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Delores Ann Gallegos, By and Through Her Guardian Ad Litem Fidel Gallegos, and Fidel Gallegos v. Midvale City : Brief of Respondent

In the Supreme Court of the State of Utah

DELORES ANN GALLEGOS, by and through her Guardian ad Litem Fidel Gallegos, and FIDEL GALLEGOS,
Plaintiffs-Appellants,

vs.

MIDVALE CITY, a municipal corporation,
Defendant-Respondent,

and

ROBY A. TESTER and NELLIE K. TESTER,
Defendants.

Case No. 12312

BRIEF OF RESPONDENT

Appeal from the Amended Summary Judgment of the Third District Court for Salt Lake County
Honorable James S. Sawaya, Judge

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NATURE OF THE CASE

This is an action to recover for personal injuries and medical expenses which resulted when the minor claimant fell against a low metal post and attached wire fence on the parking area between the sidewalk and the gutter adjacent to her home. The parties will be referred to hereinafter as they appeared in the lower court.

DISPOSITION IN LOWER COURT

Summary Judgment was granted in favor of the defendant, Midvale City.

RELIEF SOUGHT ON APPEAL

Defendant Midvale City seeks affirmance of the summary judgment in its favor.

STATEMENT OF FACTS

On the afternoon of July 21, 1966 (R. 1) the minor plaintiff, then age 2, (Deposition of Carmelita Gallegos, p. 3) was riding her tricycle along the sidewalk in front of and adjacent to her home in Midvale, Utah. Her tricycle somehow came into contact with a short wire fence and she fell onto the fence and was injured.

The fence, about 9 inches high, onto which she fell, had been constructed by the co-defendant Roby A. Tester about a year prior to the accident (Deposition of Carmelita Gallegos, p. 19) for the purpose of protecting a new lawn he had planted at that spot from bicycle riders and pedestrians (Deposition of Roby A. Tester, pp. 7, 8). The fence was erected at or near the property line between the Tester and Gallegos residences both located on the west side of Adams Street. It extended

across the parking area from the east edge of the sidewalk on one side to the gutter on the other side (Exhibits 1 through 4). At least two other similar fences had been constructed in the same neighborhood (Deposition of Roby A. Tester, pp. 12, 13).

The Gallegos and Tester families both resided on Adams Street, in a dedicated subdivision of Midvale City. That street as platted is 50 feet wide from the private property line of the Gallegos and Tester residences on the west to the private property line on the east (Exhibits 1 and 2 to deposition of Alton H. Sorensen, and also page 7; deposition of Roby A. Tester, p. 23). Within the 50-foot street as platted are located the sidewalks at the east and west property lines, the paved roadway with curb and gutter at each edge and the parking strip between the curb and the sidewalk on either side of the roadway (Deposition of Alton H. Sorensen, pp. 17-19, 25, 29-32).

Following the accident on July 21, 1966 no claim was filed on behalf of the minor plaintiff until February 26, 1967 more than seven months later (R. 9). This suit was commenced May 8, 1967 (R. 1-4).

A Motion for Summary Judgment, filed on behalf of defendant Midvale City on July 30, 1970, was granted by District Judge Sawaya following a hearing and argument on September 18, 1970 (R. 62-63). This appeal followed.

ARGUMENT

POINT I

THE PARKING STRIP LOCATED BETWEEN THE SIDEWALK AND THE CURBING IS A PART OF THE "STREET" WITHIN THE MEANING OF SECTIONS 63-30-8, 63-30-13, 10-7-77 and 10-7-78, UTAH CODE ANNOTATED, 1953 (REPLACEMENT VOLUME).

Plaintiffs contend that the parking strip, upon which the fence and metal posts were located, was not a part of or included within the "street," "highway" or "sidwalk" as those terms are used in Sections 63-30-8, 63-30-13, 10-7-77 and 10-7-78, Utah Code Annotated, 1953 (Replacement Volume). This contention is made in an effort to avoid the 30-day notice requirement of Section 10-7-77 which otherwise would apply. A reading of the quoted sections, however, shows that such a contention runs contrary to both the wording and the obvious purpose of those sections. Those sections provide in part pertinent here as follows:

> 63-30-8. *Waiver of immunity for injury caused by defective, unsafe, or dangerous condition of highways, bridges, or other structures.*— Immunity from suit of all governmental entities is waived for any injury caused by a defective, unsafe, or dangerous condition of any highway,

road, street, alley, crosswalk, sidewalk, culvert, tunnel, bridge, viaduct or other structure located thereon.

63-30-13. *Claim against political subdivision —Time for filing notice—Claim against city or town for injury on highways, bridges, or other structures.*—A claim against a political subdivision shall be forever barred unless notice thereof is filed within ninety days after the cause of action arises; provided, however, that *any claim filed against a city or incorporated town under section 63-30-8 shall be governed by the provisions of section 10-7-77, Utah Code Annotated, 1953.* (Emphasis added.)

10-7-77. *Time for presenting — Contents — Condition precedent to action. — Every claim* against a city or incorporated town *for damages or injury, alleged to have been caused by the defective, unsafe, dangerous or obstructed condition of any street, alley, crosswalk, sidewalk, culvert or bridge of such city or town, or from the negligence of the city or town authorities in respect to any such street, alley, crosswalk, sidewalk, culvert or bridge, shall within thirty days after the happening of such injury or damage be presented to the board of commisioners or city council of such city, or board of trustees of such town, in writing, signed by the claimant or by some person authorized to sign the same,* and properly verified, stating the particular time at which the injury happened, and designating and describing the particular place in which it occurred, and also particularly describing the cause and circumstances of the injury or damages,

and stating, if known to claimant, the name of the person, firm or corporation, who created, brought about or maintained the defect, obstruction or condition causing such accident or injury, and the nature and probable extent of such injury, and the amount of damages claimed on account of the same; such notice shall be sufficient in the particulars above specified to enable the officers of such city or town to find the place and cause of such injury from the description thereof given in the notice itself without extraneous inquiry, and *no action shall be maintained against any city or town for damages or injury to person or property, unless it appears that the claim for which the action was brought was presented as aforesaid,* and that such governing body did not within ninety days thereafter audit and allow the same. * * * (Emphasis added.)

10-7-78. *Failure to file, a bar—Amendment of claim.*—It shall be a sufficient bar and answer to any action or proceeding against a city or town in any court for the collection of any claim mentioned in section 10-7-77, that such claim had not been presented to the governing body of such city or town in the manner and within the time specified in section 10-7-77; provided, that in case an account or claim, other than a claim made for damages on account of the unsafe, defective, dangerous or obstructed condition of any street, alley, crosswalk, way, sidewalk, culvert or bridge, is required by the governing body to be made more specific as to itemization or description, or to be properly verified, sufficient time shall be allowed the claimant to comply with such requirement.

These sections show a clear intent by the legislature to permit the prosecution of injury claims caused by a defective, unsafe or dangerous condition of any "highway, road, street," etc. only upon the presentation to the city within 30 days of a verified claim in the form prescribed. These sections all refer to areas upon and adjacent to which people travel.

To say, as plaintiffs do, that their claim was not based upon Section 63-30-8 overlooks the fact that their claim, if they have one, *must* be based upon that section, since the accident here involved an alleged unsafe, dangerous condition of the *parking area* (R. 1) which *is a part of the street.* The quoted statutes, with regard to such claims, make the thirty-day notice provisions of Section 10-7-77 mandatorily applicable and not merely optional as plaintiffs seem to suggest.

That the parking area is a part of the street is solidly supported in the law. Thus 63 C.J.S. 104, *Municipal Corporations,* Section 794a, provides:

> "A *sidewalk* is usually regarded *as part of the street,* and a municipality is generally held liable, to the same extent as in the case of streets."
>
> * * *
>
> "A strip located between the sidewalk proper and the curb, variously denominated a *parking strip* . . . *is* generally regarded as *a part of the*

> *street* which the municipality is bound to keep in a reasonably safe condition." (Emphasis added.)

Also in 39 Am. Jur. 2d, *Highways, Streets, and Bridges,* Section 8, p. 408 it is stated:

> Generally, the term "street" includes sidewalks, and the sidewalk constitutes a part of the street, although in no sense, it is said, can the term "sidewalk" be held to include the street proper. A "sidewalk" is a walkway along the margin of a street or other highway, designed and prepared for the use of pedestrians, to the exclusion of road vehicles and horsemen. It may embrace all that portion of a street from the building line to the curbing, including grassplats or park strips between the walk proper and the curbing.
>
> A "curb" is the dividing line between the part of the street or highway intended for vehicular traffic and the sidewalk, or part, intended for the use of pedestrians, and it may, according to the law or facts involved, be considered as either a part of the street or highway or a part of the sidewalk.

That the term "street" includes all sidewalks, curbs, roadways, parking, etc. located within the area between private propety lines and dedicated to public use is also indicated by Section 41-6-7(a) and (b), Utah Code Anno-

tated, 1953 (Replacement Volume), regarding traffic rules and regulations, which defines a "street or highway" and a "sidewalk," respectively as:

> "Street or Highway." The *entire width between the boundary lines of every way publicly maintained* when any part thereof is open to the use of the public for purposes of vehicular travel.
>
> "Sidewalk." *That portion of a street* between the curb lines, or the lateral lines of a roadway, and the adjacent property lines intended for the use of pedestrians. (Emphasis added.)

These definitions are consistent with the deposition of Alton H. Sorensen and the exhibits attached thereto which show the boundaries of Adams Street to extend from the private property line on the west edge of the street to the private property line on the east edge of the street.

The case of *Brown v. Salt Lake City,* 33 Utah 222, 93 P. 570 (1908), relied upon by plaintiffs, supports the rule that the parking area is included within the meaning of the statute. In *Brown* the court was dealing with a statute identical in all material aspects to Section 10-7-77 of the present Utah Code.

The court stated, with respect to the class of things to which the statute applied:

> "All these pertain to places and things which the city is bound by law to maintain in a reasonably safe condition, and the statute makes them liable for a neglect of duty with respect thereto." 93 P. at 573.

Streets, alleys, crosswalks, sidewalks, culverts, and bridges are all things over which people travel or adjacent to areas people travel upon. In *Brown* the court properly excluded from the class a large underground masonry water conduit 5-½ feet in diameter. Obviously such a conduit is not intended for use by people in traveling nor is it physically a part of, or immediately adjacent to such travel areas, as is the parking strip.

In *Morris v. Salt Lake City,* 35 Utah 474, 101 P. 373 (1909), the defendant had been charged with liability for damage resulting when trees on a parking strip fell over. The language of the court shows a clear recognition that the parking area must be considered part of the street:

> "This is an action for damages . . . caused through . . . cutting of the roots of . . . trees standing and *growing in a public street* in front of his home."
>
> * * *
>
> "that *in the street* and between the outer margin of the walk and *the street proper* there was an irrigating ditch, upon the bank of which the trees stood." (Emphasis added.)

The case of *Liberman v. City of Akron,* 80 Ohio L. Abs. 170, 159 N.E. 2d 635 (1959), cited by plaintiffs was decided upon a rule of construction which conflicts with the rule applicable in Utah. The court there, moreover, went to considerable lengths to attempt to distinguish other Ohio Supreme Court cases which held to the contrary, in deciding that the parking strip there was not included within the meaning of "street." The Ohio County Court (not the Supreme Court) referred specifically to and relied upon a rule of strict construction:

> "This is a law in derogation of the common law and must be strictly construed."

The result in *Liberman* cannot obtain in Utah where a specific code section provides, with respect to the construction of statutes:

> 68-3-2. *Statutes in derogation of common law liberally construed — Rules of equity prevail.* —The rule of the common law that statutes in derogation thereof are to be strictly construed has no application to the statutes of this state. The statutes establish the laws of this state respecting the subjects to which they relate, and their provisions and all proceedings under them are to be liberally construed with a view to effect the objects of the statutes and to promote justice. Whenever there is any variance between the rules

> of equity and the rules of common law in reference to the same matter the rules of equity shall prevail.

The case of *Niblock v. Salt Lake City,* 100 Utah 573, 111 P.2d 800 (1941), cited by plaintiffs is readily distinguishable from the present case and actually tends to support the lower court's ruling. In that case the court held, as would be expected, that an injury resulting from the negligent operation of a vehicle operated by one working on street repairs did not result from defects or dangerous conditions in the street.

Brinkerhoff v. Salt Lake City, 13 Utah 2d 214, 371 P.2d 211 (1962), cited in plaintiffs' brief does not hold that a parking strip is to be excluded from the list of conditions specified in Section 10-7-77. The court did not reach this issue. Rather, that decision tends strongly to support the lower court ruling:

> "This allegation was proper under Title 10-7-77, Utah Code Annotated 1953, having to do with defective streets alleys, sidewalks, bridges and the like."

The *Brinkerhoff* case merely holds, again as would be expected, that the failure to fence a stream was not a condition for which the city could be liable under Section 10-7-77.

The clear majority of courts which have dealt with the precise issue have held that a parking strip is included within the scope of a city's liability for its "streets." For example, in *City of Holdenville v. Talley,* 205 Okla. 693, 240 P.2d 761 (1952), the court held:

> "It is the duty of a municipality to maintain its streets and sidewalks in a reasonably safe condition for public use and its duty in this respect as to its sidewalks is not confined within the exact lines followed by the public in passing over sidewalks but includes the duty to protect the public from dangers near the sidewalks. City of Muskogee v. Roberts, 193 Okl. 61, 141 P.2d 100; Oklahoma City v. Stewart, 155 Okl. 37, 8 P.2d 30.
>
> "It is generally held that where a municipality in laying out its streets sets aside a plot of ground between the curb line and building line as a parkway, the parkway constitutes a part of the street. Village of Grosse Pointe Shores v. Ayres, 254 Mich. 58, 235 N.W. 829; Kleopfert v. City of Minneapolis, 90 Minn. 158, 95 N.W. 908; Castro v. Sutter Creek Union High School Dist., 25 Cal. App. 2d 372, 77 P.2d 509.
>
> "This Court in City of Tulsa v. Ensign, 189 Okl. 507, 117 P.2d 1013, 1015, said:
>
> 'It is common knowledge that in most of the cities of this state the streets in the residential districts are so laid out that there are grass plots between the sidewalk and the building line, also

> between the sidewalk and the curb line, which not infrequently contain trees, flowers or ornamental shrubs, and grass, which serve the purpose of making the street more attractive to those who live upon it or pass through it.
>
> 'These areas so devoted to ornamentation are still a part of the highway and the municipality must use a reasonable degree of care with reference to their condition.' "

In *Gilmore v. Kansas City,* 157 Kan. 552, 142 P.2d 699 (1943), the plaintiff had stepped into a hole in the parking area left by the removal of a power pole. On appeal from a judgment for the plaintiff the city argued that the defect was not in a street or a sidewalk and it was therefore not liable.

The Kansas Supreme Court rejected that argument and applied the same rule with respect to the parking area as that applied to the street or sidewalk.

POINT II

THE CLAIM AGAINST MIDVALE CITY WAS PROPERLY DISMISSED FOR FAILURE TO COMPLY WITH UTAH CODE ANN. SECTION 10-7-77 (1953).

Plaintiffs argue that the trial court misapplied the Governmental Immunity Act. The argument is based

in an assertion that the claim is based on Section 10 of the act rather than Section 8.

Section 8 of the act waives immunity from suit for injuries resulting from defective, unsafe, or dangerous conditions of streets, etc. The language of this section is strikingly similar to Section 10-7-77 of the Utah Code Annotated.

Section 10 of the act waives imunity from suit for injuries resulting from negligent acts or omissions of employees committed within the scope of their employment provided the act or omission does not fall within any of the eleven numerated exceptions.

Section 13 of the act requires all Section 8 claims against cities to comply with the provisions of Section 10-7-77.

Plaintiffs argue that their claim is a Section 10 claim and therefore it was error to have dismissed this defendant for failure to comply with Section 10-7-77.

If plaintiffs' claim is based on Section 10 as opposed to Section 8 the record does not aid in this distinction.

Plaintiffs' argument appears to be that unless a claimant elects to specify in his complaint that the action is brought under Section 63-30-8, Section 10-7-77 can have no bearing upon the matter. In other words they

argue that a claimant may elect at his option which section to bring his claim under.

No part of the Governmental Immunity Act requires a pleading to state the section upon which the suit is based. The section which governs a claim can only be determined by the nature of the claim itself and the circumstances which gave rise to the alleged injury.

It is clear from the act itself that the separate sections waiving immunity are set up in categories according to the nature of the defect or condition causing the injury or the place where the injury occurred.

Once a person determines from the first part of the act that he has a claim for which immunity has been waived, it must then be determined from the latter part the procedure which must be followed if the claim is to be pursued. Section 63-30-13 sets forth the procedure for claims against cities on account of defective conditions in the public ways and requires compliance with the conditions set forth in Section 10-7-77.

Plaintiffs cannot escape the requirements of Section 10-7-77 if the nature of their claim falls within it simply by stating that they elect to proceed under a different, but inapplicable, statute. The section under which plaintiffs' claim must be brought is not governed by plaintiffs' own declarations, but by the nature of the claim itself.

Plaintiffs' attempt to distinguish Section 63-30-8 from 63-30-10 on the basis of whether or not the city had notice of the defect giving rise to the injury does not further their cause. Section 63-30-13 governs the filing of all claims against cities. If the claim is in the nature of claims provided for under Section 10-7-77, that section must be complied with. Plaintiffs failed to do this.

> "It is a cardinal rule of statutory construction that all parts of the enactment should be considered together so as to produce a harmonious whole and to give effect to the intent and purpose to be divined from the entire act." *Great Salt Lake Authority v. Island Ranching Co.,* 18 Utah 2d 45, 414 P.2d 963 (1966).

The Governmental Immunity Act as a whole is harmonious with the ruling of the lower court. By contrast the construction urged by plaintiffs requires an assumption the legislature knew nothing about the scope of Section 10-7-77. It would also require reading into the statute distinctions which do not comport with the express provisions contained therein.

CONCLUSION

The injuries sustained by the minor plaintiff were allegedly caused by a defective, unsafe or dangerous condition of the parking area which by definition and

custom is a part of the street or highway referred to in Sections 63-30-8, 10-7-77 and 10-7-78. Immunity of the city from suit for such a claim having been waived by the legislature upon specified procedural steps being taken the plaintiffs may pursue their claim only upon compliance with the procedure as outlined. The procedure to be followed is a prerequisite to recovery upon the claim, it being neither optional with the plaintiff nor with the court, but determinable solely from the nature and the circumstances of the injury itself.

Having failed to comply with the procedure and conditions set forth in the Governmental Immunity Act the defendant, Midvale City, was entitled to a dismissal as indicated in Section 10-7-78 and the lower court so ruled. Its Summary Judgment should be affirmed.

Respectfully submitted,

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