

1992

Dora Schreiter v. Wasatch Manor, INC : Reply Brief

Utah Court of Appeals

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DOCKET NO. 920573 IN THE UTAH COURT OF APPEALS

DORA SCHREITER,)	
)	
Plaintiff/Appellant,)	
)	
vs.)	Case No. 920573-CA
)	
WASATCH MANOR, INC.,)	Argument priority
)	classification: 15
Defendant/Appellee.)	

REPLY BRIEF OF PLAINTIFF/APPELLANT
DORA SCHREITER

APPEAL FROM DISTRICT COURT ORDER
GRANTING SUMMARY JUDGMENT TO DEFENDANT
FROM THE THIRD DISTRICT COURT, SALT LAKE COUNTY
JUDGE RICHARD MOFFAT

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JAN 22 1993

Neuman
Clerk of the Court

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**Determinative Constitutional Provisions, Statutes, Ordinances,
and Rules**

The following rules are determinative in this appeal:

U.R.C.P. Rule 56(c):

. . . The judgment sought should be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving parties are entitled to a judgment as a matter of law. .
..

Utah Rule of Evidence 105 titled "Limited Admissibility:"

When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, upon request, shall restrict the evidence to the proper scope and instruct the jury accordingly.

Utah Rule of Evidence 402 titled "Relevant Evidence Generally Admissible; Irrelevant Evidence Inadmissible:"

All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States or the Constitution of the State of Utah, statute, or by these rules, or by other rules applicable in courts of this state. Evidence which is not relevant is not admissible.

Utah Rule of Evidence 407 titled "Subsequent Remedial Measures:"

When, after an event, measures are taken which, if taken previously, would have made the event less likely to occur, evidence of the subsequent measures is not admissible to prove negligence or culpable conduct in connection with the event. This rule does not require the exclusion of evidence of subsequent measures when offered for another purpose, show as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment.

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IN THE UTAH COURT OF APPEALS

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REPLY BRIEF OF PLAINTIFF/APPELLANT
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APPEAL FROM DISTRICT COURT ORDER
GRANTING SUMMARY JUDGMENT TO DEFENDANT
ON APRIL 22, 1992

ARGUMENT

- I. THE COST ESTIMATE DOES NOT CONSTITUTE A SUBSEQUENT REMEDIAL MEASURE UNDER RULE 407 AND IS THEREFORE ADMISSIBLE.

The authorities that have considered the scope of Rule 407 indicate it is quite narrow. Only when the policy on which the rule is founded is furthered should relevant evidence be

excluded. Because all relevant evidence is admissible under U.R.E. Rule 402, excluding otherwise probative information is prejudicial to the fact finder's goal. Wright and Graham, Federal Practice and Procedure, Vol. 23, Evidence § 5285, pp. 120 - 121.

As noted in appellant's earlier brief, the obtaining of a cost estimate for putting sprinklers in by Wasatch Manor is not, in and of itself, a subsequent remedial measure. While that act may circumstantially indicate such a remedial measure, this alone does not bar the Court from making use of this highly probative evidence if there is a need to do so. Wright and Graham, supra, P.128. Because obtaining the cost estimate for the sprinkler system does not cross the threshold to constitute a subsequent remedial measure, and because the Rule 407 exclusion should be construed narrowly, this information regarding the cost of installing the sprinkler system should not be excluded.

II. THE COST ESTIMATE IS ADMISSABLE UNDER RULE 407 TO SHOW THE EXISTENCE OF A DUTY ON THE PART OF WASATCH MANOR.

As noted above, courts construe Rule 407 narrowly to effectuate the legitimate policy of the rule without unduly impinging on the ability of the fact finder to consider relevant evidence and reach a fair and accurate decision in any given case. It has been noted that the range of permissible uses of subsequent remedial measures is broader than the scope of the exclusion, Wright and Graham, supra, p. 121. and that the listing of permissible uses of subsequent remedial measures

contained in Rule 407 is illustrative, not exhaustive. Id. at page 130. If a subsequent remedial measure is relevant to show anything other than negligence it comes in under the doctrine of multiple admissibility contained in Utah Rule of Evidence 105. At common law, the exclusion of subsequent remedial measures in a negligence action was required only when the evidence was offered to show a breach of an existing duty by a defendant. On the other hand, if the subsequent remedial measure was offered to show only the existence of a duty, it was admissible. As stated by Wright and Graham:

Given the intent to preserve the common law, Rule 407 should also be read as not applying to proof of remedial measures where relevant to other elements of the negligence cause of action.

Id. at pg. 122. Interestingly, the footnote included by Wright and Graham after this statement refers to the advisory committee note to the predecessor to Utah Rule of Evidence 407, Utah Rule of Evidence 51, which stated that: "This rule relates only to negligence and not to causation."

The manner in which plaintiff sought to use the evidence of the cost estimate obtained by Wasatch Manor for installing a sprinkler system was not to show a breach of any duty by Wasatch Manor but was rather to demonstrate that installing such a sprinkler system in Wasatch Manor was feasible. The evidence related directly to demonstrating to a jury that a duty existed on the part of Wasatch Manor to install such a

sprinkler system given all the circumstances of the case. Under the authority cited above, use of that information to show that a duty existed on the part of Wasatch Manor does not violate the principles that underline Rule 407. As noted in the original brief, admission of this crucial bit of evidence is the best possible information available about whether installation of such a precautionary measure was feasible and should have been carried out by Wasatch Manor before the fire broke out at the high rise retirement home.

III. THE COST ESTIMATE IS ADMISSIBLE TO PROVE THE FEASIBILITY OF PRECAUTIONARY MEASURES BECAUSE FEASIBILITY HAS BEEN CONTROVERTED BY WASATCH MANOR.

Wasatch Manor argues in its brief that on the one hand, feasibility has not been controverted and therefore under the language of Rule 407, the information on the cost estimate may not be admitted. However, it is clear from the stance it has taken in the case that Wasatch Manor does contest feasibility. Wasatch Manor argues vigorously that the Motion for Summary Judgment was properly granted because the appellant had not carried her burden to show "the cost of designing, constructing, and installing the sprinkler system." Brief of Defendant/Appellee, pp. 8. Either Wasatch Manor must concede that feasibility is not an issue and that the appellant has no responsibility as part of a prima facie case to establish the cost of designing, constructing, and installing a sprinkler system, in which case the issue concerning the cost estimate is

moot, or the appellee must dispute this, put the appellant to her proof, and controvert the issue of feasibility. Wasatch Manor has chosen to do the latter. It cannot now be heard to say that feasibility is uncontroverted.

The reason for requiring that dispute exist before allowing introduction of subsequent remedial measures on feasibility is that: ". . . feasibility, unlike many other permissible uses, is an issue that exists in almost every case." Wright and Graham, supra, §5286, p. 133. As stated in footnote 29 on pg. 133, "If this 'exception' is permitted to be used when there is no real issue of feasibility, it would soon devour the rule."

Wasatch Manor cites in support of its proposition that evidence of subsequent precautionary measures may be introduced only if feasibility is controverted the case of Werner v. Upjohn Co., Inc., 628 F.2d 848 (1980), cert.den., 449 U.S. 1080 (1981). Werner does in fact stand for the proposition cited by the defendant that unless feasibility is controverted by the non-offering party, evidence of the subsequent remedial measure will not come in unless offered for some other acceptable purpose. However, the appellee in this case does not have any basis to claim that feasibility is uncontroverted. Werner is helpful to the appellant because it verifies that under F.R.E. 105 evidence that is inadmissible for one purpose may be admissible for another and that the usual solution for such a problem is to

admit the evidence to prove the permissible inference but limit its use by jury instructions. Id. at 854. This is exactly the use that appellant seeks for the cost estimate on the sprinkler system.

Wasatch Manor seeks to show that feasibility is uncontroverted by claiming that it conceded that a sprinkler system would have been effective had it been installed at the time of the fire. However, this is a concession as to causation, not a concession that the cost of designing, constructing, and installing the sprinkler system would have been feasible. Consistently throughout the Motion for Summary Judgment and thereafter, the appellee's position has been that the appellant has not sustained her burden of proof to show that the cost of designing, constructing, and installing the sprinkler system was feasible. This position amounts to controverting the feasibility of putting in a sprinkler system.

IV. APPELLANT HAS NO BURDEN TO SHOW WASATCH MANOR'S ABILITY TO PAY FOR THE COST OF INSTALLING THE SPRINKLER SYSTEM.

Although the appellee adamantly maintains that as part of a prima facie case of negligence, the appellant must show that Wasatch Manor was able to bear the cost of installing the sprinkler system, the appellee has never cited any authority to support its proposition. What authority the appellant has found on this subject clearly indicates just the reverse. Section 288A(c) of the Restatement (Second) of Torts indicates that such an argument may very well constitute a valid defense to a claim

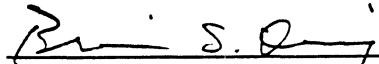
by the plaintiff, but that it is in the nature of the defense, rather than a part of the plaintiff's prima facie case. Wasatch Manor may very well be correct when as it argues in its brief that this is a classic example of a risk/benefit analysis. But it is also clear under the case law cited by the appellant in her primary brief that the question of whether a legal duty exists under all the facts is left in the hands of the jury. Sufficient evidence has been presented to show Wasatch Manor breached its duty by not installing a sprinkler system in the building. Whether such a breach occurred is something that must be decided by the ultimate fact finder in the case, the jury.

CONCLUSION

The cost estimate of putting a sprinkler system into Wasatch Manor is admissible evidence under the Rules of Evidence and specifically under Rule 407. In addition, the appellant has no burden to show that Wasatch Manor was able to pay for the cost of installing a sprinkler system. The order of the trial court granting Summary Judgment to the defendant should be reversed and the case remanded for trial before a jury.

RESPECTFULLY SUBMITTED THIS 15 DAY OF JANUARY, 1993.

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CERTIFICATE OF HAND DELIVERY

I hereby certify that I caused a copy of the foregoing
REPLY BRIEF to be hand-delivered on the 15 day of January, 1993
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