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

Utah Supreme Court

IN THE SUPREME COURT

OF THE

STATE OF UTAH

GILBERT CAPSON and LINDA CAPSON, his wife, Plaintiffs and Appellants, vs. A. J. DEAN READY MIX CONCRETE COMPANY, Defendant and Respondent.	CASE NO. 15431

BRIEF OF RESPONDENT

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

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NATURE OF THE CASE

This is an action brought by plaintiff, Gilbert Capson against defendant A. J. Dean Ready Mix Concrete Company for damages arising from a trench cave-in. In addition, plaintiff Linda Capson has sued defendant for loss of consortium and for medical and family expenses incurred by her on behalf of her husband.

DISPOSITION IN LOWER COURT

Defendant's motion for summary judgment was granted by the Honorable David Dee on September 13, 1977 as to all claims by both plaintiffs.

RELIEF SOUGHT ON APPEAL

Defendant-respondent seeks affirmance of the lower court

order.

STATEMENT OF FACTS

Appellants in their statement of facts have greatly simplified the procedural aspects of this case. This case was first filed in 1974. It has been reviewed and ruled upon by a number of District Court judges and by this Court in a previous appeal. The following is a brief outline of the procedural path this litigation has taken.

Plaintiffs filed the initial complaint on September 9, 1974 alleging that plaintiff Gilbert Capson suffered damages in the amount of $102,000 as a result of negligence caused by two Utah corporations--A. J. Dean Ready Mix Concrete Company (hereinafter Ready Mix Co.) and Arctic Circle, Inc. In addition, plaintiff Linda Capson claimed $5,000 for loss of her husband's services and for support of her husband and family. This complaint consisted of three separate causes of action. (R., pp. 1-4).

Defendant Ready Mix filed an answer to plaintiff's complaint on October 15, 1974. (R., pp. 7-9). The other defendant, Arctic Circle Inc., filed a motion to dismiss on October 10, 1974 on the grounds that it failed to state a claim upon which relief could be granted. (R., pp. 15-16). Subsequently, defendant Ready Mix Co. filed its motion to dismiss upon the same grounds. (R., p. 28).

On December 22, 1975 the Honorable Bryant H. Croft granted both motions to dismiss but gave leave to amend plaintiffs' complaint. (R., pp. 31-32). Accordingly, a second amended complaint was filed by plaintiffs on January 9, 1976 identical to the original complaint except that a fourth cause of action was added claiming that plaintiff Gilbert Capson was employed by Arctic Circle and was therefore entitled to receive medical expenses and unemployment benefits from defendant Arctic Circle. Also, plaintiff Linda Capson sought reimbursement for money expended by her for medical expenses and maintenance of the family. (R., pp. 33-40).

Once again, defendant Arctic Circle moved to dismiss the second complaint for failure to state claim upon which relief could be granted and failure of the court to have jurisdiction over the controversy. (R., pp. 41-42). Defendant Ready Mix filed an answer to the second amended complaint alleging affirmatively, inter alia, that plaintiffs were barred from bringing such action because of the provisions of Section 35-1-60 of the Utah Code Annotated, 1953. (R., pp. 43-45).

Defendant Arctic Circle's motion to dismiss the amended complaint was granted by the Honorable James Sawaya on March 1, 1976. (R., pp. 50-51). Plaintiffs appealed from this order of dismissal. (R., p. 52).

Pending the Arctic Circle appeal defendant Ready Mix moved for a dismissal. This motion was denied by the Honorable Marcellus K. Snow. (R., p. 59).

On November 4, 1976 this Court published its decision concerning the Arctic Circle appeal. (R., pp. 64-65; 556 P.2d 505). Justice Henriod in speaking for a unanimous court held that plaintiffs' complaint showed that Gilbert Capson was a subcontractor working under the direction and control of Arctic Circle Inc. This Court ruled that under Title 35-1-42 Utah Code Annotated, 1953, plaintiff became an employee of Arctic Circle and was therefore precluded from bringing a suit against it and that Capson's remedy was provided by Workman's Compensation. The lower court decision was affirmed.

On August 17, 1977 defendant Ready Mix Co. moved for a summary judgment based upon this Court's decision in the Arctic Circle case. On September 13, 1977 the Honorable David Dee granted defendant Ready Mix's motion for summary judgment against both plaintiffs. (R., pp. 97-98). From this order the present appeal is taken. (R., p. 99).

ARGUMENT

POINT I

THE UTAH WORKMAN COMPENSATION LAWS IN EFFECT AT THE TIME OF PLAINTIFF'S ACCIDENT PRECLUDES AN ACTION AGAINST DEFENDANT READY MIX CO.

The accident in this case occurred on July 26, 1972. As

such, any claims arising out of this accident were controlled by the law then in effect. Section 35-1-42 in part states:

> 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 a 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 provides an exclusive remedy against an employer, or officer, agent or employee of an employer. This section states in part the following:

> 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 liabilities whatsoever. (Emphasis added).

Section 35-1-62 addressed itself to injuries or death caused by wrongful acts of third parties. This section in 1972 stated:

> When any injury or death for which compensation is payable under this title shall have been caused by the wrongful 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 his heirs or principal representative may also have an action for damages against such third person. (Emphasis added).

Section 35-1-62 was subsequently amended by the 1975 legislature in which the term "same employment" was omitted and language speaking in terms of "employer" or "employee of said employer" was substituted. In addition, the following paragraph was added:

> For the purpose of this section and notwithstanding the provisions of Section 35-1-42, the injured employee or his heirs or personal representative may also maintain an action for damages against subcontractors, general contractors, independent contractors, property owners or their lessees or assigns, not occupying an employee-employer relationship with the injured or deceased employee at the time of his injury or death.

This statutory scheme in effect during 1972, this Court's decisions interpreting such statutes, and the pleadings of the plaintiffs conclusively establish that the trial court was correct in granting judgment in favor of defendant Ready Mix Co.

As noted by this Court in the previous appeal, plaintiffs' own pleadings allege that Arctic Circle, Inc., the general contractor, was the employer of plaintiff Gilbert Capson as defined in Section 35-1-42. Such pleadings also show that defendant Ready Mix Co. was acting under the control of Arctic Circle Inc. and was therefore a subcontractor of Arctic Circle at the time of the accident. See plaintiff's second amended complaint. (R., pp. 33-39 and appellant's brief, pp. 3-6).

Thus, it is agreed by the parties that both plaintiff Capson and defendant Ready Mix were subcontractors and thereby each became a "statutory employee" of the general contractor Arctic Circle as defined by Section 35-1-42, U. C. A.

Appellants contend that even though this relationship existed under Section 35-1-42 this status is not controlling for purposes of Section 35-1-60 and 35-1-62 for determining "same employment". (Appellant's brief, pp. 3-7). However, the law existing at the time of plaintiff's accident is contrary to appellant's position. This Court in several decisions clearly held that statutory employees were precluded from suing the employer or other "statutory employees."

In Gallegos v. Stringham, 21 U.2d 139, 442 P.2d 31 (1968) an employee of a general contractor sued the owner of a truck for injuries sustained by the employee. This Court concluded that the defendant in that case was acting under the control and direction of the general contractor and as such was an employee of the plaintiff's employer. This Court stated:

> We, therefore hold that the defendant was an employee of Gibbons and Reed Company within the meaning of Section 35-1-42, U.C.A., 1953. This being so, the plaintiff must look to Workman's Compensation insurance coverage and is prevented by Section 35-1-60 from suing the defendant in this case. 442 P.2d at 34.

In 1972 this Court in Peterson v. Fowler, 27 U.2d 159, 493 P.2d 997 (1972) held that an employee of a general con-

tractor could not maintain an action against a subcontractor "in the same employment" as the general contractor. Justice Ellett in a unanimous decision clearly defined the meaning of "same employment":

> To be fellow servants, they must be engaged in the same line of work and labor together in such personal relations that they can exercise an influence upon each other promotive of proper caution in respect of their mutual safety. They should be at the time of the injury directly operating with each other in the particular business at hand, or they must be operating so that mutual duties bring them into such co-association that they may exercise an influence upon each other to use proper caution and be so situated in their labor to some extent as to be able to supervise and watch the conduct of each other as to skill, diligence, and carefulness. When workmen are so engaged, we think they are working in the same employment. 493 P.2d at 1000. (Emphasis added).

In Adamson v. Okland Construction Company, 29 U.2d 286, 508 P.2d 805 (1973) this Court again established the relationship between Sections 35-1-42 and 35-1-62. In the Adamson case an employee of a subcontractor attempted to sue the general contractor. This Court held that Section 35-1-42 automatically made the plaintiff's employer (the subcontractor) an employee of the general contractor and as such the plaintiff was precluded from maintaining an action against the general contractor since he was then in the "same employment" as the defendant as enumerated in Section 35-1-62. This Court in the Adamson case also made a pertinent statement as

to the purpose of a Workman Compensation Act and its application. The Court said:

> [T]he 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. 508 P.2d at 807.

In Peterson v. Fowler, 29 U.2d 366, 510 P.2d 523 (1973) this Court decided the second appeal involving the death of the general contractor's employee caused by a fall in a sports arena. In the first appeal this Court affirmed the dismissal of the subcontractor on grounds that it was in the same employment as the decedent's employer and therefore was protected from suit by Section 35-1-62. In the second case several other defendants had been granted summary judgments by the trial court. This Court held that two of the three defendants were materialmen to the subcontractor and were therefore not in the "same employment" as the decedent. However, the Court sustained the motion for summary judgment as to these defendants on the grounds there was no evidence showing any negligence on their part.

Appellants' assertion that defendant Ready Mix Co. was a materialman to this project and not in the "same employment"

as plaintiffs (appellants' brief, pp. 6-7) is without merit in view of plaintiffs' own pleadings in the complaint and the undisputed fact throughout this appeal that Ready Mix Co. was a subcontractor of Arctic Circle. For example, appellants clearly state this fact in their brief when they say, "We have a subcontractor bringing suit against another subcontractor". (Appellants' brief, p. 5). Thus, any "materialman" distinction raised by appellants is completely inapplicable to the facts and pleadings of this case.

The final and perhaps most controlling case is Shupe v. Wasatch Electric Company, 546 P.2d 896 (Utah 1976). In that case the survivors of a deceased workman who was an employee of the general contractor sued a subcontractor for alleged negligence in causing the employee's death. The accident occurred on July 19, 1974.

This Court held that at the time of the accident Section 35-1-42 placed the employee in the same employment as the subcontractor and thus no cause of action was permissible.

This Court acknowledged the 1975 amendment to Section 35-1-62 and stated the following:

> The legislature, undoubtedly being aware of the decisions of this Court construing the terms "same employment" in 1975 amended Section 35-1-62, U.C.A., 1953 by adding the following provision:
>
> > "For the purposes of this section and notwithstanding the provisions

> of Section 35-1-42 the injured employee or his heirs or personal representative may also maintain an action for damages against sub-contractors, general contractors, independent contractors, property owners or their lessees or assigns, not occupying an employee-employer relationship with the injured or deceased employee at the time of his injury or death."
>
> The amendment if applicable would leave the plaintiffs in Court. Id. at 898. (Emphasis added).

This Court rejected a retroactive application of the amended statute. Citing Section 68-3-3, U.C.A., 1953 as authority this Court stated the following:

> The amendment above referred to provides a cause of action on behalf of an injured workman against individuals not covered by the statute prior to its amendment. To apply the statute retroactively would compel a new class of individuals to assume risks which did not exist prior to the amendment, and we are of the opinion that retroactive application would deny equal protection to a new class brought within the terms of the statute as amended so as to deprive them of equal protections of the laws. Id. at 898.

Appellants throughout their brief argue that it is unfair to make the persons who are employees under 35-1-42 persons of the same employment under 35-1-62 and that appellants cannot imagine any situation in which any class working on the same job could sue another class working on that job. (Appellants' brief, p. 6). Obviously, the arguments advanced by appellants

in their brief and by Justice Maughn's dissent in the Shupe decision had persuasive weight on the 1975 legislature which amended Section 35-1-62 to prevent a statutory employee from being automatically deemed an "employee" for purposes of Sections 35-1-60 and 35-1-62.

However, the very fact of amendment shows that the prior statute in effect at the time of the accident included a statutory employee in the "same employment" category. It is a well-established rule of statutory construction that when the legislature amends a statute it is presumed to have been intended that the statute have a different meaning than it had prior to the amendment and such amendment indicates not only the intention of the new law but also that of the old. Leonard Construction Company v. State Tax Commission, 539 P.2d 246 (Idaho 1975).

Thus, had plaintiff been injured in an accident after the effective date of the 1975 amendment it is probable, just as in the Shupe case, that plaintiffs "would be left in court". However, because this accident occurred prior to that amendment the old statutory language and the applicable common law created by this Court must apply.

Using this criteria there can be no question that both plaintiffs and defendant Ready Mix Co. were subcontractors of the general contractor Arctic Circle and were therefore co-

employees pursuant to the provisions of Section 35-1-42. The Gallegos case and the Adamson case clearly established the proposition that an employee under Section 35-1-42 is deemed a person of the same employment for purposes of Section 35-1-62. Appellant's own pleadings establish the employee status of plaintiff Capson and defendant Ready Mix Co. which standing alone is sufficient to divest the District Court of jurisdiction. As stated by this Court in the previous appeal:

> The record does not reflect that he pursued anything or any procedure, discovery, or otherwise, that would overcome his own pleaded statements or admissions of an employer-employee relationship or substantiate his urgence for the first time on appeal, of any debatable issue as to whether he was or was not an employee in the Workman's Compensation sense of the term. 556 P.2d at 506.

Aside from the statutory employee status, however, it is obvious that plaintiff Capson was in the "same employment" as Ready Mix when the activity surrounding the accident is examined in light of the standards enumerated by this Court in the first Peterson appeal.

Plaintiffs in their complaint alleged that Gilbert Capson has prepared the forms in the excavation of the building and that defendant Ready Mix Co. was engaged in pouring cement into the forms at the time of the accident. (R., pp. 1-2). Certainly the operator of defendant's cement truck and

plaintiff Capson were at the time of the injury "directly operating with each other in the particular business at hand" and were able to "exercise an influence upon each other to use proper caution and be so situated in their labor to some extent as to be able to supervise and watch the conduct of each other as to skill, diligence, and carefulness." 493 P.2d at 1000. Therefore, even under the common law terminology of fellow servants it is apparent that plaintiff and defendant were "in the same employment" at the time of the accident and plaintiff was therefore precluded by the then existing Section 35-1-62 from maintaining an action against Ready Mix Co.

For the preceding reasons the trial court was correct in granting defendant's motion for summary judgment and holding that the prior statutory law precluded a suit against defendant Ready Mix Co. by plaintiff Gilbert Capson.

POINT II

THE TRIAL COURT PROPERLY GRANTED JUDGMENT AGAINST PLAINTIFF LINDA CAPSON AS TO HER CLAIM OF CONSORTIUM AND FOR LOSS OF SUPPORT AND MEDICAL EXPENSES.

Plaintiffs' second amended complaint alleged that plaintiff Linda Capson sustained "great and irreparable harm in that she will be deprived of the services and support of her husband and she will continue to be so permanently deprived of the comfort and solace usually and ordinarily provided by

a husband in good health and unimpaired vigor." (R., p. 35).

This language clearly speaks in terms of a claim for loss of consortium. This Court has conclusively established that such a claim is invalid under Utah law. In Ellis v. Hathaway, 27 U.2d 143, 493 P.2d 985 (1972) a wife sought to recover for claimed loss of support, companionship, love and affection because of injuries which her husband received in an automobile accident. This Court stated:

> Plaintiffs are husband and wife. The husband was driving the car. He sued for injuries which he claims he received to his neck. The wife sued for claimed loss of support, companionship, love, and affection. She does not call it consortium.
>
> 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. Our statute placed husband and wife on an equal basis by saying: ". . .There shall be no right of recovery by the husband on account of personal injury or wrong to his wife. . ." (Citation to Section 30-2-4, U.C.A., 1953).

In light of the Ellis decision, the trial court was correct in granting judgment against Linda Capson for her claims of loss of consortium.

The trial court was equally correct in granting judgment against plaintiff Linda Capson for her claim of loss of support and medical expenses arising therefrom. Plaintiff's amended complaint stated the following:

> That plaintiff Linda Capson has also been damaged in that she has had to provide from her own funds for the payment of medical expenses and the support of the family of Gilbert Capson in the sum of approximately $18,000 and that she is thereby damaged in said sum. (R., p. 35).

As stated in the Ellis opinion supra, a wife has no cause of action for negligent injury to her husband. Plaintiff Linda Capson is seeking to recover for medical expenses and expenses for support of her family resulting from her husband's injury. Only her husband has a cause of action for these alleged damages.

This Court in Corbridge v. M. Morrin & Son, Inc. 19 U.2d 409, 432 P.2d 41 (1967) faced an analogous situation where a husband was attempting to recover for his own lost wages and expenses from missing work to provide care for his children while his wife recovered from injuries which she sustained from falling into an excavation. In affirming the summary judgment of the District Court against the husband this Court relied upon Section 30-2-4 U.C.A., 1953 for the premise that since a husband and wife were placed by the legislature on an equal basis that neither spouse can recover for expenses incurred as a result of injuries to the other spouse. This Court in Corbridge stated:

> The wife, (husband in the instant case) if anybody, should recover the expenses incurred in connection with her injuries. The reasonable value of the services which she was

> unable to perform as a result of her injuries and which she otherwise would have performed would be part of her recovery if any she is entitled to. (Parentheses added).

In addition, even if Linda Capson had a cause of action for these damages, which she clearly does not as stated in Corbridge, her husband is already seeking recovery for these same damages and any recovery by her would be duplicitous.

Thus, the trial court properly granted judgment against Linda Capson for her claims alleged in the amended complaint.

CONCLUSION

The trial court correctly held that Utah law applicable to this accident precluded plaintiffs from bringing an action against defendant Ready Mix Co. This Court's previous decisions and the language of these statutes establish that plaintiff, as a subcontractor of Arctic Circle, Inc., and defendant, as a subcontractor of Arctic Circle Inc., were both employees of Arctic Circle and were necessarily in the "same employment" as specified in Section 35-1-62. In addition, under the standards of this Court in the Peterson case plaintiff and defendant's agent would be deemed fellow servants under common law because of the type of work being done at the time of the injury.

While it may be true as appellants point out in their brief that it is unfair not to allow one subcontractor on a job to sue another this unfairness is and was a question for

the legislature and not for this Court. The 1975 amendment passed by the Utah legislature obviously eliminated this unfairness, if any, existing under the prior law but did so only as to prospective injuries.

This Court in the Shupe case has already ruled that the statute should not be applied retroactively because it would deny equal protection of the laws to those people in the class existing before the amendment and to those people after the amendment. Appellants must be bound by this decision just as were the plaintiffs in Shupe.

Finally, the claims raised by plaintiff Linda Capson are clearly without merit in that both loss of consortium and expenses incurred for family support and medical expenses are not recoverable under Utah law.

For these reasons the judgment of the trial court should be affirmed.

Respectfully submitted,

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