

1979

Gordon Benson and Sharlynn Benson v. Bert D. Ames Dba Bert D. Ames Construction Co : Appellants' Brief on Appeal

Utah Supreme Court

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IN THE SUPREME COURT OF UTAH
STATE OF UTAH

GORDON BENSON and
SHARLYNN BENSON,

Plaintiffs-
Appellants,

vs.

BERT D. AMES dba
BERT D. AMES CONSTRUCTION
CO.,

Defendant-
Respondent.

APPELLATE COURT

APPEAL FROM THE DISTRICT COURT OF
DISTRICT COURT OF UTAH
HONORABLE JUDGE

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Roosevelt, Utah 84066

IN THE SUPREME COURT OF UTAH
STATE OF UTAH

| | | |
|---------------------------|---|----------------|
| GORDON BENSON and | : | |
| SHARLYNN BENSON, | : | |
| | : | |
| Plaintiffs- | : | |
| Appellants, | : | |
| | : | |
| vs. | : | Case No. 16139 |
| | : | |
| BERT D. AMES dba | : | |
| BERT D. AMES CONSTRUCTION | : | |
| CO., | : | |
| | : | |
| Defendant- | : | |
| Respondent. | : | |
| | : | |

APPELLANTS' BRIEF ON APPEAL

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

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APPELLANTS' BRIEF ON APPEAL

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

STATEMENT OF NATURE OF THE CASE

This case involves a claim for damages by appellants against defendant-respondent for the diminished value of their residence because of the alleged failure of respondent to install a septic tank system which would function in a satisfactory manner.

DISPOSITION IN LOWER COURT

The case was tried without a jury to the court. The Honorable J. Robert Bullock ruled that plaintiffs had no cause of action against defendant since the septic system

had been approved by the Uintah County Building Inspector when a building permit issued, notwithstanding the fact that the design of the system had not been approved by the Utah Board of Health and was therefore constructed contrary to standards set forth in the Utah Code of Waste Water Disposal, a standard which appellants claim is applicable to respondent.

RELIEF SOUGHT ON APPEAL

Appellant seeks to have the trial court reversed and for an award of damages in accordance with the evidence received in the trial.

STATEMENT OF FACTS

Appellants are the owners of a home in Ballard, Utah. The home was constructed by one Ray Williamson, a licensed contractor who subsequently died. Williamson had sub-contracted with respondent to install the septic tank system in the home (R-39). A soil percolation test had been accomplished on the property and filed with the Uintah County Building Inspector as part of the building permit process (R-98-99). Respondent constructed the septic system in accordance with the approval with a minor modification in the number of drain fields necessitated because of an enlargement to the residence. The county building inspector approved the construction as to form (R-114).

Upon the house being apparently complete, appellants purchased the residence from Williamson, the general contractor. After living in the home for a short time they discovered that the septic system was not working properly (R-93) creating sewage backup. An inspection was made by a representative of the State Board of Health revealing that the soil surrounding the septic tank and drain system was red clay and therefore impervious to drainage. It was also discovered by the State Board of Health that the existing water table was too high to allow a septic system and probably the soil could not support the standard, conventional, as installed septic and drain system (R-55 & R-73). An alternative sewage disposal system was devised by a representative of the State Board of Health which respondent refused to install without further compensation, hence this civil action (R-39). There is no assurance that the alternative system costing approximately \$3,000.00 would work (R-67) and in the event it did not work, pumping of holding tanks and trucking the sewage to a treatment plant until such time as sewer lines may someday be connected to the Roosevelt City plant is the only way that the home can be occupied (R-68). There are no present plans for that extension and speculation was that it may be as long as ten years before appellants' property may be connected to public sewer lines (R-66).

Appellants offered expert testimony at the trial from a qualified real estate appraiser as to the diminished

value of their home because of the inoperative septic system (R-89), the \$375.00 paid out for temporary repairs and sewage hauling (R-95) and the estimated costs of the alternative system which may or may not work, \$3,750 (R-80).

The trial court took the matter under advisement and found that appellant had no cause of action against respondent either in tort or contract.

ARGUMENT

POINT I

RESPONDENT BEING A LICENSED SEWER CONTRACTOR ASSUMED THE RESPONSIBILITY FOR INSTALLING A SEPTIC TANK SYSTEM IN ACCORDANCE WITH THE UTAH STATE CODE OF WASTE WATER DISPOSAL REGARDLESS OF WHETHER OR NOT A COUNTY BUILDING INSPECTOR ERRED IN GRANTING A BUILDING PERMIT TO A GENERAL CONTRACTOR, FURTHER THAT RESPONDENT'S DUTY IS IMPOSED BOTH IN TORT AS WELL AS IN IMPLIED CONTRACT.

Respondent is a licensed sewer contractor by the Department of Contractors in the State of Utah. He acknowledges that sewage systems are covered by the Utah State Code of Waste Water Disposal and that as a contractor this Code applied to him (R-104). One of the requirements of that Code is that a septic system must be built a minimum of four feet above any impervious material (R-64, Code Page 4). The respondent knowingly built the system in red clay soil in violation of this Code and imperviousness of that material.

Presumably the Code is a standard for the regulation of persons who contract work under the particular speciality

of respondent. Presumably these type of regulations are promulgated for the health and safety of the general public and can therefore become a standard for tort liability if violated and a person meant to be protected by the Code is harmed. LANGLOIS V. REES, 10 Utah 2d 171, 351 P. 2d 638 (1960). See also KANELOS V. KETTLER 406 F. 2d 951 (D.C. Circuit 1968) where the District of Columbia Court of Appeals held that a housing regulation imposed upon a landlord a duty of compliance and that non-compliance was evidence of negligence.

The Code, being specialized in nature, was intended to protect persons such as the appellants who are not charged with the knowledge of it's contents notwithstanding the ministerial error of the county building inspector. Respondent can not be relieved of this duty by virtue of the fact that he was a sub-contractor from the general, if he retains independency in performing the work. In Restatement of Agency 2d Section 343, it is noted that an agent who does an act otherwise a tort is not;

"relieved from liability by the fact that he acted at the command of the principal or on account of the principal except where he is exercising a privilege of the principal or a privilege held by him for the protection of the principal's property, or where the principal owes no duty or less than the normal duty of care to the person harmed."

Paraphrasing from the Restatement of Agency 2nd, Section 220 gives guidelines on when a person is a sub-contractor with independent status rather than servant status,

which appear to involve the following tests:

1. Does the general contractor have control over the work to be done and to what extent?
2. Is the general contractor and the sub-contractor in distinct lines of business?
3. Is the work to be done without supervision?
4. Is some degree of specialized skill required for the job?
5. Who supplies the tools?
6. For how long is the sub-contractor employed?
7. Is the sub-contractor to be paid by the hour or by the job to be accomplished?
8. What is the employer's regular business?
9. Did the general contractor and the sub-contractor consider themselves in a master-servant relationship?

A fair reading of the entire transcript will lead to an obvious conclusion that respondent was an independent contractor from the general contractor and therefore liable for his own torts, a sale of the residence being an obvious intended result and a use of the house by it's occupants also being an obvious intent.

Since the applicable Code, Page 4, sub-section IV, (R-64) created a standard and therefore a duty on respondent, the un rebutted testimony of the various witnesses as to the cause of the septic system non-function, Roger (R-55), Currie (R-73), Montague (R-115), the fact that it was manually

constructed and approved by Montague as to a correctness in design is immaterial and adequately explained by this latter witness.

Respondent cannot escape liability on the claim that he was following specifications if he should have had reason to believe that those specifications were dangerous, as it is a common law duty of a contractor to inspect the ground and soil conditions for adequacy in construction projects. See KAVALARIS V. ANTHONY BROS., INC. 32 Cal Rptr. 205, 217 Cal. App. 2d 737 (1963). This Court in ANDRUS V. STATE 541 P. 2d 1117 (Utah 1975) affirmed a trial court's refusal to enter a judgment against a contractor on a jury finding that the contractor "did not negligently follow plans, specifications, and directions that were so obviously dangerous that no reasonable contractor would have followed them" affirming this general rule.

Respondent had performed percolation tests numerous times before this contract (R-100). He also knew that in the past there had been problems with installation of septic tanks in the immediate area of appellants' residence caused by the impervious nature of the red clay soil (R-98). Appellants submit that under the status of the record it was negligence for respondent to rely on someone else's approved test, a simple procedure, not even knowing how accurate the test had been. This conclusion is further supported in the record by the examination of James Currie,

employed by the Utah State Department of Health as an inspector, under cross-examination by respondent's attorney (R-73):

Q. (By Mr. Draney) "In your opinion, Mr. Currie, is the contractor justified in relying upon that percolation test as taken by the office of the government and the Department of Health?"

A. "No. We have worked with many of the contractors here. We have several meetings with the County Commissioners and with other officials here. It is my personal opinion that there is negligence on the officials of the county in allowing systems to go into areas where systems are not adequately protected, the environment is not adequately protected. There is an attitude here in the county that if a person has a piece of property they may do what they want in that piece of property."

Q. "If there had been a percolation test performed on the property and that percolation test proved to show that it was determinable or acceptable, then he would be justified in relying on that, wouldn't he?"

A. "That percolation test just shows what happens at one side, on one piece of property. To adequately percolate a piece of property, there should be anywhere from four to eight percolation tests taken on that property. However, this is not the case in this area."

Q. "But it's not customary here, isn't it?"

A. "No, it isn't customary."

Q. "And wouldn't you say in your opinion that a percolation is better than a test that shows that mud is sticking to the side of the backhoe?"

A. "No."

Q. "Why is that?"

A. "A percolation test only shows what happens at one time in one place. The Code also required that soil exploration be done according to that percolation test. Soil exploration was only done to 28 inches, therefore, at least four foot of fill had to be hauled into that site and the septic system put into the top two foot of that soil; and again, that is against the Code."

The conclusion that inadequate testing is permissible as a trade custom can not stand. Acts or omissions to act, if that custom is not reasonable, creates and imposes liability. THE T.J. HOOPER, 60 F. 2d 737 (2d Circ. 1932)

POINT II

APPELLANTS HAVE BEEN DAMAGED BY RESPONDENT'S ACTIONS AND ARE ENTITLED TO COMPENSATION.


There is no contrary evidence in the record that appellants did not suffer damages as a result of the defective septic system. As set forth in the Statement of Facts, the amount of their past, present and future damages in the form of expenditures and diminishing value was established at the trial. Should this Court find that respondent had a duty to appellants and breached that duty either in tort

or implied contract, appellants submit that a reversal should mandate the District Court to enter a judgment based on the record and status of the evidence in the sum of \$7,000.00 diminished value of this defective house, \$3,750.00 for the cost of remedial work, \$375.00 for out of pocket costs to the date of trial as contemplated in MITCHELL V. STEWART 581 P. 2d 584 (Utah 1978).

CONCLUSION

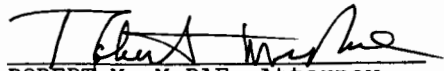
Based on the foregoing arguments this Court should find that the trial court erred in finding that the defendant-respondent Bert Ames was not liable to plaintiffs in either tort or contract. The judgment of the trial court should be reversed and damages should be awarded to plaintiffs.

Respectfully submitted,


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CERTIFICATE OF MAILING

I hereby certify that I mailed two copies of the foregoing, postage prepaid, to Dennis L. Draney, Attorney for Defendant and Respondent at 91 North 2nd East, Roosevelt, Utah 84066 on this 11th day of March, 1979.


ROBERT M. McRAE, Attorney