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Marielle Lebouthillier, and Denise, Gisele, Victor and Susanne Lebouthillier, Minors, By their Guardian Ad Litem, Elaine K. Wood and Gloria Oliver v. Shurtleff & andrews, Inc. v. Peter Kiewit Construction Co., Morrison-Knudson, Inc., and Mid-Valley, Inc., Doing Business As Arch Dam Constructors : Appellant's Petition For Rehearing and Brief In Support thereof

In the Supreme Court of the State of Utah

MARIELLE LeBOUTHILLIER, and DENISE, GISELE, VICTOR and SUSANNE LeBOUTHILLIER, minors by their Guardian ad Litem, ELAINE K. WOOD,
Plaintiffs and Appellants,

GLORIA OLIVER,
Plaintiff and Appellant,

vs.

SHURTLEFF & ANDREWS, INC., a corporation,
Defendant and Third Party Plaintiff and Respondent,

vs.

PETER KIEWIT CONSTRUCTION CO., MORRISON-KNUDSON, INC., and MID-VALLEY, INC., doing business as ARCH DAM CONSTRUCTORS,
Third Party Defendants and Respondents.

No. 10368

APPELLANTS' PETITION FOR REHEARING AND BRIEF IN SUPPORT THEREOF

Appeal from the Judgment of the Third District Court for Salt Lake County Honorable Aldon J. Anderson, Judge

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IN THE SUPREME COURT OF THE STATE OF UTAH

MARIELLE LeBOUTHILLIER, and DENISE, GISELE, VICTOR and SUSANNE LeBOUTHILLIER, minors by their Guardian ad Litem, ELAINE K. WOOD,
Plaintiffs and Appellants,
GLORIA OLIVER,
Plaintiff and Appellant,
vs.
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Defendant and Third Party Plaintiff and Respondent,
vs.
PETER KIEWIT CONSTRUCTION CO., MORRISON-KNUDSON, INC., and MID-VALLEY, INC., doing business as ARCH DAM CONSTRUCTORS,
Third Party Defendants and Respondents.

No. 10363

APPELLANTS' PETITION FOR REHEARING AND BRIEF IN SUPPORT THEREOF

Come now Gloria Oliver and Marielle LeBouthillier, and Denise, Gisele, Victor and Susanne LeBouthillier, minors, by their Guardian ad Litem, Elaine K. Wood, and move for a rehearing in the above-entitled matter upon the ground that this court erred as a matter of law:

(1) In affirming the decision of the lower court;

(2) In failing to consider or rule upon the very issue on appeal;

(3) In rendering its decision after obtaining a stipulation that the matter would be considered by Mr. Justice Tuckett, when Mr. Justice Tuckett did not participate in the decision; and

(4) In usurping the function of the jury in this cause and thereby denying appellants their constitutional right to a jury trial, depriving appellants of due process of law and equal protection of the laws under the Utah and Federal Constitutions.

STATEMENT OF FACTS

The facts are as stated by the court in its opinion and substitute opinion filed herein, with the following serious omissions from said opinions: The case was submitted to the jury on a special verdict and special interrogatories, and the jury made findings as follows:

> "1. Was the accident in question an unavoidable accident, as that has been defined for you in these instructions?

Answer: No.

2. Was the defendant, Shurtleff & Andrews, negligent in the following situation:

(a) In failing to exercise that degree of care which a reasonably prudent lessor of a crane would do under all of the circumstances of this case prior to its delivery to the lessee, to inspect the crane for any defects which might be so discovered and to repair the same before delivering it to the lessee, Arch Dam Constructors, so that it would be safe to use by and around its employees?

Answer: Yes.

If your answer is YES then answer the following: Was such negligence of the defendant Shurtleff & Andrews a proximate cause of the accident?

Answer: No.

3. *Was it the reasonable intendment of the parties that the obligation to repair found in paragraph 7 of the lease (Exhibit D-27) should include an obligation of the lessee, Arch Dam Constructors, to exercise such care as a reasonably prudent lessee of a crane would do under all of the circumstances of this case to remove the jib from the boom to inspect the 'ears' at such time or times as may have been necessary to make any needed repairs?*

Answer: Yes.

If your answer to the foregoing question is YES then answer the following:

(a) Did the Arch Dam Constructors fail to

exercise the duty so undertaken by them under the agreement?

Answer: Yes.

If your answer to (a) is YES then answer the following:

(b) Was such failure a proximate cause of the accident?

Answer: Yes.

4. What amount of damages do you find, if any, that would reasonably compensate Gloria Oliver for the loss she has sustained?

$68,000.00

5. What amount of damages do you find, if any, that would reasonably compensate Marielle LeBouthillier and the children for the loss they have sustained?

$150,000.00" (R. 88, 89).

The opinions make no reference to any findings other than the first two findings. The other findings are crucial to the result and cannot be ignored. The opinions state that: "On the other hand, there was evidence in the record from which a jury could reasonably have found that the unfamiliarity of the operator assigned that day by Arch Dam Constructors to work on the crane with a 'special power' lever which required manual centering, might, because of incorrect operation, have caused the jib to fall backward." Appellants concede this statement of fact, but it becomes utterly immaterial in view of the jury's total findings as set forth above, and particularly in view of the jury's answers to Interrogatory No. 3.

ARGUMENT

POINT I.

THE OPINIONS OF THE COURT COMPLETELY IGNORE THE FINDINGS OF THE JURY.

The crux of the court's opinions is that appellants complain of the error of a certain instruction given and are therefore entitled to relief. The court concedes that the instruction "might be error", but concludes that it is not prejudicial. This utterly ignores the precise and only issues on appeal, to wit:

(1) *Did the jury's finding that the employer's (Arch Dam's) failure to discover the defect was a proximate cause of the accident preclude, as a matter of law, the claim of a superseding cause, to wit: operator negligence?*

(2) *Did the jury's finding that the employer's (Arch Dam's) failure to discover the defect was a proximate cause of the accident necessarily result in the negligence of defendant to discover the same defect a proximate cause of the accident, as a matter of law, entitling plaintiffs to judgment?*

The answer by all authorities cited in the briefs on file herein, none of which are discussed or considered, is overwhelmingly *yes*. The only importance of the erroneous instruction is that it clearly directed the jury to answer the interrogatory regarding the proximate cause of the defendant's negligence as it did. This was the prejudice of the instruction. What can be more

prejudicial than erroneously directing a jury to make a particular finding? But, be that as it may, it is not the heart of the matter. Irrespective of the erroneous instruction, the findings of the jury entitled appellants to judgment, or, at the very least, a new trial.

This court, in failing to pass upon the vital issues, utterly ignores long standing Utah law as set forth in *Ehalt v. McCarthy,* 104 Utah 110, 138 P.2d 639. As a matter of fact, the opinions fail to consider any issue before the court except that an erroneous instruction by the trial court may be considered non-prejudicial in the opinion of this court—not the problem presented.

Our law is clear that when facts are submitted on special interrogatories, the court shall enter judgment after applying appropriate legal conclusions to the facts as found. *Milligan v. Capitol Furniture Co.,* 8 Utah 2d 383, 335 P.2d 619. The trial court refused to apply appropriate legal conclusions to the facts as found by the jury, and this court fails to consider, discuss or decide said legal conclusions.

The jury found: (1) Shurtleff & Andrews was negligent in delivering a defective crane; (2) That this negligence was not a proximate cause of the accident (having been erroneously directed to so find); (3) That Arch Dam was negligent in failing to discover the defect; (4) That Arch Dam's negligence was a proximate cause of the accident; (5) That the plaintiffs were damaged in the total sum of $218,000.00.

The only legal conclusions resulting from said findings are: (1) That if Arch Dam's negligence in failing to discover the defect was a proximate cause, Shurtleff & Andrews' negligence in failing to discover the same defect was a proximate cause (*Ehalt v. McCarthy,* supra; *Schweitzer v. Stone,* 13 Utah 2d 199, 371 P.2d 201); (2) That the jury found that Shurtleff & Andrews' negligence was not a proximate cause because the court directed them erroneously that if Arch Dam's negligence was a proximate cause, Shurtleff & Andrews' negligence could not be a proximate cause (*Leininger v. Stearns-Roger Manufacturing Co.* (1965), 17 Utah 2d 37, 404 P.2d 33); (3) That if Arch Dam's negligence was a proximate cause, operator conduct could not be the superseding cause which by law is the sole cause (*Ehalt v. McCarthy,* supra).[1]

POINT II.

APPELLANTS HAVE BEEN PREJUDICED IN THIS COURT BY A PROCEDURAL IRREGULARITY, ENTITLING THEM TO A REHEARING.

The above case was argued before five justices of this court on November 12, 1965, and the matter thereafter remained under advisement by the court for a period of seven months. Upon the death of Mr.

[1] In addition, the court failed to consider, discuss or rule upon the issues of breach of warranties, which issues the trial court erroneously refused to submit to the jury.

Justice Wade, the Chief Justice called counsel for appellants and inquired whether counsel desired to reargue the case before the court, including the newly appointed Mr. Justice Tuckett, or submit the matter to the court, including Mr. Justice Tuckett, upon the record and the briefs and the transcript of the prior oral argument. Counsel indicated that he would like to listen to the prior oral argument, and the Chief Justice assented and arranged for the hearing of same. Thereafter, all parties entered into a written stipulation on file herein waiving further argument before Justice Tuckett and stipulating that Mr. Justice Tuckett could participate in the decision upon the basis of the record, the briefs, the exhibits and the transcript of the oral argument. Mr. Justice Tuckett does not participate in the decision of the court. Certainly, had appellants been apprised of this, they would have elected to reargue the case as per the invitation of the Chief Justice.

There is no doubt that three justices may hear and decide matters submitted to this court, but having argued the matter before five justices, and then having been given the option to reargue the matter before a newly constituted court, appellants are entitled to the consideration of this most important problem by the new court. The matter involves the future of two widows and four children. The trial took a full week. The jury deliberated at great length. The briefs on appeal are extensive. This court, prior to the death of Mr. Justice Wade, deliberated for seven months. For the court, thereafter, to dispose of the matter with less than the

full court and without deciding the very issue before the court seems to appellants to constitute error and fundamental lack of fair play.

Good cause for reargument is shown where a case is not argued because of the suggestion of a justice of the appellate court that an argument is not necessary. *Equitable Trust Co. v. Madsen,* 132 N.Y.S. 316.

POINT III.

THE COURT'S REFUSAL TO APPLY APPROPRIATE CONCLUSIONS TO THE SPECIAL FINDINGS OF THE JURY USURPS THE JURY'S FUNCTION AND DEPRIVES APPELLANTS OF THEIR RIGHT TO JURY TRIAL, THEREBY DEPRIVING THEM OF DUE PROCESS OF LAW AND EQUAL PROTECTION OF THE LAWS AS PROVIDED BY THE UTAH AND UNITED STATES CONSTITUTIONS.

The Utah Constitution, Article I, §10, provides:

> "In capital cases the right of trial by jury shall remain inviolate. In courts of general jurisdiction, except in capital cases, a jury shall consist of eight jurors. In courts of inferior jurisdiction a jury shall consist of four jurors. In criminal cases the verdict shall be unanimous. In civil cases three-fourths of the jurors may find a verdict. A jury in civil cases shall be waived unless demanded."

It has been argued that it is uncertain whether or not the right to trial by jury in Utah is guaranteed in a civil case. See Vol. 8, Utah Law Review, No. 2, "Right to Civil Jury Trial in Utah: Constitution and Statute", by Ronan E. Degnan.

Irrespective of the ultimate answer to this issue, the right to a jury trial through Utah's history has existed by statute, and at the time of the trial of this cause existed both by statute and court rule. See Rule 38(a), Utah Rules of Civil Procedure, which provides:

> "Right Preserved. The right of trial by jury as declared by the Constitution or as given by statute shall be preserved to the parties."

See also 78-21-1, Utah Code Annotated, 1953. The plaintiffs herein demanded a jury, and the case was tried before a jury, and the matter was submitted to a jury which made findings entitling plaintiffs to judgment, or, at the very least, a new trial before another jury. The trial court and this court both refuse to allow the jury findings to control, but take the findings from plaintiffs as though the matter had never been tried before a jury.

Plaintiffs concede that when there is no dispute that a particular fact is not supported by any evidence, the court may make this conclusion and either direct a verdict or take a verdict away from a jury. That, however, is a far cry from the situation herein. The jury made findings on each and every material fact, and the findings must be treated in one of the two

following manners: (1) They are so inconsistent that a new trial must be ordered; or (2) They are consistent, and a judgment should be entered.

The court's refusal to consider the consistency or inconsistency of the findings amounts to a refusal to consider the findings themselves, and this the court can do only where the facts undisputedly show that the plaintiff is not entitled to relief. See ***Raymond v. Union Pacific Railroad,*** 113 Utah 26, 191 P.2d 137, where Mr. Justice Wolfe says:

> "It has been strenuously argued by plaintiff that this decision has deprived him of his constitutional right to a jury trial. That contention has been urged upon this court in almost every case of nonsuit and directed verdict brought before us. This court is charged with the duty of protecting all of the rights of all litigants. This is especially true of those fundamental rights guaranteed by the State and Federal Constitutions. But the right to have a jury pass upon issues of fact does not include the right to have a cause submitted to a jury in the hope of a verdict where the facts undisputably show that the plaintiff is not entitled to relief."

See *Creamer v. Ogden Union Railway & Depot Co.,* 121 Utah 406, 242 P.2d 575, where Mr. Justice Henriod says:

> "As to plaintiff's contention that denying recovery here denies him a constitutionally guaranteed jury trial, answer is found in the language of Mr. Justice Wolfe in a case decided by us and in decisions of the U. S. Supreme

> Court, to the effect that no such deprivation occurs where the facts indisputably establish no right to relief."

The result of the trial and appellate courts' refusal to consider all of the findings of the jury deprives plaintiffs of their existing right to a jury trial resulting in fundamental lack of fair play, a violation of the Due Process and Equal Protection of the Law Clauses of the United States Constitution (Article XIV, Section 1, Amendments) and the Utah Constitution (Article I, Sections 7, 10).

The United States Supreme Court has passed upon this situation of fundamental unfair play on a number of occasions. In *Basham v. Pennsylvania Railroad,* 372 U.S. 699,10 L.ed 2d 80, 83 S.Ct. 965, the court stated:

> "Only when there is a complete absence of probative facts to support the conclusion reached [by the jury] does a reversible error appear. But where, as here, there is an evidentiary basis for the jury's verdict, the jury is free to discard or believe whatever facts are inconsistent with its conclusion. And the appellate court's function is exhausted when that evidentiary basis becomes apparent, it being immaterial that the court might draw a contrary inference or feel that another conclusion is more reasonable." 327 U.S. at 653.

In *Brinkerhoff-Faris Trust & Sav. Co. v. Hill,* 281 U.S. 672, 74 L.ed 1107, the court stated:

> " * * * The federal guaranty of due process extends to state action through its judicial, as

well as through its legislative, executive, or administrative, branch of government.

It is true that the courts of a state have the supreme power to interpret and declare the written and unwritten laws of the state; that this court's power to review decisions of state courts is limited to their decisions on federal questions; and that the mere fact that a state court has rendered an erroneous decision on a question of state law, or has overruled principles or doctrines established by previous decisions on which a party relied, does not give rise to a claim under the 14th Amendement or otherwise confer appellate jurisdiction on this court.

But our decision in the case at bar is not based on the ground that there has been a retrospective denial of the existence of any right or a retroactive change in the law of remedies. We are not now concerned with the rights of the plaintiff on the merits, although it may be observed that the plaintiff's claim is one arising under the Federal Constitution and, consequently, one on which the opinion of the state court is not final; or with the accuracy of the state court's construction of the statute in either the Laclede Land & Improv. Co. Case or in the case at bar. Our present concern is solely with the question whether the plaintiff has been accorded due process in the primary sense, — whether it has had an opportunity to present its case and be heard in its support. Undoubtedly, the state court had the power to construe the statute dealing with the state tax commission; and to re-examine and overrule the Laclede Land & Improv. Co. Case. Neither of these matters raises a federal question; neither is sub-

ject to our review. But, while it is for the state courts to determine the adjective as well as the substantive law of the state, they must, in so doing, accord the parties due process of law. Whether acting through its judiciary or through its legislature, a state may not deprive a person of all existing remedies for the enforcement of a right, which the state has no power to destroy, unless there is, or was, afforded to him some real opportunity to protect it."

Recently, in April of 1962, the United States Supreme Court in *Atlantic and Gulf Stevedores, Inc. v. Ellerman Lines, Ltd.*, 369 U.S. 355, 7 L.ed 2d 798, 82 S. Ct. 780, the jury in a negligence suit made findings as follows:

"1. Was unseaworthiness a substantial factor in causing the injuries to the plaintiff?

Yes.

2. Was there negligence on the part or Ellerman Lines, Ltd. [Defendant], which was a substantial factor in causing injuries to the plaintiff?

Yes.

3. In what amount, if any, did you assess the damages to be awarded the plaintiff?

$100,000.

4. If you have answered yes to Interrogatories 1 or 2, did the fault of Ellerman Lines, Ltd. [Defendant], and the City Line, Ltd., arise out of any failure on the part of Atlantic and Gulf Stevedores, Inc. [Employer], to do its work in accordance with the contractual obligation?

No.

5. If you have answered yes to Interrogatory

No. 4 was Atlantic and Gulf Stevedores, Inc.'s [Employer] breach of this contract a substantial factor in bringing about the injuries to the plaintiff?

No."

Thereupon, the District Court entered judgment in favor of the plaintiff against the defendant, and in favor of the third party defendant against defendant on the claim of indemnity (a remarkable similarity in facts with the instant case). The Third Circuit Court of Appeals, despite the findings of the jury, reversed the judgment in favor of the third party defendant, and the United States Supreme Court, on a petition for certiorari, held:

"We might agree with the Court of Appeals had the question of fact been left to us. But neither we nor the Court of Appeals can redetermine facts found by the jury any more than the District Court can predetermine them. For the Seventh Amendment says that 'no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.'

* * *

We cannot say that petitioner was liable as a matter of law nor that the trial judge in the charge to the jury omitted any ingredient from petitioner's contractual liability. Moreover, we cannot say that the jury's verdict was inconsistent. The Court of Appeals said that the case of the respondents' negligence was established because ' . . . the record affords ample basis for a jury fact-finding that (1) use of the bale hook method in the discharge of the burlap bales con-

stituted negligence, and (2) that the injured longshoreman was not afforded a safe place to work.' 289 F.2d, p. 207.

So far as we know the jury may have found respondents liable not on either of those two grounds but soley on a third, namely, because of defective bands—a matter which was covered by the charge to the jury on the issue of unseaworthiness, and properly so. Weyerhaeuser S.S. Co. v. Nacirema Operating Co., 355 U.S. 563, 567, 2 L ed 2d 491, 494, 78 S Ct 438. If that was the jury's view of the facts, then petitioner plainly would not be liable under its warranty. Where there is a view of the case that makes the jury's answers to special interrogatories consistent, they must be resolved that way. For a search for one possible view of the case which will make the jury's finding inconsistent results in a collision with the Seventh Amendment. Arnold v. Panhandle & S. F. R. Co., 353 US 360, 1 L ed 2d 889, 77 S Ct 840. Cf Dick v. New York Life Ins. Co., 359 US 437, 446, 3 L ed 2d 935, 942, 79 S Ct 921.

Reversed."

The Utah courts have refused to apply a view of the case that makes the jury's answers to the special interrogatories consistent and resolve them in that manner, except to conclude that the jury might have found operator conduct to constitute the sole proximate cause of the accident. The jury found to the contrary, having found the defect and its non-discovery to be the proximate cause of the accident. The result is that this court refuses to consider the findings of the jury and deprives plaintiffs of a jury trial.

True, the United States Supreme Court in the *Ellerman* case construes the Seventh Amendment, which deals with jury trials in Federal Courts, but the Seventh Amendment provides that a jury in a Federal Court shall be a "common law" jury. The juries in the Utah courts are "common law" juries as that term is known by the law, and there is no distinction in the federal or state courts as to when the court may disregard the findings of the jury.

CONCLUSION

It is respectfully submitted that the opinion and substitute opinion of this court completely ignore the total findings of the jury, and that this results in depriving appellants of their right to a jury trial thereby violating the Due Process and Equal Protection of Law Clauses of the Utah and United States Constitutions. It is further respectfully submitted that appellants have been prejudiced by the procedural irregularity discussed above, and that fair play entitles appellants to a rehearing, and that the court should reconsider its opinions and vacate same.

Respectfully submitted,

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Dated: September 21, 1966.