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Heber W. Glenn v. Gibbons & Reed Company : Brief of Respondent

Utah Supreme Court

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Case No. 7952

IN THE SUPREME COURT
of the
STATE OF UTAH

HEBER W. GLENN,

Plaintiff and Appellant,

— vs. —

GIBBONS & REED COMPANY, a
corporation,

Defendant and Respondent.

FILED

AUG 11 1953

Clerk, Supreme Court, Utah

BRIEF OF RESPONDENT

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BRIEF OF RESPONDENT

STATEMENT OF FACTS

The appellant is also the plaintiff and the respondent is the defendant, and hereafter, the parties will be referred to as plaintiff and defendant.

Defendant does not feel that plaintiff has fully stated the facts, nor emphasized those that are controlling. Therefore, as briefly as possible and without undue repetition we shall attempt to point out to the court those facts which seem to us to be determinative and decisive in this case.

Defendant is the owner of the property upon which the slide occurred damaging plaintiff's shovel. It is situated in South Davis County, east of the road leading to Val Verda where the cutoff takes place from Beck Street going north, and consists of mountainous country used for many years for gravel pit operations (R. 26, 27, 408). Although the property was under lease to Gordon T. Hyde, operating as the White Hill Sand & Gravel Company, the defendant as the owner had reserved the right to come upon its own property and take the gravel from it (R. 31). The defendant for many years has owned and operated many other gravel pits in this and other areas (R. 408).

Defendant testified that there is no standard procedure in operating gravel pits. There are many ways, but not any particular one is standard. It all depends on how you want to handle the gravel after you get it out. It can be extracted with a dragline, dozed down with a dozer, pushed over a trap, loaded with a shovel, loaded with a dragline, loaded with a back hoe, or loaded with an elevating grader, or pushed on to a belt conveyor. There is nothing unusual about using a shovel to excavate a gravel pit. "That is probably the major reason that a shovel was developed." To take material out of a mountain. It is not adapted to digging holes or to carrying dirt long distances. It was originated to operate particularly in gravel and sand pits and one of the most common methods of operating a gravel pit is by means of a shovel (R. 409-410).

On July 19, 1951, the defendant started to remove gravel from its pit involved in this case. From then until August 16, it had excavated from the mountain with its own shovel and without blasting 24,211 yards of earth. From August 16, until October 13, 1951, 49,175 yards of additional gravel was taken from its pit by the defendant so that defendant took from the pit 73,386 yards. On October 8, one Vic Newman began working in the pit with his shovel and he moved 6,784 yards of gravel. He loaded this into defendant's trucks for 10c a yard. He had a shovel of his own and so far as the defendant knew he was using his own shovel. Newman was an independent contractor hired by Mr. Reed, one of the defendant's officers, and worked under the supervision of the defendant's foreman Mr. Keith, neither of whom knew of any interest of the plaintiff in the shovel used by Newman. All Newman was hired to do was pick up the gravel with his shovel and load it into defendant's trucks; his man operated the shovel and all the defendant did was to furnish the trucks and Newman loaded them. He could go any place he cared to as long as he got the material the defendant could use for its customer (R. 406, 407, 362, 363).

The defendant had an order to furnish material to be used as fill for the Phillips Petroleum Company and indicated at the beginning of its operations that probably about 20,000 yards would be needed. Defendant started in at the base of the hill, which had not been theretofore worked, and proceeded with a shovel to work from south

end of the property to the north in a sort of half circle from the base of the hill and on into the undisturbed mountain (R. 30, 31, and 349, 350). The record contains a good deal of testimony about who originally handled the gravel and whose shovel did the original shoveling and so forth, which is immaterial to the points involved in this appeal, and we shall, therefore, not detail such evidence. The record is also full of statements and estimates as to the height of the vertical bank created by the shovel and blasting operations in excavating the gravel on defendant's land. The testimony of the man who was actually doing the blasting was that on October 13, the highest point from the ground level to the top of the cliff was some 65 feet and about $\frac{1}{2}$ of this or $32\frac{1}{2}$ feet was undisturbed and loose material sloping away from the face, so that the so-called vertical cliff was about $32\frac{1}{2}$ feet; then came the sloping material which extended out about 32 feet at an angle of 45° (R. 327). The defendant's foreman testified to the same thing and also that 20 feet in height from the bottom of this sloping material was solid dirt that had never been disturbed, topped by an additional ten feet of slough (R. 359, 360). It also appears that what is referred to by appellant as the vertical wall is not vertical at all, and never was vertical and was never steeper than a one to one slope. The face was never perpendicular (R. 352, 353).

As defendant proceeded with the securing of material it became necessary eventually to use some dynamite to blast in the mountain in order that there would be

loose material slough off to be picked up later by the shovels. Defendant at first used its own shovel and as heretofore indicated later engaged Newman with his shovel to continue the loading of the trucks.

Blasting begun, as above indicated, on August 16, was done after hours by employees of Mr. Hyde (White Hill Sand & Gravel), who were paid for this work by defendant. Defendant's foreman states that the blasting was always done after 4:30 in the afternoon. Some days they would not blast at all because there would be enough loose material (R. 355). Between about September 15 and October 13, very little material was moved from the pit by defendant. In that period White Hill Sand & Gravel loaded about 4,000 yards, and Newman loaded about 6,000, so that in the last month before the slide only about 10,000 yards were moved from the pit (R. 413).

As we have already indicated, up to August 16, 24,000 yards were moved; in the last month 10,000, so that between August 16, and the middle of September, more than half of all the material was moved from the pit.

Mr. Dastrup who was the Superintendent of White Hill Sand & Gravel, and an experienced powder man, and who had been doing the blasting for the defendant (R. 115, et. seq.), testified that on October 13, which was Saturday, the day before the slide, they used 32 sticks of dynamite, just one shot, and felt that as a result there would be plenty of material in the morning for the shovel

to scoop up and load into the trucks (R. 121). However, sometime during the night the entire mountain broke loose several hundred yards back from the place where the excavating and blasting was being done and moved from the southeast to the northwest, covered up the shovel being used by Newman, which we learned after the slide was owned by the plaintiff, covered some of the sheds of the White Hill Sand & Gravel and a good deal of the White Hill Sand & Gravel equipment, which was located up on the mountain far distant from the excavating operations. Mr. Hyde estimated probably half to three-quarters of a million yards of material moved in the slide (R. 68, 69).

Although no witness knew or testified to what caused this terrific slide, Dr. Cook, a witness for the plaintiff purported to advance a theory based upon hypothetical assumptions not present in the case. He assumed that there was a straight up and down cliff, a distance of 80 to 100 feet on a solid clay base, saturated with water, loosened by terrific blasting, so that the mountain slid out like a pea in a pod on the clay base. However, an examination of his testimony demonstrates that it is of very little value in this case. First, there is no evidence of a vertical cliff 80 to 100 feet high. There is no evidence of a clay base, nor is there any evidence of water saturation. Dr. Cook admitted that he didn't know the extent of the clay, but it looked like it would be about six or eight feet, but he didn't know how far back it went (R. 219). It sloped downward from west to east so that

the mountain would have to go up hill to move on the clay (R. 220): that in order to state that the clay was an important factor in the slide, he would have to know more about it. He summarized his own evidence as follows:

“Q. In order to consider the clay was an important factor in the break, wouldn't you have to know how extensive it was? Where it was, something about it?

A. Actually you would and I am expressing this merely as a theory. I agree. I don't know what exactly caused this break. I say that the evidence that is there I would suspect, as a result of the evidence there, that there was a clay bed underneath this burden. We see a clay bed. Now that is in about the right position for it to have caused this particular difficulty. And I will tell you one other thing that you know beyond any question—

Q. Now, wait a minute, before we leave this. You don't know where the clay bed is except where you saw it in this one spot out there?

A. Well you see in its position with respect to the rest of the burden that it was near the bottom of the break. It was near the bottom of the material.

Q. I say, you don't know how extensive it is, Dr. Cook?

A. That's correct. You can't see into the face.

Q. So you can't tell without knowing the extent of the clay bed whether it was a factor or not?

- A. That's right. You need to know all of those details to know that.
- Q. That's right. You need to know that. And you don't know that?
- A. That's right. I only suspect that that was the situation." (R. 233).

Although he also stated that the explosives were a factor at page 225, he then said the following in contradiction:

- "A. No, indeed. I don't believe that the explosives had anything to do with the break practically, only a slight amount. It doesn't have a direct, it wasn't the direct cause of the break."

Very little material was moved in blasting "sometimes there would be a ton or so at other times several tons come down." This is the testimony of the man who actually did the blasting (R. 313, 134).

It also appears from the record, not only that there was no solid clay base, but that it was not saturated with water. The clay only appeared occasionally, and the water only appeared once in a while. No witness testified that there was a saturated clay base. The defendant's foreman, Mr. Keith, testified that earlier in the work water was encountered, but as they proceeded back into the mountain it disappeared (R. 362). Neither Mr. Gibbons nor Mr. Reed had seen water and Mr. Gibbons had seen no clay (R. 412, 418).

Mr. Hansen, the original shovel operator for the defendant on this project, objected to working on the project when blasting operations began. He estimated that he had moved out about 50,000 yards of earth with the Gibbons and Reed shovel, and that at that time, the pit was not a great deal bigger than it was when 20,000 yards had been moved out. He objected to working any longer because the operation was dangerous to the shovel operator (R. 180). There was always a slope at the bottom and at the top and it was never straight up and down. The blasting occurred intermittently only over a period of about a month (R. 183).

There are many statements in the record about the danger of this operation, but that danger was only to the men working under the cliff from sloughing or from falling rocks. Mr. Hyde obviously didn't think that the operation was dangerous to him. He did not move his own machinery and equipment and it was covered over. He stated that while he didn't go in under the cliff because of the personal danger he didn't anticipate that anything would happen such as did happen. He didn't expect a slide to cover up his equipment. He didn't expect it at all. The danger that he was afraid of was to the person operating under the cliff. He never expected any slide of the character that occurred (R. 81, 82, 83). He felt that when they were blasting that was dangerous to anyone near the blasting (R. 88). He had no objection to his own superintendent and other employees working at the blasting as long as they were doing it on their own time (R. 92).

Mr. C. W. Spence, a witness for plaintiff and a former state inspector stated that he couldn't expect the whole mountain to move; the blasting might be dangerous for men who were near it, but you don't expect the whole mountain to move (R. 161).

Defendant's foreman, Mr. Keith, testified that on the 13th of October, 1951, he saw nothing different than on previous days (R. 359); that there was nothing to indicate that such a slide would occur, or that there was danger of such sliding (R. 373); that there was just a little water pocket in the formation at the northwest side; he only saw water a time or two (R. 385); that he would have done this operation just as he did had he known from the beginning that there was going to be taken out of the pit the amount that was taken out. He realized that there would be a little danger from the sloughing and to the powder men who were up digging the hole, "but he didn't know there was going to be anything like a slide like that." (R. 394).

On October 13, 1951 the plaintiff came out to the gravel pit looking for his shovel. He had loaned it to Newman who is a contractor in Salt Lake City, with whom he trades work frequently, and he had done so prior to this time. Newman works for himself and when he took the shovel he told plaintiff he was going to work at the White Hill Sand & Gravel Company with which operation the plaintiff was familiar. Plaintiff did not know how he intended to use the shovel and made no effort to

find out. Newman said he would use the shovel for about three days and later trade work with plaintiff for that three days work. On October 13, when the plaintiff went out to the gravel pit looking for his shovel; about 3:00 o'clock in the afternoon he found Perry, who was Newman's man, running the shovel between the sheds of the White Hill Sand & Gravel and the bank. He was loading dirt within 20 feet of the bank.

“Q. And what did you do?

A. I called the man off the shovel and told him to get it out of there and do it fast.

Q. And did he?

A. No, he did not.

Q. Did you stay there until he got it out?

A. No sir. I did not.

Q. Did you make any other effort to get it out?

A. I didn't have time.

Q. Did you make any effort that day to get it out?

A. I tried to find Vic Newman or some of Gibbons and Reed's men, and I could not find them. I drove down to the petroleum company and tried to find somebody down there that knew something about it and as it happened I missed them. They had just left there and that was all the effort that I tried to get it out. * * *

Q. And it was dangerous, looked dangerous to you where he was working?

A. Absolutely dangerous.

Q. And so you went off and left your equipment in this dangerous condition?

A. I didn't have any, I had on my good clothes, my car was in danger. I didn't want to leave my car there.

Q. Well I just asked you, Mr. Glenn, you went off and left your shovel there?

A. That's right.

Q. Left your shovel in that dangerous place?

A. That is it. I guess I did it.

Q. And did nothing more about it that day?

A. That's right." (R. 290, 291, 299, 301, 302).

Mr. Keith was at the pit and Mr. Perry remained there until 4:30 trying to get the shovel to work. On this night the shovel wouldn't go forward, but it would go backwards, and Perry parked it 100 to 150 feet from the face of the cliff (R. 128, 129). It appeared to be in a safe place (R. 127).

Mr. Glenn, the plaintiff, knew how to run the shovel and could have moved it away himself had he so desired. He did not rent the shovel to Gibbons & Reed. He rented it to Vic Newman who stated he would use it for about three days and when Glenn went out for it, Newman had had it about two weeks. The plaintiff is a contractor specializing in roads and excavating, and has been in that business for 35 years (R. 289, 307).

We had nothing to do with determining where the shovel would be left. The shovel operator would back it up to what he thought was a safe distance (R. 135).

PRELIMINARY STATEMENT

Defendant does not believe that the plaintiff has correctly approached the problem involved here. The defendant does not feel that its negligence or lack of negligence is an issue, nor does it feel that in this case it had any burden of proving or establishing the contributory negligence of the plaintiff. We shall, therefore, present the problem to the court under the following headings:

STATEMENT OF POINTS

POINT I. IN THE OPERATION OF ITS OWN PROPERTY, WAS THE DEFENDANT UNDER ANY DUTY TO ACCOUNT TO THE PLAINTIFF FOR THE METHOD USED.

POINT II. THERE IS NO ACTIONABLE NEGLIGENCE OF THE DEFENDANT IN THIS CASE.

POINT III. PLAINTIFF'S CONTRIBUTORY NEGLIGENCE AND THE BURDEN OF PROOF WITH RESPECT TO IT.

POINT IV. A CONSIDERATION OF PLAINTIFF'S POSITION AND BRIEF.

ARGUMENT

POINT I. IN THE OPERATION OF ITS OWN PROPERTY, WAS THE DEFENDANT UNDER ANY DUTY TO ACCOUNT TO THE PLAINTIFF FOR THE METHOD USED.

The defendant is the owner of the property upon which the plaintiff's shovel was being used. Defendant had no contract, express or implied, with the plaintiff for the use of his shovel. It did have an agreement with Newman whereby it paid him for shoveling the sand and gravel into its trucks for a specified price.

Newman was an independent contractor engaged to do certain work on the defendant's property for a consideration. He furnished his own equipment. So far as the defendant knew the shovel belonged to Newman. It had no relationship whatsoever with the plaintiff. Newman and the plaintiff had an agreement of benefit to both whereby plaintiff loaned his shovel to Newman, in return for the future use of Newman's shovel by the plaintiff. Defendant had no part in this transaction, nor did it know of it. Newman used the shovel as he saw fit. Defendant had no control over its use or operation, nor did it exercise any control over it, nor did it tell Newman where he should leave the shovel at the conclusion of the day's work. Newman was either a mere licensee or a very limited invitee. If he was a licensee, that is, "a person who enters upon the property of another for his own convenience, pleasure or benefit," then we owed him no duty

" * * * except not to harm him wilfully or wantonly, or to set traps for him, or to expose him to danger recklessly or wantonly." 38 *Am. Jur.* 765, par. 104.

If he was an invitee :

“There is no liability for injuries from dangers that are obvious, reasonably apparent, or as well known to the person injured as they are to the owner or occupant.” *38 Am. Jur.*, 757, 758, par. 97.

Newman was hired to do the very thing complained about by the plaintiff. Newman not only knew the conditions present, but was actively engaged for compensation in assisting in the creation of the alleged dangerous condition.

As to the plaintiff:

Defendant never invited the plaintiff to place his shovel on its property nor did it give him a license to do so. Had the plaintiff himself been present with his shovel, he would have been a trespasser.

The conditions surrounding the work were open and obvious and no witness, nor anyone else, had any reason to believe that the operations being conducted upon the land would cause the tremendous slide that occurred. Nor is there any evidence that the operations did cause a slide. No one knows what caused it. It is an unexplained catastrophe.

Plaintiff complains that the defendant was not operating the pit in the normal way. The owners of the pit are experienced men and they and their foreman stated that they were operating it in the only practical way, which was also normal and usual, in order to extract

the limited amount of gravel required by the defendant. Defendant was the one to determine how its pit should be worked.

It is elementary that

“An action to recover damages for an injury sustained by the plaintiff on the theory that they were caused by the negligence of the defendant will not lie unless it appears that there existed, at the time and place where the injury was inflicted, a duty on the part of the defendant and a corresponding right in the plaintiff for the protection of the latter.” *38 Am. Jur.*, par. 12, page 652.

So far as the defendant knew Newman was using his own shovel. The actual fact is that he was using the shovel at a place the plaintiff knew about, where he had a right to use it with the plaintiff's consent. The defendant owed to the plaintiff no greater duty than it did to Newman. It had no relationship whatsoever, express or implied, with the plaintiff. It did not request the plaintiff to loan Newman his shovel; it did not request Newman to use the plaintiff's shovel; the plaintiff had no right to have his shovel on the defendant's property except through Newman.

“In other words, there can be no actionable negligence where there is no act or service or contract which a party is bound to perform or fulfil. While the existence of a duty to use due care may be predicated merely upon a relation between the parties, and while its extent depends in the last analysis upon the circumstances of the particular

case, it is of necessity a real duty in every case of negligence, not to be supplied by proof of mere usage or custom, and the care which must be observed in its performance is measured by a definite standard." 38 *Am. Jur.*, par. 12, pages 654, 655.

The evidence in this case is undisputed that defendant was operating its property as it had a right to operate it. All of the conditions known to the defendant were as open and obvious to Newman, plaintiff or anyone else as they were to the defendant. The defendant had no control over the shovel or where it was left and never attempted to exercise any control of any kind over it. It owed no duty to Newman or the plaintiff and

"It is essential to liability for negligence, then, that the parties shall have sustained a relationship recognized by law as the foundation of a duty of care; some relationship must exist between the one inflicting the injury and the person injured, by which the former owes some duty to the latter." 38 *Am. Jur.*, par. 14, page 656.

Cases of highway accidents, automobile collisions and the like are not in point here because here the injury arose on defendant's own property, to one on the property for his own profit and under conditions which he himself was assisting in creating and which were as open and obvious to him as they were to anyone else. Neither plaintiff nor anyone else had the right to tell the defendant how it should operate its property.

The evidence without conflict shows :

1. That in the operation of our own property we owed no duty of any kind to the plaintiff; we never requested the plaintiff to bring his shovel on our property and never even knew that it was his shovel.

2. That the plaintiff never at any time had any right to tell us how we should operate our pit; we had the right to operate as in our judgment best suited our purposes.

3. The plaintiff made his own arrangements with Newman for Newman to use his shovel and these arrangements were for the benefit both of Newman and the plaintiff. Newman for his own and plaintiff's profit brought the shovel as his own on our property. Newman himself was a part of the operation and his own acts aided in the creation of any alleged danger, and all of the circumstances, the method of shoveling, the blasting, the loading, and actual condition of the ground, its condition as the work progressed, were as open, obvious and apparent to plaintiff and Newman as they were to us.

4. We had no knowledge, express or implied, of any dangerous trap, latent or concealed perils, or of any other facts which would lead us or any other reasonable person to assume that the thing that actually occurred would occur as a result of our operations.

POINT II. THERE IS NO ACTIONABLE NEGLIGENCE OF THE DEFENDANT IN THIS CASE.

None of plaintiff's authorities on foreseeability, proximate cause, or negligence are of assistance in the solution of the problem presented by this case. No witness anticipated that our operations would result in the tremendous slide that occurred, nor did any witness testify from facts that our operations did cause the slide. The cause of the slide is unknown and unexplained. It is a thing that has never occurred before or since in this area, nor was there anything that warned or should have warned anyone that such a cataclysm would occur.

The foreseeability rule applies to the things that human foresight can and should anticipate. Before we can discuss particular injuries it must have been reasonably foreseeable that the cause of the injuries could be anticipated. The rule is well stated in *38 Am. Jur.*, par. 61, page 712, as follows:

"In accordance with the general test of proximate cause above set forth, the law does not charge a person with all the possible consequences of his negligent act. He is not responsible for a consequence which is merely possible, according to occasional experience, but only for a consequence which is probable, according to ordinary and usual experience."

In the case at bar it was not even possible according to occasional experience for anyone to foresee such a slide because one had never occurred in any of defendant's

gravel pits or anywhere else in this area, nor is there any evidence that we could have anticipated any such slide as a result of usual and ordinary experiences. Continuing the quotation, the author says:

“It has been said that the natural and probable consequences are those which human foresight can anticipate because they happen so frequently that they may be expected to happen again, and that the possible consequences are those which happen so infrequently that they are not expected to happen again. Negligence carries with it liability for consequences which, in the light of attendant circumstances, could reasonable have been anticipated by a prudent man, but not for casualties which, although possible, were wholly improbable.”

Also the same author, *38 Am. Jur.*, par. 24, page 669, has the following to say:

“Generally speaking, no one is bound to guard against or take measures to avert that which, under the circumstances, a reasonably prudent person would not anticipate as likely to happen. Mischief which could by no reasonable possibility have been foreseen, and which no reasonable person would have anticipated, cannot be taken into account as a basis upon which to predicate a wrong. Negligence must be determined upon the facts as they appeared at the time, and not by a judgment from actual consequences which were not then to be apprehended by a prudent and competent man. * * * If men were held answerable for everything they did which was dangerous in fact, they would be held for all their acts from which harm in fact ensued.”

The last sentence applies particularly in the case at bar. It is true that the very nature of the operation itself carried with it certain dangers. As Spence, a witness for the plaintiff, said: Every gravel pit is inherently dangerous, gravel sloughs off all the time, it never stops sloughing, regardless of the height of the bank (R. 152). But the danger is to the men operating and blasting who were right against the material being loosened. The danger to be apprehended to them according to all the witnesses was only from the sliding or sloughing of the rocks, material and boulders in the immediate operation. The court in the trial of the case expressed this thought in opposition to the plaintiff's continuous repetition, when he said:

"The Court: Yes, it would be dangerous to him in a shovel, or the man standing at the base, but that isn't the issue here. These people aren't charged with having endangered this man's life or the man that put in the dynamite; they are charged here with operating in such a manner that caused this slide that caused this trouble * * * except insofar as it relates to the slide that happened that covered the shovel, I don't see how it is material, unless you can connect it up in that manner" (R. 181, 182).

Again the author at *38 Am. Jur.*, par. 23, page 665, has the following to say:

"Fundamentally, the duty of a person to use care and his liability for negligence depend upon the tendency of his acts under the circumstances

as they are known or should be known to him. The foundation of liability for negligence is knowledge—or what is deemed in law to be the same thing: opportunity by the experience of reasonable diligence to acquire knowledge—of the peril which subsequently results in injury.”

Also,

“On the other hand, an injury is not actionable if it was not foreseen, or could not have been foreseen or reasonably anticipated.” 38 *Am. Jur.*, par. 23, page 666.

This court is committed, of course, to the same universal doctrine as we have been discussing. In *Bogden v. Los Angeles & S. L. R. Co.*, 59 U. 505, 205 P. 571, this court states at page 578 of the Pacific Reports, par. 7 and 8,

“While the accident was an unfortunate one, yet it was one which the defendant could not have foreseen, and therefore cannot legally be held liable for. In the conduct of modern business enterprises, accidents will, and of necessity, must happen. The law, however, does not impose liability unless the party charged with negligence could by the exercise of reasonable care and diligence have prevented the accident.”

There is no evidence in this case that we knew or reasonably could have known, because what happened had never happened before, that our operations would result in a slide of the entire mountain. Nor is there any evidence that our operation was the cause of the slide.

We took the gravel out with a shovel and by blasting, which was customary. The only way that we could have avoided the accident was not to use our property and not to take out the gravel. Of course, plaintiff argues that terracing the pit or taking the gravel off the top would have avoided the accident, but we tried to terrace it without success and there was no top from which to take the gravel, because the mountain was untouched when we started the operation. The argument is made that we should have foreseen that operating the way we did would loosen up the entire mountain; the thing we could not have anticipated; it has never happened before or since in any of our operations or of any other operations in this area. So plaintiff's argument narrows to this in result: That we couldn't take out gravel from our land and use our own knowledge and experience as to the proper way to take out the gravel in the limited amount we needed. We know of no rule of law that would impose such a restriction on us nor has the plaintiff cited any. The plaintiff, himself, did not anticipate or foresee that our operation would cause this tremendous slide. Any danger that he did foresee was as open and obvious to him as it was to us.

We, therefore, respectfully submit that the plaintiff has shown no action for negligence against the defendant.

POINT III. PLAINTIFF'S CONTRIBUTORY NEGLIGENCE AND THE BURDEN OF PROOF WITH RESPECT TO IT.

As we have shown, the evidence of the plaintiff himself establishes that on Saturday, October 13, the day before the slide, at 3:00 o'clock in the afternoon, the plaintiff personally came to our property seeking his shovel. When Newman called him and asked for the use of the shovel he told the plaintiff he was going to use it at the White Hill Sand & Gravel Company, and the plaintiff consented. The plaintiff was familiar with the operations out there, but he made no effort to find out how the shovel was to be used (R. 291, 300). His testimony is the only testimony in the case with reference to his conduct. He is a contractor with 35 years experience in roads and excavating. Newman wanted to use the shovel for three days and he had already had it two weeks on October 13. When plaintiff got to the gravel pit he couldn't find Newman so "When I drove up I called to the operator, the man on the shovel and told him to get it out of the pit, that the pit was dangerous and I didn't want the shovel there." The operator was using the shovel at the time plaintiff was out there. He had it between the sheds and the bank and he was within 20 feet of the bank. Plaintiff told the man to get the shovel out, and he made no further effort to get it out except to drive up to the petroleum plant to try to find Newman or some of Gibbons & Reed's men. He thought that Perry (the operator) would walk it out, but he didn't stay to see that he did. He knew how to operate the shovel, but he had his good clothes on

and his car was in danger and he didn't want to leave his car, and so he just went off and left the shovel in that dangerous place and did nothing more about it (R. 302, 307).

The plaintiff testified that the place was absolutely dangerous. He, nevertheless, didn't move his own shovel, which of course, he had a right to do. He knew how to move it, but he had his good clothes on and he didn't want to leave his car in danger. So from his testimony the danger was very imminent, so much so that he couldn't take the time to move his shovel because to do so would be to leave his car in danger. He then went and left his shovel and did nothing further about it.

The slide did not occur until some 14 hours later. The operator was using the shovel and, of course, the plaintiff would know that he would continue to use it, but he voluntarily elected to leave it there for what he says were three reasons:

1. The operator said that he would have to get orders from Newman. Of course, that is not true because the plaintiff owned the shovel; he knew how to operate it and could have moved it himself. Also he immediately shows that that was not the reason because he says he expected the man to walk it out.

2. He didn't move it himself because he had on his good clothes.

3. He didn't move it himself because his car was in danger. Obviously his car was in no more danger than the shovel and yet he took no further action with reference to the shovel when there were 14 hours during which he could have done anything necessary to get the shovel away. Obviously the plaintiff did not regard the conditions there as so dangerous as to require him to take the shovel out. He, not we, assumed that the shovel would be backed out. We had nothing whatever to do with where the shovel was left; had no control over it, no connection with it. So the uncontradicted evidence shows that the plaintiff with full knowledge of all the circumstances left his shovel and went his way. He either did not regard the situation as dangerous to the shovel or else he voluntarily left it in a position of danger for his own convenience.

None of the defendant's officers or employees shared the plaintiff's apprehensions, so that he now finds himself in a position from which he is trying to extricate himself. That there can be no recovery by the plaintiff under such circumstances is well established.

Referring again to *38 Am. Jur.*, par. 171, page 846, we find the following, which is particularly applicable in this case:

“Thus, a person upon the property of another, who deliberately chooses to expose himself to danger of a patent character in the condition of the premises, which he could easily avoid with the exercise of care may not hold the landowner liable

for any resulting injuries, whatever may be the nature of his relationship to the landowner."

This is the doctrine of assumption of risk. Also, as to contributory negligence:

"No rule of the common law has been accepted more readily or more widely than the general rule that the contributory negligence of the plaintiff constitutes a defense for a defendant charged with negligence." 38 *Am. Jur.*, par. 174, page 848.

This court has long been committed to the doctrine that a plaintiff who subjects himself or property to obvious risks to avoid inconvenience to himself cannot recover as a matter of law.

Whalen v. Union Pacific Coal Co., 55 U. 445, 168 P. 99. In that case the court cited *Shearman & Redfield On Negligence* with approval as follows:

"But the plaintiff will be chargeable with contributory negligence if he runs the risk of an obvious and serious danger merely to avoid inconvenience."

In the case of *Bogden v. Los Angeles & S. L. R. Co.* 59 U. 505, 205 P. 571 heretofore cited on another point, this court said on the question of contributory negligence that the defendant did not even need to plead contributory negligence, and that without an affirmative plea it could take advantage of the evidence produced by the plaintiff:

“That a defendant may rely upon plaintiff’s evidence in that regard and may move for a non-suit or for a directed verdict upon plaintiff’s own evidence showing contributory negligence, and that he may request the court to charge upon that question upon such evidence, is fully considered and determined in favor of the proposition by this court.”, (citing cases).

In that case the defendant did not even plead contributory negligence and presented no issue with respect to it.

In *Kuchenmeister vs. Los Angeles & S. L. R. Co.*, 52 U. 116, 172 P. 725, at page 729 of the Pacific Reports, this court distinguishes between assumption of risk and contributory negligence, holding that the former implies an intelligent choice, whereas contributory negligence does not necessarily require intelligent choice on the part of the plaintiff. Both assumption of risk and contributory negligence appear in the case at bar to prevent the plaintiff from recovery.

The fact that the jury found no contributory negligence is not controlling. Not only do the Rules of Civil Procedure protect the defendant from unauthorized jury verdicts by permitting the court to give judgments notwithstanding the verdict, but this court even prior to the rules was committed to that doctrine.

In the case of *O’Brien vs. Alston*, 61 U. 368, 213 P. 791, the question was argued that the jury had fore-

closed the question of contributory negligence and purged the plaintiff of the same. In that case as well as in the case at bar the contributory negligence appeared from the plaintiff's own evidence and this court said at page 793 of the Pacific Reports :

"It is contended in the case at bar, however, that the jury passed upon this question, and have purged the plaintiff and her son of negligence. Where, as here, plaintiff's own evidence discloses that the acts and conduct of her son, for which she is responsible, were the proximate cause of the injury and damage complained of, neither court nor jury has a legal right to absolve her from the consequences of such conduct. To do that would be to permit one to recover damages which he himself has caused or could have prevented by the exercise of ordinary care and a compliance with the existing law. To permit a recovery under such circumstances amounts to the taking of property wrongfully from one person and giving it to another. That, the law does not tolerate, and no court or jury can rise above the law."

In the case at bar, the plaintiff could have walked his own machine out of the pit had he so desired. He, not the defendant, thought the shovel was in danger, yet he did nothing about it. He left it. The shovel could have been backed out, even though there was something wrong with it that would not permit it to go forward (R. 128).

In the case of *Taylor vs. Bamberger Electric R. Co.*, 62 U. 552, 220 P. 695, plaintiff chose to ride on the steps of an open railroad car rather than at a safe place inside because of smoke and heat in the interior of the car. Several interesting questions were discussed by this court that are present in the case at bar. There the plaintiff's negligence appeared from his own testimony. The court instructed the jury that the burden of proving contributory negligence was upon the defendant. This was error. In the case at bar the trial court did the same thing (R. 428, 429), and it may well be that one of the reasons for granting our motion for judgment notwithstanding the verdict was that the trial court realized that it should not so have charged the jury because that burden here was not ours. The evidence here is that of the plaintiff, himself, and is without conflict. As a matter of law, it bars the plaintiff from recovery. In the *Bamberger case*, *supra*, the court said (p. 701 P.):

“The ordinary and natural meaning of the language used by the court (that it was defendant's burden of proving contributory negligence) to the minds of ordinary laymen would therefore be to the effect that, the defendant having failed to produce any affirmative evidence upon the issue of plaintiff's contributory negligence, therefore that issue should be found in favor of plaintiff. In view of plaintiff's statements respecting his acts and conduct, which, under the circumstances, were certainly inexcusable, the jury must have construed and applied the language of the instruction as we have indicated, or they could

not have arrived at the conclusion that plaintiff was not guilty of contributory negligence as that term was defined by the district court."

Under the circumstances it was held that this instruction was erroneous. It was also held that the plaintiff was guilty of contributory negligence as a matter of law; that the evidence was uncontradicted and came from him, and, therefore, was not for the jury's determination.

The Bamberger case has been cited in other jurisdictions and was announced by our court because of similar holdings in other states. In the case of *Denham Theatre, Inc., vs. Beeler* (1941, Colo.) 109 P. 2d 643, the Supreme Court of Colorado cited the Bamberger case and held that where the plaintiff's own evidence discloses his negligence there is no burden of proof resting upon the defendant, and that to instruct the jury that the defendant has the burden of proof under such circumstances is error.

"Where it may legitimately be inferred from plaintiff's own evidence that she was contributorily negligent, there is no burden of proof resting upon defendant." (p. 655 #4.)

The proximate cause of the plaintiff's injury was leaving the shovel in a place of danger. We did not leave the shovel in a place of danger, we did not even place it in a place of danger. Plaintiff left his shovel in a place of danger according to his own evidence. Under

such circumstances his own conduct is the proximate cause of his damage. In *Olson vs. Denver & R. G. W. R. Co.*, 98 U. 208, 98 P. 2d, 944, this court held that although the defendant created the condition, it was the plaintiff's own act in running into the defendant's train which was the proximate cause of the accident.

The plaintiff voluntarily left his shovel in a position which he and he alone says was one of absolute danger. It is not our duty to back his shovel out. That duty was his if he felt it was in danger. Actually he could not have believed it to be in danger or he wouldn't have left it there. His excuse that he had on his good suit, etc., is the real reason and he cannot escape the consequences of his own act merely because it was inconvenient for him to act. The truth of the matter is that he didn't think the shovel was in any particular danger and if he didn't think so he can't charge us with any further knowledge than he had. Plaintiff is impaled upon either or both horns of his dilemma, assumption of risk or contributory negligence.

POINT IV. A CONSIDERATION OF PLAINTIFF'S POSITION AND BRIEF.

It will readily appear from an examination of the record that the plaintiff has only partially and incompletely stated the undisputed facts as they appear from the record. On pages 5 and 6 and 33 and 34 of his Brief, plaintiff lists 13 points which:

1. Do not establish any duty that we owe him,
2. Are not accurate,
3. Do not exonerate plaintiff from his corresponding duty even if there had been a duty owed him by us.

He states in his first three propositions that the gravel pit was operated with a vertical bank extending from 60 to 100 feet in height resting on a wet clay base, and that water ran down, through and along the clay washing therefrom the fine material holding the coarse gravel formation intact. Bearing in mind that we were operating our own gravel pit on our own property, the plaintiff has no right to complain about the method of operation unless we owed him a duty. However, nowhere does it appear that there was a vertical bank 60 to 100 feet in height. All the testimony is to the effect that there was a solid slope and loose material at least half way up the bank, the solid material had never been touched and the loose material was that which had sloughed off in the course of operations, so, although only one witness, Mr. Hyde, ever stated that the bank was 100 feet in height which obviously was erroneous from the testimony of all the other witnesses, that would only establish that the so-called vertical bank was 50 feet and that bank was never vertical, but always sloped back. There is no evidence that there was a wet clay base. Water was found only intermittently, as also

was the clay, nor did the water run down through the gravel washing it out; the evidence is that the water was never running and such water as there was was intermittent.

We have already commented on the value of Dr. Cook's evidence. He was the only one who purported to give a theory of this tremendous slide, and on cross-examination he conceded that he didn't know what caused it; that his theory was based upon facts given to him which he conceded were not borne out by the evidence.

Point 4 by the plaintiff is that we used dynamite. There is nothing in the evidence that the defendant violated any proper procedure in this respect.

In Point 5 plaintiff states that the operation was not in compliance with the orders of the Industrial Commission. This court will search the record in vain for any such evidence. Not only are the so-called regulations of the Industrial Commission too vague and indefinite to establish a duty, but Mr. Spence the former safety official of the state completely failed to point out any violation of these vague regulations on our part.

Point 6 is completely untrue that the pit was not operated in the normal and usual manner. It is true Mr. Hyde stated that he didn't operate the pit that way, but we are not bound to follow Mr. Hyde or his views, and the very fact that Mr. Hyde himself left his own machinery and equipment where it was damaged

by the cataclysm that occurred is conclusive proof that Mr. Hyde did not expect that our operations were dangerous to him. On the other hand, our foreman and both Mr. Reed and Mr. Gibbons testified that their operations were in accordance with established practice, and that we were using the shovel for the very purpose for which it had been invented.

Point 7 states that we had owned and operated other gravel pits and are familiar with other and normal procedures. That is true, and it is likewise true that this pit was operated in a normal manner.

There is no point to either number 8 and 9 since there is no evidence whatever that any other of our operators or engineers would have worked the pit in any different way than it was worked. In fact, the contrary appears, because both Mr. Gibbons and Mr. Reed are experienced operators and engineers and the pit was operated as it was with their full knowledge and approval.

The plaintiff stated in point 10 that we were warned by Mr. Hyde that the operation was dangerous. We have already shown that all Mr. Hyde was afraid of was for the safety of the men actually working in the blasting and in the removal of the material. He never warned us that there was any possible danger of the slide that actually occurred, nor did anyone else, nor is there a word of evidence that any such slide has ever occurred before in this area.

There is no point to number 11 because it was conceded that there was a danger to the men working from the sloughing off of material from the face of the cliff. That is not the kind of danger that plaintiff is complaining of in this case.

On point 12, there is not a word of evidence that men from a commercial operation refused to blast at this pit. The most that can be gained from that evidence is that two men came out and left; that they were hard-rock miners and didn't care to work in gravel, presumably because they knew nothing about blasting in gravel.

On point 13 there is not one witness who testified that this slide reasonably could be anticipated. Nothing of the kind was foreseen by anyone or could be foreseen by anyone because such a thing has never before occurred in this area.

Not one of the 13 points shows any duty that we owed the plaintiff. There is nothing in this case that required us to operate our pit to suit either Mr. Hyde's ideas or the plaintiffs. On the other hand, it appears from both the testimony of Mr. Hyde and from the plaintiff himself that if there was any danger both of them knew of it and were far more apprehensive than was the defendant, yet their apprehensions did not lead them to protect their property either because they thought their property was in no danger and if they

thought that to be the fact we cannot be charged with anticipating something neither of them anticipated, or in spite of the danger which was more apparent to them than to us they deliberately and of their own accord left their property where it could be injured. In either event there can be no recovery either by Mr. Hyde or the plaintiff since we owed no duty to them and if we did, they had knowledge equal or superior to ours and did not act to protect themselves, or else they felt that our operations were not dangerous to their property. Under any one of the propositions there can be no recovery by the plaintiff.

Plaintiff has cited many cases with which we have no quarrel. Actually they have no application, although several of them do announce well-established principals of law which absolutely bar the plaintiff from recovery in this case.

The cases and the texts discuss proximate cause, foreseeability, negligence and other well-established principles. There is not one case cited, and we have found none, where the event that caused the injury was of the kind with which we are concerned here. It is true that the rule is quite uniform that the foreseeability rule in determining proximate cause does not require the negligent person to foresee the injury in the precise form in which it occurred or to anticipate the particular consequences actually caused from his act or

ommission. However, it is likewise true that in all jurisdictions in determining proximate cause the law does not charge a person with all possible consequences of his negligent act.

“He is not responsible for a consequence which is merely possible, according to occasional experience, but only for a consequence which is probable, according to ordinary and usual experience. It has been said that the natural and probable consequences are those which human foresight can anticipate because they happen so frequently that they may be expected to happen again, and that the possible consequences are those which happen so infrequently that they are not expected to happen again. Negligence carries with it liability for consequences which, in the light of attendant circumstances, could reasonably have been anticipated by a prudent man, but not for casualties which, although possible, were wholly improbable.” 38 *Am Jur*, par 61, page 712, (supra).

Of course, all the authorities cited assume that the defendant owed a duty to the plaintiff. In *Cove vs. Thompson*, 254 P. 2d 1047, cited by plaintiff at page 35, this court affirmed a directed verdict because of the deceased's contributory negligence. The court also discussed the last clear chance rule, with which we are not concerned in this case.

Stone vs. Railroad, 32 Utah 205, 89 P. 722, commences at page 715 of the Pacific Reports, and the quotation given by the plaintiff is completed by the following which when applied to plaintiff bars his recovery:

"If the act is one which the party, in the exercise of ordinary care, could have anticipated as likely to result in injury, then he is liable for any injury actually resulting from it, although he could not have anticipated the particular injury which did occur."

The evidence in the case at bar is all to the effect that no reasonable person could have anticipated the slide that injured the plaintiff's shovel. The plaintiff however, claims that he was apprehensive for his shovel working in close proximity to the bank. He was not so apprehensive that he took any steps to remove it from the pit, clearly indicating either that he didn't care or that he didn't think it was in any particular danger.

The next case cited by the plaintiff is *Mountain States Tel & Tel. Co., vs. Consolidated Freightways*, 242 P. 2d 563 (cited in plaintiff's index as 232 P. 2d). That case merely applies the test of foreseeability, which as we have already pointed out has no application here since no one could foresee or did foresee that the entire mountain would slip away or that there was any danger to anyone except as might be caused by sloughing material and rocks.

The texts cited by plaintiff are merely repetitious of the principles announced in the cases. This is particularly true of the annotation 155 A. L. R. 157.

In the case of *Coray vs. Southern Pacific*, 112 Utah 166, 185 P. 2d 963, this court made several interesting

observations particularly applicable here and which in our judgment point up both the lack of a cause of action and also the plaintiff's equal responsibility if there was any responsibility. At page 968 of the Pacific Reports, this court stated in par. 12:

"Jurors sitting as triers of the fact are not empowered to decide legal questions, nor draw any conclusions of law therefrom except as guided by the instructions of the court. If there is no dispute as to the facts, there is no occasion to instruct the jury, for the jurors have no conflict in evidence to determine, and no ultimate facts to find."

In our case as we have already pointed out the plaintiff himself brought out all the facts with reference to his knowledge, his fears, his apprehensions and what he did. There was no burden upon us to prove this and it was undisputed. There was nothing for the jury to decide. Nor is it disputed that we owned the land and that the plaintiff's shovel was present on said land at the plaintiff's own risk. This court also said (par. 14) in that case:

"The 'cause' must, of course, be the legal cause, in order to be the basis of recovery. To show merely that the injury would not have occurred had there been no violation of the act, is not the equivalent of showing that the violation was the cause thereof. 'In order to be the legal cause of another's harm, it is not enough that the harm would not have occurred had the actor not been negligent * * *. The negligence

must also be a substantial factor as well as an actual factor in bringing about the plaintiff's harm. The word 'substantial' is used to denote the fact that the defendant's conduct has such an effect in producing the harm as to lead reasonable men to regard it as a cause, using that word in the popular sense in which there always lurks the idea of responsibility, rather than in the so-called 'philosophic sense,' which includes every one of the great number of events without which any happening would not have occurred. Each of these events is a cause in the so-called 'philosophic sense,' yet the effect of many of them is so insignificant that no ordinary mind would think of them as causes.' "

On page 969 this court said :

"So in the instant case the question of liability may be considered as a question of whether there was any breach of duty on the part of the railroad to plaintiff's intestate, rather than a question of proximate cause."

That is exactly the question here. There was no breach of duty in the case at bar owed by the defendant to the plaintiff and the court so found as did this court in the Coray case.

On the question of plaintiff's contributory negligence plaintiff, of course, is understandably vague. He states at page 38 of his brief :

"Under the tension and strain of cross examination as to why he did not personally remove the

shovel instead of attempting to locate Newman, he testified that he had his good clothes on and didn't want to leave his car in danger."

This is not the entire extent of the plaintiff's conduct as we have already pointed out and to which we shall make no further reference.

The case of *Clay v. Dunford*, 239 P. 2d 1075, cited by plaintiff at page 39, discusses assumption of risk as compared to contributory negligence and states that (p. 1076):

"The essential elements of assumed risk are *knowledge*, actual or implied, by the plaintiff of a *specific* defect or dangerous condition caused by the negligence of the defendant in the violation of some duty owing to the plaintiff, * * * together with the plaintiff's *appreciation* of the danger to be encountered and his voluntary exposure of himself to it."

Page 1077 of the Pacific Reporter also states:

"It has been said that 'knowledge of the risk is the watchword of * * * assumption of risk'."

In our case there is lacking also the violation of a duty owed plaintiff by us.

The case of *Gibbs vs. Blue Cab*, 249 P. 2d 213, cited by plaintiff at page 40, states as is the general rule that each case depends on its own facts, with which we agree.

There is no case cited by plaintiff, nor have we found one asserting that a property owner using his

own property for the very purposes for which it is valuable is bound to protect a person on said property for his own benefit, with full knowledge of everything being done and of all the facts and circumstances surrounding the activity, from the results of an event that was not and could not be foreseen by anyone present at the operation.

The case of *Stickle vs. Union Pacific R. R. Co.*, 251 P. 867, cited at page 41 of plaintiff's brief does not add anything to the discussion. This court said at page 870 of the Pacific Reporter, par. 7 and 8:

"It should be kept in mind that so far as the quantum of proof necessary to take the question of contributory negligence from the jury is concerned, the tests are the same as with respect to primary negligence."

In the case at bar there is no conflict in the evidence regarding plaintiff's conduct. It came from the plaintiff's own lips. He, of all those present, was the only one who claimed that there was any danger to his shovel. He did nothing about it. He could have done something about it. He voluntarily elected to do nothing, either because he didn't think there was any pressing danger to the shovel or else because he was heedless of its safety. There was nothing to be decided by the jury with reference to plaintiff's conduct, nor was there anything to be decided by the jury with reference to our duty so far as the plaintiff was concerned.

The very reason that our rules have been drafted as they are to permit courts to give judgment notwithstanding jury verdicts is a long recognized necessity of protecting litigants from unwarranted, unauthorized and illegal jury verdicts.

CONCLUSION

The District Court was right in giving judgment to the defendant. In the use and operation of its property it owed no duty to the plaintiff; it was guilty of no acts or omissions for which it could be held liable for negligence. It was also wrong to submit the case to the jury because the plaintiff's own testimony establishes that he both assumed the risk and that his own conduct was the proximate cause of his damage. If there was negligence in this case it was the negligence of the plaintiff which bars his recovery.

Respectfully submitted,

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