1982

Dee Jay Bigler and Carol Bigler v. Mapleton Irrigation Canal Co et al : Brief of Appellants

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

DEE JAY BIGLER and CAROL BIGLER, his wife,	)	
Plaintiffs-Respondents	)	CASE NO. 18256
vs.	)	
MAPLETON IRRIGATION CANAL COMPANY and JOHN DOES I, II and III	)	
Defendants-Appellants	)	

BRIEF OF APPELLANTS MAPLETON IRRIGATION CANAL COMPANY AND JOHN DOES I, II AND III

APPEAL FROM THE JUDGMENT OF THE FOURTH JUDICIAL DISTRICT COURT OF UTAH COUNTY
THE HONORABLE GEORGE E. BALLIF
DISTRICT JUDGE

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BRIEF OF APPELLANTS MAPLETON IRRIGATION CANAL COMPANY

NATURE OF CASE

This is an action for negligent flooding of respondents' property. The court entered judgment on a jury finding that appellants were negligent and the sole and proximate cause of all of the damage.

RELIEF SOUGHT ON APPEAL

Appellants seek reversal of the judgment entered on the grounds that the wrong standards of law were applied by the court and the jury finding is not supported by the evidence and facts.

STATEMENT OF FACTS

Appellant Mapleton Irrigation Canal Company is a nonprofit corporation. (TR 504)* that provides irrigation water to its shareholders and derives its income by assessing shareholders for the use of water. Appellant receives its water principally from the Strawberry Reservoir with diversion dams in Hobble Creek Canyon. The water flows down a main canal with turnouts to approximately twenty-seven lateral canals. From each of the lateral canals there are approximately twelve to fifteen branch ditches or sublaterals which service the individual home owners and farmers. Locks are placed on the headgates from the Strawberry and Hobble Creek turnouts into the lateral ditch known as the Fullmer. TR 226 . There are approximately two hundred branch ditches with some two thousand privately owned dams or turnouts.

Water is diverted from the main canal and laterals by a water master. When water is turned down a lateral ditch into a sublateral, the water master notifies the user at the head of the ditch that the water is coming and that they will be allocated a certain amount of water. Each individual then notifies the next person that the water is coming down the sublateral or branch ditch. Water is diverted from branch ditch onto individual properties by headgates installed and maintained by individual

*(All references to the District Court file are designated "TR" with the page number following).

shareholders. Each person, as his turn arrives, removes the headgate to allow the water onto his property and inserts his headgate into the main flow of the branch ditch, thereby turning out the water onto his property for the period of time that he is entitled. (TR 308). So long as the headgates to the individual property owners are in their normal place, the water flows down the branch ditch, passed the property and out into a drainage area that absorbs all waste water.

Appellants have a policy and practice of requiring that headgates diverting water out of branch ditches be kept out of the ditch in the event waste water or irrigation water unexpectedly comes down those ditches. (TR 507,508). The shareholders at annual meetings have been advised to keep their headgates out of said branch ditches, (TR 508), and assessed penalties if they do not. (TR 308) The flow of water down the canals is not constant and varies considerably. (TR 285 & 506).

Respondents as shareholders participated in and utilized appellants' system for eleven years preceding the accident, and accordingly had diverted the water during their time and then passed it on down to subsequent users, (TR 196, 203). Respondents owned their own headgate and put it in themselves. (TR 240). Respondents were aware of appellants' policy and agreed that that was a policy that had been pursued over the years. (TR 257).

On August 24, 1979, respondents were the last users of the water in the sublateral or branch ditch, and when the watering turn ended and the water ceased to flow respondents did not pull

out their headgates which left a continuing dam or blockage to any water coming down the sublateral ditch (TR 330). Respondents' watering turn ended and the water ceased to flow at approximately 4:30 p.m. Sometime in the middle of the night, some amount of water came down the lateral ditch, was diverted by respondents' headgate onto respondents' property, thereby flooding the property, causing damage to the home, personal effects and property of respondents.

Respondents admitted that had the headgate been removed they would not have been flooded. (TR 250, 254). The testimony of Mr. Bigler on cross examination at TR 250, line 7 provides:

> "Question. On the 24th day of August you took the water. The water came to you and your boy took it. He put the headgate in. And then you left and went to work and your wife went to a function of some sort, and the dam was not taken out, was it?
>
> "Answer: No.
>
> "Question. If the dam had been removed as you had done for nine years other than about three times, you would not have been flooded, would you?
>
> ''Answer. No."

There was also testimony that water may unexpectedly be in the ditch if someone downstream asked for it. (TR 521). In fact, Mr. Mayberry, a user downstream, said he could always use all excess water on his hay field where the water only runs about one-third the distance down. (TR 535).

Respondents commenced an action in the Fourth Judicial District Court alleging negligence and seeking monetary damages.

The matter was tried to a jury and a special verdict was rendered finding appellants negligent and the sole and proximate cause of all damage. No allocation of cause or negligence was attributed by the jury to respondents. Judgment was entered against appellants in the amount of $8,361.70 plus costs of $363.10. A cash bond of $300.00 has been posted with the court and subsequently a supersedeas bond in the amount of $8,361.70 was filed with the court.

Appellants take no issue with the dollar amount of damages found by the jury, but only dispute (1) the standard of legal liability imposed by the court and relied upon by the jury and (2) the jury finding that appellants' irrigation company was negligent.

ARGUMENT

POINT I

THE JURY DECISION SHOULD BE REVERSED BECAUSE THE COURT IMPROPERLY IMPOSED A HIGHER STANDARD OF CARE ON APPELLANTS BY GIVING JURY INSTRUCTION NO. 8, THAN REQUIRED BY UTAH LAW.

Appellants particularly take exception to Instruction No. 8 given to the jury (TR 571) because it imposes a higher standard of care upon appellants, than required by Utah law.

> The court stated that it was the duty of appellant to: "No. 3. To use reasonable care in knowing where the water is in its irrigation system to prevent same from flowing into ditches where users are not on notice of its presence, or expectation in such ditch."

Appellants submit that there is no case law or statutory law in the State of Utah that requires appellants to know where the water is in all of its sublateral or branch ditches at all times.

The law only requires that appellants use ordinary care in the construction, maintenance and operation of its ditches so as to prevent any damage or injury to the property of others. See UCA 73-1-18; McKay v. Breeze, 72 Utah 305, 310, 269 Pac. 1026 (1928) and cases cited therein.

Even though the above instruction is couched in terms of "to use reasonable care in knowing..." the standard is vague enough that it implies appellant must know at all times and at all places and under all circumstances where the water is. In this case it means knowing there was water in a ditch in the middle of the night. By charging appellants with the duty to know where all water is in its sublateral ditches at all times imposes strict liability upon appellants.

In the ancient case of Fletcher v. Rylands, LR 3 HL 330, 1 Eng Rul Cas 256 (1868), the doctrine of strict liability was first enunciated wherein the owner of a mill built a reservoir and when the reservoir was partially filled with water, the dam broke through into old mine workings under the site of the reservoir, of whose existence the defendant was ignorant, and thence into the mines resulting in heavy loss. The House of Lords held:

> "We think that the true rule of law is that the person, who for his own purposes, brings on his land and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril, and if he does not do so he is prima facie answerable for all the damage which is a natural consequence of its escape."

The court in Rylands subsequently modified the liability for any "nonnatural" use of the land. Ibid. No evidence was presented at the trial in the present case as to the source of

the water that came down the ditch in the middle of the night that was diverted by respondent onto his property causing the damage. The water could have been waste water that was otherwise draining off over-saturated ground and flowing back into the ditches. In Brian v. Fremont Irrigation Company, 112 Utah 220, 186 P2d 588 (1947), this court held that since Utah is one of the arid states and conservation of water is of the utmost importance to the public welfare:

> "...To waste water is to injure that welfare, and it is therefore the duty of the user of water to return surplus or waste water into the stream from which it was taken so that further use can be made by others." Citing Kinney on Irrigation and Water Rights, Second Edition, Section 912, pages 1614-1616, at page 590.

The court in Brian noted that the channels served as natural drainage for the waters in the area, and therefore denied plaintiff's cause of action for waste water flowing back into a canal upstream from plaintiff, which overflooded and damaged plaintiff's property.

Since the water in the present case came unexpectedly during the night, the source seems of primary importance. Other sources of excess water that may have been in the sublateral ditch that evening could include flash flooding from heavy rainfall. See Jordan v. Mount Pleasant, 15 Utah 449, which holds, among other things, that companies are not liable for unlooked for or overwhelming displays of power, such as storms, but they may be required to meet weather emergencies that may be reasonably expected. No evidence was presented as to the weather and the potential for flash flooding.

Other excess waters could have come from percolating or

subsurface waters, or mountain runoff, or regular irrigation company water. In any event, the absence of such evidence showing the source or the nature of the water causing the damage, except that "it was present" imposes a strict liability standard on appellant. This prevents appellant from exercising ordinary care, because appellant is liable whether reasonable care is exercised or not and whether he knew about the water or not.

In McKay v. Breeze, supra, this court held that no negligence was shown that defendant failed to prevent seepage and flood damage to plaintiff when constructing a new irrigation ditch through otherwise very porous soil. The court in McKay, expressly rejected the doctrine of strict liability set forth in Fletcher v. Ryland, supra probably in furtherance of a public policy of encouraging private irrigation companies to meet the water needs of agricultural communities by imposing less stringent standards of care.

Appellant submits that it would be unwise to now impose strict liability on shareholder irrigation companies for the following additional policy reasons:

(1) There are some two hundred sublateral or branch ditches in appellants' system and about two thousand individual dams or turnouts, constructed and owned by individual property owners. Public policy would better be served by leaving the determination of responsibility for flooding and damage to the shareholders of the company. Here the shareholders annually approve a practice of imposing a financial penalty on individuals who leave their diversion headgates in the branch ditch. To hold appellant

liable in this case, defeats that self determination and imposes a legal requirement that the water master personally walk down each ditch every time to insure all two thousand headgates are properly situated before any water is turned down the ditch, with the company bearing the responsibility for failure to do so.

(2) Individual property owners are in a better position to police and maintain their diversion dams in situations where children are mischievous or playful in daming a branch ditch to swim or float boats, etc. Parents can better handle their children than the water master can.

(3) To hold appellant strictly liable creates a situation where individual farmers, who have suffered crop failure or financial loss, could simply leave their dams in the branch ditch in the middle of the night hoping to catch some water and then seek restitution for damage to their property from the irrigation company.

(4) The laws in Utah ought to support private irrigation companies providing low cost irrigation water to agriculture communities. Appellant as a non-profit corporation seeks only to meet expenses and not make a profit. Higher standards of legal care impose higher costs and would force the company to seek governmental subsidies through taxation. Appellant submits that to impose strict liability of requiring appellants to know where any and all water is at all times is not in the best interests of the parties or the people of the state of Utah and is a legislative decision.

A second point regarding Instruction No. 8 that merits consideration is that even if appellants are held strictly liable

to know where all water is in all their sublateral ditches at all times, appellants submit it is not the law in the state of Utah that notice be given to all property owners when water is passing through the sublateral ditch to another location. In the case of Anderson v. Pleasant Grove Irrigation Company, 26 Utah 2d 420, 490 P2d 897 (1971), this court held that an irrigation company could not escape liability on the theory that the duty to see where the water went after receiving notice of their turn was on the shareholder. In Anderson the facts were substantially different from the present case, in that a non-user had previously notified the irrigation company of the potential for flooding and had asked the irrigation company to exercise care in seeing that any water passing through his land would not overflow. The irrigation company then having been put on notice failed to take such reasonable care to prevent the flooding and damage to the shareholders' property. The court in Anderson never imposed a duty on the irrigation company to notify the plaintiff every time that water would be flowing through or passed his premises. Appellant submits that no case heretofore decided in the State of Utah has imposed an obligation on any irrigation company to notify individual property owners when water is passing through a sublateral or branch ditch on their property. In fact, legal counsel for respondents argued that the failure to provide this notice in the middle of the night by appellants was the cause of the damage and constituted negligence under Utah law, which was an improper statement of Utah State Law. (See Transcript at pages TR 576, 577, 579, 580, 582,

583,606, 607.) From the facts illicited at the trial, respondents readily admitted that had they not left their headgate in, thereby turning the water out onto their property and had the headgate been removed as they had done for the preceding nine years, other than about three times, the property would not have been flooded. (TR 250). The Utah Legislature has spoken rather forcibly on the subject that any individual diverting water from its water course, except to prevent damage to private property, is acting contrary to Utah State Law and is guilty of a misdemeanor and is subject to damages and costs. UCA 73-1-15 provides:

> "Obstructing canals or other water courses-penalties. Whenever any person, partnership company or corporation has a right of way of any established type or title for any canal or other water course, it shall be unlawful for any person, persons, or government agencies to place or maintain in place any obstruction or change of the water flow by fence or otherwise along or across or in such canal or water course, except as where said water course inflicts damage to private property, without first receiving written permission for the change and providing gates sufficient for the passage of the owner or owners of such canal or water course. That the vested rights in the established canals and and water course shall be protected against all encroachment. That indemnifying agreements may be entered as may be just and proper by governmental agencies. Any person, partnership company or corporation violating the provisions of this section is guilty of a misdemeanor and is subject to damages and costs."

Appellant submits that "other water course" within the meaning of the above statute, applies to all lateral, sublateral and branch ditches of irrigation companies. Appellants believe that one of the reasons why the headgate was left in the sublateral ditch by respondents was to turn any excess water onto their property.

Appellants submit that the court applied the wrong standard

of law imposing strict liability upon them for all water going down sublateral or branch ditches, whether or not they had notice of said water and regardless of the source of said water. Furthermore, respondents' intervening act which diverted the water from the sublateral onto its property, violated statutory law and company policy and procedures. The water otherwise would have gone down the sublateral into the drainage area, causing no injury to anyone.

POINT II

THE JURY FINDING OF ONE HUNDRED PERCENT NEGLIGENCE ON THE PART OF APPELLANTS IS NOT SUPPORTED BY ANY SUBSTANTIAL OR REASONABLE EVIDENCE AND AS SUCH SHOULD BE REVERSED.

This court in Erickson v. Bennion, 28 U2d 371, 503 P 2d 139 (1972), reiterated the general standard of appellant review of not upsetting a finding by a jury if any reasonable or substantial basis exists to support it. In Erickson, the court held that plaintiff's contributory negligence in having a driveway built without a culvert caused his own damage by diverting defendant's irrigation water onto his property. Appellants submit that respondents in the pesent case failed to present any compelling or substantial evidence upon which a jury could rely, establishing that appellants were negligent in the operation of the sublateral or branch ditches. No evidence was presented that appellants failed to repair or maintain their ditches. In fact the ditches are in good operating order, do not allow seepage and are adequate for the normal flow of water. The dam gate where the problem arose belongs to respondent (TR 240) and is built out of concrete with a firm plywood board being

inserted in the grooves that sufficiently turns the water out of the lateral ditch onto respondents' property. See Exhibit No. 12. No evidence was ever presented that the sublateral or branch ditches were improperly constructed or that the dykes, dams or turnouts were improperly constructed.

No evidence was presented by respondents that the failure to lock up a headgate on the main ditch or lateral ditch on any given occasion was the cause of the damage to respondents. The testimony of the water master, Doc Snow, (Transcript page 27 line 10 through 13) indicated that it was his job to check and make sure that the locks on those headgates on the distribution system were in good repair. In fact, in testimony set forth in the deposition of Doc Snow (Deposition of Louis Snow-page 5-which was published) (TR 226-227) information was provided that appellants always kept the main canals locked and he kept them locked up. From the transcript of proceedings, no mention was made of any failure to keep the main canals locked up. The only possible evidence was a hearsay statement testified to by Mr. Bogardus (Transcript, page 265, line 17 through 20) to the effect that Mr. Bleggi indicated to the water master that "the gate should be chained and locked". However, it appears from the transcript of the proceedings that no evidence was ever presented or offered, which would indicate that the failure to keep the gate chained and locked was the direct cause of the harm to respondents. In fact, no evidence was ever presented as to the source of the water, whether it was from rain, flooding, runoff from over-saturated land, percolation, or diversion by other individuals of

water into the sublateral ditches. Appellants submit that there is not any substantial evidence upon which a jury could rely in finding negligence attributable to appellants as to the lockups of the main canals, laterals, sublaterals, or branch ditches where the incident occurred.

Respondents did allege that the system of taking turns, followed by appellants over the past fourteen years, and of notifying the individual at the head of a sublateral ditch who then notifies the next person down the line, constituted negligence. Respondent Bigler testified that he has operated under such system for approximately eleven years. (TR 196) Respondent also testified that he has read the statement of policy of appellants' irrigation company and agrees that it is the policy that irrigation company pursues. (TR 257) Another witness for respondent, Donald Bogardus also testified that he was acquainted with appellants' policy on notification (TR 266-267) and furthermore testified that he knew if he left his headgate in very long, he would get flooded. Mr. Bogardus stated at TR 267 lines 15 through 19:

> "Question: And if you left your headgate in very long, you may get flooded, is that correct?
>
> "Answer: Yes, I knew that I wouldn't know when the water was coming in the ditch, so I always left the headgate out."

Appellants offered testimony (at TR 308) that the users themselves agreed to notify each other down the line when water was coming and when their headgate should be removed to allow the water to flow down the sublateral ditch. It had been the

established policy of appellants' irrigation company for the last fourteen years and, in fact, at annual meetings the policy was announced and discussed. (TR 507, 511, 553) Appellants attempted to introduce evidence as to the custom and common usage of following such procedure throughout Utah County by the various irrigation companies, which proffer of evidence was refused by the court and which the jury never had the opportunity to consider. (TR 566-67). The proffer would have set forth the so called "turn system" such as the Springville System which allows each user to take his turn and thereby imposing an obligation upon the water users to open and close their own gates and notify the next ones in line that the water was available. Appellants submit that should this court conclude that the notification or "turn system" employed by appellants constituted negligence in this case, then appellants should have been given the opportunity to present evidence on the common usage and practice in the state and community, together with the reasons and history for such use. The failure to allow evidence on this point is reversable error.

One additional area which is misunderstood may have unduly influenced the jury. For some unexplained reason the water master's records for the month in question were missing from his book. This disappearance is not substantial evidence upon which a jury could rely to find that appellant was negligent in the operation of its irrigation system. Under the irrigation company rules, an individual can only receive so much water as he is entitled to evidenced by his shares or ownership in the

irrigation company. Each share receives only so much cubic feet of water. The water master's records, although not the best, do indicate the number of hours that an individual receives water on any given day. The date of August 24, 1979, when the accident occurred, was at or near the end of the watering season. From the records at the end of the year, it could be established the amount of water that each shareholder received. If any shareholder received more water than his shares entitled him to he would be liable to the company for such excess water. It is unfortunate, but appellants believe, because of this fact, some shareholder in the system obtained and tore out the pages of the water master's book in order to conceal the fact that he received more water than he was entitled to. No evidence was ever presented by any of the parties that the water master or the officers and directors of appellant irrigation company themselves destroyed the records, nor did they in any way consent to the destruction of records by individuals known to them. If the jury relied upon the torn out records to find negligence on the part of appellant, then said evidence is insufficient to warrant a finding of negligence or causation by appellants.

The only evidence presented was that during the night some unknown amount of water from some unknown source, came done one of 200 branch ditches, and was diverted by respondents headgates onto the property causing the damage. The headgate should have been removed to allow the water to flow by harmlessly.

Excluding the hearsay statement of Mr. Bleggi, and disregarding the fact that daily records were missing, there is no evidence of negligence other than water was present in the

branch ditch that night. Appellants submit the evidence is insufficient to substantiate the jury verdict.

POINT III

THE JURY'S FINDING OF NO CONTRIBUTORY NEGLIGENCE BY RESPONDENTS IS NOT SUBSTANTIATED BY THE EVIDENCE.

Respondents testified that had they removed their headgate they would not have been flooded or damaged. The testimony of Mr. Bigler on cross examination at TR 250, line 7 provides:

"Question: On the 24th day of August, you took the water. The water came to you and your boy took it. He put the headgate in. And then you left and went to work and your wife went to a function of some sort and the dam was not taken out, was it?

"Answer: No."

"Question: If the dam had been removed as you had done for nine years, other than about three times, you would not have been flooded, would you?

"Answer: No."

Another witness for respondent, Mr. Bogardus testified that he knew that if he left his headgate in that the water would be turned onto his property, and he would be flooded. (TR 267 line 15). Appellants do not dispute the testimony of respondents in this regard that had they removed their dam, they would not have been flooded. Appellants do submit that it was foreseeable that water could possibly come down the ditch. Appellants presented testimony of Mr. Mayberry, a party further down the line on the sublateral or branch ditch, that he could always use any excess

water. Mr. Mayberry stated at TR 534-535 beginning at line 17:

"Question: Do you have any knowledge, Mr. Mayberry, as to whether any water has come down that ditch, other than on scheduled times when you were taking the water?

"Answer: I can't pinpoint a definite time, but I imagine there was about a half-a-dozen times that we had waste water come down the ditch. We welcomes sic it, because the water over there is very rare and very scarce in that ditch.

"Question: Let me ask you this: Are you or are you not short of water, then?

"Answer: Well, we don't have too much, that's true.

"Question: And you have stated that you welcomed the water, is that correct?

"Answer: That's right."

Appellants submit that the jury finding of no contributory negligence on the part of respondents is wrong and is not supported by the evidence presented. See generally UCA 78-27-37, Rigtrup v. Strawberry Water Users Association, 563 P2d 1247 (1977).

CONCLUSION

Appellants submit that the decision and judgment of the lower court should be reversed because:

1. The court applied the wrong standard of law in its jury instructions, which was tantamount to imposing strict liability

on appellant irrigation company for any and all water found in its sublateral or branch ditches. Furthermore, charging appellants with the knowledge of said water and requiring them to give notice to everyone that said water is passing by or through their property in said sublateral ditch at all times is contrary to the law heretofore established in Utah.

2. No substantial or reasonable evidence was presented to the jury setting forth negligence in the operation, care and maintenance of said ditches, nor demonstrating that appellant violated any duty of care to respondents.

3. The jury was wrong in finding no contributory negligence by respondents, based upon respondents' own testimony that the flooding and damage would have been avoided had respondent removed the headgate from the ditch after his watering turn, which respondent had the opportunity to do, but failed to do. The judgment of the District Court should be vacated and the matter should be remanded back to the District Court for a trial applying the proper standards of law in the State of Utah.

DATED this 21 day of July, 1982.

Respectfully submitted,

Michael L. Deamer
Attorney for Appellants