

1970

Darren J. Pollick, By and Through His Guardian Ad Litem, John R. Pollick, and John R. Pollick v. J. C. Penney Company : Brief of Appellant

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Recommended Citation

Brief of Appellant, *Pollick v. J.C. Penney*, No. 11880 (1970).
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IN THE
SUPREME COURT
OF THE
STATE OF UTAH

DARREN J. POLLICK, by and
through his Guardian ad Litem,
JOHN R. POLLICK, and JOHN R.
POLLICK,

Plaintiffs and Respondents,

vs.

J. C. PENNEY COMPANY, a
corporation,

Defendant and Appellant.

Case No.
11289

BRIEF OF APPELLANT

Appeal from a judgment of the Third
District Court in and for Salt Lake
State of Utah,

HONORABLE MARCELLUS K. SNOW,

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FILED

MAY 6

Clerk, Supreme Court

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Defendant and Appellant.

} Case No.
11880

BRIEF OF APPELLANT

STATEMENT OF THE KIND OF CASE

This is an action for personal injuries to Darren J. Pollick, resulting from a fall over a bannister surrounding a stairwell in the J. C. Penney Store located at 4849 South State Street, Murray, Utah.

DISPOSITION IN LOWER COURT

The case was tried before the Honorable Marcellus K. Snow, sitting with a jury. From a verdict and judgment for the plaintiff, defendant appeals.

RELIEF SOUGHT ON APPEAL

Defendant seeks a reversal of the judgment and judgment in its favor as a matter of law, or that failing, a new trial.

STATEMENT OF FACTS

On the morning of May 5, 1964, John R. Pollick went to the J. C. Penney store at 4849 South State Street, Murray, Utah to purchase a Mother's Day gift (R. 122). He took his three-year-old son, Darren Pollick, with him to the store (R. 123). Mr. Pollick had been in the store a number of prior occasions (R. 133). He had taken his son shopping with him before (R. 123). Mr. Pollick knew there were stairs from the main floor to the basement floor (R. 134).

Mr. Pollick shopped for five or ten minutes before he found a dress he wanted to buy (R. 125). Mr. Pollick had Darren "in hand" most of the time while he was shopping (R. 125). The saleslady proceeded to write up the charge ticket and put the dress in a box (R. 126). While Mr. Pollick was checking the sales slip and signing it, Darren walked away from him (R. 126). The next thing Mr. Pollick heard was crying, screaming and commotion coming from the center of the store (R. 127). Mr. Pollick walked toward the stair casing and saw Mr. Barlocker, a Penney employee, carrying Darren up the stairs (R. 128). Although no one saw Darren fall, it is assumed that he climbed over the bannister surrounding the stairwell and fell eleven feet to a display table on the basement floor (R. 129, 152). Darren suffered a broken leg from the fall (R. 114).

The evidence presented in the lower court indicates the bannister over which Darren fell was a fraction under 36 inches in height (R. 154) and had a mop board around the bottom that was 7½ inches high and ¾ inch wide at its

top (R. 154). At the time of the accident the boy was shorter in height than the waist of his 5 foot 8 inch father (R. 139).

A Mr. Lloyd M. Dalton, building inspector for Murray City, testified that the City had adopted the Uniform Building Code. *He testified the code required the bannister around the stairs in the Penney store should be 36 inches in height* (R. 173). *This testimony was uncontroverted. He also testified there was nothing in the building code regarding mop boards* (R. 176). The defendant attempted to introduce evidence from Mr. Barlocker that from 1961 to 1964, while he worked in the store, no one had fallen over the bannister (R. 155). The court sustained plaintiff's objection to the evidence (R. 160).

At the conclusion of the plaintiff's case, the defendant moved the court for a directed verdict (R. 157). The court denied the motion (R. 169). The jury returned a verdict in favor of the plaintiff and against defendant awarding special damages of \$821.36 and general damages of \$2500.

A R G U M E N T

POINT I

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

During the course of the trial the defendant moved for a directed verdict on the ground that the plaintiff had produced no competent evidence from which the jury could find any negligence on behalf of the defendant, and that the evidence taken in a light most favorable to the plaintiff showed that the plaintiff's minor son walked away from his father while he was making a purchase, climbed over a bannister and fell to the basement below (R. 157). The court denied the defendant's motion (R. 160).

Appellant contends that its motion for a directed verdict should have been granted.

There is absolutely no evidence in the record that would indicate that the appellant was negligent in any manner whatsoever. There was no evidence to show that the bannister was negligently designed or constructed. There was no evidence from which the jury could find the mop board was improperly constructed. The evidence clearly indicates that the bannister was within a fraction of an inch of being 3 feet in height as required by the building code (R. 154). Since there was no evidence relating to the design or construction of mop boards, it must be presumed that they were constructed properly. *The burden of proof was on the plaintiff to prove the defendant's negligence. A finding of negligence cannot be based on speculation or conjecture.*

See *Alvarado v. Tucker*, 2 Utah 2d 16, 268 P. 2d 986 (1954) where this court held:

*"The burden was upon plaintiff to prove the charge of speeding; such a finding of fact could not be based on mere speculation or conjecture, but only on a preponderance of the evidence. This means the greater weight of the evidence, or as sometimes stated, such degree of proof that the greater probability of truth lies therein. A choice of probabilities does not meet this requirement. It creates only a basis for conjecture, on which a verdict of the jury cannot stand. * * *" (Emphasis added)*

It is elementary that before a person can recover from another for injuries suffered, the one from whom the damages are sought must be shown to have been negligent and further such negligence must be shown to have been the cause of the injury.

In *Mortensen v. First Security Bank of Utah*, 12 Utah

2d 89, 363 P.2d 75 (1961), the plaintiff had the tip of her thumb cut off while making a deposit in the bank's night depository. The jury found for the plaintiff, but the court granted defendant's motion for judgment N.O.V. In upholding the ruling of the trial court judge, Justice Crockett stated:

"It is not doubted that the plaintiff injured her thumb, nor that it was both painful and unfortunate. But that provides no basis for making another pay for it. It is so elementary as to hardly require exposition that this can be done only if the defendant was at fault in causing the injury. *Before plaintiff could recover she had the burden of showing that the defendant was guilty of negligence: that is, that by some act or omission it failed in its duty to use reasonable care for the safety of persons in plaintiff's situation and thereby exposed them to an unreasonable risk of harm.*" *Mortensen* at 77. (Emphasis added)

This court has held that a verdict cannot stand unless it is supported by the evidence. In *Larson v. Evans*, 12 Utah 2d 245, 364 P.2d 1088 (1961), plaintiff brought suit for injuries suffered in an automobile accident. At the trial the judge instructed the jury that the defendant was negligent as a matter of law for running a stop sign. The jury was then instructed that they might find that the plaintiffs were contributorily negligent. The plaintiff appealed from a jury verdict of no cause of action and the denial of a motion for a new trial.

This court held there was insufficient evidence to sustain a finding of contributory negligence and reversed the lower court judgment.

Generally speaking appellate courts are reluctant to overturn jury verdicts. However, under certain circumstances, such verdicts will be overturned.

"The rule that a verdict will not be disturbed where the evidence tends to support it does not embrace a case where a verdict has been rendered in favor of plaintiff in an action and the record shows an entire absence of evidence supporting, or tending to support, some material and indispensable fact necessary to be proved by him to justify the rendition of a verdict in his favor.

"Further it has been held that, where the verdict is manifestly against the evidence, the judgment will be reversed notwithstanding the trial court had refused to set aside the verdict. So also the verdict or findings will not be permitted to stand where they are directly contradictory of, or irreconcilable with, the evidence or rest only on speculation and conjecture; or where the verdict is unsupported by the evidence; and a similar rule applies where the verdict is not supported or sustained by substantial evidence, or by any evidence, or is not sustained by any reasonable hypothesis based on the facts proved; or where the evidence is clearly insufficient as a matter of law." 5A C.J.S. Appeal & Error, Sec. 1647 (1958) (Emphasis added).

The uncontroverted evidence shows that the bannister was constructed in accordance with the Uniform Building Code.

The defendant called as a witness Mr. Lloyd M. Dalton, who is a building inspector for Murray City (R. 170). Mr. Dalton testified that the building code required bannisters of the type found in the appellant's store to be 36 inches in height (R. 174). He further testified that there is nothing in the code with regard to mop boards (R. 176). From Mr. Dalton's testimony it was clear that Penney's had complied in every respect with the building code.

The plaintiff did not produce one shred of evidence to contradict or impeach this evidence.

This court has consistently held that findings *against* uncontroverted and unimpeached evidence will be set aside. In *Parker v. Weber County Irr. Dist.*, 68 Utah 472, 251 P. 11 (1926), plaintiff sought to recover from the defendant irrigation district on a written contract. The lower court rendered judgment for plaintiff, notwithstanding testimony by three witnesses to the effect that plaintiff knew and agreed that his contract should not commence until defendant district obtained a loan. The loan was never obtained.

This court reversed the trial court finding for the plaintiff, and noted, with regard to the uncontroverted testimony of the witnesses:

“The witnesses were not impeached nor their testimony in any particular discredited or contradicted or impaired. The court thus was not at liberty to disregard it and make a finding contrary thereto, which in effect was done by finding that there was no such agreement or understanding as testified to by the witnesses. In other words, the district by undisputed evidence proved what this court on the first appeal said was a complete defense to plaintiff’s cause, but the court by its finding disregarded such evidence and found contrary thereto; and hence it follows that the finding must be set aside and the judgment based upon it vacated.” *Parker* at 13.

In the case of *American Scale Mfg. Co. v. Zee*, 120 Utah 402, 235 P.2d 361 (1951), this court adopted the rule from another court:

“The general rule as to the effect of positive uncontradicted evidence is found in *National Bank of Commerce of N. Y. v. Bottolfson*, 55 S.D. 196, 225 N.W. 385, 386, 69 A.L.R. 892, wherein the court said: “*Where the testimony of a witness is uncontradicted and not inherently improbable, and there are no circumstances tending to raise a doubt of its truth, the*

facts so proven should be taken as conclusively established and verdict directed or decision entered accordingly." *American Scale* at 364. (Emphasis added)

The testimony of Lloyd M. Dalton was uncontroverted. The plaintiff not only failed to show that the bannister did not comply with the building code, but also introduced no testimony that would even imply that the bannister was negligently designed or constructed.

POINT II

THE TRIAL COURT ERRED IN ALLOWING INDIRECTLY INTO EVIDENCE THE FACT THAT DEFENDANT MADE REPAIRS TO THE BANNISTER SUBSEQUENT TO THE ACCIDENT.

In March of 1966, two years after the accident, the defendant installed a wrought-iron addition to the bannister over which Darren fell. The addition increased the height of the bannister by approximately 17 inches (R. 168). Before the trial began, counsel and the court agreed that evidence of such repairs was inadmissible (R. 168). However, during the cross-examination of Mr. Dennis Barlocker the plaintiff's attorney asked several times whether or not an extension could have been added to the bannister to prevent people from falling over it (R. 166). Defendant made a timely objection to this testimony (R. 170).

The defendant contends that by allowing plaintiff to ask such questions, it put into evidence indirectly the fact that the defendant had put an extension on the bannister. Such questions were highly prejudicial and deprived the defendant of a fair trial. These questions accomplished indirectly the very thing that plaintiff's counsel admitted was contrary to law (R. 169).

The rule of admissibility as to repairs that is followed

in the great majority of jurisdictions including Utah is well stated in Rule 51 of the Uniform Rules of Evidence.

When after the occurrence of an event remedial or precautionary measures are taken, which, if taken previously would have tended to make the event less likely to occur, evidence of such subsequent measures is not admissible to prove negligence or culpable conduct in connection with the event.

There are two persuasive reasons for this rule of evidence. One is that because repairs are made, it does *not* follow that the condition was defective at the time of the accident. The other reason is that if such evidence were admitted, it would have a tendency to cause employers to omit making needed repairs for fear that the precaution thus taken by them could be used as evidence against them.

This court followed the general rule in the case of *Potter v. Dr. W. H. Groves Latter-day Saints Hospital*, 99 Utah 71, 103 P.2d 280 (1940). Here suit was brought for the death of a hospital patient after she had fallen from her bed. The plaintiff alleged that the hospital was negligent in not having sideboards on the patient's bed. This court held that the trial court should have granted defendant's motion for a directed verdict because the evidence in the record failed to show negligence on the part of the defendant.

After the accident sideboards were placed on the patient's bed. Plaintiffs asserted that due care required the hospital to use sideboards before the fall. To this contention the court stated:

"Evidence of alterations or repairs to premises under his control made following an accident therein is inadmissible to show as against a defendant that the former condition was unsafe or was being negligently maintained." *Potter* at 282.

See also *Christensen v. Utah Rapid Transit Co.*, 83 Utah 231, 27 P.2d 468 (1933), where this court said:

“It is the general rule that where a dangerous or defective appliance is alleged to have resulted in an injury for which damages are sought to be recovered, *evidence that subsequent to the accident changes or repairs thereof or thereto were made is inadmissible to show antecedent negligence or as an admission of negligence on the particular occasion in question*, although such evidence may be admissible for other purposes.” *Christensen* at 474. (Emphasis added)

While it is true that plaintiff did not specifically ask defendant's floor manager whether repairs had been made subsequent to the accident, the questions that were asked of Mr. Barlocker were equally prejudicial and produced the same effect. Mr. Barlocker was asked three times by the plaintiff whether or not an extension could have been added to the bannister (R. 165, 166). The plaintiff made reference in his questions to the very type of extension that had in fact been added to the bannister.

The questioning that took place on the part of the plaintiff was designed to introduce into evidence indirectly that which could not be introduced in Utah by direct evidence. Such a tactic violates public policy in that it has the effect of discouraging a defendant from repairing or altering a condition that may cause another accident whether the defendant was guilty of negligence in the first instance or not.

In *Northwest Airlines v. Glenn L. Martin Co.*, 224 F. 2d 120 (6th Cir., 1955), the airline brought action against the aircraft manufacturer for alleged negligence in design and manufacture of airplanes. In the trial court the plaintiff attempted to introduce evidence as to modifications that defendant had made in the wing joint after the damage was discovered. The evidence was introduced to show

how the wing should have been designed in the first place. The evidence was not admitted, and the Circuit Court upheld the lower court. The appellate court held that the result of admitting the evidence would have been to provide a basis for inferring what should have been done. The court said:

“This kind of hindsight evidence is not properly admissible upon the issue of ordinary care.” *Northwest* at 130.

In the case of *Triplett v. Napier*, 286 S.W.2d 87 (Ky. 1955), the plaintiff was injured in a fall on defendant's allegedly defective stairway. During depositions the plaintiff asked concerning subsequent repairs. Proper objections were made to these questions and answers which were sustained by the trial court. However, notwithstanding these objections, plaintiff on two separate occasions on cross-examination questioned witnesses on repairs. Both times objections were made and sustained. The appellate court said that such questions were:

“* * * calculated to elicit answers from which the jury could learn, or infer, that such repairs had been made.”

In ruling that such questions were prejudicial, the court stated:

“Such conduct with resulting argument is the evil sought to be avoided by the general rule, as is pointed out in the *Kentucky & West Virginia Power Co. v. Stacy* case. The continued and persistent efforts of appellee's counsel to bring the matter of the repairs to the attention of the jury after adverse rulings must be considered as prejudicial.” *Triplett* at 89-90.

POINT III

THE TRIAL COURT ERRED IN SUSTAINING OBJECTIONS TO DEFENDANT'S PROFFERED EVIDENCE.

During the direct examination of Mr. Dennis Barlocker, defendant asked the witness,

"During the time that you have worked at the store, did work at the store, from 1961 up until the time of the accident, to your knowledge had there been any children or other people that had fallen over that stairs?" (R. 155)

Before the witness could answer, the plaintiff objected to the question as immaterial. Defendant then argued the point both in court and in chambers citing to the court the case of *Erickson v. Walgreen Drug Co.*, 120 Utah 31, 232 P.2d 210 (1951) (R. 155). After hearing argument the court sustained plaintiff's objection (R. 160).

Defendant respectfully submits that the ruling of the trial court was prejudicial error.

Defendant should have been allowed to introduce evidence of the absence of prior accidents for two critical, independent reasons. In the first place such testimony would be evidence that the bannister was not a dangerous fixture in defendant's store, and, in the second place, the testimony, if allowed, would have shown that the defendant had no notice of the allegedly dangerous condition. Such testimony was critical to the defendant's case, and under Utah law should clearly have been admitted.

In the case of *Erickson v. Walgreen Drug Co.*, *supra*, the plaintiff sued the drug store for injuries suffered in a fall on a wet terrazzo floor in the entrance of the store. During the course of the trial the defendant attempted to

introduce evidence that approximately 4,000 to 5,000 persons entered the drug store every day during the fifteen years prior to the accident and during that period of time the defendant had never received a single complaint or report about anyone slipping on the terrazzo slab. The trial court excluded the testimony. This court held that such exclusion was error. In so holding the court said:

“Evidence of the absence of accidents occurring prior to the accident complained of may not be admissible to establish that an unsafe condition did not exist at the time of the accident in question. That matter we need not decide here. *But such evidence is clearly admissible to prove that a possessor of land had no knowledge nor could he be charged with knowledge that unsafe condition existed, particularly when the unsafe condition complained of is latent.* In the instant case the appellant can only be liable if the terrazzo floor when wet subjected business visitors to an unreasonable risk and the appellant either knew or by the exercise of reasonable care could have discovered that such a condition existed. Evidence that thousands of business visitors had walked through the entranceway in all kinds of weather and that none of them had ever complained to the appellant of slipping on the terrazzo slab, while not conclusive on the question, as heretofore pointed out, does have probative value upon the question whether the appellant knew or should have known of the existence of an unreasonable risk to customers entering and leaving the store.” *Erickson* at 214. (Emphasis added)

The fact that there were no prior accidents involving the stairs or bannister was a circumstance that should have been considered by the jury in determining whether the bannister was dangerous and whether the defendant had any notice of a dangerous condition.

The facts of the instant case and the *Erickson* case are very similar. In each case the defendant was a retail store

with the same legal obligations toward their customers. In both cases the dangerous condition, if one existed, was latent. In both cases the element of notice of a dangerous condition was an important element of the case. It is submitted that the *Erickson* case is controlling law in this case, and that the defendant should have been allowed to present evidence as to the absence of prior accidents.

CONCLUSION

Defendant respectfully submits that the trial court erred in failing to grant its motion for a directed verdict. The trial court also committed prejudicial error in allowing indirectly into evidence the fact that alterations had been made to the bannister and in not permitting defendant to introduce evidence showing the absence of prior accidents. If this court does not grant defendant's motion for a directed verdict, it should grant a new trial.

Respectfully submitted,

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