1983

Evelyn Michaels Wessel v. Erickson Landscaping Company : Appellant's Brief

IN THE SUPREME COURT OF THE STATE OF UTAH

EVELYN MICHAELS WESSEL,	:	
Plaintiff and Appellant,	:	
v.	:	No. 19219
ERICKSON LANDSCAPING COMPANY,	:	
Defendant and Respondent.	:	

APPELLANT'S BRIEF

On Appeal From the Third Judicial
District Court of Salt Lake County,
The Honorable Bryant H. Croft, Judge

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CASES CITED

BRIEF OF APPELLANT

IN THE SUPREME COURT OF THE STATE OF UTAH

No. 19219

EVELYN MICHAELS WESSEL, Plaintiff-Appellant

v.

ERICKSON LANDSCAPING COMPANY, Defendant-Respondent

STATEMENT OF THE CASE

Plaintiff appeals from the dismissal of her complaint following trial of the action wherein she alleged the negligent design and construction of certain railroad tie retaining walls on her property, to her damage.

Following the presentation of plaintiff's case in chief, and on motion of the defendant, the District Court dismissed plaintiff's complaint. Plaintiff seeks a reversal of the order of dismissal and a new trial.

STATEMENT OF FACTS

In 1978, plaintiff entered into a contract in writing with defendant to design and construct certain landscaping at plaintiff's newly constructed home in Salt Lake County.[1] The front of the home faces westerly, and the front yard of the home had not been landscaped at the time the parties entered into the landscaping contract. The front yard was a steep slope,[2] greater than 2-to-1.[3] Defendant designed[4] and constructed a number of retaining walls to terrace the plaintiff's front yard, changing the front yard from a generally smooth slope to the west to a stepped or terraced slope down toward the west. The retaining walls were made of railroad ties fastened together with 50 and 60 penny nails.[5] The walls were constructed on fill material,[6] and, except for two or three very short pieces, the wall was not anchored but depended on its own weight for stability.[7]

In June, 1981, while plaintiff was out of town, the front yard (the plants, railroad ties, dirt and mud) slid out into the street west of the house.[8]

ARGUMENT

POINT I. Erickson Landscaping Company had a duty to perform its landscaping services skillfully, carefully, diligently, and in a workmanlike manner.

The traditional formula of the elements necessary for a cause of action in negligence includes, first, a duty or responsibility recognized by the law requiring the actor to conform his conduct to a certain standard for the protection of others against unreasonable and foreseeable risks. This Court in Meese v. Brigham Young University, 639 P.2d 720, 723 (1981), declared that:

> Negligence is the failure to do what a reasonable and prudent person would have done under the circumstanes, or doing what such person under such circumstances would not have done.

In Mrs. Wessel's case, she entered into a construction contract with the defendant, a landscaping company, for the design and construction of landscaping terracing of her new yard. The written contract[9] provides in paragraph 3 thereof that Erickson "will not be responsible for damage or loss except the same be the direct result of negligent work or defective parts performed or installed." Thus, by its agreement with plaintiff, defendant promised to perform its landscaping

services in the manner in which a reasonable and prudent person would have done.

As declared in Keel v. Titan Const. Corp., 639 P.2d 1228, 1231 (Okla. 1981), where the owners of a residence brought an action against their contractor and architect for the improper design of a solar heat system,

> As a general rule, there is implied in every contract for work or services a duty to perform it skillfully, carefully, diligently, and in a workmanlike manner.

And the rule was restated later by the Oklahoma Court in the same case, at page 1232, as follows:

> Accompanying every contract is a common-law duty to perform it with care, skill, reasonable experience and faithfulness the thing agreed to be done, and a negligent failure to observe any of these conditions is a tort, as well as a breach of contract.

In the performance of its contract for landscaping, Erickson Landscaping Company had the legal duty to perform its work skillfully, carefully, and in good workmanlike manner. It was undisputed at trial that the parties had entered into the subject contract, that Exhibit No. 3-P is a copy of that contract, and that Erickson Landscaping Company undertook to, and did perform, the design and construction of the landscaping project.

Plaintiff would contend that the District Court below erred in finding and concluding that plaintiff failed to prove the existence of a duty owed by defendant to plaintiff.

POINT II. Erickson Landscaping Company failed to conform to the standard of conduct and the degree of skill, efficiency, and knowledge possessed by those of ordinary skill, competency, and standing in the landscaping trade.

The second element necessary to a cause of action for negligence is, of course, a breach of a legal duty. It is well-settled that the standard of conduct against which to test the actor's conduct is that conduct of the ordinary and prudent person in the particular trade or industry involved. The general rule was stated in Keel v. Titan Const. Corp., supra, at page 1231, as follows:

> With respect to the skill required of a person who is to render services, it is a well-settled rule that the standard of comparison or test of efficiency is that degree of skill, efficiency, and knowledge which is possessed by those of ordinary skill, competency, and standing in the particular trade or business for which he is employed, or . . . 'such care and skill as a reasonably competent and skillful person should have exercised in the performance of his contractual obligation'" [citation omitted].

Testimony adduced at trial showed that the longer sections of the retaining wall would have to have been designed to withstand an anticipated pressure of 240 pounds,[10] and that the ability of the wall designed and built by the defendant was only 49 pounds and capable of taking only 15% of the overturning force applied to it, without proper anchoring devices in place.[11] No proper anchoring devices were found to have been installed in the wall.[12] Mr. Robert Wright testified that he was a landscape contractor[13] and that he used 12-inch spikes in constructing railroad tie walls.[14] Defendant used only 50 and 60 penny nails in constructing the retaining walls.[15] Mr. Aposhian testified that the wall as built was defective.[16] Mr. Aposhian further testified that the fill material on which the walls had been placed was uncompacted,[17] and Mr. Wright testified that when he built his replacement wall, he compacted the soil.[18]

Plaintiff would contend that the District Court below erred in finding and concluding that plaintiff produced no evidence of defendant's breach of its duty to perform its construction and design services skillfully, in light of the substantial and competent testimony and the inferences to be drawn therefrom.

POINT III. The evidence was sufficient to show, prima facie, that Erickson Landscaping Company's breach of its duty was the proximate cause of plaintiff's damages.

The third element necessary for a cause of action in negligence is that of a reasonably close causal connection between the conduct and the resulting injury.

Mr. Aposhian testified at trial that there were three contributing causes of the damage to plaintiff's property. First, the soil had not been compacted tending to permit the wall to move out of position as the ground behind the wall settled.[19] Second, without proper anchors, such as the so-called "deadmen," the wall did not have sufficient ability to withstand the pressures exerted against the wall.[20] Third, had the soil behind the wall become saturated (as by water), the pressures exerted against the wall would have been greater.[21]

Plaintiff would contend that the District Court below erred in finding and concluding that plaintiff failed to produce any evidence that her damages were proximately caused by defendant's conduct.

CONCLUSION

Plaintiff sincerely contends that the Court below erred and abused its discretion in granting defendant's motion to dismiss on the grounds of failure to prove duty, breach of duty, and proximate cause. Plaintiff has met her burden of proving by a preponderance of the evidence her allegations of negligence and proximate cause. There is both competent and substantial evidence to support every element, herein relevant, necessary to showing a prima facie right to a recovery for negligence.

Respectfully submitted,

KEITH F. OEHLER
Attorney for Plaintiff-Appellant

MAILING CERTIFICATE

I do hereby certify that I mailed two copies of the foregoing Brief of Appellant, postage fully prepaid thereon, to Scott W. Christensen, Esq., Attorney for Defendant-Respondent, 650 Clark-Leaming Office Center, 175 South West Temple, Salt Lake City, Utah 84101, this 11 day of July, 1983.

FOOTNOTES

1. Exhibit No. 3-P
2. Page 80
3. Page 95
4. Page 136; Exhibit No. 2-P
5. Page 81
6. Page 82
7. Page 100
8. Page 147
9. Exhibit No. 3-P
10. Page 99
11. Page 102
12. Page 108
13. Page 118
14. Page 123
15. Page 81
16. Page 103
17. Page 105
18. Page 128
19. Page 107; See also Exhibit No. 25-D
20. Id.
21. Page 108; See also Exhibit No. 25-D