

1961

## Sherman V. Lund v. Mountain Fuel Supply Co. : Brief of Respondent and Cross-Appellant

Utah Supreme Court

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Oman & Saperstein; Attorneys for Plaintiff and Respondent and Cross-Appellant;

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IN THE SUPREME COURT  
of the  
STATE OF UTAH

FILED

SHERMAN V. LUND,

*Plaintiff, Respondent, and  
Cross-Appellant,*

vs.

MOUNTAIN FUEL SUPPLY COM-  
PANY,

*Defendant and Appellant.*

MAR 31 1961

Supreme Court Utah

Case No.  
9389

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Brief of Respondent and Cross-Appellant

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OMAN & SAPERSTEIN

*Attorneys for Plaintiff and  
Respondent and Cross-Appellant*

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# IN THE SUPREME COURT of the STATE OF UTAH

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## Brief of Respondent and Cross-Appellant

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### PRELIMINARY STATEMENT

Sherman V. Lund, the respondent herein, commenced this action against Mountain Fuel Supply Company, appellant, in the District Court of Davis County, Utah, seeking damages for losses sustained as a result of saturation by natural gas of the soil at his residential property situate in the City of Bountiful. From a jury verdict awarding damages to respondent in the amount of \$1,800.00, Mountain Fuel Supply Company brings this appeal; and from the trial court's denial of respondent's motion for an additure, respondent cross-appeals.

## STATEMENT OF FACTS

During the late spring and early summer of 1958, respondent's beautifully landscaped yard, which had theretofore been regarded as the "showplace" of the neighborhood (Tr. 87), inexplicably began to show signs of abnormal plant behavior. Respondent's lawn turned yellow, his trees began to wither and die and his flowers failed to grow (Tr. 50, 71, 72, 90). At the suggestion of the County Agricultural agent, appellant's employees were summoned by respondent to the area and discovered a gas leak directly across the road from respondent's property at the precise point where the feeder pipeline supplying gas to respondent's premises was attached to appellant's main gas line (Tr. 13, 14, 183). At the point of the break, the main gas line was found to be only 16 inches below the surface of the ground, and the surface of the ground was found to be impressed with tire mark indentations approximately 12 inches in depth (Tr. 25).

Upon initial examination of respondent's yard, appellant's agents found portions of the same fully saturated with gas (Tr. 51, 52, 53, 74, 195). Appellant's employees thereupon warned respondent and his wife about smoking and lighting lights (Tr. 52, 53, 54, 74), painted cautionary signs on and about the respondent's home and dug pits along each side of respondent's driveway to permit the gas in the ground to escape (Tr. 53, 54, 75, 95). Respondent's ground smelled of gas and emitted visible gas fumes (Tr. 59, 85). Appellant's employees admitted that gas was present in respondent's soil and that natural gas has a deleterious effect on plant life (Tr. 195, 205, 219, 221, 222). The damage to respondent's property

as a result of the gas continued to be evident in varying degrees from the time of its initial discovery to the time of trial (Tr. 51, 60, 61, 62, 65, 73, 79, 80, 96, 97).

Appellant's main pipeline was installed in the area with which we are here concerned in 1947 (Tr. 12), was owned by appellant and under its exclusive management and control (Tr. 33, 189, 190). Appellant purports to maintain a regular inspection service of its lines (Tr. 39). The appellant's normal procedure is to install its pipes at least three feet below the ground (Tr. 33); however, after repairing the break discovered in the instant case, appellant left the pipes at the same distance below the surface of the ground as they were at the time of the discovery of the leak (Tr. 56, 57, 79, 192), to wit: 16 inches (Tr. 25).

Respondent acquired his property approximately seven years prior to the time of trial; and at the time of the acquisition, the home situate upon this property was several years old (Tr. 42). During the time of respondent's residence in the neighborhood, continuous residential construction had taken place in the area (Tr. 56, 77).

The before and after value of respondent's premises were estimated by respondent and an expert appraiser called at respondent's behest. Respondent estimated that the fair market value of his premises immediately prior to the damage complained of was \$22,500.00 and he estimated the value of said premises to be \$16,000.00-\$17,000.00 after the damage had been fully inflicted (Tr. 63). Respondent's expert placed the fair market value of the property in question at \$21,500.00 immediately prior to the injury and \$15,500.00 immediately

after the gas pollution had reached its fullest extent (Tr. 106). Appellant, Mountain Fuel Supply Company offered no evidence whatsoever relative to damages.

## STATEMENT OF POINTS

### POINT I

THE TRIAL COURT COMMITTED NO ERROR IN SUBMITTING THE CASE TO THE JURY EVEN ASSUMING THE ABSENCE OF PROOF OF A STANDARD AS TO THE PROPER DEPTH AT WHICH APPELLANT'S PIPELINES SHOULD HAVE BEEN INSTALLED OR PERMITTED TO REMAIN.

### POINT II

THE TRIAL COURT COMMITTED NO ERROR IN ITS CHARGE TO THE JURY CONTAINED IN INSTRUCTION NO. 6.

### POINT III

THE TRIAL COURT ERRED IN DENYING RESPONDENT'S MOTION FOR ADDITURE.

## ARGUMENT AND AUTHORITIES

### POINT I

THE TRIAL COURT COMMITTED NO ERROR IN SUBMITTING THE CASE TO THE JURY EVEN ASSUM-



ING THE ABSENCE OF PROOF OF A STANDARD AS TO THE PROPER DEPTH AT WHICH APPELLANT'S PIPELINES SHOULD HAVE BEEN INSTALLED OR PERMITTED TO REMAIN.

Appellant contends that the evidence in the record of its negligence was insufficient to go to the jury because of the absence of proof of a standard prescribing the depth at which appellant's pipeline should properly have been buried; that, consequently, the view taken of the premises by the jury could not supply this standard; and because of the lack of such standard, appellant's motions to dismiss were improperly denied.

At the outset, it is submitted that the propriety of this argument is questionable in the light of the evidence of record. Appellant's own employee, Mr. Makin, supplied the jury with the standard appellant now contends was lacking. Called as a hostile witness, he testified that it was "normal procedure" for appellant to bury its line at a depth of 3 feet (Tr. 33). The uncontroverted evidence shows that the appellant's pipes at the point of break and leak were a mere 16 inches below the surface of the ground (Tr. 25). Viewing the evidence in the light most favorable to respondent, as this court is bound to do on appeal, it is submitted that the jury could readily have inferred that the appellant's pipes were originally installed and permitted to remain at that depth, to wit: 16 inches. This conclusion is strengthened by the complete absence of any testimony on the matter proffered by appellant, and is further strengthened by appellant's own testimonial admission that the pipes were allowed to remain at that same depth, viz., 16 inches, even after the discovery of the leak

and the repair thereof (Tr. 192). Thus, from the testimony of appellant's agents and employees, the jury could not only infer the existence of the standard contended for, to wit: three feet; but the jury could also infer a clear violation thereof, to wit: 16 inches.

Although appellant suggests that the main at the point of the break was originally imbedded in three feet of dirt and that some unknown person whom appellant never produced in court removed 20 inches of this cover while excavating a driveway (Tr. 39), it should be noted by this court that such evidence was simply the bare conclusions of appellant's employees, completely unsupported by any direct evidence. Because of the obvious self-interests of appellant's employees, testifying as they were in the presence of a superior official of the appellant company (Tr. 217, 218), the jury was not bound to accept their version of the facts, but on the contrary, was entitled to draw its own conclusions from the evidence. *Arnold Machinery Company v. Intrusion Prepakt Inc.*, 357 P.2d 496 (Utah 1960).

But let us assume, *arguendo* only, the correctness of appellant's position that proof of a standard as to depth is lacking in the evidence. To substantiate this position, appellant attempts to analogize the determination of a proper depth below the surface at which to lay conduit pipe to the professional skill and care required of a physician in administering to a patient. Stated another way, appellant argues that the amount of dirt required to adequately cover a metal pipe and thereby protect it from damage by external pressure from above is a matter so technical and dependent upon such com-

plex scientific skill and knowledge that a layman must be presumed to know nothing about such things. Cf. *Huggins v. Hicken*, 6 Utah 2d 233, 310 P.2d 523, 524. The bare statement of this proposition reveals its inherent fallacy; even a small child burying toys in a sand pile has some appreciation as to how deep he must burrow!

Harper & James, Vol. 2, The Law of Torts, 1956, Sec. 17.1, states the general rule as follows:

"As a general proposition it is not essential to a party's case that he prove or otherwise show what his opponent *should have done* under the circumstances. It is enough to show *what he did* and what the circumstances were. It is then for the jury to determine whether, in the light of their common experience in the affairs of men, they find he failed to act as a reasonable man would have acted. This implies that there was some concrete thing that he could have done or omitted to do, and that such act or such omitted precaution was reasonable and feasible, and would have been effective to prevent injury under the circumstances. But if it is within the competence of men of affairs generally to make this judgment in a given case, the jury may make it even though there is no proof . . . in the case which points directly to any specific precaution that could reasonably have been taken and even though the jury themselves are not satisfied as to the precise nature of what ought to have been done. In this sense the jury need not fix or agree upon a standard of conduct of precaution to be taken, but need only find that the conduct of the party falls short of *any* standard which they would agree upon as reasonable. The jury's finding of negligence is thus always that the actor *should not* have acted as he did; this implies a finding that he *should have acted other-*

wise, but not necessarily in any specific manner.'" (Emphasis is the author's.)

\* \* \*

"Courts could very easily expand the area in which expert testimony is required to establish the standard of conduct, *but the tendency has been instead to resolve doubtful questions in favor of allowing the jury to decide the issue of negligence without its aid.*" (Emphasis supplied.)

Thus, it has been held that the question of whether a ship deck without guard or rail was a reasonably safe place to work, without proof of what good seamanship demanded under the circumstances, was properly for the jury. *Zinnel v. U. S. Shipping Bd. E. F. Corp.*, 10 F.2d 47 (2d Cir. 1925, per L. Hand). The question of required clearance between a train and a mail crane, without testimony on the matter, was held properly for the jury in the case of *Missouri K. & T. Ry. Co. v. Williams*, 103 Tex. 228, 125 S.W. 881. The feasibility of carrying electric wires on cross arms that protrude from one side of a pole only was held properly for the jury unaided by expert testimony in the case of *Harris v. Central P. Co.*, 109 Neb. 500, 191 N.W. 711 (1922). The proper safeguards for the construction and operation of an escalator in a department store was likewise held to be a matter for the jury despite the absence of proof of a standard to guide it in the case of *Reynolds v. May Dept. Stores Co.*, 127 F.2d 396 (8th Cir. 1942). See also *Graves v. May Dept. Stores Co.*, 153 S.W. 2d 778 (Mo. App. 1941).

It is submitted, therefore, that the question of whether 16 inches or even three feet was a proper depth at which to bury an unencased metal pipe line, or a proper depth at which

to permit such a line to remain, in an area bustling with residential construction and where one could reasonably anticipate heavy vehicular surface traffic was in any view of the evidence a question properly within the unaided competence of the jury to decide and the court below committed no error in permitting them to do so.

## POINT II

### THE TRIAL COURT COMMITTED NO ERROR IN ITS CHARGE TO THE JURY CONTAINED IN INSTRUCTION NO. 6.

Appellant next assigns error to the court below in its charge to the jury contained in Instruction No. 6. Appellant attacks this instruction on three separate theories, to wit: (1) The instruction assumes that the seepage of gas in the plaintiff's yard was the cause of plaintiff's damage, although there was no proof of that ultimate fact in the record; (2) The instruction took from the jury the question of appellant's negligence; and (3) The instruction put to the jury the question of negligent installation when there was no proof that appellant installed the pipes and the instruction further allowed the jury to determine whether appellant was negligent in permitting the pipes to remain too near the surface, although there was no proof of a standard to guide the jury in deciding what was a proper depth.

With respect to appellant's first theory enumerated above, it is respectfully submitted that Instruction No. 6 does not take from the jury the question of causation. Interrogatories

1-A and 2-C (R. 58, 60) of said Instruction, which is quoted in toto in appellant's brief, clearly require the jury to find that respondent's damage was "proximately caused by the seepage of gas in question." Moreover, appellant is not entitled to have this instruction construed in vacuo. Instruction Nos. 7 and 8 (R. 61, 62) given to the jury by the trial court properly presented to the jury the issue of proximate cause and said Instruction No. 8 defined the same fully and fairly. This court has held time and again that instructions are to be viewed as a whole. *Hadley v. Wood*, 345 P.2d 197, 199 (Utah 1959). As to the contention that the record is devoid of proof of causation, the court is referred to the statement of facts contained in this brief, which reveals in essence that respondent's yard noted for its lush and beautiful appearance (Tr. 87) suddenly and inexplicably (Tr. 71) became "barren-like" (Tr. 90), the flowers and trees withered and died and the lawn became straw-like (Tr. 89, 90). Simultaneously with this change of condition in respondent's yard, a gas leak was discovered directly across the road from the yard and the yard was found to be saturated with gas (Tr. 14, 51, 52, 53, 74, 183, 195). Moreover, appellant stipulates at Page 10 of its brief that gas seeped into respondent's yard. It is submitted that from these facts alone the jury would be entitled to infer causation. However, appellant's own witness, Mr. Robinson, the Superintendent of Distribution for appellant (Tr. 218), supplied by his testimony any alleged deficiency in the evidence as to the poisonous character of natural gas. Note the following examination by Court and counsel of this witness (Tr. 222):

"THE COURT: Do you know the mechanics of death to the plant when they are affected by gas?"

A. Yes.

THE COURT: Will you tell the jury what the mechanics of death is.

A. The gas goes into the soil and dries out the soil and takes away the moisture and they dry up and wilt.

THE COURT: Your witness.

MR. OMAN: Does natural gas not enter moisture itself and be carried in suspension in water?

A. Water enters the gas and goes along with the gas, the gas will absorb the moisture out of the soil.

Q. So in the breathing process of the plant, part of that takes place in the roots, does it not?

A. It could do.

MR. OMAN: And the gas is entering the plant through that process through the synthesis of the plant and causes the plant to lose its ability to breathe.

A. That is true.

MR. OMAN: That is all.

MR. CRAWFORD: That is all.

THE COURT: I am curious then, why would a plant die left in the soil after the gas is removed?

A. Well, because the gas is not out of the soil. \* \* \*

With respect to appellant's second theory of attack enumerated above, suffice it to say that Instruction Nos. 7, 9, 10 and 19 (R. 61, 63, 64, 73), given by the trial court to the jury, fully and fairly, and without exception taken thereto, presented the issue of negligence to the jury as did Interrogatory 2-B (R. 60) embodied within the very instruction complained of. Moreover, Instruction 15 (R. 69) clearly admonished the



jury that allegations of and instructions upon the question of damages are to be considered *only* after a finding of liability. *Hadley v. Wood, supra.*

As to appellant's third contention enumerated above that there was no proof of installation of the pipes by appellant, it must be noted in considering this contention that the record clearly reflects that the line was installed in 1947 (Tr. 12), that although appellant sometimes may not install its own pipe, but may let a contract for its installation, installation in such cases is effected under the complete direction and supervision of the appellant, and the details of such installation are completely prescribed by appellant, even as to "where" the line shall be put (Tr. 189, 190); moreover, the lines, including the feeder lines, are owned, maintained, inspected and controlled absolutely and exclusively by the appellant (Tr. 33, 190). It is submitted that the jury was entitled to infer from this evidence that any determination as to the depth or manner of installation was the determination of appellant and none other. It should further be noted in this connection that the fact of installation is a matter peculiarly within the sole knowledge of the appellant, yet it came forward with no evidence whatsoever to rebut the above inference.

Appellant's argument that the court erred in allowing the jury absent testimony of a standard to determine appellant's negligence in permitting the pipe to remain too near the surface has been treated earlier in this brief.

### POINT III

THE TRIAL COURT ERRED IN DENYING RESPONDENT'S MOTION FOR ADDITURE.



The measure of damages applied by the trial court in its charge to the jury is contained in the first paragraph of Instruction No. 6 (R. 58). The measure applied was the diminution in the value of the property in question resulting from the gas pollution complained of.

The only testimony presented to the jury was that of respondent himself, who estimated the value of his property diminished at least \$5,500.00 and that of respondent's duly qualified expert, Marcellus K. Palmer, who estimated that respondent's property diminished in value \$6,000.00 as a result of appellant's gas pollution of respondent's premises (Tr. 63, 106). Appellant offered no evidence whatsoever to contradict this testimony.

The general rule was recently and succinctly stated by this court in the case of *Page v. Federal Security Insurance Co.*, 332 P. 2d 666 (Utah, 1958) as follows:

"The traditional and well established rule is: the fact trier, in this instance the jury, has the prerogative of judging credibility of witnesses and the weight to be given the evidence. *This admittedly would not go so far as to permit it to arbitrarily disregard credible uncontradicted evidence.* But wherever there is a basis from which bias, prejudice or self interest may be seen, or there is anything incredible in the testimony, the jury is not obliged to accept it." (Emphasis supplied).

Certainly no basis is shown in the evidence here that Mr. Palmer was in any way biased or prejudiced for respondent or against appellant, nor can it be said that a diminution in the fair market value of respondent's land in the amount of \$6,000.00 is incredible when viewed against the abundant

evidence of plant damage and soil pollution, coupled with the constant danger of explosion requiring extreme care upon the part of the occupants of the premises involved (Tr. 52, 54, 74, not to mention the consternation caused by this situation (Tr. 80, 100), which, it is submitted, would be a substantial factor in and of itself in diminishing property values.

It is submitted, therefore, that the jury by fixing damages in the amount of only \$1,800.00 arbitrarily disregarded the only credible, uncontradicted evidence in the record and the trial court, therefore, erred in failing to grant respondent's motion for additum (R. 81, 82; Tr. 247). This court may cure such error on appeal. *Bodon v. Subrmann*, 327 P.2d 826 (Utah 1958).

## CONCLUSION

It is therefore respectfully submitted that the jury below was entitled to determine the fact of appellant's negligence unaided by proof of any standard assuming, arguendo, that such proof was lacking; that the charge of the court contained in its Instruction No. 6 was in all respects proper; and that, therefore, the verdict returned by the jury and the judgment entered thereon should be affirmed and increased by additum by this court in the additional amount of \$3,700.00.

Respectfully submitted,

OMAN & SAPERSTEIN

*Attorneys for Plaintiff and  
Respondent and Cross-Appellant*