

1981

Clement Johnson, Darrell Johnson And La Von Johnson v. Garkane Power Association, Inc. A Utah Corporation : Brief of Defendant-Respondent Garkane Power Association, Inc.

Utah Supreme Court

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IN THE SUPREME COURT
OF THE STATE OF UTAH

CLEMENT JOHNSON, DARRELL)
JOHNSON and LA VON JOHNSON,)
Plaintiffs-Appellants,)
-vs-)
GARKANE POWER ASSOCIATION,)
INC., a Utah corporation,)
Defendant-Respondent.)

Case No. 17251

BRIEF OF DEFENDANT-RESPONDENT,
GARKANE POWER ASSOCIATION, INC.

APPEAL FROM THE JUDGMENT OF THE SIXTH
JUDICIAL DISTRICT COURT IN AND FOR
GARFIELD COUNTY, STATE OF UTAH
HONORABLE DON V. TIBBS, PRESIDING

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FILED

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BRIEF OF DEFENDANT-RESPONDENT,
GARKANE POWER ASSOCIATION, INC.

NATURE OF CASE

This is an action by plaintiffs-appellants for damages resulting from an alleged failure by defendant-respondent to provide three-phase electrical power at a certain date and time, to plaintiffs' farming operation located outside Tropic, Utah.

DISPOSITION IN THE LOWER COURT

The Court below awarded defendant Garkane Power Association, Inc. Judgment in its favor and against plaintiffs, no cause of action on plaintiffs' Complaint, and

further awarded defendant Garkane Power Association, Inc. Judgment in its favor and against each of the plaintiffs in the sum of \$8,883.53, the amount prayed for in defendant's counterclaim.

RELIEF SOUGHT ON APPEAL

Defendant-respondent, Garkane Power Association, Inc., seeks affirmation of the Judgment granted by the Lower Court in its favor.

STATEMENT OF FACTS

Defendant Garkane Power Association, Inc. is a company based in Richfield, Utah, which provides electrical power to consumers located in and around the area. During the year 1974, defendant had a "three-phase" system at a substation in Tropic, Utah which provided distribution power for Tropic and surrounding areas. A three-phase power line consists of three wires, with one neutral and three energized or primary wires. Power from Tropic to surrounding areas was provided by means of a two-phase power system consisting of two energized lines and one neutral. This type of power supply is commonly referred to as the "V" phase primary connection. A primary line or primary voltage is the power line running from a substation along a course

of consumers to specific delivery points along the line that correspond to each resident or user. A secondary or service wire is a power line which is transformed down from the delivery point to the individual consumers. This secondary line can be modified to deliver a greater capacity of power known as "three-phase power" when the primary line is a "V" phase open "Y" system. This modification is known as an "open delta connection" and when utilized, all three wires or lines carry voltage to the consumer. This configuration is used to supply adequate power to consumers whose equipment requires three-phase as opposed to two-phase power, that is, voltage in three wires as opposed to two. In an area where the only power available is a "V" phase system, it is customary and routine to provide an "open delta connection" for the purpose of delivering three-phase service through the system. (see trial transcript, pgs. 191-192)

Plaintiffs owned and operated a farming operation near Tropic, Utah in an area to which defendant supplied electrical power. During the year 1974, plaintiffs contacted defendant about providing electrical service to plaintiffs' property. Defendant, in response to a request, established a primary power service consisting of a "V" phase power line with an open delta connection to provide three-phase power service to the consumer on the secondary

line. Defendant understood from conversations with the plaintiffs that plaintiffs intended to establish an irrigation system utilizing electrical pumps totaling 100 to 125 horsepower. (T.pgs. 198 and 199) While optimum service in those circumstances would consist of a three-phase four-line power system (three hot wires carrying current with one neutral wire), it was explained to plaintiffs that service of this nature was not available at that time in that area. Defendant explained to plaintiffs what type of service was available, that said service did have limitations and that certain problems could be expected and how those problems could be countered. (see trial testimony pages 200 and 201) Defendant at that time had no plan to install a three-phase four-line power system. (see trial testimony page 201)

Defendant continued to supply the same type of power they had routinely supplied to the area in order to facilitate plaintiffs' irrigation operation. Subsequently defendant discovered that plaintiffs had installed a 100 horsepower pump and were attempting to use it for irrigation purposes. Defendant's employees then attempted to facilitate use of that pump by installing larger transformers, however, supervisory personnel were not made aware of the

existence of the 100 H.P. pump. (T.p. 516 & 517) Plaintiffs were trying to "prove up" their water rights as rapidly as possible in order to secure their right to that water in the future, and plaintiff, La Von Johnson, testified that they realized they might have some problems with the system but decided to go forward with the present electrical system and accept the risk. (T.p. 34) Plaintiffs operated their irrigation pumps successfully in 1975, 1976 and part of 1977 on the "V" phase power with an open delta connection and in the midst of the 1977 growing season, began having problems with the 100 horsepower pump. Plaintiffs brought an action alleging they had lost their 1977 crop and expenses and that defendant had agreed to provide "V" phase power only until the defendant installed a three-phase four-line power system. Plaintiffs allege that defendant agreed to provide that three-phase four-line power system within one year from the original date of installation of service to their property in 1974 and that in reliance thereon, plaintiffs had installed the electrical pump. The trial court weighed the evidence and found that defendant had not agreed to provide three-phase four-line power within any specific time and that defendant's evidence indicated that the power system provided by defendant to the area had not caused plaintiffs' loss and damage and awarded Judgment in defendant's favor.

ARGUMENT

POINT I

DEFENDANT DID NOT AGREE TO
PROVIDE THREE-PHASE FOUR-LINE
POWER SERVICE TO PLAINTIFFS'
FARMING OPERATION WITHIN ANY
SPECIFIC TIME PERIOD AND THE
TRIAL COURT CORRECTLY SO RULED.

Plaintiffs allege that in July or August of 1974, plaintiff La Von Johnson and defendant's representative Darwin Jackson discussed the type of power which could be made available to plaintiffs' farm and that Mr. Jackson represented that three-phase four-line power would be available in the area within one year. As stated above, the power supply available at the time of the conversation consisted of a "V" phase power system which could be modified to provide three-phase power by means of an open delta connection. Plaintiffs rely on a written memorandum signed by Mr. Jackson indicating that Garkane was working on plans to construct a three-phase four-line power system within a year in asserting that defendant promised to provide that power within one year of 1974. However, that memorandum is not dated and there was no evidence adduced at trial indicating a precise date for that memorandum. Further, plaintiff La Von Johnson testified that the document produced at trial

was not the document they claimed to have received. (T.p. 36 & 37) Plaintiffs have not produced the written document allegedly obligating defendant to provide three-phase four-line power.

Plaintiffs' Brief quotes language in the trial testimony in which counsel for plaintiffs questioned Mr. Jackson as to the meaning of the quoted language appearing in the undated memorandum. Plaintiffs quotation from that trial testimony is persuasive when taken out of context. However, when read in context, it becomes clear that the date of that memorandum is questionable at best and in fact, the testimony indicates that the date of that memorandum was sometime after 1975. The testimony adduced is as follows:

Q: So, it is true, Mr. Jackson, that the document you hold in your hand [referring to the memorandum] refers to conversations with Mr. LaVon Johnson at or about the time that he first contacted you concerning electrical service to their operations?

A: Yes, it refers to that.

Q: So, it's referring to the conversation or a number of conversations which occurred early in 1974?

A: Not necessarily, it could have been later. (emphasis added) (T.p. 211)

Sometime later in the testimony Mr. Jackson stated with regard to the memorandum:

A: This could have been after the determination to run third-phase power from the Tropic substation to Henrieville, after it was determined in late 1976, to go ahead and build that power line. (T.p. 214)

Jackson further testified that defendant's general manager asked him a number of questions that came up during a Board of Directors meeting which was held sometime after 1977. The statement or memorandum was, according to Jackson's testimony, a written summation of answers to questions that the general manager had asked. (T.p. 209) The evidence brought forth at trial indicates that the date of that memorandum is ambiguous at best. Defendants did not agree to provide three-phase four-line power at a specific date in that or any other memorandum and plaintiffs provided no proof to the contrary.

Plaintiffs admit that this testimony and memorandum constitute the only evidence on the question of whether or not defendant did indeed commit itself to providing three-phase four-line power within one year of 1974. Based on this evidence, the trial court properly determined that

there was no such agreement between the parties specifying a time frame for obtaining three-phase four-line power.

In Zions First National Bank v. First Security Bank of Utah, 534 P.2d 900 (Utah, 1975) the Supreme Court held that where the appeal raises questions of fact rather than issues of law, their review goes only to the problem of whether the findings of the trial court are supported by substantial evidence. The Court further held "this court will not upset the findings of a trial court unless the evidence clearly preponderates to the contrary." After a careful review of the evidence in the present case, it is clear that defendant's evidence is persuasive and plaintiffs provided no evidence that preponderates against the findings of the trial court. This view was upheld in Tanner vs. Baadsgaard, 612 P.2d 345 (Utah, 1980) wherein the court also held that due to the prerogatives in advantaged position of the trial judge, the Court will indulge considerable deference to the trial judge's findings. In fact, where the evidence is in dispute, the Court will assume that the trial judge believed that which is favorable to his findings and this Court will not disturb them unless the evidence clearly preponderates to the contrary. Defendant believes that the evidence before the Court on this issue is not in dispute and that the testimony of Darwin Jackson establishes the

date of the memorandum as sometime after 1975. The trial court weighed the evidence before it and determined that the defendants did not agree to provide the greater capacity three-phase four-line power system that allegedly would have prevented plaintiffs' damages.

Plaintiffs also argue that the trial court erred in finding there was no written contract or agreement relating to providing power within a specific time frame. Plaintiffs urge that Exhibit "4" entitled "Agreement For Purchase of Power", dated July 1, 1974, is evidence of a contract or agreement between defendant and plaintiff Clement H. Johnson. That document provides for alternating current, three-phase at approximately 60 cycles, 240/480 volts. Three other exhibits entitled "Agreement For Purchase of Power" were entered as evidence. (T.p. 45 & 46) They consist of copies of contracts to provide power to plaintiff Clement H. Johnson. Those exhibits, dated 12 February, 1975, 12 February, 1975, 19 July, 1976 and 19 July, 1976, indicate defendant would provide "Two-phase at approximately 60 cycles, 240/280 volts." (emphasis added) Each of those exhibits bears a later date than exhibit "4" dated July 1, 1974. Plaintiffs did not identify the Agreement of July 1, 1974 as relating specifically to their 100 H.P. pump. In fact, defendant did not enter into an agreement to provide

power to a 100 H.P. pump, as the testimony indicates. Darwin Jackson testified that he did draw up all agreements for the plaintiffs' electrical power supply which were all placed in evidence. He stated that he did not draw up a contract for the 100 H.P. pump, that plaintiffs had never requested that he do so, and that such a service contract could not be drawn up without his knowledge. (T.p. 230-233 & 238)

Plaintiff La Von Johnson testified initially that he had a hand in the execution of all service contracts provided by defendant. He later admitted that he had not seen all the service agreements and had authorized his father to sign his name on some of them. Further, he admitted that the alleged contract to provide service to a 100 H.P. pump was not in evidence and that he presumed his father had signed such a contract. (T.p. 58-65) (emphasis added)

A copy of any such contract was never produced. The testimony is clear that defendant did not have any agreement or contract with regard to the 100 H.P. pump.

The power supplied to plaintiffs' farm was done through a "V" phase system providing two hot wires or phases of electrical current and one neutral wire. The three-phase power was provided by means of an open delta connection

which modified the "V" system so that the secondary service from the point of distribution to plaintiffs' farm transmitted three hot wires or phases of voltage to plaintiffs' operation. Defendants provided power as it existed to the plaintiffs' farm as can be seen by a review of the testimony taken at trial and noted above. The trial court was justified in finding this evidence did not constitute a contract or agreement between the parties and plaintiffs have provided no evidence which would support a finding to the contrary.

POINT II

DEFENDANT'S POWER SERVICE DID
NOT CAUSE OR CONTRIBUTE TO
PLAINTIFFS' ALLEGED LOSS AND
DAMAGE.

Plaintiffs allege they conclusively established that a voltage imbalance resulting from defendant's power supply, the "V" phase system with an open delta connection caused their crop loss and resulting damages. Again, plaintiffs' evidence is inconclusive at best and is contradicted by testimony from defendant's witnesses establishing that there was no problem with their power supply that would have caused the problems plaintiffs claim they suffered with

their 100 H.P. pump.

Plaintiffs quote testimony by Howard Dalton, an employee of defendant, who at the request of plaintiffs, tested their pump installation and suggest this testimony proves conclusively that defendant was at fault. A closer look at Mr. Dalton's testimony reveals that plaintiffs' contention is without merit. Dalton testified that he did test the installation at plaintiffs' farm and made voltage and current measurements on the open delta connection employed there. His testing revealed that the center leg or wire would draw excessive currents during starting conditions on its normal rating. He further testified that his measurements in terms of current differences between the three legs or phases would not be called an "imbalance". In fact, he stated: "I would say that would be a normal starting current" and while in a ground delta, the common conductor carries more current normally than the other two phases. (T.p. 348-349) He also stated that had there been a voltage or amperage imbalance, it would have affected the other pumps on plaintiffs' irrigation system and that he had been informed that they had had no problems with their other pumps. (T.p. 403 & 404) He stated that he did not know the 100 horsepower pump existed until these tests were run in 1977. (T.p. 353)

In his testimony Dalton indicated that the power system operated by defendant is kept operating satisfactorily by means of voltage regulators installed at their substation. These regulators control the power being delivered to consumers so that a consistent voltage level is maintained. Thus, when consumers turn on electrical power, the regulators automatically function and "step up" the voltage so a consumer will not suffer a corresponding loss of power. (T.p. 421-427) Any "imbalance" would be the result of a malfunction or failure of the voltage regulators to operate properly. Defendant's voltage regulators have operated properly from 1975 to the present and there has been no malfunction. (T.p. 421) Dalton took voltage and amperage (current) readings at plaintiffs' property in 1977. He stated that any variation in voltage which he discerned in his readings had not caused the "imbalance" plaintiffs argue caused their damages. (T.p. 355 & 356) In fact, there was no imbalance as defendant's equipment was operating properly. (T.p. 357)

Plaintiff La Von Johnson testified that defendant was responsible for providing poles, power lines and power service; however, defendant was responsible only for service to plaintiffs' switch box. Plaintiffs were responsible for all wiring, connections and equipment running from the

switch box to the motor as well as the switch box and installation of fuses and a fuse panel. Those connections were installed or serviced by a private electrician. (T.p. 53 & 274) Dalton stated that, in the absence of any problem with the connections, wiring and regulators that defendant provide, he would have to attribute plaintiffs' alleged problems to running the motor over its rated capacity (T.p. 395) He also noted that plaintiffs had fused all three wires leading to their pump, and plaintiffs complained that one of the three fuses would constantly blow out as a result of the alleged imbalance.

His examination revealed that plaintiffs were running their pump in excess of its rated capacity. (T.p. 388) He established a derated capacity at which plaintiffs could operate their pump efficiently and bring the amperage down to a tolerable level and fashioned a system to bypass one of the fuses. It is not clear whether plaintiffs followed his suggestion. However, they did inform him that they were forced to operate the pump at a greater capacity due to the type of crop they had planted. (T.p. 354-359) In response to the question about the addition of customers contributing to any imbalance in the open delta connection secondary system, Dalton testified that this would not

necessarily contribute to any imbalance and none was indicated where, as testified to above, the voltage regulators were operating properly. (T.p. 360) Plaintiffs failed to provide any evidence to refute Dalton's testimony or to prove the alleged imbalance of power existed. They provided no evidence to support their allegation that the alleged "imbalance" caused or contributed to their damages.

Defendant also called an expert witness who testified as to the alleged "imbalance" in the electrical system provided by defendant for plaintiffs' use. Defendant called Dennis Harmon, an electrical engineer currently employed by Intermountain Consumer Power Association. Harmon is a registered, licensed, professional engineer, licensed to practice in Utah, Nevada and Wyoming and does consulting work for four different rural electric associations in Utah as well as numerous municipal associations. (T.p. 304) He is intimately acquainted with the transmission lines of Garkane Power Association, Inc. in the Bryce Valley area (the area of plaintiffs' property) and, in fact, authored their current work plan. Harmon testified that the "V" phase distribution system with an open delta connection to obtain three-phase power on the service side is perfectly legitimate and is frequently used. It is true, special

precautions are often called for. For example, a three-phase motor connected to an open delta connection must be derated and cannot be operated at full capacity, as defendants suggested to plaintiffs. (T.p. 311)

Harmon stated that for safety reasons one of the phases or wires on an open delta connection should be grounded through the entire system to the pump. Further, the National Electric Code requires that the grounded phase conductor not be fused. If all three phases or wires are fused, then the grounded wire would tend to receive more of the in-rush current when the motor starts and that fuse would either blow out immediately or would be "stressed" and after several starts and stops would blow. (T.p. 312 & 313) As noted above, the position and wiring of fuses are the consumer's responsibility and plaintiffs had fused all three wires. (See also Harmon's testimony p. 315) This situation would account for the major voltage increases which plaintiffs asserted were evidence of a power imbalance which caused their crop loss. Plaintiffs complained that a fuse on their pump continually blew out and that they were unable to operate it at full capacity. Harmon's testimony explains the continued malfunction of fuses and shows that defendant was not responsible for plaintiffs' problems. Dalton and Harmon were of the opinion that plaintiffs'

alleged problems and damages were the result of improper installation and/or operation of their pump at an excessive capacity. Indeed, Harmon had investigated a similar situation and found that the problem was improper installation at the pump and subsequent problems with fuses blowing out and motors burning up. (T.p. 319)

Harmon also testified that during the years 1974-75 he did studies for defendant. He advised them in about July of 1975 that they should consider installing the three-phase four-line power system to provide additional capacity required for their peak load. Obviously this advice did not come until some time after the plaintiffs approached defendant and requested a power system be installed to accommodate their farming operation. It was Harmon's understanding that there had been no previous decision to act along those lines or any commitment to a customer to provide three-phase four-line power. (T.p. 322) Harmon also testified that the circumstance wherein a 100 horsepower motor functioned with the open delta connection for a period of two years without difficulty and then, without modification, suddenly developed problems with the fuse did not indicate that problem resulted from an increase in customers on the same line. Where the voltage regulators were operating properly he

"would just have to assume that it's the customer's problem." (T.p. 328 and 329) All the evidence indicates that defendant's voltage regulators were operating correctly. This, together with Harmon's testimony proves that the problems plaintiffs experienced were "the customer's own problems."

The trial court correctly ruled that plaintiffs failed to meet their burden of proving that defendant's actions in supplying electrical service caused the difficulties with the operation of their pump. Defendant, through its representatives, instructed the plaintiffs that the power system available would be "V" phase power on the primary line with an open delta connection providing three-phase power on the secondary line to the customer and no agreement was made to provide any other type of power within any specified time. Plaintiffs were instructed that there would be some risk in using this type of power system and as plaintiffs were in a hurry to "prove up" their water rights they accepted the risk and proceeded with their plans. Mr. Dalton suggested an alternative procedure for operating their pump utilizing the available power. Defendant's system was operating as expected.

POINT III

THE TRIAL COURT IS ENTITLED TO WEIGH ANY AND ALL EVIDENCE RECEIVED WITH REGARD TO THE ALLEGED AGREEMENT ON THE PART OF DEFENDANT TO SUPPLY GREATER CAPACITY POWER WITHIN A DEFINITE TIME FRAME AND MAKE A DECISION BASED THE CREDIBILITY OF THAT EVIDENCE.

Plaintiff alleges that the trial court forgot or disregarded direct testimony constituting the only evidence on the alleged agreement by defendant to supply three-phase four-line power within a definite time period to the plaintiffs. This point was discussed at great length in Point I of defendant's Argument. The trial court was there, weighed the evidence and made its decision accordingly. The cases cited in Point I indicate that on review the Supreme Court will view all evidence in the light most favorable to the prevailing party and will assume that the trial judge believed that evidence which is favorable to his findings. Defendants established that there was no agreement to furnish power to plaintiffs' 100 H.P. pump and no agreement to provide three-phase four-line power within a specific time. Plaintiffs have never produced the written document by which they allege defendant agreed to provide that capacity of power. Defendant produced evidence in the testimony

of Darwin Jackson and Dennis Harmon that the decision to expand to three-phase or four-line power came later.

Plaintiffs also assert that the trial court disregarded or forgot the testimony of Darwin Jackson relating to the written memorandum designated as Exhibit "2". To the contrary, Mr. Jackson stated that he produced that memorandum in response to questions from the defendant's general manager following a Board meeting in 1977 and the court made its finding accordingly. (T.p. 209) Defendant produced a second witness, Carl R. Albrecht, who has been employed by defendant for six and one-half years including four and one-half years as office manager. Mr. Albrecht surveyed the evidence marked as plaintiffs' Exhibit "2" and stated that in 1978 one of the plaintiffs came into defendant's office and submitted a claim for a crop loss incurred in 1977. Albrecht spoke to the general manager about the claim and the general manager asked Darwin Jackson to prepare a statement concerning a loss over that area. Albrecht testified that plaintiffs' Exhibit "2" was prepared pursuant to that request. (T.p. 705 and 706) This evidence, together with that of Mr. Jackson, indicating that defendant did not at any time during 1974, '75 or '76 agree to provide three-phase four-line power to plaintiffs' farm prove conclusively that there was no agreement.

POINT IV

THE TRIAL COURT CORRECTLY AWARDED JUDGMENT IN FAVOR OF DEFENDANT AND AGAINST PLAINTIFFS FOR THE AMOUNT OF DAMAGES IN DEFENDANT'S COUNTERCLAIM.

In response to plaintiffs' contention that no evidence was presented by the defendant by way of testimony or exhibits to support defendant's counterclaim of \$8,833.53, defendant would only say that the trial court awarded damages to defendant on the basis of a stipulation between the parties holding "the court finds that based upon the stipulation, the defendant shall be awarded judgment against the plaintiffs for the sum of \$8,833.58 for services for 1978 and 1979 together with interest as the law provides up to the date of judgment . . ." (T.p. 710)

CONCLUSION

The evidence obtained at trial clearly indicates that there was no agreement on the part of defendant to provide greater capacity power via a three-phase four-line power system to the plaintiffs' farming operation. That evidence also indicates that there was no written or oral contract obligating defendant to provide three-phase four-line power service to the plaintiffs. The trial court

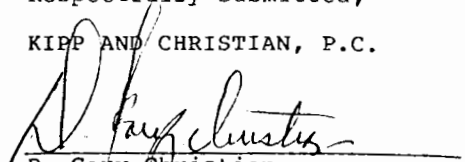
properly ruled on both of these assertions. The evidence establishes that the court correctly ruled that plaintiffs failed to meet their burden of proof with regard to the alleged contracts and/or agreements. There was no voltage imbalance or amperage imbalance to cause the damage or problems they suffered with regard to their 100 horsepower motor. Plaintiffs were aware of the risks of using their irrigation system with the type of transmission system defendant had installed to meet their needs and assumed that risk in their operation.

The trial court is permitted to weigh the evidence produced at trial and render its Judgment accordingly. Said Judgment will not be overturned on appeal in the absence of clear and convincing proof or evidence leading to a contrary conclusion. Defendant's evidence provided conclusive support for defendant's position. The trial judge was there, heard the witnesses, surveyed the exhibits and made a decision. When viewed in the light most favorable to the prevailing party, that is defendant, the testimony and exhibits

taken at trial provide clear and convincing support for the
Judgment rendered and that Judgment should be affirmed.

DATED this 16th day of April, 1981.


Respectfully submitted,
KIPP AND CHRISTIAN, P.C.

A handwritten signature in cursive script, appearing to read "D. Gary Christian", written over a horizontal line.

D. Gary Christian
Attorney for Defendant-
Respondent Garkane Power
Association, Inc.

MAILING CERTIFICATE

I HEREBY CERTIFY that I mailed two (2) copies of Defendant-Respondent Garkane Power Association, Inc.'s Brief to Anthony M. Thurber, Attorney for Plaintiffs-Appellants, 211 East Broadway, Suite 213, Salt Lake City, Utah 84111, this 16th day of April, 1981.


Secretary