1982

Shell Oil Co. v. Brinkerhoff-Signal Drilling Co. : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT
OF THE STATE OF UTAH

SHELL OIL COMPANY, Appellant, vs. BRINKERHOFF-SIGNAL DRILLING COMPANY, Respondent.	:	Case No. 18084

BRIEF OF RESPONDENT

ON APPEAL FROM THE FOURTH JUDICIAL DISTRICT COURT OF
DUCHESNE COUNTY, STATE OF UTAH
THE HONORABLE ALLEN B. SORENSEN, PRESIDING

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IN THE SUPREME COURT
OF THE STATE OF UTAH

SHELL OIL COMPANY,	:	
	:	
Appellant,	:	
	:	
vs.	:	Case No. 18084
	:	
BRINKERHOFF-SIGNAL DRILLING COMPANY,	:	
	:	
	:	
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IN THE SUPREME COURT
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SHELL OIL COMPANY, Appellant, vs. BRINKERHOFF-SIGNAL DRILLING COMPANY, Respondent.	:	BRIEF OF RESPONDENT Case No. 18084

I. NATURE OF THE CASE

This is an indemnification action brought by Appellant, Shell Oil Company, as a third-party action against Respondent, Brinkerhoff-Signal Drilling Company, for all damages which are awarded to Respondent's employee, Billie Thomas Back, in his personal injury claim against Appellant.

II. DISPOSITION IN LOWER COURT

The Fourth Judicial District Court granted Respondent's Motion for Summary Judgment dismissing Appellant's Third-Party Complaint.

III. NATURE OF RELIEF SOUGHT ON APPEAL

Respondent asks this Court to affirm the judgment of the District Court.

IV. STATEMENT OF FACTS

With the following additions, Respondent accepts Appellent's Statement of Facts:

1. Plaintiff Back's Complaint against Appellant alleges a cause of action for negligence based on Appellant's agent's conduct at the accident site (R. 1-2).

2. Respondent has in every way complied with all of its obligations as an employer under the Utah Workmen's Compensation Act, Utah Code Ann. §§35-1-1 through 35-1-106 (1953, as amended), including securing compensation due Plaintiff Back for the alleged injury (R. 52).

V. ARGUMENT

I. INDEMNIFICATION AGREEMENTS ARE DISFAVORED GENERALLY AND SUBJECT TO STRICT CONSTRUCTION AGAINST THE NEGLIGENT INDEMNITEE.

It has been long held by this Court that contracts exempting persons from liability for negligence are contrary to the public policy of inducing the exercise of due care. In Jankele v. Texas Company, 88 Utah 325, 54 P.2d 425, 427 (1936), the Court stated: "It is very doubtful that defendant could relieve itself by contract from its own negligence. Ordinarily, such contracts are contrary to public policy." Thereafter, the Court reasoned that the highest incentive to the exercise of due care rests in a consciousness that a failure to so act will fix liability for any resulting injury.

Although Utah law does not prohibit the enforcement of all indemnity agreements, case law has clearly demonstrated Utah's difference in policy concerns from those cited in Appellant's Brief. In Union Pacific Railroad Company v. El Paso Natural Gas Company, 17 Utah 2d 255, 408 P.2d 910, 913-14 (1965), this Court declared:

> [T]he law does not look with favor upon one exacting a covenant to relieve himself of the basic duty which the law imposes on everyone: that of using due care for the safety of himself and others. This would tend to encourage carelessness and would not be salutary either for the person seeking to protect himself or for those whose safety may be hazzarded by his conduct. For these reasons, such covenants are sometimes declared invalid as being against public policy.

The general distaste of the Utah courts for indemnity agreements is increased where an affirmative act of negligence is involved. Barrus v. Wilkinson, 16 Utah 2d 204, 398 P.2d 207, 208 (1965). In Howe Rents Corporation v. Worthen, 18 Utah 2d 263, 420 P.2d 848, 849 (1966), this Court set forth the standard rule of construction wherein the drafter of an indemnity provision which is to relieve him of liability for his own negligence, should have, in case of doubt, the provision strictly construed against him.

This general judicial policy of disfavor toward indemnity agreements has been adopted by the Utah Legislature in Utah Code Annotated §13-8-1 (1953, as amended). Although not strictly applicable to the facts of this case, instructive is

the direction of the statute which prohibits a contractual provision as being against public policy and void when it purports to indemnify a promisee against liability for damages arising from the sole negligence of the promisee pursuant to a construction contract.

Paragraph 11.6 of the Master Rotary Drilling Contract is an attempt by Appellant to contract away liability for its own negligence in violation of the clear public policy of Utah. By way of this standard provision of its form contract, Appellant is attempting to evade responsibility for its own negligent conduct and that of its agents. This is exactly the elusive liability that the Court in Jankele feared. If Appellant can rely upon Paragraph 11.6 for its complete indemnity for "all claims, demands, and causes of action" resulting from personal or property injury to Respondent's employees, there is no incentive for Appellant to exercise due care in its operations.

In its Brief, Appellant relies heavily on cases from numerous other jurisdictions for the proposition that indemnity agreements "are valid and do not violate public policy." Nevertheless, although Respondent recognizes the impressive list of citations in Appellant's Appendix I, it does not agree with Appellant's conclusion. Rather, Respondent asserts that the Court need not go outside this jurisdiction to understand that Utah law will offer an indemnitee protection only in the rarest of circumstances.

> Assuming that in the absence of some consideration of public policy militating against it, one may contract to protect himself against liability for loss caused by his negligence, it is nevertheless well settled that contracts in which a party attempts to do so are subject to strict construction against him; and further, that he will be afforded no protection unless the preclusion is clearly and unequivocally stated.

Walker Bank & Trust Company v. First Security Corporation, 9 Utah 2d 215, 341 P.2d 944, 947 (1959). The "majority rule" referred to by Appellant is discussed in Union Pacific Railroad Company v. Intermountain Farmers Association, 568 P.2d 724, 726 (1977), was that there is a presumption against any intention of the parties to form an agreement whereby a negligent party would be indemnified from its own negligent acts. Said presumption could be overcome only by a clear and unequivocal indemnity obligation intended by the parties to cover the specific set of circumstances.

Appellant's overstated argument is best illustrated by its own attempt to parallel the subject indemnity provision with a commercial liability insurance policy. An insurance policy is drafted and sold by a company trained and licensed specifically to offer such services. Such companies are regulated in Utah by the State Insurance Department to assure fair practices and are the subjects of extensive legislation. On the other hand, Respondent is a drilling company. The indemnity provision at issue is but one subparagraph of a 28-page form contract, the main purpose of which is to provide an arrangement

for the drilling of oil wells. The narrow decision of refusing to enforce the subject provision in these circumstances need not be the harbinger of doom for the insurance industry, rather another example of public policy encouraging due care and safety in hazardous operations.

II. THE STATUTORY COMPENSATION PROVIDED BY THE UTAH WORKMEN'S COMPENSATION ACT IS THE ONLY EXPOSURE OF A COVERED EMPLOYER TO LIABILITY FOR AN EMPLOYEE'S INJURY.

Section 35-1-60 of Utah Code Annotated (1953, as amended) gives an injured employee the right to recover compensation pursuant to the Workmen's Compensation Act from the employer. It further provides that such compensation,

> shall be the exclusive remedy against the employer . . . and the liabilities of the employer imposed by this act shall be in place of any and all other civil liability whatsoever, at common law or otherwise, to such employee or . . . any other person whomsoever, on account of any accident or injury . . . incurred by such employee in the course of . . . his employment, and no action at law may be maintained against an employer . . . based upon any accident, injury, or death of an employee. (Emphasis added)

The Utah State Supreme Court has early addressed the exclusiveness of the statutory remedy. "Since the enactment of the Workmen's Compensation Act in 1917, the exclusive remedy of an employee who is injured in the course of his employment is the right to recover the compensation provided for in the Act . . .." Murray v. Wasatch Grading Company, 73 Utah 430, 435, 274 P. 940, 942 (1929). This Court declared that the Act abrogates "the employee's common law right to sue the

employer for any and all injuries suffered while in the course of his employment, except in those cases where the employer was not subject to the act or the common law remedy of an employee was expressly reserved by the act." Masich v. United States Smelting, Refining & Mining Company, 113 Utah 101, 191 P.2d 612, 616 (1948).

In its Brief, Appellant cites the Tenth Circuit case of Titan Steel Corporation v. Walton, 365 F.2d 542 (10th Cir. 1966) for the proposition that the "exclusive remedy" provision of the Utah Act is in fact non-exclusive as to contractual indemnity to third parties. Since the facts set forth in Titan appear analogous to those of the present case, the reasoning of the Tenth Circuit merits analysis. Nevertheless, Utah State courts do not accept rulings of Federal Courts as binding authority for the law of this State. Beal v. Turner, 22 Utah 2d 418, 454 P.2d, 624, 625 (1969).

In Titan, the Court reviewed an action on an indemnity agreement between an indemnitor-employer covered by the Utah Workmen's Compensation Act and a negligent indemnitee-third party as it related to injuries suffered by an employee, and noted that such "release-from-negligence contracts" are seen by federal law as contrary to public policy. The sparse Utah law upon which the Court could rely concerned only the issue of the validity of indemnity agreements generally. The conflict between indemnity agreements and the exclusive remedy provision of the Utah Workmen's Compensation Act had not, nor has it to

date, been presented to the Utah State Supreme Court. Neither was the Tenth Circuit presented with any case from another jurisdiction construing the exclusionary language in a Workmen's Compensation statute as forbidding enforcement of an indemnity contract where a negligent third party would be indemnified by the employer from all liability arising out of the injury of a covered employee. Therefore, absent support to the contrary, it upheld the agreement.

Since that time, this Court has unambiguously extended the Act's exclusive remedy provisons to preclude third-party actions against an employer.

> The exclusive remedy provisions of both the Utah and North Carolina Workmen's Compensation provisions make it clear that an employer's only liability for injuries sustained by an employee is the extent of benefits under the Act. Additional exposure through the indirect method of third-party action would be a blatant violation of expressed legislative policy.

Phillips v. Union Pacific Railroad Company, 614 P.2d 153, 154 (Utah, 1980). (Emphasis added)

Appellant has listed numerous cases in its Appendix II which allegedly "hold that the exclusive remedy provisions of the applicable state and federal Workmen's Compensation statutes do not bar suits founded upon express contracts of indemnification." However, a review of the respective statutes and factual circumstances surrounding the cited authorities offer insight into the reasoning of those other jurisdictions. Appendix A to Respondent's Brief annotates the cases cited by Appellant,

very few of which actually uphold an express indemnity agreement. And, those that do, concern distinguishing contractual provisions and/or are governed by a statute which differs materially from Utah's.

> Perhaps the most evenly-balanced controversy in all of compensation law is the question of whether a third party in an action by the employee can get contribution or indemnity from the employer, when the employer's negligence caused or contributed to the injury.

Larsen's Workmen's Compensation Law, §76.10 at 14-287.

Several jurisdictions have recently decided that the Legislature alone should make the exceptions to the exclusivity provisions of their Workmen's Compensation Acts. Indeed, Texas, Pennsylvania, and Minnesota have recently amended their statutes to expressly allow third-party indemnity agreements to be enforced against an otherwise immune employer.

In Gulf Oil Corporation v. Rota-Cone Field Operating Company, 84 N.M. 483, 505 P.2d 78 (1978), New Mexico's Workmen's Compensation Act was tested by an attempt to enforce a third-party indemnity agreement on facts indistinguishable from the present case.

> This case presents a question of first impression in New Mexico. Is an employer subject to liability in addition to the Workmen's Compensation Act where the employer voluntarily enters into a contract which also seeks indemnity? We say "no."

505 P.2d at 79. Voiding only the provisions of the contract which relate to indemnification, the court declared the statute

to be a prohibition of any additional liability sought to be imposed on a covered employer.

Alabama has encountered several cases much like this one. In Paul Krebs & Associates v. Matthews & Fritts Construction Company, 356 So. 2d 638 (Ala. 1978), the court was faced with an indemnity clause similar to that in the Master Rotary Drilling Contract. There, as here, an employee of the indemnitor was injured on the job partially due to the negligence of the indemnitee. The employee was precluded from suing his employer because of the exclusivity clause of the state's Workmen's Compensation statute (similar to Utah's). When the employee sued the indemnitee, a third-party action was brought against the employer. The Alabama State Supreme Court refused to enforce the indemnity provision and upheld the dismissal of the third-party action stating: "To allow a third-party tort-feasor to recover over against the employer for injury to an employee would be to allow indirectly what is prohibited directly." Id. at 639. Overruling a prior inconsistent decision and citing Gulf Oil Corporation v. Rota-Cone Field Operating Company, 84 N.M. 483, 505 P.2d 78 (1972), the Alabama court held that its Workmen's Compensation Act compelled the result since enforcement of the agreement would "write into the legislation an exception which is not there." Id. at 640.

In Hertz Equipmental Rental Corporation v. Dravo Corporation, 360 So. 2d 325 (Ala. 1978), the Alabama court again reached the same legal conclusion, citing Paul Krebs as

dispositive of the issue. "The right to indemnity from Dravo is founded on a contractual duty which is unenforceable as violation of a legislative enactment. Most recently, that court echoed the same policies in Stauffer Chemical Company, Inc. v. McIntyre Electric Service, Inc., 401 So. 2d 745 (Ala. 1981).

Michigan and Massachusetts have also recently joined the growing number of jurisdictions which refuse to enforce indemnity agreements in contravention of State Workmen's Compensation statutes. In Darin & Armstrong, Inc. v. Ben Agree Company, 276 N.W. 2d 869 (Mich. App. 1979), the court refused to enforce the indemnity provision as void as against public policy. "Nor could the provision be used to indemnify Darin & Armstrong from its concurrent negligence; this would be akin to contribution, which is forbidden by Michigan courts where worker's compensation is involved." Id. at 873. In Luken v. Westermann, C.A. 70-511-M (February 23, 1972) (unpublished opinion by the United States District Court in Massachusetts), Judge Murray refused enforcement of contractual indemnity as violative of the Workmen's Compensation Act of Massachusetts. See, Roy v. Star Chopper Co., Inc., 442 F.Supp. (D.R.I. 1977).

The legal positions taken by these courts are not without theoretical opposition from other jurisdictions; however, in light of the strong legislative and judicial statements of policy in Utah, this State has demonstrated its intent to align itself with those jurisdictions upholding clear public

policy over an oppressive indemnity agreement.

Respondent has complied with the Utah Act and, as an employer, has compensated Plaintiff Back for his alleged injuries. The third-party action brought by Appellant for for indemnification from Back's suit now threatens to violate both the language and the purpose of the Workmen's Compensation Act. Additional liability is sought to be attached to Respondent indirectly through the third-party action, yet that liability is undeniably resultant from the accident. This is a direct violation of the mandate of Section 35-1-60 and is incompatible with the clear interdiction of legislative policy encompassed in the Act.

III. THE LEGISLATIVE POLICY OF THE UTAH COMPARATIVE NEGLIGENCE ACT IS TO APPORTION LIABILITY FOR DAMAGES PROPORTIONATELY TO THE NEGLIGENCE OF EACH PARTY.

Sections 78-27-37 through 78-27-43 of the Utah Code Annotated (1953, as amended) are the legislative adoption of comparative negligence in Utah. The basic scheme of compensation diminishes total damages in a negligence action in proportion to the amount of negligence attributable to the person recovering. Joint tort-feasors then assume responsibility for damages due in proportion to their "relative degrees of fault" causing the injury. Thus, the clear legislative policy of Utah is that the parties should be responsible for their proportion of the negligent cause of injury.

Paragraph 11.6 of the Master Rotary Drilling Contract is plainly in contravention of the unequivocable policy in the Utah Comparative Negligence Act. Through this indemnity agreement, Appellant seeks to shift all responsibility for the alleged injury to Plaintiff Back to Respondent. The unfairness and obvious violation of Utah pbulic policy is illustrated if Appellant were 99 percent at fault and Respondent only 1 percent responsible. Disregarding the legislative policy, Appellant's contractual provision would make Respondent liable for 100 percent of the proven damages.

By statute, Respondent cannot be a joint tort-feasor. Utah Code Annotated §35-1-60 (1953, as amended). If Appellant was negligent and its negligence constituted at least 51 percent of the total negligence as compared to Plaintiff Back, Appellant must be held 100 percent responsible for the alleged injuries caused by that negligence. Respondent is statutorily protected from all liability resulting from the accident having fulfilled its obligations providing Back compensation under the Workmen's Compensation statute. This is entirely consistent with the comparative negligence policy of making parties responsible for their own actions. Appellant must now fulfill its legal obligation and pay in full any proven damages caused by its negligence as a sole tort-feasor.

VI. CONCLUSION

The action of the lower court in granting Respondent's Motion for Summary Judgment should be sustained. Based on

the foregoing analysis, this Court should fill the void in the State's case law concerning indemnity agreements in Workmen's Compensation actions by affirming the lower court's decision to hold the subject provision void and unenforceable.

RESPECTFULLY SUBMITTED this 16 day of February, 1982.

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APPENDIX A

Alaska

Statute: Alaska Stat. §23-20-055; very broad and similar to Utah's; workmen's comp. remedy is exclusive against anyone entitled to damages from employee's injury.

Case: Northwest Airlines, Inc. v. Alaska Airlines, 343 F.Supp. 826 (D. Alas. 1972); Fed. court finds no state law on subject; relies on federal statutes to enforce indemnity agreement.

Hawaii

Statute: Hawaii Rev. Stat. §386.5; indistinguishable from Alaska.

Case: Kamali v. Hawaiian Electric Co., Inc., 504 P.2d 861 (Hawaii 1972); court finds contract not express enough for enforcement; dicta says enforcement possible if intent is clear enough.

Maryland

Statute: Md. Ann Code, Art. 101, §§15, 58; workmen's comp. remedy exclusive only to employee; limits employee's rights, not employer's liability.

Case: Mason v. Callas Contractors, Inc., 494 F.Supp. 782 (D. Md. 1980); Fed. court upholds indemnity agreement; supports Appellant's argument.

Massachusetts (cited as Rhode Island)

Statute: Mass. Gen. Laws. Ann. Ch. 152, §§15, 24; broad replacement of civil actions by workmen's comp.; no "exclusive" language.

Case: Roy v. Star Chopper Co., Inc., 442 F.Supp. 1010 (R.I. 1977); Fed. court in Rhode Island interpreting Mass. law, rejects Mass. contrary decision and enforces indemnity agreement, see Brief at 11.

Michigan

Statute: Mich. Comp. Laws Ann. §418.131; workmen's comp. remedy exclusive against employee; limits employee's rights, not employer's liability.

Cases: Nanasi v. General Motors Corp., 56 Mich. App. 652, 224 N.W.2d 914 (1974); McLouth Steel Corp. v. A. E. Adnerson Const. Corp., 48 Mich. App. 424, 210 N.W.2d 448 (1973); both cases enforcing indemnity agreement superceded by Darin & Armstrong, Inc. v. Ben Agree Company, 276 N.W.2d 869 (Mich. App. 1979), see Brief at 11.

Minnesota

Statute: Minn. Stat. Ann. §176.061(10); expressly allows written indemnity contracts.

Case: Irrelevant because of statute.

Montana

Statute: Mont. Rev. Codes Ann. §§92-203 and 204; broad all encompassing "exclusive" remedy language.

Case: DeSlaw v. Johnson, 472 P.2d 298 (Mont. 1970); court upholds contract which indemnifies only employer's negligence.

Ohio

Statute: Ohio Rev. Code Ann. §4123.74; broad language similar to Utah restricts employer's liability.

Case: Williams v. Ashland Chemical Co., 52 Ohio App. 2d 81, 368 N.W.2d 304 (1976); Dicta states that enforcement of indemnity contract is possible.

Okalhoma

Statute: Okla. Stat. Ann. Tit. 85, §12; very broad language similar to Utah.

Case: Harter Concrete Products, Inc. v. Harris, 592 P.2d 526 (Okla. 1979); Dicta states that indemnity based on independent legal relationship may be enforced.

Oregon

Statute: Or. Rev. Stat. §656.018(1); broad language similar to Utah.

Cases: Gordon H. Ball, Inc. v. Oregon Erecting Co., 539 P.2d 1059 (ore. 1975); United States Fidelity and Guaranty Co. v. Kaiser Gypsum Co., Inc., 539 P.2d 1065 (Ore. 1975); both cases declare indemnity agreements enforceable in workmen's comp. cases, Kaiser in dicta.

Pennsylvania

Statute: 77 Pa. Cons. Stat. Ann. §481(b); expressly allows written indemnity contracts.

Case: Irrelevant because of statute.

Texas

Statute: Tex. Rev. Civ. Stat. Ann. Art. 8306, §3; expressly alows written indemnity contracts.

Cases: Irrelevant becuase of statute.

Vermont

Statute: Vt. Stat. Ann. Tit. 21, §622; limits employee's rights, not employer's liability.

Case: New England T&T Company v. Central Vermont Public Service Corp., 391 F.Supp. 420 (D. Vt. 1975); Fed. court admits no state law on subject; follows other Fed. courts' decisions enforcing agreements.

Virginia

Statute: Va. Code §65.1-40; limits employee's rights, not employer's liability.

Case: Burnette v. General Electric Co., 389 F.Supp. 1317 (W.D. Va. 1975); Fed. court finds no state law on subject; follows other Fed. courts enforcing agreements.

Washington

Statute: Wash. Rev. Code. Ann. §§51.04.010 and 51.32.010; limits employee's rights, not employer's liability.

Cases: Redford v. City of Seattle, 94 Wash.2d 198, 615 P.2d 1285 (1980); Calkins v. Lorain Division of Koehring Co., 26 Wash. App. 206, 613 P.2d 143 (1980); Broxson v. Chicago, Milwaukee, St. Paul & Pacific R. Co., 446 F.2d 628 (9th Cir. 1971); Redford and Broxson uphold agreements indemnifying only employer's negligence; Calkins took great pains to avoid enforcing agreement while declaring indemnity possible.

Wisconsin

Statute: Wisc. Stat. §102.03(2); vague declaration of "exclusive remedy against employer."

Cases: Hintz v. Darling Freight, Inc., 17 Wis.2d 376, 117 N.W.2d 271 (1962); Huck v. Chicago, St. Paul, Minneapolis & Omaha Ry. Co., 5 Wis. 2d 124, 92 N.W.2d 349 (1958); Hintz allowed agreement indemnifying only employer's negligence; Huck did not discuss workmen's comp.

Wyoming

Statute: Wyo. Stat. §27-50; limits employee's rights, not employer's liability.

Cases: Pittsburg-Des Moines Steel Co. v. American Surety Company of New York, 365 F.2d 412 (10th Cir. 1966); Pan American Petroleum v. Maddux Well Service, 586 P.2d 1220 (Wyo. 1979); Pitts Fed. court finds no state law and enforces agreement indemnifying aonly employer's negligence; Maddux avoided enforcing that agreement, but declared indemnity possible.

I certify that I caused two copies of the foregoing Brief to be mailed to Chris Wangsgard and Jeffrey C. Collins of VanCott, Bagley, Cornwall & McCarthy, 50 South Main, Suite 1600, Salt Lake City, Utah 84144, this 16 day of February, 1982.