

1960

Johnson Ready-Mix Concrete Co. v. United Pacific Insurance Co. : Brief of Appellant

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/uofu_sc1



Part of the [Law Commons](#)

Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errors.

Skeen, Worsley, Snow & Christensen; Attorneys for Defendant and Appellant;

Recommended Citation

Brief of Appellant, *Johnson Ready-Mix Concrete Co. v. United Pacific Insurance Co.*, No. 9247 (Utah Supreme Court, 1960).
https://digitalcommons.law.byu.edu/uofu_sc1/3661

This Brief of Appellant is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs (pre-1965) by an authorized administrator of BYU Law Digital Commons. For more information, please contact hunterlawlibrary@byu.edu.

In the Supreme Court
of the State of Utah

JOHNSON READY-MIX CONCRETE
COMPANY, a corporation,

Plaintiff and Respondent,

Clerk, Supreme Court, Utah

—vs.—

UNITED PACIFIC INSURANCE
COMPANY, a corporation,

Defendant and Appellant.

FILED
22 1967
No. 9247
UNIVERSITY OF UTAH

JUL 10 1967

BRIEF OF APPELLANT **LAW LIBRARY**

SKEEN, WORSLEY, SNOW &
CHRISTENSEN

*Attorneys for Defendant and
Appellant*

701 Continental Bank Building
Salt Lake City, Utah

TABLE OF CONTENTS

	Page
STATEMENT OF FACTS	1
STATEMENT OF POINTS	8
ARGUMENT	9
POINT I. THE COURT ERRED IN SUBMITTING TO THE JURY THE QUESTION OF WHETH- ER JOHNSON READY-MIX HAD NOTICE OF THE ACCIDENT	9
POINT II. THE COURT ERRED IN ITS INSTRU- TION NO. 9	15
CONCLUSION	17

CASES CITED

Black and White Cab Company v. New York Indemnity Co. (W. Va., 1929), 150 S. E. 521.....	13
Fox v. Taylor (Utah, 1960), 350 P. 2d 154.....	17
Hoffman v. Employers Liability Assur. Corp., Ltd., (Ore., 1934), 29 P. 2d 557	11
Latses v. Nick Floor, Inc., 99 Utah 214, 104 P. 2d 619 (1940)	14
Ohio Farmers Indemnity Company v. Charleston Laundry Co., (4 Cir., 1950), 183 F. 2d 682.....	18
Olsen, et al., v. Warwood, et al., 123 Utah 111, 255 P. 2d. 725 (1953)	10
Woolverton v. Fidelity and Casualty Company of New York (N. Y., 1907), 82 N. E. 745.....	10

AUTHORITIES CITED

8 Appleman, Insurance Law and Practice, 137, Section 4742....	10
2 Mecham on Agency (2d Ed.) 1397 (Sec. 1813).....	14
Rule 51, Utah Rules of Civil Procedure.....	17

In the Supreme Court of the State of Utah

JOHNSON READY-MIX CONCRETE
COMPANY, a corporation,

Plaintiff and Respondent,

—vs.—

UNITED PACIFIC INSURANCE
COMPANY, a corporation,

Defendant and Appellant.

No. 9247

BRIEF OF APPELLANT

STATEMENT OF FACTS

This is an action upon an insurance policy brought by Johnson Ready-Mix Concrete Company, Plaintiff and Respondent, herein referred to as Johnson Ready-Mix,

against United Pacific Insurance Company, Defendant and Appellant, herein referred to as United Pacific. Trial was held in the District Court of Cache County, Utah, before a jury on March 7 and 8, 1960, the Honorable Lewis Jones, District Judge, presiding, and resulted in a verdict in favor of Johnson Ready-Mix for \$12,250.00 (R. 160). Prior to entry of judgment on the verdict, United Pacific moved the entry of judgment in accordance with its Motion for Directed Verdict or, in the alternative, for a new trial (R. 323). This appeal followed denial of these motions and entry of Judgment on Verdict on March 14, 1960 (R. 161, 172).

United Pacific is an insurance company organized under the laws of the State of Washington on March 20, 1928, and duly qualified to do business as an insurer within the State of Utah since March 30, 1933. Johnson Ready-Mix is a Utah corporation engaged in the manufacture, distribution and sale of mixed concrete primarily in the area of Cache County, Utah. On May 12, 1954, the President of Johnson Ready-Mix was LeGrand Johnson. Percy Quinney was Secretary and Treasurer and Office Manager (R. 214). Mr. Quinney had similar positions with four other corporations principally owned by Mr. Johnson (R. 222).

On May 12, 1954, there was in full force and effect a comprehensive bodily injury and property damage liability policy issued by United Pacific to Johnson Ready-

Mix covering, among other things, the liability of Johnson Ready-Mix to persons injured as a result of the use of motor vehicles by employees of Johnson Ready-Mix Company (Ex. 1). On that date one of the employees of Johnson Ready-Mix, while making a delivery of concrete, was involved in an accident in which Christian F. Blazer received personal injuries ultimately requiring an operation (R. 249, 256). The driver of the truck John Olsen, was aware of this accident (R. 261, 262). Mr. Blazer reported the accident to Devere Taggart, a supervisory employee of Johnson Ready-Mix, who then interviewed Mr. Olsen briefly concerning it (R. 221, 270, 271). According to both Mr. Taggart and Mr. Quinney the accident was not brought to Mr. Quinney's attention (R. 219, 220, 272) although he had the responsibility for reporting accidents to the agent of United Pacific.

The procedure of Johnson Ready-Mix relative to the reporting of accidents was detailed by Mr. Quinney. He testified:

“Q. Did you, Mr. Quinney, have anything to do as a part of your duties as office manager, anything to do with the instructions given employees as to the reporting of accidents?

A. Yes, I instructed them.

Q. And did you instruct specifically Mr. Taggart as to what he was to do with regard to accidents that came to his attention?

A. Yes.

Q. And what instructions did you give him?

A. That they should be reported to the office.

Q. And I take it that would be to you?

A. Yes.

Q. As office manager?

A. Yes.

Q. Did you give any instructions to Mr. John Olsen the truck driver?

A. I don't recall.

Q. Did you give any general instructions to truck drivers?

A. No, not directly.

Q. Did you give any instructions to Mr. Taggart with respect to telling the drivers what the procedure was in connection with reporting accidents?

A. Yes.

Q. And what did you tell Mr. Taggart in that regard?

A. That if we had an accident, to report it.

Q. In other words, the truck drivers were to report any accidents of which they knew to who, to you or to Mr. Taggart?

A. Well, to either one as long as it got to the office.

Q. I see. So they could have reported then to you or to Mr. Taggart, and he in turn, under the procedure, would have reported it to you?

A. Yes.

Q. And was that procedure in effect prior to May of 1954?

A. Yes.

Q. And was in effect during the month of May of that year.

A. Yes." (R. 224, 225).

The general duties of Mr. Taggart were described by Mr. Quinney as follows:

“Q. And did the corporation, on May twelfth of 1954, also employ a man by the name of Devere Taggart?

A. Yes.

Q. And what was his job?

A. He was batch plant operator, and he overseen the operations, drivers' delivery of the concrete to the layers.

Q. Did he sort of oversee the ready-mix concrete end of the business?

A. Yes.

* * * * *

“Q. Now were there other businesses being conducted by corporations in which Mr. LeGrand Johnson had an interest at that time?

A. Yes.

Q. And just generally what other businesses were being conducted?

A. Well, there was the LeGrand Johnson Enterprises; that was a holding company; and LeGrand Johnson Corporation was a mining and quarrying—

* * * * *

the other one was LeGrand Johnson Construction Company.

* * * * *

“Q. Now were there other men in addition to Mr. Taggart that had the same type of job that he did with Johnson Ready Mix Concrete Company?

A. Not the same type of job, no.

Q. Was he the only supervisor?

A. Yes.

Q. And did these truck drivers, four or five, work under him?

A. Yes.” (R. 221-3)

The policy provided with respect to notice of accidents:

“When an accident or an occurrence takes place, written notice shall be given by or on behalf of the insured to the company or any of its authorized agents as soon as practicable. Such notice shall contain particulars sufficient to identify the insured and also reasonably obtainable information respecting the time, place and circumstances of the accident or occurrence, the names and addresses of the injured and of available witnesses, and information respecting applicable insurance available to the insured at the time of the accident or occurrence. If claim is made or suit is brought against the insured, the insured shall immediately forward to the company every demand, notice, summons or other process received by him or his representative.” (Ex. 1).

Johnson Ready-Mix admits that no notice of this accident was given United Pacific until after Johnson Ready-Mix Concrete Company received a demand letter from counsel for Mr. Blazer on May 14, 1957, more than three years after the accident occurred (R. 196, 220, Ex. 11).

At the trial of this case the Court submitted as issues of fact for determination by the jury whether Johnson Ready-Mix knew of the occurrence of the accident and whether, if Johnson Ready-Mix knew of the accident, it reasonably appeared too trivial to require reporting to United Pacific (Instruction No. 2, R. 148).

By its verdict the jury found either that Johnson Ready-Mix had no knowledge of the accident or that it appeared so trivial as to not require that notice of it be given United Pacific.

STATEMENT OF POINTS

POINT I

THE COURT ERRED IN SUBMITTING TO THE JURY THE QUESTION OF WHETHER JOHNSON READY-MIX HAD NOTICE OF THE ACCIDENT.

POINT II

THE COURT ERRED IN ITS INSTRUCTION NO. 9.

ARGUMENT

POINT I

THE COURT ERRED IN SUBMITTING TO THE JURY THE QUESTION OF WHETHER JOHNSON READY-MIX HAD NOTICE OF THE ACCIDENT.

There was no question concerning the fact that notice of the accident was not given to United Pacific until more than three years after the accident had occurred. It was the position of Johnson Ready-Mix that Mr. Taggart's knowledge of the accident was not imputable to it as he was a mere batch plant operator with authority only to mix cement, receive orders for cement and dispatch haulers to customers (R. 129).

It was the position of United Pacific that notice to the company was shown as a matter of law and that the only issue for the jury was whether the accident reasonably appeared so trivial as to not require that notice of it be given to United Pacific (R. 298, 301, 308).

Since the Court submitted the question of the knowledge of Johnson Ready-Mix of the accident and since the jury could have found that no such knowledge existed and thus sustain its verdict, if it was error to submit that issue, then this case must be reversed and remanded

to the District Court of Cache County for a new trial. *Olsen, et al., v. Warwood, et al.*, 123 Utah 111, 255 P. 2d 725 (1953).

The evidence was without conflict that Mr. Taggart had authority to receive notice of accidents involving Ready-Mix truck drivers from such truck drivers and relay such notice to Mr. Quinney. There also was no conflict in the evidence that Ready-Mix truck drivers were instructed to report accidents to either Mr. Taggart or Mr. Quinney (R. 224, 225).

It is well settled that where a driver notifies one whose duty it is to receive reports of accidents and transmit them to a supervisor, it constitutes notice to the insured, although such knowledge is not properly transmitted. 8 Appleman, Insurance Law and Practice, 137 (Duties of Insured, Notice of Accidents, Claim or Suit, Section 4742).

The leading American decision upon this question is *Woolverton v. Fidelity and Casualty Company of New York*, (N. Y., 1907) 82 N. E. 745. In that case it was held that an insured is not excused from giving notice of an accident merely because none of its general officers or directors or anyone who had the duty of adjusting differences between it and the insurer had knowledge thereof, and that, while the knowledge of the driver who caused the accident is not imputable to the insured,

yet, if he reported it to one whose duty it was in the ordinary and natural conduct of the business to receive reports of accidents and transmit them to the general superintendent, and he failed to transmit such knowledge, the insured is chargeable for his delay and neglect.

In *Hoffman v. Employers Liability Assur. Corp., Ltd.*, (Ore., 1934) 29 P. 2d 557, an accident occurred at The Dalles, Oregon while Plaintiff was engaged in constructing a theatre building and laying a cement sidewalk in front of it. Donaca was Plaintiff's foreman at the time of the accident. He had been instructed to report all accidents to Plaintiff or to Plaintiff's general superintendent immediately upon their occurrence but failed to do so and this accident was not reported to the insurer until one year later.

Plaintiff sought to excuse his late notice upon the ground that he had no personal knowledge of the accident and asserted that he was not chargeable with the knowledge of the accident that Donaca had acquired at the time of its occurrence and failed to report. Quoting the Woolverton decision, the court said:

"Where, however a master employs many servants and the duty of acquiring information of the accidents as they occurred is necessarily committed to servants or agents, if the acquisition of such information is an affirmative duty on his part, we cannot see why he is not respon-

sible for the negligence or fault of the servants to whom he entrusts the duty to the same extent as he would be responsible for their negligence or misconduct in any other obligation to third persons . . .”

“While we thus hold that the Plaintiff was chargeable for the delay and neglect of its agents or servants in failing to apprise it of an accident, the occurrence of which they had acquired knowledge or information, this principal must be confined to those agents whose duty it was, either by express regulation of the Plaintiff or by their supervision and control in the natural and proper conduct of business over the subordinate servants by whom the accident had been caused, to transmit such knowledge to their superiors or the company . . .”

The Oregon court then said:

“In the case at bar the evidence shows that Plaintiff was actively engaged, as a contractor, in constructing numerous buildings in different cities and transacted his business under the supervision of a general superintendent. That neither Plaintiff nor said superintendent was at The Dalles where this particular work was being carried on. Donaca had been sent to The Dalles to take charge of and supervise the work of completing the building and sidewalk, and he had been instructed to report all accidents covered by the policy either to Plaintiff or to the general superintendent. In the performance of the work he was not a mere servant but the man. in charge

who stood in the shoes of and represented the master. For Donaca's conduct while acting within the scope of his employment and for his failure to perform his duties while so acting, Plaintiff was responsible to third parties so far as their rights were affected thereby, and as much chargeable with the knowledge Donaca had of the happening of the accident as he would have been had he been personally present and possessed all of the knowledge that Donaca had at the time."

A similar result was reached in *Black and White Cab Company v. New York Indemnity Co.*, (W. Va., 1929) 150 S. E. 521, where it was held that the insurer was relieved from liability for an accident which the cab company had failed to report, and that lack of knowledge of the accident on the part of the managing officers of the cab company did not excuse its failure since the driver of the cab involved in the accident had been instructed by his employer to report accidents and thereby became the company's agent to receive the information.

This rule is not, of course, peculiar to knowledge of accidents or to insurance policies.

"The law imputes to the principal, and charges him with, all notice or knowledge relating to the subject-matter of the agency which the agent acquires or obtains while acting as such agent and would in the scope of his authority, or,

according to the weight of authority, which he may previously have acquired and which he then had in mind, or which he had acquired so recently as to reasonably warrant the assumption that he still retained it. Provided, however, that such notice or knowledge will not be imputed: (1) where it is such as it is the agent's duty not to disclose: (2) where the agents relations to the subject-matter are so adverse as to practically destroy the relation of agency; and (3) where the person claiming the benefit of the notice, or those whom he represents, colluded with the agent to cheat or defraud the principal.

“This rule does not depend, in either case, upon the fact that the agent has disclosed the knowledge or information to his principal; subject to the exceptions named, the law conclusively presumes that he has done so, and charges the principal accordingly.” *Latses v. Nick Floor, Inc.*, 99 Utah 214, 104 P. 2d 619 (1940), citing 2 Mechem on Agency (2d Ed.) 1397 (Sec. 1813).

Because there was no issue of fact for the jury as to the knowledge of Johnson Ready-Mix of the accident, the trial court committed prejudicial error in instructing the jury that:

“The final issues of fact for you to determine in this case become:

1. Was any notice of the accident ever received by the Plaintiff corporation prior to May 1957?

2. Did the accident appear so trivial or minor (even though Plaintiff found out about it within a few days, should you so find) as to not require that notice of it be given to Defendant?" (Instruction No. 2, R. 148).

POINT II

THE COURT ERRED IN ITS INSTRUCTION NO. 9.

In its Instruction No. 9 the Court charged:

"Ordinarily, knowledge of an accident to a teamster is not imputed to his employer. The duty of the employer is to exercise ordinary diligence in adopting such measures as would lead to knowledge on his part of the occurrence of the accident and if you believe in this case that the Plaintiff company did use reasonable care to learn of the accident then the mere fact that the teamster or truck driver or other employee not authorized to act for the company had knowledge of the accident which was not transmitted to a proper officer would not constitute knowledge to the Plaintiff.

The Plaintiff's theory of this case is that no proper officer or agent of the Plaintiff had any notice of the accident whatever until a letter from the attorney was received approximately three years after the accident. And in this connection they contend that notice to the witness Olsen and notice to the witness Taggart was not notice to the company.

In this connection, you are instructed that a corporation can only receive notice through its officers and agents and there is a difference between a mere employee and a supervising agent or officer of the company.

If the jury believes that the witness Taggart was a supervising agent or a person authorized to accept notice for and on behalf of the Plaintiff, then whatever notice Taggart had of the accident is notice to the Plaintiff.

If, on the other hand, you find that Taggart was a mere batch plant operator with authority to mix the cement, receive orders for cement and dispatch the haulers to the respective customers with no supervisory or other such authority or power in the conduct of the business of the corporation, then notice to Taggart would not be notice to the Plaintiff.

You are further charged that the witness Quinney was at all times an officer of the corporation, and any notice which you may find he received concerning the accident became notice to the corporation." (R. 155).

This Instruction, requested by Johnson Ready-Mix (R. 129), is not supported by the evidence and, indeed, is contrary to the undisputed testimony of the Secretary-Treasurer and Office Manager of Johnson Ready-Mix, Mr. Quinney. The argument made under Point I is applicable to this phase of the error contained in this Instruction.

In addition, this Instruction is a comment on the evidence tending to indicate to the jury the attitude of the Court on the question of knowledge of the accident. Phrases like “the mere fact that”, “mere employee” and “mere batch plant operator” necessarily imply that the Court believes Mr. Taggart to have been without sufficient authority to bind Johnson Ready-Mix with his knowledge.

This Court in *Fox v. Taylor*, (Utah, 1960) 350 P. 2d 154, said:

“We recognize the duty of the Court under our law to avoid comments on the evidence; or which may tend to indicate an opinion as to what the facts are on disputed issues.”

See also Rule 51, U.R.C.P., which expressly forbids the trial court to “comment on the evidence in the case.”

CONCLUSION

Under the Instructions in this case, the jury could have found its verdict upon an issue which should not have been submitted to it. The jury was aided in such a finding by the comments of the trial judge contained in the charge.

Delayed notice of more than three years after the accident is so flagrant a violation of the policy it suggests that the jury decided that Johnson Ready-Mix did not know of the accident.

“The importance to an indemnitor of a prompt and accurate report of an accident and of full assistance and cooperation on the part of the insured should not be minimized, and when the insured fails in this duty the release of the indemnitor from liability is fully justified.” *Ohio Farmers Indemnity Company v. Charleston Laundry Co.*, (4 Cir., 1950) 183 F. 2d 682.

The Judgment on Verdict in this case should be reversed and a new trial granted if United Pacific is to be afforded even minimum requirements of substantial justice.

Respectfully submitted,

SKEEN, WORSLEY, SNOW &
CHRISTENSEN

*Attorneys for Defendant
and Appellant*

701 Continental Bank Building
Salt Lake City 1, Utah