1973

George A. Long v. Smith Food King Store And Cream O' Weber Dairy : Respondent's Brief

Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errors.Leonard H. Russon and Blaine V. Glasmann ; Attorneys for Respondents

IN THE SUPREME COURT OF THE STATE OF UTAH

GEORGE A. LONG,
Plaintiff and Appellant,

vs.

SMITH FOOD KING STORE
and CREAM O'WEBER DAIRY
Defendants and Respondents.

Case No.
13252

RESPONDENTS' BRIEF

Appeal from Summary Judgments of the District Court of Weber County,
the Honorable Ronald O. Hyde, Judge

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STATEMENT OF KIND OF CASE

This is an action brought by the Plaintiff-Appellant, George A. Long, against Respondents, Smith Food King Store and Cream O'Weber Dairy, for injuries arising from a slip and fall accident involving pumpkin pie in the Smith Food King Store.

DISPOSITION IN LOWER COURT

The District Court for Weber County, the Honorable Ronald O. Hyde, granted to both Defendant-Respondents, their respective motions for summary judgment, and judgment was entered in favor of each Defendant-Respondent upon the grounds that there was no evidence of negligence on the

part of either Smith Food King or Cream O'Weber, that there was no evidence of how the pie got on to the floor, by whom it was deposited, how long it had been there, or that either defendant knew of its presence before the accident, and that the facts, established by the depositions of the Appellant, the Appellant's wife, the manager of the store, and the Cream O'Weber employee, fall directly within the Utah Supreme Court cases of *Koer vs. Mayfair Markets,* 19 Utah 2d 339, 431 P.2d 566, *Howard vs. Auerbach Company,* 20 Utah 2d 355, 437 P.2d 895, and *Lindsay vs. Eccles Hotel Company,* 3 Utah 2d 364, 284 P.2d 477.

RELIEF SOUGHT ON APPEAL

Respondents seek an affirmation of the Trial Court's decision granting their respective motions for summary judgment.

STATEMENT OF FACTS

Appellant's statement of facts does not fully set forth the facts established by the depositions of the Appellant, his wife, and others, and, furthermore, incorrectly states the testimony of the pie demonstrator, Mrs. Moss, and furthermore leaves out vital testimony of the Appellant and his wife bearing upon the length of time the pie was upon the floor and notice thereof.

Respondents jointly submit this brief and the following statement of facts:

On the evening of November 26, 1969, Appellant and his wife entered the Smith Food King Store. After shopping approximately thirty to thirty-five minutes (R-54, p. 6), Ap-

pellant allegedly slipped and fell on some pumpkin pie and whipped cream which was on the floor.

Appellant did not see the said pie and cream before he fell (R-55, p. 23-24). He does not know how the said pie and cream got on to the floor. (R-55, p. 48). He does not know how long the pie was on the floor before he fell (R-55, p. 48, 55). He did not see any other pie or cream on the floor where he fell or elsewhere in the store either before or after he fell (R-55, p. 23, 24, 28).

The Appellant's wife did not see the said pie on the floor before her husband fell, nor did she see any other pie or cream elsewhere on the floor prior to the accident. (R-54, p. 8, 15).

Neither the Appellant, nor his attorney, know of anyone who saw any pie or cream on the floor, or who knows how the particular pie in question got on to the floor, or how long it was on the floor before the accident (R-55, p. 55-56 and R-104, p. 5-6).

On the day of the accident, small samples of pumpkin pie, supplied by Respondent Smith Food King Store, and topped with whipped cream supplied by Respondent Cream O'Weber Dairy, were being given away by Lois Moss, a demonstrator-emloyee of Cream O'Weber Dairy (R-53, p. 22). The samples were set out on a tray and were available to those customers of the store who desired them. (R-53, p. 9). The samples consisted of small pieces of pie, topped with cream, measuring approximately one inch square placed upon a butter pat measuring approximately two inches square (R-53, p. 7, 9).

The pie demonstrator was located in an aisle seven to ten feet away from the aisle where the accident occurred. She regularly viewed the area, including the area where Appellant fell,

and did not see any pie or cream on the floor prior to the accident. (R-53, p. 18, 20, and 25-26).

Seconds prior to the accident, the pie demonstrator walked from her display toward a nearby dairy case to obtain more cream. When she had walked about ten to fifteen feet, she heard a noise and looked and saw Appellant on the floor. She did not see the Appellant before the accident or have any indication of a problem in the area where he was to walk. She regularly viewed the floors and never saw any pie or cream (R-53, p. 18, 20, and 25-26).

Contrary to Appellant's claim (Appellant's Brief p. 7), the pie demonstrator did not state that she had a problem with the pie. These were the words of Appellant's attorney and not of Mrs. Moss. She did state that on occasion, but not customarily, pie is spilled and she regularly and routinely checks the floors so that a problem will not be created. She never stated that there was a problem (R-53, p. 16).

The manager of the store, Jon Little, states that he never saw any pie or cream on the floor. (R-43, p. 16, 26).

ARGUMENT

POINT I

THERE IS NO EVIDENCE OF NEGLIGENCE ON THE PART OF THE RESPONDENTS.

The law is well established in Utah, as it is in most other jurisdictions, that an injured plaintiff who slips and falls upon substance upon a commercial floor, must establish either that the defendant placed the substance on the floor, or that the

substance was upon the floor for such a length of time that the defendant knew or reasonably could have discovered it and removed it.

In *Howard vs. Auerbach Company,* 20 Utah 2d 355, 437 P.2d 895, a customer slipped on some oil on the escalator in the store and fell injuring herself. Summary judgment in favor of Auerbach's was affirmed by the Utah Supreme Court which stated:

> . . . the record is devoid of any indication who put any oil on the steps of the escalator or, if so, it was for such a time that the store people reasonably could have discovered and removed it.

The Court further stated that the Auerbach case fell directly within the law enunciated in *Koer vs. Mayfair Markets,* infra.

In *Koer vs. Mayfair Markets,* 19 Utah 2d 339, 431 P.2d 566, a customer slipped and fell on a grape on the floor of the store. The customer alleged that the store manager had passed by the spot where the accident occurred just prior to the accident and, therefore, either had actual knowledge or constructive notice of the presence of the substance on the floor and should have removed it. The Trial Court granted a judgment not withstanding the verdict which was affirmed by the Utah Supreme Court. The Supreme Court stated:

> We concede that the grape on the floor was a dangerous condition and that the plaintiff slipped and fell by reason of such condition. But we are not able from the evidence to find any support for the further and necessary inference that this condition was caused by an act of the defendant, or that the defendant had actual or constructive knowledge of it. We just cannot

> ignore the fact that the grape was only seen after the fall occurred. From these circumstances alone a jury could not be justified in inferring that the grape had been there for such a period of time that, had the defendant exercised reasonable care, he should have known of its presence. Furthermore, there was testimony at trial that others were shopping in the aisle. It is quite possible that one of them dropped the grape on the floor after the manager passed by. There may have been any number of reasons, including legitimate pre-occupation with other problems than whether there was a grape on the floor, or that other shoppers may have blocked his view, as to why the manager did not see it. It seems unfair to permit even a jury with its admittedly broad prerogatives, to conclude on the one hand that it was the manager's duty and that he must have seen it, but on the other, that it was not the plaintiff's duty and she was excused from doing so.

The Court in the Koer case recognized and followed the rule set down in *Lindsay vs. Eccles Hotel Company,* 3 Utah 2d 364, 284 P.2d 477. In that case, a coffee shop patron slipped and fell on water which was present on the floor of the coffee shop. The Supreme Court held that the coffee shop owner would not be liable to a patron in absence of showing how or when water got on to the floor or that the owner had knowledge of its presence.

The Court stated:

> . . . although the evidence indicated that a waitress delivered water in glasses to plaintiff and her companion, there is no evidence as to whether the waitress, the plaintiff, her companion, other patrons or persons spilled the water on the floor, or exactly when it was spilled, or whether the management knew of its existence. In other words, there was no evidence as to how the water got on the floor, by whom it was deposited,

exactly when it arrived there or that the defendant had knowledge of its presence. Under such circumstances, a jury cannot be permitted to speculate that the defendant was negligent.

In *Morgan vs. American Meat Company,* 46 N.E.2d 669 (Ohio 1942), samples of olives were being given away to customers in defendant's store. One customer slipped on an olive and fell injuring herself. There was no evidence that the storekeeper knew the olive was on the floor or how long it had been there and the Court granted defendant a directed verdict.

In the course of its decision, the Court in the above case stated:

> The giving away of articles of food in grocery stores, as samples, has long been a recognized method of advertising and there is no rule of law which will charge the merchant with knowledge that the customers will dispose of what remains of the sample in such a way as to make the store dangerous to other customers.

In the case at bar, the Appellant and his wife, before the accident, had been in the crowded store thirty to thirty-five minutes, including the area where pie samples were being given away, and at no time did they see any pie and cream on the floor. The only pie and cream ever observed by anyone was the one single portion upon which Appellant slipped. And, it is unknown how that particular portion got on to the floor, or how long it had been on the floor before Appellant fell.

The pie demonstrator regularly checked the floor and did not see any pie on the floor before the accident.

The manager of the store did not see any pie on the floor on the day of the accident.

Neither the Appellant nor his attorney know of anyone else who knows how the pie got on to the floor or how long it was there.

The particular piece of pie and cream in question could have been dropped by any customer merely seconds before Appellant fell.

There is no evidence as to how the pie got on to the floor, by whom it was deposited, exactly when it arrived there or that the Respondents had knowledge of its presence. Under such circumstances, a jury cannot be permitted to speculate that the Respondents were negligent. It would be impossible for a jury to determine whether or not there was negligence on the part of either Respondent without such speculation and this would be contrary to the well established laws of this State.

The Appellant has cited as authority several cases from other jurisdictions which have no application here. But in any case they are distinguishable. For instance, Appellant cites *Jasko vs. Woolworth,* 494 P.2d 839 (Colorado) where pizza was sold for consumption on the premises. However, the facts indicated that there was constant debris on the floor where the pizza was sold and this constant debris was known to the manager before the accident.

In our case, there was no debris or pie any place in the store or even by the demonstration table before the accident and nothing to put the Respondents on notice of the particular pie upon which Appellant fell.

Appellant cites *El Grande Market No. 2 vs. McAlpin,* 475 P.2d 961, (Arizona), where a customer slipped on an apricot pit on a ramp. However, again the facts not only indicated that it was common for debris to be on the ramp, but that the pit in question had been there thirty to forty minutes. In fact, the Arizona Court stated at page 962 that "were it not for the estimate of time that the pie had been on the ramp, given by the store manager, evidence concerning defendant's constructive knowledge may well have been deficient."

In our case, there is no evidence of how long the pie had been on the floor.

Appellant further cites *Rhodes vs. El Rancho Markets,* 418 P.2d 613, (Arizona) where a customer slipped on a lettuce leaf. However, the manager testified that the Produce Department is common for debris being on the floor and that lettuce was uncrated all day long.

In our case it was not common for pie to be on the floor. In fact, during the thirty to thirty-five minutes before the accident Appellant and his wife traveled around the store, including the area where the pie and cream samples were demonstrated, they admit that they did not see any pie on the floor whatsoever.

The Appellant further attempts to distinguish the case at bar from other slip and fall cases claiming that the giving out of samples is not an inherent necessity of the operation of the super market, but is only to increase sales. (Appellant's Brief, page 13.) However, it is most common for samples of pie, ice cream, egg nog, and other such items to be demonstrat-

ed and given away especially at holiday time and such certainly is an integral part of the retail grocery business. In fact, Mrs. Moss, the pie demonstrator, testified she had been giving out samples at stores for over thirteen years and at this particular store at least every other month for several years and that people are accustomed to seeing her there. (R-53, p. 2, 8.) Also, most super markets, including this one (R-43, p. 15) have snack bars at which they sell ice cream and other such items which are consumed in the store and it is not unusual for customers to sample grapes, strawberries and other such items from the produce stand. Such activities are no different from the handing out of food samples.

The Appellant also cites and quotes from Utah slip and fall cases dealing with wet floors. (Appellant's Brief, page 22.) However, these cases have been distinguished by the Utah Supreme Court from slip and fall cases involving slippery substance. In *Erickson vs. Walgreen Drug Company,* 120 Utah 31, 232 P.2d 210, the Supreme Court stated:

> This is not the case of a business visitor slipping on some foreign substance such as oil which had carelessly been spilled on the floor only a short time prior to the accident. In such cases it is often held as a matter of law that the storekeeper had no knowledge nor could he be charged with knowledge of the presence of foreign substance which caused the fall. But in the instant case the jury could find that through constant wear the terrazzo slab had over a period of time become smooth, resulting in its being very slippery when wet . . .

In *DeWeese vs. J. C. Penney Company,* 5 Utah 2d 116, 297 P.2d 898, the Utah Supreme Court stated:

> This case differs from those involving a foreign substance such as spilled oil or grease or where a pool of water is allowed to accumulate, creating a hazardous condition which, under most circumstances, is as easily observable to the business invitee as to the store owner. The terrazzo surfacing is part of the permanent structure of the building.

It is respectfully submitted that there is no evidence of negligence on the part of either Respondent and that the Trial Court's decision granting both motions for summary judgment should be affirmed.

POINT II

THE GRANTING OF A MOTION FOR SUMMARY JUDGMENT IS PROPER WHERE THERE IS NO GENUINE ISSUE OF ANY MATERIAL FACT.

The depositions of the Appellant, the Appellant's wife, the store manager and the pie demonstrator have been taken and all parties have had an opportunity of full cross-examination. There are no other known witnesses or other evidence to shed light upon this matter. All available facts are now before the Court and clearly indicate that there are no genuine issues of any material fact remaining to be tried and that the summary judgment was proper.

All witnesses and parties agree that it is unknown how the pie got on to the floor or how long it had been there before the accident. All witnesses and parties agree that no pie was seen any place on the floor of the store before or after the accident except for the one piece upon which Appellant slipped.

Rule 56(c) of the Utah Rules of Civil Procedure concerning summary judgment provides:

> . . . The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law . . .

CONCLUSION

It is respectfully submitted that there is no evidence of any negligence on the part of the Respondents and that the Trial Court did not err in granting both Respondents' motions for summary judgment and that the same should be affirmed.

Respectfully submitted,

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