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Elbert B. Rumsey v. Salt Lake City : Petition for Rehearing and Supporting Brief

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

PETITION FOR REHEARING AND SUPPORTING BRIEF

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

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PETITION FOR REHEARING

The defendant and appellant respectfully move this court for a rehearing of the case at bar for the following reasons:

1. It is the considered judgment and opinion of the appellant that it is erroneous as a matter of law for the court to affirm a proposition that any officer of the appellant in this state can waive governmental im-

munity of the said appellant's liability for tort; that the province of waiving such liability is entirely with the State Legislature. That in the opinion of the writer the court has not thoroughly considered the proposition that previous decisions of cases rendered by this court may be determinative of the issue in a subsequent case when the capacity in which the appellant city was acting, proprietary or governmental, was neither pleaded nor proved by the respondent in a jury trial and such affirmation is prejudicial to the lawful rights of the respondent and controverts the rule of stare decisis approved and sustained by this court.

2. That the prevailing opinion and decision of this court is erroneous as a matter of law and legal civil procedure, in affirming that the respondent could lawfully reopen a jury trial after the jury had made and entered its verdict and had by the court been discharged, when the said respondent had requested a jury trial covering all of the facts without exception.

3. That the court was in error in holding that previous cases were determinative of issues in this case when the capacity in which the facility operated by the appellant city was neither pleaded nor proved while the court was in session sitting with a jury. The court appears to assume that the capacity of the appellant in operating the Wasatch Springs Plunge is proprietary without pleading or proof, except in controvention of the rules of civil procedure in force and effect in this state.

SUPPORTING BRIEF

POINT I

THE PREVAILING OPINION AND DECISION OF THE COURT IS IN ERROR IN HOLDING THAT GOVERNMENTAL IMMUNITY OF THE DEFENDANT CAN BE WAIVED BY THE ASSISTANT CITY ATTORNEY.

In the case of *Hamilton v. Salt Lake City,* this court said with approval:

> "The California District Court of Appeals, Second District Court, had this to say in a case where injury had occurred upon a sidewalk and where a 'verified claim for damages shall be presented in writing and filed with the clerk . . . ' St. Cal. 1931, P. 2475 §1. It is generally accepted rule that a municipality *and its officers* are without power to waive compliance with the law in such matters. . . . The statute does not authorize a waiver nor does it provide any substitute for a written verified claim. The authorities we have cited quite generally hold that actual knowledge on the part of officers of a municipality of the facts required to be stated in a claim does not dispense with the claim itself. In view of our holding that the *city could not be bound by any alleged waiver,* consisting as it would of an extension of time for fiiling the claim, it is unnecessary to point out the particulars in which the complaint failed to show any aiuthority on the part of defendants Curl and MacIntyre to represent or act for the city except in the mere matter of the investigation of the plaintiffs injuries and the cause thereof."

In the case of *Cooper et al v. Butte County et al.,* 17 Cal. App. 2d 43, 61 P.2d 516, the California Court held that a provision of a statute requiring the filing of a verified claim by any person seeking recovery against the county for injuries sustained as a result of dangerous or defective condition of the public street or highway *is not subject to waiver by the county,* and the county could not be estopped to set up failure to comply with the statute as a defense in an action against the county for injuries, where the claim was not verified. *Hamilton v. Salt Lake City,* 106 P.2d 1028, at page 1032 of the Pacific Reporter, 99 Utah 362. (The decision was unanimous.)

"Where a right is purely statutory and is granted upon conditions, one who seeks to enforce the right must by allegation and proof bring himself within the conditions." Id. page 1030 of the Pacific Reporter.

So here, if the city cannot waive its defense and a county cannot waive such, then it is absolutely impossible for an officer to do so. It follows that if the alleged discussion of governmental immunity, as held at the pretrial of the case at bar, which the attorney for the city denies, such attorney could not waive the defense of governmental immunity. One ponders why the respondent's attorney did not amend his complaint then. Later he stated in his affidavit that he was taken by surprise.

In the recent case of *Morrison v. Horne,* 363 P.2d 1113, 12 U. 2nd 131, this court held:

"As to estoppel: It would be unreasonable unrealistic to conclude that a clerk or a ministerial officer having no authority to do so, could bind the county to a variation of a zoning ordinance duly passed, to which everyone has notice by its passage and publication, because a ministerial employee erred in characterizing the type of property. The authorities generally support such a conclusion, (1. A.L.R. 2nd 351 et seq.) and we are constrained to and do hold that the assessor's erroneous description of the subject property as commercial does not preclude the zoning authorities from denying the permit for the service station."

Section 1.01 Immunity. "In absence of constitutional or statutory provision, state generally immune from tort liability. *Waiver is a 'legislative question* in almost all states. A few have constitutional prohibitions against state being sued'." Same rule is applicable to state agencies. Personal Injury. Actions. Defenses. Damages. Vol. 6, page 144.

"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 performance 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 v. Salt Lake City,* 32 U. 180, 89 P. 714, where this court cited with approval the above quotation from American and English Encyclopedia of Law, page 1193.

Grantee purchasers of a city deed executed by mayor to certain street property dedicated as a public alley, purchasers received no interest against the city, this court saying:

> "Balancing the justice of the cause, we find there is no ground for an estoppel in pais as against the city. In so doing we are mindful of the fact that individuals dealing with officers should be able to rely upon their acts; that officers should act within the authority granted; and that officers should be held to their acts and covenants like individuals. However, the community is interested in vacating of streets and the legislature has provided that they may be vacated by ordinance, in order that the community may have notice of the acts of the commissions and thereby protect the private property holder and the community against such actions." *Tooele City v. Elkington,* 100 Wash. 485, 116 P.2d 406.

Mr. Justice Crockett, speaking for the court in an unanimous decision in the case of *Mary Ramirez v. Ogden City,* held:

> "It has long been recognized in this jurisdiction that a municipal corporation may act both in a public and private capacity and that when performing in a public or governmental function it is not subject to tort liability. From time to time certain judicial expressions have been uttered questioning the soundness of that rule as a matter of policy. Whatever its desirability or undesirability may be, it has long been firmly established in our law by the ruling of the majority of this court. In deference to the prin-

ciple of stare decisis we do not feel at liberty to consider its merits or demerits. *Any change would be properly within the province of the legislature.*" *Ramirez v. Ogden City,* 279 P.2d 463, at page 464, 3 U. 2d 102. See also *Davis v. Provo City,* 1 U.2d 244, 265 P.2d 415; *Husband v. Salt Lake City,* 92 U. 449, 69 P.2d 491.

If then, only the legislature can lawfully make any change in a city's immunity from tort liability and this excludes the city commission and all courts, how can this court consistently say that an assistant city attorney can make a change by waiving the city's governmental immunity?

True, the pretrial order had the following statement, "The parties agree that the plaintiff at the time of his claimed injuries was a business invitee." Now even if one could infer that this established the capacity in which the city operated the Wasatch Springs Plunge, it was not pleaded and unless it was so pleaded by the plaintiff he could not raise in a jury trial such a proposition after the trial and discharge of the jury. *Wade v. Salt Lake City,* 10 U.2d 374, 353 P.2d 914.

From this statement in the pretrial order it is preposterous to believe that the city operated its swimming pool in a proprietary capacity. One may be a business invitee in applying for a city building permit or paying taxes, yet that does not change the capacity of the city in issuing the permit from acting in governmental to a private or propietary capacity, nor the county in collection of taxes from acting in a governmental or

public capacity to acting one of a private or proprietary capacity. Yet in each instance the building permit applicant and the taxpayer came to do business; they are business invitees. Moreover, the city attorney or his assistant could not waive governmental immunity as a defense of the city.

POINT II.

THE PREVAILING OPINION AND DECISION OF THE COURT IS IN ERROR IN HOLDING THAT THE PLAINTIFF HAD A RIGHT TO REOPEN A JURY TRIAL AFTER THE VERDICT HAD BEEN MADE AND ENTERED AND THE JURY DISCHARGED.

In this case the lower court permitted the plaintiff below to reopen a jury trial after the conclusion thereof and discharge of the jury. The appellant claims that there is no rule of civil procedure in force in this state to permit this. Yet the prevailing opinon and decision of this court holds this:

> "Respondent Rumsey's complaint alleged that the City operated Wasatch Springs Plunge, and that he paid an admission fee for entrance. However, whether those allegations were sufficient to state a cause of action against the City or whether it is necessary to allege more facts as to the competitive nature of the operation so that it can be determined from the complaint rather than from evidence produced at trial whether the operation is governmental or pro-

prietary, *need not be decided here.* As shown above, a pre-trial conference was held in this case. In the pre-trial order it appears that the parties agreed that at the time of the accident, respondent was a business invitee. Such a fact could only be material in the event the Wasatch Springs Plunge was being operated in a proprietary capacity. If the Plunge was operated in a governmental capacity the City would be immune from liability regardless of the status of the respondent. It would appear therefore that the issue of whether the plunge was operated in a governmental or proprietary capacity was a matter which was disposed of in the pre-trial conference and the issues for trial were therefore under Rule 16 U.R.C.P. limited to the remaining issues of negligence and damages, unless modified at the trial to prevent manifest injustice. We are more disposed to that conclusion in view o fthe failure of the City to contradict the affidavit of respondent's attorney filed in opposition to the City's motion for a judgment notwithst anding the verdict, that the issue of governmental or proprietary operation was discussed and that the City admitted that the Wasatch Springs Plunge was operated in a proprietary capacity, as it could have done, if such were not the facts, by filing an opposing affidavit as provided in Rule 59(c) U.R.C.P."

There is nothing in the record to justify this conclusion, until after the case was reopened. The appellant's attorney took the attitude that the whole proceeding on the part of the respondent was, after rendition of the verdict, illegal and did not comport with the rules of civil procedure. Why did not the respondent amend

his complaint at the pre-trial if the capacity in which the city was acting was discussed? Yet one of the grounds for reopening the trial was that he was surprised.

Rule 59(a) of the Rules of Civil Procedure, the pertinent parts here, provide 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 plaintiff below requested and was granted a jury trial without specifying any particular issues to be tried. Rule 38(c) of the Utah Rules of Civil Procedure provides as follows:

> "(c) Same: Specification of Issues. In his demand a party may specify the issues which he wishes so tried; *otherwise he shall be deemed to*

have demanded trial by jury for all the issues so triable. If he has demanded trial by jury for only some of the issues, the other party within 10 days after service of the demand or such lesser time as the court may order, may serve a demand for trial by jury of any other or all of the issues of fact in the action."

Rule 39(a) provides as follows:

"When trial by jury has been demanded as provided in Rule 38, the action shall be designated upon the register of actions as a jury action. *The trial of all issues so demanded shall be by jury,* unless (1) the parties of their attorneys of record, by written stipulation filed with the court or by an oral stipulation made in open court and entered in the record, consent to trial by the court sitting without a jury, or (2) the court upon motion or of its own initiative finds that a right of trial by jury of some or all of those issues does not exist, or (3) either party to the issue fails to appear at the trial."

In the case of *Houston Real Estate Investment Co. v. Hechler,* 47 Utah 215, 152 P. 726, in which one of the parties tried to convert a trial at law to one in equity after rendition of a jury verdict, claiming such verdict was advisory only and to the proposition this court held:

"The case having, up to rendition of the verdict, been treated by the parties and the court as one trial by the jury, one of the parties having merely suggested to the judge in chambers, during an intermission, that he thought the case equitable and the verdict advisory merely, the court was

required to render judgment on the verdict, and, could not make findings at variance with the verdict, and thereon render judgment."

Neither could the lower court after the rendition of the verdict convert a jury trial into one by the court alone and make new findings upon facts not heard by the jury. Such a procedure barred cross-examination by the appellant and request for special interrogatories to be put to the jury if such were found necessary.

POINT III

THE PREVAILING OPINION AND THE DECISION OF THE COURT IS IN ERROR IN HOLDING THAT TWO PREVIOUS CASES INVOLVING THE WASATCH SPRINGS PLUNGE RESOLVES THE PROPRIETARY FUNCTION OF THE DEFENDANT CITY IN THE CASE AT BAR WHEN NOT PLEADED BY THE PLAINTIFF.

The plaintiff Rumsey never pleaded any sufficient facts showing that the city operated the Wasatch Springs Plunge in a proprietary capacity while the jury for whom he asked to hear the case, was in session or before the jury trial came on for hearing. The appellant agrees with the dissenting opinion in this regard and herein repeats that dissenting language:

"It is no answer to assert that in two previous swimming pool cases we have affirmed the City's

role as proprietor, since each case must stand or fall on its own facts, and no end of stare decisis can establish that a city can't operate a swimming pool other than in a proprietary capacity.

"Nor is it an answer to say that the issue of immunity conclusively was resolved against the City by a pre-trial stipulation that Rumsey was a 'business invitee,'—implying that such conclusion of necessity put the City in competition with privately operated pools. Two good reasons refute such conclusion:

"1) A person, for example, may be a business invitee when he goes to the city treasurer to pay the tax on the business he operates, but such a circumstance could not ipso facto make the city a businessman under any of the rules incident to a game of musical chairs. The whole thing is a matter of fact,—that's all,—and Rumsey failed to allege or prove the conditionally precedential required to construct his claim of tortious compensability.

"2) Assuming arguendo, that the officials of the city attempted to stipulate away the latter's immunity, it couldn't be done, since a government official cannot sell the city's immunity down the river with impunity.

"As to the *second trial*, the main opinion says it was surplusage because the governmental immunity was resolved by stipulation at pretrial. The latter fallacious conclusion followed the equally fallacious assumption of the former. Counsel for plaintiff himself did not entertain any such gratuitous or novel assumption, since, by the very motion for another trial, he conceded that Rumsey had failed to plead or prove a proprietary role by the City."

CONCLUSION

For the reasons stated and the errors of the main opinion now called to the court's attention, it is respectfully submitted that the court should grant the appellant's petition for rehearing and the judgment of the lower court reversed.

Respectfully submitted,

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