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Gilbert Capson and Linda Capson, His Wife v. A.J. Dean Ready Mix Concrete Company and Arctic Circle, Inc. : Appellants' Brief

Utah Supreme Court

Timothy P. Hanson; Attorneys for RespondentBoyd M. Fullmer; Attorneys for Appellants

IN THE

SUPREME COURT

OF THE

STATE OF UTAH

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GILBERT CAPSON and LINDA CAPSON, his wife,

Plaintiffs and Appellants,

vs.

A. J. DEAN READY MIX CONCRETE COMPANY and ARCTIC CIRCLE, INC.,

Defendant and Respondent.

Case No.

****

APPELLANTS' BRIEF

****

Appeal from the Judgment of the
for Salt Lake City, Honorable David

****

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IN THE

SUPREME COURT

OF THE

STATE OF UTAH

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GILBERT CAPSON and LINDA CAPSON, his wife,	)	
Plaintiffs and Appellants,	)	CASE NO. 14524
vs.	)	
A. J. DEAN READY MIX CONCRETE COMPANY and ARCTIC CIRCLE, INC.,	)	
Defendant and Respondent.	)	

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APPELLANTS' BRIEF

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Appeal from the Judgment of the Third District Court for Salt Lake City, Honorable David B. Dee, Judge.

****

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	)	
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APPELLANTS' BRIEF

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STATEMENT OF KIND OF CASE:

This is an action for damages for personal injuries sustained by the Plaintiff, GILBERT CAPSON, in an industrial accident, allegedly as the result of the negligence of the Defendant.

DISPOSITION IN LOWER COURT:

The District Court, per JUDGE DAVID B. DEE, granted Defendant, A. J. DEAN READY MIX CONCRETE COMPANY, Motion for Summary Judgment and dismissed the action with prejudice.

RELIEF SOUGHT ON APPEAL:

Appellants seek the reversal of the Judgment below.

STATEMENT OF FACTS:

On or about July 26, 1972, the Appellant, GILBERT CAPSON, was subcontractor doing foundation work for ARCTIC CIRCLE, INC. This work was taking place on the premises of ARCTIC CIRCLE at 1700 South 500 East, Salt Lake City, Utah.

ARCTIC CIRCLE was the general contractor on the job and had already completed doing the excavation work. This excavation was approximately FIVE (5) feet below grade level. It was the Appellant's responsibility to complete the foundation work inside of the excavation.

Concrete for the foundation was ordered from A. J. DEAN READY MIX CONCRETE COMPANY, the Respondent herein. The concrete was to be poured into the forms provided and set up by the Appellant. While the Appellant was in the process of pouring concrete into the forms, the bank on which the A. J. DEAN COMPANY truck was sitting gave way, severely injuring the Appellant. This action was commenced against ARCTIC CIRCLE and A.J. DEAN READY MIX COMPANY. In a prior action, Judge Sawaya dismissed Co-Defendant ARCTIC CIRCLE on the basis that Appellant failed to state a cause of action against the Defendant, ARCTIC CIRCLE. Appellant appealed the dismissal to the Utah State Supreme Court, which affirmed the District Court's dismissal on November 4, 1976. Capson v. A. J. Dean Ready Mix Concrete Co. and

Arctic Circle, Inc., 556 P.2d 505.

On September 8, 1977, the Third Judicial District Court, per JUDGE DAVID B. DEE, granted Respondent's Motion for Summary Judgment. This appeal followed.

ARGUMENT

POINT I.

APPELLANT AND RESPONDENT ARE NOT CO-EMPLOYEES UNDER U.C.A. § 35-1-42.

In its Memorandum of points and authorities in support of its Motion for Summary Judgment, Respondent claimed that Appellant and Respondent were "co-employees" under U.C.A. §35-1-42; therefore, any injury caused by Respondent was compensable only under the Workmen's Compensation Act. It is Respondent's rationale that since U.C.A. §35-1-42 makes both Respondent and Appellant employees of ARCTIC CIRCLE, that they were co-employees. Therefore, Under U.C.A. §35-1-60 Appellant is precluded from suit against Respondent. But Respondent's rationale is faulty. As Justice Maughan pointed out in his dissenting opinion in Shupe vs. Wasatch Electric Company, Inc. 546 P.2d 869, U.C.A. §35-1-42 is divided up into TWO (2) subsections-- the first section defining "statutory employer" and second section defines "statutory employee". Justice Maughn interpreted the statute in this way:

> The language of §35-1-42 clearly shows a legislative intent. The initial section provides:
>
> The following shall constitute employers subject to the provision of this title: Title is the key word here. Thus, the definition of §42 insofar as a "statutory employer" is involved is to be applied to

the entire act. In contrast, Subsection 2 provides those who are deemed "statutory employees" are made so only for the purpose of that section. Section is the key word. The pertinent provisions of Subsection 2 are:

> Where any employer procures any work to be done wholly or in part for him by a contractor over whose work he retains supervision or control, and such work is a part or process in the trade or business of the employer, such contractor, and all persons employed by him, and also contractors under him, shall be deemed within the meaning of this section, employees of such original employer . . .
>
> The legislature specifically has expressed an intention that its definition of "statutory employer" remain constant throughout the Workmen's Compensation Act...It is expressly confined to those provisions wherein the responsibility flowing to them from the "statutory employer" is set forth.

Thus just because Respondent and Appellant may be "statutory employees" of ARCTIC CIRCLE, they are not co-employees under U.C.A. §35-1-60; and therefore, that section is not applicable. To hold otherwise would completely ignore the clear intention of the legislature and the underlying policy under U.C.A. §35-1-42. Again, quoting Justice Maughan:

> The concept of "all persons in the same employment" does not include subcontractors, their employees on the same project; thus, they are not immuned as co-employees of the employer of an employee of a general contractor.[1] (emphasis added)
>
> The legislature in enacting §35-1-42 was not concerned with third party tort liability; its purpose was to establish a general statutory definition of an employer, to assure that a general contractor would guarantee compensation for the employees of a subcontractor. Where a statute such as §35-1-42 makes the general contractor the employer

[1] 2 Larson's Workmen's Compensation Law, §72.20, pp. 14-44 to 14-46.

> for the purposes of the compensation statute certainly he should enjoy the regular immunity of an employer from third party suit when the facts are such that he could be made liable for compensation. The majority of the Courts have so held.[2]

Further, Larson on Workmen's Compensation Laws states:

> . . . overall responsibility of the general contractor for getting subcontractors insured, and his latent liability for compensation if he does not, should be sufficient to remove him from the category of "third party". He is under a continuing potential liability; he has thus assumed the burden in exchange for which he might well be entitled to immunity from damage suits, regardless of whether on the facts of a particular case actual liability exists.

In the present case, we have a subcontractor bringing suit against another subcontractor. Neither of the subcontractors had any insurance that would cover the other subcontractor; nor were they under any obligation to buy any insurance covering the other subcontractor. Thus, neither should be given the immunity provided by U.C.A. §35-1-60.

POINT II.

AFFIRMANCE OF THE LOWER COURT'S DECISION CONFLICT DIRECTLY WITH U.C.A. §35-1-62.

If this Court should affirm the Lower Court's decision in granting Summary Judgment, U.C.A. §35-1-62 would become meaningless. The pertinent provisions of §35-1-62 provide:

> When any injury or death for which compensation is payable under this title, shall have

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[2] 2 Larson's Workmen's Compensation Law, §72.31, p. 14-47.

> been caused by a wrongful act or neglect of another person not in the same employment, the injured employee, or in the case of his death, his dependents may claim compensation and the injured employee or his heirs or personal representative may also have an action for damages against such third person.

This section allows an employee to bring suit against a person "not in the same employment" to recover damages resulting from the wrongful act or negligence of another person. In cases previously decided by this Court, it has been held that a subcontractor or any of his employees cannot bring suit against the general contractor. Adamson vs. Oakland Construction Company, 508 P.2d 805 (1973), and Smith vs. Brown, 493 P.2d 994 (1971). Conversely, it has been held that the general contractor or his employee cannot maintain an action for damages against a subcontractor. Gallegos vs. Stringham, 442 P.2d 31 (1968); Shupe vs. Wasatch Electrical Company, Inc., Supra; and Peterson vs. Fowler, 493 P.2d 997 and 510 P.2d 523. If now this Court were to hold that subcontractors are co-employees under U.C.A. §35-1-60, it would proclude any suits between persons who work on the same job. Thus, U.C.A. §35-1-62 would have little or no application. Under the Lower Court's ruling, wherein subcontractors are prohibited from bringing suit against other subcontractors, Appellant cannot imagine any situation in which any class working on the same job could sue another class working on that job; and therefore, under the lower Court's ruling, U.C.A. §35-1-62 would be meaningless. On the other hand, if this Court were to hold that even though the Respondent is a statutory employee of ARCTIC CIRCLE,

he is not necessarily a co-employee of the Appellants under U.C.A. §35-1-60. Therefore, the Appellant should be able to bring suit against the Respondent if he meets the qualifications of U.C.A. §35-1-62. This interpretation of the above-quoted statutes would give some meaning to U.C.A. §35-1-60.

As to the questions as whether the Appellant can qu under U.C.A. §35-1-62, the case of Peterson vs. Fowler, Supra, seems to be very helpful. This case was twice brought before t Supreme Court. In that case, an employee of the general contra was assigned by the general contractor to assist a subcontracto in putting ceiling tile on the top of a large sports arena. In order to place the ceiling tile, the subcontractor and his employees used a scaffold set up by a scaffolding company. In the process of applying the ceiling tile, the scaffolds fell an the general contractor's employee was killed. His personal rep sentative brought suit against the subcontractor, the architect, the company that supplied the scaffolding and the co that erected the scaffolding. In the first case, the Supreme C held that the employee was working under the control of the sub contractor and therefore was engaged in the "same employment" w the subcontractor. In the second case, 510 P.2d 523, the Court that the company that furnished the scaffolding and the subcont that built the scaffolding were not in the "same employment" wi deceased employee. The Court pointed out that the company that supplied the scaffolding was simply a materialman to the sub- contractor and therefore was not in the "same employment" as th subcontractor or the decedent.

The present case seems to be very similar. In the present case, the Respondent was merely a materialman to ARCTIC CIRCLE. Therefore, it cannot be said that it was in the "same employment" as the Appellant. And as Justice Maughan pointed out in his dissent in Shupe:

> The definition of a third party "not in the same employment" is not the subject of §35-1-42 (2). The concept of "all persons in the same employment" does not include sub-contractors, and their employees on the same project; thus, they are not immuned as co-employees of an employee of a general contractor. (Emphasis added)

CONCLUSION

The manner in which U.C.A. §35-1-42 was drafted makes it clear that the legislature did not intend to make the Appellant and the Respondent co-employees. Although it is true that both Respondent and Appellant may have been statutory employees of ARCTIC CIRCLE for the purposes of U.C.A. §35-1-42, this does not mean that they were co-employees for the purposes of U.C.A. §35-1-60, or engaged in the same employment with the purpose of U.C.A. §35-1-62. If this Court were to uphold the Lower Court's decision granting Summary Judgment, it would be saying that a subcontractor is barred from bringing suit against another subcontractor, and would thus make U.C.A. §35-1-62 a nullity.

The Appellant respectfully asks the Court to reverse the Trial Court's decision and remand this case for a trial on the merits.

Respectfully submitted,

FULLMER & HARDING

Boyd M. Fullmer

BOYD M. FULLMER
ATTORNEY FOR PLAINTIFF AND
APPELLANTS

CERTIFICATE OF SERVICE

Mailed TWO (2) copies of the foregoing Appellant's Brief to TIMOTHY R. HANSEN, Esq. Attorney for Defendant and Respondent, A.J. DEAN READY MIX CONCRETE COMPANY, 702 Kearns Building, Salt Lake City, Utah 84101 on this 12th day of December, 1977.

Deborah L. Woolley

SECRETARY