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Alice R. Benally and Belinda Benally v. L. G. Robinson, Clifford G. Edmunds and Louis W. Duncan : Respondent L. G. Robinson's Petition for Rehearing and Supporting Brief

Utah Supreme Court

Homer Holmgren; Jack L. Crellin; Attorneys for Defendant-Respondent;
Glenn C. Hanni; Attorney for Plaintiffs-Appellants;

IN THE SUPREME COURT
of the
STATE OF UTAH

ALICE R. BENALLY and PERLINDA BENALLY, by her guardian ad litem, ALICE R. BENALLY,

Plaintiffs-Appellants,

vs.

L. G. ROBINSON, CLIFFORD G. EDMUNDS and LOUIS W. DUNCAN,

Defendants-Respondents.

Case No. 9677

RESPONDENT L. G. ROBINSON'S PETITION FOR REHEARING AND SUPPORTING BRIEF

Appeal from the Judgments of the District Court of Salt Lake County, Hon. Merrill C. Faux and Ray Van Cott, Jr.

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RESPONDENT L. G. ROBINSON'S PETITION FOR REHEARING

Comes now the defendant-respondent L. G. Robinson and respectfully petitions this court for rehearing in the above entitled action and alleges that the court in its opinion filed on November 20, 1962, erred on the following points, to-wit:

(1) The opinion has established that the defendant-respondent L. G. Robinson was under a duty to

exercise "the degree of care and caution which an ordinary reasonable and prudent person would use under the circumstances" in arresting and booking the plaintiffs' decedent, but has not indicated wherein the lower court erred in holding that the facts established at the trial of the matter did not warrant the submission to the jury of the question of negligence or wherein the facts disclosed by the record would require the trial court to submit the issue of negligence to the jury, and in the absence of clarification by this court on this point, the trial court will be without proper guidance in the retrial of this case.

(2) The decision of this court establishes a standard of care on the part of police officers in the performance of police duties which is contrary to previous decisions of this court without even recognizing the existence of such cases.

WHEREFORE, defendant-respondent L. G. Robinson prays that this action be reheard by this Honorable Court, and that the foregoing errors be corrected, and that such other order be entered as may be just.

Respectfully submitted,

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BRIEF IN SUPPORT OF PETITION FOR REHEARING

STATEMENT OF FACTS

The facts are fully set forth in the brief filed by respondents in this case. Reference to such facts will be made in the following argument.

ARGUMENT

POINT I

THE COURT ERRED IN HOLDING THAT DEFENDANT-RESPONDENT L. G. ROBINSON WAS UNDER A DUTY TO EXERCISE "THE DEGREE OF CARE AND CAUTION WHICH AN ORDINARY REASONABLE AND PRUDENT PERSON WOULD USE UNDER THE CIRCUMSTANCES" IN ARRESTING AND BOOKING THE PLAINTIFFS' DECEDENT WITHOUT INDICATING WHEREIN THE LOWER COURT ERRED IN HOLDING THAT THERE WAS NOT SUFFICIENT EVIDENCE OF NEGLIGENCE TO SUBMIT THE ISSUE TO THE JURY.

It appears that this court in its decision has assumed that the lower court erroneously failed to consider the negligence aspect of this case. The fact of the matter is that the lower court actually applied the rule of law enunciated by the opinion of this court to the facts AND CONCLUDED THAT THERE WAS NOT SUFFICIENT EVIDENCE OF NEGLIGENCE ON ROBINSON'S PART TO WARRANT SUBMISSION OF THAT ISSUE TO THE JURY. (R. 425-427).

The only acts claimed by plaintiffs to constitute negligence on Robinson's part were (1) his failure to close the door at the head of the stairway, and (2) his

failure to keep Benally under physical control by releasing him in the booking area after removing the $10 bill from his person.

It was undisputed that Robinson had no duty to keep the door at the head of the stairs closed under police department regulations and was not even aware that it was open until Benally fell through it.

As to the second contention the facts were undisputed that Benally was on his hands and knees at the time Robinson released his leg-hold of him and this court in its opinion recognized that Benally had to "get around a corner" to fall down the stairway. In addition to the foregoing, Section 77-13-2, Utah Code Annotated 1953, prohibits a police officer from subjecting a prisoner to "any more restraint than is necessary."

Under these facts the lower court ruled that there was not sufficient evidence of negligence on Robinson's part to justify the submission of that question to the jury. This court should not reverse a lower court ruling by the simple declaration of a rule of law which was applied by the lower court to the facts of the case and was there found to be wanting in supportable evidence.

If this court is of the opinion that the above actions of the defendant Robinson were such as to warrant their submission to a jury upon the issue of simple negligence as a matter of law, then it should hold so directly in order to provide a reasonable guide to the lower court in the retrial of this case and to provide

future litigants who may venture into the "no-man's land" of police liability with a usable tool.

POINT II

THE DECISION OF THE COURT IS CONTRARY TO THE PREVIOUS DECISIONS OF THIS COURT AND FAILS TO EVEN RECOGNIZE SUCH PREVIOUS CASES.

Both the appellant and the respondents in their briefs recognized that the previous decisions of this court in the cases of *Lowry v. Carbon County et al.*, 64 U. 555, 232 P. 908, applying the doctrine of *Moynihan v. Todd,* 188 Mass. 301, 108 Am. St. Rep. 473, 74 N.E. 367, and *Roe v. Lundstrom,* 89 P. 520, 57 P.2d 1128, were applicable to this case—the appellant arguing that the holdings in said cases should be ignored or overruled and the respondents arguing for their application under the rule of stare decisis. Both parties were extremely cognizant of the importance of those previous Utah cases in this action, BUT THIS COURT HAS NOT EVEN RECOGNIZED THE EXISTENCE OF SUCH CASES IN ITS DECISION.

The doctrine of the *Moynihan* case which was expressly adopted by the Utah court in the Lowry case is that negligence that is nothing more than an omission or nonfeasance creates no liability for public officers in the performance of their governmental duties. The court's present decision totally ignores the previous

holdings of this court and cites for its support a *Georgia* case involving acts of commission and misfeasance. If the present court disagrees with its previous holdings it should, at least, make some reference to such holdings so that anyone concerned will know that such holdings were presented to and considered by the court in arriving at its decision.

Indeed, the present decision even goes further than to hold a police officer liable for negligence including acts of omission and nonfeasance. It makes him an insurer of the well-being of a drunken person taken into custody and precludes any issue of contributory negligence on the part of the arrested person by reason of his intoxication. Such a rule of strict or absolute liability is not only contrary to the law, but would render effective law enforcement a nullity. Under the rule of this case at the present time an arresting officer is not only liable for injuries to the prisoner resulting from the officer's negligence, he is also liable for injuries sustained by the prisoner through the prisoner's own negligence or failure to exercise due care for his own safety and such an officer may well be liable for injury resulting to the prisoner from the latter's own deliberate acts. A voluntarily intoxicated person should not be relieved of his duty to exercise reasonable care for his own safety merely because he has been taken into custody by a policy officer. See 38 *Am. Jur., Negligence*, Secs. 203, 36.

CONCLUSION

This court should grant rehearing as prayed for by the defendant-respondent L. G. Robinson and apply the law of this state to the facts of this case in a manner consistent with approved appellate procedures.

Respectfully submitted,

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