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Record No. 2004

In the Supreme Court of Appeals of Virginia at Richmond

VIOLA HOGGARD

v.

CITY OF RICHMOND, VIRGINIA

FROM THE CIRCUIT COURT OF THE CITY OF RICHMOND

"The briefs shall be printed in type not less in size than small pica, and shall be nine inches in length and six inches in width, so as to conform in dimensions to the printed records along with which they are to be bound, in accordance with Act of Assembly, approved March 1, 1903; and the clerks of this court are directed not to receive or file a brief not conforming in all respects to the aforementioned requirements."

The foregoing is printed in small pica type for the information of counsel.

M. B. WATTS, Clerk.

172 Va 145

IN THE

Supreme Court of Appeals of Virginia

AT RICHMOND.

Record No. 2004

VIOLA HOGGARD

versus

CITY OF RICHMOND, VIRGINIA, A MUNICIPAL CORPORATION.

To the Judges of the Supreme Court of Appeals of Virginia:

Your petitioner, Viola Hoggard, respectfully shows that she is aggrieved by a final judgment rendered against her in the Circuit Court of the City of Richmond, on the 19th day of November, 1937, in an action at law lately depending in said Court wherein she was plaintiff and the City of Richmond, a Municipal Corporation, was defendant. A transcript of the record of said action accompanying this petition discloses the following case:

STATEMENT OF THE CASE.

This is an action by notice of motion for judgment against the said City for $5,000.00 alleged to be due by reason of injuries sustained by the plaintiff when she struck her left hand against one of the barbs on a barbed wire fence which the said City carelessly and negligently erected and maintained

both under and above the water of Shields' Lake, a bathing ersort in said City, owned and maintained by the said City, to which it invited the plaintiff and other residents and citizens of said City to use as a swimming and bathing resort. The notice of motion also alleges that the City unlawfully erected and maintained said barbed wire fence under and above the waters of said resort and that the plaintiff's injuries were a direct and proximate result of such unlawful acts.

The City of Richmond demurred to said notice of motion on the ground that in maintaining and operating the bathing and swimming resort known as Shields' Lake it was engaged in the exercise of a governmental function. The trial court sustained the said demurrer and dismissed the plaintiff's notice of motion, to which action of the Court the plaintiff excepted.

ASSIGNMENT OF ERROR.

The petitioner is advised and charges that the trial Court erred in sustaining the said demurrer to her notice of motion and in dismissing her action, on the ground that such action was not authorized by law.

ARGUMENT.

The City's demurrer to the notice of motion raises two questions, first, Was the City of Richmond engaged in a governmental function in constructing and maintaining a barbed wire fence in Shields' Lake, as a part of its activity in operating its swimming lake, so as to relieve it from liability for injuries sustained through its negligence by a person lawfully using the lake? and, second, Is the City liable, irrespective of whether it was acting in a governmental capacity or in its proprietary or municipal capacity in operating the lake, for unlawfully erecting and maintaining a dangerous barbed wire fence in the lake and thereby causing injury to the plaintiff?

On the first question the courts of the various States are divided, some holding that parks and swimming pools owned and maintained by a municipality for public recreation and amusement are held by it in its governmental capacity and that the municipality is therefore not liable for injuries resulting from its negligence. In other States such places of recreation are regarded as private property of the City and it is held responsible for injuries arising from its negligence in

the operation thereof. The question has not been decided by the appellate court of this State.

In 19 R. C. L., p. 764, Sec. 68, after stating that the question whether a system of public parks is owned and operated by a municipality in its proprietary or in its governmental capacity, is one upon which the authorities are not in agreement, and that on one side it is said that such parks are used for public purposes, continues:

"On the other hand, it is said that the people of the State as a whole have no interest in the parks of a particular City. Primarily, at least, such parks are for the adornment of the City and for the pleasure and recreation of its people. While visitors may enjoy them freely as a matter of right, yet if that bare, intangible right is sufficient to create the public interest of the entire people of the State in these parks, then it is difficult to understand what is meant by the purely local and private concerns of a city. * * * "

Corpus Juris states the subject in this way:

" * * * Municipal functions are those granted for the specific benefit and advantage of the urban community embraced within the corporate boundaries. Logically all those are strictly municipal functions which specially and peculiarly promote the comfort, convenience, safety, and happiness of the citizens of the municipality, rather than the welfare of the general public"—43 C. J., p. 183, Sec. 179.

In 6 McQuillin on Municipal Corporations, p. 1191, Sec. 2850, this subject is fully treated, and after stating the diversity of opinion prevailing in the courts of the various states, and citing decisions on both sides, the author closes the section with the following significant statement:

"In view of the tendency of late decisions and the development of the law on this subject, the rule will ultimately prevail that in maintaining parks, playgrounds and like recreations, the City is performing a local function for its people and it should be held liable on the same basis as a private person or corporation."

Under the general law cities of this State may establish and conduct a system of public recreation and playgrounds (Code 3032b), "The municipality has a discretion to do or not

to do the work; the duty is, therefore, judicial up to the time that it is determined to do the work; but when the work is ordered the law often requires that it be done in a particular manner, or that it be not done in a certain way, and, therefore, after the work is ordered, the duty of the municipality to do the work in the manner required and not to do it in the way forbidden, is ministerial".—McQuillin Mun. Corp., Sec. 2799.

In *Warden* v. *City of Grafton,* 99 W. Va. 249, 128 S. E. 375 (1925), plaintiff was injured while playing on a defective chute erected and maintained by the City in a public park owned by it. After citing numerous authorities for the proposition that a municipal corporation is liable for negligence in the maintenance of parks and other public enterprises of like character, concludes:

"From the authorities examined and reviewed, there is to be observed a distinct movement toward the doctrine that municipal corporations are under a duty of exercising reasonable care in the maintenance of parks and other public enterprises of like character, which we think is the more wholesome and equitable rule."

The Supreme Court of West Virginia, again on March 30, 1937, reaffirmed its stand on the question, in *Ashworth* v. *City of Clarksburg,* 190 S. E. 764:

"Whatever the law in other jurisdictions, it is the law in this State that a municipality acts as a proprietor in maintaining a public park. In this capacity, the City must exercise ordinary care, and is liable to one injured through a breach of that duty."

In *Honaman* v. *City of Philadelphia,* 185 Atl. 752 (Supreme Court of Pennsylvania, June 26, 1936), it is said:

"While immune from liability for negligent conduct in some, though not all, classes of governmental activity (see *Scibilia* v. *Philadelphia, supra*), this immunity does not follow breach of duty in its corporate or proprietary capacity. We think the City acts in its corporate or proprietary capacity in maintaining its parks. It is then subject to the same measure of care in the performance of its duties and obligations arising out of ownership as any other person in possession and control of land." (Citing many cases.)

In *City of Waco* v. *Branch,* 5 S. W. 499 (1928), the Commissioner of Appeals of Texas states that the authorities are divided as to which class of powers and duties the maintenance of a public park is referred, and continues:

"In this State, however, the trend of decision is toward what we regard as the sounder view that the maintenance of a public park by a city is a proprietary function, exercised primarily for the peculiar advantage of the inhabitants of the municipality, although members of the general public incidentally become entitled to enjoy the recreational advantages thus afforded. For this reason, we think that negligence imputable to the city, with respect to the safety of those in lawful use of the park, may furnish ground of liability for resulting injury. * * * "

The Supreme Court of Oklahoma in *City of Sapulpa* v. *Young,* 296 p. 418 (decided in 1931), said:

"There seem to be as many or more states holding that it is the duty of a city owning and operating a public park to exercise ordinary care to keep the same in a reasonably safe condition for the benefit of persons lawfully using the same and that, in maintaining its parks, the City is not acting in a purely governmental capacity, but in its proprietary or private capacity. * * * "

And continuing, the Court said:

"We feel that it would be announcing a very harsh rule to hold that the children of the City of the public generally who play in a city park, for the purposes of pleasure, amusement, recreation, and improving their health, should be invited to a place of danger where they might lose their lives or be maimed or injured. When the City invites them into its parks for health and recreation, it is the duty of the city to use ordinary care in providing them a reasonably safe place for such recreation, so we hold that a city must keep its public parks in a reasonably safe condition for the benefit of all persons using them."

In *Glirbas* v. *City of Sioux Falls,* 264 N. W. 197 (decided in 1935), the Supreme Court of South Dakota, stated:

"This court in *Norberg* v. *Hagna,* 46 S. D. 568, 195 N. W. 438, 29 A. L. R. 841, held that the maintenance of bathing facilities in a public park by a city does not constitute the exercise of a governmental function within the meaning of the law that exempts cities from liability for the negligence of their officials and employees in the performance of such functions and that the defendant city was liable for injuries resulting from the placing of a spring-board above the surface of shallow water. * * * "

It is held in the *City of Denver* v. *Spencer,* 34 Colo. 270 (1905), that:

"The parks are the private and exclusive property of the City, in which the State, as distinguished from the Municipality, has no property interest whatever."

Other cases holding that in maintaining its parks and other places of recreation, cities are not performing governmental functions, but are acting in their proprietary or private capacity, include the following:

"*City of Kokomo* v. *Loy,* 185 Ind. 18; *Bloom* v. *Newark,* 3 Ohio N. P. (N. S.) 480; *Capp* v. *St. Louis,* 251 Mo. 345; *Ehrgott* v. *New York,* 96 N. Y. 264; *Weber* v. *Harrisburg,* 216 Pa. 117; *Barthold* v. *Philadelphia,* 154 Pa. 109; *Boise Development Co.* v. *Boise City,* 30 Idaho 675; *Ramirez, Admr.,* v. *City of Cheyenne,* 34 Wyo. 67; *Byrnes* v. *City of Jackson,* 140 Miss. 656; *Pennell* v. *Wilmington,* 7 Pennewill (Del.) 229; *White* v. *City of Charlotte,* 189 S. E. 493."

THE CITY'S UNLAWFUL ACT.

Irrespective of whether the City was exercising a governmental or a municipal function it is liable to the plaintiff, because her injuries were caused by the unlawful act of the City in erecting and maintaining a barbed wire fence in the waters of the lake, thereby creating a dangerous situation amounting to a nuisance.

This question is treated in 6 McQuillin Mun. Corp., p. 1191, Sec. 2850, where it is said:

"The rule of exemption based on the governmental function should not apply where the negligence causing the in-

jury is the result of an affirmative act of commission or omission of the municipality in creating a public nuisance or any essentially dangerous condition, or knowingly permitting such nuisance or condition to exist in a public park or other public place where it probably will cause injury. The creation or sufferance of the nuisance or dangerous condition is not, in the light of numerous decisions, an exercise of a governmental function."

In 43 C. J., p. 956, Sec. 1734, the same principle of law is thus stated:

"Where a municipal corporation creates or permits a nuisance by non-feasance or misfeasance, it is guilty of tort, and like a private corporation or individual, and to the same extent, is liable for damages in a civil action to any person suffering special injury therefrom, irrespective of the question of negligence; and such liability cannot be avoided on the ground that the municipality was exercising governmental powers."

The Supreme Court of North Carolina has recently applied the law as above expounded. In *White* v. *City of Charlotte*, 189 S. E. 493, the Court said:

"Conceding that Independence Park and its facilities, including the swing from which plaintiff's intestate fell or was thrown with the result that she suffered the injuries from which she died, are owned, controlled, and operated by the defendant in the exercise of a governmental function, and not for a corporate purpose (*Adkins* v. *Durham*, 210 N. C. 134, 138 S. E. 599), it does not follow as a matter of law that defendants owed no duty to the plaintiff's intestate, and others who had the right to use said facilities for purposes of play or recreation, to exercise reasonable care to provide facilities which were reasonably safe, or that defendants would not be liable to plaintiff for a breach of such duty, if such breach was the proximate cause of injuries which resulted in the death of his intestate. (*Fisher* v. *New Bern*, 140 N. C. 506, 53 S. E. 342, 5 L. R. A. (N. S.) 542, 111 Am. St. Rep. 857; *Walden* v. *City of Grafton*, 99 W. Va. 249, 128 S. E. 375, 42 A. L. R. 259."

There are many States holding that a municipality in operating a swimming pool or park for recreation is engaged in a governmental function and is not liable for injuries caused by its negligence to those using the resort, but it is respect-

fully submitted that those decisions are not based on the soundest principles of public policy. The underlying reasons running through most of such decisions is that to hold a municipality liable for its negligence in erecting and maintaining such resorts would discourage them in establishing places of recreation for their citizens, or would make the municipality practically an insurer against injury.

Is it to the best interest of the public that cities be encouraged to erect and maintain resorts without regard to their safety and invite women and children to use them at their peril? or to require the municipality to use reasonable care in the operation of such resorts as it may establish and hold it liable for injuries caused by its negligence in failing to do so. The many decisions of various states holding the municipality liable for injuries sustained through their negligence in the management of pleasure resorts, are predicated upon the principle that the safety of the public is paramount to its pleasure and recreation.

The governmental functions of the State are primarily concerned with the health and safety of the people; and in accordance with that principle this Court has held that the removal of garbage by a city is a governmental function (*Ashbury* v. *City of Norfolk,* 152 Va. 278). The Supreme Court of Pennsylvania also held that the collection of ashes and rubbish in a city is primarily a health measure, and, therefore, a governmental function (*Scibilia* v. *City of Philadelphia,* 279 Pa. 549), yet when the question of the liability of a municipality for negligence in the operating of its park later came before the same Court, it held that the City acted in its corporate or proprietary capacity and is subject to the same measure of care in the performance of its duties arising out of ownership as any other person in possession and control of land. (*Honaman* v. *City of Philadelphia, supra.*)

Many years ago this Court decided that when a city is given control over its streets, and is empowered to provide ways and means of making and keeping them in repair, the law not only imposes it as a duty upon the corporation to keep its streets in repair, but by implication it imposes a liability upon it in the event of its failure to do so. See *Noble* v. *Richmond,* 31 Gratt. 271; *Gordon* v. *Richmond,* 83 Va. 436.

In *Noble* v. *Richmond,* the Court held that notwithstanding the power to open, lay out, and improve streets is a power to be exercised for the public benefit, yet it is also a power from the exercise of which the city and its inhabitants derive benefits and advantages not enjoyed by the people of the state at large, and where it is authorized to lay out and improve streets, and at the same time authorized to raise funds

by taxation or assessment to improve and repair the same, there is imposed upon it a duty to maintain and repair, and for its negligence or failure to perform its duty the city will be liable in damages for injuries resulting therefrom. The reason for this rule is that such duties are assumed by the city in consideration of the privileges conferred upon it by its charter.

It is submitted that the same reasoning which obtains with reference to streets should apply to the maintenance by a city of swimming pools for the recreation and pleasure of its citizens.

For the reasons herein set out the petitioner prays that she may be granted a writ of error to the judgment aforesaid and that the same may be reviewed and reversed.

Your petitioner states that a copy of this petition was delivered to opposing counsel in the trial of this case in the Court below on the 9th day of May, 1938.

VIOLA HOGGARD,
By Counsel.

M. HALEY SHELTON,
THOS. I. TALLEY,
Attorneys for Petitioner.

I, Clav Crenshaw, an attorney at law, practicing in the Supreme Court of Appeals of Virginia, do certify that, in my opinion, the judgment complained of in the foregoing petition should be reviewed by the Supreme Court of Appeals of Virginia.

CLAY CRENSHAW.

Received May 9, 1938.

M. B. WATTS, Clerk.

June 1, 1938. Writ of error awarded by the Court. Bond $300.

M. B. W.

Received June 3, 1938.

M. B. W.

RECORD

VIRGINIA:

In the Circuit Court of the City of Richmond.

Record of the proceedings had before the Court aforesaid, in the Court room in the City Hall, on a Notice of Motion for Judgment, under the style of Viola Hoggard, Plaintiff, *v.* City of Richmond, Virginia, a Municipal Corporation, Defendant, wherein an order was entered on Friday, the 19th day of November, 1937, from which judgment of the Court therein contained Notice of Appeal has been given.

Be It Remembered that heretofore, to-wit: At a Circuit Court of the City of Richmond held in the Court room of the City Hall thereof on Monday, the 1st day of November, 1937, the following order was entered:

page 2 } Viola Hoggard, Plaintiff,
v.
City of Richmond, Virginia, a Municipal Corporation, Defendant.

ORDER.

This day came the Plaintiff herein, by her attorney, and on motion of the Plaintiff, by her attorney, this Notice of Motion for Judgment is hereby docketed.

Viola Hoggard, Plaintiff,
v.
City of Richmond, Virginia, a Municipal Corporation, Defendant.

NOTICE OF MOTION FOR JUDGMENT.

To: The City of Richmond, Virginia, a Municipal Corporation:

PLEASE TAKE NOTICE, that I shall on the 1st day of November, 1937, at 10 o'clock A. M. or as soon thereafter as

I may be heard, move the Circuit Court of the City of Richmond, Virginia, for a judgment against you in the sum of Five Thousand ($5,000.00) Dollars, for this, to-wit:

That on and before the 15th day of July, 1937, you owned and maintained a bathing resort known as Shields
page 3 } Lake located in the City of Richmond, Virginia, to which you invited me and other residents and citizens of said city to use as a swimming and bathing resort, and it became and was your duty to erect and maintain said resort in a reasonably safe condition, so as not to injure me and other invitees and persons using same, but notwithstanding your duty in this behalf, you, carelessly and negligently erected and maintained both under and above the *wates* of said resort, at a point designated by you as a safe place for me and other amateur swimmers to use, a barbed wire fence, and which I was bathing at said point in said lake, on the 15th day of July, 1937, I struck my left hand upon and against one of the barbs on said fence which was partly beneath the waters of said lake and unseen by me, and severed the ligaments of the third finger of said hand where it joined the palm of my hand.

From which injuries I was for many days confined to my home under the care of a physician, and was, and still am unable to do my usual work and will never *to* able to use my hand as heretofore. I have suffered great mental and physical pain and anguish, and my hand permanently marred, disfigured and injured, all as a direct and proximate result of your negligence.

I further allege that I gave you written notice, verified by affidavit, of the particulars of said accident and injuries, within sixty days from date of its occurrence, as provided by law, and;

page 4 } That damages have been sustained by me in the sum of $5,000.00.

SECOND.

That on and before the 15th day of July, 1937, you owned and maintained a bathing resort known as Shields Lake, located in the City of Richmond, Virginia, to which you invited me and other residents and citizens of said city to use as a swimming and bathing resort, and it became and was your duty to erect and maintain said resort in a reasonably

safe condition and especially not to erect any dangerous instruments in, under and around said resort, at places to be used by me and other invitees in swimming and bathing, but notwithstanding your duty in this behalf, you unlawfully erected and maintained both under and above the waters of said resort at a point designated by you as a safe place for me and other amateur swimmers to use, a barbed wire fence, and while I was bathing at said point in said resort, on the 15th day of July, 1937, I struck my left hand against one of the barbs on said fence which was beneath the water of said resort and unseen by me, and severed the ligaments of the third finger of said hand where it joined the palm of the hand, from which injuries I was for many days confined to my home under the care of a physician and was and still am unable to do my usual work, and will never be able to use my hand as heretofore. I have suffered great physical and mental pain and anguish and have been permapage 5 } nently marred, disfigured and injured, all as a direct and proximate result of your unlawful acts, and;

That damages have been sustained by me in the sum of $5,000.00, for which judgment will be asked of the Court at the time and place herein set forth for the sum aforesaid.

VIOLA HOGGARD.
By (Signed) M. HALEY SHELTON,
Counsel.

And at another day, to-wit: At a Circuit Court of the City of Richmond held in the Court room of the City Hall thereof, on Monday, the 8th day of November, 1937.

page 6 } Viola Hoggard, Plaintiff,
v.
City of Richmond, Virginia, a Municipal Corporation, Defendant.

ORDER.

This day came the defendant, City of Richmond, by counsel, and filed its demurrer in writing to the plaintiff's Notice of Motion for Judgment.

Viola Hoggard, Plaintiff,
v.
City of Richmond, Virginia, a Municipal Corporation, Defendant.

DEMURRER.

The defendant, City of Richmond, demurs to the Notice of Motion for Judgment in this action and to each count thereof, and says the same is not sufficient in law and assigns the following ground of demurrer:

That the said defendant in maintaining and operating the bathing and swimming resort known as Shield's Lake was engaged in the exercise of a governmental function.

CITY OF RICHMOND,
By Counsel.

JAMES E. CANNON,
City Attorney.

page 7 } And at another day, to-wit: At a Circuit Court of the City of Richmond held in the Court room in the City Hall thereof, on Friday, the 19th day of November, 1937.

Viola Hoggard, Plaintiff,
v.
City of Richmond, Virginia, a Municipal Corporation, Defendant.

ORDER.

This day came the parties by their attorneys and the defendant's demurrer to the plaintiff's Notice of Motion for Judgment being argued, it seems to the Court that the said Notice of Motion and the matters therein contained are not sufficient in law for the plaintiff to have and maintain her action against the said defendant.

It is, therefore, considered by the Court that the plaintiff take nothing by her Notice and that the defendant go thereof without day and recover of the plaintiff its costs by it about its behalf expended, to which action of the Court the plaintiff, by her attorney, excepted.

page 8 } I, Walker C. Cottrell, Clerk of the Circuit Court of the City of Richmond, do hereby certify that the foregoing is a true and accurate transcript of all of the record in a Notice of Motion for Judgment of Viola Hoggard *against* City of Richmond, a Municipal Corporation, and I further certify that the defendant herein, through its attorney, has had due notice of the intention of the plaintiff herein to apply to this Court for the aforesaid record.

Given under my hand the 15th day of February, 1938.

WALKER C. COTTRELL, Clerk.

Fee for transcript $3.00.

A Copy—Teste:

M. B. WATTS, C. C.

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