1960

Benjamin Hampton v. Marion H. Rowley et al : Brief of Defendants and Respondents

Utah Supreme Court

Hanson, Baldwin & Allen; Attorneys for Respondents;

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.

Case No. 9050

BRIEF OF DEFENDANTS AND RESPONDENTS

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NATURE OF THE CASE

This appeal arises out of an action for personal injury brought by Benjamin Hampton against Marion H. Rowley and Norma Rowley dba Rowley Builders Supply. Mr. Hampton fell while carrying a bag of cement down the steps in front of a building at defendants' place of business, the fall allegedly resulting from a rock on the step. (R. 1, 2, 3). The case was tried and the jury returned a verdict in favor of the defendants and against the plaintiff, No Cause of Action. (R. 137, 138). It is from the Judgment on the Verdict that this appeal is taken.

STATEMENT OF FACTS

Plaintiff gives a short statement of fact in his brief, but we are not in accord with the facts as set forth, and plaintiff failed to give all the pertinent facts.

Saturday, March 29, 1958, at approximately 1:15 P.M., the plaintiff was trying to locate a hardware store that was open, so he could purchase some cement. He drove to the defendants' place of business at 4300 South 9th East Street, and it was closed, it being Saturday afternoon. (R. 6-33-34). Defendants' place of business consists of two Army type barracks buildings located on the west side of 9th East, the buildings being separated by a driveway leading into the business supply yard. The south building was not being used in the business, and it had been remodeled into an apartment in the front, and was occupied by Mr. Rowley's father, Wilford Rowley, a gentleman 76 years of age, who was retired and a widower. (R. 17-23-24-28). The defendant, Marion Rowley provided his father with the apartment, and Mr. Wilford Rowley was not employed and did not work for his son, having quit work about one and one half years previously, and he had a heart condition that restricted his activity. (R. 28-30-31).

The plaintiff went up the steps to the front door of the south building, and found it locked.

He had observed Mr. Wilford Rowley moving the curtains, and knocked at the door, and Mr. Rowley Sr., answered the door. (R. 63). Plaintiff was told the place of business was closed, but he wanted some cement, and Mr. Rowley Sr., told him he could get some cement but there was no one there who could carry it out, and plaintiff was told he would have to carry the cement out himself. (.R 35, 34 - 61, 62, 63). The cement was available by going through the south building to some storage boxcars in the rear. Plaintiff carried one bag of cement to his trailer, went back and got a second bag, and fell while descending the steps with the second sack. (R. 36). After the fall he rested five or ten minutes then went back and got the third sack of cement, loaded it on his trailer, went home, mixed the cement, went out and got more gravel, and then had to quit work on the job he was doing because of the ankle swelling and paining. (R. 40).

The defendants' place of business is located about 22 feet west of the west line of 9th East Street. (R. 13). There is a graveled shoulder on 9th East Street and defendants had graveled the area in front of their place of business to keep it from getting muddy. (R. 19-20).

In front of the south building there was a concrete apron about four feet in width, out from the bottom step of two steps leading into the building. The first step was three inches above the concrete

apron, and the second step was six inches above the first step, and the building floor level was six and one half inches above the second step. (R. 21, 80, 81, 82). Exhibits P-1, 2, 3 and 4 show the general nature of the steps and area.

Plaintiff contended there was a rock on the first step and that he stepped on the rock while leaving the building with the second bag of cement, and it caused him to fall. Although plaintiff contended that the rock was on the first step, he testified on cross examination and at deposition, that he had taken but one step down from the building floor level when he fell — that he fell as he stepped down from the floor level. (R. 36, 65, 68, 73). The rock was about the size of a quarter and he observed it on the first step after the fall. He never observed any rocks or gravel on the steps the first and second time he entered the building, or the first time he left the building with the cement. (R. 66, 72, 74).

The rock on the step, alleged by plaintiff, was larger than the gravel on the ground and on the cement apron in front of the steps. (R. 38, 72).

There is no evidence in the record as to whether the rock which caused plaintiff to fall was of the same type and nature of material as the gravel fill, the only evidence being that it was larger than any of the other gravel material in the area in front of the store and on the cement apron. (R. 38-72).

STATEMENT OF POINTS

POINT I.

THE COURT CORRECTLY INSTRUCTED THE JURY IN INSTRUCTION NO. 11-A.

ARGUMENT

POINT I.

THE COURT CORRECTLY INSTRUCTED THE JURY IN INSTRUCTION NO. 11-A.

Plaintiff admits that the instruction given by the court is a correct instruction as to the elements necessary to hold a possessor of property liable to a guest or business visitor, but contends that this case is an exception to the rule of law set forth in the instruction. Plaintiff makes the bald statement that the mere fact that the defendants had put some gravel on the ground in front of the place of business created a dangerous condition, intentionally and voluntarily.

Reading of the plaintiff's brief fails to reveal any case, text book authority or any valid argument that pea gravel spread upon the ground creates and makes a dangerous condition. It is common knowledge that driveways, road shoulders, playgrounds and areas in front of buildings, schools, service stations and other places too numerous to mention, are graveled, to keep them from being muddy, dusty or rutted.

From the undisputed facts, the alleged rock

on the step was larger than the gravel in front of the building. There is no evidence in this record that the rock allegedly on the step was of the same or similar size, color or nature as the pea gravel on the ground in front of the building.

The rock was on a step — not on the apron — not on the ground. The defendants did not gravel the steps, did not put rock or gravel on the steps. The rock, even if it had of been placed in the area graveled, could not have jumped, flown, or moved in any way onto the step, be it the first or second step above the cement apron.

Plaintiff claims comfort from the decision of this court in the case of *DeWeese* v. *J. C. Penney Company*, 5 Utah 2nd 116; 297 P. 2d 898, contending that the case now before the court is within the principle announced in the quoted case. The opinion of Chief Justice Crockett sets forth the fundamental rule of law applicable, and the opinion states:

> "(b) Defendant's negligence.
>
> "The essential inquiry relating to defendant's negligence is whether in performing its duty of due care just recited, *it knew or should have known*, that a dangerous condition existed and whether sufficient time elapsed thereafter that, in due care, it should have put out the mats or sprinkled feldspar on the surface to reduce the slipperiness." (emphasis ours)

In the very case plaintiff quotes, and in which

he claims to find succor, the court announces that the essential inquiry relating to defendant's negligence is whether in performing its duty of due care just recited, *IT KNEW OR SHOULD HAVE KNOWN* that a dangerous condition existed.

Judge Faux, in instructing the jury, Instruction 11 A, submitted that essential inquiry to the jury for determination, *did the defendants know, or should they have known, that a dangerous condition existed.* The portion of the instruction of which plaintiff complains was correctly given, and was a correct and essential part of the instruction.

In the *DeWeese* v. *J. C. Penney Co.* case, it was admitted that the company knew the terrazzo was slippery when wet, and on the day of that accident the terrazzo was wet, and therefore the elements in the case as to the dangerous condition, wet terrazzo, was known to the defendant, and thus that defendant did know of the dangerous condition.

In the case now before the court, there is no evidence that defendants knew of the rock being on the step, or that any rock had ever been on the steps. The court correctly submitted to the jury the question as to whether the defendants knew or should have known the rock was on the step.

Defendants respectfully submit that this case is more within the principle ennunciated by the court in the case of *Maxine D. Lindsay* v. *Eccles*

Hotel Company, 3 Utah 2d 364; 284 P. 2d 477. In that case the plaintiff slipped and fell on some water on the floor in the Coffee Shop of the Eccles Hotel. The waitress had delivered some water to the plaintiff but there was no evidence as to how the water got on the floor, by whom it was deposited, when it got there, or that defendant had any knowledge of its presence, and the court, in upholding the trial court's directing a verdict in favor of the defendant, said, that under such circumstances, a jury cannot be permitted to speculate that the defendant was negligent.

Defendant respectfully represents to the court that the record in this case is barren of any evidence as to how the rock got on the step, by whom it was deposited, when it got on the steps, or that defendants had knowledge of its presence.

Defendants contend that the circumstances of the rock being on the step are equally consistent with non-negligence as with negligence, and under the doctrine announced in the cases of *Jackson* v. *Colston*, 116 Utah 295; 209 P. 2d 566; *Jensen* v. *S. H. Kress Company*, 87 Utah 434; 49 P. 2d 958; and *Quinn* v. *Utah Gas and Coke Company*, 42 Utah 113; 129 P 362.

In the case of *Hatzis* v. *United States Fuel Company*, 21 P. 2d 862, 82 Utah 38, a case involving dynamite caps in a house leased by defendant to

the plaintiffs, and the son of the plaintiff finding the caps and suffering injury, the court said that there being no evidence in the record proving or tending to prove that the defendant either stored the caps in the place or knew that they were there, that the evidence was not sufficient to make the defendant liable for the injury.

Plaintiff quotes to the court the case of *Falconer* v. *Safeway Stores Inc.*, 49 W. 2d. 78; 303 P. 2d 294, but defendants submit that the case is not applicable. In that case the defendants knew of the suet on the sidewalk, and had actually placed it there. The defendants knew of the suet being on the sidewalk, admittedly having put it there, and so the question as to whether the defendants knew or should have known of its existence on the sidewalk would not be proper for a jury, it being an undisputed fact in the case.

In this case now before the court there is no fact or admission that the rock was placed on the step by defendants, no evidence of how it got there, when it got there, who put it there, or that defendants had or should have had knowledge of its presence. It did not fly up onto the step. It could not get on the step unless someone put it there. It could not jump up from the gravel on the ground in front of the building. There is no evidence that it was of the same type and nature as the pea gravel

put in front of the building, and it was larger than any of the pea gravel on the apron and in the area in front of the store.

Defendants respectfully contend that the court did not err to prejudice the plaintiff, and that the instruction as given was correct insofar as plaintiff is concerned, and plaintiff should not be granted a new trial; he had his day in court, and had a fair, impartial trial.

CONCLUSION

Defendants respectfully represent that the trial court should not be reversed and no new trial ordered.

Respectfully submitted,

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