1966

Mildred N. Cornwell v. Ray H. Barton : Respondent's Brief

IN THE SUPREME COURT
of the
STATE OF UTAH

MILDRED N. CORNWELL,
Plaintiff and Appellant,

vs.

RAY H. BARTON,
Defendant and Respondent.

Case No.
10557

RESPONDENT'S BRIEF

Appeal from Judgment of the Third District Court
for Salt Lake County
Honorable Merrill C. Faux, Judge

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STATEMENT OF THE KIND OF CASE

This is an action by plaintiff who was a guest of defendant's tenant, to recover for personal injuries claimed to have been sustained when she fell on a walkway owned by defendant.

DISPOSITION IN THE LOWER COURT

Plaintiff has appealed from a judgment entered in favor of defendant on a jury finding of no negligence. The case had been previously tried to a court and jury. The defendant prevailed and plaintiff was granted a new trial. The appeal is from the results of the retrial.

RELIEF SOUGHT ON APPEAL

Defendant seeks to have the judgment entered on the jury verdict affirmed.

STATEMENT OF FACTS

Defendant accepts plaintiff's Statement of Facts except as modified in his argument and in those instances where plaintiff has omitted certain facts, or his statement of them deviates materially from the record.

ARGUMENT

POINT I.

THE COURT'S INSTRUCTION NO. 9 DID NOT CONSTITUTE A DIRECTED VERDICT, NOR WAS IT A FORMULA INSTRUCTION.

Plaintiff finds two objections to the court's instruction No. 9, which is a modification of defendant's requested Instruction No. 5. First, she camplains that it is in effect a directed verdict, and second, that it is a formula instruction and fails to contain the theories of both parties. Each of these matters will be discussed separately.

1. *The Instruction is not in form or effect a directed verdict.*

It should be noted that the plaintiff in attempting to prove her case developed, both on direct and on cross-examination, considerable testimony in an apparent attempt to show that the ice was present for a sufficient length of time to have reasonably permitted Mr. and Mrs. Davis, defendant's custodians, to discover and remedy the condition, and further, that the snow had been on the ground for a sufficient length of time to have reasonably permitted Mr. and Mrs. Davis to have removed the

same. In this connection the plaintiff testified that there was snow on the ground when she awakened between 8:00 and 9:00 A.M. the morning of the accident, having observed the weather conditions from her window (R. 88). She claimed that it had snowed during the night and that it quit snowing between 8:00 and 9:00 a.m. the morning of the accident. Davis indicated that she arose at 6:30 a.m. on the morning of the accident and observed no snow on the walks (R. 159). When she left for a Relief Society Meeting at 9:30 a.m. there was no snow on the walks and it was not snowing. However, when she returned from the meeting between 11:30 a.m. and 12:00 noon, it was snowing lightly (R. 160). After arriving home, she changed her clothes, fixed lunch for her daughter and herself and was in the process of sweeping a light skiff of snow from the walks between 1:00 p.m. and 1:30 p.m., when she was called to the telephone and advised of plaintiff's accident (R. 161). Mr. Davis said there was no snow on the walks when he left for work at 7:40 a.m. (R. 150). The procedures with respect to caring for the walks in relation to ice and snow were also placed in evidence by the plaintiff (R. 154, 155). Detailed weather reports were also introduced in evidence (Exhibit 4-P).

Plaintiff built her case upon the accumulation of both snow and ice on the walkways and the care that was exercised by Mr. and Mrs. Davis in maintaining them. The jury was entitled to know that

ice formed as a result of natural weather conditions, as opposed to artificially created conditions, could not be charged to the responsibility of defendant or his employees. Further, if the presence of ice, was not revealed by *newly fallen snow*, such did not constitute negligence on the part of the defendant. The instruction, as given, simply goes to the question of negligence of defendant, if any, in permitting the accumulation of ice and snow. The instruction properly leaves open for determination by the jury, whether or not the ice, if found to have been present, should have been discovered before the *new* snow fell, or if other duties to the plaintiff, as defined by the Court, had been violated. The Court fully advised the jury of a property owner's responsibilities to tenants and their guests in Instruction 9A (Plaintiff's Requested Instruction No. 2) (R. 9), which immediately followed the instruction to which exception is now taken. Instruction No. 9A reads as follows:

> "You are instructed that it is the duty of a landlord to exercise ordinary care in maintaining in a reasonably safe condition all parts of the premises over which he retains control, and which are used in common by all the tenants and their guests. A violation of said duty subjects the landlord to liability to a tenant or guest injured as a proximate result of such violation.
>
> "In this respect, you are instructed that Ray H. Barton, the owner of the premises in-

volved in this case, had the duty:

"1. To exercise ordinary care so as to maintain common walkways in a reasonably safe condition for tenants and guests and had the further duty to observe any existing dangerous condition known to him or by use of reasonable diligence would have become known to him, which, in the exercise of ordinary care would not be discovered by said tenants and guests.

"2. To remedy or remove any such dangerous condition.

"If you should find from a preponderance of the evidence that defendant was guilty of negligence in either or both of the above particulars, you should so answer the questions hereinafter to be submitted to you."

The Court's Instruction No. 10 (Plaintiff's Requested Instruction No. 3), further advised the jury that if they should find that Mr. and Mrs. Davis were negligent, at the time in question in either or both of the particulars referred to in Instruction No. 9, that their negligence was then to be imputed to and became the negligence of the defendant.

The plaintiff does not, nor can she claim any deficiency in Instruction No. 9A, as not fully setting forth the duties of a property owner towards the guest of a tenant. Had Instruction No. 9 been given without the Instruction No. 9A, the jury would, of course, not have been fully advised of the responsibility of defendant toward his tenants and their guests. Because of the evidence which had been

submitted in the case, the court properly determined that it was necessary to place the questions concerning the accumulation of ice and snow in proper prospective for the jury (R. 190).

This court has repeatedly announced the rule that all instructions are to be considered and read together. A specific instruction concerning this was given by the Court as Instruction No. 29, which read as follows:

> "INSTRUCTION NO. 29
>
> "These instructions, though numbered separately, are to be considered and construed by you as one connected whole. Each instruction should be read and understood with reference to and as a part of the entire charge and not as though one instruction separately was intended to present the whole of the case upon any particular point. For that reason you are not to single out any certain sentence or any individual point or instruction and ignore the others, but you are to consider all the instructions, as a whole, and to regard each in the light of all the others."

This well accepted principle has been repeatedly affirmed by this Court. *Startin v. Madsen*, 120 Ut. 631, 237 P.2d 834 (1951), *Walkenhorst v. Kesler*, 92 Ut. 312, 67 P.2d 654 (1937), *Haywood v. Rio Grande Railway*, 6 Ut. 2d 155, 307 P.2d 1045 (1957).

Further, the failure to state the law fully and completely in one instruction in the light of other

instructions is not prejudicial error. *Taylor v. Weber County*, 4 Ut. 2d 328, 293 P.2d 925 (1956). The instructions must be read in light of the whole charge in determining whether a particular instruction was calculated to mislead the jury. *Martin v. Sheffield*, 112 Ut. 478, 189 P.2d 127 (1948).

Plaintiff's argument that the instruction "eliminates entirely any duty whatsoever to inspect, discover and remove accumulations of ice, regardless of how long and how notorious the existence of the same" (Plaintiff's Brief p. 9), when considered in light of her own instruction No. 9A, and other instructions given by the Court defining the duties of the parties and the manner in which the instructions were to be considered by the jury, is unsound.

2. *The Instruction is not a formula instruction.*

Plaintiff's additional complaint with instruction No. 9 is that it is a formula instruction because it fails to include plaintiff's theory that "defendant failed to exercise ordinary care to discover and remedy the dangerous condition." Plaintiff cites *Ivie v. Richardson*, 9 Ut. 2d 5, 336 P.2d 781 (1959), as authority that the giving of Instruction No. 9 constitutes reversible error.

The instruction given in the present case is not a formula instruction. The condemned instruction in the *Ivie* case recited certain facts, which if found by the jury would constitute negligence, and then

directed the jury if they so found ". . . your verdict must be in favor of the plaintiff and against the defendant." The instruction failed to contain any reference to contributory negligence which was an issue in the case.

The Court left unanswered in the *Ivie* case whether the giving of such a "formula instruction" constituted reversible error. Plaintiff need not have resorted to general law texts in an attempt to define Utah law in this regard for it is fully set forth in the recent case of *Ortega vs. Thomas*, 14 Ut. 2d 296, 383 P.2d 406 (1963), which was either ignored or overlooked by the plaintiff. The instruction in the *Ortega* case was to the effect that if the jury found the defendant negligent, and that it proximately caused plaintiff's injury ". . . you should determine the damages sustained by the plaintiff . . ." The issue of contributory negligence was not contained in that instruction but was contained in a separate one.

In determining that this did not constiute reversible error, the Court said:

> "Defendant argues that the giving of Instructions Nos. 12 and 14 referred to above, separately and without correlating them, would confuse the jury, citing the case of Ivie v. Richardson. It is true that we there voiced some criticism of similar instructions. In regard to that case, and its possible application here, these observations should be made. The criticism was also leveled at another fault.

> The instruction regarding negligence ended with the phrase, 'then your verdict must be in favor of the plaintiff and against the defendant.' Aware that instructions in that form, often referred to as 'formula' instructions, sometimes occur over and over again in requests for instructions, or in some instances in instructions actually given by the court, we observed that the instructions in that form are undesirable because they tend to be partial and argumentive. It will be noted that the criticism was in mild language, stating that 'It is better to avoid giving such instructions,' and went on to say, 'of more importance is the (next) error assigned * * *'. While we think the criticism is justified, and we reiterate it, the reversal was not placed solely on that ground. On the other hand, there is precedent for refusing to do so."

The Court then stated that since the trial court had given an appropriate instruction advising the jury that they should not single out any particular instruction and give it undue importance, but consider them altogether, no error was committed. As previously noted the court gave such a cautionary instruction in the present case (Instruction No. 29, R. 63).

Instruction No. 9 is not a formula instruction. It correctly defines the responsibility of a landlord for natural accumulations of ice and snow under the factual issues of this case. That is all it professed to do.

The case of *Konold vs. The Rio Grande West-*

ern Railway Company, 21 Utah 379, 60 P. 1021 (1900), cited by the plaintiff is not helpful here. That case dealt with the inconsistent or contradictory instructions given on a material issue in a case. There was no inconsistency between Instruction No. 9 as given by the court and any other instruction. It was merely explanatory of the law in the case.

The plaintiff further claims that the error in giving instruction No. 9 was increased because another instruction advised the jury that the defendant was not a guarantor against the occurrence of accidents on his property.

In *Steele v. Denver & Rio Grande Western Ry. Co.*, 16 Ut. 2d 127, 130, 396 P.2d 751, 753 (1964), this court in denying a claim of error stated:

> ". . . the owner of property is not to be regarded as an insurer for even an invitee upon his property. His duties toward invitees are limited to those risks which are unreasonable . . . which he has no reason to believe such persons will discover or realize the risk involved . . . and which he has no reason to anticipate that persons acting with ordinary and reasonable care will encounter . . ."

The instructions in the present case properly advised the jury of the law concerning the duties of the defendant as a landowner and his responsibility with respect to the natural accumulation of ice and snow on walkways. Instruction No. 9 was necessary to define that duty because it had become a prominent part of plaintiff's case. It did not

amount to a directed verdict but was a definition of responsibility and when read with the other instructions was a proper statement of the law of the case. Further, the instruction was not a formula instruction in form or substance. The theory of the defendant was fully set forth in other instructions which he requested and were given by the court.

POINT II.

THE SUBMISSION OF UNAVOIDABLE ACCIDENT IN INSTRUCTION NO. 5 WAS NOT ERROR.

Instruction No. 5 is verbatim JIFU Instruction 16.1. The identical instruction was given and approved in *Porter v. Price*, 11 Ut. 2d 80, 84, 355 P.2d 66 (1960). In that case the defendant's automobile went out of control when defendant suffered a severe insulin shock. No evidence was presented that he had conducted himself other than as a reasonably "well-regulated diabetic." He had no previous warning symptoms. The plaintiff claimed it was error for the court to give an instruction on unavoidable accident. The following language is taken from the opinion:

> "However, there are some situations where the evidence is susceptible of being so interpreted that an accident occurred without negligence on the part of anyone, and if it is reasonably susceptible of such interpretation, and a party requests it, the trial court commits no error in so advising the jury."

Also, of significance in the *Porter* case is the

discussion of the Utah Court concerning the California case of *Butigan v. Yellow Cab Co.*, 49 Cal. 2d 652, 320 P.2d 500, 65 A.L.R. 2d 1, upon which plaintiff relies heavily in assigning error in the giving of the unavoidable accident instruction in the present case. (See Plaintiff's Brief Page 16).

Of significance is the fact that the plaintiff has failed to cite one Utah case dealing with the question of unavoidable accident, although as will be observed, there are several which have dealt with this question. The cases cited by Plaintiff will be considered first and then reference will be made to several Utah cases.

The Utah Court in discussing the *Butigan* case noted that the California court condemned the unavoidable accident instruction in part because it was misleading in suggesting to the jury that they "should consider unavoidability as an issue or ground of defense separate and apart from the questions of negligence and proximate causation." It is interesting to observe that the California Supreme Court has since reconsidered its decision in *Butigan* and has retracted considerably from the bold position taken in that case. In *Pobor v. Western Pacific*, 55 Cal. 2d 314, 359 P.2d 474, 478, (Cal., 1961), that Court made these observations:

> "Question: Did the trial court commit prejudicial error in instructing the jury, at the request of the defendants:
> * * *
> (d) on unavoidable accident?

> No. Although under Butigan v. Yellow Cab Company, 49 Cal. 2d 652, 320 P.2d 500, 65 A.L.R. 2d 1, it is error to give an instruction upon unavoidable accident, still it is a question for the appellate court to determine whether the giving of the instruction constituted prejudicial error."

The lower court judgment was affirmed, there being no determination of prejudicial error.

The plaintiff also cites the Oregon case of *Fenton v. Aleshire*, 238 Ore. 24, 393 P.2d 217 (1964), which followed the rationale of the *Butigan* case, in support of her claim of error in giving an unavoidable accident instruction. Although the *Fenton* case held that an instruction on unavoidable accident should not be given in any case, two subsequent cases decided by the Oregon Supreme Court held that the giving of such an instruction, although error, was not prejudicial. (See *McBee v. Knight*, 239 Ore. 606, 398 P.2d 479 (1965), and *Hills v. McGillvrey*, ... Ore. ...., 402 P.2d 722 (1965)).

Plaintiff cites at page 21 of her Brief numerous cases for the apparent purpose of sustaining her position that instructions on unavoidable accidents are in disfavor with the courts. The Washington case of *Bennett v. McCready*, 57 Wash. 2d 317, 356 P.2d 712 (1960), is one such case. However, in the later Washington case of *Cooper v. Pay-N-Save Drugs, Inc.*, 59 Wash. 2d 829, 371 P.2d 43, the court reaffirmed its long standing position that it is proper to give such an instruction if the facts warrant it.

Plaintiff also cites the case of *Carlburg v. Wesley Hospital and Nurse Training School*, 182 Kan. 634, 323 P.2d 638 (1958), in favor of her position. In that case the plaintiff was injured when he fell out of defendant's hospital bed while he was under the influence of drugs and a patient at the hospital. The Court there merely held that the facts did not lend itself to an instruction on unavoidable accident because under the circumstances, the plaintiff was under the "*complete*" control of the hospital and its employees and there was nothing unavoidable about the accident. The Court recognized that such an instruction is proper where the occurrence is not contributed to by the negligent act or omission of either party.

Although plaintiff characterizes the recent decisions of Courts of other states as being the "clear trend of authorities toward condemnation of unavoidable accident instructions in *automobile* collision *cases*" (emphasis added), it is evident from a review of those cases that even the California Court has retrenched from the position it appeared to take in the *Butigan* case. The Idaho Supreme Court in the 1964 case of *Hackworth v. Davis*, 87 Ida. 98, 390 P.2d 422, refused to follow the California case in *Butigan v. Yellow Cab Co.* With few exceptions the Courts still recognize that in proper circumstances an unavoidable instruction is proper for the purpose of clarifying issues for the jury. The Utah Courts have consistently followed this procedure.

A case which is similar in many respects to the one at bar is *Dennison v. Chapman*, 6 Ut. 2d 379, 382, 314 P.2d 838, 840 (1957). There plaintiff sued for injuries sustained when an automobile driven by him collided with a truck which had crossed into his lane of traffic after it was struck by the defendant's automobile which suddenly spun out of control on icy roads as it was being passed by the truck. The Supreme Court sustained a dismissal of the case finding that there was sufficient evidence to justify a determination that the accident was not the result of anyone's negligence.

The following language is taken from the opinion:

> "To say that this type of accident could not happen except for negligence is specious. *Many times accidents are caused by icy conditions beyond the control of any of the parties involved.* Likewise, the icy roads would remove the element of exclusive control from the defendants. A person cannot be in exclusive control of a vehicle under weather conditions in which the elements can act at variance with the control of the operator." (Emphasis added)

The instant case is particularly suited to an instruction on unavoidable accident. As in the *Dennison* case, icy conditions were involved. Weather obviously created conditions over which neither of the parties had any control. There was sufficient evidence in the record which were reasonably suseptible to a finding that neither the defendant nor the

plaintiff were negligent in the manner in which they conducted themselves. The jury was therefor properly advised that in certain situations legal responsibility does not attach to either party.

The present case clearly comes within that class of cases referred to in *Porter v. Price*, 11 Ut. 2d 80, 355 P.2d 66 (1960). The Court there stated that if the evidence is reasonably susceptible to the interpretation that the accident occurred without the negligence on the part of anyone, and if a party makes such a request, that the trial court commits no error in so advising the jury. See also *Wellman v. Noble*, 12 Ut. 2d 350, 366 P.2d 701 (1961), where the Court again stated that in cases where the facts warrant doing so, it is not error to give an instruction on unavoidable accident, and *Jensen v. Dolen*, 12 Ut. 2d 404, 367 P.2d 191 (1962).

No cases are cited to the contrary by the plaintiff, but she suggests that the Utah court follow the uncertain sound of the *Butigan* case.

CONCLUSION

Instruction No. 9 properly advised the jury concerning the responsibility of a landowner for natural accumulations of ice and snow upon property controlled by him. The instruction was appropriate because of the prominence of evidence introduced into the case by plaintiff concerning the alleged presence of ice and snow prior to, at, and subsequent to the time of the accident. The instruc-

tion was not a formula instruction, and even if found to be such, did not constitute prejudicial error.

The instruction given concerning unavoidable accident was particularly appropriate because there was evidence of weather conditions which was reasonably susceptible to an interpretation by the jury that the accident occurred without negligence on the part of anyone. This court has consistently affirmed such an instruction when given in cases similar to this one. The jury verdict should be affirmed.

Respectfully submitted,

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