1972

Jaylyn Eaton, A Minor, By and Through Her Guardian Ad Litem, Jay H. Eaton v. Leon H. Savage and Paula Savage, His Wife : Appellant's Brief

Utah Supreme Court

IN THE SUPREME COURT OF THE STATE OF UTAH

JAYLYN EATON, a Minor, by and through her Guardian ad Litem, JAY H. EATON,
Plaintiff and Appellant,
vs.
LEON H. SAVAGE and PAULA SAVAGE, his wife,
Defendants and Respondents.

Case No. 12814

APPELLANT'S BRIEF

Appeal from the summary judgment of the Third Judicial District Court of Salt Lake County, State of Utah
The Honorable James S. Sawaya, Judge

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STATEMENT OF KIND OF CASE

This is an appeal from a summary judgment dated January 6, 1972 signed by James S. Sawaya, District Judge. The plaintiff's complaint alleges that the defendants, as owners of apartment buildings, were negligent in installing and maintaining pipe railing on their premises in the area where children were authorized and known to play, over which the plaintiff minor fell, sustaining permanent crippling injuries. The complaint further alleges that the pipe railing was highly dangerous, was a nuisance and served no useful purpose.

DISPOSITION IN LOWER COURT

In the lower court the judge granted a motion of counsel for the respondents for summary judgment on the grounds that the pleadings raised no genuine issue as to any material fact, and that the defendants were entitled to a judgment as a matter of law. The motion was based on the files and records of the court and the depositions of the parties which had been taken at that time.

RELIEF SOUGHT ON APPEAL

Appellant seeks a reversal of the summary judgment of the district court, and for a right to be granted a jury trial so that the actual issues presented by the pleadings and depositions can be submitted to a jury for final determination. This right is granted to appellant by the Constitution of the State of Utah, Article 1, Section 10.

STATEMENT OF FACTS

In her deposition, the defendant Leon Savage testified that he was the owner of the apartments consisting of 16 units (four fourplexes). That the pipe railings were installed in 1964 or 1965 around the sidewalks, using 3/4" pipe. Many of the railings had been recemented during April prior to the accident as they had become unstable. The railings were installed 15" above the ground and were put in to help the grass grow. He was on the premises 365 days a year, observed a lot of children playing in the front yard area, and that there were a lot of children among his tenants that were allowed to play in the front yard area whenever they chose. Following the

accident the defendants removed some of the railings, feeling that it would increase their chances of selling the apartments, and that it would be better if they were taken out, and that the main reason for taking them out was to improve the looks of the apartments. (Deposition of Leon Savage, p. 3-12.)

The plaintiff minor, Jaylyn Eaton, in her deposition testified that she was 13 years old at the time of the accident. (p. 4). On the day of injury she was acting as a babysitter for one of the tenants of the apartments (p 6). Many times prior to that day she had visited girls friends and played in the apartment house area and it was a common practice for her and her friends to play on the railings bordering the sidewalk (p 8). Others had fallen from the bars, skinned their knees and things like that. She had been walking a four year old child, whom she was tending, on the bars for about ten minutes. She describes the activity thusly:

> "She was walking on the bars and I was holding her hand and she would let go and walk, and then she would take hold of my hand again. And she went to fall away from me and I went to grab her and I just fell over the bars."

When asked if the railing was solid, she testified that it was kind of wiggly, and that she had determined that sometimes before the accident (p 9-11). She stated that when the child fell she fell in trying to grab and get hold of her and they fell together over the bar (p 13). She was taken to the hospital by ambulance where she underwent

hip surgery which was followed by another hospitalization in January (p 17-19). When asked if children still walked on the railing she answered:

> "I don't know, once in awhile they did before they took the railings down and they would scream at them, so now they don't anymore." (p 26).

Carol Eaton, mother of the plaintiff minor, testified that she had hollered at all the kids while playing on the bars because she knew they could get hurt (p 3). She had been informed by the doctors that plaintiff might have to remain on crutches or even be put in a brace, and that she could have trouble with her hip for the rest of her life (p 5), and that she would probably require future surgery more than once (p 7). She testified that none of the pipe railings were in very solid, and that one section was so loose it could be lifted out of the ground and they were a hazard (p 7, 8).

ARGUMENT

POINT NO. I

THE COMPLAINT STATED A VALID CAUSE OF ACTION WHICH WAS SUPPORTED BY THE FACTS SET FORTH IN THE DISPOSITIONS, AND THE LOWER COURT ERRED IN GRANTING THE MOTION FOR SUMMARY JUDGMENT.

In the case of *EDLER v. SEPULVEDA PARK APARTMENTS (Cal.) 297 P.2d 508* the landlord had excavated small holes around sprinkler heads to facilitate watering the grass. The hole was about six inches in

diameter and three inches in depth extending about two inches in width beyond the sprinkler head. A small child suffered a broken leg when his foot caught in the hole. The jury found for the defendant, and plaintiff was granted a new trial. The court said:

> "That one is negligent in maintaining an agency which he knows or reasonably should know to be dangerous to children of tender years at a place where he knows or reasonably should know such children are likely to resort, or to which they are likely to be attracted by the agency, unless he exercises reasonable care to guard them against danger which their ignorance and youth prevent them from appreciating. If, to the knowledge of the owner, children of tender years habitually come on his property where this dangerous condition exists to which they are exposed, the duty to exercise reasonable care for their safety arises, not because of the implied invitation but because of the owner's knowledge of unconscious exposure to danger which the children do not realize. Children of tender years have no foresight and scarcely any apprehensiveness of danger, a circumstance which those owning instrumentalities potential for harm must bear in mind; for it is every individual's duty to use toward others such due care as the situation then and there requires . . . The Restatement says 'a possessor of land is subject to liability for bodily harm to young children trespassing thereon caused by a structure or other artificial condition which he maintains upon the land if (a) the place where the condition is maintained is one upon which the possessor knows, or should know, that such children are likely to trespass, and (b) the condition is one of which the possessor knows, or should know, and which he realizes, or should realize, as involving an unreasonable risk of death or serious

bodily harm to such children, and (c) the children because of their youth do not discover the condition or realize the risk involved in intermeddling with it or in coming within the area made dangerous by it, and (d) the utility to the possessor of maintaining the condition is slight as compared to the risk to young children involved therein.' See 65 C.J.S. Negligence Section 228 Page 454. The rule in California is substantially as stated in the Restatement."

The order granting the new trial was affirmed. The principle of the foregoing California case and of the Restatement of the Law of Torts discussed with approval in that case would apply a fortiori in the case at bar in which the plaintiff minor was an invitee and not a trespasser.

To the same effect is *GARDNER v. STONESTORM CORP.* (Cal.) 302 P.2d 674 where a contractor had installed a temporary plank ramp to wheel concrete over an area connected with a children's playground of an apartment building. A child's foot was caught in the crack between the plank, causing her to fall and be injured. The court in that case said:

". . . The jury could have found that Stonestorm knew or should have known of the character of the ramp's construction and that children would and did play upon it. Such findings would be sufficient to place liability upon Stonestorm for the accident upon the principle that the children were in fact invitees of Stonestorm on the play area and, therefore, Stonestorm was required to use ordinary care for their safety. Such care would not be met by permitting in the area a ramp which would attract children and which ramp was unsafe for them.

> Permitting a ramp with loose boards where it was reasonable to assume that children would go could be held to be lack of ordinary care."

The court in that case said also that decisions providing liability in such situations are based upon the general principle that the person in possession of the premises must take such precautions for the safety of his invitees as are reasonable under all the circumstances, considering their relation, the burden of the interference with his own affairs and the danger to the invitees to be anticipated, and that special caution is required in behalf of invitees of immature age, whose inability to appreciate and prospensity to ignore certain dangers he ought to consider.

The pipe railings in the case at bar were ineffective to keep children from playing on the grass, but instead were a constant temptation for the children to play on the railings themselves. The grass was five to six years old at the time of the accident, and it was customary and allowable for children to play on it. Indeed, the railings had not only become useless, but were an eyesore, had an adverse effect on the value of the property, and some of the railings were ultimately removed by the defendants in order to improve the saleability of the property.

RESTATEMENT OF LAW OF TORTS Vol. 2 Sec. 339 states that the possessor of land is subject to liability for bodily harm, even to trespassing children, caused by an artificial condition which he maintains upon the land, when the conditions quoted from the Restatement in the Edler case, supra, exist, including when:

"(d) the utility to the possessor of maintaining the condition is slight as compared to the risk of young children involved therein."

Defendant was maintaining a nuisance in this case because the pipe railing was a disadvantage to him and had completely lost any utility it may have had in the beginning. It was out of repair and a continuing threat to the bodily safety of children who were lawfully playing in the area, and the cost of removal, which was to the advantage of the owner, was negligible.

See also *PETERSEN v. CRAWFORD (1942) 34 N.Y.S. 2d 91 and MARTINEZ v. PINKASEEWICS (1935) 180 A. 153.*

In the case of *O'DRISCOLL v. METROPOLITAN LIFE INSURANCE COMPANY (1942) 33 N.Y.S. 2d 557* the court said:

"The act of the defendant landlord in attempting to protect a grass plot in what was apparently the common courtyard of its apartment building by installing sharp spikes on top of the wire fence, where to its knowledge, the tenant's children were accustomed to play a game of 'tightrope' by walking on the fence was held not only to show negligence but to constitute a nuisance, so as to render the defendant liable for injury to one of the tenant's children who attempting to walk on the spikes fell on them and was injured, even though the defendant landlord had warned the children not to play on the fence. In that case the injured child was seven years of age. The court further said.

"There is an important question that concerns us here and that question is whether or not the permitting of these pickets to be placed on the fence was such a dangerous hazard, knowing the propensity of children to play thereabouts as to constituting a nuisance arising out of the continuous operation of a negligent act. With the knowledge of the propensity of children to play thereabout as is evident from the testimony, I am of the opinion that the maintenance of this fence with the pickets thereon was a negligent act and more so a nuisance. . . ."

"The low, metal fence on the south side of the entrance of defendant's apartment house cemented by metal pointed spikes, upon which this seven year old child fell, created an unsafe condition of the premises for the 35 child population of the apartment house. Plaintiff's proof of injury not only to herself but to other small children of tenants of the house, despite admissions of warning by the superintendent not to play on the fence, made out a prima facia case. The utility, to the possessor of maintaining the condition is slight as compared to the risk to young people involved therein."

In the case of *SMITH v. SPRINGMAN LUMBER COMPANY (Ill.) 191 NE 2d 256,* a seven and one-half year old child lived with her family in an apartment dwelling owned by the defendant. A fuel oil tank which was no longer in use was located next to a tree in the side yard of the premises and about 15 feet from the apartment building. The tank rested upon concrete blocks, was rounded on top. It was agreed by the parties that there was no physical defect in the tank itself. Children living in the apartment house played around the tank, climbed upon it, and climbed from it into the adjoining tree. The

minor plaintiff climbed on the tank and while attempting to climb into the tree slipped and fell to the ground and was injured. The defendant contended that there was no evidence that a dangerous agency existed. The case relied on a former landmark Illinois case of *KAHN v. JAMES BURTON COMPANY, 126 NE 2d 836.* In that case a child was injured while playing upon a lumber pile in an adjoining lot. A new home was being constructed on the lot by the defendant construction company and the lumber had been piled upon the lot by them. The court said:

> "The creator of certain conditions dangerous and hazardous to children because of their immature appreciation of such dangers and hazards must be held to an ordinary standard of conduct for the protection of such children in accordance with the attendant circumstances and conditions. Account must be taken of the cause and burden of taking precautionary measures and of the right of families and society to rear and develop children with freedom of activity in their communities without being subject to unreasonable risks which might cause serious injury or death to such children."

In applying the rule of the Kahn case the court stated that the question was not whether the oil tank was defective but whether because of the defendant's knowledge that children played upon it, it was likely to cause injury to children.

See also *DOUD v. HOUSING AUTHORITY OF THE CITY OF NEWARK (N.J.) 183 A.2d 149* where a small child was injured when his scooter left the smooth sidewalk and ran over adjoining uneven cinder blocks

which had been put down as a walkway at the end of the sidewalk. It was held that the defendant could have foreseen that a child would ride his scooter off the smooth surface onto the rough surface and be hurt and hence the duty arose.

See also *YAZZOLINO v. JONES (Cal.) 315 P.2d 107* and *COUGHLIN v. JONES 295 N.Y.S. 671.*

POINT NO. II

SUMMARY JUDGMENT PROCEDURE IS DRASTIC AND SHOULD BE USED WITH CAUTION SO AS NOT TO BECOME A SUBSTITUTE FOR AN OPEN TRIAL.

In the case of *RELIABLE FURNITURE COMPANY v. FIDELITY AND GUARANTY INSURANCE UNDERWRITERS, INC. 16 UTAH 2d 211, 398 P.2d 685,* Justice Crockett made the following observations:

> "The summary disposal of a case serves a salutary purpose in avoiding the time, trouble and expense of a trial when it is justified. But unless it is clearly so, there are other evils to be guarded against. A party with a legitimate cause, but who is unable to afford an appeal, may be turned away without his day in court; or, when an appeal is taken, if a reversal results and a trial is ordered, the time, trouble and expense is increased rather than diminished. It is to avoid these evils and to safeguard the right of access to the courts for the enforcement of rights and the remedy of wrongs by a trial, and by a jury if desired, that it is of such importance that the court should take care to see that the party adversely affected has a fair opportunity to present his contentions against precipitate action which will deprive him of that privilege.

> His contentions as to the facts should be considered in the light most favorable to him, and only if it clearly appears that he could not establish a right to recovery under the law should such action be taken; and any doubts which exist should be resolved in favor of affording him the privilege of a trial.

To the same effect is *ROWLAND v. CHRISTIAN 70 Cal. Rptr 97, 443 P.2d 561, 563* from which we quote as follows:

> "The summary judgment procedure is drastic and should be used with caution so that it does not become a substitute for an open trial. This court in two recent cases has stated: 'Summary judgment is proper only if the affidavits in support of the moving party would be sufficient to sustain a judgment in his favor . . . and doubts as to the propriety of granting the motion should be resolved in favor of the party opposing the motion. (Citing numerous cases.) . . . A defendant who moves for a summary judgment must prevail on the basis of his own affidavits and admissions made by the plaintiff and unless the defendant's showing is sufficient there is no burden on the plaintiff to file affidavits showing he has a cause of action or even to file counter affidavits at all. A summary judgment for defendant has been held improper where his affidavits were conclusionary and did not show that he was entitled to judgment and where plaintiff did not file any counter affidavits.

See also *ROBISON v. ROBISON, 16 Utah 2d 2, 394 P.2d 876.*

CONCLUSION

The pipe railing which defendants installed and permitted to become wobbly and out of repair had long since lost any usefulness or advantage to the defendants in any

respect at the time the plaintiff minor sustained her crippling injury. Although the railing may have had some temporary utility to protect newly planted grass in 1964, at the time of the injury in 1970 it was to the defendants' acknowledged advantage to remove it, as it had become unsightly and distracted from the value of the property. Its only remaining function was to provide energetic and enterprising children, inappreciative of the risks involved, with a wobbly and dangerous facility for "tightrope" walking. In the words of Justice Cardozo, "the danger to be perceived defines the duty to be obeyed". Certainly the defendants in the case at bar should not be heard to claim, as a matter of law, that they could not have reasonably foreseen the danger that was apparent to everyone else but the small children who were exposed to it and whose activities defendants were in a position to observe.

The appellant respectfully urges this Court to reverse the summary judgment granted by the District Court, in order that the appellant may have a full opportunity to present all the evidence available to her to a jury, in accordance with her constitutional rights.

Respectfully submitted this 10th day of April, 1972.

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