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In the Supreme Court of the State of Utah

1975
BRIGHAM YOUNG UNIVERSITY
J. Reuben Clark Law School

RULON ROMRELL,
Plaintiff and Respondent

vs.

W. W. CLYDE AND COMPANY,
Defendant and Appellant

Case No. 13801

BRIEF OF PLAINTIFF-RESPONDENT

APPEAL FROM A JUDGMENT OF THE FOURTH DISTRICT COURT FOR UTAH COUNTY, STATE OF UTAH, THE HONORABLE J. ROBERT BULLOCK, JUDGE.

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FILED
DEC 18 1974
Clerk, Supreme Court, Utah

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41 Tex. L. Rev. 599, (1963) 10

42 Va. L. Rev. 403 (1956) 10

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In the Supreme Court of the State of Utah

RULON ROMRELL, *Plaintiff and Respondent,* *vs.* W. W. CLYDE AND COMPANY, *Defendant and Appellant.*	Case No. 13801

STATEMENT OF THE NATURE OF THE CASE

The defendant-appellant's statement is substantially accurate excepting as to how the animals got under the fence at a cut made by defendant-appellant, as there was no evidence that the animals "crawled under the fence and the jury found there was no acceptance of the work of the defendant-appellant.

DISPOSITION IN THE LOWER COURT

Defendant-appellant's statement as to the disposition is accurate.

RELIEF SOUGHT ON APPEAL

Defendant-appellant's statement is correct with respect to the relief sought on appeal.

STATEMENT OF FACTS

Defendant-appellant's statement of facts is substantially correct as far as it goes, but some salient facts are left out. The fence in the general area of the cut in question was not

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completed by the contractor until long after the damage to plaintiff-respondent (Tr. 62 - p. 44, lines 16-30; p. 45, lines 1-23), (Tr. 62 - p. 14, lines 15-30; p. 15, lines 1-18). At the time the cow and the bull got out and died, the fence had not been completed. The fence had not been fastened down according to the plans and specifications and had been left unfastened at the bottom (Tr. 62 - p. 34, lines 9-27). The highway construction itself was not completed until long after the damage to plaintiff-respondent (Tr. 61 - p. 42, lines 12-30, p. 43, lines 1-30, p. 44, lines 1-10).

ARGUMENT

POINT I

THE EVIDENCE FULLY SUPPORTS THE VERDICT OF THE JURY AND THE JUDGMENT OF THE COURT THEREON.

The jury found under proper instructions from the court that the defendant-appellant was negligent and that its negligence was the proximate cause of the injury to the plaintiff-respondent. The jury found that the defendant-appellant was negligent in either failing to fasten the fence, which would be a failure to follow the specifications (Tr. 61 - p. 33, lines 25-30, p. 34, lines 1-11, and Tr. 61 - p. 21, lines 1-13, Tr. 61 - p. 11, lines 3-10), or in failing to place an obstruction in the cut under the fence, which any reasonable person would know was necessary to prevent damage to the animals regardless of whether such action was specified or not. Or the jury may have determined the negligence of the defendant upon both issues. The issue of contributory negligence raised by the defendant-appellant was determined by the jury against its claims.

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POINT II

THERE IS SOME EVIDENCE THAT THE DEFENDANT-APPELLANT ATTEMPTED TO DIG THE TRENCH UNDER THE FENCE PURSUANT TO DIRECTIONS OF A STATE EMPLOYEE, BUT IF IT DID SO IT DID IT NEGLIGENTLY FOR WHICH IT SHOULD BE HELD RESPONSIBLE.

POINT III

THERE WAS NO PRACTICAL OR OTHER ACCEPTANCE OF THE HIGHWAY CONSTRUCTION WORK INCUMBENT UPON THE DEFENDANT-APPELLANT WHICH WOULD INSULATE IT FROM LIABILITY TO PLAINTIFF-RESPONDENT FOR HIS DAMAGES.

Inasmuch as the defendant-appellant treats the same subject matter under its Points I and II in its Brief as we would treat under Points II and III, Points II and III are treated in this Brief together.

The defendant-appellant cites the case of *Black vs. Peter Kiewit Son's Inc., 94 Idaho 755, 497, Pacific 2d 1056 (1972)* in support of its view that a contractor is not liable to a third person where the contractor has performed its work in accordance with its plans and specifications. In that case it was stipulated that the respondent contractor had constructed the whole highway section in accordance with the plans and specifications, and that the State Highway Engineer had accepted the work as completed. This case involved the completion of a whole section of road and the acceptance thereof by the proper state authority. How different that is from the present case. It was pointed out by the court in the Idaho case that at no time after the work was accepted by the state did the contractor maintain or control such highway

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section, but that responsibility was left with the state. In the present case, the defendant-appellant didn't fasten the fence in accordance with specifications (Tr. 62 - p. 34, lines 9-27), (Tr. 61 - p. 33, lines 25-30, and p. 34, lines 1-11). That is what the jury believed and such belief was substantially supported by the evidence.

The defendant-appellant cites annotations in *13 A.L.R. 2d 195 and 58 A.L.R. 2d 869* to support its view that where the contractor performs his work according to plans and specifications there may be no liability imposed upon him for damage resulting from such construction. Interestingly, both annotations are entitled "Negligence of building or construction contractor as ground for liability upon his part for injury or damage to third person occurring after completion and acceptance of the work". It was further pointed out in the annotations that they did not deal with the liability of the contractor for negligence resulting in injury or damage to third persons during the performance or progress of the work. In examining the cases cited in the annotations, the work involved and not just isolated parts thereof had been completed and accepted by the owner. In the present case there had been a fence constructed although later completed long after the damage (Tr. 62 - p. 44, lines 16-30, p. 45, lines 1-23), (Tr. 62 - p. 14, lines 15-30, p. 15, lines 1-18). The construction of the fence was one of the first things to be done in a road construction job and an infinitesimal part of the whole road job. None of the cases that the writer has been able to find would imply an acceptance of a small part of a highway construction job, when the contractor remains in control.

The case of *Haynes vs. Norfolk Bridge and Construction Company, 126 Nebraska 281, 253 N.W. 344 (1934)* cited by

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defendant-appellant involved a contract for the construction of twin culverts. The evidence showed that the last work was done upon that project by the defendant Norfolk Company on the 18th of July 1930, and at that time the State's Project Engineer and the foreman of the Norfolk Company together estimated and agreed upon the yardage and the engineer in his book kept for the purpose stated that the work was finished and completed, and a day or two after that the Norfolk Company removed all of its equipment and entered upon work of construction on another project several miles distant from the scene of the twin culverts and upon an entirely different contract. The Court pointed out that the record disclosed that there was also a second contract between the state and another contractor, the latter to do the work of grading and servicing on the first project after the two culverts were installed. The injury in this case occurred after the total completion of the contract of the defendant and on or about July 30, 1930. This case involved a total completion of a contract and the acceptance by the state and the Court held that the defendant contractor was insulated from liability because of the acceptance after the total completion of the job. That is not at all the case on appeal before this Court.

The case of *Rengstorf vs. Winston Bros. Col, 167 Minn., 290, 208 N.W. 995 (1926)* cited by defendant-appellant involved a situation where a grading contractor contracted to construct certain grades but not to construct guard rails. The injury occurred when an accident happened because no guard rails were constructed. The construction of the guard rails was not in any way the obligation of the contractor. The Court pointed out that the defendant contractor's whole contract had been completed and accepted prior to the injury and the contractor was insulated from liability.

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The case of *Reynolds vs. Manley, 223 Ark. 314, 265 S.W. 2d 714 (1954)* also cited by defendant-appellant also involved another situation where the whole contract of the defendant had been completed and accepted on May 22, 1951, and an injury occurred on October 27, 1951. The State had had the responsibility for the upkeep and maintenance of the road long before the injury occurred.

The case of *Leininger vs. Stearns-Roger Manufacturing Company, 17 Utah 2d 37, 404 P. 2d 33 (1965),* also involved a situation where there had been the completion of a contract for the installation of a fan four years prior to an injury resulting from the dismantling and repair of an exhaust fan. The fan had been constructed according to the instructions of the employer of the independent contractor. The whole contract for the installation of the fan had been completed four years before according to the instructions of the employer. There was no claim in this case of any negligence on the part of the defendant contractor. That case also is entirely different form the facts of the present case where there was a piecemeal construction of a fence by a contractor whose responsibility it was to build a whole highway and whose negligence was proved by the evidence.

The defendant has cited no cases or authorities supporting the view that an acceptance or even an implied acceptance can be effected piecemeal. In other words, to follow defendant's argument to its logical conclusion, if ten feet of fence on a highway project had been constructed by a contractor on a road building contract just begun and the balance of a mile of fence was changed and altered, then there would be no liability on the part of a contractor if damage resulted from the faulty construction of a ten-foot strip of fence while the contractor was working on and was in control of

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the highway job. That cannot be the law and the cases do not support that view.

In the case *Leininger vs. Stearns-Roger Manufacturing Company, 17 Utah 2d 37, 404 P. 2d 33 (1965)* cited by defendant-appellant, supra, this Court acknowledged its familiarity with the old rule and the modern view. In that case, the Court applied the modern view with the limitation that the contractor is not liable if he merely carried out the plans, specifications and directions given him, at least when the plans are not so obviously dangerous that no reasonable man would follow them.

We submit that even under the doctrine of the Leininger case, supra, and disregarding the fact that in that case there had been an acceptance of the entire contract of the defendant four years before, and assuming the completion of the entire highway project in the area by defendant-appellant Clyde, the jury could have found for the plaintiff as it did base on either of the two specifications of negligence, (1) defendant-appellant's failure to fasten the fence pursuant to specifications, and/or (2) failure to provide an obstruction in the cut under the fence. If the jury's finding of negligence was based on the failure to fasten the fence it was proper because this would not be work done in accordance with the plans and specifications. If the jury's finding of negligence was based on defendant-appellant's failure to place an obstruction under the fence in the cut to prevent the animals from going under the fence it was also proper. Even when specifications are furnished, a contractor is not immune from liability merely because he follows the specifications if his work creates a situation which is so clearly dangerous that a reasonable and prudent man would not simply leave the work in a dangerous condition, which was the case here.

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The jury was instructed that a verdict could not be returned against the defendant-appellant if the loss to the animals occurred after the defendant-appellant had completed its work on or about the fence and the same was accepted by the state. That instruction was certainly more favorable to the defendant-appellant than it should be. The jury did return a verdict against the defendant and therefore had to have found that the work was not completed and accepted before the loss of the animals.

Whether or not the work was completed and accepted before the animals died was clearly a question of fact and since there was evidence produced on both sides of the issue, it was properly submitted to the jury. Defendant-appellant's argument, therefore, that the Court should have instructed, as a matter of law, that there had been an acceptance of the work is clearly erroneous. The issue, rather, is whether the jury's finding is supported by the evidence.

Both of defendant-appellant's witnesses on the issue, Lundell and Corless, testified that they had not accepted the work and turned it over to the State (Tr. 61 - p. 43, lines 1-30, p. 44, lines 1-10). There was also testimony by Mr. Corless that there was some work left for the contractor to do on the fence after May 22, 1972, the date appellant alleges it completed its final work on the fence (Tr. 61 - p. 36, lines 1-23).

In the rather extensive annotation in *38 A.L.R. 403* entitled "Personal liability of contractor in respect of injuries sustained by persons other than the contractor during the progress of the stipulated work" the general doctrine is stated on pages 495-496 as follows:

> "In this monograph it is proposed to review the cases which illustrate the operation of the general doctrine

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that an independent contractor is responsible for any wrongful acts that may be committed by himself or his servants while the stipulated work is in progress. In respect of the responsibility thus imposed upon him, there is an essential difference between his position and that of a servant.

"The ground upon which this responsibility is based is the implied duty which the law casts upon him, as the person in control of the work, to see that the rights of other persons are not injuriously affected by its performance.

"The responsibility so imputed extends not only to the work specified in the contract itself, but also to any additional work which the contractor undertakes in compliance with a direction given by the employer, acting in the exercise of a right expressly reserved in the contract, or which he voluntarily agrees to execute in pursuance of an agreement, while the contract is in course of performance.

"The doctrine that the independent status of a contractor is not destroyed by the employer's reservation of a right to exercise over the performance of the work a degree of control which does not extend to direction in respect of details obviously involves the corollary that a contractor must answer for his own tortious acts and those of his servants, although an agent was deputed by the employer to superintend the work, and see that the terms of the contract were complied with."

The work on the highway in the pertinent area had just begun and the defendant-appellant is responsible for the damages resulting.

POINT IV

THE APPELLANT-CONTRACTOR IS RESPONSIBLE TO THE PLAINTIFF RESPONDENT FOR DAMAGES RESULTING TO PLAINTIFF BY REASON OF THE NEG-

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LIGENCE OF THE APPELLANT CONTRACTOR.

As shown by the previous argument and the authorities cited by the defendant-appellant, the jury's verdict should stand under the facts and the law. There is, however, a further development in extending 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.* This extention is set forth so vividly in the case of *Tomchik, et al. v. Julian, et al., (California) 340 P. 2d 72,* which says:

> "The rule that a general contractor is not liable for injuries to third persons resulting from his negligence in construction of the work after the work is completed and accepted by the owner is no longer the law; the modern tendency being to hold building contractor to the general standard of reasonable care for the protection of anyone who may reasonably be endangered by negligence even after acceptance of the work."

To the same effect are the law review articles in the following law reviews: *41 Tex. L. Rev. 599, (1963); 42 Va. L. Rev. 403 (1956); 43 Marq. L. Rev. 252 (1959); 15 Okl. L. Rev. 68 1962). Also, see annotation in 58 A.L.R. 2d 865.*

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CONCLUSION

In any event, the appellant contractor in the case before this Court should be held liable on any theory adopted because of the negligence of the defendant-appellant and because the injury occurred while the contractor was in full control of the highway facility and long before it was completed and accepted and the verdict of the jury and Judgment entered thereon should be affirmed.

Respectfully submitted,

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