

1954

Heber W. Glenn v. Gibbons & Reed Company : Petition for Rehearing

Utah Supreme Court

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IN THE SUPREME COURT
of the
STATE OF UTAH

HEBER W. GLENN,

Plaintiff and Appellant,

— vs. —

GIBBONS & REED COMPANY, a
corporation,

Defendant and Respondent.

PETITION FOR REHEARING

AND

BRIEF OF AUTHORITIES

FILED

FEB 20 1954

Clerk, Supreme Court, Utah

SHIRLEY P. JONES

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Attorneys for Defendant

GIBBONS & REED

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IN THE SUPREME COURT of the STATE OF UTAH

HEBER W. GLENN,

Plaintiff and Appellant,

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GIBBONS & REED COMPANY, a
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No. 7952

PETITION FOR REHEARING AND BRIEF OF AUTHORITIES

The defendant respectfully petitions the Court for a rehearing and shows:

STATEMENT

The Court has not applied the correct rules of law to the facts of this case. This appears from the following quotation from the Court's decision appearing on page 2:

“The fact that the defendant did not foresee the likelihood of such *an accident* is not controlling here, for it was warned that there was danger to the men working under the vertical bank. Negligence may be the proximate cause of damage even though the actor was not able to foresee the injury in the precise form in which it occurred, nor to anticipate the precise damage which would result from his negligence. *Mountain States T. & T. Co. v. Consolidated Freightways*, *Utah*, 242 P. 2d 563, *Furkovich v. Bingham Coal & Lumber Co.*, 45 *Utah* 89, 143 P. 121, L.R.A. 1915B, 426.”

BRIEF OF AUTHORITIES

There are no additional authorities, nor have we found a single case, until this one, holding a landowner liable under conditions present here. We respectfully submit that the Court has given emphasis to selected excerpts of testimony and then applied inapplicable legal principles to them. The damage here was not caused by a break in the vertical bank, nor by sloughing or sliding material. Those are the dangers feared by the witnesses. The evidence and the photographs depicting the same show that the bank is still standing.

The thing that caused the damage was the movement of the entire mountain. No witness testified that the defendant could or should foresee that any of its activities would cause the mountain to move. The trial court repeatedly called attention to the fact that we were not concerned with sloughing or sliding material; that the evidence, with respect thereto, was not controlling

because the sloughing and sliding material did not cause the damage. The record is replete with statements that the dangers which were feared by the various witnesses were from the sloughing and sliding materials or from the breaking of the face of the cliff. No one contended that those dangers were not present. They were not the cause of the damage here.

By its decision the Court has held that the defendant is liable because it did not reasonably “forsee”, what neither it nor anyone else could foresee — that the entire mountain would move. Neither this defendant nor anyone else anticipated or could anticipate that this mountain would break away and move. The “danger” that the Court states that we were warned about, to-wit: the sloughing and sliding of materials, and the break in the cliff did not cause the “accident” nor did they cause the damage. We could anticipate sloughing and sliding, but not a breaking away of the entire mountain.

Mr. Spence, one of plaintiff’s witnesses, stated (R. 152). “Well gravel is something that sloughs off all the time. It sloughs by the air. You take a gravel pit, regardless of whether it is straight up and down, you go back two weeks after and that same pit that is straight up and down you will probably see a couple of hundred tons laying at the bottom. That has sloughed during that time. It sloughs by the air. Gravel and sand when it hits the air is always sloughing. It never stops sloughing.”

Contrast this with the testimony of Mr. Hyde as to what actually occurred (R. 68). "But this went, that break occurred here and brought the entire mountain down for, oh I would say, two hundred and twenty yards anyway, back to the east, the whole mountain came down there. Not only came down there but it covered over this canyon". * * *

* * * (R. 69) "There was natural mountain left up there but a big part of that mountain just moved like that."

Also contrast the couple of hundred tons that sloughs and slides in a gravel pit according to Mr. Spence, with what Mr. Hyde said actually moved (R. 69). * * * "I think possibly it was half a million maybe three quarters of a million, but half a million anyway. That is just a guess." (He was speaking of the yards of earth that actually moved.)

Mr. Spence also said in answer to a question as to expected dangers, whether he would expect these to include the movement of the whole mountain. "No I don't expect that. I would be in a very poor position to say I expected the whole mountain to move" (R. 161).

The cases cited by the Court, *Mountain States Telephone and Telegraph Company v. Consolidated Freightways* and *Furkovich v. Bingham Coal and Lumber Company*, have no application here. We are not here considering the damage that occurred, nor the injury that happened. The injury and damage were to the shovel

of the plaintiff. The thing that we could not foresee was that which caused the injury and damage. We are not claiming that we could not foresee the extent or form of the damage. If we cannot foresee the event that did cause the damage, then we should not be held to liability. Newman moved the shovel back to where he thought it was safe and where it would have been safe from sloughing or sliding material or from a break in the face. We never attempted to tell him where he should leave the shovel at the conclusion of the day's work. On the occasion in question obviously he had moved it to a point where he and everyone else thought it was perfectly safe. It would have been safe if an event had not occurred which no one anticipated or could anticipate. Not even Mr. Hyde nor any of the plaintiff's witnesses expected anything to occur such as did occur, and to charge us with liability for not "foreseeing" this event, is to make us an absolute insurer.

Other expressions of the Court place constructions upon the record not supported thereby.

For instance the Court says on the first page of its opinion that Mr. Gordon T. Hyde "testified also that a commercial powder man came out and inspected the bank and refused to perform any blasting work for the defendant." This statement is apparently made to show that the defendant's operations were so dangerous that commercial powder men would not undertake them. That is not the record. Mr. Hyde testified with reference to these two powder men:

“Q. At that time Mr. Keith didn’t say that they said that they were hard rock men and they didn’t know how to blast or had had no experience blasting gravel?

A. Not to me, no. He just said that those men looked at the bank and went down. They wouldn’t blast it.

Q. He didn’t tell you why?

A. No.” (R. 91)

The reason the commercial men didn’t blast was because they had no experience in gravel. However, Mr. Hyde’s own employees did do the blasting, and no harm came to them from it.

The Court also says immediately following the above quotation. “Some attempt was made by the defendant company to raise the shovel operation on the face so that the digging did not go constantly to the bottom of the pit, in accordance with a method known as ‘terracing’ the hill, but the material on the higher level was found to be unfit for immediate use and would require extra handling to suit it to the purpose of the supply.” The record is that we began to operate on a second level but found the material was too fine and did not suit the Fluor corporation. They wanted more gravely material (R. 36). There is nothing sinister here. No inference even of wrongdoing. Mr. Reed testified without contradiction that there are many ways of operating a gravel pit, including the use of a shovel. That is one of the major reasons why the shovel was developed. The purpose for

which you wanted the gravel after you got it out determined your method of operation (R. 409). So from Mr. Hyde we learn that the material secured by terracing was not suitable, and from Mr. Reed that our operation was one of many recognized suitable operations. Nowhere does it appear that the reason we operated as we did was because the gravel would require extra handling if secured by a different method of operation. Mr. Keith, who was in charge of the gravel pit for the defendants, did say that if you are going to use the material as a fill, as they were here, you use the shovel because to use a dozer or a line you would have to handle material twice, which is unnecessary, and not usually done (R. 365, 366). The terracing or lack of it was not shown to have been the cause of the disaster.

All of that, however, is beside the point in this case because the only reason that anyone, including Mr. Hyde, ever advocated one method over another was to prevent sliding from the face of the operation. It was not slides from the face of the operation that caused the damage. It was the breaking away of the mountain, and even Mr. Hyde at several places indicated that no one anticipated or could foresee what occurred here. At page 68 he said after testifying that the entire mountain moved:

“Q. I say, did you expect it to happen?”

A. Not to that extent, no.”

Even the decision here states the difference without giving it its proper significance. This Court says: “Ap-

parently, a slide of this proportion was not anticipated even by Mr. Hyde or the other men who warned of the possible dangers of the operation, although they did recognize the possibility of dangerous sloughing off of loose gravel from the face of the pit." By calling the event a "slide" the Court erroneously puts it in the category of things we should foresee and against which we were warned, whereas actually the event was not a slide at all such as testified to by the witnesses, nor was it anything like the dangers feared by Mr. Hyde or any other witness and against which we were warned. It was something no one could foresee and concerning which no one warned us.

On page 2 the Court says that we contend that we should not be held liable because we could not foresee the harm or the manner in which it occurred. This statement points up the error of the decision herein. We are not contending and never have intended to contend that we are not liable because we could not foresee the harm or the manner in which it occurred. We have already attempted to point out that what we are contending for is, that we could not foresee the event that caused the harm. What we could not foresee was that the mountain would break away and no one even attempted to argue that we or anyone else could foresee the actual event or the actual cause of the damage.

This Court also says in the same connection on the second page of the decision, that we contend we are not liable because such a slide had not occurred within the

history of the Gibbons & Reed operations in this area. Our contention is much broader than that. We contend that no such slide had occurred within the knowledge of any of the witnesses anywhere. The Court states that Mr. Hyde testified that he had seen similar slides, but we submit he made no such statement. He had seen sloughing off and slides from the face, but never had he ever seen the entire mountain move, where between one-half and three-quarters million yards of dirt moved (R. 69).

The Court says that Mr. Hyde also, testified "It's not unusual if you take the bottom out. It happens nearly every time." We respectfully submit the Court's interpretation of this statement is not born out by the record. Mr. Hyde did use the language just quoted, but in the following connection.

"Q. In all your experience you have never seen anything like it, have you?

A. Oh yes, yes, I have seen them. Not quite the same, but I have seen it. I have seen it in Parley's canyon.

Q. So that you would expect it?

A. Yes. Not exactly like that but I have seen the same cause produce the same effect.

Q. To that extent?

A. I don't think as large as that, no.

Q. Anything like that?

A. Well, like it yes, on the same lines. *No, I think not*, but it is not unusual to have something of that kind happen.

Q. It is not unusual to have a slide in a gravel pit, is it?

A. It is not unusual if you take the bottom out, it happens nearly everytime.

* * *

Q. I say, would you expect it to happen?

A. Not to that extent, no." (R. 87-89).

This testimony is very different from saying that what happened here happens nearly every time "you take the bottom out."

Mr. Hyde had also testified that we had removed a wedge which was supposed to have retarded sliding, but again he said: "that retarded any slipping *unless there was a terrific pressure directed behind it.*" (R. 44. Italics added).

Nothing that we did had aroused anxiety or led Mr. Hyde to exercise any care for his own equipment, which he thought was perfectly safe because it was 100 feet away. What he meant by our operation being dangerous, was to someone working under it (R. 81-83), and almost at the conclusion of his testimony, he frankly repeated:

"Q. You said there was some danger, you thought that there was some danger here although you may not have visualized it was that great, that you have seen this sort of thing cleaned out at the bottom, that that was the usual thing for it to slide.

In your opinion, could you have anticipated or seen that the slide could have covered up the full part of the pit?

- A. I didn't expect it to." (R. 112, 113. Italics added)

Nor did the expert when cross examined testify as indicated by the Court on page 2 of the decision. The expert, Professor Cook, said that the explosives were not the contributing cause of this cataclysm, nor did he know what caused it (R. 225). He also said:

"Q. In order to consider the clay as 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 it merely as a theory. I agree. I don't know what actually 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 can 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.

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. 223)

With reference to explosives, he said: (R. 225)

"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."

With reference to the plaintiff's contributory negligence this Court says the "Plaintiff had no knowledge of the probable presence of water and wet clay at the base of the gravel" etc. No one else had any knowledge of the "probable presence of water and wet clay at the base of the gravel" *at the time of this disaster*. Mr. Keith is undisputed in his answer to the following question:

"Q. All right, take your seat up there again, please, Mr. Keith. So that you encountered the water earlier and as you proceeded back with your work it disappeared?

A. Right." (R. 362)

Mr. Glen had all the information that we had. He is an experienced contractor, and everything that was obvious to us was even more obvious to him. He was fearful, he says. We were not. But he did nothing to protect his property. No different inferences can be drawn from that. Either the fear was ignored, or he thought the danger was not pressing. In either case, we are not more responsible than he is. Everything was open and apparent, there was nothing concealed. If we are liable, he is liable. He expressed concern where we felt none. He didn't even take the trouble to go back to see if Newman had removed the shovel from the, to him, obvious danger of the high bank. And he didn't move it himself because he didn't want to dirty his suit.

CONCLUSION

We respectfully submit that there is nothing whatever in this record to justify a reversal of the trial court. We were using our own land for lawful purposes in a lawful and recognized manner. Neither we nor anyone else had any reason to expect, nor could we possibly foresee the thing that happened. The trial court should be affirmed.

Respectfully submitted,

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