1987

Dana A. Meier v. Hobbs and Sons : Brief of Respondent

Utah Court of Appeals

Dean H. Becker; attorney for appellant.
Dana Meier; pro se.

DOCKET NO. 870028

COURT OF APPEALS

STATE OF UTAH

DANA A. MEIER, Plaintiff and Respondent vs. HOBBS AND SONS, Defendant and Appellant.	RESPONDENT'S BRIEF ON APPEAL Docketing No. 87-0028

RESPONDENT'S BRIEF ON APPEAL

An appeal from the Small Claims Court, Salt Lake Department, Fifth Circuit Court, Salt Lake County, State of Utah.

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STATEMENT OF THE COURT'S JURISDICTION

This appeal is from a final judgment from the Fifth Circuit Court of Salt Lake County, Salt Lake Department, and is taken pursuant to the provisions of Rule 3(a) of the Rules of the Utah Court of Appeals.

Statement of the Case

This case is in response to the damages that the Respondent suffered to his residence due to the negligence of the Appellant, who assumed liability for the work done on the sewer lateral located just off of the Respondent's property line.

The case was originally filed in the Small Claims Court on December 3, 1986. Of the four original defendants named in the case all were dismissed with the exception of the Appellant. The Small Claims Court heard the arguments of both parties and awarded judgement against the Appellant.

Statement of the Facts

1. The Appellant guaranteed all the work to the Taylorsville-Bennion Improvement District and is therefore legally responsible for the damages (Index of Record p. 22).

2. The break in the sewer lateral occurred approximately 13 feet beyond the Respondent's property line (Index of Record p. 16).

3. The Appellant verbally agreed to pay for any damages incurred due to their neglect. Upon receiving the bill for the damages the Appellant refused to pay (Index of Record p. 17 and pp. 18 - 19).

Summary of Arguments

1. The Appellant asserts that the Appellant was not involved with the installation of the sewer lateral. The Appellant however, did complete the work that was initiated by E. L. Cline Co. and did guarantee all the work on the project, whether that work was done by the Appellant or not. The Appellant is therefore responsible for the damage to the sewer lateral.

2. The completion of construction is the date that should be used to begin the Statue of Limitations time limit, not the date of a periodic inspection report that was used by the engineer. The certificate of completetion was issued on January 19, 1981 which would place the filing of the suit well within the time limit imposed by the Statue of Limitations.

3. The Respondent need not contract with the Appellant to recover damages done by the Appellant's negligence. The Appellant should not be allowed to hide from their responsibility simply because there was no Privity of Contract.

4. The Small Claims Court did correctly interpret the facts. It is the Appellant that misunderstood the facts and the testimony presented at the hearing, which facts include the statement that the sewer lateral was damaged at a location 10-14 feet off the property line and that no other individual or entitity dug any nearer than 10 feet away from the damaged portion of the sewer lateral until the sewer lateral was excavated for repair.

ARGUMENT

A. Factual Background:

In the summer of 1979 E. L. Cline Co. was retained by Arnold Development Co. to install the water and sewer lines for Whitewood Estates #2 (5700 South 3615 West). E. L. Cline was unable to complete the work on the above referenced project. At about this time, the Appellant renamed their corporation from Cornwell and Company to Hobbs and Sons. Most, if not all, of the corporate officers of Hobbs and Sons were at this time employed by E. L. Cline in management and supervisory positions. Shortly thereafter E. L. Cline Co. was involuntarily dissolved for failure to file a Corporation Annual Report in 1981.

By mutual agreement of all parties involved (i.e. Arnold Development Co., E. L. Cline Co., and Hobbs and Sons), the Appellant completed the work on the above project.

On September 10, 1979 the sewer lateral which extends from the sewer main to the property line of lot 95, Whitewood Estates #2, was damaged by the tooth of a backhoe as the subcontractor for the developer was backfilling the sewer lateral trench.

The Appellant completed the project on January 19, 1981 (Appellant's brief, Exhibit A) and guaranteed the work for one year to the Taylorsville-Bennion Improvement District (hereafter named Improvement District) on February 13, 1981 (Appellant's Brief, Exhibit B).

In October of 1985, the Respondent retained Nelson Trucking Co. (hereafter named Nelson) to connect the existing sewer

lateral to the residence being built on lot 95.

On November 16, 1985 the Respondent occupied the residence and discovered that the sewer lateral did not drain, which subsequently flooded the Respondent's basement. Within two days the Respondent contacted the Appellant, specifically George Hobbs Sr., and other parties who might have had liability concerning the damaged sewer lateral. In separate conversations that the Appellant had with the Respondent and with Nelson, the Appellant indicated that if the sewer lateral was damaged due to their neglect they would be responsible for the repairs. Nelson also gave the Appellant the opportunity of excavating the sewer lateral with their own equipment, thus reducing the possible cost of the repair to the Appellant should the damage prove to be caused by the Appellant's negligence.

On November 27, 1985, Nelson Trucking Co. excavated and replaced the damaged sewer lateral. Prior to removing the damaged sewer lateral, Nelson contacted the Appellant, specifically David Hobbs, to inspect the sewer lateral. At this time the Appellant indicated to Nelson that the damage was probably done by George Hobbs II, one of their employees and previous president of Cornwell and Company.

Nelson mailed a bill for the repairs to the Appellant on December 30, 1985. A copy of the bill was also sent to the Respondent (Index of Record pp. 18 - 19).

B. Arguments of Law :

1. **The Appellant should be a party to this action.**

The Appellant argues on page 9 of Appellant's brief "that the Appellant was not involved in any of the installation of the water and sewer lines and laterals involved in this matter", and that the only association the Appellant had to E. L. Cline Co. was that both entities hired Michael Hobbs at different times. At the time that Michael Hobbs was hired as foreman for E. L. Cline Co., he was also the vice president of Hobbs and Sons and also the licenced contractor which allowed Hobbs and Sons to do business in the construction industry. The Appellant also fails to mention that E. L. Cline Co. also employed, in management and supervisory positions, George Hobbs Sr., George Hobbs II, David Hobbs, Jeff Hobbs, as well as Michael Hobbs, most of whom comprised the corporate officers of Hobbs and Sons during the installation of the water and sewer lines involved in this matter.

Because the Appellant was closely involved with the installation of the water and sewer lines in this project, they were able to complete the work that was initiated by E. L. Cline Co. and thus they assumed total liability for the project by providing a one year guarantee on all work to the Improvement District (Appellant's Brief Exhibit B). If E. L. Cline Co. is actually responsible for the work in question, then why didn't Hobbs and Sons ever contact the Improvement District and correct the misunderstanding that the Improvement District had concerning

the completion of work and the one year guarantee?

The Appellant also argues on page 9 of his brief that the break causing the damage occurred "at a point on the Plaintiff's property." Testimony was entered into the record at the trial by Mr. Tracy Morgansen of the Improvement District and by Mr. Bruce Nelson of Nelson Trucking Co. that the break did occur outside of the property line. Mr. Morgansen testified that the break occurred below the gutter at the edge of the street. This location is approximately 10 ft. away from the property line. Mr. Nelson testified that the break occurred approximately 13 feet outside of the property line. The Respondent submitted, as evidence at the trial, a site plan of the property/street (Index of Record p. 16) which shows that the break occurred approximately 13 - 14 feet outside of the property line.

2. **The Statute of Limitations does not bar Recovery**

The Appellant argues on page 10 of the Appellant's brief, that "the work . . . was given approval by a government inspector on September 10, 1979, after which date no more work was performed." The document to which the Appellant refers (Appellant's Brief Exhibit D-1), was not issued by a government agency and does not give an approval of any kind for the work completed. The document in question is actually an inspection form that was used by Caldwell, Richards, & Sorensen, Inc., a private Engineering firm, that was retained by the Improvement District. Caldwell, Richards, & Sorensen Inc. did not approve the work in this inspection report, nor were they authorized to

give final approval of the project.

Utah Code Section 78-12-25.5 states:

> No action to recover damages for any injury to property, real or personal, or for any injury to the person, or for bodily injury or wrongful death, arising out of the defective and unsafe condition of an improvement to real property, nor any action for damages sustained on account of such injury, shall be brought against any person performing or furnishing the design, planning, supervision of construction or construction of such improvement to real property more than seven years after the completion of construction.
>
> (1) "Person" shall mean an individual, corporation, partnership, or any other legal entity.
>
> (2) Completion of construction for the purposes of this act shall mean the date of issuance of a certificate of substantial completion by the owner, architect, engineer or other agents, or the date of the owner's use or possession of the improvement on real property.

The legal completion of construction is the date the engineer issued the letter to the Improvement District stating that "Hobbs and Sons has completed the sanitary sewer and water lines for the above project" (Appellant's Brief Exhibit A). This date is January 19, 1981. Seven years after this date would be January 19, 1988. The action was filed December 3, 1986 which is well within the time limit specified by the Statute of Limitations.

It can also be argued, that the nature of the defect was such that any reasonable person could not detect the damage to the sewer line until the sewer lateral from the house was installed and operable, November 16, 1985. Therefore, the time limit for the Statute of Limitations would not begin until November 16, 1985.

No matter how this matter is construed the filing of the

action was done in a timely manner, within the Statute of Limitations time limit.

3. **The Appellant was negligent and cannot be shielded from liability merely because there was no Privity of Contract Between the Appellant and the Respondent.**

There is some question as to what part of the work was completed by E. L. Cline Co. and what part of the work was completed by the Appellant. If the Appellant did the actual installation of the water and sewer lines, then the Appellant was negligent in fulfilling his responsibility to install the lines properly and according to the Salt Lake County specifications. If the Appellant did not do the actual installation of the water and sewer lines, then the Appellant was negligent by guaranteeing the water and sewer lines to the Improvement District without verifying if the lines had been installed properly and according to the Salt Lake County specifications.

In the case of STEWART v. COX, 362 P.2d 345, the Supreme Court of California concluded that

> "Subcontractor . . . was not insulated from liability for property damage caused by Subcontractor's negligence in performing contract merely because there was no privity of contract between subcontractor and homeowners who had accepted the work."

The Appellant was aware that the work was being provided for a future homeowner, and that property damage to the future homeowner was foreseeable in the event the work was so negligently done as to prevent proper drainage to the sewer lateral. It is clear that the transaction between the developer

and the Appellant and/or E. L. Cline Co. was intended to specifically affect the future homeowner. The future homeowner, or the Respondent in this case, did suffer serious damage, which damage was caused by the Appellant's negligence.

In November of 1985, the Appellant did indicate that if the damage to the sewer line was caused through the negligence of the Appellant, the Appellant would be responsible for the repairs to the damage. The Appellant was present on November 27, 1985, when the sewer line was excavated and the cause of the damage was revealed. At this time the Appellant indicated that the damage was probably caused by George Hobbs II, an employee of Hobbs and Sons.

The Appellant did assume liability for the work performed and did verbally agree to pay for repairs to the work if the damage was caused by his negligence. Under all circumstances the Appellant should not be exempted from liability.

4. The Appellant, Not the Small Claims Court, Has Incorrectly Interpreted the Facts.

As the Appellant has indicated in the Appellant's brief, substantial evidence was submitted at the hearing to determine the location of the break in the sewer lateral. However, all of the evidence submitted shows that the break occurred approximately 10 - 14 feet outside of the Respondent's property line.

The Appellant also argues that the several parties may have dug around the sewer lateral since it's initial installation. It

is true that there may be several utility lines in the location of the sewer lateral, however these utility lines are located at maximum depth of 3 to 4 feet. The sewer line in question is located approximately 10 feet below grade, therefore precluding any utility companies from digging around the sewer lateral. It is also true that the Respondent hired Nelson to connect the sewer line from the house to the existing sewer lateral, which necessitated excavating the sewer lateral at the property line. Nelson was then working at a location, which, as testimony indicates, is approximately 10 - 14 feet away from the area in which the lateral was broken. Therefore, there was no other person digging in the location of the sewer lateral break since the installation of the sewer line.

CONCLUSION

Based on the facts of the case, and the foregoing legal arguments, the Court of Appeals must uphold the lower courts decision and modify it to award the Respondent the full amount of costs incurred in repairing the sewer lateral and the costs incurred in pursuing this appeal.

Dated this 24 day of April, 1987.

Dana A. Meier
Pro Se

Certificate of Service

I certify that I served four true and correct copies of the oregoing Respondent's Brief to:

DEAN H. BECKER #261
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)n the 24 day of April, 1987.