THE PLAINTIFF WAS GUILTY OF CONTRIBUTORY NEGLIGENCE AS A MATTER OF LAW.

ARGUMENT

We recognize of course, that on this appeal the evidence, and all reasonable inferences therefrom, must be viewed in the light most favorable to the plaintiff. However, there is a presumption in favor of the regularity and validity of all proceedings in the court below. The motions for directed verdict, were based upon multiple grounds. If these respondents are correct on any one of their points, the judgment below should be affirmed. We shall undertake to demonstrate that respondents were correct in each and all of their points.

POINT I.

SALT LAKE COUNTY IS AN ARM OF THE STATE AND AS SUCH IS VESTED WITH SOVEREIGN IMMUNITY, AND, IN THE ABSENCE OF PERMISSIVE LEGISLATION, CANNOT BE SUED IN TORT FOR NEGLIGENCE.

Without even taking the trouble to examine the constitutional differences between Counties on the one hand, and cities and towns on the other, and without even a passing reference to Utah decisions dealing with the doctrine of sovereign immunity, as applied to Counties, appellant would summarily tear away the distinction which has heretofore existed, and place counties in

the same category as cities, and other municipal corporations, as regards the doctrine of sovereign immunity. Although appellant has quoted copiously from the decisions of other jurisdictions in an effort to persuade this court to put aside its well established rule, he has ignored the Utah precedents on this very subject. Before so lightly setting aside a rule so long and well established, we believe it appropriate to examine into its origin, and the validity of the bases upon which it rests. A helpful basic discussion appears in 14 Am. Jur., commencing at page 215, Counties, Secs. 48 and 49. We quote the more illuminating portions:

“Sec. 48. Generally.—It is well settled that since counties are organized for public purposes and charged with the performance of duties as arms or branches of the state government, they are never to be held liable in a private action for neglect to perform such duties, for acts done while engaged in the performance of such duties, or because they are not performed in a manner most conducive to the safety of employees or the public, unless such liability is expressly fixed by statute. The fact that counties are declared by statute to be municipal corporations does not change the rule in the absence of anything in the statute imposing any additional liability. Moreover, no new liability for torts is imposed upon a county by state making it a municipal corporation for exercising the powers and discharging the duties of local government and administering public affairs, and providing that actions for damages for any injury to property or rights for which it is liable shall be in the name of the county. * * *

“Sec. 49. Reason for Rule of Nonliability.—The principal ground upon which it is held that counties are not liable for damages in actions for their neglect of public duty is that they are involuntary political divisions of the state, created for public purposes connected with the administration of local government. They are involuntary corporations, because created by the state, without the solicitation or even the consent of the people within their boundaries, and made depositaries of limited political and governmental functions, to be exercised for the public good, in behalf of the state, and not for themselves. They are in fact no less than public agencies of the state, invested by it with their particular powers, but no power to decline the functions devolved upon them, and hence, are clothed with the same immunity from liability as the state itself. In other words, the rule of nonliability for torts is dictated by public policy. Since a suit against the County is in effect, a suit against the state, an action will not lie without the consent of the legislature.”

See also the discussion in 38 Am. Jur., commencing at page 260, Municipal Corporations, Sec. 571, et seq.:

“Sec. 571. Generally—It was well settled at common law that a mere territorial subdivision, such as a county or a hundred, was not liable for the negligence of its officers. Such a body, while it in a certain sense constituted a legal entity, was not considered a municipal corporation. * * *

“In this country, all territorial subdivisions created by the state and having the power to assess and collect taxes are so far quasi corporations as to be liable to be sued, but a mere territorial subdivision such as a county, township,

or district performing only governmental functions and having no right of self government or private or proprietary interest is not ordinarily liable to actions of tort, in the absence of statutory provision. * * *

“Sec. 573. — Basis and History. — Following the decision in *Russell v. Devon County*, it became a settled principle of the common law that an individual could not maintain an action against a political subdivision of the state for injury resulting from negligence in the performance of any governmental function. The municipality was but a hand of the sovereign, and it was the ‘right divine of kings to govern wrong.’ This principle today is but a rudimentary survival of the maxim ‘The King can do no wrong,’ and immunity is still based on the theory that the sovereign cannot be sued without its consent, and that a designated agency of the Sovereign is likewise immune. The reason frequently assigned in the earlier cases was that the principle which holds that it is better for the individual to suffer than the public to be inconvenienced is stronger than the conflicting principle that for every injury the law gives a remedy. The later cases more often support the rule of governmental immunity on the ground of a public policy which seeks to prevent public funds and public property from being diverted from public uses and applied to the liquidation of private damages. Some cases likewise reason that it would be against public policy to retard and stifle gratuitous governmental activities vitally necessary to the public health and welfare of the population of expanding urban centers by subjecting municipal corporations to tort liability as to *parks, playgrounds, etc.*” (Emphasis ours.)

In this state, counties are established by constitutional fiat. Article XI, Sec. I, of the State Constitution provides as follows:

“The several counties of the Territory of Utah, existing at the time of the adoption of this Constitution, are hereby recognized *as legal subdivisions of this State*, and the precincts, and school districts, now existing in said counties, as legal subdivisions thereof, and they shall so continue until changed by law in pursuance of this article.” (Emphasis ours.)

A relatively early Utah case, *Lowry v. Carbon County*, (Ut.), 232 Pac. 909, considered the problem here involved, and set it at rest until the present time. This court there said:

“First, does the complaint state facts sufficient to constitute a cause of action against Carbon County? We are clearly of the opinion that it does not, and that as to the defendant Carbon County, the trial court properly sustained the general demurrer. The law relating to the liability of counties, under circumstances present in this case, is so clearly stated in 7 R.C.L. at pages 954 and 957, that no further citation of authority is either advisable or necessary at this time.

“While a municipal corporation is liable to an individual in certain cases for a failure to discharge its corporate duties upon the ground that its powers have been granted at the special solicitation, and for the benefit of its citizens, and not so much to aid in the administration of the state government as for the local advantages and convenience, still the law is well settled that *counties being organized for public purposes, and charged with the performance of duties as an arm*

or branch of the state government, are never to be held liable in a private action for neglect to perform a corporate duty, or for acts done while engaged in the performance of such duties, or because they are not performed in a manner most conducive to the safety of its employees or the public, *unless such liability is expressly fixed by statute*. The rule is dictated by public policy, and the fact that counties are declared by statute to be municipal corporations does not change it in the absence of anything in the statute imposing any additional liability. The principal ground upon which it is held that counties are not liable for damages in actions for their neglect of public duty is that they are involuntary political divisions of the state, created for governmental purposes, and are organized without regard to the consent or dissent of the inhabitants. The theory upon which municipal corporations proper are held liable in such cases is that they are voluntary associations, created and organized at the solicitation of, and with the free consent of, the inhabitants, under the laws of the state, and that the benefits accruing to the people by such incorporation compensate them for the liability. Another reason is that, *since a county is but a political subdivision of the state, a suit against the county is, in effect, a suit against the state, and that therefore an action will not lie without consent of the Legislature.* * * *

“It is a general and well-established rule that counties are not liable at common law for injuries resulting from the negligence of their officers or agents. And when the law itself imposes a duty upon the board of county commissioners as such, and they are not appointed thereto by the county, the county will not be responsible for their breach of duty or for their non-

feasance or misfeasance in relation to such duty.' ” (Emphasis ours.)

In the more recent case of *Bingham v. Board of Education of Ogden City*, (Ut.), 223 Pac. (2d) 432, which involved a school district, rather than a county, this court followed the same reasoning:

“The general law of this jurisdiction, as in most other jurisdictions, does not authorize actions for damages for personal injuries against school districts. School districts are corporations with limited powers, and act merely on behalf of the state in discharging the duty of the educating the children of school age in the public schools created by general laws.

* * *

“Since many of the cases relied on by plaintiffs deal with the liability of municipal corporations, we point out that the authorities seem to make a distinction between municipal corporations and what are termed ‘quasi-municipal’ corporations. This distinction is better understood when consideration is given to the fact that school boards are created exclusively for school purposes and are mere agencies of the state established for the sole purpose of administering a system of public education for which they receive no private or corporate benefit; and that, as to tort liability, such agencies or authorities occupy a status different from that of municipal corporations which ordinarily have a dual character and which may exercise proprietary as well as governmental functions. McQuillin on Municipal Corporations, explains the distinctions as follows (Sec. 2775, 2d Ed.):

“* * * It is pertinent to state here that there is a distinction between municipal corporations

proper and quasi-municipal corporations concerning liability for torts, and that the general rule is that the latter is not liable for torts unless allowed by statute. * * *

“The immunity from liability of quasi-public corporations is generally placed upon the ground of their involuntary and public character. They are usually treated as public or state agencies, and their duties are ordinarily wholly governmental. They exercise the greater part of their functions as agencies of the state merely, and are created for purposes of public policy, and hence the general rule that they are not responsible for the neglect of duties enjoined on them, unless the action is given by statute. On the other hand, it is recognized that the municipal corporation proper has functions which are performed by it not as a mere agent of the state, but in its capacity as a corporation serving alone the local inhabitants. If the city should be regarded as a state agency at all times, which is frequently asserted without qualification by courts, there would exist no logical ground for holding it liable for damages due to negligence, since in no instance is a state held liable under the general principles of law.’

“The Supreme Court of Iowa, in the case of *Snethen v. Harrison County*, 172 Iowa 81, 152 N.W. 12, 13, refused to declare a county liable for negligence in the performance of its governmental functions. There the court based its reasoning on the distinction between the involuntary and voluntary nature of political and territorial divisions of the state, and said: ‘Counties, unlike cities and incorporated towns, are not, as a rule, held liable for torts committed by them, so long as they are acting within the scope of their governmental powers. They are quasi municipal cor-

porations engaged in the performance of governmental functions and are not responsible for the neglect of duties enjoined upon them, in the absence of a statute giving a right of action.’”

This court also quoted with approval from a Tennessee case, *Odil v. Maury County*, 175 Tenn. 550, 136 S.W. 2d, 500, also involving a public playground or recreation place, as follows:

“ ‘In the present case the county was acting within its delegated power when it constructed this school building; and even if it be conceded that the opening into which plaintiff fell constituted a nuisance, a question unnecessary for this court to determine, the defendant is no more liable than was the county in *Tyler v. Obion County, et al.* (171 Tenn. 550, 106 S.W. 2d 548) *supra*, where the county committed a nuisance by dumping six or seven large piles of gravel or rock in the middle of the road and left them there overnight.’”

The principle was reaffirmed in the case of *Shaw vs. Salt Lake County*, (Ut.), 224 Pac. (2d) 1037, where this court said:

“This court has recognized that counties as quasi-municipal corporations *partake of the sovereign immunity of the State, as an arm of the state*. In this respect they are similar to school districts. See *Bingham v. Board of Education of Ogden City*, (Ut.), 223 P. 2d 432.” (Emphasis ours.)

Apparently the only Utah authority cited by appellant is the early case of *Lund v. Salt Lake County*, 58 Ut. 596, 200 Pac. 510. In that case plaintiff sought re-

covery against defendant for causing or permitting contaminated waters to flow into his fish ponds, destroying his fish. Plaintiff proceeded on three theories: (1) Eminent domain; (2) Nuisance; and (3) Negligence. After rejecting the first two theories as unsound, the court rejected the third theory on the grounds that the county was engaged in an *ultra vires* act, and therefore not liable for the torts of its agents and employees. During the course of its discussion, it indicated, by way of *dicta*, that the doctrine of respondeat superior, would apply if the act were not *ultra vires* and if the county were a municipal corporation. What was there said was *obiter dicta* wholly unnecessary to the decision. Such reasoning has since been clearly, specifically, and unequivocally rejected by the later Utah decisions above cited and quoted by us.

In view of the firmly established Utah law, it appears unnecessary to look to the decisions of sister states for assistance on this point. However, appellant has represented that the trend of authority is toward holding counties liable in tort for damages for personal injury. Lest this court draw the unwarranted inference that it stands alone on this point, we call attention to the following recent cases from other western jurisdictions, as illustrative, but by no means exhaustive, of the many authorities adhering to the same doctrine as Utah:

In *Hazlett vs. Board of County Comm'rs of Muskogee County, Okl.* (Okl.), 32 Pac. (2d) 940, the court said:

"It is well settled in this state that counties and townships are merely quasi-municipal corporations charged by law with certain governmental and administrative functions as state agencies, and as such are not liable in damages for the negligence of the Board of County Commissioners or township officers, or those they are obliged to employ in carrying on such functions."

In *Board of Comm'rs of Harmon County vs. Keen*, (Okl.), 153 Pac. (2d) 483, the same court said:

"We are committed to the rule that in the absence of an express statute creating a liability therefor, a county is not liable in a civil action for damages for injuries resulting from negligent acts or omissions of its officers or those it is obliged to employ in the performance of their duties as such officers or employees."

To the same effect see *Keesee v. Board of County Comm'rs of Kiowa County*, (Kan.), 281 Pac. (2d) 1089.

Although California is represented by appellant as adhering to the opposite rule, it does so only by express statute known as the Public Liability Act. So much is manifest from a reading of appellant's own authority on the subject, *Dineen v. City and County of San Francisco*, (Cal. App.), 101 P. (2d) 736:

"The first question to be determined upon this appeal is whether the respondent is generally liable in tort for alleged injuries growing out of the use and operation of a superior courtroom, or whether the respondent's liability is predicated solely on the provisions of the Public Liability Act. *** *Counties are political subdivisions of the state for purposes of government. Art. XI, Sec. 1, of*

the Constitution; Hill v. Board of Supervisors, 175 Cal. 84, 167 P. 614; Reclamation District v. Superior Court, 171 Cal. 672, 154 P. 845. Counties are vested by the state with a variety of powers which the state itself may assume or resume and directly exercise. The principal purpose in establishing counties was to make effectual the political organization and civil administration of the state which require local direction, supervision and control, including to a large extent, the administration of public justice. * * * In so far as the building involved is maintained for the superior courts, the respondent is acting as a county, in governmental capacity, performing a duty expressly imposed upon it by the state. * * The doctrine contended for by appellant, therefore, has no application. If the respondent is liable at all, such liability must be based on the provisions of the Public Liability Act." (Emphasis ours.)

For a more recent California decision to the same effect see:

Albraeck v. Santa Barbara County (Cal. App.), 266 Pac. (2d) 844, where the court said:

"Inasmuch as counties are agencies of the state, their functions are exclusively governmental. As such counties, they are protected by the doctrine of sovereign immunity. Dillwood v. Riecks, 42 Cal. App. 602, 607, 184 P. 35."

Nor does Alabama follow the contrary rule. Although there is dicta in the case of *Jones v. Jefferson County*, (Ala.), 89 So. 174, (cited by appellant at page 15 of his brief) to that effect, on a rehearing of the same case, reported at 89 So. 177, the court said:

"As stated in the original opinion in this case, and as all the authorities hold, counties are never liable as for torts of their officers, agents or employees in the discharge of public or governmental functions, unless expressly made so by constitutional or statutory provisions.

"There is a well recognized distinction between liability of counties, and that of cities or towns, as to these matters. Towns and cities are voluntary corporations, but counties are involuntary corporations. As was said by this court in the case of *So. Ry. Co. v. St. Clair County*, 124 Ala., 495, 27 So. 25:

" 'at all periods of organized government, territorial and state [counties] have been recognized as political divisions, created and organized as governmental agencies or auxiliaries, to aid by local administration, the sovereign power, in promoting the general welfare within the territorial limits to which they are assigned . . . A County has been defined as an involuntary political or civil division of the state, created by statute, to aid in the administration of government. It is, in its very nature, character and purpose public, and a governmental agency, rather than a corporation. Whatever of power it possesses, or whatever of duty it is required to perform, originates in the statutes creating it, or in the statutes declaring the power and duty . . . '

"For these reasons it is the policy of the law not to hold the sovereign, nor its arms or agency, such as counties, liable as for damages in the discharge of these public duties done to preserve the health and promote the happiness and the general welfare of the people in the state or county. In the discharge of these public and governmental functions by the counties, damage or

injury may often result to the citizen in consequence of the negligence of some agents or officers of the state, county, or other arm or agency of the government; but it is the law of the state and of the land that neither the state, county, nor other arm or agency of the government is liable in damages to the citizens who may suffer loss in consequence of such negligence, *unless the constitution or statutes expressly so provide.*" (Emphasis ours.)

We caution that the decisions from other jurisdictions are not necessarily helpful guides to this court. The counties in all of the states do not have the same constitutional origin, nor are they endowed by constitutional fiat with the same duties, obligations and immunities. In many states, the county serves a function similar to that performed by a city in Utah. In fact, in large metropolitan areas, city and county governments have in many instances been merged. This has given rise to some ambiguous situations as set forth in *Dineen v. City and County of San Francisco*, *supra*:

"It is appellant's theory that the superior court is a state court, and that the city hall in which the courtroom is located is a city and county building, and that therefore the respondent was acting in a proprietary capacity in permitting the state court to occupy the courtroom, and in that capacity is liable for general negligence. The contention is unsound. The respondent is not only a city, but a city and county. While the superior court is, in one sense, a state court, it is also a county court. * * * A city and county government partakes of the nature and has the powers and exercises the functions of both a city and county

* * * Although such dual organization sometimes presents some ambiguous situations, it is quite clear that in operating a superior court it is acting as a county and not as a city. * * In so far as the building involved is maintained for the superior courts, the respondent is acting as a county, in a governmental capacity, performing a duty expressly imposed upon it by the state. * * The doctrine contended for by appellant, therefore, has no application. If the respondent is liable at all, such liability must be based on the provisions of the Public Liability Act."

There may well be sound reasons in other jurisdictions for treating counties in the same manner as cities, and in holding them liable in tort for damages resulting from negligence in the performance of what are termed proprietary functions. We submit that such reasons do not apply in this case. By express provision of our constitution, counties exist as an arm of the state, without the consent or acquiescence of the inhabitants. They are created as a subdivision of the state for the purpose of administering the state's business. All acts which they perform are, by definition, governmental. In this instance, the county was authorized to establish athletic fields, and other recreational facilities; to equip, maintain, operate and supervise the same; and to employ such supervisors and other employees as it deemed proper for the purpose. Sec. 11-2-1, U.C.A., 1953. The purpose of this statute is to provide wholesome recreation for the leisure time of the public of the county. Sec. 11-2-2, U.C.A., 1953. This is a provision for the health and welfare of the citizens which is a well recognized and

traditional police function, certainly governmental in its character.

Appellant refers to Sec. 17-15-10, U.C.A., 1953, which provides for presentation of claims against the county. We believe that appellant intended to refer to Sec. 17-4-3, U.C.A., 1953, providing in part as follows:

“A county has power:

“(1) To sue and be sued.”

It was specifically held in *Shaw vs. Salt Lake County*, (Ut.), 224 Pac. (2d) 1037, that this section was but a general grant constituting the county an entity to sue and be sued, where it might under other applicable statutes or principles, properly sue or be sued; it is not a blanket authorization for suits to be brought against counties. It most certainly is not sufficient authority to support the bringing of this suit.

And in *Jones v. Jefferson County*, (Ala.), on rehearing, 89 So. 177, the court said:

“The mere fact that the statutes authorized suits against counties or corporations which constitute arms or agencies of the government, does not render them liable to actions in damages in consequence of the torts of the agents or officers of such corporations.”

POINT II.

EVEN IF SALT LAKE COUNTY IS LIABLE IN TORT FOR PROPRIETARY ACTS, THE OPERATION OF A PUBLIC GOLF COURSE IS A GOVERNMENTAL AND NOT A PROPRIETARY FUNCTION, AND THEREFORE THE DOCTRINE OF SOVEREIGN IMMUNITY APPLIES.

If the court is persuaded that we are correct in our Point I, there is no occasion for the court to examine Point II. However, in the event that the court is now disposed to tear away the cloak of sovereign immunity which has heretofore protected counties from civil liability in tort, we contend that in this instance the county was engaged in a governmental and not a proprietary function, and would in any event be entitled to the benefits of the doctrine. It is well established in this jurisdiction that the operation of public parks and playgrounds is a governmental as distinguished from a proprietary function. In *Alder v. Salt Lake City*, (Ut.), 231 Pac. 1002, this court said:

“The most general test of governmental function relates to the nature of the activity. It must be something done or furnished for the general ‘public good, that is, of a public or governmental character,’ such as the maintenance and operation of public schools, hospitals, public charities, *public parks or recreational facilities*.” (Emphasis ours.)

The court said further:

“The maintenance of the public park and the presentation of the pageant on the 4th of July by the defendant city were clearly matters of public service for the general and common good, designed exclusively for the *social advantage, entertainment, and pleasure of the general public*; and from which the city could derive no benefit in its corporate or proprietary capacity.” (Emphasis ours.)

The doctrine was reaffirmed in the later case of *Husband v. Salt Lake City*, 92 Ut. 449, 69 Pac. (2d) 491.

It has recently been reaffirmed in *Davis v. Provo City Corp.*, 1 Ut. 2d 244, 265 Pac. (2d) 415, and in *Ramirez v. Ogden City*, 3 Ut. (2d) 102, 279 Pac. (2d) 463.

In the *Davis* case this court said:

“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. *** There is no competition with privately owned business, such a play area is generally operated only by city, and the operation results in no benefit, pecuniary or otherwise, to the municipal corporation as such but is for the use of the general public.” (Emphasis ours.)

Appellant seeks to derive comfort from the fact that a nominal charge was made by the county for the use of the facilities provided at the golf course. Thus green fees were charged to play the course, and a rental fee was charged for those desiring to have the use of lockers for storing of clothing, etc. Appellant cites in support of this contention *Burton v. Salt Lake City*, 69 Ut. 186, 253 Pac. 443, and *Griffin v. Salt Lake City*, 111 Ut. 94, 176 Pac. (2d) 156. Both of those cases involved the operation of a municipal swimming pool by Salt Lake City wherein admissions were charged for use of the facilities. However, there are two very important differences between the facts of those two cases, and those in the case at bar. In the first place, in those cases it appears that the operation of the swimming pool was actually a profit-

able venture to the city, rendering a net profit resulting from the surplus of income over expenses of operation. That is exactly contrary to the situation here. Here, revenue from the golf course, has never come close to paying the expenses of operation. Secondly, in the swimming pool cases, it appeared that Salt Lake City was actually in competition with private enterprise, which was engaged in the same business for profit. There is no evidence of that in this case. On the contrary, we believe that this court can take judicial notice that there is no golf course in the entire state operated by private enterprise for pecuniary profit. All of the golf courses are either operated by governmental agencies for the benefit of their citizens, or else are purely private clubs whose facilities are available only to the limited few who belong.

In the Burton case, it was recognized that the mere fact that a fee was charged did not make the operation proprietary if it was otherwise governmental in character. This court said:

“True it is, as suggested by counsel for the city, that where the municipality is clearly discharging governmental functions in conducting a particular enterprise, or is conducting it entirely in the interest of the public health or welfare, etc., the mere fact that a fee is exacted or a charge is made is not conclusive against the city.”

See also 39 Am. Jur. 835, Parks, Squares and Playgrounds, Sec. 37, to the same effect:

“Nor does an exaction of nominal fees or a charge used in defraying expenses impose liability upon the city in the event of an injury.”

See also *Calkins v. Newton*, (Cal. App.), 97 Pac. (2d) 523, cited and relied upon by appellant:

“The imposition of a charge for service is not inconsistent with the exercise of a governmental function. *** Nor is the fact that the county general hospital was operated at a profit controlling.”

Appellant has cited and quoted from several cases where the renting of a public building for private or non-governmental use has been held to be proprietary activity. From these, he argues that the letting of a portion of the club house to a private entrepreneur for the operation of a restaurant for profit, makes the operation of the golf course, proprietary rather than governmental in character. We believe that the fundamental distinction between those cases and the case at bar, is that in those cases, the use was inconsistent with or irrelevant to the principal function of the governmental building. Thus in *Worden v. New Bedford*, 131 Mass. 23, 41 Am. Rep. 185, (cited in appellant's brief at page 24), a room in the city hall was let to a poultry association. Obviously a poultry association would have no ordinary connection with local government, and the letting of municipal office space for private use would appear to be engaging in private business. However, a restaurant is a normal adjunct of a golf course, just as a lemonade stand is a normal adjunct of a recreation park. Nor is it a departure from governmental activity to make available on a lease basis, restaurant facilities for those resorting to the course. This is similar to the case of *Lefrois v. County of Monroce*, 162 N.Y. 563, 57 N.E. 185, where the opera-

tion of a farm in connection with the maintenance of an almshouse and penitentiary was held to be a mere incident to the latter functions, and therefore governmental in character.

A conclusive answer to this contention on the part of appellant is found in the Ramirez case. There a snack bar was operated for profit by a private entrepreneur in the same building which this court held was operated as a governmental function because for the recreation and relaxation of its citizens.

Plaintiff also relies upon two golf course cases from foreign jurisdictions. The first is *Plaza v. City of San Mateo*, (Cal.), 256 Pac. (2d) 523. In that case the California court attempted to harmonize a series of earlier cases in some of which various types of public recreational facilities had been held to be governmental in character, while others, very similar in nature, had been held to be proprietary in character. The court indulged in some very dubious reasoning to arrive at the conclusion that recreational functions which served the purposes of public education, training for self preservation and good citizenship, and fostering and safeguarding public health, were governmental functions, while the providing of mere amusement or entertainment was not. The language of the court was as follows:

“But what is the primary purpose behind each of them? If any general conclusion is to be drawn from a consideration of the cases, it is that public education, training for self preservation and good citizenship and the fostering and safeguarding of public health are governmental functions, while

the providing of mere amusement or entertainment is not. *** It must be conceded that time spent by a boy in summer camp is to a degree educational, and if nothing more, training in co-operation and good citizenship. It is a matter of self preservation that all who are physically able should learn to swim for who can tell when it may be a factor in saving not only the life of the swimmer, but also the lives of others."

Whatever may be the rule in California, the Utah courts have never indulged in such finely drawn reasoning. In the Alder case, the court cited "social advantage, entertainment and pleasure of the general public" as being governmental functions from which the city could derive no benefit in its corporate or proprietary capacity, and in the Ramirez case, maintenance of a building used for dancing and similar social amusements was held to be governmental in character. It is clear therefore, that the California decision was based upon reasoning wholly contrary to the reasoning which has been announced by this Court in holding parks, playgrounds and recreational facilities as being governmental functions.

The case of *Gorsuch v. City of Springfield*, (Ohio App.), 61 N.E. (2d) 898, is equally inapplicable to the facts of this case. There, the income from the operation of the golf course did not go back into the general fund, but was maintained in a special fund and was used solely for capital improvements and operation and maintenance of the golf course. Over a three year period the golf course had built up a gross balance of over \$5,000 after paying all of the expenses above mentioned. The evidence clearly showed that the operation of the golf course

was for pecuniary profit, and that it directly benefited the city which maintained it. The court there said:

“It is sufficient for the present case to say that if the city in the maintenance and operation of its municipal golf course was directly compensated or benefited by growth and prosperity of the city and its inhabitants, and the city had an election to do or omit to do the acts set forth herein as shown by the evidence, the function is private and proprietary.”

The facts in the Gorsuch case were wholly different from those in the case at bar. Here the course has been operated at a deficit for the past several years and the nominal green fees which are charged have not been sufficient to pay the cost of operation and maintenance. The course is available for the use and benefit of the entire public and is operated pursuant to statutory authority set forth in Sec. 11-2-1, and Sec. 11-2-2, U.C.A., 1953.

More similar on its facts, and therefore more helpful in the determination of the case at bar, is *Williams v. City of Birmingham*, (Ala.), 121 So. 14. In that case, under a statute very similar to the statute under which defendant Salt Lake County operates, and maintains Meadowbrook Golf Course, the Alabama Supreme Court held that the operation of a municipal golf course for the use and enjoyment of the inhabitants of the city, was a governmental and not a proprietary function. Said the Court:

“The park in question may be assumed, by judicial notice, . . . to be a public enterprise, conducted by the city for the welfare of its citizens

and the public generally, under the Act of Sept. 29, 1923. . . .

“Under such act the power is given the city to provide parks, playgrounds, recreational centers, or park areas by and through a park and recreation board named by the city. There is provision made for reasonable fees or charges for access to or use or enjoyment of any playground, etc., conducted by the city, to be paid into and become a part of the park and recreation fund of the city. . . . The board is vested with the power to acquire and operate for the city public parks and playgrounds. . . .”

After reviewing many cases involving the operation of public parks and playgrounds, the court concluded as follows:

“There being no uniform rule in this respect established in the country at large, we must choose our own path. *** [W]e think that, to hold the function public and governmental, and not merely corporate or ministerial, is in the spirit of the decisions heretofore rendered by this court, and is our idea of the correct interpretation of such service to the public by a city.”

Although we have discovered no other cases involving golf courses, the foregoing decision has been cited with approval in many cases, of which the following are the most similar in their facts:

Parr v. City of Birmingham, (Ala.), 85 So. 2d 888;

Atkins v. City of Durham, (N.C.), 186 SE 330;

Downey v. Jackson, (Ala.), 65 So. 2nd 825;
Commissioner of Internal Revenue v. Sherman, 69 Fed. (2d) 755.

POINT III.

EVEN IF THE OPERATION OF A PUBLIC GOLF COURSE IS DEEMED TO BE A PROPRIETARY FUNCTION, THERE IS NO EVIDENCE OF NEGLIGENCE ON THE PART OF DEFENDANT SALT LAKE COUNTY.

POINT IV.

THERE IS NO EVIDENCE THAT THE ACCIDENT WAS CAUSED BY ANY NEGLIGENCE ON THE PART OF ANY OF THE DEFENDANTS.

If the court is favorably influenced by our argument either under Point I or Point II, it will not need to examine Points III and IV. However, if the court rules adversely to us on both of the two preceding propositions, we further contend that there is no evidence whatsoever of any negligence on the part of Salt Lake County, or that any negligence on the part of the County (or any other defendant) caused or contributed to cause the accident. Points III and IV involve a consideration of the same evidence and can conveniently be discussed together.

The evidence shows without dispute, that the club house was built around 1949 or 1950; that it was converted from a pre-existing building, and that among other things, there were in the former building, concrete abutments at regular intervals along the entire east wall. Although there was no expert testimony on the subject, it appeared that such abutments served a useful purpose in the structure, and they were accordingly left there when the building was converted for use as a golf club house. The building was so designed and arranged that the pro-shop or golf shop was in the northerly end, and the coffee shop was in the central portion, and they were

connected by a passageway running along the east side, in which one or two abutments were located at points within the passageway. No artificial light had ever been provided for the passageway from within, that is, there was no light or lamp of any type within the passageway itself. However, the passageway was amply lighted by light from the golf shop, the restaurant, and the adjacent locker room and card room. The passageway was not a long one, being only about 18 feet, a distance which the average person would traverse in about six steps. The passageway had existed in this condition for a period of some five to six years prior to the accident, without, so far as the evidence shows, any previous accident, or other untoward event. There is no evidence that any officer, agent, servant or employee of Salt Lake County had anything whatsoever to do with the design, construction, or conversion of the building. Whatever danger inhered in the concrete abutments in the passageway was not created by the county, and was open, obvious and patent to all who traversed it.

As we see it, the only possible ground upon which the plaintiff can claim negligence on the part of any defendant to this action, is that the passageway was darkened by the placing of the score board over the glass brick along the easterly wall of the building. Admittedly, this had the effect of occluding a portion of the natural light which otherwise would have entered the passageway *during daylight hours*, and to that extent diminished the illumination therein. The record is extremely hazy at best, as to the proportion of the illumination provided by

artificial light and the portion provided by natural light. However, the record is clear, that even at night, the illumination coming from rooms at either end of the passageway, and those adjacent thereto, was sufficient to illuminate it sufficiently for safe passage.

The strongest testimony in the record in support of plaintiff's position is the testimony of Paul Gore, to the effect that he stumbled over the abutment only a few minutes before the plaintiff's accident; that it was so dark in the hallway that he could not see it; and he didn't know exactly what he stumbled over until he felt it after his fall. However, Mr. Gore was a contestant in the tournament. Quite naturally if he had been out in the bright August sunlight immediately preceding the fall, and if his eyes had had no opportunity to adjust to the lighting conditions within, he would have difficulty in seeing. This is a perfectly natural phenomenon which everyone experiences in coming from bright outdoor light into even a well lighted room.

On the other hand, there is an abundance of evidence by persons who traversed the passageway during the tournament during daylight hours, that there was ample light to see the abutments; that they did see them, and that they experienced no difficulty whatsoever in observing them. Of even greater importance, is the testimony of those who traversed the passageway at night, including plaintiff, himself. Quite obviously the amount of outside light which would enter the passageway through the glass bricks at night would be inconsequential, even in the absence of the scoreboard. The testimony

is undisputed that the facilities of the club house are used three or four nights a week, and had been since the club house was built. Persons desiring to use the men's lavatory and wash room would of necessity have to proceed through this passageway to go there. Yet there is no evidence that any person had any difficulty traversing the passageway, including even those who might have their faculties somewhat impaired by indulging in alcoholic beverages. In the face of such evidence, the testimony of the witness Paul Gore, standing alone, as it does, falls far short of satisfying plaintiff's burden of proving, by a preponderance of the evidence that the erection of the score board was the proximate cause of the plaintiff's accident.

The plaintiff's own testimony shows that prior to the accident, he had been through the same passageway approximately half a dozen times. He had never on any of his several trips observed the concrete abutments. Yet, when he was asked directly on cross examination, why he didn't see the large cement abutments, he answered, "That is what I would like to know." (R. 178). At no place in his testimony did the plaintiff state that he failed to see the abutment by reason of the darkness or insufficient illumination in the passageway. He frankly admitted that he didn't understand why he didn't see it. Such testimony is certainly not sufficient to sustain plaintiff's burden of proof. As said in Schwartz, *Accidents in Buildings*, page 283:

"As in all negligence actions, the plaintiff must establish a causal relation between the exist-

ence of a defect in the stairs or passageways and the injury. If the cause or manner of plaintiff's fall is not clear, a verdict in his favor will not be sustained."

Even if the court should determine that a jury might find that it was negligence to erect the score board along the wall, still it was erected by Riley for his own purposes, and not for any benefit of the defendant Salt Lake County, and in erecting the score board, he was not engaged in the course of his employment as golf pro and manager at the Meadow Brook Golf Course. Under Riley's contract of employment by the County (Ex. 24-P) the duties of Riley were defined in paragraphs 7 and 8. They were in substance, proper operation of the golf course; promotion of instruction; supervision, operation, improvement, and maintenance of the golf course, including supervision of tee markers; treating of tees; changing of putting cups; watering of fairways; cutting of fairways, greens, and trees; installation and maintenance of ball washers; closing greens when necessary; requiring use of temporary greens and tees, when necessary; establishment of a policy requiring play by golfers in groups of four or less; and such other activity as would be reasonably necessary to maintain, operate and improve the golf course, as the need appeared. He was further obligated under paragraph 8, to maintain and operate at reasonable prices a first class golf shop, and to have on hand an adequate supply and variety of golf equipment and accessories. These were the only duties enjoined upon him by his contract of employment. He had no duties whatsoever in connection with the manage-

ment, operation, or maintenance of the club house, except the portion thereof designated as the pro shop. In consideration for the services to be rendered by him, he was to receive various benefits as outlined in paragraphs 1, 2, 3, 4 and 5. Among these benefits were the right to act and advise as consultant and architect of golf courses; to play in all sectional open tournaments, and to have and promote various tournaments at the Meadow Brook Golf Course, including one Men's open amateur tournament each year.

If Mr. Riley while playing in a sectional open tournament, at, for example, Ogden, had injured someone by driving a ball into him, we do not believe that anyone could reasonably claim that while so engaged he was acting for and on behalf of Salt Lake County, or that the county would in anywise be responsible for his acts under those circumstances. The same reasoning would apply here as well. Riley was engaged in the promotion of an open tournament in accordance with the privilege accorded him under his contract of employment. Admittedly, the score board had been prepared and erected for the purpose of the open tournament. Admittedly the county derived no benefit from the holding of the tournament. On the contrary, the tournament was a detriment to the county in that, during the holding of the tournament, public play was limited, and therefore the county lost the green fees which otherwise would have been paid. The county received no financial benefits whatsoever from the holding of the tournament. In erecting the scoreboard, Riley was acting solely in his own interest

and for his own purposes, and not for any purpose, advantage or benefit of the county. If he was negligent while so acting, such negligence is not imputable to the county.

In summary, it appears:

(a) That there was no negligence in the design or construction of the club house.

(b) There is no evidence that the county, acting through any of its duly authorized officers, agents, servants or employees, had any part in the design or construction of the club house.

(c) The placement of the score board along the outside wall of the club house did not materially decrease the illumination of the inside passageway, and there is no evidence from which a jury could find negligence in so doing.

(d) There is insufficient evidence to make a prima facie case that the erection of the scoreboard caused, or contributed to cause the accident to the plaintiff.

(e) In erecting the scoreboard the defendant Riley acted solely in his own interest, and not on behalf of Salt Lake County, and the county is not chargeable with his negligence, if any, in so doing.

Of course, points (c) and (d) establish a defense not only for Salt Lake County, but for all other defendants as well.

POINT V.

THE PLAINTIFF WAS GUILTY OF CONTRIBUTORY NEGLIGENCE AS A MATTER OF LAW.

It is axiomatic that a person passing through a darkened or insufficiently lighted passageway should proceed with caution, commensurate with the risk involved. One may not with abandon traverse a darkened or dimly lighted passageway with the same freedom that one may pass through a well lighted one, in which any obstructions to free passage would be readily apparent. If the passageway were as dark as appellant contends that it was, he should have proceeded slowly and cautiously, step by step, to be certain that the footing was safe and sure. This is particularly true where, as here, a large tournament was in progress, and large crowds had gathered to observe the competition, and one might readily anticipate that a caddy bag, box of equipment, or similar impediment might be left in the passageway by a careless or thoughtless person.

Having traversed the passage on several previous occasions, plaintiff knew or should have known, of all that any formal notice might have given him. The unfortunate accident plainly resulted from plaintiff's own negligence, and not from the conduct of any person having anything to do with the operation of the tournament.

CONCLUSION

Salt Lake County, as an arm of the state government, has complete sovereign immunity, and is not liable in tort for damages in the operation of a public golf course. It

is engaged in a purely governmental function, that is, of providing wholesome recreational facilities for inhabitants of the county. The county was not in anywise negligent in the construction, operation or maintenance of the club house. The accident did not result from any negligence on the part of any defendant in this action, and the plaintiff was, as appears from his own testimony, guilty of contributory negligence.

The judgment should be affirmed.

Respectfully submitted,

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