

1972

Maylom F. Erickson v. Sterling Bennion : Brief of Appellant

Utah Supreme Court

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Recommended Citation

Brief of Appellant, *Erickson v. Bennion*, No. 12617 (Utah Supreme Court, 1972).
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**In the Supreme Court
of the State of Utah**

**MAYLON F. ERICKSON
MRS. MAYLON F. ERICKSON**

Plaintiffs-Appellants

vs.

STERLING BENNION

Defendant-Respondent

APPELLATE

**APPEAL FROM THE DISTRICT COURT
IN AND FOR MILLARD COUNTY
HONORABLE J. EARL**

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DISPOSITION IN THE LOWER COURT

The Honorable J. Harlan Burns, District Court Judge in and for Millard County, Utah, granted the defendant's Motion for Dismissal at the conclusion of the evidence presented by the plaintiffs.

RELIEF SOUGHT ON APPEAL

Appellants seek an Order remanding the cause back to the Trial Court with instructions to award damages to appellants for the amount of damage to the plaintiffs' home and premises caused by defendant's fugitive water.

STATEMENT OF FACTS

Sometime during the month of May, 1968, defendant-respondent (usually hereinafter called Bennion) ordered water from the Melville Irrigation Company to irrigate his farm located near Delta, Utah, consisting of 160 acres. Mr. Bennion was the owner of 60 shares of stock in the Melville Irrigation Company and was entitled to water from the irrigation company at times and for places indicated by him consistent with the regulations of the company. Mr. Bennion's property is located on the North side of the Delta-Fillmore Highway near the city of Delta, (S. A. Bennion Deposition, pages 4, 5, and 7-8; Tr. 110-114).

The water ordered by Mr. Bennion in May of 1968 was delivered from the Melville Irrigation Company in the Jones ditch to the North side of the Bennion farm. (S. A. Bennion Deposition, 8 and 10; Tr. 114-116).

The irrigation water in May of 1968 escaped from the Bennion farm property and traveled across a county road situated immediately East of the Bennion property and traveled East, parallel to the Delta-Fillmore State Highway, to the appellants' (hereinafter usually referred to as Ericksons) property upon which was constructed their home. (S. A. Bennion Dep. page 21; Tr. 126).

Mr. Bennion used a four foot stream to irrigate the farm property on each occasion that he ordered water for irrigation. (S. A. Bennion Dep. page 10; Tr. 115).

On June 19, 1968, Bennion ordered a stream of water to irrigate the farm in a customary manner. The stream ordered was a larger stream than usual as he was advised by Paul Adams at the time the stream was turned to him that "well, that's a bigger stream than you usually use." (S. A. Bennion Dep. page 11). Bennion took the water at approximately noon on the 19th of June, 1968 and irrigated the farm property in what appeared to be a customary manner at least as far as the first two placements of the water were concerned. (S. A. Bennion Dep. pages 15 & 16; Tr. 129-131).

Bennion physically divided the property he was then farming for irrigation purposes by using the stream approximately one-third of the 24 hour water turn on the first one-third of the property, one-third of the 24 hour water turn on the second one-third of the property and the balance of the water turn on the remaining one-third. On June 19th the change from the first one-third to the middle one-third was effected during the evening after the water had been on the first one-third from approximately noon until evening — between 6 and 8 hours. (S. A. Bennion Dep. page 16; Tr. 130-131). The middle one-third was irrigated until about 12:00 o'clock midnight at which time the water was all directed to the remaining one-third of the property. (S. A. Bennion Dep. page 16; Tr. 130-133).

The following morning Mr. Bennion determined that the water had moved faster than he thought. (S. A. Bennion Dep. page 17, Tr. 132). The water had traveled all the way through the property and was escaping from the lower portion thereof over a dike which was constructed at that end of the field to retain the water and keep it from leaving the property and crossing the county road situated immediately East of the field.

The slope of the property is from North to South and from West to East. When the water has completed the course through the property from North to South it is

held by an irrigation facility described as a dike and, if allowed to escape over or through the dike, it travels East across a county road immediately adjacent to the property and, after crossing the road, continues to travel East parallel to the Fillmore-Delta Highway until it reaches the plaintiffs'-appellants' property (Tr. 113, 125-126).

Several years ago major repairs were made to the Delta-Fillmore Highway at which time the Highway was significantly improved and the road base as well as the hard surface portion of the road was widened. The widening of the road extended out to and beyond the barrow pit which was parallel to the old Fillmore-Delta road as it extended East from the Bennion property. The Bennion waste water had previously been allowed to escape from the Southeast corner of his property and travel East parallel to the old Fillmore-Delta Highway down past the Erickson property and allowed to flow out into a waste area extending East and North from the Erickson property. However, when the Utah State Department of Public Highways improved the Delta-Fillmore Highway and constructed a road on the East side of the Bennion property parallel to the East side of the Bennion property connecting the Delta-Fillmore Highway with the U.S.-6 Highway North of the Bennion Property, they constructed a drain for Mr. Bennion to allow the waste water to flow from his property at a point approximately $1/8$ to $1/4$ of a mile North of the Southeast corner of his prop-

ARGUMENT

POINT I

THE TRIAL COURT ERRED IN HOLDING THAT BENNION WAS NOT NEGLIGENT IN THE MANAGEMENT OF HIS IRRIGATION WATER.

The evidence is insufficient to support the finding that Mr. Bennion was not negligent in the manner in which he managed his irrigation water on the 19th and 20th of June, 1968.

Mr. Bennion had farmed his property and irrigated the same in connection with his farming operation for many years prior to the year 1968. He knew of the particular characteristics pertaining to his farm property, the slope of the ground, the time required to irrigate each parcel of said ground and the amount of water required. He knew the direction the water traveled while it was traversing the farm property and the direction the water traveled as it became waste water after it had completed its passage through his farm property. He knew from prior experience that when the water reached the South end of his farm property it would travel East along the South end of the property and, unless retained at that point, would cross the county road situated East of the property and escape into the barrow pit on the North side of the Delta-Fillmore Highway and continue to travel East parallel to the Highway down onto the Erickson property and other properties situated in the general area.

Mr. Bennion's own testimony and the testimony of other witnesses called at the trial left no doubt that Mr. Bennion knew and understood his responsibility as to the irrigation of his farm property.

The testimony at the trial indicated that Mr. Bennion was aware that several years prior to 1968 the highway known as the Delta Fillmore Highway had been widened and improved and thereby removed or significantly limited the use of the barrow pit situated North of the highway for escaping water. He knew, on his own observation of May of 1968, that his escaping water would travel down to and flood the Erickson property unless retained on his own property or diverted at a point East of the Erickson property along the North side of the highway. Mr. Bennion knew that the state had constructed for him a drain facility situated North of the Southeast corner of his property and he knew that it was his responsibility to construct an irrigation facility (dike) and maintain the same sufficiently to direct the waste water along the dike to the drainage pipe installed by the State of Utah. Mr. Bennion knew at the time the drainage pipe was installed that he no longer enjoyed the right to allow his irrigation water to flood from the Southeast corner of his property down the old drainage area parallel to the old highway. He knew that a connecting road had been constructed on the East portion of his property and that said road was a county road and that he did not have the

right to allow his water to cross said county road or flood the same except as he was allowed to use the drainage pipe constructed under the connecting road to allow his waste water to escape from his property.

The owner of irrigation water and/or the person in charge of irrigation water and canals and/or ditches and or irrigation facilities, has a duty of exercising ordinary care to prevent injury and damage to others. Utah courts have held as early as 1897 that liability existed as to the owner of or the person in control of water allowed to cause flood damage. In the case of *Jordon vs. Mt. Pleasant*, 1897, 15 Utah 449, 49 Pacific 46,

The Court held that a City is liable for damages resulting from the overflow of a natural stream caused from barriers erected in the stream by the City. The City constructed the barriers to avoid flood damage farther down stream, but the barriers as constructed became clogged and caused the creek to overflow above the barriers, damaging the plaintiff. (*Digest of Utah Water Law*, page 127).

The general rule governing liability for injuries resulting from the construction and operation of irrigation works, has been applied in a variety of instances. Thus owners of irrigation works have been held liable for damage resulting from their negligence in discharging water upon adjoining property, in permitting water to escape or overflow from their ditches onto adjoining land. In causing, by embankments and dams, water to back up or

another's land, even though the irrigation canal was built prior to the construction of the buildings that were injured.

The statutes of the State of Utah impose an affirmative responsibility on owners and persons in control of irrigation water. *Utah Code Annotated*, 1953, Section 73-1-8 provides :

Duties of owners of ditches — safe condition — The owner of any ditch, canal, flume or other water course shall maintain the same in repairs so as to prevent waste of water or damage to property of others, and is required by ditch, bridge or otherwise, to keep such ditch, canal, flume or other water course in good repair for the same cause as any public road or highway so as to prevent obstruction to travel or damage or overflow on such public road or highway.

In the instant case, Mr. Bennion was the owner or in charge of the responsibility of maintaining the dike which contained his waste water and forced the same to flow North along the East boundary of his property to the point where it was allowed to travel under the public road and escape to the East in a barren brush area wherein it would cause harm to no person or property. Mr. Bennion failed to maintain the dike in such a condition as the waste water was allowed to escape on the very first occasion that he used the water in 1968, to-wit, at the time of his irrigation turn in May of 1968, and at that

time he was based on notice of the defect to the di-
 Thereafter, to-wit, in June 1968, he accepted a stream
 of water which was placed in his care and control by the
 irrigation company and he knew at the time he accepted
 the stream of water that it was a stream which was big-
 ger than he customarily ordered (S. A. Bennion Dep. p.
 11).

Mr. Bennion knew from prior experience that if the
 water was allowed to escape from the Southeast corner
 of his property it would travel East parallel to the high-
 way down to the Erickson property and flood the same
 (S. A. Bennion Dep. p. 24). Mr. Bennion knew that the
 drain which was previously used in connection with the
 drain of the Bennion property had been closed when the
 highway connecting Delta and Fillmore was repaired
 several years prior to 1968 (S. A. Bennion Dep. p. 25 &
 26).

Mr. Bennion admitted that he had not properly main-
 tained the control of the irrigation water during the night
 of June 19th and the early morning of June 20th when
 he advised Mrs. Erickson that he had overslept (Tr. p.
 33). In view of the fact that Mr. Bennion knew that he
 had a stream of water larger than was customary and be-
 cause he knew from prior experience in 1968 that the es-
 caping water would travel down to and on the Erickson
 property, he failed to maintain the standard of care

required for a pertinent person in the irrigation of his property. He breached the duty imposed upon a person charged with the use of irrigation water and was negligent in allowing the water to escape.

By allowing the water to travel onto and over the county road situated immediately East of the Bennion property, Mr. Bennion is negligent as a matter of law as he is in violation of Sec. 73-1-8, Utah Code Annotated, as amended.

The Utah Courts have indicated that recovery is allowed where there is a showing of negligence or want of ordinary care in the construction, operation or maintenance of irrigation ditch facilities. *Chipman v. American Fork City*, 46 Utah, 148 Pacific 1103; 54 Utah 93, 179 Pacific 742. *MacKay v. Breeze*, 72 Utah 305, 269 Pacific 1026.

The California Courts have held in actions for damages and for injunctive relief that the injured party is entitled to recovery where draining operations caused water to flow from realty of defendant onto realty of plaintiff. *Sturges v. Charles L. Harney, Inc.*, 331 Pacific 2nd, 1072, 165 Cal. 306.

Some courts appear to hold that there is absolute liability resulting from flooding waters damaging adjoin-

ing property. However, it appears that the Utah Court and most of the Western States Courts have held the liability is predicated on negligence. In *West Union Company v. Provo Bench Canal & Irrigation Company*, 208 Pacific 1119, 116 Utah 128, the Court held as follows:

An irrigation company is not an insurer against damages caused to others by its water, but is only liable for its negligence.

In a very recent Utah case, *Anderson vs. Pleasant Grove Irrigation Company*, (490 P. 2d 897) the Supreme Court of Utah affirmed the Fourth District Court, Utah County, Maurice Harding, Judge, Judgment against the irrigation company and water master in connection with flooding of plaintiff's property.

The Court found as follows:

Evidence as to overcapacity flow of water in irrigation ditch and as to means of avoiding damage to plaintiff's adjacent property by closing main head gate sustained finding of negligence of irrigation company and its watermaster in the flooding of plaintiff's property. (490 P. 2d 897).

The instant case is substantially the same as the evidence presented to the Court indicating that there was an overcapacity flow of the water allowed by the defendant to accumulate at the dike he was charged with the responsibility of maintaining to insure that the water

not escape and travel the course known by him to be the course the water would follow and ultimately flood the plaintiffs' property.

POINT II

THE COURT ERRED IN DETERMINING THAT THE PLAINTIFFS ACTED IN SUCH A WAY AS TO BE GUILTY OF CONTRIBUTORY NEGLIGENCE.

The total evidence before the Court indicated that when the plaintiffs determined that the water escaping from Mr. Beunion's farm would travel down the North side of the Delta-Fillmore Highway and, unless otherwise diverted, would flood the property of plaintiffs, the plaintiffs constructed a small dam to divert the escaping water in May of 1968. This small dam was constructed on the West portion of the plaintiffs' property in an effort to divert the water flowing from the Bennion property parallel with the road at a point before it reached the plaintiffs' property and divert the same to the North in an effort to cause it to travel North a sufficient distance and then change its course to the East and thereby miss the plaintiffs' home and yard. The evidence presented to the Court and particularly the pictures presented to the Court show that the quantity of water was so large that it covered not only the land and ground situated immediately West of the plaintiffs' property and the land and ground situated immediately West

of the small dam which was constructed but the water covered the entire dam area in a sufficient depth that it was impossible to determine where the dam was even located at the time the water was at its crest. The Court mistakenly took the dam as having an impact upon the flooding of the property. A proper interpretation is clear from the evidence that the quantity of water was so significant that the dam had no impact upon diverting the water to the North and the volume of water flooded the entire dam area and flooded the plaintiffs' property. It was clear from the evidence that the quantity of water was sufficient to have covered the entire area despite the fact that a dam was constructed. It is clear that the Court possibly misunderstood the evidence and concluded that the dam was located downstream from the subject property of the plaintiffs and thereby contributed to the flooding involved. However, a review of the evidence indicates that the dam was constructed upstream from the plaintiffs' property and that the dam thereby, in its then location, contributed in no way to the actual flooding condition. The volume of water was so sufficient that it flowed through, over and beyond the dam area and traveled onto and beyond the plaintiffs' property which was located downstream from the dam.

The evidence is also clear that the plaintiffs made every effort to mitigate the damages being caused.

them by the flooding. Mr. Erickson was called from his place of employment and spent many hours of time and effort in attempting to dam off the water at its point of escape from the Bennion property and spent time attempting to divert the water around his home and yard. However, the evidence was clear that the quantity of water was so large at the time attention was directed to the same that it was impossible to divert the water and the only solution at that point was to attempt to dam the water off at its source (the Bennion property) and to pump the water off the plaintiffs' property by the use of pumps which were employed and by efforts from friends and the plaintiffs to channel the water away from and around their home and yard.

The only interpretation that can be placed on the Court's finding of contributory negligence is that the Court must have inadvertently misunderstood the evidence. It is conceivable that if the Court understood the dam referred to to have been constructed downstream from the subject property that such a facility would have in fact possibly contributed to the upstream flooding and damage to property upstream from the dam. However, since the dam is located upstream from the subject property and since when the water was at its highest point the dam itself together with all surrounding property was flooded, it is impossible to see where the construction

of the dam would be a contributory factor in the flooding itself which caused the damage.

It is also important to note that the Court on the occasion of the hearing of this case had scheduled several cases to commence on the date that the immediate case was set for trial. At least one other case was partially tried on the day preceding the commencement of the immediate case. Inasmuch as the prior case was not completed on the day that the immediate case was designated to commence the Court required the attorneys and the parties in the prior case to be available at noon on the second day of the Erickson v. Bennion case to proceed with the completion of said prior case. The plaintiff completed the evidence regarding the Erickson v. Bennion case during the late morning hour on April 16, 1971, at which time the counsel for defendant presented his Motion for Dismissal at that time. The Court took the Motion under advisement for a review of the evidence and thereafter ruled on the Motion completing the case at or about the designated time that he was to commence the trial of the balance of the previous case.

There could be some consideration given to the pressure of the Court at the time and date of his consideration of defendant's Motion and possibly offer some suggestion for the misunderstanding of the evidence.

CONCLUSION

For the reasons stated herein, the appellants respectfully pray this Court to issue its order determining that defendant is responsible to the plaintiffs for the actual damage caused by his escaping water and that the evidence produced was sufficient to establish negligence as a matter of law and that the case be remanded to the trial Court for completion thereof on the question of damages.

Respectfully submitted,

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