1982

Acculog, Inc. et al v. Keith Peterson : Reply Brief on Appeal

Utah Supreme Court

Paul W> Mortensen; Harry E. Snow; Attorneys for Appellant;
Nelson L. Hayes; Richards, Brandt, Miller & Nelson; Attorney for Respondent;

IN THE SUPREME COURT OF THE

STATE OF UTAH

ACCULOG, INC., a State of Colorado corporation, ROBERT PFISTER and KENTON SHAW, co-partners doing business under the firm name and style of ACCULOG FIELD SERVICES, Plaintiff-Appellant, vs. KEITH PETERSON, dba, PETERSON FORD, Defendant-Respondent.	CASE NO. 18133

REPLY BRIEF ON APPEAL

APPEAL FROM THE JUDGMENT OF THE SEVENTH JUDICIAL DISTRICT COURT IN AND FOR GRAND COUNTY, HONORABLE GEORGE E. BALLIF PRESIDING

PAUL W. MORTENSEN
131 East 100 South
P. O. Box 339
Moab, Utah 84532

HARRY E. SNOW
82 N. Main
P. O. Box 520
Moab, Utah 84532

Attorneys for Appellant

NELSON L. HAYES
RICHARDS, BRANDT, MILLER
& NELSON
48 Post Office Place
P. O. Box 2465
Salt Lake City, Utah 84110
Attorney for Respondent

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vs.

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Defendant-Respondent.

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Attorneys for Appellant

NELSON L. HAYES
RICHARDS, BRANDT, MILLER & NELSON
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Salt Lake City, Utah 84110
Attorney for Respondent

TABLE OF CONTENTS

CASES CITED

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REPLY BRIEF ON APPEAL

POINT I

THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN NOT GRANTING A DIRECTED VERDICT IN FAVOR OF THE PLAINTIFFS ON THE ISSUE OF THE PLAINTIFFS' COMPARATIVE NEGLIGENCE AND IN NOT BARRING DEFENSE COUNSEL FROM ARGUING TO THE JURY THAT FAILURE TO HAVE A FIRE EXTINGUISHER CONSTITUTED NEGLIGENCE ON THE PART OF THE PLAINTIFFS

The Respondent's Brief confirms that there was no issue of negligence on the part of the Plaintiffs to be presented to the jury. All "issues" raised by the Defendant are without support in the evidentiary record. All "issues" raised by the Defendant necessarily would have required the jury to speculate.

The Respondent's Brief first attempts to dredge up two reasons, in addition to his improper fire extinguisher argument,

that the jury "could" have used to find the Plaintiffs' negligent. The Defendant now attempts to advance these reasons even though trial counsel did not consider them worthy of being argued to the jury.

First, the Defendant cites the testimony of Mr. Shaw where he states that he and Mr. Gates had smelled gasoline for a minute or two before the fire. The Defendant's brief conveniently ignores the prior testimony of Jim Gates wherein Gates testified that it took time to investigate and locate the source of the gasoline odor since they had a gasoline can inside the van which also omitted an odor:

Q Do you recall about what time you were done logging the final hole that day?

A I believe it was a quarter until 9:00.

Q And, again, prior to that time, had you observed any functional problem of any kind with the van?

A No.

Q What occurred at that time?

A Well, we finished our job and wrapped everything up and proceeded to come back to town. And we had made it, oh, a couple of miles at the most and we smelled some gasoline. And, at first, you know, we weren't sure exactly what it was, and I turned around to see if it could have been the gas can that we kept there in the van, but it wasn't.

Q What gas can are you referring to now?

A We have a two-gallon gas can that we used to run our generator.

Q Where was it located?

A It's a gas can that is located in the middle section of the van.

Q All right. Where were you and Mr. Shaw at that time in the van?

A Kenton was driving, and I was in the passenger's seat.

Q All right. Now, you were testifying regarding smelling the gasoline, and you thought it might be related to that can. Go ahead and tell us about that again.

A I smelled the gasoline--I don't think any words were spoken, but I looked at Kenton and I realized that he acknowledged something was out of norm. And I smelled around to see if I could locate it.

And it did seem to be coming from the engine compartment. And within a minute of that, there was a pop, and Kenton--well, there was a pop. I'll let it go at that.

Q Is that the best you can describe it, or is that an accurate description of what happened?

A Well, it was kind of a kawoosh sound. It wasn't real sharp or real loud, but we knew something had happened.

Q And what happened then?

A We stopped the van and got out. And I think Kenton mentioned that he saw some flames, or something. And we went around in front of the vehicle to see if we could extinguish the fire. And we proceeded in that manner. We threw dirt and rocks and everything we could find on the engine.

Q Before we come to that, let's go back to the point before you even got out of the van, if we could. How fast was the van traveling at that time?

A Oh, a couple of miles an hour, I guess. It was going at a very slow rate.

The Defendant's brief, after citing the alleged unreasonable delay in stopping the van, then asserts that the jury should have been allowed to speculate that, had the Plaintiffs stopped the engine a few seconds prior to the ignition of the gasoline, which had squirted on the engine, "...there probably would have been no fire, explosion or damage to the engine or any portion of the van." (Respondent's Brief at page 10). This is pure speculation on the part of the Defendant. The Defendant cites no testi-

mony whatsoever to prove that stopping the engine would have prevented the fire. In fact, the testimony of the Plaintiff's expert, which the jury accepted, was to just the opposite conclusion namely, that the fire was caused by gasoline collecting on the top of the hot engine and then being ignited by hot engine components (T. 114-119). Even had the engine been stopped a few seconds earlier, the hot engine components could still have ignited the gasoline which had been squirted out of the defectively installed fuel filter. The burden was on the Defendant to prove alleged negligence on the part of the Plaintiffs and the Defendant did not meet his burden because he did not provide any evidence to prove that a few seconds delay in stopping the engine would have prevented the hot engine components from igniting the gasoline..

Second, the Defendant's brief seeks to find negligence on the part of the Plaintiffs because they did not have the Defendant's employees check into the possibility that the van's original "cutting out" problem had been caused by a non-standard ignition system. This again asks the Court to speculate that something else caused the fire. However, nobody, not the Plaintiffs' expert, Mr. Caldwell, nor the Defendant's expert, Dr. Limpert, nor the Defendant's mechanics, nor anyone else, testified that a faulty ignition system caused the fire. To the absolute contrary, Dr. Limpert and Mr. Caldwell both agreed that the fire was a fuel system fire and not an ignition system caused fire (T. 114-119, T. 294).

When the foregoing have been objectively considered, it becomes clear why the Defendant's counsel did not argue these

"issues" to the jury. They were pure speculation with no basis in the record to support them. There was no issue of comparative negligence to go to the jury except as related, erroneously, to the Plaintiffs' failure to have a fire extinguisher.

While the Defendant attempts to quote the court to show that the court believed that there were other negligent acts of the Plaintiffs which caused the fire (Respondent's Brief at page 22), the statement relied upon shows that the court was only talking of possible negligent acts of the Plaintiffs in failing to mitigate damages by not putting out the fire in the best way once the fire had begun. The court stated:

> But I think it's a legitimate matter and can be handled by both of you in your arguments in having it considered as one of the negligent acts, if it is considered to be a negligent act by the jury that affects some portion of the damages, possibly. (T. 340-342).
>
> (Emphasis added.)

The court clearly was not talking about negligent causation of the fire but rather of failure to mitigate damages by using a fire extinguisher once the fire had occurred. This may be further verified by referring to the entire content of the court's remarks which are set forth in pages 12-14 of the Appellant's Brief.

Completely aside from the foregoing, remains the fact that by permitting the Defendant's fire extinguisher argument the court improperly invited the jury to find that the Plaintiffs' failure to have a fire extinguisher constituted comparative negligence and further invited the jury to speculate without the aid of any evidence that a fire extinguisher would have in fact

prevented the damage caused to the van and its contents. The fire extinguisher argument constitutes reversible error aside from the question of whether or not other actions of the Plaintiffs were negligent since the argument was clearly prejudicial in and of itself.

The Defendant's guest vs. host statute argument and the cases related thereto are simply inapposite to the Plaintiffs' case since they all involve an element of a conscious and knowing assumption of the risk by a guest who enters into a vehicle where a known present danger exists. The Plaintiffs in the case before the court did not know that the Defendant was going to cause their vehicle to burn down. Only if they had known, could they be held responsible for failing to put a fire extinguisher into their van.. The seat belt analogy asserted by the Plaintiffs is directly on point since a person in a car does not know that someone else is going to negligently drive into him and cause him injury. Hampton v. State Highway Commission, 209 Kan. 565, 498 P2d 236 (1972). As noted in the Plaintiff's prior brief, the State of Washington has refused to allow the use of comparative negligence principals to defeat an injured person's right to recover against a negligent driver of another automobile where the injured person was not wearing a seat belt. Amend v. Bell, Wash., 570 P2d 138, 95 ALR 3d 225 (1977). The courts have been unwilling to give a wrongful defendant such a windfall to avoid liability and this court should not become the exception to the overwhelming rule. Fischer v. Moore, 183 Colo. 392, 517 P2d 458 (1973).

POINT II

THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN NOT GRANTING THE PLAINTIFFS' MOTION FOR A NEW TRIAL SINCE THE EVIDENCE WAS INSUFFICIENT TO JUSTIFY THE JURY'S APPORTIONMENT OF 86% OF THE NEGLIGENCE TO THE PLAINTIFFS

As has been shown by the Plaintiff's rebuttal in Point I, there was no evidence before the court to enable the jury to find that the Plaintiffs were more negligent than was the Defendant. The evidence was so totally lacking that the jury could find against the Plaintiffs on the issue of comparative negligence only by speculating that a fire extinguisher would have stopped the fire in the engine compartment and, thereby, prevented 86% of the damage.

The whole of the evidence makes clear that the Plaintiffs could never have been 86% at fault for the fire. Therefore, there was insufficient evidence to support the jury's finding and a new trial should be granted if a directed verdict is not ordered in favor of the Plaintiffs as requested in Point I.

POINT III

THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN GRANTING A DIRECTED VERDICT THAT THE PLAINTIFFS' HAD FAILED TO PROVE A LOSS OF PROFITS

Rather than restate the Plaintiffs' position regarding the sufficiency of the Plaintiffs' evidence, the Court is respectfully and earnestly directed to the detailed treatment of the facts and evidence set forth in the Plaintiffs' prior brief. Comments here will be limited to rebutting specific arguments set forth by the Defendant.

First, the Defendant, at pages 27 and 28 of its brief,

quotes testimony by Mr. Canter in an attempt to show a lack of sufficient certainty as to the Plaintiffs' loss of profits. The key point here is that the testimony quoted does not go to calculation of lost profits or to whether or not the Plaintiffs were awarded contracts by Amoco Minerals.

The context of the testimony clearly shows that Mr. Canter was testifying of his attempts to find work for the Plaintiffs' logging units during the time period before he was informed by Amoco Minerals that he had been awarded the Alzada job. The Plaintiffs stipulate that they were uncertain of being awarded the Alzada Contract before they were awarded the contract by Mr. Lewis. However, as should be clear by now, the Plaintiffs and Mr. Lewis of Amoco Minerals both testified that once Mr. Lewis notified the Plaintiffs that the job was theirs, the uncertainty ceased. The job would have been performed by the Plaintiffs but for the loss of their logging unit caused by the Defendant. Therefore, the Defendant's attempt to mischaracterize Mr. Canter's testimony must be rejected by the Court.

Using the foregoing mischaracterization of Mr. Canter's testimony as an inaccurate foundation for further argument, the Defendant next argues that because a written contract was never signed, it was speculative as to whether the Plaintiffs would have performed the Alzada job. To the contrary, the testimony offered showed that it was more than reasonably certain that the Plaintiffs would have performed the Amoco Minerals jobs. Mr. Lewis testified as follows:

> Q Now, as I understand your testimony, you didn't have authority to sign the final prepared contract, is that correct?
>
> A Correct. Right.

Q In the conduct of your business, during that period of time, did you have authority to select the contractors, though?

A I had authority to recommend the contractors. And in two and-a-half year's history, John Squyres has never gone against a geologist's recommendation. (T. 193)

Mr. Canter testified as on cross examination as follows:

Q Mr. Canter, isn't it customarily the practice that if you enter into a contract for doing work with these companies, that there would be a written contract?

A Yes.

Q And in this case there were no written contracts?

A They were forthcoming. They ususally don't deliver the contracts until immediately before the work is to be done, customarily.

Q Okay. And until you signed that contract, do you feel you are bound on those contracts?

A No.

Q Do you think Amoco Minerals is bound on the contract?

A No.

Q What you're telling me is that when Mr. Lewis called you on October 14th and told you that you had the project, you didn't feel like you could hold them to it if they decided to change their mind on who was going to do the job?

A Without a written contract, I suppose they could change their minds, although, historically, we have never had that happen once we have been officially contacted and awarded a contract. (T. 215-216)

(Emphasis added.)

Additionally, the testimony was that the Amoco Minerals geologists have their own budgets to work with and the Plaintiffs' services were so greatly desired at Amoco Minerals that different Amoco geologists were competing with each other to obtain the Plaintiffs' services (T. 172). There was, therefore, sufficient evidence to allow the jury to find that written contracts would have been

signed and the Plaintiffs would have performed the jobs but for the Defendant's wrongful conduct.

Finally, the Defendant on appeal correctly states the rule regarding the calculation of loss of profits from a lost contract; namely: gross contract profits less the costs of performing the contract. This is exactly the rule used by the Plaintiffs' in presenting their evidence at trial, although at trial the Defendant tried to avoid this rule and the trial court could not grasp that this rule of law applied. As was shown by the Plaintiffs' prior brief, the evidence provided by both Mr. Cantor and Mr. Lewis of Amoco Minerals showed that gross profits of no less than $37,690.40 would have been received by the Plaintiffs' from their lost contracts. Costs of performing the contracts would have been $4,568.00, leaving a net loss to the Plaintiffs of $33,122.40. Plaintiffs' Exhibits 12, 14, 15, 16, and 17, and the testimony of Mr. Canter and Mr. Lewis clearly showed how the loss was to be figured (T. 175-182, 209-214).

Unfortunately, as noted in the Plaintiffs' prior brief at page 30, the trial court, over the Plaintiffs' objection, allowed the Defendant to question the Plaintiffs regarding matters totally unrelated to the calculation of loss of profits from the lost contracts. The court improperly allowed the Defendant to question Canter regarding the Plaintiffs' gross income for the entire year even though such evidence had no bearing whatsoever on calculating the loss of profits from the specific lost contracts (T. 227-228). It was in the context of this improper line of questioning that Mr. Canter stated that he could not tell what

the final over-all profit to the company would have been after general overhead was taken into account (T. 227). Mr. Canter had made clear previously that the general overhead would have remained the same regardless of whether or not the Plaintiffs had performed the lost contracts and that general overhead was not material in figuring the loss of profits from the lost contracts (T. 211, 225-226). Therefore, the Defendant's attempt to utilize this improper line of questioning on appeal must also be rejected by the Court.

As noted in the Plaintiffs' prior brief, the Defendant did not even move for a directed verdict on the ground that the Plaintiffs' damages could not be reasonably calculated. There clearly was sufficient evidence presented for the issue of lost profits to be submitted to the jury and the court erred in directing its verdict against the Plaintiffs.

CONCLUSION

The record is replete with errors committed by the trial court. This Court is respectfully requested to set matters straight by granting to the Plaintiffs' the relief requested in their prior brief.

Respectfully submitted this 1st day of November, 1982.

PAUL W. MORTENSEN
Attorney for Plaintiffs-Appellants

HARRY E. SNOW
Attorney for Plaintiffs-Appellants

CERTIFICATE OF MAILING

I hereby certify that I mailed two (2) true and exact copies of the foregoing Brief of Appellant to Nelson L. Hayes, counsel for the Defendant-Respondant, RICHARDS, BRANDT, MILLER & NELSON, P. O. Box 2465, Salt Lake City, Utah 84110, dated this 2nd day of November, 1982.

Michelle M Jorgensen
SECRETARY