

1990

Lynn Degraw v. Kindt Enterprises, INC., and Arthur Kindt and Doris Kindt : Brief of Appellant

Utah Court of Appeals

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Recommended Citation

Brief of Appellant, *Degraw v. Kindt Enterprises*, No. 900506 (Utah Court of Appeals, 1990).

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UTAH COURT OF APPEALS
BRIEF

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IN THE UTAH COURT OF APPEALS

LYNN DEGRAW,

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vs.

:

Case No. 900506-CA

KINDT ENTERPRISES, INC., and
ARTHUR KINDT and DORIS KINDT,

:

BRIEF OF APPELLANT

Appeal from a judgment of no cause of action in
a civil case before the Seventh District Court
in and for Uintah County, State of Utah, the
Honorable Dennis L. Draney Judge presiding

Arthur and Doris Kindt
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Pro Se as Respondents

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Attorney for Appellant

FILED

AUG 26 1991

IN THE UTAH COURT OF APPEALS

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IN THE UTAH COURT OF APPEALS

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ARTHUR KINDT and DORIS KINDT, :

BRIEF OF APPELLANT'

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JURISDICTION AND NATURE OF PROCEEDINGS

This is an appeal from the judgment in the Seventh District Court for Uintah County. This appeal was originally taken to the Utah Supreme Court and was poured down to the Utah Court of Appeals. This Court has jurisdiction to hear this matter under Utah Code Annotated §78-2a-3 and 78-3a-51.

STATEMENT OF ISSUES

Did the trial court error in finding that there was sufficient evidence to overcome the statutory presumption of negligence on part of the employers after proof of the injury was shown.

STATEMENT OF THE CASE

On April 7, 1983, appellant was injured on the job while employed by respondents. Respondents were without workmans compensation insurance and on or about October 7, 1983, appellant filed a civil action against Kindt Enterprises, Inc., and Arthur

and Doris Kindt in their individual capacities. The action was temporarily stayed by the filing of the Chapter 11 Bankruptcy Protection. The case was tried before the bench in the District Court for Uintah County on April 26, 1990. The court found no cause of action and plaintiff/appellant appealed.

STATEMENT OF FACTS

In 1983, appellant worked as a truck driver for respondents. On April 7, 1983, while as an employee of respondents. Respondent, Arthur Kindt directed appellant to connect an electric furnace to the electrical power source. Appellant told respondents that he did not feel that was his job and suggested that they have an electrical contractor finish the work. Appellant was not furnished with any type of testing equipment or proper tools for this job. Following the instructions of respondent Kindt, appellant did attempt to make the electrical connection and did sustain electrical shock, fell from a ladder and sustained serious injury to his ankle resulting in numerous medical procedures.

At trial, evidence was received and the court found the corporate defendant was the alterego of the individual defendants, Arthur and Doris Kindt. The lower court held that there was evidence to support defendants freedom from negligence sufficient to overcome the burden or the presumption of negligence set forth in Utah Code Annotated § 38-5-57 (1953) as amended.

SUMMARY OF ARGUMENT

The evidence clearly preponderates against the finding the defendants were free from negligence.

ARGUMENT

POINT I

The court misapplied the law in construing the statute that any evidence whatsoever showing freedom from negligence was sufficient to relieve defendants from their statutory obligation.

It was found that the defendants had not complied with Utah Code Annotated § 35-1-46 (1953) as amended and were hence subject to the non-compliance penalty contained in Utah Code Annotated § 35-1-57. Section 35-1-57 provides in part:

.... that in any such action, defendant shall not avail himself of any of the following defenses. Defensive of fellow servant rule, the defensive of assumption of risk or the defense of contributory negligence. The proof of injury shall constitute prima facie evidence of negligence on the part of the employer and the burden shall be upon the employer to show freedom from negligence resulting in such injury.

The court found that any evidence of freedom from negligence completely relieved defendants from their obligation. This is plain error and as the court must rule upon the totality of the evidence and not just upon the fact that some evidence was available to show freedom from negligence. The totality of evidence contained in the record clearly preponderates to a finding that defendants were negligent, even in the absence of the

statutory presumption, a preponderance of the evidence would still show defendants were negligent. It may be said that appellant was also negligent, however, the statute provides contributory negligence is not a defense. It may be said that plaintiff assumed the risk also. Such defense is taken away by our statute.

The court relies upon the language of Peterson v. Sorensen 65 P.2d 12 and English v. Kienke 774 P.2d 1155, 1157 for the proposition that there shall be ^{no} award for negligence charged, but not proved. Appellant has no objection with that statement of the law and in fact believes that to be a correct assessment. Here the court found that any showing that defendants may be free from any negligence overcomes the totality of the evidence showing that defendants were in fact negligent and without affirmative defenses.

This case is clearly one in which the appellant court must act to set aside the trial court's findings in that the evidence clearly preponderates to a different result. Zions v. First Security Bank § 534 P.2d 900.

The record in its entirety contains extensive evidence that defendants were negligent. The defendants had an electrical contractor install an electrical space heater. Installation was incomplete. Respondents then directed appellant, a truck driver, to finish the electrical connection. Requesting anyone without experience and knowledge and training necessary to work on electrical connections is negligent. There could be no question about the fact that defendants directed an unskilled person to perform

work with inherent dangers that attend the connecting of electrical appliances to power source. There was no test equipment or special tools supplied to appellant. Nothing in the record indicates that appellant had ever worked for a heating contractor as found by the court. Appellant had worked as a swamp cooler-air conditioning installer, but had little or no experience with the electrical apparatus. The court rests its finding of freedom from negligence on the statement of appellants belief that he could successfully perform the work.

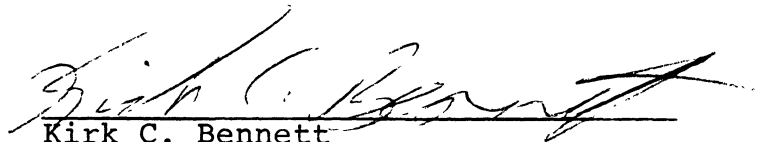
The preponderance of the evidence clearly showed that defendants were negligent in instructing and directing the manner of work which lead to the injury of appellant.

CONCLUSION

The record taken in its entirety shows the trial court abused it's discretion and made erroneous finding of law and misapplied the law to the facts and the totality of the evidence indicates that defendants were negligent and without affirmative defenses and should be held liable for the injuries sustained by the appellant.

DATED this 27 day of June, 1991.

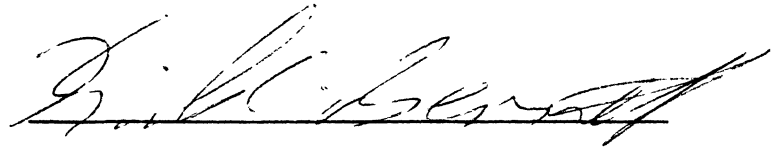
CONDER & WANGSGARD:


Kirk C. Bennett
Attorney for Appellant

CERTIFICATE OF MAILING

I hereby certify that a true and exact copy of the foregoing Brief of Appellant was mailed, postage prepaid, to the Respondents at their last known address:

Arthur Kindt
Doris Kindt
715 East 500 South
Vernal, UT 84078

A handwritten signature in cursive script, appearing to read "Bill Bennett", is written over a horizontal line.