

1976

Gilbert Capson and Linda Capson v. A.J. Dean Ready Mix Concrete Company : Brief of Respondent

Utah Supreme Court

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BRIGHAM YOUNG UNIVERSITY
J. Reuben Clark Law School

GILBERT CAPSON and
LINDA CAPSON, his wife,

Plaintiffs and
Appellants,

v.

A. J. DEAN READY MIX
CONCRETE COMPANY,

Defendant,

ARCTIC CIRCLE, INC.,

Defendant and
Respondent.

Case No. 14524

RESPONDENT'S BRIEF

Appeal from the Judgment of the Third District Court for
Salt Lake County, Honorable James S. Sawaya, District Judge

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Clerk, Supreme Court, Utah

IN THE
SUPREME COURT
OF THE
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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 defendants.

DISPOSITION IN LOWER COURT

The district court granted defendant Arctic Circle, Inc.'s motion to dismiss plaintiffs' second amended complaint and dismissed the action as to said defendant.

RELIEF SOUGHT ON APPEAL

Respondent seeks an affirmance of the judgment below.

STATEMENT OF FACTS

Plaintiffs, husband and wife, commenced this action against defendants for personal injuries sustained by plaintiff Gilbert Capson in an industrial accident which allegedly resulted from negligence upon the part of the defendants. Defendant Arctic Circle, acting as its own contractor, was building a place of business. Plaintiff Gilbert Capson was employed by said defendant to do work on the foundation of the building. (R. 1, 33)

In plaintiffs' original complaint, they alleged in their first cause of action as follows:

"2. On or about July 26th, 1972, plaintiff Gilbert Capson was a subcontractor doing foundation work on the premises of the defendant Arctic Circle, Inc., . . .

"3. Arctic Circle, Inc., or its contractors or agents performed excavation work on the premises, which excavation was five feet or more in depth below grade.

"4. Plaintiff in performance of his subcontract obligation formed the foundation in the excavation provided by the defendant Arctic Circle, Inc., and concrete was ordered by Arctic Circle, Inc., to be poured in the forms provided by the plaintiff Gilbert Capson.

"5. The defendant, Arctic Circle, Inc., by and through its agents directed the placement of the A. J. Dean Ready Mix Concrete Company truck for discharging the concrete."
(Emphasis added) (R. 1)

These allegations were adopted by reference in plaintiffs' second and third causes of action. (R. 3)

Plaintiffs subsequently obtained leave to file an amended complaint, increasing the prayer for damages. (R. 25) Defendant attacked plaintiffs' original complaint, as amended, by motion to dismiss. (R. 15-16) That motion was heard before Judge Croft, who granted the motion, with leave to plaintiffs to file a second amended complaint. (R. 31-32)

Plaintiffs subsequently filed their second amended complaint, essentially restating the allegations of their original complaint and adding a fourth count for benefits under the Workmen's Compensation Act. (R. 33-40) In their second amended complaint, plaintiffs also added the following allegation in Count I:

"7. That the defendant Arctic Circle, Inc., directed the work of the plaintiff as to how he should hold the concrete forms during said pouring." (Emphasis added) (R. 34)

This allegation was likewise adopted in plaintiffs' second and third counts. (R. 35)

Defendant Arctic Circle attacked the second amended complaint by a motion to dismiss, since the defects attacked by the original motion were not cured by the amendment, and in fact were exaggerated. (R. 41-42) The motion to dismiss the second amended complaint was heard by Judge Sawaya, and after hearing, and after being taken under advisement, the motion was granted. (R. 51-52) This appeal followed. (R.52)

ARGUMENT

POINT I. PLAINTIFF GILBERT CAPSON WAS AN EMPLOYEE OF DEFENDANT ARCTIC CIRCLE, INC., WITHIN THE MEANING OF THE UTAH WORKMEN'S COMPENSATION ACT, AND THEREFORE HIS SOLE REMEDY IS FOR BENEFITS UNDER THE WORKMEN'S COMPENSATION ACT.

In their brief, plaintiffs concede that the court's

ruling was correct insofar as it pertains to the third and fourth counts. (Plaintiffs' Brief, p. 8) This court, therefore, need consider only the correctness of the court's ruling as to Counts I and II. Plaintiffs also concede in their brief that plaintiff Gilbert Capson was acting under the direction and control of defendant Arctic Circle at the time of the accident. (Appellants' Brief, p. 2)

The argument advanced by plaintiffs in support of their appeal wholly disregards the basis upon which the trial court acted in granting this defendant's motion. Section 35-1-42, U.C.A., 1953, insofar as material here, provides as follows:

"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 all subcontractors under him, and all persons employed by any such subcontractors, shall be deemed, within the meaning of this section, employees of such original employer. . . ." (Emphasis added)

Section 35-1-60, U.C.A., 1953, provides insofar as material here as follows:

"The right to recover compensation pursuant to the provisions of this title for

injuries sustained by an employee, whether resulting in death or not, shall be the exclusive remedy against the employer and shall be the exclusive remedy against any officer, agent or employee of the employer and the liabilities of the employer imposed by this act shall be in place of any and all other civil liability whatsoever, at common law or otherwise, to such employee or to his spouse, widow, children, parents, dependents, next of kin, heirs, personal representatives, guardian, or any other person whomsoever, on account of any accident or injury or death, in any way contracted, sustained, aggravated or incurred by such employee in the course of or because of or arising out of his employment, and no action at law may be maintained against an employer or against any officer, agent or employee of the employer based upon any accident, injury or death of an employee. . . ." (Emphasis added)

These statutory provisions have been interpreted by this court in a series of decisions commencing with Smith v. Alfred Brown Co., 27 Ut.2d 155, 493 P.2d 994 (1972), and Peterson v. Fowler, 27 Ut.2d 159, 493 P.2d 997 (1972). These decisions were followed in Doyle v. Facilities, Inc., 29 Ut.2d 41, 504 P.2d 1006, and Adamson v. Okland Construction Co., 29 Ut.2d 286, 508 P.2d 805. In the case last cited this court said:

"In the recent case of Smith v. Brown we had occasion to consider a closely analogous situation. We there set forth the principles which should be considered in applying the Workmen's Compensation Act to

such a problem: that the purpose of the act is to provide speedy and certain compensation for workmen and their dependents and to avoid the delay, expense and uncertainty which were involved prior to the act; and the concomitant purpose of protecting the employer from the hazards of exorbitant and in some instances perhaps ruinous liabilities. Those principles are applicable here and correlated to them is the proposition that the act should be liberally construed and applied to provide coverage and effectuate those purposes.

"Fundamental standards of justice dictate that it would be inconsistent to apply the act liberally in favor of the injured workman in order to find coverage by one employer on a project, and then to reverse that policy and adopt a restrictive view to exclude coverage of another employer on the project so that a suit could be maintained against him. . . .

"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 all subcontractors under him, and all persons employed by any such subcontractors, shall be deemed, . . . employees of such original employer."

It was upon the basis of this line of decisions that both Judge Croft and Judge Sawaya determined that plaintiffs' several complaints failed to state a claim upon which relief could be granted.

The case of Shupe v. Wasatch Electric Co., Inc., ___Ut.2d___, 546 P.2d 896, following the same reasoning and arriving at the same holding, was decided on February 20, 1976, five days before the hearing on this defendant's motion to dismiss the second amended complaint. That decision had not come to the attention of counsel at the time of hearing, and therefore was not brought to the attention of the court, but it adds further support to the correctness of the trial court's ruling.

The allegations of plaintiffs' several complaints, and particularly paragraph 7 of the first count of the second amended complaint, clearly bring this case within the line of authorities above cited. Plaintiffs by their own allegations specifically establish that defendant Arctic Circle not only retained supervision or control over Gilbert Capson's work, but actually controlled the details as to how the work should be performed. The trial court correctly held that under the provisions of Section 35-1-42, as it existed at the time of the accident, and as interpreted by this court, Gilbert Capson was an employee of defendant Arctic Circle, his sole remedy was under the Workmen's Compensation Act, and that his several complaints failed to

state a claim upon which relief could be granted as against defendant Arctic Circle.

POINT II. PLAINTIFF LINDA CAPSON HAS NO ACTION FOR THE PERSONAL INJURIES SUSTAINED BY HER HUSBAND.

In their complaint, plaintiffs claim not only damages for the injuries sustained by Gilbert Capson, but his wife also claims damages for losses allegedly sustained by her. That such claims and actions are not recognized in this state under the married women's emancipation statutes was firmly established by the holding of this court in Ellis v. Hathaway, 27 Ut.2d 143, 493 P.2d 985, where it was said:

"The wife has no basis for her action. At common law she could not sue for loss of consortium, and under the Married Women's Act no cause of action was given to her for negligent injury to her husband. . . ."
(Emphasis added)

This is an additional ground for dismissing the action as against plaintiff Linda Capson.

CONCLUSION

Plaintiffs' second amended complaint did not state a claim upon which relief could be granted as against defendant Arctic Circle. The trial court correctly granted

defendant Arctic Circle's motion to dismiss, and the judgment should be affirmed.

Respectfully submitted,

CHRISTENSEN, GARDINER, JENSEN & EVANS

s/

Ray R. Christensen
Attorneys for defendant
and respondent Arctic Circle, Inc.

CERTIFICATE OF SERVICE

Mailed two copies of the foregoing Respondent's Brief to Boyd M. Fullmer, Esq., Attorney for plaintiffs and appellants, 540 East 500 South, Suite 203, Salt Lake City, Utah 84102, and to Timothy R. Hanson, Esq., Attorney for defendant A. J. Dean Ready Mix Concrete Company, 702 Kearns Building, Salt Lake City, Utah 84101, this 2nd day of July, 1976.

K.A. Sumner

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