1960

Benjamin Hampton v. Marion H. Rowley et al : Brief of Appellant

Utah Supreme Court

King and Hughes; Attorneys for Appellant;

Case No. 9050

IN THE SUPREME COURT

of the

STATE OF UTAH

BENJAMIN HAMPTON,
Plaintiff and Appellant,

—vs.—

MARION H. ROWLEY and NORMA ROWLEY, his wife, dba ROWLEY BUILDERS SUPPLY,
Defendants and Respondents.

BRIEF OF APPELLANT

KING AND HUGHES
Attorneys for Appellant

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BRIEF OF APPELLANT

PRELIMINARY STATEMENT

Throughout this Brief, plaintiff and appellant will be referred to as "Plaintiff" and defendant and respondent, Marion H. Rowley. will be referred to as "Defendant." All Italics are ours.

STATEMENT OF FACTS

Defendants are the operators of a lumber yard and building materials store at 4350 South 9th East Street, Salt Lake County, Utah.

On the 29th of March, 1958, which was a Saturday at approximately 1:15 P.M., plaintiff came to the store of defendants and found the south portion thereof occupied by the father of defendant, Wilford H. Rowley. Plaintiff knocked on the door of the portion of the building occupied by Wilford H. Rowley and informed him of the need which he had for three bags of cement. Wilford H. Rowley informed plaintiff that he could not help him get the cement but if he wanted to get three bags of cement he could do so. Plaintiff, thereupon, went through the south portion of the defendants' establishment and obtained a sack of cement. As he came out of the front of the building and stepped on the step, his foot hit a piece of gravel and plaintiff fell forward off the steps onto the apron surrounding the steps and suffered a sprain of his right foot and ankle.

Around the apron which was made of cement and the steps leading into the south portion of defendants' place of business, the defendant, over the years, had spread a gravel covering. This covering had been maintained and raised as defendants dumped additional gravel on the area (T. 81, 82). Defendant had on the premises hand trucks for use in carrying heavy materials but plaintiff

was not furnished with such a truck to assist him in getting the cement which he purchased out of the defendants' place of business (T. 92). After plaintiff had received the cement he paid Wilford H. Rowley for the articles and left the place of business of defendants.

The case came on for trial before the Honorable Merrill C. Faux on the 15th day of December, 1958. Plaintiff presented his evidence and defendants presented their evidence and the Court instructed the Jury. A verdict of No Cause of Action was rendered.

SUMMARY OF ARGUMENT

POINT I

THE COURT ERRED IN INSTRUCTING THE JURY IN ACCORDANCE WITH INSTRUCTION NO. 11-A, SUB-PARAGRAPH C.

ARGUMENT

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After the Jury had retired, the Court prepared Instruction 11-A and pursuant to a Stipulation of Counsel

for both parties gave 11-A to the Jury while they were in the Jury room.

Plaintiff had no objection to the procedure followed by the Court but did object to the Instruction 11-A and particularly that portion of the instruction which read as follows:

> "(a) That defendant knew, or in the exercise of reasonable care should have known, the rock was on the step."

In many of the slipping and falling cases where a person is a guest, or business visitor, the laws require that before negligence can be found on the part of the store owner there must be evidence from which the Jury could find that the owner knew, or in the exercise of reasonable care should have known of the dangerous condition. The case at bar is an exception to this rule. Knowledge is not required under the facts of this case, and it is error to require such a finding on the part of a Jury.

Where the owner of the store has intentionally and voluntarily created the dangerous condition no knowledge is necessary.

There is no dispute about the fact that defendants hauled in the gravel along the front of their store and created the dangerous situation. Gravel from the area

immediately adjacent to the steps on which plaintiff fell would, under ordinary use, slop over on to the steps. It is submitted that the Jury could find that in the normal ordinary use of the gravel-covered area and the steps that pieces of gravel would be deposited on the steps and create and constitute a dangerous condition.

Plaintiff submits that the present case is within the principle which this Court announced in *De Weese v. J. C. Penney Company*, 5 U.2d 116, 297 P.2d 898. The Court's opinion written by Justice Crockett contains the following pertinent statement of the general principle which plaintiff submits is applicable:

> "(3) This case differs from those involving a foreign substance such as spilled oil or grease, or where a pool of water is allowed to accumulate, creating a hazardous condition which, under most circumstances, is easily observable to the business invitee as the store owner. The terrazzo surfacing is part of the permanent structure of the building. While it is true that the construction and maintenance of the entranceway of terrazzo on an inclined plane does not of itself constitute negligence, it comes within the rule that a negligent act may be one which 'creates a situation which involves an unreasonable risk to another because of the expectable action of the other, a third person, an animal or a force of nature.' "

In the *DeWeese* case we are concerned, of course, with water being deposited on a terrazzo surface and

having it thereby rendered slick and slippery. As the Court indicates, a similar situation would exist if the deposit causing the surface to be dangerous came on the premises as a result of a third person's activity, so long as such activity might be reasonably anticipated.

A case, perhaps more closely analagous to the present case on its facts than the *DeWeese* case is *Falconer vs. Safeway Stores, Inc.*, 49 W. 2d 478, 303 P.2d 294 which involved the Safeway Stores, Inc., removing its garbage in cans. There, the facts indicate that the plaintiff was injured within a very few moments of the time that the suet on which she slipped was actually placed on the sidewalk. The defendants contend that unless they had notice of the dangerous condition of the premises they would not be liable. The Washington Supreme Court, in distinguishing the notice cases from the case at bar stated as follows:

> "**** The notice is for the purpose of showing that the occupant was aware of the condition of the premises, which was created by others, and negligently permitted it to continue thereafter. *The rule requiring such notice is not applicable where the dangerous condition of the premises was created in the first instance by the occupant. The negligence in the instant case consists of creating a dangerous condition*, not in permitting it to continue. One is presumed to know what one does."

Instruction No. 11 places the present case with the

cases where the dangerous condition is not created by the voluntary and intentional acts of the defendant, and as a consequence, the Jury would be required to find against plaintiff unless plaintiff showed by a preponderance of evidence that defendants knew that the rock on which he stepped was on its front step. Plaintiff respectfully submits that this was prejudicial error on the part of the Court and that as a consequence this Court should reverse the Trial court and grant to the plaintiff a new trial.

CONCLUSION

Plaintiff respectfully submits that the Court should reverse the trial court and order a new trial.

Respectfully submitted,

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