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James J. Milligan v. Capitol Furniture Co. : Brief of Defendants and Respondents

Utah Supreme Court

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APR 11 1958

Case No. 8777

Clerk, Supreme Court, Utah

IN THE SUPREME COURT
of the
STATE OF UTAH

UNIVERSITY UTAH

JAMES J. MILLIGAN,
Plaintiff and Appellant,

—vs—

CAPITOL FURNITURE COMPANY, a
Utah corporation, GLADYS PETER-
SON, MARY E. SHULSEN and JAMES
H. SPRUNT,
Defendants and Respondents.

MAY 3 1958

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BRIEF OF DEFENDANTS AND RESPONDENTS

Appeal from the District Court of the Third
Judicial District, in and for the County
of Salt Lake City, State of Utah
Honorable A. H. Ellett, Judge

GUSTIN, RICHARDS
& MATTSSON
*Attorneys for Defendants
and Respondents*

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8777

BRIEF OF DEFENDANTS AND RESPONDENTS

STATEMENT

The parties will be designated as in plaintiff's brief. Where the word defendants is used it means the individual defendants who are defending this appeal.

STATEMENT OF FACTS

As plaintiff has failed to set forth any of the facts surrounding his fall, we deem it necessary to do so.

The testimony is uncontradicted that the plaintiff fell on a sidewalk in front of defendants' building located on West Second South Street, Salt Lake City, Utah, and that the sidewalk was 20.9 feet wide extending from the defendants' building to the curb line on Second South Street (Ex. D-15).

The weather reports covering the months of January and February, 1956, Exhibit D-16 and Exhibit D-17 disclose that there was no snow from January 27th until February 7th; that the average temperature was below freezing and the maximum temperature was below freezing from January 31st through February 7th.

Plaintiff is employed by the Railroad (R. 32) and on numerous occasions prior to his fall had stopped at the Salt Lake Restaurant for a bite to eat prior to going to work. He testified that he left his home about 4:00 o'clock P.M. on the day of the accident with his friend and neighbor, Lewis Johnston (R 33). Mr. Johnston drove plaintiff to the Salt Lake Restaurant, which is located about 539-563 West Second South, the entrance of which is approximately 27 feet from the place where plaintiff fell (R 33).

Located in front of defendants' building was a sidewalk elevator properly covered by two steel doors, said doors covering an area of approximately 4-6 feet square. Attached to the building directly west of the steel doors was a drain spout, which carried water from the roof of the building down into a hole in the sidewalk and ultimately out into the street (Ex. D-14).

There is conflict in the testimony as to the condition of the sidewalk extending from the cafe east up to and past the Beer Barrel, which was some distance east of where plaintiff fell and as to what plaintiff did prior to the time he fell.

Plaintiff testified in his deposition taken in October, 1956 that when he arrived at the restaurant there was

a little snow on the sidewalk in front of the restaurant. He had a cup of coffee and had started east for the railroad station when he fell. His friend was not going to take him to the station (R. 88).

On direct examination he testified he had a sandwich and coffee and in about 15-20 minutes left the cafe and started east. There was snow and ice on the sidewalk, but it was pretty clear in front of the restaurant. In response to a leading question he testified that the sidewalk in front of the restaurant was clear (R. 33-35). He further testified that there was ice near the big steel doors and he started to walk around where it looked good and clean. He was of the impression that ice and a skiff of snow extended over the entire sidewalk (R. 35-36).

On cross-examination he testified that he was familiar with the premises where he fell as he went there nearly every week (R. 82). At the restaurant he ordered some sausage and coffee and while the sausage was being cooked he went out to look for a Mr. Hardman (R. 82). He definitely stated that his friend was not going to drive him to the station (R. 83). Further in his cross-examination he testified that he went to look for Mr. Hardman. He went west to Shulsen's Restaurant, returned and had a cup of coffee and that there was snow and ice over the whole sidewalk.

Mr. Johnston, plaintiff's witness, definitely stated that he was going to take plaintiff to the train. In describing the activities of the plaintiff he stated that he and plaintiff had stopped at the restaurant, ordered

food and that plaintiff immediately left and within a few minutes thereafter he was advised that plaintiff had fallen (R. 99). In describing the condition of the sidewalk east of where plaintiff fell he testified it was clear, except for a strip about five to eight feet in width which extended across the sidewalk (R. 105).

Alex Geros, who had operated the cafe for years and knew the plaintiff, testified that the entire sidewalk was clear, except for about three to six feet around the drain pipe (R. 117) and that plaintiff told him just before he fell that he was going to the Beer Barrel when he left the cafe (R. 118).

POINT TO BE RELIED UPON

POINT 1.

THE COURT WAS JUSTIFIED IN ENTERING A VERDICT IN FAVOR OF THE INDIVIDUAL DEFENDANTS.

ARGUMENT

POINT 1.

THE COURT WAS JUSTIFIED IN ENTERING A VERDICT IN FAVOR OF THE INDIVIDUAL DEFENDANTS.

Plaintiff's Points 1, 2, 3 and 4 will be discussed under defendants' one Point.

The third point argued by plaintiff is that plaintiff was not contributorily negligent as a matter of law. This question is not involved in this case. The jury by its answer to Interrogatory No. 5, which was:

"INTERROGATORY NO. 5. Was plaintiff negligent in walking across the ice where he fell.

"ANSWER. Yes."

found that as a matter of fact plaintiff was negligent and this finding by the jury is supported by the evidence.

The plaintiff under the same point discusses the sufficiency of the evidence to support the jury's answer to Interrogatory No. 5, claiming the same to be insufficient. The conflict in the plaintiff's own testimony and the facts supporting the inference that plaintiff was in a hurry, together with testimony that he was familiar with the condition of the sidewalk; that the sidewalk was 20.9 feet in width and only a small portion of the same was covered with ice are sufficient to support the jury's finding that plaintiff did not exercise due care and caution and was negligent in walking across the ice where he fell.

In plaintiff's second point he contends that if the answers to the special verdict questions are inconsistent a new trial should have been granted, and in connection with this argument, quotes the last sentence of Rule 49 (b). Rule 49 (b) does not involve the question of special verdict and interrogatories, but involves the question of general verdict accompanied by answer to interrogatories. In this case there was no general verdict rendered. The Court submitted the cause under subdivision (a) Rule 49, which deals with special verdicts and interrogatories. This procedure is upheld and supported by the case of *Cooper v. Evans*, 1 Utah 2d 68, 262 P. 2d 270, wherein the Court stated:

"There is no question but that it is within the discretion of the trial court to follow such procedure if he so desires. According to the answers given, the jury found the defendant guilty

of negligence, but also found the plaintiff was contributorily negligent, upon the basis of which the trial court entered a judgment for the defendants."

The dissertation by Moore and other expounders of the jury system, in our opinion, have no place in this case, for regardless of our respective views in connection therewith, under our present system we are governed and controlled by the Utah Rules of Civil Procedure, and in this case as indicated by Rule 49. This brings us to the final question, was the Court justified in entering a judgment in favor of the defendants, ~~In~~ view of the answer to Interrogatory No. 6, which was:

"INTERROGATORY NO. 6. Was such negligence a proximate cause of plaintiff's fall?

"ANSWER. No." ?

The view stated in the case of *Anderson v. Bransford*, 39 Utah 256, 116 P. 1023, we believe, is correct:

"It is true that the question of proximate cause is ordinarily one of fact for the jury. This is so because of different conclusions generally arising on a conflict of the evidence, or because of different deductions or inferences arising from undisputed facts, in respect of the question of whether the injury was the natural and probable consequence of the proved negligence or wrongful act, and ought to have been foreseen in the light of the attending circumstances. Where, however, there is no such conflict, and where but one deduction or inference under the evidence is permissible, then the question of proximate cause is one of law."

In this case there is no question but that plaintiff's injury was caused by slipping on the ice on the sidewalk. The jury has found that plaintiff was negligent in crossing the ice. With these two undisputed facts, how could anyone arrive at a conclusion that plaintiff's negligence in crossing the ice did not contribute to his fall. There is no evidence which shows any other intervening cause. The ice upon the sidewalk and plaintiff's negligence in crossing the same caused the fall and the injury. An adult person who is negligent in crossing ice must reasonably anticipate that some injury might result. This is the only deduction or inference which is permissible, therefore it is a question of law as to the proximate cause of plaintiff's fall.

As stated in the case of *Smith V. Shevlin v. Hixon Co.* 157 F. 2d 51 (9th Cir.) the Court held that:

“‘In order to constitute a particular act the proximate cause of the injury.’ *Maimi Quarry Co. v. Seaborg Package Co.*, 103 Ore. 362-371, 204 P. 492-495. It is sufficient if the wrongdoer would have reasonably anticipated that some injury might result.”

Can we say that one negligently crossing a slippery place may not reasonably anticipate that some injury might result?

In the case of *Missouri Pacific R. R. Co. v. Howard* (Ark.) 161 S.W. 2d 759, the Court stated:

“Had she stopped, before reaching the main line track, she could have heard the train and had she looked, after easing by the obstruction, she

could have seen it. It was there, making a loud noise, whether the whistle was blown or the bell rung, and signals cease to be a factor where the train is plainly discoverable by other means. Thus her own negligence was the proximate cause of her injury, if any, which is doubtful."

See also *Pacific R. R. Co. v. Dawson*, (Ark.) 168 SW 2d 1105.

In the case of *Black v. City of Berea*, (Ohio) 32 NE 1, 132 A.L.R. 1391, where plaintiff a passenger in an automobile permitted her arm to extend outside of the automobile and strike a rural mailbox located on the side of a public road, the Court held:

"She was familiar with the road and the location of the mailboxes, including the one here in question. It was broad daylight, and the evidence shows that the mailbox was in plain sight. Under such circumstances, a person of ordinary prudence would not have had any part of her arm out the window of an automobile. As a matter of law, plaintiff was guilty of negligence which was the proximate cause of her injury, and it was the duty of the court to sustain defendant's motion for a directed verdict."

The Court in the case of *Wold v. Ogden City*, 123 Utah 270, 258 P. 2d 453 in quoting from Dean Prosser stated:

"Dean Prosser points up the principle as it applies to the instant case when he asserts that an objective standard must maintain, and that 'the plaintiff cannot be heard to say that he did not comprehend a risk which must have been obvious to him.' Further that 'as in the case of negligence

there are certain risks which anyone of adult age must be taken to appreciate; the danger of slipping on ice, or falling through ungarded openings,' etc. He goes on to say that 'In the usual case, his knowledge and appreciation of the danger will be a question for the jury; but where it is clear that any person of normal intelligence in his position must have understood the danger, the issue must be decided by the court.' "

In the case of *Houston E. & W. T.R. Co. v. Lynch*, 208 S.W. 714, plaintiff was assisting his wife and married daughter in getting on the train. The train started before he could get off.

"It is manifest (from all the evidence in the case), or at least it is sufficient to warrant a finding, that appellee was not caused to fall from the train because of a sudden jirk or lurch, but that he fell while in the attempt of alighting from said train to the ground. But on rehearing, the judgment was reversed. On this occasion the court said: 'We have concluded that if the plaintiff, Lynch, was guilty of negligence, which was left as a question of fact to be determined by the jury, then it follows as a matter of law that such negligence proximately contributed to the injury. It is the contention of appellee, however, that this requested instruction takes from the jury both the issue of negligence on the part of the plaintiff and the issue of proximate cause; but it will be readily seen, upon consideration of the requested charge, that it does not take from the consideration of the jury, as a question of fact, the issue of negligence on the part of the plaintiff, but it does take from the jury the question as to whether such negligence, if it existed, proximately contributed to the plaintiff's injury and properly so.' "

CONCLUSION

We respectfully submit that the judgment should be affirmed.

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