1957

Leda Combe v. Utah Construction Co. : Brief of Appellant

Utah Supreme Court

Dean N. Clayton; Keith E. Murray; Attorneys for Plaintiff and Appellant;

Case No. 8705

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IN THE SUPREME COURT

of the

STATE OF UTAH

LEDA COMBE,

Plaintiff and Appellant,

-vs-

UTAH CONSTRUCTION CO.,

Defendant and Respondent

BRIEF OF APPELLANT

DEAN N. CLAYTON
KEITH E. MURRAY
Attorneys for
Plaintiff and Appellant

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LEDA COMBE,

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Brief of Appellant

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STATEMENT OF FACTS

This is an appeal by the Plaintiff-Appellant, hereinafter called Plaintiff, from a judgment for Defendant-Respondent, hereinafter called Defendant, on a jury verdict directed by the Honorable Parley E. Norseth, District Judge, on the 18th day of April, 1957, in the District Court of the Second Judicial District, Weber

County, Utah. Since the record on appeal is in two parts, Plaintiff will hereinafter refer to the transcript of evidence as (T) and the balance of the record as (R).

At the close of Plaintiff's case in chief Defendant moved the Court for a directed verdict (T 62), and the Court overruled the motion but reserved the right to rule on it. (T 63). After the close of Defendant's case in chief, the Court granted the Defendant's motion for a directed verdict (T 144-145). Plaintiff's motion for a new trial was denied by the Court on May 9, 1957.

Plaintiff was the owner of certain real estate located in the Southeast Quarter of Section 16, Township 6 North, Range 1 East, Weber County, Utah. Plaintiff had certain residential dwellings located on said property which was in the mouth of Wheeler Canyon in Weber County, Utah. For many years prior to the fall of 1955, there was a large cement culvert under Highway U-30 (T 43-55). This culvert was adequate to carry the flow of Wheeler Creek for many years. (T. 55). During

the fall of 1955, the Defendant constructed a temporary road (T 44-45) and installed some temporary culverts (T 47) to take care of the flow of Wheeler Creek. Prior to the 23rd day of December, 1955, there was for a period of several days, a rather heavy rainfall and snowfall in Wheeler Canyon (T 37). On December 23, 1955, Plaintiff's witnesses Andrew J. Shupe, DeLyle Muir and John R. Newey observed that the temporary culvert was not taking the complete flow of water from Wheeler Creek and that water had backed up around the cabins belonging to the Plaintiff. (T 23-37-51-56) On the evening of December 23, 1955, (T 23-35-36-48-49) the temporary road was washed out and all traffic was stopped and the water continued to back up for a period of several days around the cabins of the Plaintiff which Plaintiff contends was the proximate cause of the damages suffered by the Plaintiff.

STATEMENT OF POINTS

POINT I

The Court erred in sustaining Defendant's

motion for a directed verdict and directing a verdict in favor of Defendant and against Plaintiff upon the ground and for the reason that the undisputed evidence in this cause was sufficient to raise a jury question.

ARGUMENT

Plaintiff appeals from a judgment for Defendant on a directed verdict. The rule is established in this state, that upon Plaintiff's appeal from a judgment for Defendant on a directed verdict, this Court will consider and apply the evidence in the light most favorable to Plaintiff's cause of action and every controverted fact shall be resolved in Plaintiff's favor, A.W. Sewell v. Commercial Cas. Co., 80 Utah 378, 15 P. 2d 327; Jackson v. Colston, 116 Utah 296, 209 P. 2d 566; Boskovich v. Utah Const. Co., _____ Utah _____, 259 P. 2d 885, 886. The question here resolves itself into one of whether after considering the evidence in a light most favorable to Plaintiff, it would be unreasonable to find in favor of Plaintiff under the pleadings. Winchester v. Egan Farm Service, 4 Utah 2d 120, 288 P. 2d 709.

Stated another way:

> "....if by admitting for the purposes of the motion all facts which the evidence, given a reasonable construction in favor of the adverse party, tends to support or prove, it appears that all essential facts are supported by evidence with respect to which reasonable men may arrive at different conclusions, or the evidence is such that reasonable minds may draw different inferences, the motion should be denied and the case submitted to the jury." 52 Am. Jur., Trial, Sec. 362; Accord: 61 C.J.S. Motor Vehicles, Sec. 526

The Utah Rules of Civil Procedure are directly descended from the Federal Rules of Civil Procedure, although they contain a few modifications to suit local practice. Rule 50 (b), U.R.C.P., provides, in substance, that whenever a motion for a directed verdict is made at the close of the evidence and denied for any reason, the trial court is deemed to have submitted the cause to the jury subject to a later determination of the legal questions involved. The U.S. Circuit Court in Fratta v. Grace Line (C.C.A. 2d) 139 Fed. 743, 744, admirably states the text authority and Federal

view of the intent and purpose of Rule 50 (b):

> "We take this occasion to suggest to trial judges, that, generally speaking--although there may be exceptions--it is desirable not to direct a verdict at the close of the evidence, but to reserve decision on any motion therefor, and to allow the jury to bring in a verdict; the trial judge may then, if he thinks it improper, set aside the verdict as against the weight of the evidence and grant the motion, F.R.C.P., Rule 50 (b)....with the consequence that if, on appeal, we disagree with him, we will be in a position to reinstate the verdict, thus avoiding the waste and expense of another trial." See also: Moss v. Pa. R. Co., 68 F. Supp. 740; Barron & Holtzoff, Federal Practice and Procedures, Sec. 1076.

Plaintiff regards this case as presenting two main issues:

1. Whether or not the interference with the natural flow of water by the change in size of the culvert constituted negligence on the part of the Defendant.

2. Whether or not the proximate cause of the injuries suffered by the Plaintiff was an Act of God and was independent of any intervening acts of the Defendant.

In Paragraph 3 of Plaintiff's complaint the Plaintiff alleged:

"That during the fall of 1955 the Defendant through its servant, agents and employees, negligently obstructed the entrance to said culvert and changed its size and location."

In Paragraph 4 of Plaintiff's complaint, the Plaintiff alleged:

"That as a result of the negligence of the Defendant mentioned aforesaid, the waters that normally flowed through said culvert were caused to back up and flood residential homes that were located on Plaintiff's property."

The Defendant in his answer, as a Third Defense alleged as follows:

"Defendant alleges that if Plaintiff suffered the damages set forth in said complaint, the same were caused by an Act of God."

The Court in this case stated that the Plaintiff failed to prove by a preponderance of evidence any negligence on the part of the Defendant (T 144) and the Court further stated that there was no relation to negligence, if any, on the part of the Defendant to the proximate cause of the flood or the damages caused to Plaintiff's property (T 145). In this case the Defendant could have easily ascertained the maximum flow

of water down Wheeler Creek Canyon and could have taken precautions to install adequate culverts to carry such flow. The Defendant's witness David A. Scott (T 64 and following) testified that during the month of December, 1955, there was a maximum flow of 211 second feet and a maximum flow of 206 second feet on December 26. Mr. Scott further testified that there was a flow of 200 second feet on May 18, 1952, (T 70-72-73) and that on April 25 and April 26, 1952, there was a flow of 250 second feet. The plaintiff vigorously contends that the Defendant was under a duty to install temporary culverts which would be adequate to carry the maximum flow of water down Wheeler Creek Canyon irrespective of the time of year. The Plaintiff contends that the temporary culverts were inadequate to carry the flow of water and that it was negligence on the part of the Defendant to install inadequate culverts.

With respect to the Defendant's contention that Plaintiff's damages were caused by an Act of God, the Plaintiff vigorously contended all

through the trial of this case and still contends that there was negligence on the part of the Defendant and that such negligence was a question to be decided by the jury.

With regard to the interference, with the natural flow, see the case of Garrett v. Beers, 97 Kan. 255, 155 Pac. 2, where on page 4, Court said:

> "Nor can it be doubted that plaintiff sufficiently alleged, and that their evidence tended to prove actionable negligence. If the new channel had been adequate to carry the flood waters, plaintiff would not have been damaged. As the old channel flowed, their property, real and personal, would have been above, or chiefly above, the point where the water left Defendant's land. There was some evidence that the flood waters which did the damage came from another direction and not from Defendant's land. That was only a question for the jury."

Also see 56 Am. Ju., Sec. 32, where at page 521 it is stated:

> "While it is the general rule that where rains are so unprecedented, and the flood caused thereby so extraordinary, that they are in legal contemplation the Act of God, one obstructing a natural watercourse will not be held liable, it must appear, in order to give immunity under that rule, according to many authorities, that the Act of God is not

only the proximate cause but the sole cause of the injury."

In the case of Lisonbee v. Monroe Irr. Co. 18 Utah 343, 54 P. 1009 at page 1010, the Court stated:

> "Water controlled by gravitation manifests a power familiar to all, capable of accomplishing useful and beneficial purposes, or destructive and disastrous consequences and results; and therefore, when individuals interfere with or undertake to control such a force as an agency for their own purposes, by the employment of dams, canals, or machinery, the law requires them to use judgment, skill, care, and caution in the construction and maintenance of such means and appliances, in order that their neighbors or other people may not be injured. But they are only required to anticipate and prepare to meet such emergencies as may reasonably be expected to arise in the course of nature; they are not required to prepare to meet unlooked-for and overwhelming displays of adverse power,--such as storms of such unusual violence as to surprise cautious and reasonable men. Jordan v. City of Mount Pleasant 15 Utah, 449, 49 Pac. 746."

In a Kansas case the Defendant constructed a railroad embankment and left insufficient openings so that Plaintiff's farm was inundated. See Riddle v. Chicago, R.I.& P. Ry. 88 Kan. 248, 128 Pac. 195. In that case, at page 197, the Court held:

"It matters little what term is applied to a flood, and it may be that a flood such as has occurred at intervals for a number of years and which it is reasonable to expect will occur again should not be designated as extraordinary, but whatever name is given to it, a liability will arise against one whose obstruction causes the overflow and injury if he was in fact bound to anticipate and provide against such a flood."

The trial Court in effect decided that there was not any negligence on the part of the Defendant in this case and that Plaintiff's damages were caused by an Act of God. With respect to this point, this Court in the case of Charvoz v. Bonneville Irr. Dist., 20 Utah 480, 235 Pac. 2d 780, the Court held at page 782:

"It is well settled that one is accountable if his negligence concurs with an Act of God or with the negligence of a stranger in effecting damage."

38 Am. Jur., page 649, states the general rule:

"An Act of God is an unusual, extraordinary, sudden, and unexpected, manifestation of forces of nature which man cannot resist. The fact that no human agency can resist an Act of God renders misfortune occasioned solely thereby a loss by inevitable accident which must be borne by the one upon whom it falls. On the other hand, when an Act of God com-

bines or concurs with the negligence of the Defendant to produce an injury, the Defendant is liable if the injury would not have resulted but for his own negligent conduct or ommision."

CONCLUSION

Plaintiff contends that the evidence in this case was sufficient to go to the jury on the issue of whether or not Defendant was negligent in the manner that they installed the temporary culverts. Plaintiff further contends that the question as to whether or not the proximate cause of the damages to Plaintiff's property was the negligence of the Defendant or was an Act of God, was an issue that should have been determined by the jury.

Respectfully submitted,

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