

1979

Gordon Benson and Sharlynn Benson v. Bert D.
Ames Dba Bert D. Ames Construction Co :
Respondent's 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-

Case No. 16139

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

Defendant-
Respondent.

RESPONDENT'S BRIEF ON APPEAL

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

DENNIS L. DRANEY
Attorney at Law
Attorney for Defendant
and Respondent
P. O. Box 1886
Roosevelt, UT 84066

ROBERT M. McRAE, for
McRAE AND DELAND
Attorneys for Plaintiffs
and Appellants
317 West First South
Vernal, UT 84078

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Defendant-
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RESPONDENT'S BRIEF ON APPEAL

APPEAL FROM THE JUDGMENT OF THE FOURTH
DISTRICT COURT OF UINTAH 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 the building permit was issued.

RELIEF SOUGHT ON APPEAL

Respondent seeks to have the decision of the trial court affirmed, and for his costs herein.

STATEMENT OF FACTS

Respondent is a general contractor in Roosevelt, Utah. He sub-contracted to construct a septic tank system for a home being constructed by Ray Williamson, a licensed contractor, who owned the home jointly with a third party. Prior to construction of the system, a soil percolation test was performed by Mr. Jess Miller, Uintah County Zoning Administrator and Inspector, (R-62). Respondent was advised by Mr. Williamson that the test was satisfactory, and that the design of the system was approved (R-99). Respondent constructed the system in accordance with the plans and percolation test submitted to him, and the system was accepted and approved except for reason that plans had not been submitted (R-62, R-71). After completion of the home, including respondent's work, it was sold to the appellants herein. Sometime after the home was sold, the appellants began to have difficulty with the septic system. Various officials examined the premises and the appellants hired another contractor who attempted to change the system. Upon failure of the alternative system, this action was commenced.

Following the trial to the court, the court ruled that appellants had no cause of action against the respondent, either in tort or contract.

ARGUMENT

POINT I

APPELLANTS ARE ESTOPPED FROM ASSERTING A CAUSE OF ACTION BASED UPON AN ALLEGED BREACH OF CONTRACT.

Appellants complaint alleges only negligence by the respondent. The evidence presented at trial sought only to establish negligence. Not until appellants filed their appellate brief did they allege breach of contract by the respondent. Therefore, respondent submits that because the issue of contract was not properly before the trial court, the appellants are now estopped from claiming a breach of contract and if they are to prevail, they can do so only by proving negligence on the part of the respondent.

POINT II

APPELLANTS HAVE FAILED TO ESTABLISH THE EXISTENCE OF ANY CONTRACT OF THE RESPONDENT WITH OR FOR THE PARTICULAR BENEFIT OF THE APPELLANTS.

Even if the court determines that appellants may, by this appeal, raise the issue of breach of contract, there is no evidence upon which to support a finding that a contract existed with the appellants, or for their

particular benefit. Appellants did not even allege that they had any relationship with the respondent until after his work was finished and certainly claim no contract directly with him. Their only possible claim would be as third-party beneficiaries. In order to perfect such a claim, they would be required to allege and prove that the parties to any contract intended to confer rights or benefits upon a third person; or that the contract was entered into directly or primarily for the benefit of such third persons, and that they were those third persons, 17 AmJur 2d, Contracts, Sections 304-305; KELLY v. RICHARDS, et al, 95 Utah 560, 83 P. 2d 731. To the contrary, the record shows that the contractor, Ray Williamson, was, along with another party, the owner of the home when the respondent entered into the contract and when he performed his work. Appellants fail to show in any way that any of the parties intended that the work to be done by respondent would be for the benefit of anyone other than those who owned the home at the time of the making and performance of the contract.

POINT III

APPELLANTS HAVE NEITHER ALLEGED NOR PROVEN THE NECESSARY ELEMENTS TO SUPPORT THEIR CLAIMED CAUSE OF ACTION IN NEGLIGENCE.

"It is a well-established rule of law in this, as well as other jurisdictions, that the acts of negligence relied upon by the plaintiff for a recovery must be both

alleged and proved."
INDUSTRIAL COMMISSION OF UTAH v. WASATCH
GRADING CO. 80 Utah 223, 14 P. 2d 988

"It is the settled law in this jurisdiction that negligence must be both charged and proved. A failure of either is fatal."
WOODWARD v. SPRING CANYON COAL CO. 63 P2d
267

Respondent submits that, if for no other reason, the decision of the trial court should be affirmed because the appellants failed to allege any acts of negligence by the respondent. Their complaint makes only a general allegation of negligence, but fails to set forth any particular acts or omissions of respondent which constitute negligence. Furthermore, there was no evidence presented to the court which would remedy that fatal defect.

"In order to constitute actionable negligence there must exist three essential elements - namely a duty or obligation which the defendant is under to protect the plaintiff from injury; a failure to discharge that duty; and injury resulting from the failure. Not only must the complaint disclose these essentials, but the evidence must support them, and the absence of proof of any of them is fatal to recovery."
INDUSTRIAL COMMISSION OF UTAH v. WASATCH GRADING
CO., supra at 992-993

In addition to the elements set forth in the foregoing decision of this court, a plaintiff seeking to establish a cause of action in negligence must prove that the alleged acts or omissions of the defendant were the

the proximate cause of any claimed injury.

"The connection between the negligence and the injury must be a direct and natural sequence of events, unbroken by intervening, efficient causes, so that...it can be said that the negligence was the proximate cause of the injury..."
57 AmJur 2d, Negligence, Section 128, p.479

Respondent submits that while appellants have shown that they have suffered some injury, they have completely failed to show that respondent had any duty to them, that any alleged duty was breached, or that any alleged breach was the proximate cause of the injury.

First, any claim of negligence must be based upon the existence of a duty owed to the plaintiff by the defendant. Appellants here presume to rely upon state regulations to establish that duty. However, they fail to show in any definitive way, that said regulations were ever intended to impose such a duty, or that it has ever been the law in the state of Utah that such a duty is imposed by these regulations. Respondent submits that in order for such a duty to exist, it must be clearly shown, not merely presumed.

Second, even if the court rules that a duty did exist, appellants have still failed to sustain their burden. Again, they apparently rely upon the regulations to prove that the alleged duty was breached by respondent's construction of a septic system in a particular type of soil. However, by the testimony of the respondent and three of appellants'

witnesses, it is clearly shown that the respondent exercised due care and acted reasonably in all he did concerning this matter. Respondent testified that when he was first approached about the job, he was concerned about problems with septic tanks in the particular area. He specifically asked the contractor about approval, and the contractor advised him and showed him the documentary evidence that the percolation test had been performed, and that the system had been approved. Respondent relied upon the assurances of the contractor and installed the system (R-98,99).

Three of appellants' witnesses, all qualified as having extensive experience, testified that it was customary and reasonable in the construction industry to rely upon the contractor and government officials to determine approval and acceptability of septic tank systems. Richard William Fausett, a contractor with licenses similar to those of the respondent, testified that in his work, he relies upon the Health Department to take such tests (R-83). James L. Rogers, an engineering geologist with extensive experience in hydrology and construction of sewer systems, testified that it was customary for a contractor to rely upon "other officials to provide the necessary expertise" (R-60). James D. Currie, a geologist and the area environmental health specialist testified that if the contractor did not take the percolation test, he was justified in relying upon the

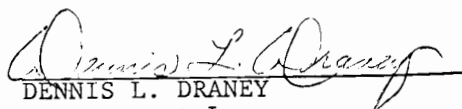
officials who took the test (R-73 lines 20-22, R-75). Therefore, respondent submits that he acted reasonably and with, not just ordinary, but particular care in determining acceptability and approval of the system he installed.

Third, appellants argue that respondent's negligence was installation of the system in the particular soil that existed at the site. Appellants' own witness, James D. Currie however, testified that the high water table in the area, as much as any other factor, would cause the system to be inoperative (R-73, 75). Based upon that testimony, respondent submits that appellants have failed to show that any alleged breach by respondent was the proximate cause of any injury sustained by them.

CONCLUSION

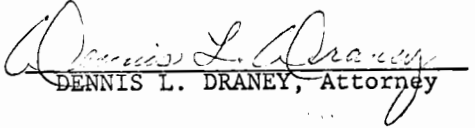
Because the appellants have failed to allege or prove any contractual obligation to them from respondent, or to properly allege or prove the elements of a cause of action in negligence, the respondent respectfully urges the court to affirm the decision of the trial court, and to award the respondent his costs herein.

Respectfully submitted,


DENNIS L. DRANEY
Attorney at Law
Attorney for Defendant
and Respondent
P. O. Box 1886
Roosevelt, UT 84066

CERTIFICATE OF MAILING

I do hereby certify that on this 15th day of June, 1979, I mailed two copies of the foregoing to Mr. Robert M. McRae, Attorney for Plaintiffs and Appellants, postage prepaid, at 317 West First South, Vernal, Utah 84078.


DENNIS L. DRANEY, Attorney