1965

Robert E. Crandall, Richard G. Crandall, William H. Crandall, Nancy C. Tullis and Calvin W. Crandall, dba Crandall Building v. Ed Gardner : Brief of Appellant

IN THE SUPREME COURT OF THE STATE OF UTAH

ROBERT E. CRANDALL, RICHARD G. CRANDALL, WILLIAM H. CRANDALL, NANCY C. TULLIS and CALVIN W. CRANDALL, dba CRANDALL BUILDING,
Plaintiffs and Respondents,

vs.

ED GARDNER,
Defendant and Appellant.

Case No. 10290

BRIEF OF APPELLANT

STATEMENT OF THE KIND OF CASE

This is an action for property damage which plaintiffs claim proximately resulted from alleged unworkmanlike plumbing services rendered by defendant to plaintiffs.

DISPOSITION IN LOWER COURT

The case was tried to the court. From a judgment awading plaintiffs the sum of $1367.39, costs of court, and interest, defendant appeals.

RELIEF SOUGHT ON APPEAL

Defendant seeks reversal of said judgment and judgment in his favor as a matter of law.

STATEMENT OF FACTS

Sometime between March 17, 1963, and March 22, 1963, defendant, a good plumber (R. 40, 67, 78, 107), with 16 years in the plumbing business (R. 90), installed in plaintiffs' building, the Crandall building, Salt Lake City, Utah, ball cocks in 19 toilets in said building (R. 87, 93), including one in the ladies' restroom on the 5th floor thereof. On the morning of June 10, 1963, at 6:30 a.m. plaintiffs' building manager, Elmer J. Peters (R. 36), and plaintiffs' night watchman discovered that a short upright pipe (about 12″ to 13″ in length R. 84) which led into the ball cock unit from below, it being one of the ball cocks defendant had installed in a toilet in said restroom in March, was disconnected, and flowing water (R. 37, 63). (This short pipe will hereafter be referred to as the upright; it is sometimes referred to in the transcript as a riser.) Water had not been flowing therefrom at 10:00 p.m. the evening before, and no check of the building had been made between said times (R. 63). Thereupon, defendant was called to repair the situation (R. 80), and defendant's helper, Joe Cummings, came and replaced the upright (R. 96), and connected it to the ball cock unit. The said Joe Cummings was a plumber's helper not a journeyman (R. 98). The said helper testified that the replacement pipe was of the same overall length as the upright replaced (R. 98, 101), and that he thought that after making the

repair he had told plaintiffs' said manager that he had made the replacement with a *stronger* pipe (R. 107). Plaintiffs' manager testified that said helper had told him at that time: "I put a longer pipe in this time. You won't have no more trouble." (R. 42). He also testified that the helper had said at that time when asked if it would hold: "You bet. She will stay there this time." (R. 43).

The upright had been connected to the ball cock unit by a gasket, friction ring and lock nut (R. 85). When the said helper made the repair in June, 1963, he found that the upright was bent and sprung ¼ inch (R. 97,-101). He stated that this is why he replaced the upright (R. 100). He used an upright with a different joint as he thought it would be better (R. 101). Cummings did not think the upright which he replaced had been bent when the ball cock was installed in March, 1963 (R. 101). When he came in June, 1963, he found the nut still tightly in place (R. 99). He stated that the pipe he replaced was not too short (R. 96).

Defendant testified in March, 1963, he put the upright into the ball cock in question as far as it would go (R. 86). Defendant also testified that the upright was not replaced in March (R. 79, 87), and that it had been in perfect condition (R. 87). Plaintiffs' manager testified that it had been replaced in March (R. 43).

Defendant testified that if a ball cock is properly installed there will be no leak (R. 86). R. D. Fereday, a plumbing contractor in the Salt Lake City area for 16 years (R. 116) testified, as an expert witness called

by defendant, that if such a ball cock joint installed March 17, 1963, didn't leak before June 10, 1963, that it would be a good joint (R. 117,133), and that if it suddenly gave thereafter without having leaked it was his opinion that such giving would have been caused by an external force (R. 118), and that if the joint had been bad, he believed it would have leaked right away (R. 119). Joseph L. Buhler, a plumbing contractor of 14 years experience in Salt Lake City and vicinity (20 years as a plumber) (R. 134) testified as an expert witness called by defendant to the same effect and in substance the same as did the said R. D. Fereday (R. 135, 136, 137), and if anything, stronger than Fereday in favor of defendant (R. 142, 149). It was undisputed that the ball cock joint did not leak at any time (R. 66, 79), after installation in March 1963.

After the trial, the court made and entered Findings of Fact and Conclusions of Law (R. 27, 28) and Judgment (R. 29). Defendant was allowed a set-off of $122.61 which plaintiffs concede was owing to defendant (R. 165).

ARGUMENT

POINT 1. THE EVIDENCE DOES NOT SUPPORT THE FINDING THAT DEFENDANT NEGLIGENTLY AND CARELESSLY INSTALLED A BALL COCK UNIT BY CONNECTING IT WITH A PIPE TOO SHORT TO MAINTAIN AND HOLD THE CONNECTION AGAINST THE NORMAL WATER PRESSURE WITHIN PLAINTIFFS' BUILDING.

1. Not a scintilla of evidence.

The sole issue on this appeal is whether there is evidence to sustain the trial court's finding that defendant negligently installed a ball cock unit in plaintiffs' restroom, by connecting it to a pipe too short to hold, and if so whether such negligence was the proximate cause of property damage to plaintiffs. Defendant claims that there is not even a scintilla of evidence of negligence to support the foregoing finding.

The fact that a mishap occurs, in and of itself, does not establish negligence; negligence will not be presumed. Quinn v. Gas and Coke Co. 42 Utah 113, 129 Pac. 362 (1912).

The evidence in the record concerning the length of the pipe is in favor of defendant, except it is true that plaintiffs' building manager testified that defendant's helper, Joe Cummings, after having repaired the toilet in June, 1963, said: "I put a longer pipe in this time. You won't have no more trouble." And also: "You bet. She will stay there this time." The witness, at the trial, denied that he put in a longer pipe.

The alleged statement in one sense is nothing more than a simple statement of fact that he had used a longer pipe, and of a conjecture that it would hold in the future, however, even if we permit an inference from it that had a longer pipe been used before there would have been no separation, it does not help plaintiffs' case. The very most that this shows is causation. Proof of causation alone does not impose liability on defendant unless he is an insurer, and of course he is

not. Defendant is not liable unless he was also negligent. Negligence is a violation of a standard of care. The standard of care for a plumber is that he shall perform his work in a reasonably skillful and workmanlike manner in accordance with the accepted standards in this locality for such work by plumbers, and to do said work with the degree of skill and care which generally prevails in this locality for plumbers. A violation thereof would be of negligence. See Fritz v. Western Union, 25 Utah 263, 71 P. 209. See also Sec. 54.8 J.I.F.U. The standard is thus essentially the same as that applied to physicians and surgeons. Of course, a plumber, just as a physician and surgeon would be, should be held to the usual standard of the reasonably prudent man in many areas of conduct, but the higher standard of conduct is required of him with regard to his specialty. However, at the same time, although a higher degree of skill is required of him, since an understanding of conduct with regard to that specialty involves knowledge not possessed by a layman, expert testimony should be required to show negligence just as it is in the medical field.

It is stated in *Prosser on Torts,* 2nd Ed. at page 134:

> "Since juries composed of laymen are normally incompetent to pass judgment on questions of medical science or technique, it has been held in a great majority of malpractice cases that there can be no finding of negligence in the absence of expert testimony to support it."

This is the rule in Utah with regard to technical medical matters. Jackson v. Colston, 116 Utah 259, 209 P. 2nd 566 (1949), Coon v. Shields, 88 Utah 76, 39 P. 2d 348 (1934).

In the present case the only evidence of the standard required of defendant, as it bears upon the length of pipe, is that of defendant's witnesses who uniformly state in effect that a pipe is long enough if the joint doesn't leak. There is no evidence whatsoever that defendant violation that standard. He clearly met it. Defendant's helper, Joe Cummings, was certainly not an expert as far as the record shows. The most that can be said for him is that he was a plumber's helper from March, 1963 until June, 1963, when he allegedly made the statement. He was not even a journeyman plumber. However, even if he were an expert, his statement would not be evidence on the question of standard of care required of a plumber in this situation. At most, it would be a statement that in his opinion defendant was negligent for using a shorter pipe than the situation called for.

The alleged statement of the helper, Joe Cummings, means in effect, at most, that if the pipe had been longer in the first place, it would have held. Since he was not present at the time that the said upright became separated from the ball cock unit, he could not know of his own knowledge why it came apart, and therefore his statement is at best an opinion. And, of course, it is often easy to see after an act is done, that it would have been better to do it in another way, but that is not the issue. The issue is, was defendant negligent at the time he did the work. The court is not allowed to compare one expert opinion against another on the question of negligence. The court can only arrive at a finding of negligence by comparison of defendant's conduct with that of plumbers in the community generally. Coon v.

Shields, supra. Even if the record contained a direct statement by an expert plumber, that the pipe was too short and that it should have been done differently to begin with, this would not be evidence of negligence.

Also, the court cannot substitute its own expert knowledge of plumbers and plumbing (R. 42, 67, 86, 128, 163) in place of expert testimony, and cannot take judicial notice of the standard of a plumber in the community on a technical subject. The court, of course, knows that defendant will be negligent unless he lives up to the standard generally of plumbers in this area, but he cannot take judicial knowledge of what plumbers generally in the area would do in a particular case, despite his own individual knowledge. If this were allowed, how could this court review the matter of the judge's "expert knowledge" as there is nothing in the record to show it? If we were only concerned with the reasonable prudent man test, the judge as a finder of fact would, of course, determine whether defendant met that standard, but he cannot substitute himself in the place of an expert witness, even though he may be familiar with the subject, to determine how an expert should handle a technical subject.

2. No substantial evidence.

Even if the court should hold that the alleged statement of defendant's helper is some evidence, it is not substantial evidence, and is no more than a mere scintilla of evidence.

At the trial, respondent, as plaintiff, had the burden of affirmatively showing defendant's negligence by

substantial evidence. Gordon v. Provo City, 15 Utah 2d 287, 391 P. 2d 430 (1964). A mere scintilla of evidence is not enough. Seybold v. Union Pac. R. Co. 121 Utah 61, 239 P. 2d 174 (1951). Thus, although the Supreme Court will not substitute its judgment for that of the trial court, nor even weigh the evidence, the court must review the evidence to see if there is substantial evidence to support the trial court's findings, even if there is a scintilla of evidence.

In Seybold vs. Union Pac. R. Co., supra, one of the issues presented was whether there was substantial evidence that a certain caboose was unlighted at the time of the accident. The only evidence that it was not lighted was that of plaintiff who testified that he didn't notice any lights on it when he saw it just before it collided with the vehicle he was driving. This court felt that plaintiff had only "an extremely limited and fleeting opportunity" to observe for lights. The court in effect held that to constitute substantial evidence it must be "reasonable to suppose he would have observed." The court further stated at page 67:

> "Considering the limited opportunity plaintiff had to observe, it can hardly be said in fairness that his evidence was substantial. Contrasted with the testimony of other witnesses who had adequate opportunity for observation and especially that of the two disinterested witnesses who saw lights on the caboose from their vantage point, it seems to us that it would be unreasonable to make a finding that there were no lights on the caboose."

Thus, it appears that the court's decision was based on two grounds: 1) that the overwhelming testimony

was in the other direction, namely that the caboose was lighted (particularly since much of it was disinterested), and 2) the court seemed to feel that there was doubt that plaintiff had had a satisfactory opportunity to see whether the caboose was lighted or not.

Although the Seybold case, supra, dealt with a pure question of fact, the reasoning there is equally applicable to the present case concerning the alleged statement of defendant's helper, Joe Cummings, although his statement is an opinion.

The overwhelming testimony, of three experts, two of whom were disinterested, was that the connection was good; the only other possible evidence is the said disputed statement of the helper. The qualifications of this helper were never shown and there is thus, considerable doubt as to his ability to render an opinion as to whether defendant was negligent or as to what caused the separation. We thus, have the same situation as the said Seybold case, to-wit: overwhelming testimony to the contrary, disinterested witnesses to the contrary, and doubt as to the ability to observe (know) on the part of the declarant. All we know from the record is that the helper worked as a helper for about three months, at the time he allegedly made the statement, we don't know how long he worked before that time. (It is interesting also to note that the statement of the helper at the time of trial, namely that the pipe was not too short, would actually be more valuable than his statement in June, 1963, because we at least know that he had that much more experience upon which to base such a statement.)

Also, it seems doubtful that defendant's helper, Joe Cummings, ever made the statement attributed to him. First of all, he disputed and denied that he made the statement, and stated that the pipe which he used as a replacement was exactly the same length. Second, there appeared to be no reason why defendant would have replaced the upright which he found in place in March with a shorter one. It is difficult to suppose that the defendant would remove an upright which was apparently satisfactory and replace it with a shorter one and thereby risk an unsatisfactory connection. Third, it seems very doubtful that the building manager ever examined the upright after the repair work in March so as to be able to say whether defendant had replaced it. Defendant worked on 19 toilets in the building and, it is very doubtful that said manager would go through 19 of them and look to see if defendant had changed any risers. That he ever observed whether the defendant changed the upright in question in March is very doubtful. Whether he observed that a new riser was installed in March is a pure question of fact, and falls directly within the Seybold case, supra, as being a doubtful observation.

The case of Jackson v. Colston, supra, involved a claim for damages for the alleged burning by means of certain lamps of plaintiff's leg during weight reducing treatments by defendants. The trial court directed a verdict for defendants and this court affirmed. Among other things, appellant contended that an alleged admission was sufficient evidence to make a case for the jury. Plaintiff claimed that the admission was made by one of the defendants about 3 months after plaintiff's last

treatment as follows: "Oh, yes, we have burned you and I am sorry." The Supreme Court held that said defendant "did not possess the qualifications necessary to determine the cause of . . . (plaintiff's) injury." There was a dissent in the case, but no reference is made in the dissent to the matter of admission, and it seems to be based on other grounds. Just as in the Jackson case, supra, an alleged admission was held to be insufficient evidence on the issue of causation, to make a question of fact, for the reason that the declarant lacked the necessary qualifications (which is the same as saying because his qualifications were not shown) so in the present case the alleged statement of defendant's said helper is insufficient evidence of claimed negligence of defendant as well as of the issue of causation. The qualifications of the said helper to testify with regard to standard of care of plumbers in this vicinity was never shown nor were his qualifications to testify with regard to the technical issues of pipe joint stresses, water pressure, etc., as those matters bear upon causation. The said helper doubtless had *some* knowledge as a helper, and no doubt the said defendant in the Jackson case had *some* knowledge of the effect of said defendant's lamp upon human flesh. But just as sufficient specific qualifications of the said defendant in the Jackson case, with regard to that particular technical subject, were not adequately shown, so, too, in the present case, the qualifications of the helper with regard to the technical questions involved in this case have never been shown.

3. Res ipsa loquiter not applicable.

The trial court seemed to feel that the defendant

had the burden to show why the pipe became disconnected, and that if he couldn't meet this burden, he was liable. The court said at page 164 of the record: ". . . I can't believe that there is any basis at all for saying that vandalism caused the thing to come out. I think the thing speaks for itself, that is was negligently constructed if there was not vandalism . . ."

The only way defendant could have the burden of explaining the accident is if the doctrine of res ipsa loquiter applies. In using the phrase "the thing speaks for itself" the court seems to be relying on that doctrine. This case, of course, doesn't involve an instrumentality within the control of defendant, nor was the doctrine ever raised as an issue. It has no application in this case.

The court thus, was not justified in casting the burden of proof onto defendant.

In using the phrase, ". . . it was negligently constructed if there was not vandalism . . ." the court was clearly in error. *If* defendant was negligent, he was negligent when he did the work in March. Vandalism will not change that. Vandalism has a bearing only on causation, as it would be an intervening cause. Thus, the court seems to feel that negligence has been established by the doctrine of res ipsa loquiter. Such is not the case.

4. Equal inferences rule.

Finally, even if plaintiffs' evidence survives the foregoing objections, then certainly no more can be said for it, than that it points equally to two causes. One, that the riser was short, and two, that an external force was

applied against it. It is well settled in this state that where the plaintiff seeks to prove an allegation by inference sought to be deduced from proven facts and the evidence so deduced points with equal force to several inferences, only one of which would render the defendant liable, then plaintiff has not sustained his case. Quinn v. Utah Gas and Coke Company, supra.

POINT 2. THAT THE EVIDENCE DOES NOT SUPPORT A FINDING THAT PLAINTIFFS SUSTAINED PROPERTY DAMAGE AS THE DIRECT AND PROXIMATE RESULT OF SAID ALLEGED NEGLIGENCE.

In Section 1 of Point 1, supra, defendant has demonstrated that plaintiffs' case must fail because of plaintiffs' failure to prove negligence, even if he had proved causation.

In Section 2, of Point 1, supra, defendant has shown that plaintiffs have failed to prove negligence by substantial evidence (even if a scintilla of evidence has been shown). The same arguments there set forth to show lack of sufficient evidence to prove negligence also demonstrate the lack of sufficient evidence of causation, and in fact, defendant has at times in discussing Point 1 briefly referred to the matter of causation. Defendant, of course, adopts those arguments, but does not repeat them here at length, as it would serve no useful purpose, except it may be emphasized that the case of Jackson v. Colston, supra, since it deals directly with the question of causation, is particularly applicable here and compels the conclusion that the defendant's helper is not shown to be sufficiently expert to prove why the pipe joint was

found disconnected. It goes without saying that the doctrien of res ipsa loquiter discussed in Section 3 of Point 1 has no application to causation, and can be of no help to plaintiffs' case.

The argument contained in Section 4 of Point 1 is reaffirmed in connection with Point 2.

CONCLUSION

It thus appears that plaintiffs' have failed to produce even a scintilla of evidence that defendant was negligent, and certainly failed to show substantial evidence of any negligence on the part of defendant and that any such negligence was the proximate cause of any damage to plaintiffs. The judgment of the trial court should be reversed with directions to enter judgement against plaintiffs, no cause for action, and to enter judgement for defendant upon his amended counterclaim for $122.61, interest and costs.

Respectfully submitted,

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