1961

Cecelia Wilson and Clara Martin v. Salt Lake City : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT
of the
STATE OF UTAH

CECELIA WILSON and
CLARA MARTIN,
Plaintiffs and Respondents,

vs.

SALT LAKE CITY, a Municipal
corporation,
Defendant and Appellant.

No.
9567

APPELLANT'S BRIEF

Appeal from the Judgment of the
3rd District Court for Salt Lake County
Hon. Stewart M. Hanson, Judge

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STATEMENT OF THE KIND OF CASE

This is an action for personal injuries and property damage arising out of an accident when one of the plaintiffs was driving the other's automobile on 13th West Street in Salt Lake City, and the right rear wheel thereof crashed through a sewer manhole lid.

DISPOSITION IN LOWER COURT

The case was tried to a jury. From a verdict and judgment for each of the plaintiffs, defendant appeals.

RELIEF SOUGHT ON APPEAL

Defendant seeks reversal of the judgment and judgment in its favor as a matter of law and dismissal of the action.

STATEMENT OF FACTS

The pertinent facts leading to the filing and prosecution of the action are as follows:

On August 20, 1961, the plaintiffs and respondents, Cecelia Wilson and her daughter, Clara Martin, were returning from a neighborhood grocery store in Mrs. Wilson's Ford automobile along Arapahoe Avenue in Salt Lake City. Clara Martin was driving and her mother, Mrs. Wilson, was sitting in the front seat along side of her (R. 63, lines 27, 28 and 29). When she reached 13th West, she turned north and ran over a sanitary sewer lid about 40 feet north of the intersection of Arapahoe Avenue and 13th West (R. 151, lines 12 and 13), at which time the rear wheel of the car fell into the manhole and Mrs. Martin and Mrs. Wilson suffered alleged personal injuries and damage to the Wilson car (R. 48 and 49). (See Exhibits P. 1, 2, 3 and 4.) There is some evidence that one of the braces on the lid had a latent crack, which was underneath side of the lid, (R. 143, lines 16 to 26), but that the main crack was freshly made (R. 51, lines 3 to 20 inclusive). The respondents produced two girls, approximately 14 years old, and a mature woman who testified that the lid had been broken for about one week or a little more, prior to the accident (R. 82, 85, 92, 93, 94 and 102, line 13). Salt Lake City has 11,000 sewer lids to inspect (R. 146, 147 and 149). Storm sewers are inspected twice per year; sanitary lids are

inspected approximately every month (R. 149). The sewer lid involved in this case is a sanitary sewer lid and was inspected on July 13, 1960, and found to be in a sound condition (R. 146, 151, lines 18 to 30).

Salt Lake City had no actual knowledge or notice that the said sewer lid was cracked or broken, nor had it any notice that it was maintaining a hazardous condition on said street for vehicular travel (R. 148, 151, lines 18 to 30; and 152, lines 1 to 19). The two questions raised by this appeal are whether or not under the plaintiffs' testimony Salt Lake City had constructive notice of the broken sewer lid and the hazardous condition it made for vehicular travel, to support a finding that it was negligent and whether or not the defendant city is absolved from liability because it operates its sewer system in a governmental capacity.

POINTS URGED FOR REVERSAL

I. THAT THE EVIDENCE DOES NOT SUPPORT A FINDING THAT DEFENDANT WAS NEGLIGENT.

II. THE DEFENDANT IS NOT LIABLE FOR THE PERSONAL INJURIES AND DAMAGE, BECAUSE IT OPERATES ITS SEWER SYSTEM IN A GOVERNMENTAL CAPACITY.

ARGUMENT

I. THAT THE EVIDENCE DOES NOT SUPPORT A FINDING THAT DEFENDANT WAS NEGLIGENT.

The appellant contends that it was not negligent in maintaining 13th West Street in a reasonably safe condition for vehicular traffic, and that the testimony of the plaintiffs' witnesses that the lid had been broken for approximately one week is not sufficient lapse of time, considering the place of the accident and character of the defect, to warrant a finding that the appellant had constructive notice of such defect.

In the case of *City of Phoenix v. Clem,* Supreme Court of Ariz., May 26, 1925, 28 Ariz. 315, 237 P. 168, holds at page 173 of the Pacific Reporter:

> "The evidence clearly showing that the defendant had no knowledge of the hole in the trench, or that it had existed long enough to give the city constructive notice thereof, and these things under the facts of this case, being necessary before liability is established, the motion for an instructed verdict should have been granted."

So with the case at bar, the appellant was not aware of any hazard to vehicular traffic on 13th West Street. The street is in the outskirts of the city and does not bear the burden of traffic as streets in the central area or arterial streets, and therefore the likelihood of the city officials obtaining notice of such defect would be much less than a defect on an arterial street or in the business district. See Exhibit P-4.

In the case of *Hedden et al v. Town of Bingham Canyon, Utah,* 94 Utah 442, 78 P.2d 637, the Supreme Court held:

> "Evidence whether erection of a cement structure by municipality at side of highway was the cause of accumulation of ice and snow at the scene of an auto-

mobile accident in which occupant of automobile lost her life was insufficient for the jury.

"Evidence whether municipality was negligent in failing to provide a warning signal due to an alleged hazard presented on a street which curved at 30° angle so as to render municipality liable for death of automobile occupant, sustained when automobile skidded on ice at the curve was insufficient for the jury."

Maloney v. Salt Lake City, 1 Utah 2d 72, 262 P.2d 281, this court held:

"In an action by pedestrian against city for personal injuries sustained when section of city sidewalk collapsed, where there was no evidence that defect existed in sidewalk before the accident took place, *which presented a hazard to those using it sufficient to give city notice* that there was dangerously defective condition which it negligently failed to correct, pedestrian could not recover."

At page 282 of the Pacific Reporter, this court said:

"In order to support this claim, the evidence must show *that for some period of time before the accident, the sidewalk which collapsed was in such a condition that it obviously presented a hazard to those using it sufficient to give the city notice that there was a dangerously defective condition which it negligently failed to correct.* Only if the evidence will reasonably support a finding to that effect when construed most favorably to the appellant can we reverse the judgment of the trial court. In this respect we think appellant's evidence fails to support a finding in his favor."

The decision was unanimous. The lower court had directed a verdict in favor of the respondent city and the plaintiff appealed.

In the case of *Cheney v. City of Los Angeles,* 119 C.A. 2d 75, 258 P.2d 1099, at page 1100 (3) of the Pacific Reporter, the California court stated:

> "It is likewise settled that before a defendant municipality may be charged with constructive notice it (the defect) must have existed for a sufficient length of time and be sufficiently conspicuous or notorious to give rise to the inference that the defendant had knowledge thereof."

In the case at bar the defect in the sewer lid had not existed long enough nor was it conspicuous enough to impute notice to the appellant city.

In *Berger v. Salt Lake City,* 56 Utah 403, 191 P. 233, this court said:

> "Negligence consists in doing or omitting to do any act which an ordinarily prudent and careful person under the same circumstances would do or omit to do, but not in doing or omitting to do an act which can only be done or prevented by the exercise of extra-ordinary exertion or care or by the expenditure of extra-ordinary sums of money."

The accident involved in the case at bar happened in a sparsely populated area of the city and on a street with comparatively little travel. See Exhibit P4.

In *Scoville v. Salt Lake City,* 11 Utah 60, 39 P. 481, page 482, this court said:

> "The question of notice is not alone determined from the length of time a defect has existed, but also from the nature and character of the defect, the extent of the travel, and whether it is in a populous or sparsely settled part of the city."

In *Dahl v. Nelson and the City of Fargo,* N. D. Supreme Court of N.D., January 26, 1953, 56 N.W. 2d 757, it was held that when an action against driver of automobile by guest was dismissed, but a judgment of $5,000.00 on jury's verdict was awarded plaintiff against the city of Fargo for maintaining an obstruction in the street, that the evidence which showed that ruts in a muddy street straddled a manhole encasement, and the auto in driving along said ruts collided with encasement of the sewer manhole injuring guest, that maintenance in such condition for a period of 24 hours was insufficient to take to the jury the question of either actual or constructive notice of the defect. On page 760 (5) of the N.W. report the Supreme Court of North Dakota said:

> "In order for the city to have had sufficient notice in the instant case, it would have been necessary for the city to have had notice, first, that there was a single track down the center of the road which straddled the manhole; and, second that the ruts of the tracks were of sufficient depth so it should have reasonably been anticipated that they would eventually become deep enough to make the manhole casing an obstruction. Notice that the street was wet, had an unpaved surface and that some ruts might develop of course could be imputed to the city. From notice of these facts, however, it cannot be said that the city officials should have anticipated that the traffic upon the street would create a single track astride the manhole, rather than one track for west bound traffic north of it and another for east bound traffic south of it, or that the ruts created by the traffic would become of dangerous depth. To say that the existence, for a period of one day, of the ruts astride the manhole, of sufficient depth to make witness Willits consider them dangerous, is sufficient to impute to the

city notice of a defect, which was potentially but not certainly dangerous, would be to say that reasonable maintenance of the city's streets required those charged with the duty of street maintenance in the city of Fargo to make a careful inspection of all of the unpaved streets in all of the outlying districts of the city within twenty four hours after every rain, taking notice of the location of ruts, measuring or estimating their depth and reaching an accurate conclusion as to whether the ruts might eventually reach a depth which would become dangerous. In other words, it would burden a city with the duty of exercising not only the highest possible degree of care but a degree which in some instances would be impossible. *Such is not the measure of a city's duty.* A city is only required to exercise reasonable care to discover and remedy defects in its streets.

"Since as a matter of law, the evidence in this case is insufficient to establish either actual or constructive notice of the defect in the street which caused the injuries suffered by the plaintiff's daughter and there appears to be no reasonable probability that the deficiencies in the proof can be supplied upon a new trial, the judgment of the district court against the city of Fargo is reversed and the case ordered dismissed."

The case of *Colby v. City of Portland, et al.,* 85 Ore. 359, 166 P. 537, was an action for personal injuries sustained by the plaintiff on a board walk crosswalk in one of the streets of Portland. It was testified to by a city employee that the defect complained of had existed from 3 to 6 weeks; others testified that the defect had existed open, patent and visible from 3 weeks to months. A rotten plank in the crosswalk gave way and plaintiff pushing a baby buggy in front of her, caught

her foot in defective plank and fell. She sued the city, mayor, councilmen and city engineer. Non-suit was granted the city and the individual defendants appealed. The Oregon Supreme Court held on page 543 of the Pacific report, paragraph 10:

> "Portland contains approximately a quarter of a million of inhabitants. It appears from the testimony that something less than a dozen people had noticed the defect, and that three or four of that number had casually mentioned it to neighbors, but nobody seemed to consider the matter serious enough to report to the authorities. The existence of the defect seems not to have been known to anybody, except these few persons living in the immediate neighborhood, and was not a matter of general public notoriety or concern. The plaintiff, who resided within a block of the crossing, testified that she was entirely ignorant of the defect, and yet it is contended the mayor and commissioners, with all the multitudinous duties devolving upon them, should be adjudged to have been negligent, and to pay the plaintiff $6,350.00, because they did not know of the existence of the defect in the walk for three weeks, or perhaps double that time, *is no evidence of notice to the council, or lack of diligence on their part in the discharge of their duties.* If one of the principal bridges in the town should become in such a state of disrepair as to be a public menace or impede the public travel, it naturally would become a source of public concern to many people, and the commissioners would in the ordinary course of affairs hear of it. If they were charged with the duty of making a personal inspection of the walks of the city, and failed to find a defect which was *open and apparent,* there might be some reason for the inference that a defect which had existed for several weeks should have been discovered and repaired; but in the very nature of things they can act only through subordinate officers, and

it is not claimed that any policeman or inspector ever made any report, and it is evident that no member of the council ever had any personal knowledge of the defect. There was no evidence to justify a finding that the mayor and commissioners were guilty of negligence."

In *Smith v. Krebs et al.,* 166 Kan. 586, 203 P.2d 215, while the plaintiff was walking on a cement sidewalk in a city street she stepped on a board which covered an opening in the walk, the board gave way, she was injured and sued the city and the abutting lot owner for damages. Under the facts and the authorities stated in the opinion it is held that neither the city nor the owner of the abutting lot was liable:

"Its (the city) only duty is to furnish streets and sidewalks that are reasonably safe and suitable for the use made of them by the public. Its liability for injuries to persons which result from defects of the streets or sidewalks arises by reason of the negligence of the city in failing to provide streets and sidewalks which are reasonably safe for use. It is a tort liability and the general rule is that the city is not negligent and has no liability for injuries to persons using the sidewalks resulting from a defect therein unless it has knowledge or notice of such defect and an opportunity to repair it.

"In this case it is conceded that the city did not have knowledge of the defect, and there is no claim that it was patent. The board the plaintiff stepped on looked as sound as any of the others. There was nothing in the appearance of the covering over the hole in the sidewalk which would cause anyone looking at it to think it was otherwise than sound.

"Therefore, under the authority of the cases above cited, it is clear that no negligence of the city was shown." (Page 217 id.)

There was no patent defect in 13th West Street—plaintiffs themselves said the street looked fine. (R. 59, line 10; R. 64, lines 9 and 10; R. 70, lines 9 to 14).

"There is in such instance no fixed or definite rule as to what length of time a defect must have existed to furnish notice. Much depends upon the character of the defect and upon the circumstances and surroundings." Williams v. Wessington Twp., 70 S.D. 75, 14 N.W. 2d 493, at page 494.

There was no evidence introduced in the case at bar to dispute the testimony of the plaintiffs' witnesses that the lid had been cracked for approximately one week, but they failed to notify the city or any of its servants or employees. There was no further evidence that the lid was originally defective, or of bad design or did not fit prior to its being broken. The slight discoloration on the underneath side of the lid may disclose some evidence of a fracture of longer duration than a week, but it was not discovered prior to the break because it was hidden from the inspector's view (R. 143, lines 14 to 25).

"Injuries resulting from latent defects in a street not due to faulty municipal work, and which could not have been discovered by ordinary care and diligence, do not give right of action against the municipal corporation in the absence of such notice." C.J.S. Municipal Corporations, Vol. 63, Section 829, page 169.

II. THE DEFENDANT IS NOT LIABLE FOR THE PERSONAL INJURIES AND DAMAGE, BECAUSE IT OPERATES ITS SEWER SYSTEM IN A GOVERNMENTAL CAPACITY.

In a recent case, this court held that cities operate their sewer systems in a governmental capacity, (*Cobia vs. Roy City, Utah,* rendered December 8, 1961), and in the particular case further held, that the defendant city of Roy was not liable for damage to the plaintiff's property, even though the defendant may have been negligent.

In the case at bar the manhole was maintained for flushing the sewer; it was a flush tank. (R. 149, lines 17 to 26).

In operating a waterworks system for protection against fire, *for flushing sewers* or for other uses pertaining to public health and safety, a municipal corporation exercises governmental power; C.J.S., Vol. 63, Municipal Corporations, Section 241, page 51. (See R. 159, lines 10 to 25.)

The lid alleged to be defective was a part of the sanitary sewer system of Salt Lake City and was used as a flush tank to wash out the sewer approximately once per m o n t h. The defendant operates its sewer system in a governmental capacity, and is not, therefore, liable for the alleged personal injuries and damages resulting from its operation.

CONCLUSION

It is, therefore, respectfully submitted that the defendant's motion for non-suit and dismissal (R. 135) or directed verdict

(R. 167) should have been granted and that in accordance with the law and the facts of this case and the authorities herein cited, the defendant is entitled to a judgment; that the plaintiffs take nothing by their complaint, and the case be remanded to the District Court for Salt Lake County, with instructions to enter its judgment for defendant and against the plaintiffs.

Respectfully submitted,

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