1969

Arthur 0. Nauman v. Harold K. Beecher & Associates, A Utah Corporation : Amicus Curiae Brief of Utah Chapter Associated General Contractors

Utah Supreme Court

IN THE SUPREME COURT OF THE STATE OF UTAH

ARTHUR O. NAUMAN,
Plaintiff-Respondent,

vs.

HAROLD K. BEECHER & ASSOCIATES, a Utah corporation
Defendant-Appellant.

Case No. 11579

Amicus Curiae Brief of Utah Chapter Associated General Contractors

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NATURE OF THE CASE

This is an action by a workman for personal injuries claimed to have resulted from the defendant architect's failure properly to supervise contract work being performed by the plaintiff's employer.

DISPOSITION IN LOWER COURT

Plaintiff recovered a judgment against defendant Harold K. Beecher & Associates in the amount of $638,135.99 plus interest and costs.

RELIEF RECOMMENDED BY AMICUS CURIAE

The Utah Chapter, Associated General Contractors, which is filing this brief as Amicus Curiae pursuant to an order of the court dated August 29, 1969, believes that the judgment should be reversed for the reasons hereinafter set forth

STATEMENT OF FACTS

The position of this Amicus Curiae is based primarily upon the legal relations existing among plaintiff, defendant, and the employer-contractor involved in this case. It accepts the statements that the plaintiff's recovery was predicated upon negligence of the general contractor and the failure of the defendant architect to properly supervise the contractor. The other facts have no substantial bearing upon the arguments contained herein.

ARGUMENT

POINT I

THE WORKMEN'S COMPENSATION ACT WAS NOT INTENDED TO PERMIT AN ACTION BY AN

INJURED WORKMAN AGAINST A PERSON OTHER THAN HIS EMPLOYER WHERE AN INJURY RESULTS FROM AN EMPLOYER'S CONCURRENT NEGLIGENCE.

The decision of the trial court in the instant case necessarily involves complex and bi-lateral questions of contribution and indemnity. In bringing the action plaintiff relied on that part of 35-1-62 Utah Code Annotated 1953, which provides:

> "When any injury or death for which compensation is payable under this title shall have been *caused by* the wrong act or neglect of *another person not in the same employment,* the injured employee, or in the case of death his dependents, may claim compensation and the injured employee or heirs or personal representatives may also have an action for damages against such third person." (Emphasis added.)

Read by itself, the foregoing provision suggests the threshold problems inherent in determining the meaning of "caused by" and "not in the same employment." Additional problems of construction arise from the language used in the second sentence of 35-1-62:

> "If compensation is claimed and the employer or insurance carrier becomes obligated to pay compensation, the employer or insurance carrier *shall become trustee of the cause of action against the third party* and may bring and maintain the action either on its own name or in the name of the injured employee, or his heirs or the personal representative of the deceased. * * * " (Emphasis added.)

The section then provides that after payment of expenses of the action any recovery against the third party will be used to reimburse the employer or insurance carrier in full for all payments made.

Because of many decisions relating to contributions and indemnity (discussed under Point III) the creation of a cause of action in favor of the employer or insurance carrier, in a situation in which an employee is injured by the concurrent negligence of an employer and a third person, would lead to contradiction and confusion.

This court has heretofore decided that 35-1-62 (prior to the 1945 amendment) was intended to cover "passive" as well as "active" negligence of the third party tort feasor. In *Johanson* v. *Cudahy Packing Company,* 107 Utah 114, 152 P.2d 98 (1944), a truck driver had backed his employer's truck into high tension electric wires while making a delivery to defendant. It was held that the employee had a right of action against defendant even though negligence was predicated upon a failure to warn rather than an affirmative wrongful act. In that case, however, the terms "passive" and "active" were used to refer respectively to acts of omission and commission rather than to the primary and secondary liabilities of different persons. The court, in construing the section, said:

> "The section was designed to permit the person or firm paying compensation to participate in any recovery had from the negligent third party."

Inasmuch as 35-1-62 permits recovery from a third person only if the injury is "caused by" the wrongful act or neglect of such person, and there is no reference to contributing causes, it is arguable that the section was meant to cover situations on which the employer was not also negligent. It does not seem to contemplate situations in which the injury resulted from a concurrence of negligence on the part of a third person and the employer if the injury occurs within the scope and course of employment within the meaning of the Workmen's Compensation Act.

It might be argued that prohibition of recovery from a third person where the injury results from his and the employer's concurrent negligence would be unfair because it would permit third parties to escape liability which should be imposed upon them.

The matter can perhaps best be resolved not on the basis of whether negligence is "passive" or "active", but on whether the employer's negligence or the third person's negligence was the primary cause of the injury. If the employer's negligence was the primary cause, the exclusive remedy be should be under the Workmen's Compensation Act; but if the third party's negligence was the primary cause, the employee would be able to invoke 35-1-62, provided the employee and the other party (or parties) were not "in the same employment."

Such a construction would achieve fairness, carry out the policies of the Workmen's Compensation Act,

and avoid problems arising out of classic doctrines of contribution and indemnity.

POINT II

PLAINTIFF'S EXCLUSIVE REMEDY IS UNDER THE WORKMEN'S COMPENSATION ACT BECAUSE PLAINTIFF AND DEFENDANT WERE IN "THE SAME EMPLOYMENT."

Under 35-1-62 an action may be brought by an injured employee against a third-party tort feasor only when the third party is "not in the same employment." The provision must refer to others than co-employees of an injured employee, because under 35-1-60, the right to recover compensation under the Workmen's Compensation Act is the exclusive remedy against not only the employer, but any officer, agent or employee of the employer. Although this court does not appear to have expressly defined "the same employment," several decisions demonstrate that it is not limited to "the employer," and his officers, agents and employees.

The most recent case is *Cook* v. *Peter Kiewit Sons Co.*, 50 Utah 2d 20, 86 P.2d 616 (1963), in which defendant and plaintiff's employer, another construction company, formed a joint venture to build a diversion tunnel at Flaming Gorge Dam. Plaintiff was injured while working in the tunnel and obtained compensation for the injuries. He brought an action against defendant, claiming that negligence of its employees caused the injuries. In discussing 35-1-62 the court said:

> "The language of the statute preserving an action against ' * * * third persons' who are 'not in the same employment * * * ' seems plainly designed to apply to strangers to the employment and not to co-workers jointly engaged in the same endeavor."

The court held that the joint venture should be regarded as the employing unit and that employees of both companies were engaged in the same employment within the meaning of the section. In so doing it relied partly upon the fact that plaintiff worked fairly closely with defendant's employees and was directed to drill by defendant's engineers. Although some reliance was placed upon the fact that plaintiff probably could have contended successfully that he would be covered by workmen's compensation as an employee of defendant, this would not be an important factor if the defendant were a fellow employee, or an officer of the employer. Yet under the Workmen's Compensation Act such fellow employees and officers are as protected as the employer. Other reasons advanced by the court in the *Cook* case for denying liability are as pertinent to the present case as they were there.

The position of the defendant in the present case is somewhat unique. As architect under contract with Salt Lake City and Salt Lake County, it was not in any ordinary sense an officer, agent or employee of the contractor, a co-employee of the plaintiff, a supervisor of the plaintiff, or employer of the contractor. Yet, it had attributes of all of these. Its activities were so interwoven with those of the contractor and its employees,

including the plaintiff, that it must necessarily be regarded as in the same employment.

One of the fundamental tests applied by this court, as by those in other jurisdictions, to determine whether an employer-employee relationship exists, is whether there is a right of supervision and control. In *Weber County-Ogden City R. Com.* v. *Industrial Commission,* 98 Utah 85, 71 P2.d 177 (1937), the court stated:

> "This court, in several cases, has stated the principles as generally followed by the courts of this country. * * * 'Whenever the employer retained supervision and control of the work to be performed, *no matter what relation he had sought* to establish, the workmen under him were to be deemed his employees'.
>
> "It may be admitted that the application of that principle in those cases was called for by the express language of the statute defining an independent contractor. Obviously, however, *this rule is not limited in its application to cases involving a distinction between an independent contractor and an employee.*" (Emphasis added.)

The court further pointed out that the exercise of supervision and control was the most important test to determine the existence of an employer-employee relationship and said that the fact that one person paid the employee's wages and had the exclusive right to discharge or suspend him would not prevent the employee from being in the service of another person.

There is no doubt in the present case that the defendant had the right of supervision and control over the

plaintiff in connection with the work being done. Indeed, it is the alleged failure to properly perform this supervision and control that constitutes the whole basis of the lawsuit. It is recognized that most of the cases following the *Weber County* case involve primarily a determination of whether the employer-employee relationship existed. However, if there is sufficient basis, using such test, to establish the employer-employee relationship, certainly the test should have great materiality in determining whether the parties were in the same employment, as was recognized by this court in *Cook* v. *Peter Kiewit Sons Company, supra.,* when the court placed reliance upon the fact that the plaintiff had worked closely with defendant's employees, and was directed where to drill by its engineers.

A case in which similar principles were invoked is *Long* v. *Springfield Lumber Mills, Inc.*, 214 Ore. 231, 327 P.2d 241 (1958). The plaintiff was employed by one who had entered into a joint venture with the defendant for logging of a tract of timber and delivery of logs to the defendant's pond, the profits of the venture to be shared. Employees of both cooperated in the unloading of the logs and were doing so when plaintiff was injured. Plaintiff had driven his truck loaded with logs to the defendant's dumping site and while unloading the logs was struck and injured. The agreement between plaintiff's employer and defendant required the employer to provide workmen's compensation insurance for his employees, which he had done. The Oregon court, under a somewhat different statute, held that the defendant and

plaintiff's employer had joint supervision and control over the log dump area, and that the two employers were engaged in furtherance of a common enterprise, and that consequently plaintiff could not bring this action against defendant but had to rely on workmen's compensation.

POINT III

THE ADVERSE CONSEQUENCES WHICH COULD FOLLOW FROM HOLDING THE DEFENDANT LIABLE TO PLAINTIFF UNDER THE CIRCUMSTANCES OF THIS CASE DEMONSTRATE THAT THE POLICIES AND PURPOSES OF THE WORKMEN'S COMPENSATION ACT REQUIRES A BROAD CONSTRUCTION OF THE TERMS "IN THE SAME EMPLOYMENT" AS USED IN 35-1-62 U.C.A. 1953.

While this court has refused to allow contribution among joint tort feasors, it has applied a generally accepted rule that one guilty of only passive or inactive negligence is entitled to indemnity for amounts paid to an injured plaintiff from one who was actively negligent in causing the injury. See, e.g., *Salt Lake City* v. *Schubach,* 108 Utah 266, 155 P.2d 149 (1945).

If an architect can be held liable to an injured employee of the contractor or a subcontractor for his "passive" negligence in failing to supervise construction, presumably he would have a right, in the absence of countervailing policy considerations, to obtain indemnity from the contractor or sub-contractor whose

"active" (or less remote) negligence resulted in the injury. If indemnity were allowed against an employer for amounts paid by a third person to his employee, the policies of the Workmen's Compensation Act would be circumvented and the employee might do directly what he could not do indirectly — obtain a large judgment against his employer (finally) for negligent injury in the course and scope of employment. Such a result would also deprive the employers in the construction industry of the protection and certainty that was meant to be afforded by the Workmen's Compensation Act. It would have a serious effect upon the risks assumed by contractors in bidding upon public and private construction projects and would make it difficult to anticipate such risks in connection with the preparation of bids or negotiation of the construction contracts.

If, on the other hand, the court, in accordance with the majority rule, should deny indemnity, a third party who may be less culpable than the employer would be held liable in damages in an unlimited amount while the culpable employer would not only have complete protection against suit but would be entitled, under the Workmen's Compensation Act, to recover compensation paid to the injured employee.

We do not mean to suggest that the court can or should make a policy determination regarding rights, obligations or remedies, which is not permissible under the language of the Workmen's Compensation Act. That is properly a matter for the legislature. However, the

policies behind the act and the objectives to be accomplished thereby are well known to the court. And where it is necessary to construe a provision such as "the same employment" provision of 35-1-62, policy considerations may be taken into account in determining the legislative meaning.

There is a conflict among jurisdictions as to whether contribution or indemnity should be allowed against the employer when a third party tort feasor is required to pay a judgment to an injured employee. Most of the courts deny the right on the ground that the sole obligation of the employer is under the Workmen's Compensation Act and consequently the employer and the third party tort feasor are not under a common liability to the injured or killed workmen. See, for example, Annotation, "Effects of Workmen's Compensation Act on right of third person tort feasor to recover contribution from employer of injured or killed workmen," 53 A.L.R. 2d. 977; Annotation, "Joint Tort Feasors' Act as applicable to employer within Workmen's Compensation Act, 156 A.L.R. 467. There are, however, cases which do allow indemnity and in fact third party tort-feasors have a somewhat greater success in obtaining indemnity from concurrently negligent employers than they have had in obtaining contribution. See e.g., *American Dist. Del. Co.* v. *Kittleson,* 179 F.2d 946 (8th Cir., 1950); *Baugh* v. *Rogers,* 24 Cal. 2d 201, 48 P.2d 633 (1944); *Westchester Lighting Co.* v. *Westchester County Small Estates Corporation,* 278 N.Y. 175, 15 N.E.2d 567 (1938). The courts in these cases have been able to advance

compelling reasons for the decisions. Thus, it is probably no answer to say that the problem can be solved at the point where the third party tort feasor attempts to obtain contribution or indemnity from the employer. In situations such as the present, a much more satisfactory solution can be arrived at by holding the third party suit is not justified either because the injuries were not caused by the third party in the sense that he was the one primarily at fault (efficient cause), or that the parties were engaged in a common endeavor and thus in the same employment.

POINT IV

PLAINTIFF CANNOT RECOVER FROM DEFENDANT FOR INJURIES RESULTING FROM THE ALLEGED FAILURE OF DEFENDANT TO SUPERVISE HIS ACTIVITIES OR WARN HIM OF DANGERS WHEN THE RISK WAS AS READILY OBSERVABLE TO PLAINTIFF AS IT WAS TO DEFENDANT.

The plaintiff was an experienced excavation contractor who was employed to supervise the construction of the trench. Any dangers inherent in the construction of the trench should have been as readily observable to him as they were to the defendant. In fact, since plaintiff was employed at the site, and was there continuously, the dangers should have been more observable.

This court has held in a number of cases that where a hazardous condition on land is as easily observable

to an invitee or licensee thereon as to the land owner, the duty to warn him of such dangers does not exist, and the land owner consequently cannot be held negligent for such failure. See *Steele* v. *Denver & Rio Grande Western Railroad Company,* 96 P.2d 751, 16 Utah 2d 127 (1964); *Lindsay* v. *Eccles Hotel Company,* 3 Utah 2d 751, 284 P.2d 477 (1955); and *DeWeese* v. *J. C. Penney Company,* 5 Utah 2d 116, 297 P.2d 898 (1956). While these cases dealt with the duty of a land owner to an invitee or licensee, there is no reason why the principle should not apply to the facts of cases such as this. Both situations involve negligence of a passive rather than an active type, and the principle is but an extension of the contributory negligence and assumption of risk doctrines.

POINT V

THE DEFENDANT'S DUTY TO SUPERVISE WAS NOT OWED TO THE PLAINTIFF.

In the recent case of *Wells* v. *Stanley J. Thill and Associates, Inc.,* ..... Mont. ....., 452 P.2d 1015 (1969), the Supreme Court of Montana had occasion to review an action by employees of an independent contractor against a city and its supervising engineer for injuries suffered in a trench cave-in, which had been dismissed by the trial court on motions for summary judgment. As the defendant architect had done in the present case, the defendant engineers in the *Wells* case had drawn the plans and specifications for the city, and were to supervise on behalf of the city to insure that the contract was performed in accordance with the plans and specifications.

In upholding the dismissals, the court noted that the basis for the trial court's order granting the motions was the "independent contractor rule," and a determination that an employee of an independent contractor was not qualified for recovery under exceptions to that rule which allows recovery to third persons. It was held by the Supreme Court of Montana that neither the city (owner) nor the defendant engineers were liable to the injured employee.

In discussing the possible liability of the supervising engineers, the court said:

> "The plans and specifications prepared and furnished by the engineer, which were also made a part of the contract, provided that '* * * all applicable state laws, municipal ordinances, and the rules and regulations of all authorities having jurisdiction over construction of the project shall apply to the contract throughout, and they will be deemed to be included in the contract the same as though herein written out in full.' The plans and specifications also provided for shoring where necessary. From that it is clear to this court that there were provisions in the plans and specifications that safety precautions should be taken to insure the safety of employees working on the project. Those provisions in the contract made it the duty of the contractor to take all necessary safety precautions.
>
> "On the other hand, the duty of the engineer, which duty ran to the city, was to see that a certain end result was eventually accomplished, namely that the project as finally constructed and turned over to the city met the plans and specifi-

cations it prepared for the city. The engineer's real interest was not in the actual construction but in a completed project in accordance with the plans and specifications.

"There was no duty on the part of the engineer to see that [safety] standards set up by the Montana Industrial Accident Board were met. That duty lay with the contractor and with the Industrial Accident Board."

The Montana case adopts principles which have been followed by New York's courts for six decades. In *Potter* v. *Gilbert*, ... App. Div. ....., 115 N.Y.S. 425 (1909) the defendant was an architect who drew the plans and specifications and undertook to and did supervise the erection and construction of a building. During construction, the outer wall of the building collapsed killing the plaintiff's intestate, a workman on the job. The plaintiff alleged that the defendant had failed to use due diligence in the supervision of construction, and it had been his duty to condemn the wall before it fell down, because it had been constructed improperly. It was further alleged that the improper construction was known or should have been known to the defendant. In holding the architect not liable, the court said:

"An architect in preparing plans and specifications for the construction of a building under employment by the owner, is following an independent calling and is doubtless responsible for any negligence in failing to exercise the ordinary skill in his profession which results in the erection of an unfinished structure whereby anyone lawfully on the premises is injured; * * * but it will

be observed that there is no charge of negligence against the defendant with respect to the preparation of the plans and specifications for the erection of the building. The plaintiff does allege that the architect prepared unsafe plans and specifications, but there is no allegation that the collapse of the wall was owing to any defect in this regard. * * *

"At most, then, the complaint merely charges an omission of duty on the part of the architect while acting for his principal, the owner, which constitutes only nonfeasance for which he may be liable to his employer, but is not liable to third parties. (Citing cases.) The architect would be liable to his employer, the owner, for a failure to properly supervise the work; but a failure in this regard amounting to no more than nonfeasance would not give rise to a cause of action in favor of a third party, whose claim would merely be that, if the architect had attended to his duties more diligently, he would have discovered a departure from the plans and specifications by the contractor and might thus have prevented the accident. * * *

"It was the duty of the employer of the decedent under his contract with the owner to follow the plans and specifications. The supervision power conferred upon the architect was to insure this result. * * *

" * * * The architect owed decedent and everyone lawfully on or about the premises the duty of preparing plans and specifications under which the building could be constructed with safety, and the decedent's employer owed him the duty of following the plans and specifications; but the architect owed no duty of active vigilance to the

decedent to supervise the work of the employer of the decedent, although he may have owed this duty to the owner by whom he was employed." (Emphasis added.)

The principle announced in *Potter* v. *Gilbert* has been approved and followed in *Clinton* v. *Bohn*, 139 App. Div. 73, 124 N.Y.S. 789 (1910); and *Olsen* v. *Chase Manhattan Bank*, 9 N.Y.2d 829, 175 N.E.2d 350 (1961), affirming 10 App. Div. 539, 205 N.Y.S.2d 60 (1960).

CONCLUSION

A great number of considerations preclude recovery by an employer's workman from an architect for its failure to supervise the workman's employer. Many of these arise out of the need to prevent the use of actions against third persons, contributions, and indemnity, to reestablish a "fault" system supposedly superseded by the Workmen's Compensation Act.

Moreover, the architect owes no contractual duty to a contractor's employee, particularly one whose skills and training should make him as aware of the danger as is the architect.

The judgment of the trial court should be reversed.

Respectfully submitted,

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