

2000

Van L. Bushnell and Allison S. Bushnell, his wife v. S. Delroy Sillitoe and Donna Sillitoe, his wife, D. W. Ogden; D Land Title Compnay, a Utah Corporation; and James C. Sandberg, dba Sandberg Engineers : Brief of Respondent

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_sc2



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Supreme Court; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

Michael W. Park; Attorney for Defendant-Appellant.

Tex R. Olsen; Olsen and Chamberlain; Attorneys for Defendant-Respondent.

Recommended Citation

Brief of Respondent, *Bushnell v. Sillitoe*, No. 14055.00 (Utah Supreme Court, 2000).

https://digitalcommons.law.byu.edu/byu_sc2/141

This Brief of Respondent is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

IN THE SUPREME COURT OF THE STATE OF UTAH

RECEIVED
LAW LIBRARY

30 MAR 1976

VAN L. BUSHNELL and ALLISON)
S. BUSHNELL, his wife,)

Plaintiffs,)

vs.)

S. DELROY SILLITOE and DONNA)
SILLITOE, his wife, D. W.)
OGDEN; D LAND TITLE COMPANY,)
a Utah Corporation; and JAMES)
C. SANDBERG, dba SANDBERG)
ENGINEERS.)

Defendants.)

CASE NO. BRIGHAM YOUNG UNIVERSITY
J. Reuben Clark Law School

BRIEF OF RESPONDENT

D LAND TITLE

APPEAL FROM THE JUDGMENT OF THE FIFTH JUDICIAL DISTRICT
COURT OF IRON COUNTY, J. HARLAN BURNS, DISTRICT JUDGE
PRESIDING

TEX R. OLSEN
Olsen and Chamberlain
76 South Main
Richfield, Utah 84701

Attorneys for Defendant-
Respondent, D Land Title

MICHAEL W. PARK
110 North Main Street
Suite "F"
Cedar City, Utah 84720

Attorney for Defendant-Appellant,
James C. Sandberg, dba Sandberg
Engineers

FILED

MAR 4 1976

Clerk, Supreme Court, Utah

TABLE OF CONTENTS

	Page
NATURE OF THE CASE	1
DISPOSITION IN THE LOWER COURT	1
STATEMENT OF FACTS	2
ARGUMENT	4
POINT I. THE CROSS-COMPLAINT FILED BY DEFENDANT D LAND TITLE AGAINST DEFENDANT SANDBERG WAS FOR BREECH OF CONTRACT	4
POINT II. THE TRIAL COURT CORRECTLY AWARDED JUDGMENT TO D LAND TITLE FOR \$6,000.00 WHICH DAMAGES RESULTED FROM THE NEGLIGENT PERFORMANCE OF A SURVEYING CONTRACT BY SANDBERG ENGINEERS	5
POINT III. THE TRIAL COURT DID NOT ERROR IN FINDING THAT DEFENDANT SANDBERG WAS NEGLIGENT IN SURVEYING AND STAKING PRO- PERTY FOR HOME IMPROVEMENTS AND THEREBY BREECHED HIS CONTRACT WITH D LAND TITLE	10
CONCLUSION	11

CASES CITED

Charlton vs. Hacket, 11 U 2d 389, 360 P2d 176	11
De Vas vs. Noble, 13 U2d 133, 369 P2d 290	11
Sheley vs. Merrill, Lynch, Pierce, Fenner & Smith, Inc., <u>U2d</u> <u>P2d</u> Case No. 14093	11

AUTHORITIES CITED

American Jurisprudence 2d 432, Section 330 Damages 22	9
--	---

IN THE SUPREME COURT OF THE STATE OF UTAH

VAN L. BUSHNELL and ALLISON)	
S. BUSHNELL, his wife,	:	
)	
<i>Plaintiffs,</i>	:	CASE NO. 14055
)	
vs.	:	
)	
S. DELROY SILLITOE and DONNA	:	
SILLITOE, his wife, D. W.)	
OGDEN; D LAND TITLE COMPANY,	:	
a Utah Corporation; and JAMES)	
C. SANDBERG, dba SANDBERG	:	
ENGINEERS,)	
	:	
<i>Defendants.</i>)	

BRIEF OF RESPONDENT

D LAND TITLE

NATURE OF THE CASE

This was an action for damages against all of the Defendants for the construction and maintenance of a home which encroached upon property of the Plaintiffs. A cross-complaint was filed by D Land Title, the home builder, against James D. Sandberg, dba Sandberg Engineers, for any damages which resulted because of the failure to properly survey and stake the property.

DISPOSITION IN THE LOWER COURT

Defendants Sillitoe and Defendant D Land Title settled the claim of the Plaintiffs for a total of \$6,000.00. Defendant D Land Title then continued

with the trial against Defendant James C. Sandberg, dba Sandberg Engineers. The trial court found Defendant James C. Sandberg and his employees did negligently locate the East line of the Sillitoe property at a point 25 feet East of the true line thereby causing the encroachment. The trial court held that the settlement of the Plaintiffs' claim for a total of \$6,000.00 was the extent of the damages resulting from the engineer's failure to perform the surveying contract and granted judgment to D Land Title for that amount.

STATEMENT OF FACTS

Defendant D Land Title owned a certain building lot in Cedar City, Utah. It employed Defendant Sandberg to survey the property and to stake out the perimeter of the lot in order that home improvements could be erected thereon. Employees of Defendant James C. Sandberg did stake out the perimeter of the building lot and did locate the East line of the property at a point 25 feet East of the true property line. As a result of the error so made, the home improvements extended beyond the property owned by D Land Title and upon the property of the Plaintiffs by a total of 9 feet 4 inches (TR3 & 4 - See Exhibit No. 1).

Phillip John Leslie, an employee of Sandberg did the survey work upon the property. He examined his field notes and stated he had established the Southwest corner of the Plaintiffs' neighboring lot (TR145 - L 2 & 3). He then ran a line parallel to the street for 75 feet and thereby established the Southwest corner of the D Land Title lot (sometimes referred to as the Sillitoe lot) (TR145 - L 19 & 20). Since the D Land Title lot was actually 100 feet in width it is apparent that all of the measurements used thereafter were based upon the erroneous setting of the Southwest corner of the lot. The entire survey was off 25 feet and the pegs placed by the engineer were staked 25 feet East of the true boundary of the D Land Title lot and upon the property of the Plaintiffs.

After the property was staked by his employee, Defendant Sandberg personally checked the property and the staking and did execute a certificate for the benefit of D Land Title certifying as to the location of the lot and the home to be placed thereon (TR153 - see Exhibit No. 5). A copy of Defendants' Exhibit No. 5 is attached for ready reference as Appendix "i".

After the home was constructed by D Land Title

it was sold to the Defendants Sillitoe who were the owners and in possession at the time this action was commenced by the Plaintiffs.

ARGUMENT

POINT I.

THE CROSS-COMPLAINT FILED BY DEFENDANT D LAND TITLE AGAINST DEFENDANT SANDBERG WAS FOR BREECH OF CONTRACT.

Appellant makes the argument to this court that the Defendants were joint tort feasers and the Court has erroneously required Defendant Sandberg to pay for the damages resulting from their acts.

The appellant has not correctly analyzed the pleadings or the findings of the Court. The action was brought by D Land Title to recover for damages resulting to it because of the failure of Sandberg Engineers to perform its contract. The services of Sandberg Engineers were employed to properly locate and stake the building lot owned by D Land Title in order that the home improvements could be constructed thereon. The expert services of a surveyor were employed in order that encroachment upon other parties could be avoided. Sandberg Engineers did survey the property and did make an error of 25 feet in their survey calculations. Because of the error, 25 feet of the

property owned by the Plaintiffs to the East of the D Land Title lot was included within the survey pegs (TR145 Exhibit No. 1).

The Defendant Sandberg Engineers contracted to accurately locate the home improvements upon the D Land Title lot. D Land Title's claim against it was in contract for a breach and damages which foreseeably resulted from a breach of the contract for services. Since the sole proximate cause of the damages resulting to the parties was from a breach of this contract, it is respectfully submitted that the judgment was rightfully entered.

POINT II.

THE TRIAL COURT CORRECTLY AWARDED JUDGMENT TO D LAND TITLE FOR \$6,000.00 WHICH DAMAGES RESULTED FROM THE NEGLIGENT PERFORMANCE OF A SURVEYING CONTRACT BY SANDBERG ENGINEERS.

After being served with a summons and complaint setting forth the claims of the Plaintiffs, D Land Title filed a cross-complaint against Defendant James C. Sandberg, dba Sandberg Engineers.

The cross-complaint specifically stated the claim of D Land Title in the following language:

2. That during the month of February, 1969, this Cross-Complainant employed the services of James C. Sandberg, dba Sandberg Engineers, an engineer and surveyor residing in Cedar City, State of Utah, to make

a survey of said lands and to stake the perimeter thereof; that the Cross-Complainant further contemplated the installation upon the property of a residential home and did secure the services of said James C. Sandberg, dba Sandberg Engineers, for the purposes of staking upon the ground, the home property, which home was in fact, built. An exact copy of the Engineer's Certificate furnished to this Cross-Complainant is attached hereto and marked Exhibit "A".

3. That in compliance with the said survey and the staking of the outline of the location of the house to be constructed upon said property, this Cross-Complainant constructed the home property thereon.

4. That the Plaintiffs herein, Van L. Bushnell and Allison S. Bushnell, his wife, do in these proceedings allege that the house so erected by this Cross-Complainant encroaches upon their property and that they have sustained damages resulting therefrom which are specifically set forth in Plaintiffs' Complaint.

5. That this Cross-Complainant relied solely upon the engineering services, staking and engineering certificate furnished to it by James C. Sandberg, dba Sandberg Engineers, and in the event any damages or loss has been sustained by the Plaintiffs in these proceedings, the sole cause thereof resulted from the acts of the Cross-Defendant herein (R4).

After hearing the evidence and being advised in the position of each of the parties the court thereafter made the following specific Findings of Fact:

4. Immediately prior to the erection of a home upon the Sillitoe lot, D Land

Title did employ the services of James C. Sandberg, dba Sandberg Engineers, an engineering and survey firm in Cedar City, State of Utah, to make a survey of the Sillitoe lot and to stake out the perimeter of the home improvements to be erected thereon.

5. That James C. Sandberg through his agents and employees did stake out the perimeter of the home property and did negligently locate the East line of the Sillitoe property at a point 25 feet East of the true line. That as a result of the error so made the home improvements were staked upon the land in such a manner that instead of being constructed within the Sillitoe lot boundary they overlapped upon the Bushnell lot by a total of 9 feet 4 inches.

6. That the Defendant D Land Title reasonably relied upon the location stakes placed upon the ground by James C. Sandberg, his employees and associates.

7. That the claim of the Plaintiffs was settled for a total of \$6,000.00, that the amount was paid to Plaintiffs and was a reasonable sum to compensate the Plaintiffs for their damages; that the sum so paid limits the liability of the Defendant James C. Sandberg, dba Sandberg Engineers to Cross-Complainant D Land Title.

The findings were well supported by the overwhelming weight of the evidence presented. The reasonableness of the \$6,000.00 settlement made with the Plaintiffs was also considered and found to be reasonable. It is observed the Plaintiffs put on proof showing that they had entered into a contract to build

a home on the property where the encroachment was found to exist. Plaintiffs had a loan commitment at an 8% interest rate and at the time of trial interest rates had risen to 10 3/4%. Plaintiffs demanded \$8,582.40 because of this increased cost factor (TR12). They demanded damages for the increased costs of building the same home which could not be commenced because of the trespass. They gave testimony that costs increased from \$37,277.00 to \$45,334.00 with a resulting loss of \$8,057.00 (TR35).

Plaintiffs further demanded that Defendants remove the encroachment which would be an additional cost to them of from \$8,000.00 to \$15,000.00 (TR131). The total exposure of the Defendants was therefore in excess of \$24,000.00.

Defendant D Land Title and Defendant Sillitoe have paid the \$6,000.00. D Land Title is obligated to reimburse Sillitoes for the funds advanced by them.

Appellant argues that because some funds were advanced by Sillitoes, his client should be relieved from the obligation of paying that portion of the damage. Courts have long held that it is immaterial whether funds to pay the damages actually caused

were borrowed, contributed by an interested party or otherwise furnished to the obligated party. In personal injury cases no offset is permitted because of health and accident hospitalization insurance maintained by the injured party or in wrongful death cases for sums received as a result of life insurance maintained by the decedent or other interested parties on the life of the decedent.¹

Although Defendant Sandberg Engineers were the sole cause of the damages which resulted from their failure to perform their contract with D Land Title, they have steadfastly refused to contribute. Defendant Sandberg seems to find some comfort in the fact the other Defendants used reasonable judgment in limiting liabilities to \$6,000.00. Liability which may have exceeded \$28,000.00. We submit the action to reasonably limit liability was in the best interest of all parties and an actual benefit to Defendant Sandberg.

¹Section 330 Damages 22 Am Jur 2d 432 . . . evidence of facts which do not, under the applicable principles of the law of damages, operate to lessen the damages recoverable from a wrongdoer is not admissible to mitigate damages. Thus, evidence of the plaintiff being compensated by a collateral source for all or a portion of the damages caused by the defendant's wrongful act is generally inadmissible. Accordingly, evidence is not admissible that the plaintiff was insured against liability and has received money from insurance on account of hospital bills incurred or injuries which he received, or that medical services and hospital bills were furnished gratuitously by another.

POINT III.

THE TRIAL COURT DID NOT ERROR IN FINDING THAT DEFENDANT SANDBERG WAS NEGLIGENT IN SURVEYING AND STAKING PROPERTY FOR HOME IMPROVEMENTS AND THEREBY BREECHED HIS CONTRACT WITH D LAND TITLE.

The overwhelming evidence is that Sandberg did have an employee survey the property and locate the Southwest corner of the lot (TR125). The employee further staked out the property (TR145). The stakes were found by Ken William Esplin of D Land Title (TR126) and have also been located by Defendant F. Delroy Sillitoe (TR139). The overlap and resulting encroachment was apparent to all parties after the Plaintiffs brought it to their attention. The existence of the encroachment was stipulated to by all parties and a plat demonstrating that fact was also admitted by stipulation (TR3 & 4 - Exhibit No. 1).

After the property was staked by his employee, James C. Sandberg did enter upon the property. He did examine the staking and the location of the home thereon and did execute a certificate for the benefit of D Land Title (TR153 and 154 - Exhibit No. 5, appendix "i").

At page 154 of the transcript Defendant Sandberg

was asked by his attorney:

QUESTION: Did you go completely around the property?

ANSWER: Yes.

QUESTION: And after you had looked at the corners did you make a determination concerning the survey?

ANSWER: I thought it looked alright and I gave my approval on it on the way it was done.

QUESTION: What kind of a survey was requested by D Land Title?

ANSWER: It was a survey to put a model home on.

In reviewing the evidence in a light favorable to the prevailing party as required by the rules of this court¹ we respectfully submit the evidence was ample to support a finding of breach of contract and the judgment entered by this Court.

CONCLUSION

The Findings of Fact, Conclusions of Law and Judgment of the Lower Court correctly established the obligation of Sandberg Engineers to respond in damages for its failure to perform the surveying

¹
Sheley vs. Merrill, Lynch, Pierce, Fenner & Smith, Inc.,
U2d P2d Case No. 14093; Charlton vs. Hackett,
11 U 2d 389, 360 P2d 176; De Vas vs. Noble, 13 U2d 133,
369 P2d 290.

We respectfully submit the judgment should be affirmed.

Respectfully submitted,

TEX R. OLSEN
Olsen and Chamberlain
76 South Main
Richfield, Utah 84701

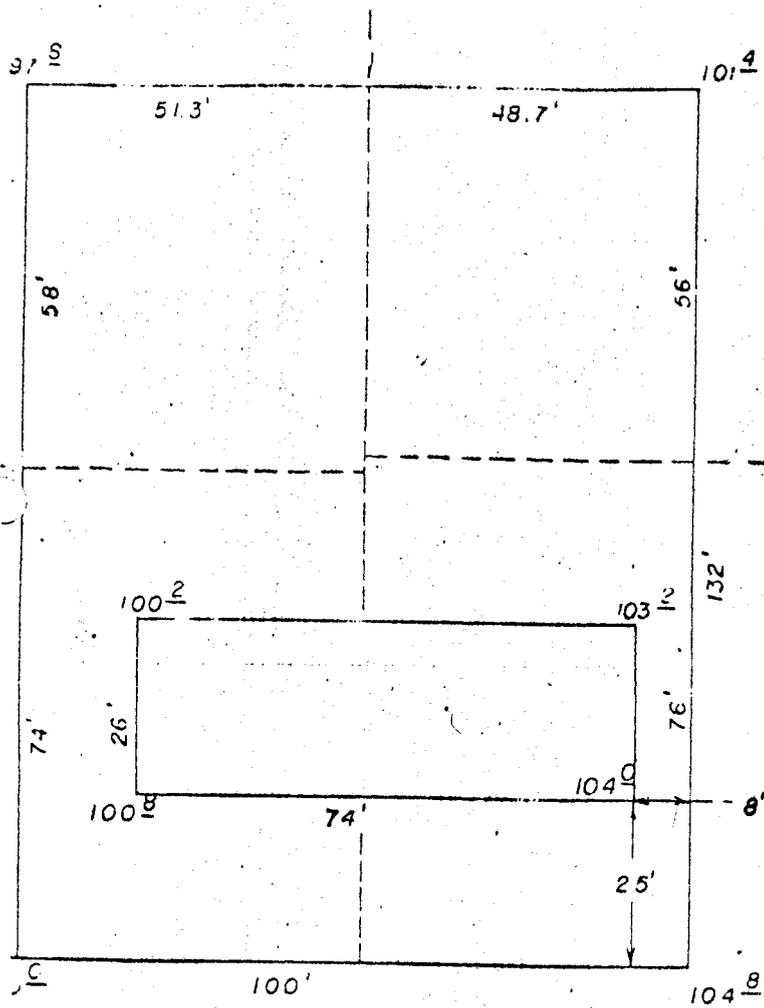
*Attorneys for Defendant-Respondent
D Land Title*

CERTIFICATE OF MAILING

I hereby certify that on the 2nd day of March, A. D., 1976, two copies of the within and foregoing Brief of Respondent, D Land Title, were served upon the following by U. S. Mail, postage prepaid:

Michael W. Park
110 North Main Street, Suite "F"
Cedar City, Utah 84720

Tex R. Olsen
Attorney for D Land Title



555 So. St.

APPENDIX "i"

ENGINEER'S CERTIFICATE

I, JAMES C. SANDBERG, Licensed Professional Engineer and Land Surveyor do hereby certify that the accompanying plot correctly portrays a survey made under my direction of the following described property:

The South 58' of the East 51.3 ft of lot 5, East 51.3 ft of lot 4, the South 56.0 ft of the West 48.7 ft. of lot 2, the West 48.7 ft. of lot 3, all in Block 1 Cedar Crest Sub-division, Extension A, Cedar City, Utah

James C. Sandberg
 L.S. 2968 P.E. 1626



PROPERTY SURVEY
 FOR
 D LAND TITLE

RECEIVED
LAW LIBRARY

30 MAR 1976

BRIGHAM YOUNG UNIVERSITY
J. Reuben Clark Law School