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James D. Ericksen v. Salt Lake City Corporation and Salt Lake Airport Authority v. Projects Unlimited, Inc., a Utah corporation : Reply Brief of Appellants

Utah Supreme Court

John Farrell Fay; Ned P. Siefried; Siefried and Jensen; Attorneys for James D. Ericksen.
Roger H. Bullock; Strong and Hanni; Attorney for Salt Lake City Corporation and Salt Lake Airport Authority; Bruce T. Jones; Suitter, Axland, Armstrong and Hanson; Attorneys for Projects Unlimited, Inc..

IN THE SUPREME COURT OF THE STATE OF UTAH

JAMES D. ERICKSEN, Plaintiff, Appellee, and Cross-Appellant, vs. SALT LAKE CITY CORPORATION and SALT LAKE AIRPORT AUTHORITY, Defendants, Appellants, and Cross-Appellees, vs. PROJECTS UNLIMITED, INC., a Utah corporation, Third-Party Defendant and Appellee.	)	Case No. 910210

REPLY BRIEF OF APPELLANTS SALT LAKE CITY CORPORATION AND SALT LAKE AIRPORT AUTHORITY

Appeal from the Third Judicial District Court
of Salt Lake County, State of Utah
Honorable Kenneth Rigtrup, Presiding

John Farrell Fay
Ned P. Siegfried
SIEGFRIED & JENSEN
310 East 4500 South #620
Salt Lake City, Utah 84107

Attorneys for James D. Ericksen

Bruce T. Jones
SUITTER, AXLAND, ARMSTRONG & HANSON
Clark Leaming Office Center
175 South West Temple, 7th Floor
Salt Lake City, Utah 84101-1480

Attorneys for Projects Unlimited, Inc.

Roger H. Bullock
STRONG & HANNI
600 Boston Building
Salt Lake City, Utah 84111

Attorneys for Salt Lake City Corporation and Salt Lake Airport Authority

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Roger H. Bullock
STRONG & HANNI
600 Boston Building
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TABLE OF CONTENTS

TABLE OF AUTHORITIES

ARGUMENT

POINT I.

THE UTAH GOVERNMENTAL IMMUNITY ACT DOES NOT WAIVE IMMUNITY FOR ERICKSEN'S CLAIM.

Salt Lake City's initial brief pointed out that governmental immunity extends to injuries by reason of making a negligent inspection under the express language of Utah Code Ann. § 63-30-10(4) (1990 Amend.), formerly § 63-30-10(1)(d). Ericksen does not dispute that governmental immunity will bar his claim if this section applies to the conduct of Salt Lake City building inspector Millard Rice, but asserts that the wording of the statute does not apply. (Brief of Appellee and Cross-Appellant James D. Ericksen).

Additional authorities for the rule that the court has a duty to give effect to every word of a statute include the following:

Madsen v. Borthick, 769 P.2d 245, 252 n. 11 (Utah 1988). In interpreting another part of the Utah Governmental Immunity Act, this Court rejected a proposed construction which would mean that an entire sentence of the statute had absolutely no meaning at all, and reiterated the court's fundamental duty "to give effect, if possible, to every word of the statute." Id.

In Sneddon v. Graham, 175 U.A.R. 13, 15 (Utah App. 1991), the Court of Appeals in discussing the Dramshop Act quoted with approval Allisen v. American Legion Post No. 134, 763 P.2d 806, 809 (Utah 1988): "Where statutory language is plain and unambiguous, this Court will not look beyond to divine legislative intent."

The plain unambiguous meaning of § 63-30-10(4) is to provide immunity if the injury arises out of negligent inspection, which is exactly what happened in this case.

If this Court finds the statute to be unclear, this Court renders interpretations that will "best promote the protection of the public." Clover v. Snowbird Ski Resort, 808 P.2d 1037, 1045 (Utah 1991). The protection of the public is promoted by inspections to disclose defects which may cause damage or injury at a later time.

If the legislature had intended to remove the waiver of immunity only for injury arising out of dangerous or defective conditions resulting from inadequate or negligent inspection, as Ericksen contends, it would have been simple enough for the legislature to say so in as many words. However, the limitation on waiver speaks for itself in removing the waiver for injuries arising out of negligent inspection.

In fact, the interpretation which Ericksen urges for subparagraph (4) is identical to the language of subparagraphs (16) and (17), which remove the waiver of liability for latent defects in various public structures and improvements. The fact that subparagraphs (16) and (17) were enacted separate from and in addition to subparagraph (4) indicates legislative intent to provide the additional meaning in subparagraph (4) implicit in the clear language of that subparagraph. This approach complies with the purpose of construing § 63-30-10 as a comprehensive whole,

giving effect to each subpart, and not in a piecemeal fashion. Clover v. Snowbird Ski Resort, 808 P.2d 1037, 1045 (Utah 1991).

The result might be different if the negligent act of the inspector were not part of the inspection activity itself, such as Ericksen's example of an inspector tossing a burning cigarette in the area of explosives (Ericksen's Brief at 13-14). However, the facts contradict Ericksen's example. In this case, the acts in question were not unrelated to the inspection but were at the core of the inspection process, necessary and essential to perform a thorough inspection.

POINT II.

IT IS FAIR AND REASONABLE TO REQUIRE PROJECTS UNLIMITED TO INDEMNIFY FOR THIS INJURY CLAIM BY PROJECTS UNLIMITED'S EMPLOYEE BECAUSE PROJECTS UNLIMITED HAD CONTROL OF THE WORK PLACE AS GENERAL CONTRACTOR. PROJECTS UNLIMITED WAS AN ACTIVE PARTICIPANT IN CREATING THE CONDITIONS WHICH CAUSED THE ACCIDENT.

The express terms of the written indemnity agreement require Projects Unlimited to indemnify for claims by its employees arising out of the work of Projects Unlimited on this project.[1]

This requirement simply requires Projects Unlimited to pay for losses arising where Projects Unlimited as general contractor was

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[1] ARTICLE 15. LIABILITY. The Contractor agrees to at all times protect, indemnify, save harmless and defend the City, its agents and employees from any and all claims, demands, judgments, expenses, including reasonable attorney's fees, and all other damages of every kind and nature made, rendered or incurred by or in behalf of any person or persons whomsoever, including the parties hereto and their employees, which may arise out of any act or failure to act, work or other activity related in any way to the project, by the said Contractor, its agents, subcontractors, materialmen or employees in the performance and execution of this Agreement.

in the best position to control the work place and to provide for safety.

The reasonableness and fairness of this requirement are borne out by the specific facts of this incident:

1. Projects Unlimited as general contractor was required under the contract documents to implement a safety program to minimize accidents. The project manual stated: "The presence on the job site of an inspector or other persons representing the City shall not in any way be construed to limit the Contractor's full responsibility hereunder for safety of all persons on the premises." (Trial Exhibit 16).[2]

2. Utah Occupational Safety and Health Rules and Regulations require that contractors provide safe working conditions for employees. (Construction Standards, § 20.1.1, Trial Exhibit 17).

3. Projects Unlimited's supervisors sent Ericksen up on Projects Unlimited's ladder to perform Projects Unlimited's work. (R. 289, pp. 10, 25-26). The City inspector correctly understood he had no power to regulate Projects Unlimited's safety procedures governing its own workmen. (R. 289, p. 30).

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[2] 4.09, Safety; The Contractor shall institute a safety program at the start of construction to minimize accidents. Such programs shall continue to end of job and conform to the latest general safety orders of the State Industrial Commission, as contained in the then current Utah Occupational Safety and Health Act. The manual of Accident Prevention in Construction may be used as a guideline for safety practices. The presence on the job site of an inspector or other persons representing the City shall not in any way be construed to limit the Contractor's full responsibility hereunder for safety of all persons on the premises.

4. Projects Unlimited's contract included furnishing and installing the overhead doors and placement of the electric controls. There was a safety lever next to the electric control buttons which would have disengaged the electric door opener and prevented this accident. Projects Unlimited's work included providing and installing this safety lever. (Trial Exhibit 15).

5. Projects Unlimited's supervisors were present on the job site at all material times, giving direction to Ericksen and to other Projects Unlimited workers and participating in the inspection procedure which lead to the accident. Part of Projects Unlimited's work was participating in the inspection procedure performed by the City inspector and correcting the details of the work which the inspector found inadequate during the course of his inspection. Two Projects Unlimited supervisors accompanied the City inspector during his inspection, including during the exact time of the accident. (R. 289, pp. 10, 25-26).

There was abundant evidence to support the jury's finding of 40% negligence on Projects Unlimited for placing the ladder improperly, for providing inadequate equipment, and for not deactivating or "red tagging" the overhead door. (Trial Exhibits 17, 18; R. 289, p. 31). The point is that the circumstances of this accident entirely justify the City's written requirement that Projects Unlimited indemnify for claims which it was in the best position to control and prevent. The indemnity agreement

anticipated just the sort of accident and claim which arose in this case.

Projects Unlimited seeks to avoid the true meaning of its contractual duty to indemnify for claims by its own employees arising out of its work on the project, by urging a narrow and restrictive meaning to the liability agreement which would be inconsistent with the words of the agreement itself and also inconsistent with the circumstances. The obvious purpose of the agreement was to require that ultimate liability for injuries in the work place be borne by the general contractor, Projects Unlimited, which was in the best position to direct and control the work and thereby to provide for safety in the work place. It is entirely fair and reasonable that the indemnity agreement require Projects Unlimited to indemnify for such injury claims.

At trial, the jury found that the accident was proximately caused by the negligence of Ericksen (10%), Salt Lake City (50%), and Projects Unlimited (40%). However, the agreement does not speak in terms of percentage of negligence which proximately caused an injury. The agreement states that Projects Unlimited will indemnify the City for <u>all claims</u> which may <u>arise out of</u> work or other activity related in any way to the work by Projects Unlimited. This contract provision is broad and inclusive, and requires full indemnity for Ericksen's claims in this action.

POINT III.

ERICKSEN CANNOT ARGUE FOR THE FIRST TIME ON APPEAL THAT THE TRIAL COURT SHOULD NOT HAVE REDUCED DAMAGES BY THE PERCENTAGE OF FAULT OF ERICKSEN'S EMPLOYER, PROJECTS UNLIMITED.

Ericksen argues for the first time on appeal that Utah's Liability Reform Act precludes reduction of damages for the fault of Ericksen's employer, Projects Unlimited.

However, Ericksen sat idly by while Projects Unlimited obtained an order and judgment on its summary judgment motion which provided: "Pursuant to Utah's comparative negligence provisions, the plaintiff can only recover from Salt Lake City in this action the amount of damage equivalent to the proportion of fault attributable to Salt Lake City." (R. 263). Ericksen never objected to the form of the order and judgment (R. 262-265). This order and judgment then became the law of the case.

Further, at trial, Ericksen never objected to the special verdict which allocated percentage of fault separately to Ericksen, Salt Lake City, and Ericksen's employer, Projects Unlimited, nor to Instruction No. 21 which told the jury that any damages allowed shall be awarded only for the percentage of fault of the defendant against whom recovery is sought. (R. 195-198; 224; 289, p. 38).

Finally, Ericksen never objected to the judgment on special verdict which reflected the jury finding of negligence among Ericksen, Salt Lake City, and Projects Unlimited, and which awarded Ericksen judgment only for the percentage of fault of Salt Lake City. (R. 266-272).

Under well-established rules, Ericksen cannot now make these arguments for the first time on appeal. Mascaro v. Davis, 741 P.2d 938, 944 (Utah 1987). A party is not entitled to both the benefit of not objecting at trial and to appellate review of the issue, State v. Morgan, 813 P.2d 1207, 1209 (Utah App. 1991). In particular, objections to the form of the special verdict or special interrogatories cannot be raised for the first time on appeal, Cambelt Int'l Corp. v. Dalton, 745 P.2d 1239, 1241 (Utah 1987); Rule 51, U.R.C.P.

CONCLUSION

The Court should reverse the denial of summary judgment to Salt Lake City and Salt Lake Airport Authority and enter judgment in their favor on Ericksen's claim, based on governmental immunity.

The Court should also reverse the summary judgment in favor of Projects Unlimited and the denial of Salt Lake City's motion for summary judgment against Projects Unlimited, and remand to the district court for entry of judgment for defense expenses to Salt Lake City as provided under the written indemnity agreement.

DATED this 20 day of February, 1992.

STRONG & ~~HANNI~~

By _____
Roger H. Bullock
Attorneys for Salt Lake City Corporation and Salt Lake Airport Authority

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MAILING CERTIFICATE

I hereby certify that four true and correct copies of the foregoing were mailed, first class postage prepaid, this 20th day of February, 1992.

Ned P. Siegfried
John Farrell Fay
SIEGFRIED & JENSEN
310 East 4500 South, Suite 620
Salt Lake City, Utah 84107
Attorneys for James D. Ericksen

Bruce T. Jones
SUITTER, AXLAND, ARMSTRONG & HANSON
Clark Leaming Office Center
175 South West Temple, Suite 700
Salt Lake City, Utah 84101-1480
Attorneys for Projects Unlimited, Inc.