1964

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

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

ALBERT 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 RESPONDENT

Appeal From a Judgment of the Third District Court,
in and for Salt Lake County
HONORABLE MARCELLUS K. SNOW, *Judge*

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STATEMENT OF THE KIND OF CASE

As stated in appellant's brief this is an action by plaintiff-respondent for personal injuries resulting from an accident on a diving board at the Wasatch Springs Plunge, operated by appellant, Salt Lake City.

DISPOSITION IN THE LOWER COURT

The action was tried before a jury in the District Court and the issues were found in favor of plaintiff-respondent and against defendant-appellant.

RELIEF SOUGHT ON APPEAL

Appellant seeks to have the judgment reversed and the action dismissed. Respondent asks that the jury verdict and the judgment of the lower court be affirmed.

STATEMENT OF FACTS

Respondent agrees substantially with appellant's statement of facts, but adds the following:

Plaintiff-respondent was injured as a result of a fall from a diving board at Wasatch Springs Plunge. The "sticky surface" or safety walk on the end of the diving board had worn off, leaving the bare metal exposed. A lifeguard had reported this condition as being dangerous on February 25, 1963 (T. 7, 20) and again brought the matter to the attention of the manager on approximately March 25, 1963 (T. 12). Nothing was done to repair the board until after the accident, which occurred on June 26, 1963 (T. 14).

The evidence further showed that plaintiff was completely unaware of the dangerous condition of the diving board. He had not patronized the pool for approximately 3 to 4 years prior to the date of the accident (T. 71). He slipped on the board and the accident occurred while making his first dive on the day in question (T. 71).

After the conclusion of the evidence the case was submitted to the jury with instructions on the issues of negligence, proximate cause, damages, contributory negligence and assumption of risk (R. 12-46). Appellant took

no exception to the instructions of the court. The jury found in favor of the plaintiff and awarded general and special damages totaling $6,400.00. The injuries suffered by the plaintiff were substantial and there is no claim that the damages are excessive.

After the entry of the jury verdict defendant moved for judgment notwithstanding the verdict, alleging among other things that plaintiff had failed to plead or prove that Salt Lake City operated Wasatch Springs Plunge in a proprietary capacity (R. 65). The issue of governmental immunity was not included or mentioned in the pre-trial order as an issue to be tried in the case (R. 8, 9) and the parties stipulated as a part of said pre-trial order that plaintiff occupied the legal position of a business invitee (R. 8). Also, the unopposed and uncontroverted affidavit of counsel shows that the governmental immunity question was actually discussed at the pre-trial conference and said defense was abandoned by defendant (R 70).

In order to remove any possibility of prejudice against the defendant and in order to correct any possible error resulting from the failure of the pre-trial order to specifically recite the governmental immunity issue, plaintiff made a motion to the trial court to clarify or amend the judgment and grant a new trial on the issue of governmental immunity (R. 71). In response to this motion the trial court exercised its discretion to permit plaintiff to reopen the case and hear further testimony on this issue. After notice, the matter was heard on June 15, 1964, at which time the short undisputed testimony

of City Commissioner Joe Christensen and Pool Manager James A. Nunley was to the effect that the city charged admissions for swimming, that the city attempts to derive revenue from the pool, that federal and state taxes are charged on admissions, that Wasatch Springs Plunge is operated differently from other city-owned swimming pools which are operated in connection with parks and playgrounds, and that the pool is operated in the same manner as it was during the time when prior Supreme Court decisions held the same operation to be proprietary. The court found from the evidence that the City of Salt Lake operated Wasatch Springs Plunge in a proprietary capacity and further granted plaintiff's additional motion to amend his pleadings to conform to the evidence (T. 114-116; R. 84-85). Defendant's motion for judgment notwithstanding the verdict was denied (R. 79-80).

ARGUMENT

POINT I.

THE COURT DID NOT ABUSE ITS DISCRETION IN PERMITTING PLAINTIFF TO REOPEN THE CASE TO PERMIT FURTHER TESTIMONY ON THE SUBJECT OF GOVERNMENTAL IMMUNITY.

Appellant has claimed that the court committed prejudicial error in permitting plaintiff to reopen his case after the jury was discharged. Appellant relies on rule 59 (a), Utah Rules of Civil Procedure, which provides as follows:

> "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 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:"

It is to be noted that the first clause of the above rule permitting a new trial on part of the issues is not restricted to non-jury cases, but applies to jury cases as well. The last clause relates solely to non-jury cases, there being no statutory direction with respect to the reopening of a jury case.

It can be reasonably argued from the language of the rule that the intent was to prohibit the reopening of a jury case with respect to issues upon which the jury considered and determined. The reason for such a rule is obviously apparent. A litigant is entitled to have a jury pass upon all questions of fact and if the court were to permit a litigant to reopen a case after the jury is discharged, such could have the effect of depriving the party of his right to trial by jury.

The above argument, however, is completely unreasonable and senseless when applied to the reopening of a case to determine matters not within the realm of the jury. With respect to such issues the distinction between a jury and non-jury case becomes meaningless. In the case before the court the only purpose of the reopening of the case was to hear additional testimony on the subject of governmental immunity. It has been uniformly

held that the qustion of whether a municipality is acting in a governmental capacity is a question of law, to be decided by the court and should not be submitted to the jury. *Carr* v. *City and County of San Francisco,* 170 Cal. Appeals 2d 48, 338 P. 2d 509; *Barrett* v. *City of San Jose,* 161 Cal. Appeals 2d 40, 325 P. 2d 1026; *Hansen* v. *City of Los Angeles,* 147 P. 2d 109. Thus, while it would clearly have been error for the court to permit the re-opening of a jury case to reconsider such questions as negligence or contributory negligence, it should not be improper in the exercise of sound judicial discretion to reopen a jury case to determine an issue solely within the province of the court and completely outside of the jurisdiction of the jury.

In the case of *Mattfeld* v. *Nester,* 226 Minn. 106, 32 N.W. 2d, 291 3 A.L.R. 2d 909, the Minnesota Court permitted the plaintiff after the verdict and the discharge of the jury to reopen the case and prove that the plaintiff was the duly appointed administrator of the decedent in a wrongful death action, a necessary element which plaintiff, through oversight, had failed to prove. It was held that independent of statute, courts have inherent power to correct or supply any omissions in the proceeding or record. The court further stated as follows:

> "Where, as here, the omission relates to a fact provable by a document of an indisputable and incontrovertible nature, the adverse party is denied no right by reopening and receiving such proof, because even upon the trial the court would have been bound to preemptorily instruct the jury that the document spoke for itself and that the jury

had nothing to determine with respect to the facts to which the document related.

> . . . Furthermore, the interests of justice require that the proof be received and that the litigation be ended. Courts, both trial and appellate, in order to prevent the miscarriage of justice resulting from a retrial, for the purpose of proving a fact, the existence of which can be conclusively established by an indisputable and incontrovertible document, have the power to reopen the case to receive such proof even after verdict, and will exercise the power to sustain a verdict or judgment where the omission was caused through inadvertence or mistake of counsel for the prevailing party in failing to offer the proof upon the trial. (Citation of Cases)."

The above reasoning clearly applies to the case before the court. The evidence offered at the rehearing was indisputable and incontrovertible and in accordance with two prior decisions of the Utah Supreme Court, holding conclusively that this exact operation of the city is of a proprietary nature. *Burton* v. *Salt Lake City,* 69 Utah 186, 253 P. 443; *Griffin* v. *Salt Lake City,* 111 Utah 94, 176 P. 2d 156.

The Utah court has traditionally held that a motion for new trial or a motion to reopen the case is a matter within the discretion of the trial court. Numerous cases on this point can be summed up by the following statement from *Wasatch Oil Refining Company* v. *Wade,* 92 Utah 50, 63 P. 2d 1070:

> "A motion to reopen a case for the purpose of introducing further evidence is addressed to the

> sound discretion of the court, which will be liberally exercised in behalf of allowing the whole case to be presented, and the granting or refusing of such motion will not be interfered with in the absence of a showing of abuse of discretion."

There has been no showing of abuse of discretion in the instant case.

One of the matters which the court in all likelihood considered in exercising its discretion to reopen the case, was the affidavit of counsel stating that the question of governmental immunity was actually discussed at the pre-trial conference and was abandoned as a defense by defendant. Rule 59 (c), Utah Rules of Civil Procedure, provides that motions made under said rule after trial may be based upon affidavits and that the opposing party shall have ten additional days after the filing of affidavits in which to file opposing affidavits. Plaintiff's affidavit was not opposed. Where matters are permitted to be determined upon the basis of affidavits an opposing party ought to be required to file an opposing affidavit or at least make a showing why he cannot do so; otherwise the facts in the unopposed affidavit should be taken as true. *Dupler v. Yates,* 10 Utah 2d 251, 351 P. 2d 624. In light of the facts as stated in the unopposed affidavit it would seem that the court was acting fair to both parties in permitting the case to be reopened for testimony on this issue. Defendant Salt Lake City could not possibly have been prejudiced by this procedure, it being given full opportunity to defend on the issue of governmental immunity if any defense were available to it.

Rule 76, Utah Rules of Civil Procedure, also can be cited as additional authority supporting the view that it was proper for the trial court to reopen the case. This rule permits the appellate court not only to affirm, reverse or modify any judgment or order, but also the appellate court may "Direct . . . further proceedings to be had" in the trial court. Under such a rule it is generally held that the appellate court may either grant a complete new trial or restrict or limit the issues to be tried in the lower court or to direct appropriate proceedings where material issues in the case were not fully litigated below. C. J. S. Appeal and Error, Sections 1935, 1942. The appellate court further can even order pleadings to be amended where the ends of justice so require. C. J. S. Appeal and Error, Section 1936. The policy of the law is to avoid appeals and to permit the trial court to correct any errors or irregularities which do not prejudice the rights of the parties. It would thus be unreasonable to say that the trial court is powerless to do on its own what the Supreme Court could direct it to do.

POINT II.

THE RECORD IS SUFFICIENT TO SUPPORT THE JUDGMENT AND JURY VERDICT EVEN WITHOUT CONSIDERING THE ADDITIONAL TESTIMONY OFFERED UPON THE REOPENING OF PLAINTIFF'S CASE.

Rule 16, Utah Rules of Civil Procedure, relating to pre-trial procedure provides that where a pre-trial conference is held, the court shall make a pre-trial order and

such order, when entered, controls the subsequent course of the action.

It is uniformly held that where a pre-trial order or report purports to state the issues to be tried, the trial should be confined to such issues and other issues are eliminated from consideration. Annotation 22 A.L.R. 2nd, 599, 603. It is also established that participants in a pre-trial conference are held to waive issues not there presented. Annotation 22 A.L.R. 2nd 599, 603. A party who is advised in the pre-trial order of the issues to be tried is in no position to claim error as to issues litigated. *Radley* v. *Smith,* 6 Utah 2d 313, 313 P. 2d 465.

The pre-trial order in the instant case purported to state the issues to be tried in the case. Nowhere in said order is there any mention of a governmental immunity issue. To the contrary, the order specifically recited the stipulation of the parties "that the plaintiff at the time of his claimed injuries was a business invitee." Stipulations made by attorneys at pre-trial are binding upon the clients and upon the subsequent course of the trial. Annotation 22 A. L. R. 2d 599, 602.

It is unfortunate that the pre-trial order did not recite in more detail the exclusion of the sovereign immunity issue. However, the unopposed and uncontroverted affidavit of counsel shows that the matter was discussed specifically and that defendant did not claim such a defense and abandoned the same after a discussion between court and counsel of the *Burton* v. *Salt Lake City* and *Griffin v. Salt Lake City* cases, supra, both of said

cases holding that the City of Salt Lake operated Wasatch Springs Plunge in a proprietary capacity.

Nor were the pleadings defective inasmuch as plaintilff moved pursuant to Rule 15 (b), Utah Rules of Civil Procedure, to amend said pleadings and specifically plead that the City of Salt Lake operates Wasatch Springs Plunge in a proprietary capacity, and said motion was granted by the court (T. 207-209; R. 84, 85). The granting of such a motion by the trial court was proper where there is no showing that defendant had been misled, or prevented from presenting all of its evidence. *Morris* v. *Russell,* 120 Utah 545, 236 P. 2d 451. The rules of Civil Procedure provide considerable latitude in pleading and proof, so long as the adverse party is protected from surprise and assured equal opportunity and facility to prove countercontentions. *Taylor* v. *E.M. Royle Corp.,* 1 Utah 2d 175, 264 P. 2d 279. Defendant has had full opportunity in this case to meet all issues and raise all defenses, including the defense of governmental immunity had such defense been meritorious.

POINT III.

THE QUESTION OF PROXIMATE CAUSE WAS PROPERLY SUBMITTED TO THE JURY.

If the defendant Salt Lake City was negligent in permitting the safety walk material at the end of the diving board to become worn off, leaving slick exposed material at the end of the board, and if, plaintiff fell and was injured from slipping on the end of the diving board,

it is difficult to see how such negligence could be anything other than the proximate cause of the injury. Such cause would be the proximate cause unless there was some other intervening cause or unless the injury was not reasonably foreseeable. *Kawaguchi* v. *Bennett,* 112 Utah 442, 189 P. 2d 109.

If the facts of any case are such that reasonable men might draw different conclusions, the question of proximate cause is for the jury. *Shafer* v. *Keely Ice Cream Company,* 65 Utah 46, 234 P. 300. Certainly here in the instant case a reasonable person might conclude the foreseeability and likelihood of injury from the negligence of defendant in permitting a slick exposed condition to remain at the end of its diving board. It would be more reasonable to argue that reasonable minds could not have reached any other conclusion and that the court should have found proximate cause as a matter of law.

The question of proximate cause was submitted to the jury under instructions which were unobjected to by defendant and upon which no exceptions were taken. The instructions were properly given and the issue of proximate cause was properly presented as a jury question and determined by the jury.

CONCLUSION

Respondent respectfully submits that the judgment and jury verdict of the lower court should be affirmed.

Respectfully submitted,

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