

1965

New Hampshire Insurance Co. v. Ballard-Wade, Inc. et al : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

NEW HAMPSHIRE INSURANCE
COMPANY,

Plaintiff and Respondent,

— vs. —

BALLARD-WADE, INC., M. R.
BALLARD, JR., and LORAL
PETERSON,

Defendants and Appellants.

Case
No. 10245

RESPONDENT'S BRIEF

APPEAL FROM THE JUDGMENT OF THE Third District Court, Utah
THIRD JUDICIAL DISTRICT COURT FOR
SALT LAKE COUNTY, STATE OF UTAH

Honorable A. H. Ellett, District Judge

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RESPONDENT'S BRIEF

STATEMENT OF THE KIND OF CASE

The case on appeal herein involves an action by plaintiff against Ballard-Wade, Inc., and M. R. Ballard, Jr., on a lease wherein plaintiff as assignee of its insured sought to recover from these defendants the amount expended by it to repair damage to the leased premises caused by a fire which occurred while an employee of defendants was using the premises in the course of his employment and in the course of his employer's business.

DISPOSITION IN LOWER COURT

The Third Judicial District Court (Judge A. H. Ellet) ruled as a matter of law that the lease, covering the damaged premises, between defendants Ballard-Wade, Inc., and M. R. Ballard, Jr., lessees, and the Patricia Graff Trust, lessor, plaintiff's insured and assignor, imposed liability by its terms against defendants for the damage to the leased premises. Having imposed liability upon defendant lessees as a matter of law, the sole question in the non-jury trial was the amount of damage sustained by plaintiff. Upon the conclusion of the trial plaintiff was granted judgment against defendant lessees for the sum of \$4,200.00 plus interest and costs.

RELIEF SOUGHT

Respondent seeks to have the Supreme Court sustain the findings and conclusions and affirm the judgment of the lower court.

STATEMENT OF FACTS

Plaintiff, New Hampshire Insurance Company, is a corporation authorized to do business in the State of Utah. (R. 1, 4) Ballard-Wade, Inc., is a Utah corporation with its principal place of business located at 1231 South Main Street, Salt Lake City, Utah. (R. 110, T-58) Defendant, M. R. Ballard, Jr., is the president of Ballard-Wade, Inc. (R. 109, T-57); Loral Peterson is an employee of the corporate defendant and at the time of the fire loss hereinafter referred to was acting within

the scope of his employment and in the course of his employer's business (R. 13). The Patricia Graff Trust is the owner of certain real property located at 1231 South Main Street, Salt Lake City, Utah, which property is insured by a fire insurance policy issued by plaintiff as the insurance carrier of the Trust (R. 13).

On November 14, 1955, the Patricia Graff Trust, by and through its trustees, entered into an agreement with Ballard-Wade, Inc., and M. R. Ballard, Jr., whereby the premises located at 1231 South Main Street were leased to the latter for a period of five (5) years. (R. 13, 16-19) The premises were to be used exclusively by the lessee for the operation of a used car sales business and related business. (R. 17) While in the course of his employment on March 6, 1961, and while inside one of the buildings on the leased premises, Loral Peterson was draining gasoline from the gas tank of a customer's car into a sump on the floor, and in the process of performing this function an explosion occurred resulting in a fire which totally destroyed the customers automobile and which extensively damaged the building (See Deposition of Loral Peterson (pp. 6-10). It is generally thought that fumes from the gasoline being drained onto the floor were ignited by the flames from a furnace located in the same building but placed in a different room.

Pursuant to its obligation under the fire insurance policy issued by it to Patricia Graff Trust, plaintiff repaired the damage to the leased building caused by the fire. The cost of repairing the damage was \$5,903.96, which amount was paid by plaintiff (R. 13). As part

of the adjustment of the loss Patricia Graff Trust by Kirk Graff, one of the Turstees, assigned to the plaintiff all and any of the rights, claims or causes of action which the Trust had against the defendants for the damage to the leased premises. (R.72, T. 19, Plaintiff's Exhibit No. 3)

Subsequently, plaintiff initiated this action against defendants framing the complaint in two counts; the first count being based on negligence and the second count being based on liability under the lease.

At the pre-trial plaintiff made a motion to the Pre-Trial Judge to declare Paragraph 8 of the Lease Agreement between its insured and defendants controlling in the case and to declare defendants liable for damages to plaintiff as a matter of law. The motion was denied and interpretation of the lease was reserved for the Trial Court. (R. 15)

Before the case was to be tried, it having been assigned to Judge A. H. Ellett for that purpose, plaintiff moved the Trial Judge to rule on the matters of law, viz., interpretation of the lease provisions, which had been reserved for the determination of the Trial Judge by the Pre-Trial Judge. (R. 54, T. 1) Judge Ellett ruled at that time that the defense of contributory negligence and assumption of the risk asserted by defendants to plaintiff's first count were not applicable and therefore not good defenses. (R. 57, T. 4) He also held that Paragraph 8, the Indemnity Provision of the lease, by its terms imposed liability on the corporate defendant and

M. R. Ballard, Jr., as signers of the lease, and ruled that the only question for the trial was damages. Thereupon, the Trial Judge dismissed plaintiff's negligence count and plaintiff proceeded on the indemnity provision of the lease. (R. 58, T. 5)

At the trial defendants sought to call witnesses to show that the Trial Judge's interpretation of the indemnity provisions of the lease was erroneous and that the parties thereto did not intend the provision to mean what it said. Counsel for the plaintiff objected to the offer of proof and the Trial Judge sustained the objection on the ground that such proof was not within the scope of the issues to be tried. (R. 63, T. 10)

From the ruling of the Trial Judge and from the judgment in this action, defendant Ballard-Wade, Inc., and M. R. Ballard, Jr., appeal.

ARGUMENT

POINT I

THE TRIAL COURT DID NOT ERR IN RULING THAT THE LEASE IMPOSED LIABILITY ON THE LESSEE AS A MATTER OF LAW.

The provisions of the lease agreement out of which the controversy on appeal arises are as follows:

1. MAINTENANCE: Lessee acknowledges that he has examined the premises above described, together with the improvements, buildings and hard surfacing thereon, and further acknowledges that the same are in good condition, and that he accepts said premises in their present

condition. Lessee agrees at his own expense to maintain all of said premises, including roof, exterior, interior, plumbing, heating, electrical fixtures and glass in the building on said premises in a good and useable condition and to maintain the hard surfacing of the premises in a good and useable condition, and at the expiration of this Lease or sooner termination thereof to surrender said premises in as good condition as when received, ordinary wear and tear, unavoidable damage by fire, the elements or other casualties excepted. Lessee may at his own expense remodel said premises, provided however, that no structural changes shall be made without the prior written consent of the Lessor. All improvements made or added by Lessee (except signs) shall become a part of said premises and shall remain thereon at the expiration or sooner termination of this Lease or any extension or renewal thereof. Lessee agrees to furnish Lessor with space for one office at the northern end of the building on said premises, rent free and utility free (except for telephone) for the first three (3) years of this Lease.

8. INDEMNITY: The Lessee will exonerate, save harmless, protect and indemnify Lessor from and against any and all losses, damages, claims, suits or actions, judgments and costs which shall arise or grow out of any injury to or death of persons and/or damage to property, caused by, arising from, or in any manner connected with the exercise of any right granted or conferred hereby, or the use, maintenance, operation and/or repair of the said premises, buildings, equipment, machinery and appliance thereon, whether sustained by Lessee or Lessor, their respective agents or employees or by any other persons or corporations which seek to hold the Lessor liable.

There are sixteen provisions in the lease agreement dealing with various rights, duties and obligations of lessor and lessee and the provisions are numbered consecutively and captioned accordingly. Although the agreement is one for the leasing of real property to lessor, the lease becomes, among other things, an indemnity contract by virtue of Paragraph No. 8 thereof.

“Indemnity” means reimbursement, restitution, or compensation for loss, *Traveler’s Insurance Company vs Georgia Power Company*, 51 Ga. App. 579, 181 E. 111; *National Bank of Monroe vs Wright*, 77 Ga. App. 272, 48 S.E.2d 306, 308; *Lavar vs Maga*, (Mun. Ct.) 1 NYS 2d 743, 744; *Rogers vs Shawnee Fire Insurance Company of Topeka*, 132 Mo. App. 275, 111 S.W. 592, 593, and as such one may contract to indemnify another for a loss agreed upon and stated in their agreement.

In general, there are two kinds of indemnity contract, viz., (1) contract of indemnity against liability, and (2) a contract of indemnity against mere loss or damage. A cause of action arises in favor of the indemnitee against the indemnitor under a contract of indemnity against liability only when the liability of the indemnitee arises. However, a cause of action arises in favor of the indemnitee against the indemnitor under a contract of indemnity against loss or damage when the loss is suffered by the indemnitee. *Duke vs Tyler*, 209 Iowa 1345, 230 N.W. 319, 321; *Freigy vs Gargaro Company*, 223 Ind. 342, 60 N.E.2d 288; *Tri-State Casualty Insurance Company vs Stekoll*, 201 Okla. 548, 208 P.2d 545, 549; 42 C.J.S., Indemnity § 2, p. 565.

Validity and effectiveness of an indemnity provision or contract does not require that there be a loss by the indemnitee in the form of a liability over to a third party or a person other than the contracting parties. In explaining this principle the Court said in *Board of Insurance Commissioners vs Kansas City Title Insurance Company*, Tex. Civ. App. 217 S.W. 2d 695, 697:

In a strict sense 'reinsurance' is indemnity and 'indemnity' is insurance or reinsurance in so far as each may provide payment for loss or damage suffered, since to that extent each includes the essential element of reimbursement for such loss or damage.

Rice vs National Credit Insurance Company, 164 Mass. 285, 41 N.E. 276 (1895) was an action on an account due (which is irrelevant for purpose of this discussion). In that case the indemnitee had acquired a bond of indemnity to cover losses to his customers. The Court indicated that no liability of the indemnitee over to third persons need be shown inasmuch as the indemnitor's liability arose upon the indemnitee's loss and not his liability to third parties.

It is a well established principle of contract law that indemnity agreements or contracts are to be construed as any other contract, and that giving words their legal, natural and ordinary meaning or construction is controlling where the language is neither technical nor ambiguous. 27*Am. Jur., Indemnity* § 14. Where the contract is complete on its face and is in plain, simple and unambiguous language, the rights of the parties are controlled and must be determined by its language.

42C.J.S., *Indemnity*, § 8. *Real Estate-Land Title and Trust Company vs William Cohen Building and Loan Association*, 130 Pa. Super 207, 197 A 511 (1938). In *Marks vs NYC Transit Authority*, 187 NYS 2d 693, 17 Misc. 2d 583 (1959) there was a contract between the defendant Transit Authority and the third party defendant, painting contractor, which contained a provision under which the painting contractor undertook and agreed to indemnify the Transit Authority. The indemnity provision was clear and definite and was given effect.

Almost all jurisdictions, if not all, have wrestled with the problem of interpreting or construing indemnity provisions and the rights and duties of the parties to such an agreement. The Court in *Southern Pacific Company vs Morrison-Knudsen Company*, 216 Or. 398, 338 P.2d 665 (1959) had this to say:

Since the parties themselves dealt with the question of indemnity in their written contract, we think it fair to say . . . that they intended it (the contract) rather than some general common law rule, to govern their rights and liabilities.

And in speaking of this subject in two other cases, *Russell vs. Lemmons*, Civ. App., 205 S.W.2d 629 (1947) and *Central Surety and Insurance Corporation vs Martin*, Civ. App., 224 S.W. 2d 773 (1949) the Courts said:

The nature of appellant's liability on the indemnity contract must be determined by its provisions, following the familiar maxim of law, that as a man binds himself, so shall he be bound.

Relative to any contract, including those which con-

tain indemnity provisions, the courts universally say that the intent of the parties will govern, and the contracting parties are held to their clear and understandable language deliberately committed to writing and signed by them.

Moore vs Standard Paint and Glass, 145 Colo. 151, 358 P.2d 33 (1960) involved the interpretation of an indemnity provision in a lease agreement which said: “. . . Lessor shall not be liable to lessee, its employees and customers, nor the public for any defect in the leased premises . . . nor for any injury or damage that may occur from the elements and lessee will hold lessor harmless from all liability or claims with respect to such defects or injuries.”

On the basis of that part of the provision that states that the tenant (lessee) would hold the landlord (lessor) harmless from all liability or claims with respect to defects in premises or injury or damage occurring from the elements, the tenant was held liable for damages caused by the collection of water in the basement of the leased premises as a result of a cloud burst and flooding which the lessor had allowed to exist for a considerable period of time.

The Court's reason for holding the lessee liable to the lessor under the circumstances was that the terms of the indemnity provision indicated a clear understanding by the parties that some injury might occur and the lessor leased the premises only upon the express agreement of the lessee that the latter would indemnify the lessor for any and all liability or loss which might occur.

In construing an indemnity provision in a construction contract wherein a subcontractor agreed to indemnify the contractor from all claims of injured parties, etc., in *Brotherton Construction Company vs Patterson-Emerson-Comstock, Inc.*, 178 A.2d 696 (1963), the Court attempted to ascertain the intent of the parties. In doing so it did not restrict itself to the language used in the contract but considered circumstances surrounding the parties and their object in making the agreement. The Court said:

In construing the agreement, the Court must ascertain the intention of the parties, and in doing so it is not confined to the language used, but may consider the circumstances surrounding the parties and their object in making the agreement. . . . They usually intend to provide against loss or liability of one party through the operation of the other, or caused by physical conditions which are under the control of the other and over which the party indemnified has no control. . . .

As to the use of extrinsic evidence in construction of lease agreements and specific provisions contained therein, the following cases are representative:

Erickson vs. Bastian, 98 Utah 587, 102 P.2d 310, express terms of a written contract may not be changed or nullified by parol nor may such parol testimony antecedent to the reduction of the agreement to writing be considered where the language of the contract is clear and unambiguous. *Harvey Machine Company, Inc., vs Hatzel and Buehler, Inc.*, 54 Cal. 2d 864, 353 P.2d 924 (1960) where circumstances of the claimed wrongful con-

duct dictate that damages resulting therefrom were intended to be dealt with in the [indemnity] agreement, there is no room for construction of the agreement. It speaks for itself.

Continental Bank and Trust Company vs. Bybee, 6 Utah 2d 528, 306 P.2d 773 if an ambiguity in a contract can be reconciled from a reasonable interpretation of the instrument, extrinsic evidence should not be allowed. The intent of the parties to the contract should be ascertained first, from the four corners of the instrument itself, second, from other contemporaneous writings concerning the same subject matter, and third, from the extrinsic parol evidence of the intentions.

The law, then, in this area is unequivocal. In construing a contract provision one must look to the words of the contract which reflect the agreement and presumably the intention of the parties thereto. If the contract is unambiguous, the words are given their usual, natural, and ordinary meaning, which it is assumed all average, reasonably intelligent people know and understand, and the parties having made their agreement are bound by it. If a particular provision in the agreement is not clear, the Courts then look to the entire contract for assistance in ascertaining the meaning.

Paragraph 8 of the Lease Agreement in question is an indemnity provision and is so entitled. In clear, unambiguous, and unequivocal terms it states that "the Lessee will . . . indemnify Lessor from . . . *any and all losses* (emphasis added) . . . which shall arise or grow

out of . . . damage to property, caused by, arising from, or in any manner connected with the exercise of any right granted or conferred hereby, or the use, maintenance operation and/or repair of said premises, buildings, . . . whether sustained by Lessee or Lessor, their respective agents or employees *or* (emphasis added) by and other persons *or* (emphasis added) corporations which seek to hold the Lessor liable.” The paragraph sets forth a provision of indemnity against loss by the Lessor. It clearly states that if the Lessor sustains any loss or damage to its buildings which loss results from the exercise of any right conferred under the lease, viz., by reason of the use or maintenance of said buildings, then Lessee will indemnify Lessor for such loss. It becomes necessary to shed the vestment of reasonableness and under the accepted legal standards of construction to engage in conclusive mental thrashing to arrive at an interpretation of this indemnity provision so distorted as to be able to say it is ambiguous. If it is not ambiguous, the parties are bound by what they agreed to and defendants were not entitled to produce extrinsic evidence from defendants, or any other source, to vary the terms of the written contract.

The Trial Judge held that the agreement was unequivocal by its terms and that if Lessor sustained any loss defendants must indemnify the Lessor or its assignees for such loss, and in doing so he precluded defendants from introducing oral evidence in an attempt to show that the provision meant something other than what it clearly stated. It is plaintiff’s position, which is earnest-

ly urged upon the Court, that the Trial Judge did not err in his ruling.

In attempting to show an ambiguity on the face of the lease, defendants quote the provisions of paragraph 4. They insist that its terms are either inconsistent with or take precedence over paragraph 8. However, paragraph 4 is a maintenance provision and it is so entitled. It relates to the upkeep of the premises and the surrender of them to Lessor. The important applicable part of the paragraph is as follows:

“ . . . Lessee agrees at his own expense to maintain all of said premises, . . . in a good and useable condition, and, at the expiration of this Lease or sooner termination thereof to surrender said premises in as good condition as when received, ordinary wear and tear, unavoidable damage by fire, the elements or other casualties excepted. . . ”

Defendants assert that since this provision requires them to maintain the buildings at their own expense, except for unavoidable fire, paragraph 8 cannot be construed to impose absolute liability upon them for loss as an indemnity against loss agreement. Plaintiff cannot agree with that position for the following reasons:

1. The provision is one relating to maintenance requiring defendants to keep the buildings in their possession or control and while doing so, to continue to preserve them in essentially the same condition as when taken under the lease;

2. Upon the termination of the lease and after defendants have used the premises and maintained them,

then defendants are to surrender the premises in as good condition as when received, unavoidable damage by fire excepted;

3. If at the termination of the lease, defendants surrender the buildings which had been damaged by an unavoidable fire, it still has a duty to repair, maintain, or preserve the building but repairing it under the maintenance aspect of the agreement requires that the buildings be repaired by Lessee at its expense while the surrender of premises terms merely states that Lessee may surrender the building to Lessor in a damaged state. There is no implication in the lease that Lessee does not have to repair for any fire loss. Viewed in light of this construction of paragraph 4, there can be little question that the two provisions, paragraph 4 and paragraph 8, require the Lessee to repair and maintain the buildings while using them, and upon expiration of the lease to either repair any damage to the buildings at its expense or surrender them to Lessor in a damaged condition and indemnify Lessor for any damage to the buildings.

Plaintiff asserts that the lease agreement is plain and unambiguous in its terms, that Lessor and Lessee purposely agreed upon an indemnity against loss by Lessee to protect property that was part of a trust and which the Lessor's Trustees had a legal duty to protect.

Plaintiff further urges upon the Court that the Trial Judge acted properly and did not err in ruling that the

indemnity provision of the lease imposed liability for loss upon lessor as a matter of law and in refusing to permit oral evidence by defendants to alter the terms of the lease.

POINT II

THE PROPER DISPOSITION OF THE CASE IS AFFIRMANCE OF THE TRIAL COURT'S JUDGMENT.

The plaintiff, New Hampshire Insurance Company, having prevailed in the Trial Court and being of the opinion that no error has been committed, admittedly has not filed a cross-appeal as defendants seem to think it should have done. If plaintiff thought its actions in the lower court would have lead the court into prejudicial error, it should go without saying that it would not have taken the steps it did while there.

In Point II of its Brief, defendants indicate that the appropriate relief in this case is to reverse the judgment of the trial court with instructions to enter judgment for the Lessee, or, in the alternative, to grant defendants a new trial. Plaintiffs position is that no error was committed by the Trial Court and consequently its judgment should be affirmed. In presenting its argument at this point, in support of its position, plaintiff incorporates the law and argument presented in Point I of the Brief.

As pointed out in the Statement of Facts, plaintiff filed a Complaint for damages against defendants setting forth two counts — one, based on negligence, and the other, on absolute liability under the lease. Upon the

ruling by the trial court that the Lease did impose absolute liability on defendants, plaintiff, with the court's permission, elected to prosecute its claim on the basis of absolute liability rather than under negligence and thereupon dismissed the negligence count without prejudice. Therefore, the theory of the case at trial and the posture of the case on appeal were determined by the trial court with the urging of plaintiff.

Defendant was not unjustly penalized by not being able to litigate all issues raised by plaintiff's Complaint. To so assert, under the facts of the case, is to utter the anguished, Victorian cry of "It's not fair." Since plaintiff's action was filed, several years ago, defendants have had the opportunity to answer all issues brought up by plaintiff's Complaint and of presenting and explaining its position to the court by filing any and all necessary pleadings, taking advantage of all permitted discovery techniques, having a pre-trial conference of the case where all issues were discussed by counsel and the court, reviewing the lease and its various provisions, and arguing the law in relation thereto to the trial court before trial of the case, and arguing the law to the trial court relative to the introduction of extrinsic evidence to show the meaning of the lease provisions. After having had these opportunities to answer plaintiff's Complaint and to present its case at trial and rebut plaintiff's case at the time of trial, upon the ruling of the trial court, after argument by counsel, disposing of all matters of law and setting the issues for trial of the matter as is the prerogative and the duty of the trial court, defendants protest that it was unjustly penalized by not being

entitled to litigate all issues raised in plaintiff's Complaint. Compelling plaintiff to try the case on the theory of negligence, even after the court had correctly ruled on liability under the lease would require plaintiff to proceed on one count regardless of the merit of another and would unjustly and unduly burden the parties, counsel, juries, and the court by requiring them to proceed with matters irrelevant to the right of plaintiff to recover from defendants. The courts and counsel are too busy to engage in such nonsense.

CONCLUSION

Plaintiff respectfully asserts that the position taken by defendants in this case and as presented in Point I and Point II of Appellant's Brief is not well taken. Considering the record on appeal, with the exhibits as part thereof, and the argument contained in its Brief, Appellant is not entitled to the relief it seeks in this matter since no error was committed by the Trial Court in its disposition of this case.

Based on the foregoing argument and authorities, it appears clear that this court should affirm the judgment of the District Court wherein judgment was granted in favor of plaintiff and against defendants Ballard-Wade, Inc., and M. R. Ballard, Jr.

Respectfully submitted,

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