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Howe Rents Corporation v. John Worthen, dba, Exotic Swimming Pool Company : Appellant's Brief

Utah Supreme Court

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K. Samuel King; Attorney for AppellantR. William Bradford and John M. Bradley; Attorney for Respondent

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IN THE SUPREME COURT OF THE STATE OF UTAH

HOWE RENTS CORPORATION,
Plaintiff-Respondent,

— vs. —

JOHN WORTHEN, dba Exotic
Swimming Pool Company,
Defendant-Appellant

APPELLANT'S BRIEF

APPEAL FROM THE JUDGMENT OF THE
THIRD DISTRICT COURT for SALT LAKE COUNTY
HONORABLE A. H. ELSTON

K. SAMUEL KLINE
409 Boston Building
Salt Lake City, Utah
Attorney for Appellant

BRADFORD & BRADLEY
1650 University Club Building
Salt Lake City, Utah 84111
Attorneys for Respondent

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IN THE SUPREME COURT OF THE STATE OF UTAH

HOWE RENTS CORPORATION,
Plaintiff-Respondent,

— vs. —

JOHN WORTHEN, dba Exotic
Swimming Pool Company,
Defendant-Appellant

} Case
No. 10583

APPELLANT'S BRIEF

STATEMENT OF THE KIND OF CASE

Plaintiff seeks to recover the cost of repair to a cement mixer plaintiff had leased to defendant, and which came loose while defendant was towing it.

DISPOSITION IN LOWER COURT

The case came to the court for trial, and judgment was awarded to plaintiff on the statements of counsel and the pleadings, without the introduction of evidence.

RELIEF SOUGHT ON APPEAL

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

STATEMENT OF FACTS

Plaintiff is in the business of leasing equipment to the public. Defendant, a swimming pool builder, on August 4, 1962, rented a large two-wheeler cement mixer from plaintiff, and signed a lease which stated in part, "Lessee assumes all liability for damages from accident caused by or incurred in the use or transportation of said equipment, and agrees to indemnify and hold harmless the said Lessor, its officers, agents and employees from any and all damages and/or liability to any person whomsoever arising out of or resulting from the use, storage or transportation of said equipment by the Lessee or by anyone else while the equipment is in the custody of the Lessee. Lessee acknowledges receipt of the equipment in good working condition and repair and agrees to return it in as good condition, subject to reasonable wear and tear, and Lessee shall be liable for all damage to or loss of the equipment regardless of cause until it shall have been returned to and receipted for by the Lessor." (Ex. P-1)

Without assistance from defendant, plaintiff attached the mixer to defendant's two-ton truck (R. 4, 7, 38), by means of a chain and ball hitch. The connection was made as illustrated in defendant's Exhibits 1, 2, 3 and 4 (R. 34, 35, 36, 37). The bolt of the ball hitch was passed through a hole on a trailer tow plate welded to the truck. Plaintiff had no safety catch on the ball hitch.

The mixer had a metal chain welded to its towing bar. Plaintiff connected the chain directly to the frame of the truck. (R. 34.)

The mixer was rented at 5:53 p.m., Saturday, August 4, 1962, at plaintiff's place of business at 2375 South State Street, Salt Lake City, Utah. Defendant drove directly to his home at 620 Grand Street, Salt Lake City, Utah, and the trailer remained there attached to the truck, and untouched to defendant's knowledge, until Monday, August 6, 1962. Defendant then started to drive to Logan. About thirty-three miles from his starting point at plaintiff's place of business, the mixer came loose, the chain snapped and the mixer overturned, causing it damage. No other damage or injury is involved in this case. Defendant at no time touched the truck — mixer connections before the accident. After the accident defendant observed that the towing bar was bent sharply upward (R. 3, 7, 38, 39).

ARGUMENT

POINT 1

PLAINTIFF'S BREACH OF ITS STATUTORY DUTIES TO THE PUBLIC CONSTITUTED NEGLIGENCE AND WAS A PROXIMATE CAUSE OF THE LOSS.

Plaintiff violated the provisions of 41-6-117 UCA, 1953, and 41-6-148.40 UCA, 1953, as amended 1961.

“41-6-117. VEHICLE IN UNSAFE CONDITION OR IMPROPERLY EQUIPPED—VIOLATION OF ACT—MISDE-

MEANOR — ACCESSORIES — EXCEPTION AS TO FAIRY
IMPLEMENTS AND ROAD MACHINERY. — (a) *It is a
misdemeanor for any person to drive or move or
for the owner to cause or knowingly permit to be
driven or moved on any highway any vehicle or
combination of vehicles which is in such unsafe
condition as to endanger any person, or which does
not contain those parts or is not at all times
equipped with such lamps and other equipment in
proper condition and adjustment as required in
this article, or which is equipped in any manner in
violation of this act, or for any person to do any
act forbidden or fail to perform any act required
under this act.*" (Emphasis added)

The absence on the hitch of a safety catch on the nut
and bolt (R. 36) might in itself be construed to be an
"unsafe condition," because the towing of a vehicle will
loosen the connection. The owner knowingly permitting
towing of his rented units knows that some will become
separated unless safety catches are used.

"41-6-148.40. SAFETY CHAINS OF TOWED VE-
HICLES REQUIRED — EXCEPTIONS — SAFETY CHAINS
ON TRAILERS—*Every towed vehicle shall be con-
nected by means of a safety chain, cable, or equiva-
lent device, in addition to the regular trailer hitch
or coupling.*

(a) *Such safety chain, cable or equivalent de-
vice shall be securely connected with the chassis of
the towing vehicle, the towed vehicle and the
drawbar.*

(b) *It shall be of sufficient material and
strength to prevent the two vehicles from becom-
ing separated, and shall have no more slack than
is necessary for proper turning.*

(c) *Such safety chain, cable or equivalent device shall be attached to the trailer drawbar (so) as to prevent it from dropping to the ground, and to assure the towed vehicle follows substantially in the course of the towing vehicle in case the vehicle(s) become separated.*

(d) This requirement does not apply to a semitrailer having a connecting device composed of a fifth wheel and king pin assembly, nor to a pole trailer.” (Emphasis added)

This statute implements 41-6-117, UCA, 1953. Plaintiff violated this statute in two ways: (1) The chain was so slack that the towing bar hit the ground when the vehicles became separated, and (2) The chain was not connected to the mixer chassis (R. 34).

Had plaintiff complied with the foregoing statutes, no loss would have occurred. These statutes were enacted for the protection of the public. Their violation, when proximately causing an injury is negligence. *O'Brien v. Alston*, 61 Utah 368, 213 P. 791.

POINT 2.

THE CONTRACT CLAUSE REQUIRING DEFENDANT TO PAY PLAINTIFF FOR PLAINTIFF'S OWN NEGLIGENCE CANNOT BE ENFORCED.

For a contract to require one person to insure another against the other's own negligence, two things are required: First, the contract language must be so explicit that there is no doubt that both parties intended one to insure the other, and Second, the agreement must

not be contrary to public policy. *Union Pacific Ry. Co. v. El Paso Natural Gas Co.*, 17 Utah 2d 255, 408 P2d 910; *Hunter v. American Rentals, Inc.*, 371 P2d 131 (Kans.); *Otis Elevator Co. v. Maryland Casualty Co.*, 33 P2d 974 (Colo).

In regard to the contract language, it states in part, “. . . Lessee shall be liable for all damage to or loss of the equipment regardless of cause until it shall have been returned. . . .” This language is not so explicit as to advise defendant that he had to look back over his shoulder for sabotage from plaintiff. If the contract after, “regardless of cause,” had added merely “including negligence of Lessor,” then it would be truly explicit. *Williston on Contracts*, Rev. Ed. 1938, §1041, sets forth the general principle,

“The bailor is subject to the same implied warranties as one who sold goods. Therefore the bailor is liable if he knowingly furnishes property unsuitable for the purpose for which it was hired.”

To relieve a party of his obligation is contrary to this policy of the law and both very precise wording to that effect, and, as applied, a loss which the parties would contemplate as coming within the insuring clause, are required for such a shift of responsibility. This is stated in *Union Pacific Ry. Co. v. El Paso Natural Gas Co.*, supra,

“In resolving a dispute about the interpretation of provisions in a contract the objective is to determine what the parties intended at the time it was executed; and if the intent with respect to

some unforeseen subsequent occurrence is not clearly articulated, what would have been their intent if their minds had adverted to such an occurrence. In pursuing the latter alternative, as we are required to do in this instance, there are some further basic principles which are helpful on our problem. The first is that each party is entitled to assume that the other intends to conduct himself as a reasonable and prudent person should under whatever circumstances may thereafter arise, which presupposes that he will commit no wrongful act nor be guilty of negligence.”

In regard to public policy, the basic principle is that a party may not, by contract, relieve himself of a duty of care which he owes to the public. In *Hunter v. American Rentals, Inc.*, supra, lessee of a rental trailer sued the lessor for damages sustained when the trailer came loose due to lessor’s negligence. The court found the lessee to be a member of the public to whom the lessor owed duties of care. Lessor sought to avoid liability based on the following lease clause, “The renter hereby absolves the American Rentals of any responsibility or obligation in the event of an accident, regardless of causes or consequences, and that any costs, claims, court or attorney fees, or liability resulting from the use of described equipment will be indemnified by the renter regardless against whom the claimant or claimants institute action.” The court held this clause to be void and unenforceable as contrary to public policy, stating,

“There is no doubt that the rule that forbids a person to protect himself by agreement against damages resulting from his own negligence applies where the agreement protects him against the

consequences of a breach of some duty imposed by law.” (371 P2d at 133.)

It might be argued that *Hunter v. American Rentals, Inc.*, dealt with damage, not to the rental unit, but to the lessee's person and car, and that the only item in issue in the case at bar is the mixer, and that defendant insured it. This argument might have validity under some circumstances. For example, if lessee, while using the mixer, burned out the motor because lessor had been negligent by not lubricating it, lessee might be liable. Under those circumstances issues of public policy are not involved. Here, however, plaintiff seeks to recover for a loss caused, or contributed to, by plaintiff's own breach of safety statutes. To give plaintiff relief would allow plaintiff to operate outside the law. *Union Pacific Ry. Co. v. El Paso Natural Gas Co.*, supra, states this matter as follows,

“A closely related proposition pertinent here is that the law does not look with favor upon one exacting a covenant to relieve himself of the basic duty which the law imposes on everyone: that of using due care for the safety of himself and others. This would tend to encourage carelessness and would not be salutary either for the person seeking to protect himself or for those whose safety may be hazarded by his conduct. For these reasons such covenants are sometimes declared invalid as being against public policy. However, this may depend upon the circumstances. The majority rule appears to be that in most situations, where such is the desire of the parties, and it is clearly understood and expressed, such a covenant will be upheld. But the presumption is against

any such intention, and it is not achieved by inference or implication from general language such as was employed here. It will be regarded as a binding contractual obligation only when that intention is clearly and unequivocally expressed.

“If it had been the intent of the parties that the defendant should indemnify the plaintiff even against the latter’s negligent acts, it would have been easy enough to use that very language and to thus make that intent clear and unmistakable, which was not done here.”

Respectfully submitted,

K. SAMUEL KING,
409 Boston Building
Salt Lake City, Utah 84111

*Attorney for Defendant
and Appellant*