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Rulon Romrell v. W. W. Clyde and Company : Reply Brief

Utah Supreme Court

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IN THE

SUPREME COURT

OF THE

STATE OF UTAH

RULON ROMRELL,
Plaintiff and Respondent,

vs.

W. W. CLYDE & COMPANY,
Defendant and Appellant.

Case No.
13801

APPELLANT'S REPLY BRIEF

Appeal from a Judgment of the Fourth District Court
of Utah County, Honorable J. Robert Bullock, Judge

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ARGUMENT

POINT I.

WHETHER OR NOT THE ENTIRE CONSTRUCTION PROJECT WAS COMPLETED BEFORE THE INJURY OCCURRED TO PLAINTIFF-RESPONDENT IS NOT DETERMINATIVE; THE RELEVANT PORTION OF THE FENCE WAS COMPLETED AND ACCEPTED BY THE STATE AND DEFENDANT-APPELLANT SHOULD NOT BE HELD LIABLE FOR ANY INJURY OCCURRING THEREAFTER.

It is Plaintiff-Respondent's position essentially that since the entire construction project was not complete at the time of the injury that no acceptance of that portion of the fence completed could be effected. This view does not comport with reality because it fails to take into account the fact that most construction projects by necessity involve "piecemeal" completion and acceptance.

The first part of a road project to be completed is normally the fencing of adjacent landowners' property along the right of way under construction. As each phase is completed, it is inspected by the State and either approved or disapproved. What rational purpose for such inspection exists if the entire fence must be inspected at some later date (perhaps several years later)? As a practical matter, it simply is not done in the manner Plaintiff-Respondent suggests. Nor does it seem fair to indefinitely protract the contractor's potential liability. [See Appellant's Brief on Appeal, pp. 24-25.]

There is ample evidence in the record that there was a practical acceptance by the State of the segment of fence in question. It was the State to whom the responsibility to third parties would shift upon a practical acceptance of the fence, and in this case, the State viewed the work as it was being done, saw that it was done in accordance with its plans and specifications and accepted the work as having been completed and thereby assumed the risk of harm to third parties which may occur as a result of the work. That the entire project is not com-

pleted until some time in the future (some three or four years after the completion of the right of way fence in the case at bar) does not change the basic fact that, insofar as the State was concerned, the fence was finished and there was nothing left for the contractor to do in connection with it.

POINT II.

THE FACTS OF THIS CASE DO NOT PRESENT SUFFICIENT REASONS TO EXTEND LIABILITY TO THE DEFENDANT-APPELLANT, W. W. CLYDE & COMPANY.

The Plaintiff-Respondent maintains that the doctrine advanced in the case of *MacPherson* v. *Buick Motor Company*, 217 N. Y. 382, 111 N. E. 1050, L. R. A. 1916F, 696 — that one who is negligent should be held liable to third persons who may foreseeably be injured by his conduct — has been extended to building contractors. The *MacPherson* rule has, in fact, been extended to *building* contractors in many jurisdictions as a logical development of the doctrine's extension to the seller of chattels some twenty years earlier.

It is understandable that liability would be extended to building contractors because of the conceivable results of his negligence. Usually, in such cases, a structure of some sort is involved which is in most instances to be used by the general public or by persons who would not

normally have the opportunity nor the technical expertise to inspect the structure for defects.

The *Tomchik* case cited by Plaintiff-Respondent [p. 10 of Respondent's Brief] is illustrative of this point. This was an action by purchasers of a house against the general contractors for death of their daughter from carbon monoxide poisoning and for injuries sustained when they were overcome by carbon monoxide gas, on the ground of negligent construction of a gas furnace. Here there was good reason to make an exception to the accepted work doctrine. Few homeowners would have the technical know-how to make a determination beforehand concerning the safety or reliability of a furnace.

The Texas Law Review article cited by Plaintiff-Respondent [p. 10 of Respondent's Brief] explains another basic reason for limiting the liability of the contractor:

> "The basis of the [accepted work] doctrine is that one who is not in privity of contract with the manufacturer or contractor cannot recover for injuries resulting from the performance of the work. This privity rationale as applied to manufacturers has been repudiated, but additional reasons for limiting a contractor's liability have developed. The principal legal argument for limiting liability of a contractor is that an owner's negligence in maintaining a structure or land is the proximate cause of an injury while the contractor's negligence is only a remote cause. More significant, however, are the reasons which point to the special problems which con-

> front a contractor. A contractor, unlike a manufacturer, often does not engage in the production of fungible goods, or anything which closely resembles a finished product; rather his work is often subject to the control and modification of subsequent parties. A contractor often has little, if any, choice in the selection of the plans, specifications, and materials which he must use in his work. For these reasons the courts held that liability to third parties for injuries resulting from defects in construction work should attach to the person in control of it. However, as indicated above, there are exceptional circumstances which cause the contractor to be liable. Among the more prominent are: (1) when a contractor's work creates a situation that is imminently dangerous to human life, and (2) knowledge by a contractor that he has constructed a dangerous article." *Torts-Negligence — Independent Contractor Remains Liable After His Work is Accepted for Injuries Resulting from His Negligence*, 41 Texas L. Rev. 599 (1963).

The case before this Court does not involve a situation that was imminently dangerous to human life nor can it be realistically asserted that W. W. Clyde & Company had knowledge that it had, in constructing the fence, constructed a dangerous article.

The State of Utah has not expressly or otherwise repudiated the "accepted work" doctrine and this case does not present facts that would so warrant. Utah still requires privity of contract in actions against a manu-

facturer based upon warranty and one would not expect a contractor to be held to a higher standard than a supplier of chattels. This is not to say that the "modern rule" is without merit. If this case involved a structure or building that presented a danger to human beings, an argument for extending that doctrine might have some weight. Under the circumstances of the principal suit, it does not.

Even in states that have repudiated the "accepted work" doctrine and abolished contractual privity as a requirement, the limitation is still applied that where the contractor merely follows plans and specifications furnished him by another, he may not be held liable unless the plans were obviously defective. [See *Davis* v. *Henderlong Lumber Company*, 221 F. Supp. 129, 133 (N. D. Ind. 1963).]

CONCLUSION

As a practical economic reality, the fence in question was complete and accepted by the State at the time the Plaintiff-Respondent's cow and bull died. Construction of a fence is not the type of contruction that merits an extension of the "modern rule" and the "accepted work" doctrine is still controlling law in the State of Utah. Even if the Court were to extend the "modern rule" to this case, the limitation still applies that one who merely follows plans and specifications furnished him by the

owner cannot be held liable unless the plans were so obviously defective as to preclude a reasonable man from following them.

Respectfully submitted,

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