1964

Elbert B. Rumsey v. Salt Lake City : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

ELBERT B. RUMSEY,
Plaintiff and Respondent,

vs.

SALT LAKE CITY, a municipal corporation of the State of Utah,
Defendant and Appellant.

Case No. 10181

BRIEF OF APPELLANT

Appeal from the District Court of Salt Lake County, Utah
Honorable Marcellus K. Snow, Judge

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STATEMENT OF THE KIND OF CASE

This is an action for personal injuries to the respondent resulting from an accident on a diving board at the Wasatch Springs Plunge operated by the appellant.

DISPOSITION IN THE LOWER COURT

A judgment was entered by the Third Judicial Court for Salt Lake County, Utah, upon a jury verdict

on May 18, 1964, in favor of the respondent and against the appellant.

NATURE OF RELIEF SOUGHT ON APPEAL

The appellant seeks to have the judgment reversed and the action dismissed.

STATEMENT OF FACTS

This cause came before the lower court, sitting with a jury on the 15th and 16th days of May, 1964, upon the complaint of the respondent upon the following facts:

Salt Lake City Corporation owns and operates a municipal bathing resort, located at 840 North 2nd West Street in Salt Lake City, Utah, known as the Wasatch Springs Plunge.

That on the 26th day of June, 1963, the respondent entered the said plunge for the purpose of swimming therein. Mr. Elbert B. Rumsey, the respondent, was at that time fifty-three years of age. (R. 163, lines 25 and 26.) While attempting to dive from the low diving board in the north end of the swimming pool or plunge, he injured his knee, (R. 164) severing the patellar ligament. (R. 189 and R. 190.) After the accident the respondent was taken from the Wasatch Springs Plunge across the street to the St. Mark's Hospital

(R. 165, lines 20 and 21) where Dr. Robert D. Morrow (R. 137) operated on him, sewing the severed tendon together. (R. 189 and R. 190.)

Mr. Rumsey was away from work because of the injury for about two and one-half months (R. 170, line 5) and lost one-half day's work for another month. (R. 170, lines 8 and 9.)

The appellant claims that his injuries were due to an exposed part of the aluminum diving board which had worn bare on the end thereof of the safety walk. Ross Ferrin, lifeguard at the Wasatch Springs Plunge, testified that this worn part exposed only a part of the end of the diving board. (R. 103, R. 111, and exhibit D-6). When the safety matting or safety walk was replaced on the end of the diving board it covered much more than the exposed area alleged to have been the cause of the accident. (R. 121).

Mr. Rumsey worked for Western Garden Center, as a stockman (R. 181, lines 5 and 6) and earned approximately $375.00 per month. (R. 170, line 2.)

On July 17, 1963, Mr. Rumsey claims to have suffered a heart attack (R. 167, lines 1 and 2) and taken to L.D.S. Hospital. (R. 167.)

After the verdict of the jury was made and entered on May 5, 1964 (R. 63) the appellant moved for a judgment in its favor, notwithstanding the verdict, (R. 65, 66 and 67) and filed notice for hearing thereof within

ten (10) days after entry of Judgment, to-wit, on May 21, 1964, (R. 74, 75 and 76) which motion was denied by the court on the 3rd day of June, 1964. (R. 79 and R. 80.)

On May 25, 1964, the respondent filed a motion to clarify or amend the judgment or grant a new trial on the issue of governmental immunity. (R. 71.) This was one week after the entry of the judgment on the jury verdict, (R. 68) and ten (10) days after the verdict of the jury had been rendered and entered and the jury discharged. (R. 63.)

The motion of the respondent was granted by the court on the 3rd day of June, 1964, (R. 79 and R. 80) and hearing thereon was heard by the court alone on June 15, 1964, at which time the case was reopened and new and further testimony given in the absence of the jury over the objections of the appellant. (R. 191, R. 195, lines 1 to 12 inclusive. See proceedings of June 15, 1964.) (R. 191 to R. 209, inclusive.)

ARGUMENT

POINT I.

THE RESPONDENT DID NOT ALLEGE OR PLEAD ANY FACTS SHOWING THAT THE APPELLANT OPERATED THE WASATCH SPRINGS PLUNGE IN A PROPRIETARY CAPACITY.

Before the respondent can recover from the appellant city, not only must it plead facts overcoming the operation of the Wasatch Springs Plunge as a governmental function, but must affirmatively plead that the appellant city was operating the Wasatch Springs Plunge in a proprietary capacity. This, the respondent did not do. (R. 1 and R. 2.)

In Wade vs. Salt Lake City, 10 Utah 2d 374, 353 Pacific 2d 914, on page 915 of the Pac. Rep., this court said:

> "Nothing is alleged reflecting any other use than that suggested, and we take it *that any purpose other than governmental must be pleaded and be free from legislative inhibition.*" (Emphasis added.)
>
> "Action against a city by a county employee, injured by lawn mower operated by a city employee while they were mowing city park. Law appeal from judgment of common pleas court, which sustained demurrer by city. The court of appeals held *plaintiff did not state a good cause of action when sufficient facts were not alleged to charge city was acting in a proprietary capacity.*" (Emphasis added.) Ballanger vs. City of Dayton, 1952, 117 N.E.2d 469.

Cities are organized as political subdivisions of the state to exercise governmental functions locally within their boundaries, and not for business purposes, the presumption being, unless pleaded and proved to the contrary, that any activity undertaken by them is governmental and for the good of all of their inhabitants. Davis vs. Provo City, 1 Utah 2d 244, 265 P.2d 415.

"The rule is general that a municipal corporation is not liable for alleged tortious injuries to the persons or property of individuals, when engaged in the perfomance of public or governmental functions or duties. So far as municipal corporations exercise powers conferred on them for purposes essentially public, they stand as does the sovereignty whose agents they are, and are not liable to be sued for any act or omission occurring while in the exercise of such powers, unless by some statute the right of action be given." Gillmor vs. Salt Lake City, 32 Utah 180, 89 P. 714, where this court cited with approval the above quotation from American and English Encyclopedia of Law, page 1193.

The motion of the appellant for a dismissal of the respondent's cause of action should have been granted by the lower court and judgment for the appellant made and entered notwithstanding the verdict. (R. 65 and R. 67.)

POINT II.

THERE IS NO EVIDENCE, AND THE RESPONDENT DID NOT PROVE THAT THE PARTIALLY EXPOSED END OF THE DIVING BOARD WAS THE PROXIMATE CAUSE OF HIS INJURIES.

One may search the record from beginning to end in this case and will never discover any positive or substantial evidence connecting the accident and the resulting injuries of the respondent with the partially exposed end of the diving board, as the cause of the accident and

the appellant's injuries. (See respondent's own testimony. R. 164 and R. 165; R. 180 through R. 182; R. 183, line 1 through 12). No witness testified that he saw the accident,and it is obvious from the respondent's own testimony that he does not know what caused him to fall except a self-serving conclusion. The exposed part of the diving board was very small and so trivial as not to cause an accident. (R. 103, lines 1 through 17.) (See Exhibit D 6.) While the repaired area was twenty (20) inches crosswise and fourteen (14) inches lengthwise, the exposed metal area at the time of the accident measured only twelve (12) to fourteen (14) inches crosswise and only three (3) to four (4) inches lengthwise of the end of the diving board. (R. 101, lines 27 through 30; R. 103, lines 3 through 10.)

> "An operator of a diving pool to which the public is admitted on payment of admission is not an insurer of the safety of the patrons but must use reasonable care and diligence in furnishing and maintaining the premises in a reasonably safe condition for the purpose for which it is designed and to which it is adapted, *but is not chargeable with negligence for failure to foresee a possible injury rather than a probable one.*" Webb vs. Thomas, 133 Colo. 458, 296 P.2d 1036.

> "Even if defendant in the construction and operating of a swimming pool where patron was injured when he dived into the pool, there was no liability for the patron's injuries unless the alleged negligence of the proprietor was the proximate cause thereof." Webb vs. Thomas, 133 Colo. 458, 296 P.2d 1036.

In Suarello vs. Coast Holding Co., (1934), 242 App. Div. 802, 274 N.Y.S. 776, the owner of a swimming pool was held not liable for injuries received by a patron who slipped and fell on a wet floor, the court saying:

> "The slippery condition of the platform surrounding the defendant's swimming pool was necessarily incidental to the use of the bath. There was no proof of the violation of any duty or obligation on the part of the defendant to provide a covering for the floor at the point where the plaintiff fell."

> "A municipality is not liable for a defect in its premises unless the defect constitutes an unsafe condition but is also of a *substantial nature.*" White vs. Standard Oil Company, Ohio App. 1962, 187 N.E.2d 504.

> "Plaintiff's allegation of a defect in the pool, without proof thereof creates no liability, for negligence is never presumed." Home Market vs. Newrock, 111 Colo. 428, 142 P.2d 272.

> "The mere happening of the accident does not raise a presumption of negligence." National Co. vs. Holt, 137 Colo. 208, 322 P.2d 1046 (1958). City of Aurora vs. JoAnn L. Weeks, June 24, 1963, 384 P.2d 90.

> "Fact that a large number of patrons had used water slide located at the edge of swimming pool in amusement park without mishap was evidence, in action by patron against owner and operator of park to recover for injuries sustained on water slide, that water slide was not inherently dangerous." Hays vs. Glen Echo Park Co., 215 Fed. 2d 34.

"In an action for injuries sustained by patron when he dived into a swimming pool operated by defendant, where patron dived in at the shallow end where there was no diving board, evidence that the pool had been used by many thousands of persons without accident and that the water where plaintiff's injuries occurred was three and one-half feet deep established that the defendant was not negligent in the maintenance of the pool." Webb vs. Thomas, 133 Colo. 458, 296 P. 2d 1036.

"A person entering a public bathhouse operated by the state, owed a duty to the state while on its premises to use ordinary care to avoid injury." Grifel vs. State, 110 N.Y.S.2d 739.

POINT III.

THE COURT COMMITTED PREJUDICIAL ERROR IN REOPENING THE CASE TO TAKE ADDITIONAL TESTIMONY AFTER THE VERDICT OF THE JURY WAS RENDERED AND ENTERED AND JUDGMENT ENTERED, THE JURY DISCHARGED AND THE RESPONDENT HAD RESTED HIS CASE.

It is the opinion of counsel for the appellant that counsel for the respondent never thought of producing further testimony in this action until he was served with a notice and motion of said appellant to grant it a judgment notwithstanding the verdict of the jury. The appellant filed and served by mail on counsel for the respondent, such motion on the 21st day of May, 1964.

Thereafter on the 25th day of May, 1964, the respondent filed a "motion to clarify or amend the judgment or grant a new trial on the issue of governmental immunity." Counsel for the respondent alleges that he was taken by surprise and that there was an agreement or stipulation between counsel or that counsel for appellant admitted that the respondent had alleged a good cause of action. Counsel for the appellant emphatically denies any such stipulation, agreement or admission.

Only some the of defenses set forth in the appellant's motion for judgment notwithstanding the verdict were mentioned in the pretrial conference or incorporated in the pretrial order. The court made the order and the appellant admits it is bound thereby, but nothing appears anywhere in the record to verify the contention of counsel for the respondent that counsel for appellant made any agreements, stipulations or admissions outside those contentions incorporated in the pretrial order regarding the capacity in which the appellant operated the Wasatch Springs Plunge. There is nothing in the motion of the respondent by way of surprise that counsel could not have guarded against and prepared. His pleadings were defective in not alleging the capacity in which Salt Lake City operated its municipal bath, and it was prejudicial error for the court to, under the respondent's appellant's motion, to reopen the jury trial, after verdict and judgment had been rendered, and the respondent's case rested, to the detriment, prejudice and injury of the appellant's substantial rights.

Rule 59 (a) of the Rules of Civil Procedure, the pertinent part here, provides as follows:

> "(a) Grounds. Subject to the provisions of Rule 61, a new trial may be granted to all or any of the parties and on all or part of the issues, for any of the following causes; provided, however, that on a motion for a new trial in an action *tried without a jury,* the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment:
> " * * * ."

Rule 59 (a) was not designed to reopen a case tried by a jury after its verdict has been rendered and judgment thereon entered, but under its provisions, it is respectfully submitted that such may be done only where the case is tried to the court without a jury and one or more of the grounds set forth in the rule alleged.

The only cases in Utah for reopening a case that counsel has found appurtenant to the question at hand are the following and all have been tried without a jury:

In an action to quiet title to certain real estate by adverse possession, tried to the court only, the Supreme Court held:

> "The refusal of the trial court to grant a motion of the plaintiff to reopen to present additional evidence, *after he had rendered his decision,* was well within his discretion." Bowen et al. vs. Olson et al., 2 U.2d 12, 268 P.2d 983 at page 986 of the Pacific Reporter.

Plaintiff brought suit in District Court for Davis County, Utah, for the purpose of enjoining the maintenance and operations of an oil refining plant on the theory that it was a nuisance, Supreme Court held:

> "Case may be reopened after trial is closed, formal decision announced and findings of fact proposed." Wasatch Oil Refining Co. vs. Wade (1936), 63 P.2d 1070.

Footnote cases in which court cites for same principal are: Kinsman vs. Utah Gas & Coke Co., 53 U. 10, 177 P. 418, suit for injunction. Summers vs. Provo Foundary and Machinery Co., 53 U. 320, 178 P. 916, suit to recind a contract (equity). Barboglio et al. vs. Gibson et al. (1923), 61 Utah 314, 213 P. 385, suit for injunction.

Needham vs. First National Bank of Salt Lake City, 96 U. 432, 85 P.2d 785. This was a suit on a note tried to the court without a jury. Case was not reopened.

Kirkham vs. Spencer, 3 U.2d 399, 285 P.2d 127. This was an action for unlawful detainer tried by court. Court properly reopened case on its own motion under Rule 59 (d).

Tuft vs. Brotherson, 106 U. 499, 150 P.2d 384. This case was an action tried without a jury for breach of sales contract. Motion to reopen case denied.

CONCLUSION

It is respectfully submitted by virtue of the foregoing authorities, that the judgment of the lower court should be reversed and the action against the appellant dismissed.

Respectfully submitted,

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