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Leone M. Evans, Ralph Evans, Bernice Evans
Stuart, and Beth Evans Johnson v. Glen S. Stuart :
Appellant's Brief

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IN THE SUPREME COURT OF THE STATE OF UTAH

LEONE M. EVANS, RALPH
EVANS, BERNICE EVANS
STUART, and BETH EVANS
JOHNSON,
Plaintiffs and Respondents,

— vs. —

GLEN S. STUART,
Defendant and Appellant.

Case No.
10499

FILED
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APPELLANT'S BRIEF

Appeal From the Judgment and Order of the
Second Judicial District Court for Davis County
HONORABLE CHARLES G. COWLEY, *District Judge*

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Case No.
10400

APPELLANT'S BRIEF

NATURE OF THE CASE

This is an appeal from the judgment entered on April 20, 1965, in favor of plaintiffs and against defendant and from the Order entered May 18, 1965, denying defendant's Motion for a New Trial.

DISPOSITION IN LOWER COURT

Trial of the instant case was held on December 17, 1964, before the Honorable Charles G. Cowley, sitting without a jury. On April 20, 1965, judgment was entered

in favor of plaintiffs and against defendant for the sum of \$9,000 general damages, \$870.55 special damages and \$21.64 costs. Subsequently, defendant made a Motion for a New Trial on the grounds that the judgment, (1) did not correspond with the evidence as against the law, and (2) was excessive and included damages on which no evidence was introduced. The Motion was denied on May 18, 1965.

RELIEF SOUGHT ON APPEAL

The relief sought on this Appeal is as follows:

A. Reversal of the judgment of the lower court.

B. An Order directing that judgment be entered in favor of defendant and against plaintiffs no cause of action.

C. In the alternative, that the lower court's Order denying defendant's Motion for a New Trial be reversed.

STATEMENT OF FACTS

On March 7, 1963, defendant Glen Stuart was a 55-year-old dairy farmer with his home located on his farm which was situated about two and one-half miles west of Kaysville, Davis County, Utah (T-18, 19). At that time he had been farming for approximately 20 years (T-54). Hugh Alva Evans, decedent, was 67 years of age (T-8) and on the day in question, as well as many times previous was working at odd jobs for defendant (T-19).

Defendant is the father of Deon Stuart who is married to Bernice Evans Stuart, the daughter of decedent (T-10). Deon Stuart and his wife lived near defendant on property that was given to them by the latter (T-21, 22). On the west side of the Deon Stuart home is a little fence and on the outside of the fence was a pile of lumber (T-43). Near the house was a gasoline pump which was in use at the time and which had gasoline in the tanks (T-22, 23).

Decedent was a very good farm hand and knew his way around a dairy ranch (T-53). He had made his living and been engaged in farming activities in his younger years (T-18), was well experienced in farming and had earned his living at that for most of his adult life (T-52, 71). He was in good health and could see, hear, and manage himself all right (T-51), his physical condition being such that he was always running foot races with his kids and he could still beat them all in a race (T-86).

March 7, 1963. was a "nice" sunny day with a little breeze blowing in the morning (T-91). There was not a big wind or gale blowing that day (T-53, 92), but what one of the witnesses characterized as a "changeable breeze" (T-53). Between 1:00 p.m. and 2:00 p.m. on that day, decedent began to remove a fence starting on the north end of defendant's property and working to the southwest (T-26, 27). While he was thus engaged, defendant asked him to start a fire to clean out a ditchbank that ran along the fence and along the whole area of defendant's field (T-24, 27). Decedent lit the fire and

burned an area along the ditch. After starting the fire, he was doing such a good job that defendant decided to have him burn farther along the ditches (T-28).

After the fire was started by decedent and during the course of two hours time (T-53) the fire burned along the ditch bank spreading out into a field of wheat stubble and new alfalfa (T-23) and burned up to a point near the gasoline pump and wood pile near the Deon Stuart home (T-30, 38). The fire in the stubble field was easily extinguished and contained by defendant with a tractor fitted with a bucket scoop on the front (T-30). There was a short delay in containing the fire when the tractor ran out of gas. The assistance of decedent was enlisted to extinguish and contain the fire near the gas pump which defendant, decedent and one Rex Terkelson, another hired man, accomplished with hand shovels very readily (T-42). After extinguishing and containing the fire around the gas pump, defendant then told decedent to go "down around the lumber and check it. Then watch it there and we'll be there in just a minute" (T-44, 55). Decedent went over to the lumber pile and was there for only a minute or two when he yelled for help (T-44). Defendant and Mr. Terkelson both became aware of the fact that Mr. Evans' clothing was on fire and they went to his assistance (T-46, 67).

After extinguishing the fire on decedent's clothing, defendant called the fire department. It was about five minutes before they arrived to put out the fire that was burning the weeds near the woodpile. It is significant to note that the pile of wood did not burn (T-51). Mr.

Evans indicated that he did not know how the fire caught onto his clothing but he supposed that it got behind him without his knowing it and caught on his pant leg (T-59, 61) and that he didn't realize that his clothing was on fire until he felt the warmth (T-61). Decedent was confined in the hospital because of the burns he received and subsequently died on April 12, 1963 (T-12).

Both defendant and Donald Evans testified that the usual way to clear grass and weeds from ditch banks on farms is either by burning or chemical spray (T-52) (T-77) and the evidence is that decedent himself had burned ditch banks and other areas on his farm when he was engaged in the business of farming on his own (T-78, 79).

Defendant, a farmer with 30 years experience in farming activities among which is included the burning of ditches said that in his opinion that the day the accident happened was a safe day for burning grass and weeds (T-54, 55).

Decedent's death resulted in an action by plaintiff's against defendant for wrongful death. The bases of their claim is that defendant was negligent in:

A. Starting the fire without first having adequate precautions available to control it.

B. Starting the fire under weather conditions which were adverse due to:

1. dry conditions that had previously existed.
2. the wind on the day in question.

It is the contention of defendant that he was not negligent and that in any event, the decedent was contributarily negligent which proximately caused or contributed to his injuries and death and that he assumed the risk involved.

ARGUMENT

POINT I.

THE TRIAL COURT ERRED IN GRANTING PLAINTIFFS' JUDGMENT AGAINST DEFENDANT.

It is defendant's contention that the trial court erred in granting plaintiffs' judgment against defendant. The lower court's error arises from the following: (A) Defendant was not negligent in the way or under the conditions that he burned the grass and weeds from the ditch bank, (B) In any event, decedent was negligent as a matter of law in his actions on the day he was injured, and (C) Decedent assumed the risk of any danger that existed in extinguishing, containing or observing the fire as it burned off weeds and grass near the wood pile.

The elements of non-liability as urged by defendant will be discussed under Point I, in the order presented above.

A. DEFENDANT WAS NOT NEGLIGENT

In attempting to ascertain whether or not defendant was negligent in burning the grass and weeds from the ditch bank on his farm, one must consider three as-

pects of the problem, viz., whether it is unsafe to burn weeds and grass at all, whether it was unsafe to burn the grass on the particular day, and whether defendant took adequate precautions to control the fire once he began to burn the weeds.

The un rebutted evidence produced at the trial establishes that the common practice of farmers, at least in Davis County, where the mishap occurred, is that whenever they desire to clean weeds and grass from the ditch banks that they either burn it off or spray the growth with chemicals. Apparently, the use of chemicals is of more recent origin which has arisen because of availability of chemicals and convenience in the saving of both time and physical output in the employment of the spraying technique. Defendant has burned grass and weeds on his farm for 30 years as is the custom of farmers generally. Decedent burned grass and weeds off his own land when he was engaged in farming activities on his own. He was a farmer for most of his adult life. It is significant that on the day that decedent was injured, he lit the fire in order to burn the growth from the ditch banks. Thereafter, defendant and Rex Terkelson watched the fire while decedent continued to work on pulling down an old fence. Apparently decedent thought that the practice of burning weeds was so common and natural, especially under the conditions of that day, that after the fire had burned for two hours, had burned along the ditch bank and out into a field, and had gone up toward the gas pump and wood pile near Deon Stuart's, that he did not suggest to defendant that it was unsafe to burn the weeds

at the time and place nor did he come to assist defendant and Mr. Terkelson to contain the fire until he was requested to do so. One can only logically think from decedent's conduct that up until the time defendant requested his assistance with the fire nothing appeared unusually unsafe or dangerous nor was defendant's conduct in burning the weeds near where decedent was working a source or cause of concern to him nor to any of the others present at the time. Decedent certainly showed no concern, or at least stated none, that his daughter's horse might burn down. He did not call the fire department or suggest that it be called nor did he ever suggest that additional help be obtained.

A search of the transcript also reveals that there was nothing unsafe about burning grass and weeds on the Stuart farm on March 7, 1963. Every person who testified about the weather conditions stated that a slight breeze was blowing which was certainly not a gale or a wind under any stretch of the facts or the imagination. Defendant stated that based on his 30 years' experience in farming that there was nothing about the weather on that particular day that made it unsafe for burning weeds and grass.

Again there is a dearth of evidence that defendant lacked adequate precautions to control the fire once he had started it. When the fire burned along the ditch bank and out into the field, defendant easily extinguished it and contained the fire there. At this time his tractor ran out of gas and he was unable to extinguish the fire on the field. However, even with the fire burning in the stubble

when defendant did not use his tractor because of lack of fuel, the fire did no damage there nor did it damage the tractor. Plaintiffs make a great deal out of the tractor running out of gas during the time the fire was burning in the stubble field when defendant was attempting to contain the blaze with his tractor. Defendant feels that this contention of plaintiffs compares to the blaze under discussion, i.e., there was much more smoke than fire.

It may be true that the tractor became nonfunctional as an instrument to contain the fire due to lack of fuel. This is really unimportant because the fire did no damage where the tractor was being used. It is certain that decedent was not injured there. The only place that adequate precautions became relevant is at the gas pump and the wood pile. This fire was so small and so far from being a dangerously hostile fire that defendant, decedent, and Rex Terkelson were able easily to contain it with nothing more than hand shovels. The fire at the wood pile burned for five minutes after decedent caught fire and did nothing more than char a plank or two. It was necessary to have the fire department extinguish the fire there, not because it was dangerous or uncontrollable but because defendant and his hired man were concerned about decedent's injuries and could not concern themselves with it any longer.

Defendant urges that on the bases of the testimony of the witnesses as revealed in the transcript that the only reasonable conclusion to be drawn therefrom is that he was not negligent.

B. DECEDENT WAS NEGLIGENT

It is defendant's contention that decedent was negligent as a matter of law in failing to exercise reasonable care for his own safety to avoid placing himself in a position of unnecessary danger, to be reasonably observant of the conditions that existed around him, and in allowing himself to stand in such close proximity to burning material as to cause his clothing to ignite. Further, defendant contends that such negligence was not only a proximate or contributing cause of his injuries but was, in fact, the sole proximate cause thereof.

It should be noted here that Mr. Evans, decedent, had good eyesight, good hearing, could manage himself well, and was so agile and fleet of foot that at the age of 67 he could still outrun any of his sons in a foot race which he was always doing. It is also important to note that he was asked to go over to the woodpile and not expose himself to danger but to merely watch the fire there. The fire at that point was not a raging conflagration but an ordinary grass and weed fire with flames from one to two or three feet high. It was not threatening the woodpile because five minutes after Mr. Evans' clothes ignited the woodpile still hadn't caught fire. There was no unusual weather condition to make the weed fire dangerous or threatening. After going over to the woodpile to "watch" the fire, because of the lack of vigilance decedent permitted the fire to get back of him and burn so close to him that it ignited his clothing. The fact that the fire could get so close to him or he so close to it without him being particularly aware of it either from the

sound or heat testifies as to the docile nature of the fire and not to it as a raging, menacing inferno as plaintiffs would have us believe.

Blomberg v. Truppuka et al. 299 N.W. 11 (Minn. 1941) involved a case where defendant was a lumber dealer and hardware store operator. He got plaintiff to hold galvanized steel upright and in equilibrium. Plaintiff let the steel get out of equilibrium and it fell causing injury to him. To plaintiff's action for the injuries, defendant asserted assumption of risk and contributory negligence. Defendant prevailed. The Court said in effect, that anyone knows or should know that the steel would fall if it got out of equilibrium and that if it did it would fall and could cause injury. In discussing this case the Court said:

A party has a right to assume that others will observe as a minimum the operation of the well-known natural laws.

And further:

The operation of the law of gravity is a matter of such common knowledge that all persons of ordinary intelligence and judgment even if they are illiterate, are required to take note of it.

Applying those principles to the instant case, defendant had the right to assume that decedent would observe the operation of the well-known law that fire burns and if one incautiously gets too close to it, his clothing may ignite and he may be injured by burning. On the other hand, decedent especially with his considerable experi-

ence as a farmer in this regard, is charged with the knowledge.

Lewis v. Cratty, 4 N.W. 2d 259 (Iowa, 1942). A farmer who sustained injuries when his clothing became entangled with the exposed power shaft of a grain combine was contributorily negligent as a matter of law which barred his recovery for injuries sustained when he failed to avoid the power shaft when he knew it was dangerous and had avoided it on prior occasions.

In *Talley v. Bass - Jones Lumber*, 173 S.W. 2d 276 (Texas 1943) an experienced fireman fighting a fire on defendant's premises, whether an invitee or a mere licensee, is guilty of contributory negligence as a matter of law in failing to exercise ordinary care for his own safety against a patent danger.

Cleveland - Cliffs Iron Company v. Metzner, 150 F. 2d 206 (Mich. 1945). Ordinary prudence requires every person to use his faculties of hearing and sight for his protection and to avoid places of danger.

Phillips Petroleum Company v. Miller, 84 F. 2d 148 (Minn. 1936). Failure to make reasonable use of faculties of sight, hearing, and intelligence to discover danger to which one is or may become exposed generally constitutes negligence.

And in *Rohmann v. City of Richmond Heights*, 135 S.W. 2d 375 (Miss., 1940). Not to see what is plainly visible when there is a duty to look constitutes negligence.

Lewis v. Dequesne Inclined Plane Company, 28 A. 2d 925 (Penn., 1940). It is the duty of a person to look where he is walking to see what is visible.

Defendant asserts that if the element of emotion, which is thrust upon the evaluator of the situation because of the injuries and death of Mr. Evans, is purged from the facts of the case, reasonable men could not but conclude that decedent was negligent and that his negligence proximately contributed to his injuries and subsequent death.

C. DECEDENT ASSUMED THE RISK

Defendant incorporates by reference the statements of fact, law and argument from the negligence claim against decedent into this claim of assumption of risk by decedent.

As has already been pointed out, decedent had been a farmer for most of his adult life. He had burned grass and weeds on his own land many times before when he was engaged in farming. On the day of his injury, decedent lit the fire that eventually burned him. He did not protest the starting of the fire, he voiced no concern over the time, place and conditions under which the fire was started, he did not express any fear or concern for his person or that of anyone else, he did not voice concern for the home of his daughter which plaintiffs contend was seriously threatened, he was not concerned enough about the situation to call the fire department for assistance in extinguishing or containing the

fire nor did he make any suggestion that it be done, and he did not suggest or take any action to enlist the aid of other farm personnel or neighbors to contain the fire.

Decedent was an employee of defendant and as such he helped the latter contain the fire near the gas pump. After doing this defendant told decedent to go "down around the lumber and check it. Then watch it there, and we'll be there in just a minute." Decedent went over to the woodpile and had not been there longer than a minute or two when his clothes caught fire even though five minutes later the woodpile still had not started to burn. Decedent was not told to attempt to extinguish the fire himself nor was he told to expose himself to any danger. He was merely told to go to the woodpile and check it and watch it. The implied instruction was for him to watch the woodpile and if the fire got too close to it or started to burn it, defendant and the hired man would come and all three of them would extinguish and contain the fire as necessity dictated. However, either through over zealousness or inattentiveness, or both, decedent unnecessarily and contrary to the instructions of defendant, his employer, exposed himself to danger and was injured.

Herzberg v. White, 66 P. 2nd 253 (Ariz. 1937). Plaintiff who voluntarily and knowingly exposes himself to danger created by defendant's negligence is guilty of contributory negligence which bars recovery for defendant's negligence.

Rirdema v. Chicago and Northwestern Railroad Company, 188 S.E. 603 (Ga.). A person who approaches

a place of danger is under a duty to do so cautiously and with a proper degree of care for his own safety having in mind the danger to which he knows he is exposed.

If the fire was not dangerous enough for decedent to exercise a reasonable degree of care for his own safety while he was near it, then defendant's act on having the fire started cannot be said to have been a negligent act. If the fire was dangerous to decedent then he was under a duty to not expose himself to the danger that existed.

POINT II

THE JUDGMENT GRANTED BY THE LOWER COURT WAS BASED UPON PASSION AND WAS EXCESSIVE.

It is difficult to review the facts of decedent's injury without one's emotions coming into play. Decedent a 67-year-old man, retired, working part-time for defendant, having a wife, sons, daughters and grandchildren enjoying their society, being seriously burned, languishing in the hospital for over a month and then dying at the end of that time.

The cold bare facts of the matter are that decedent, although a loving father and grandfather, had a life expectancy of 12 years. He was retired and worked only part-time for defendant. Other than that he was not productive and made no economic contribution of any real amount to his wife or children. He and his wife both received payments under Social Security and al-

though such payments for him stopped on his demise, the cost of supporting him also ceased. In this respect, Mrs. Evans, decedent's widow, had a net economic gain.

That plaintiffs have suffered a loss in the death of decedent cannot be and is not denied. However, the loss sustained is one of the society of Hugh Alva Evans and not an economic loss such as would justify the judgment which was granted plaintiffs.

CONCLUSION

Based upon the foregoing facts, arguments and authorities cited, Appellant urges the Court reverse the judgment of the lower court and direct that judgment be entered in favor of the defendant for no cause of action and in the alternative that the lower court's denial of defendant's Motion for a New Trial be reversed.

Respectfully submitted,

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