

1996

Farmers Insurance Exchange v. David Parker : Brief of Appellant

Utah Court of Appeals

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Recommended Citation

Brief of Appellant, *Farmers Insurance Exchange v. Parker*, No. 960236 (Utah Court of Appeals, 1996).

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DOCKET NO. 960236 CA

IN THE UTAH COURT OF APPEALS

FARMERS INSURANCE EXCHANGE,

Plaintiff/Appellee,

No. 960236 CA

vs.

Argument Priority 15

DAVID PARKER,

Defendant/Appellant.

BRIEF OF APPELLANT

Appeal from the Third Judicial Circuit Court
Salt Lake County, State of Utah
Honorable Michael Hutchings, Presiding

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FILED

AUG 12 1996

COURT OF APPEALS

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LIST OF PARTIES

The parties are identified in the caption.

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BRIEF OF APPELLANT

JURISDICTION

The Utah Court of Appeals has jurisdiction pursuant to Utah Code Ann. § 78-2a-3(2)(d).

STATEMENT OF ISSUES

1. Did the trial court err in applying joint and several liability principles and in refusing to apportion fault to non-parties who were clearly responsible for the damage? This issue was raised in the answer (R. 30) and in closing argument to the court (Tr. 8).¹ It is an issue of law and as such is reviewed for correctness.

¹ The transcript erroneously identifies Mr. McKay as raising this issue. In fact, defendant's counsel raised it.

2. Did the court err in holding defendant responsible as the "leader" of the group when no pecuniary transaction occurred between the members of the climbing party? This issue was raised during closing argument (Tr. 3-4). It is an issue of law subject to review for correctness.

GOVERNING LAW

The first issue is governed by Utah Code Ann. § 78-27-38(3) and § 78-27-38(4)(a), which provide:

No defendant is liable to any person seeking recovery for any amount in excess of the proportion of fault attributed to that defendant under Section 78-27-39.

In determining the proportionate fault attributable to each defendant, the fact finder may, and when requested by a party shall, consider the conduct of any person who contributed to the alleged injury regardless of whether the person is a person immune from suit or a defendant in the action and may allocate fault to each person seeking recovery, to each defendant, and to any person immune from suit who contributed to the alleged injury.

The second issue is governed by Utah case law.

STATEMENT OF THE CASE

A. Nature of the Case, Course of Proceedings and Disposition Below.

The plaintiff brought this subrogation action asserting its insured's claim for property damage to a vehicle. The case was tried to the court, which rendered judgment in favor of the plaintiff for \$2,746.47.

B. Statement of Facts.

The trial court found the facts to be as follows:

This property damage case arises out of an accident in Big Cottonwood Canyon, in which the plaintiff's insured ran over a rock in the road near the Storm Mountain Slide Area and suffered property damage to his vehicle. (R. 87, ¶ 1.) The defendant was a member of a group of four friends who were climbing at the top of a steep loose rock area south of the road in the area at the time of the accident. (R. 87, ¶¶ 2-3.) The climbers were following a route established in a published guide book they were using. (R. 88, ¶ 10.)

The defendant was the first of the group across the slide area and completed his crossing several minutes before the plaintiff arrived on the scene. (R. 87, ¶ 4.) No rocks were on the road following defendant's crossing, and the court expressly found that the defendant did not personally cause the rock which plaintiff hit to fall onto the road. (R. 87, ¶ 5.)

After defendant crossed, another member of the climbing party crossed. (R. 87, ¶ 6.) After the second member of the party crossed, the plaintiff collided with a rock of approximately 12" in diameter. (R. 87, ¶ 7.) No member of the climbing party was crossing at the time of the accident. (R. 87, ¶ 8.)

The court was convinced by a preponderance of the evidence that the defendant was the "guide" of the group and that he knew that rocks could fall onto the road from the climbing area. (R. 88, ¶ 12.) However, there was no pecuniary exchange between the parties on the climb; rather, they were a group of friends climbing together. (R. 88, ¶ 14.)

The court ruled that, by leading the expedition, the defendant assumed all of the duties and risks associated with the expedition. (R. 89, ¶ 2.) The court expressly found that defendant was "jointly and severally liable" for the damage caused by other members of the climbing party. (R. 89, ¶ 3.) Because the defendant did not join the other climbers in the action, the court refused to apportion fault to them and instead apportioned 100 percent of the fault to the defendant. (R. 89, ¶¶ 4-5.) Based upon the owner's estimate of damages (R. 89, ¶ 6), the court entered judgment against defendant in the amount of \$2,746.47. (R. 101.)

SUMMARY OF ARGUMENT

The trial court committed manifest error in applying the law of joint and several liability to hold defendant responsible for the fault of others. The Utah Liability Reform Act expressly provides for consideration of the fault of non-parties and re-

quires that the court not hold a defendant liable for fault exceeding his own.

The trial court also erred in finding that there was no pecuniary purpose in the outing, yet nevertheless holding defendant liable as the leader of an "enterprise." Mukasey v. Aaron, 20 Utah 2d 383, 438 P.2d 702, 704 (1968).

ARGUMENT

A. The Court Erred in Refusing to Apportion Fault to Non-Parties.

The court's findings conclusively establish that the defendant did not personally knock any rock down onto the road. It may be inferred from the evidence that another member of the climbing party may have done so. The court found that the rock was not on the road until several minutes after defendant had crossed the slide area, and after another member of the group had crossed as well. Nevertheless, the court apportioned to defendant 100 percent of the fault leading to the accident.

The court based its finding of liability on the erroneous legal principle that the defendant was jointly and severally liable for the fault of others. The court reasoned as follows:²

² The language of the written findings was taken verbatim from the tape record in the case. (Tr. 8-9.)

3. Under our joint and several liability law the defendant is responsible for 100 percent of the liability amount.

4. The defendant failed to file any third-party complaint against anyone else, and basically stands here alone. He had a remedy here that he did not avail himself of, to bring in another party to assume a portion or all of the liability if he thought that there was liability that should have been appointed elsewhere.

5. Because the defendant did not bring in additional parties for the purpose of apportioning fault to them, the court apportions 100 percent of the fault to the defendant. (R. 89.)

The Utah Liability Reform Act provides, "No defendant is liable to any person seeking recovery for any amount in excess of the proportion of fault attributed to that defendant under Section 78-27-39." Utah Code Ann. § 78-27-38(3).

Section 78-27-38(4) provides that the conduct of non-parties must be considered:

In determining the proportionate fault attributable to each defendant, the fact finder may, and when requested by a party shall, consider the conduct of any person who contributed to the alleged injury regardless of whether the person is a person immune from suit or a defendant in the action and may allocate fault to each person seeking recovery, to each defendant, and to any person immune from suit who contributed to the alleged injury.

Utah Code Ann. § 78-27-38(4) (a) (emphasis added).

The emphasized language is not ambiguous. It requires consideration of the "conduct" of non-parties. In the face of that

language, the trial court erred in refusing to consider the conduct of the other climbers on the basis that they were not parties to the action.

The trial court's action thus violates the requirement of the statute that no defendant be held liable for fault exceeding his own.³ The court's finding that no rocks had fallen after defendant crossed the slide area mandates the conclusion that no fault should have been attributed to defendant.

B. The Trial Court Erred in Holding Defendant Liable as the Leader of a Non-Commercial Enterprise.

The court based its decision in part on its conclusion that defendant was liable as the leader of the climbing party.

(R. 89, ¶ 2.) The court also found, however, that there was no pecuniary exchange between the parties on the climb; rather, they were a group of friends climbing together. (R. 88, ¶ 14.)

The decision to hold defendant liable as the leader of such a non-commercial "enterprise" is directly contrary to Utah law.

The elements of a joint enterprise are:

- (1) An agreement, express or implied, among the members of the group;
- (2) a common purpose to be carried out by the group;
- (3) a community of pecuniary interest in that purpose, among the members;
- and (4) an equal right

³ The terms "fault" and "defendant" are defined terms in the act, but neither definition requires that the at-fault person be a party to the action.

to a voice in the direction of the enterprise, which gives an equal right of control.

Mukasey v. Aaron, 20 Utah 2d 383, 438 P.2d 702, 704 (1968). The court expressly found that element (3) was missing. Thus, the court erred in assessing all liability to defendant on the basis that he was the "leader" of the group.

CONCLUSION

The decision of the trial court should be reversed. Because the court's findings establish that there was no basis for holding defendant liable, there is no need for remand for apportionment of fault.

STATEMENT REGARDING CALENDAR ASSIGNMENT

Defendant believes that this case should be resolved on the basis of well-established principles of Utah law, and that assignment to the memorandum decision calendar is appropriate.

DATED this 12th day of August, 1996.

SNOW, CHRISTENSEN & MARTINEAU

By 

Rodney R. Parker
Attorneys for Appellee

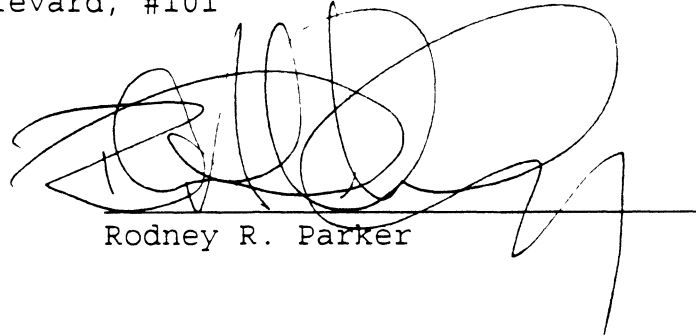
ADDENDUM

No addendum is required under the provisions of Rule
24(a)(11).

CERTIFICATE OF MAILING

I, the undersigned, hereby certify that on the 12th day of August, 1996., I caused two copies of the foregoing Brief of Appellee to be served by first class mail upon the following:

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