

1962

# Wallace L. Rosander v. Rex A. Larsen : Brief of Defendant-Respondent

Utah Supreme Court

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L. E. Midgley; Attorney for Defendant-Respondent;

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IN THE SUPREME COURT  
OF THE  
STATE OF UTAH

FILED

AUG 14 1962

WALLACE L. ROSANDER,  
*Plaintiff-Appellant,*

— vs. —

REX A. LARSEN,  
*Defendant-Respondent.*

Clerk, Supreme Court, Utah

Case  
No. 9672

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BRIEF OF DEFENDANT-RESPONDENT

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L. E. MIDGLEY  
*Attorney for Defendant-  
Respondent*

415 Boston Building,  
Salt Lake City, Utah

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STATE OF UTAH

WALLACE L. ROSANDER,  
*Plaintiff-Appellant,*

— vs. —

REX A. LARSEN,  
*Defendant-Respondent.*

Case  
No. 9672

BRIEF OF DEFENDANT-RESPONDENT  
APPEAL FROM THE DISTRICT COURT IN  
AND FOR SALT LAKE COUNTY.

STATEMENT OF THE CASE

Plaintiff owned property on which he was building a home. Defendant was the contractor, but plaintiff had reserved the right:

- (a) To perform labor in his off hours from his regular employment, for which defendant had agreed to credit plaintiff towards the reduction of the total construction cost.
- (b) To secure sub-contracts or materials cheaper than the bid of defendant, in which event the savings were credited to plaintiff.

While working on the building construction, plaintiff was injured and filed suit against defendant to recover damages.

### DISPOSITION IN LOWER COURT

At Pre-trial (R-33) the Honorable Ray Van Cott, Jr., agreed with defendant that "plaintiff maintained control over the construction by reserving the right to order materials and to sublet work on the building; that he would do his own work in which he would get a discount in the construction cost and, therefore, plaintiff was in control of the property and cannot be an employee of himself; also for the further reason that from the admitted facts there is no duty owed to this man by this defendant and there is no showing of any negligence on the part of the defendant."

The plaintiff's amended complaint was therefore dismissed.

### STATEMENT OF FACTS

The plaintiff was the owner of realty upon which he was constructing a home.

The defendant had agreed in writing to construct the said home as general contractor.

However, the plaintiff and defendant had further agreed that plaintiff, when not working in his regular employment (Depo, 6), personally could perform labor upon said construction, and receive a credit against the total contract price for the total time plaintiff personally performed labor.

In addition, the oral understanding provided that the plaintiff could secure subcontracts, and materials at a price lower than the bid of defendant, in which event the savings effected would be also credited on the total contract price. (R. 13)

On September 4th, 1959, the plaintiff in the absence of the defendant (Depo. 15), came on the site and performed carpenter labor for approximately one half hour (R. 8). It was approximately 2 o'clock P.M. and daylight (R. 7). The home was in the stage of construction where the frame work was up and the sub flooring was installed (R. 13). The roof was not on. (Depo. 10).

At the above time and immediately before the accident plaintiff climbed up one of the walls for the purpose of performing labor on the rafters which were being installed.

Upon reaching the ceiling area, he took hold of a rafter in an effort to pull himself up. The rafter was

not fastened and gave way and as a result plaintiff fell. While falling, he passed through a stairway opening and fell through it into the basement. (Pre-Trial Order R. 12-15).

## ARGUMENT

### POINT I.

#### THE LOWER COURT PROPERLY REQUIRED PLAINTIFF TO MAKE AN ELECTION.

2 Moore's Federal Practice, 2nd Edition, par. 8.33, page 170, after having noted that inconsistent pleadings are allowed, states:

"It should be noted that hypothetical and alternative pleadings are subject to the requirements of Rule 11 as to honesty in pleading; this is underscored in the last sentence of Rule 8 (e) (2). *The pleader is not at liberty to set forth variant statements of his claim or defense unless he is honestly in doubt as to what the evidence will show.*" (emphasis added).

The plaintiff from the outset of this suit showed a noticeable allergy to divulging that he was the owner of the property on which he was injured. We, therefore, test the "honesty in pleading" which is required.

## ORIGINAL COMPLAINT.

### Par. 2, (R-1)

“On or about the 4th day of September 1959 the defendant was in possession of certain premises under construction . . . incident to a contract between the defendant and the owner of the said lot. . . .”

### Par. 3. (R-1)

“The defendant invited plaintiff to come upon said lot . . . said invitation being issued by defendant incident to business relationships between plaintiff and defendant. . . .”

The plaintiff's Amended Complaint, filed after the first Pre-Trial conference, contains exactly the same allegations in the First and Second Causes of Action (R-26, 27). The Third Cause of Action (R-28) which presumably injects a new theory, the plaintiff's hiding of ownership continues:

“ . . . said possession being incident to a contract between the defendant and the owner of said lot. . . .”

Not once in the pleadings does it appear that the plaintiff was indeed the owner of the property.

This lack of candor permeates the entire file.

Defendant served plaintiff with Request for Admissions, (R-4)



"1. That each of the following statements are true:

(a) Plaintiff was the owner of the dwelling being constructed. . . ."

ANSWER (R-7)

"Plaintiff declines to admit the allegations contained in I (a) on the ground that plaintiff is advised that the owners of the land upon which the dwelling was being constructed are plaintiff and his wife and the defendant was in possession of the dwelling as such, as general contractor. Plaintiff is advised that the question as to the ownership of the said dwelling during . . . construction is a question of law and plaintiff is therefore unable to answer the same."

The answers were signed by plaintiff's attorney.

Even when the cat was out of the bag, and the obvious had to be faced, plaintiff filed an affidavit, (R-16) and again, attempting to circumvent the fact of ownership, stated:

"That he . . . was present . . . on said premises not as the owner . . . but pursuant to a contract with defendant . . . His presence on said premises had no connection with the fact that he was the fee title owner . . . and his only object in going to said premises was to do work on the home pursuant to said contract."

May we be excused for being confused? The "contract" was the arrangement whereby plaintiff retained the right to perform labor in order to reduce the con-

struction costs to the “owner” (plaintiff) as fully recited in the Pre-Trial Order (R-13), and in plaintiff’s Answers to Request for Admissions, (R-7-8). How can he, then, sign an honest affidavit, under oath, that he was working pursuant to said “contract” yet it had no connection with the fact that he was the owner?

Moore’s Federal Practice, again states, at page 1709 :

“All pleadings, of course, must be clear and understandable.”

“The Courts in a number of cases have condemned pleadings in which alternative or inconsistent allegations or theories were so intermingled that the Court was unable to determine what the pleader was getting at.”

The Lower Court certainly can demand honest pleadings. An allegation that plaintiff was the owner, but not the owner, certainly cannot be countenanced, anymore than an allegation that plaintiff was the driver of a car, yet was not driving. Defendant is certainly willing to play the game, but plaintiff ought to be required to at least stay on the field.

The Lower Court therefore, was justified in compelling plaintiff to elect whether he was alleging that he was the owner, or whether he was an employee.

## POINT II.

REGARDLESS OF THE QUESTION OF ELECTION, DEFENDANT WAS ENTITLED TO A DISMISSAL OF ALL THREE CAUSES OF ACTION ADVANCED BY PLAINTIFF.

Plaintiff's Amended Complaint advances, it is alleged, three theories. These are difficult to understand, but in substance are:

### FIRST CAUSE OF ACTION:

Plaintiff was an invitee on to his own premises.

### SECOND CAUSE OF ACTION:

Plaintiff was on his own premises with the permission of the defendant.

### THIRD CAUSE OF ACTION:

Plaintiff was an employee in the construction of his own home.

This however, is a negligence action and we look first to defendant's contention that plaintiff's Amended Complaint and all three causes thereof, fail to state a claim upon which relief can be granted.

The facts agreed upon by plaintiff's attorney are recited in the Pre-Trial Order, dated April 26, 1961 (R-13)

“... on the day in question and for some time prior to the accident ... the plaintiff had been upon the premises and had been doing some work there. . . .”

“At the time of the incident in question the plaintiff was attempting to climb up one of the walls to assist in fastening the rafters and the rafter that he was attempting to pull himself up on was not fastened and as a result he fell, falling through the stairwell. . . .”

In plaintiff's first two causes of action defendant is charged with the following acts of negligence:

*“The defendant was negligent in failing to cover a stairwell on the second story of the aforesaid building. . . .” (R. 27)*

The accident did not occur at the stairwell. It occurred on a rafter in the ceiling. The plaintiff was in flight when he reached the stairwell and while a covering may have broken his fall, it may also have broken his back.

*“In failing to provide a safe passageway for the plaintiff.”*

The accident did not occur in the passageway. The plaintiff had just climbed a wall before the accident.

*“failing to notify plaintiff of dangerous and unsafe conditions upon the premises which were known to the defendant and his agents and employees, or in the exercise of reasonable care could have been ascertained by them, and failing to notify the plaintiff of unsafe and dangerous conditions upon the premises.”*

The defendant owed plaintiff no duty to warn him of obvious and clearly discernible hazards.

*“There is no liability for injuries from dangers that are obvious, reasonably apparent, or as well*

known to the person injured as they are to the owner or occupant." 38 AM Jur. Negligence, §97 pg. 757.

"The liability of an owner or occupant . . . must be predicated upon a superior knowledge . . . It is when the perilous instrumentality is known to the owner or occupant and not known to the person injured, that a recovery is permitted."

Sherman and Redfield on Negligence, Vol. 2, Rev. Ed. Sec. 279, page 690 quotes the following language from a New York decision:

" . . . an employee cannot recover for injuries received while doing an act to eliminate the cause of the injury . . . The reason for this is that it would be manifestly absurd to hold a master to the duty of providing a safe place, when the very work in which the servant is engaged makes it unsafe. If a man is engaged in tearing down a house, he is constantly exposed to dangers of his own creation."

*Gibilterra vs. Rosemawr Homes* (1955) 19 N.J. 166, 115 Atl. 2nd 553.

"The general principle is that the landowner is under no duty to protect an employee of an independent contractor from the very hazard created by the doing of the work."

Sec. 203, 2 Sherman and Redfield on Negligence, Rv. Ed. pg 473,474:

"The doctrine of safe place ordinarily applies only to permanent conditions. It has no application where the place itself is safe, but is rendered un-

safe by the negligence of other employees. . . . It has no application to a case where the prosecution of the work itself makes the place and creates the danger. *It has no application where the very work which the servant is employed to do is to make a dangerous place safe.*"

*Landing vs. Town of Fairlee*, 112 Vt. 127, 22 Atl. (2d) 179:

"'The safe place doctrine' does not apply where the work in which the servant is engaged is of such a nature that its progress constantly produces changes in the conditions and surroundings, for in such a situation the hazards arising therefrom to which the servant is exposed are regarded as the ordinary dangers of his employment and consequently are assumed by him.'"

Furthermore, there can be no duty upon defendant, as general contractor, to warn plaintiff-owner, of conditions which both are chargeable equally by law with knowing.

At page 688 *Sherman and Redfield*, *supra* the text states:

"The duty of the owner to the employee of an Independent Contractor is the duty owed by an employer to one of his own employees. In effect this means that in case of the existence of physical defects in the owner's premises the owner is obliged to warn an employee of hidden defects of which the owner is aware or of which he should be aware in the exercise of reasonable care."

An employee of a contractor, is a “business invitee” of the owner, especially where the owner retains control over the construction.

*Dayton v. Free*, 46 Utah 277, 148 P. 408;

*Williams v. United Men's Shop*, 317 Mass. 319, 58 N.E. 2d, 2;

*LeVonas v. Acme Paper Co.*, 184 Md. 16, 40 Atl. 2d, 43.

*Shell Oil Co. v. Blanks*, (Tenn.) 330 S.W. 2d 569. 20 ALR 2d 853.

The fact that plaintiff retained complete control over the construction of his own home is evident by his own testimony (Deposition, pg 19, Line 29 on)

Q. “If I understand then, any time Mr. Larsen was to, for example, put in the ceiling, he would have to get three bids from some sub-contractors?

A. “He didn’t have to do it, I did, if I wanted, to see if I could do it cheaper. He already had his bid, but I would go out and see if I could find someone to do it cheaper. He already had his bid, but I would go out and see if I could find someone to do it cheaper than what he could do it.”

PAGE 20, Line 13:

Q. Did you undertake to subcontract any particular portion of the construction, such as plumbing, wiring, or anything else?

A. "No. I did get permits for the plumbing and the electrical.

Q. "In your own name?

A. "Yes."

Whether plaintiff wants to or not, he must face the fact that he was the owner and under the above "contract" in complete control of the construction. If, as he claims, he was also an employee of the contractor, then we reach the absurd conclusion that he (owner) owed himself (employee) a duty to warn himself of dangers which were obvious in the first place.

The Honorable District Court was justified in dismissing the plaintiff's complaint.

Respectfully submitted,

L. E. MIDGLEY  
*Attorney for Defendant-  
Respondent*

415 Boston Building,  
Salt Lake City, Utah