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Sherman V. Lund v. Mountain Fuel Supply Co. : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT
of the
STATE OF UTAH

SHERMAN V. LUND,
Plaintiff and Respondent,

—vs.—

MOUNTAIN FUEL SUPPLY
COMPANY,
Defendant and Appellant.

Case No. 9389

BRIEF OF APPELLANT

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INTRODUCTION

For the sake of brevity, reference to the record on appeal will be designated in parentheses by the capital letter “R”, followed by the page number; reference to the testimony or transcript will be shown by the capital letter “T”; and reference to the exhibits will be shown by the abbreviations “Plf’s. Ex.” or “Def’s. Ex.”, fol-

lowed by the exhibit number. The words “appellant” and “defendant” will designate Mountain Fuel Supply Company, and the words “respondent” and “plaintiff” will designate Sherman V. Lund.

STATEMENT OF FACTS

Defendant, Mountain Fuel Supply Company, is a Utah corporation, engaged in the business of distributing natural gas in certain areas in the State of Utah. In the month of May 1958, the defendant was selling natural gas to plaintiff at his home located at 71 East 6700 South Street, City of Bountiful, Davis County, Utah. Such gas was transported to this area by means of a 2-inch gas main running east and west and located directly across the street from plaintiff’s home (T 21). A 3/4 inch service or feeder line extended from this main line in a northerly direction to plaintiff’s house. This line was connected to the main line by means of a riser or nipple and a dresser coupling (T 27) Def’s. Ex. No. 1 is a fair representation of the aforementioned line and tap (T 185).

In the latter part of May 1958, plaintiff and his wife noticed a wilting and discoloration of a part of their lawn and foliage (7 57, 72). He asked his wife to call the County Agent in regard to this and the Agent, in response to her call, suggested she notify the defendant (T51). On June 17, 1958, Mrs. Lund called the defendant and reported a possible leak (T72). The defendant responded immediately by dispatching two employees, Mr.

Makin and Mr. Clark, to investigate Mrs. Lund's report (T 182). In their investigation Mr. Clark and Mr. Makin discovered a break in the service tap near the main line directly across the street from plaintiff's residence (T 183). This break was repaired immediately by Mr. Clark and his crew (T 183). Mr. Makin stated that the main line and tap had been buried approximately three feet deep, but that some people, in building a new home directly across the street, had removed the soil from the top of this main line and tap, leaving it approximately 16 inches below the surface (T 24, 25, 39). He further stated that the man who lived in the house directly across the street from plaintiff told him that a dual-wheeled cement truck became stuck directly over this tap (T 13). The record shows that the tire tracks and indentation in the earth were approximately 12 inches in depth and within approximately four inches of the main line (T 25). This pressure exerted on the service line by this truck caused the nipple to break directly below the top of the 90 degree elbow, thus causing natural gas to escape into the surrounding soil (T 29) and subsequently into the front yard of plaintiff's residence (T 195).

STATEMENT OF POINTS

POINT I

The trial court erred (a) in permitting the case to go to the jury in the absence of any standard in evidence by which the jury could determine whether or not defendant's gas line was at a proper depth; (b) in permitting

the jury to supply such lack of evidence by “view” of premises; and (c) by refusing to grant defendant’s motions to dismiss based upon such lack of evidence.

POINT II

The trial court committed prejudicial error in giving Instruction No. 6, which was leading, suggestive, contrary to the evidence, and withdrew from the jury’s consideration the question of whether defendant was negligent, and the court enhanced this error by requiring the jury to determine damages irrespective of the findings upon other questions submitted.

ARGUMENT

POINT I

THE TRIAL COURT ERRED (A) IN PERMITTING THE CASE TO GO TO THE JURY IN THE ABSENCE OF ANY STANDARD IN EVIDENCE BY WHICH THE JURY COULD DETERMINE WHETHER OR NOT DEFENDANT’S GAS LINE WAS AT A PROPER DEPTH; (B) IN PERMITTING THE JURY TO SUPPLY SUCH LACK OF EVIDENCE BY “VIEW” OF THE PREMISES; AND (C) BY REFUSING TO GRANT DEFENDANT’S MOTIONS TO DISMISS BASED UPON SUCH LACK OF EVIDENCE.

At the close of the plaintiff’s evidence, the defendant moved to dismiss on the grounds that the plaintiff failed to prove that the defendant was negligent; that there was no casual connection between the plaintiff’s alleged injury and the defendant’s act or failure to act,

and that plaintiff failed to prove damages. The motion was again renewed at the close of defendant's evidence (T 227, 228). These motions were taken under advisement by the court and on November 29, 1960, after the conclusion of the trial and prior to entering judgment therein, the motion was again renewed by the defendant (T 247). In refusing to grant these motions and after having ruled out the doctrine of *res ipsa loquitur*, the court stated:

"The other findings as to negligence in either burying the pipe too shallow or leaving it at a depth after change in the area gives me considerable trouble.

"I have thought about that since this trial. The only standard which is put in evidence is that the usual pipeline is buried in three feet. This ended up not to exceed nine inches from the top. In the verbal testimony it could not be sustained. I believe, however, in view of the premises and in view of the location and in view of the dug-up pipe I think the jury could reason from that, that this pipeline was too shallow. I recognize that this may be a slight change from the designation in the doctor case where you have a clear standard for a company or a doctor. The pipeline being such, in the explanation, I believe they could do it.

"I'll leave it stand and see how you gentlemen later stand." (T 249)

In this the court recognized that the evidence adduced at the trial was not sufficient to sustain the jury's verdict but stated that since the jury had viewed the

premises, the jury could reason that the pipeline was too shallow and thus overruled the defendant's motion to dismiss. In doing this, the trial court committed prejudicial error as a jury is not permitted to view premises for the purpose of supplying evidence or to obtain new or additional evidence.

This court held, *inter alia*, in the case of *Sorenson v. D.&R.G. Railroad Company*, 49 Utah 548, 164 Pac. 1020, that the purpose of a jury in viewing the premises was to enable them to better understand and more fully appreciate the evidence produced before them in open court, and not for the purpose of taking independent testimony. See also *Redd v. Airway Motor Coach Lines*, 104 Utah 9, 137 P.2d 374; *Portland-Seattle Auto Frieght v. Jones*, 15 Wash.2d 603, 131 P.2d 736.

As noted in the above excerpt, the trial court was of the opinion that the jury could reason, after having seen the "dug-up pipe" in place, that it was too shallow. In adopting this theory, the court committed prejudicial error as there was no standard in evidence to guide the jury in making such a determination. We submit that the jury could not find that the defendant's gas lines were too shallow because it had no standard with which to compare the depth of these lines. The fact that the line was hit and broken is not evidence of negligence because negligence cannot be assumed from an injury.

An analogous situation is found in medical malpractice cases in which this court has consistently held that

evidence must be submitted showing that the act or acts complained of were not in accordance with accepted standards of professional skill. In the case of *Huggins v. Hicken*, 6 Utah 2d 233, 310 P.2d 523, this court stated:

“Plaintiff contends that so long as there remains some evidence, lay or otherwise, upon which a finding of negligence could rest, the case should go to the jury. This is undoubtedly correct if the facts testified to are such as to show that the medical standard of care shown by expert evidence was breached by defendant. Absence such evidence, in a case involving complex post operative treatment, inferences based on mere lay knowledge should not be submitted to a jury. As this court said in *Forrest v. Eason*, 1953, Utah, 261 P.2d 178, 180: ‘Giving the case to the jury under such circumstances (when certain fluids were injected into the veins by a naturopath) with no showing that use of the substances was not in accordance with accepted standards of professional skill, * * * with no showing that any of the substances were deleterious, allows the jury to indulge in that type of speculation unpermitted by this or other courts generally’ * * *”.

See also *Anderson v. Nixon*, 104 Utah 262, 139 P.2d 216.

The same rule of law would apply in the instant case, i.e., some evidence must show that the defendant permitted its gas lines to remain too close to the surface, thus violating an accepted standard. In the absence of such evidence, there is nothing upon which a jury can base its findings. It must have substantial

evidence upon which to base a verdict and may not inject inferences based on lay knowledge. The depth at which a natural gas line is buried is not so common that laymen can say if it was proper or not. Such information is peculiarly within the knowledge of men trained in this type of endeavor. In some instances a certain depth may be considered proper while in other instances it may not. The only evidence in the record on this point is the testimony of Mr. Makin in which he stated that the lines were installed at a depth of three feet and that after the top cover had been removed they were approximately 16 inches below the surface (T 25, 39). We submit that this will not support a finding that defendant's lines were permitted to remain too close to the surface.

POINT II

THE TRIAL COURT COMMITTED PREJUDICIAL ERROR IN GIVING INSTRUCTION NO. 6, WHICH WAS LEADING, SUGGESTIVE, CONTRARY TO THE EVIDENCE, AND WITHDREW FROM THE JURY'S CONSIDERATION THE QUESTION OF WHETHER DEFENDANT WAS NEGLIGENT, AND THE COURT ENHANCED THIS ERROR BY REQUIRING THE JURY TO DETERMINE DAMAGES IRRESPECTIVE OF THE FINDINGS UPON OTHER QUESTIONS SUBMITTED.

Instruction No. 6 (R 58, 59. 60), to which counsel for defendant objected strenuously (T 234, 277), reads as follows:

“No. 6

The court desires to ascertain the extent the plaintiff has been damaged as a result of gas seep-

age into his property as a result of a break or leak in the line across the street referred to in the evidence as having been repaired June 17, 1958. The measure of such loss equals the difference in the fair market value of the house and lot of the plaintiff immediately before and immediately after the injury and damage to his property were inflicted but must not be less than the actual value of plants destroyed plus those not totally destroyed or damaged calculated by determining the value of the plants before damage and their value after the damage.

“Answer the following question if you can do so in light of the evidence as you view it:

“1-A What is the total damage proven by a preponderance of the evidence to be proximately caused by the seepage of gas in question?

Answer: \$1,800.00

“Explanation:

The parties have agreed that the gas that seeped into the plaintiff's yard at the time in question came from a break or leak located generally where the feeder line that serves the Lund property connects to the main line. The court desires to ascertain certain facts concerning the cause of the break or leak. Therefore, you as jurors are asked to answer certain questions set forth below, if you are able to do so as you view the evidence:

“2-A Is it at least just as probable that one of the proximate causes of the break or leak was the passage of vehicles over the line in the vicinity of the break or leak as it is that such alleged event was not proximate cause of the break or leak?

Answer: Yes.

“2-B Do you find it proven by a preponderance of the evidence that the defendant’s main line and/or feeder line to the Lund property was negligently installed or permitted to remain too near the surface, thereby subjecting others to an unreasonable risk that it would be broken and plant life damaged?

Answer: Yes

“2-C If you have answered question 2-B ‘yes’, then answer this question if you can: If you answer question 2-B ‘no’, pass this question:

Was the negligence found in 2-B a proximate cause of the break or leak complained of?

Answer: Yes”

The above instruction correctly states that the parties agreed that gas seeped into plaintiff’s yard but incorrectly assumes that this seepage caused plaintiff any damage. It was never shown during the course of this trial that the seepage of natural gas into plaintiff’s yard was the cause of plaintiff’s property damage. Plaintiff assumed that it was, but failed to offer any proof on this point on which he had the affirmative burden. An instruction which is given without evidence in the record to justify it will constitute error because by it the jury is told, at least inferentially, that there is some competent evidence upon which it is based. *Greenwood v. Kier*, 125 Colo. 333, 243 P.2d 417. The test of the sufficiency

of evidence to support an instruction was stated by this court in the case of *Pollari v. Salt Lake City*, 111 Utah 25, 176 P.2d 111, in which the court said:

“Evidence sufficient to support a finding upon a particular issue is sufficient to support an instruction upon such issue. See *Randall’s Instruction to Juries*, Section 140.”

It is submitted that there is no evidence in the record to support a finding that plaintiff’s property damage was due to natural gas. In fact, the only evidence on this matter was produced by the defendant’s witness, Mr. DeBell, a garden consultant, who inspected the plaintiff’s property several months after the alleged occurrence, and who said that he could find no evidence of gas damage (T 203).

A perusal of the foregoing instruction reveals that by giving Paragraph 1 thereof, the jury was lead to believe that damages was the principal question for determination, particularly in view of the following comment by the court:

“I want you (the jury) to fix damages regardless of what your other answers are, just for my information.” (T 239)

This charge was tantamount to a direction of the verdict, as it withdrew from the jury’s consideration of defendant’s alleged negligence, thus depriving defendant of its constitutional right to have the jury determine liability. Paragraph 1 of this instruction assumes that defen-

dant was negligent. This prejudiced the determination of an ultimate fact—negligence—by the jury. The general rule relating to instructions which determine questions of fact is found in 88 C.J.S. 788, Trial 285, which states:

“An instruction which directly or impliedly determines an issuable question of fact is error and is properly refused if requested. Thus, where the question of negligence is one of fact, the rule applies.”

1 Reids Branson, Instructions to Juries, 3rd Ed. 14:

“* * * The court may not give instructions taking the decisions of questions of fact from the jury and neither may it speculate with the rights of parties by submitting matters to the jury where no question of fact is involved * * *”

It is respectfully submitted that this instruction is so patently defective that it cannot be cured by considering the instructions as a whole. The erroneous assumption that the plaintiff's damage was a result of the break in defendant's line cannot be aided by other instructions as it raises a conflict and is confusing to the jury. Any instruction which is pre-emptory in form and directs a verdict, as this does, must stand or fall on its own language and is not aided by other instructions. *Boyer v. Gen. Oil Products*, Mo. 78 S.W.2d 450; *Gigoux v. Henderson*, 107 Kan. 325, 190 Pac. 1092; 53 Am. Jur. 474, Trial 601.

Question 2-B of Instruction 6 is clearly leading, suggestive, and contrary to the evidence. The first part of the question asked if the defendant's main line or feeder line was negligently installed. To properly submit this question to the jury there must be evidence in the record tending to show that the lines were negligently installed and that the defendant had installed or constructed them. The record is silent as to who installed these lines. The only evidence in the record relating to the installation of these lines is the testimony of Mr. Makin and Mr. Clark, both of whom stated they did not know who installed these lines (T 12, 189). Both witnesses also said that the break in the line was not due to faulty construction or defective pipe (T 29, 185). The plaintiff did not offer any proof on this question. Thus, we have a situation in which an alleged act of specific negligence was submitted to the jury without evidence having been presented to support it. This type of instruction was discussed by this court in the case of *Olsen v. Warwood*, 123 Utah 111, 255 P.2d 725, wherein the court stated:

“It is well settled in this jurisdiction that an instruction must be based on evidence, and that it is prejudicial error to submit a charged act of negligence to a jury for its consideration in the absence of evidence tending to support a finding that the act occurred. *Smith v. Clark*, 37 Utah 116, 106 Pac. 653, 26 L.R.A., N.S., 953, and see *Griffin v. Prudential Ins. Co.*, 102 Utah 563, 133 P.2d 333, 144 A.L.R. 1402; *Kendall v. Fordham*, 79 Utah 256, 9 P.2d 183. Likewise it is well settled that the court may not permit the jury to speculate upon the evidence and that a

finding of fact cannot be based upon surmise, conjecture, guess, or speculation. Jackson v. Colston, 116 Utah 295, 209 P.2d 566; Dern Inv. Co. v. Carbon County Land Co., 94 Utah 76, 75 P.2d 660 * * *”.

The second part of the special interrogatory, Question 2-B, implies that the defendant's gas lines were permitted to remain too near the surface, thereby subjecting other to an unreasonable risk. The testimony shows that the lines were originally laid at a depth of three feet (T 33, 39). The plaintiff did not offer any evidence to show that this was not a proper depth nor that any depth was proper. Thus, there was no standard in evidence which would guide the jury in determining what a proper depth for natural gas lines. As noted previously, a finding of fact cannot be based upon surmise, conjecture, or speculation. The maintenance of a natural gas line is not so common that the layman can express an opinion as to what is reasonable care or a proper depth. The jury cannot assume that because the line was broken the depth where it was found was improper. Negligence cannot be assumed from an injury. Yet this is the situation with which the defendant was faced when the court gave the special interrogatory, Question 2-B. In returning an answer of “yes”, the jury either found that the line was negligently installed without any evidence whatsoever relating to the installation, except as to depth, or that it was maintained at an improper depth in the absence of any evidence whatsoever as to what was a proper depth. Even if there were adequate evidence to

support either (but not both) improper installation or maintenance, an instruction permitting the jury to speculate is fatal.

For the foregoing reasons, the defendant respectfully requests that the decision of the district court be reversed and judgment be entered herein for the defendant.

Respectfully submitted,

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