1968

Jose F. Montoya v. Berthana Investment Corporation, Inc, and Robert E. Sanders and Shirley M. Sanders, Husband and Wife : Appellant's Brief

IN THE SUPREME COURT
OF THE STATE OF UTAH

JOSE F. MONTOYA,

Plaintiff and Appellant,

vs.

BERTHANA INVESTMENT CORPORATION, INC, and ROBERT E. SANDERS and SHIRLEY M. SANDERS, husband and wife,

Case No. 11113

Defendants and Respondents.

APPELLANT'S BRIEF

Appeal from the Order of the Second Judicial District Court for Weber County, State of Utah
Honorable Parley E. Norseth, District Judge

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NATURE OF CASE

This is an action for wrongful death resulting from personal injury sustained by the deceased at a public roller skating rink in Ogden, Utah.

DISPOSITION IN LOWER COURT

The lower Court sustained a motion for Summary

judgment filed by the defendant, Berthana Investment Corporation, Inc., which motion was based upon the pleadings, the affidavit, and on the briefs filed in said matter.

RELIEF SOUGHT ON APPEAL

Plaintiff seeks reversal of the order dismissing plaintiff's case as to the said defendant, Berthana Investment Corporation, Inc., and remanding the case to the lower Court for trial.

STATEMENT OF FACTS

The plaintiff, father of the deceased, filed his complaint for damages against both the Berthana Investment Corporation, Inc., as owner and lessor of the premises known as the "Berthana Ballroom and Roller-skating Rink" and against Robert E. Sanders and Shirley M. Sanders, husband and wife, as lessees and as managers and operators of the skating rink. (R. 1)

For purposes of this brief, the defendant, Berthana Investment Corporation, Inc., will be referred to as Berthana (lessor) and the defendants, Robert E. Sanders and Shirley M. Sanders will be referred to as Sanders

(lessees).

The amended Complaint (R. 15) alleges that Lonnie Montoya, age 11, paid an admission charge and received permission to rollerskate on said premises and while skating was pushed or fell violently against one of the protruding armrests described in the complaint and suffered injury to his kidneys as a result of which he died from internal bleeding later the same day.

The answer of the defendant, Berthana, to the original complaint was a general denial and alleged contributory negligence by way of defense. (R. 2) The answer of the defendants, Sanders, was basically the same except for the defense of assumption of risk and the further allegation that the accident was caused by negligence of third persons not parties to the action. (R. 4) Thereafter, the defendant, Berthana, filed its Motion for Summary Judgment on the grounds "that the answer of the defendant, Robert E. Sanders to the plaintiff's interrogatories and the attached affidavit of the eye witness, Alma Clare, conclusively show as a matter of law that the plaintiff does not have a claim against this defendant . . ." (R. 12)

Plaintiff filed an amended complaint, (R. 15) and the defendants, Sanders, filed their answer to the amended complaint. (R. 16) The defendant, Berthana, renewed its motion for Summary Judgment (R. 17) which was granted by the lower Court. (R. 23) The facts as set forth in the amended complaint (R. 15) and which are the basis of this action against the defendant, Berthana, are as follows:

A. It leased the premises for dancing and roller-skating purposes only;

B. It knew that the public would be patrons of the rink and would pay admission for said use;

C. It would allow no alterations of the premises by lessee without prior written consent of the lessor;

D. It knew that the hall was specifically designed for dancing only and was used by the public for that exclusive purpose for a number of years;

E. It knew or should have known that wooden arm-rests extended outwards towards the dance floor from benches around the floor;

F. It knew that said premises were now being used by the public for both dancing and rollerskating;

G. It knew that a large number of persons, including children, would be admitted to said premises as patrons for skating;

H. It knew that there was no proper railing or other protective device to prevent skaters from falling into or being pushed against said armrests which constituted a risk to skaters using the rink;

I. It knew that the Sanders (Lessees) would use said premises for skating purposes before the area could be put in a reasonably safe condition and that lessees would not make such changes;

J. That both defendants knew, or should have known, of the hazards in the construction of said area when used for skating purposes and of the possibility of injury to persons skating there, especially to children; and

K. That the deceased, while skating on said rink, was pushed or fell violently against one of the protruding armrests and suffered personal injuries as a result of which he died.

ARGUMENT

POINT I

THE COURT ERRED IN GRANTING SUMMARY JUDGMENT IN FAVOR OF THE DEFENDANT, BERTHANA INVESTMENT CORPORATION, INC., AND AGAINST THE PLAINTIFF

To justify the lower Court in granting the motion for Summary Judgment, it was necessary to find that as a matter of law there was no negligence on the part of the landlord as owner of the premises and that it owed no duty to the deceased. We submit that the facts above alleged and which, for purposes of this motion must be deemed to be true, show negligence and that a question of fact for the jury has been raised. The most recent case handed down by the Utah State Supreme Court relating to the matter of Summary Judgment is Singleton vs. Alexander et al. (1967) 431 P(2) 126, 19 U.(2) 292. The opinion states in part as follows:

> "It will be noted that a summary judgment can be granted only when it is shown that there is no genuine issue as to any material fact and that the moving party also is entitled to judgment as a matter of law under those facts. The Court cannot consider the weight of testimony or the credibility of witnesses in considering a motion for summary judgment. He simply determines that there is no disputed issue of

material fact and that as a matter of law a party should prevail . . ."

and, ". . .However, when it comes to determining negligence, contributory negligence, and causation, courts are not in such a good position to make a total determination of its own, and that is: Did the conduct of a party measure up to that of the reasonably prudent man, and, if not, was it a proximate cause of the harm done? See Moore, Federal Practice, paragraphs 56.15 (1.-0), P. 2285, and 56.17(42), P. 2583; Barron and Holtzoff, Fed. Pr. & Procedure. Paragraph 1232.1, p. 106."

We submit that the issues raised by this case <u>are not</u> such that "all reasonably men must draw the same conclusions from them."

Just what is the duty of lessor of premises?

The correct rule in the present case is to be found in 32 Am. Jr., page 533, which, after defining the general rule between the landlord and tenant, then states:

"It is well settled that where the lease is for a public purpose, such as for a theater, the liability of the landlord for injuries from defects in the condition of the demised premises is not governed by all of the rules applying to leases generally. Where there is a lease for a purpose involving use by the public, the rights of business patrons to recover for injuries from defects in the demised premises are not limited to the rights of the tenant. <u>There are a number of decisions which hold that where the property</u>

is leased for public or semipublic purposes, and at the time is not safe for the purposes intended, and the owner knew, or by the exercise of reasonable diligence would have known, of such conditions, he is liable to the patrons of such premises for damages resulting from such conditions, for it is his duty to make such property reasonably safe for the purposes intended, or to discontinue the conditions, as the case may be." (Italics ours)

We also call attention to 123 ALR 868 which deals with leases for a particular purpose, and cites with approval Restatement of the Law of Torts, paragraph 359. It states:

"A lessor who leases land for a purpose which involves the admission of a large number of persons as patrons of his lessee, is subject to liability for bodily harm caused to them by an artificial condition existing when the lessee took possession, if the lessor (a) knew or should have known of the condition and realized or should have realized the unreasonable risk to them involved therein, and (b) had reason to expect that the lessee would admit his patrons before the land was put in a reasonably safe condition for their reception."

See also 123 ALR, 872 which defines the responsibility of the lessor of places of amusement.

"III Leases for particular purposes.
a. Places of amusement. Places of amusement constitute an exception to the general rule of caveat emptor with respect to a landlord's liability to those who enter upon the premises in the right of the tenant. It is generally recog-

> nized that the lessor of the property for public amusement purposes owes to the public, at least as to latent defects, the duty of exercising ordinary care to provide against defects in the premises which render them unsafe for the use intended. This includes defects in construction, defects caused by the property being in a state of disrepair at the time of the lease, or a condition which, in the nature of things, must ultimately result in the property being dangerous when put to the use intended." (Italics ours)

The question now before the Court is whether the landlord knew or should have known that persons using a dance floor for rollerskating purposes might sustain injury if projected into protruding armrests which, under these circumstances, could be a hazard if not an actual nuisance, as to patrons using it. We submit that this is a question of fact and to be determined by a jury.

Rollerskating in a public rink used for that purpose by its nature is a hazardous sport. It becomes so by the actions and conduct of young people. It is common knowledge that children will engage in racing around the rink; cutting in and out around other skaters; playing games such as "crack the whip"; and skating faster than they should. A landlord leasing the premises for skating

purposes and knowing said premises were designed for ballroom dancing should and could have foreseen that kids would engage in horseplay and that protruding armrests were dangerous and hence a nuisance if a skater were projected into one of them and sustained injury as happened in this case.

The Utah case of Larsen vs. Calder Park Company, (1919) 180 P. 599, 54 U. 325, is a key case on the Lessor-Lessee relationship and correctly states the law which we deem to be applicable and controlling in this case. The case was tried before the Court with a jury and a verdict rendered in favor of the plaintiff. Defendant appealed. The judgment was affirmed.

In many respects the Calder Park case closely parallels the present case, both as to fact and as to the application of the law. In that case the defendant leased an amusement park to the lessee for entertainment of the public for profit. One of the leased buildings was used as a shooting gallery and was constructed by the lessor many years before the accident in question. As plaintiff was walking along a path a bullet glanced from a target

through a hole or crack in the wall of the gallery and struck a boy in his eye, causing permanent injury.

Appellant, lessor, admitted its ownership of the park and that it executed the written lease as alleged in the complaint and denied the other allegations.

Counsel in that case, as now, asserted:

> ". . .that the general rule is that there is no implied warranty on the part of a landlord that leased premises are in a safe condition, or that he will keep the premises repaired or in a safe condition; and that, in the absence of an express covenant on the part of the landlord to maintain the premises in repair, it is generally held that neither the tenant nor a guest of the tenant has any right of action against the landlord for injuries sustained by reason of defects in the premises where there was no fraud or misrepresentation on the part of the landlord leasing the premises; that the overwhelming weight of authority is to the effect that, where property at the time of the demise is not a nuisance, and an injury happens by some act of the tenant or while the tenant has the entire possession or control of the premises, the owner is not liable."

Our Court in answer to this stated:

> "No doubt the law is properly reflected in the excerpt quoted from Taylor, but the quotation has no application to this case for the reason that here the shooting gallery building, at the time it was leased by the appellant, was in such a condition that it constituted a quiescent nuisance.

. . .it is manifest that by using the building which was intended for use as a shooting gallery and which was leased for that purpose, in the condition it was in when leased, . . ." "It was the unsafe condition of the building as leased, however, which would expose the passer-by to danger and not the sole act of the tenant, for the reason that, if the tenant used the building at all as a shooting gallery in the condition in which it was, the danger would certainly be constantly imminent."

Whether or not the protruding armrests would expose skaters to danger, as they did here, is a question for the jury. Certainly they constituted a "quiescent nuisance" as defined by the Court.

Our Supreme Court then cited with approval 16 RCL, para. 594, p. 1076 as follows:

"It is the well-settled rule that the landlord is properly chargeable with liability to a stranger where the cause of injury to the latter is a nuisance existing on the premises at the time of the demise. No person can create or maintain a nuisance upon his premises and escape liability for the injury occasioned by it to third persons. Nor can a lessor so create a nuisance and then escape liability for the consequences by leasing the premises to a tenant. Nor is it material that the negligence of the latter contributed to the injury; that may render the lessee also liable, but it cannot exempt the lessor from liability. Indeed, the nuisance may be merely passive until some agency of the lessee intervenes, and the Lessor will still be liable. The theory upon which the landlord is held to be liable where

the premises are leased with a nuisance is that he created the nuisance, and will be presumed to have intended the continuance thereof, or that he acquired title with an existing nuisance and knowingly leased them in that condition. In either case the act of leasing with the nuisance is held to raise the presumption that he intended the nuisance to be continued. Prior to and at the time of the lease, it was the duty of the lessor to put an end to the nuisance. If he fails to do this, and leases the premises with the nuisance on them, he may be deemed, and is deemed, to authorize the continuance of the nuisance, and is therefore liable for the consequences of such continuance. Whether, therefore, the defect is one of original construction, or arises from a failure to repair, or from the maintenance on the premises of any condition endangering the health or safety of strangers, whatever its nature, if it continues a nuisance, the lessor will be responsible for its consequences if he leases the premises with the nuisance upon them, and thus authorizes its continuance.* * *" (Italics Ours)

In the present case there is a striking similarily to that case in the application of the foregoing rule. The agency of the lessee which intervened and was injured was, of course, the deceased boy. The nuisance was passive until then. There is no question but what the lessor (Berthana) leased the premises in a condition which endangered the health and safety of strangers, whatever its nature, and that it is responsible for the consequences.

The opinion also cites with approval Section 597

(supra) which states:

> "It is not always necessary in order that the landlord may be held liable for injuries resulting from a nuisance on the leased premises that the cause of the injury be in and of itself a nuisance at the time of the lease. Leases are made with a view to the use of the premises leased, and if the injury to the person or property of a stranger is the result of the reasonable, ordinary, and contemplated manner of use of the premises, the lessor will be responsible therefor, although unused, and as they stood at the time of the demise, the premises were not, of themselves, a nuisance."

The Court also answers the question of public policy as it relates to the leasing of property to a tenant for a public use as was done in this case. It said:

> "Where property is leased to a tenant for a public use the care required by the landlord should be <u>of a higher degree</u> than when the property is let for private purposes. <u>Public policy demands such care for the protection of the public, and this is particularly applicable here in Utah, where public resorts and amusement parks are numerous and their attractions varied and alluring</u>." (Italics ours)

With reference to "nuisances" the Court approved the following from Joyce, Law of Nuisances, Para. 464, as follows:

> "The lessors or owners of buildings or structures in which public exhibitions and entertainments are designed to be given, and for admissions to which the lessors directly or indirectly <u>receive compensation</u>, are subject to a different

rule from that in the ordinary cases of leasing of buildings, in that while there is in the latter no implied warranty on the part of the lessor that the buildings are fit and safe for the purposes for which they are used yet in the former case the lessors or owners of such buildings or structures hold out to the public that the structures are reasonably safe for the purposes for which they are let or used, and impliedly undertake that due care has been exercised in their erection, and such lessor having created an unsafe and dangerous structure, and not having performed his duty in exercising the proper degree of care to know that it was safe, he is liable to a person injured by reason of its being unsafe or of improper and faulty construction whereby it constitutes a nuisance." (Italics ours)

This statement seems to indicate that there is an implied warranty on the part of the lessor that the building fit and safe for the purposes for which they are leased if r public exhibitions or amusement and where admission is arged from which the lessor directly or indirectly receives mpensation. Such is the case here. The rental in the lease substantial.

In conclusion the Court disposed of the question proximate cause. It cited with approval the following ote taken from Milwaikee &St. P.R.R. Co. vs. Kellogg, U.S. 469, 24 L. Ed. 256, cited in Anderson vs. ltimore & Ohio Ry. Co., 74 W. Va. 21, 81 S. E. 581,

51 L. R. A. (N.S.) 892, in which it poses this question:

> "The question always is: Was there an unbroken connection between the wrongful act and the injury, a continuous operation? Did the facts constitute a continuous succession of events, so linked together as to make a natural whole, or was there some new and independent cause intervening between the wrong and the injury?"

Of course, the cause of injury and death was the existence of the armrest which split his kidney. If the armrest had not existed or had been protected would he have suffered such injury? The answer is obviously no. The cause which set the others in motion, the cause of causes, and without which the accident would not have occurred was the condition of the armrest on the bench.

The Court in the Calder case properly stated:

> "According to the evidence in this case there was an unbroken connection between the wrongful act and the injury--between the nuisance and the unfortunate result. The question is: Was the dilapidated condition of the so-called shooting gallery the causa sine qua non? <u>If the cause had not existed, would the injury have taken place?</u> If the wall had been properly protected and there had been no holes or cracks in the wall, would the fragment of lead have struck the respondent in the eye and blinded him? It is true that there was a concurring cause, but the cause which set the others in motion, the cause of causes, and without

which the accident would not have occurred, was the condition of the shooting gallery wall."

In the case of Gibson vs. Shelby County Fair Association et al., 44 N.W.,(2), 362 (1950) the Supreme Court of Iowa quoted with approval the case of Junkerman vs. Tilyou Realty Co., where Justice Cordozo speaking for the New York Court of Appeals stated:

> "We may say that those who enter a structure designed for public amusement are there at the invitation, not only of the lessee who maintains it, but also of the lessor who has leased it for that purpose, and that the latter's liability is merely an instance of the general rule which charges an owner of property with a duty toward those whom he invites upon it. (Citing Cases.) We may say more simply, and perhaps more wisely, rejecting the fiction of invitations, that the nature of the use itself creates the duty . . . Whatever the underlying principle that explains the rule, the rule itself is settled."

This case also cites Barrett vs. Lake Ontario Beach Imp. Co. (174 Ny 310, 66 N.E. 969) with approval which stated the rule as follows:

> "If the premises are rented for a public purpose for which he (the lessor) knows that they are unfit and dangerous, he is guilty of negligence and may become responsible to persons suffering injury while rightfully using them."

The facts in the case were as follows:

Injuries were sustained by plaintiff who was a spectator at a hot rod race on the fairgrounds owned by the defendant, association. Petition was dismissed on defendant's motion and an appeal taken. Reversed. The Supreme Court held that the Petition stated a cause of action predicating defendant's liability on their leasing of premises so defective that they could not be safely used for the express purpose of the lease. This case also deals with the question of proximate cause.

The following definition of nuisance has an application in the present case:

> "A 'nuisance' arises from the creation or maintenance of a condition having a natural tendency to cause danger and inflict injury." "Where the natural tendency of an act complained of is to create danger and inflict injury on person or property, it may properly be found to be a nuisance as a matter of fact, but where the act in its inherent nature is so hazardous that the danger of extreme and serious injury is so probable that it is almost a certainty, there is a nuisance as a matter of law." Shoemaker vs. City of Parsons, 118 P. 508, 154 Kan 387 (Italics ours)

Attached to this brief and in view of the fact that there was no trial of the issues, nor exhibits introduced, we are taking the liberty of including herein pictures of

the benches and armrests taken in the skating rink. They are marked as Appendix A and B. It should be noted that there is a small platform from the floor to the riser, then a step up to the base of the benches. The armrests in question extend out beyond the seat area itself and over the base. There is absolutely no protection to a person projected toward the benches, the skates being stopped at the area of the small platform.

CONCLUSION

The trial court's granting Summary Judgment in favor of the defendant, Berthana Investment Corporation, Inc., and Robert E. Sanders and Shirley M. Sanders, husband and wife, should be reversed and the case remanded to the lower court for trial under appropriate instructions. Disposition as this court may determine and plaintiff awarded costs on appeal.

Respectfully submitted,

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NDIX "A"