1983

Evelyn Michaels Wessel v. Erickson Landscaping Company : Brief of Defendant-Respondent

IN THE SUPREME COURT OF THE STATE OF UTAH

EVELYN MICHAELS GESSEL,)

Plaintiff-Appellant,)

vs.) No. 19219

ERICKSON LANDSCAPING COMPANY,)

Defendant-Respondent.)

BRIEF OF DEFENDANT-RESPONDENT

On Appeal From the Third Judicial District

Court of Salt Lake County,

The Honorable Bryant H. Croft, Judge

SCOTT W. CHRISTENSEN
HANSON, RUSSON & DUNN
Attorneys for:
Defendant-Respondent
650 Clark Leaming Office Center
175 South West Temple
Salt Lake City, Utah 84101

KEITH P. OEHLER
Attorney for
Plaintiff-Appellant
[illegible], Tax Plaza
[illegible] East 3300 South
Salt Lake City, Utah 84109-2699

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HANSON, RUSSON & DUNN
Attorneys for:
Defendant-Respondent
650 Clark Leaming Office Center
175 South West Temple
Salt Lake City, Utah 84101

KEITH E. GEHLER
Attorney for:
Plaintiff-Appellant
Suite 10, Ivy Place
3900 East 3300 South
Salt Lake City, Utah 84109-2699

CASES CITED

AUTHORITIES CITED

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BRIEF OF DEFENDANT-RESPONDENT

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NATURE OF THE CASE

The plaintiff filed a complaint against the defendant alleging that it had performed certain landscaping on plaintiff's property in a negligent manner resulting in damage to that property.

DISPOSITION IN LOWER COURT

Following the presentation of plaintiff's case in chief, and on motion of the defendant, the District Court dismissed plaintiff's complaint.

RELIEF SOUGHT ON APPEAL

The plaintiff seeks to revers a directed verd... entered at the close of her case and requests a new trial.

STATEMENT OF FACTS

1. Defendant contracted with plaintiff to lands... certain portions of plaintiff's property. (R-80)

2. Some initial work had been performed utilizi... railroad ties. (R-173-176)

3. Plaintiff provided the railroad ties utilized... defendant in the construction of the landscaping terrace... 176)

4. The work was started in March and completed ... April 1978.

5. On June 13, 1981, more than 2 years after Ev... Landscaping completed their work, the total front yard ga... and slid into the street. (R-191)

6. At the trial, plaintiff called a landscape... contractor who performed some repair work following the fa... He testified that he had no experience constructing ties ... using the method employed by Erickson Landscaping. (R-1...

7. Plaintiff also called a structural engineer ... testify about the characteristics of the terrace built by

defendant Erickson Landscaping.

6. At the close of plaintiff's case the Court granted defendant's motion for directed verdict, finding that plaintiff had 1) failed to introduce evidence of a duty of care of a landscape architect; 2) failed to introduce evidence of a breach of duty by defendant Erickson Landscaping; and 3) failed to introduce evidence of a proximal connection between defendant's activities and the damages suffered by the plaintiff. (R-57-60)

ARGUMENT

POINT I

PLAINTIFF FAILED TO INTRODUCE COMPETENT TESTIMONY ESTABLISHING THE DEFENDANT'S DUTY OF CARE.

At the trial of this matter the plaintiff called the principal of Erickson Landscaping, Willard Erickson, Robert Wright, a landscape contractor and George Aposhian, a structural engineer.

Upon this basis, the plaintiff claims to have established a duty of care on the part of Erickson Landscaping. In support of this claim she cites Reese v. Brigham Young University, 639 P.2d 720 (1981), and the Oklahoma case of Keel v. Titan Construction Corp. 639 P.2d 1228 (1981).

These cases simply state the hornbook definition of negligence in a contractual setting. The defendant has never

contended that it owed no duty to the plaintiff, rather, tended that it had done nothing that could be considered gent.

In bringing this action, the plaintiff has the b of proof on all of the elements necessary to establish the elements of negligence against a landscape contractor.

This Court in Meese v. BYU (supra) addressed thi issue. This was a case where a renter of ski equipment sue entity providing that rental equipment. The Court held:

> This responsibility imposes upon such rental agency the duty to use ordinary care commensurate with the standards of the industry . . . 639 P.2d at 723 (emphasis added)

This is consistent with the generally accepted ities in this area. In Prosser on Torts (4th Ed. 1971), §30, pg. 143, it states in defining negligence:

> The traditional formula for the elements necessary to such a cause of action may be stated briefly as follows:
>
> 1. A duty, or obligation, recognized by the law, requiring the actor to conform to a certain standard of conduct . . . (emphasis added)

The Second Restatement of Torts §299A states:

> 299A. Undertaking in Profession or Trade
>
> Unless he represents that he has greater or less skill or knowledge, one who undertakes to render services in the practice of a profession or trade is required to exercise the skill and knowledge normally possessed by members of that profession

> or trade in good standing in similar communities.

The California Court in Bud v. Nixen 491 P.2d 433 (1971) addressed the issue of what elements a plaintiff must prove in an action for professional negligence. That was a case of legal malpractice. The Court stated:

> The elements of a cause of action in tort for professional negligence are: (1) the duty of the professional to use such skill, prudence, and diligence as other members of his profession commonly possess and exercise; (2) a breach of that duty; (3) a proximate causal connection between the negligent conduct and the resulting injury; and (4) actual loss or damage resulting from the professional's negligence.

Finally, in Farrow v. Health Services Corp. 604 P.2d 474 (1979) this Court was faced with a medical malpractice claim. Two of the defendant's moved for and were granted summary judgment at trial. In reviewing the ruling the Court held:

> The basis of HSC's and Schricker's motions for summary judgment was that plaintiff could not make a prima facie case at trial. To make his prima facie case, plaintiff must introduce expert testimony establishing the appropriate standard of care, (cites omitted) and the causation of plaintiff's injuries (cites omitted) unless the matter is one of common knowledge. 604 P.2d at 477

The law in this area is clear. In order for the plaintiff to avoid a directed verdict she must have established a specific duty of care owed by a landscape contractor. Without

such specific information, the Court had no basis by which it could gauge the conduct of the defendant.

The general duty of care relied on the plaintiff is totally inadequate. The fact that a duty existed did not instruct the Court as to the specific activities the defendant should or should not have performed.

A review of the record is illustrative of the failure by the plaintiff. During Willard Erickson's testimony, he stated that he had been hired by the plaintiff to landscape her yard. This was subsequently confirmed by the testimony of Mrs. Vessel. She was asked on direct examination about the landscaping work done by the defendant and responded:

> A. Well, we contacted different landscapers and we consulted with Mr. Erickson and finally negotiated a contract on doing the entire yard. That included the terracing and the step construction . . . (R-131)

On cross-examination she was asked:

> Q. Mrs. Vessel, as I understand your previous testimony, if I paraphrase it incorrectly please feel free to correct me, but as I understand your previous testimony was to the effect that you on some recommendation of your neighbors, started negotiations with Mr. Erickson of Erickson Landscaping to do the landscaping work in your front yard; is that correct? The entire yard.
>
> A. The entire yard with the exception of one retaining wall that the contractor had put in on the northeast side of the house. (R-170, 171)

Mr. George Apostian, a structural engineer, was [illegible]

to testify about his involvement in this matter. He examined the remains of the wall built by the defendant and further testified about the wall that was subsequently built utilizing his calculations. Mr. Aposhian's inspections were done to analyze the "retaining system". Upon cross-examination he was asked:

> Q. Mr. Aposhian, do you have any experience as a landscape contractor?
>
> A. As a contractor, you mean, a licensed landscaper?
>
> Q. Have you ever worked in the field of landscape construction?
>
> A. I have done a lot of landscaping in my own yard but that is all. (R-109, lines 11-17)

Following the incident, Mrs. Wessel testified as follows:

> Q. Did you see an engineer?
>
> A. Then I, after that, consulted -- decided I had to consult an engineer, and I did. I consulted Mr. George Aposhian who was recommended to me. (R-158, lines 11-14)

As with Mr. Wright, Mr. Aposhian had no basis upon which he could assist the Court in knowing what a landscape contractor should have done. Erickson Landscaping was hired solely to do landscaping. Mr. Aposhian, on the other hand, was hired as a structural engineer to design a sophisticated retaining wall system.

None of the testimony produced by the plaintiff established in concrete terms, the duty of a landscape contractor. In granting defendant's motion for a directed verdict, the Court

recognized this error. The trial court Judge stated:

> THE COURT: You see, Aposhian had no landscaping experience and to bring in a civil engineer who does constructural engineering work and this involves construction of retaining walls, doesn't qualify him to show what the standard of care is required of landscaping architects in the community. (R-189, lines 22-25; R-190, lines 1, 2)

As to Mr. Wright's testimony, the Judge held:

> THE COURT: I don't think Mr. Wright's testimony helps you a bit insofar as trying to establish what the duty of a landscape architect is. What the standard of care or what the proximate cause of the cave-in was. (R-192, lines 10-13)

And finally:

> THE COURT: I don't think that you have shown that it is the duty of a landscape architect, called in to landscape a steep slope in a front yard, to put in a retaining wall that is going to guarantee that that massive dirt wall in the front yard of a house stays in place. That is what troubles me about your case and has almost from the very beginning even from your opening statement. Well, are they going to bring in a landscape architect that can testify to what the standard of care is in this community is with respect to landscape work? (R-193, lines 5-14)

POINT II

PLAINTIFF FAILED TO INTRODUCE COMPETENT TESTIMONY ESTABLISHING THAT THE DEFENDANT BREACHED ITS DUTY OF CARE OR THAT IT WAS A PROXIMATE CAUSE OF THE PLAINTIFF'S DAMAGES.

One of the bases claimed by plaintiff of the defendant's negligence was that Erickson Landscaping had used 50 60 penny nails rather than 12 inch spikes. In support of t

the plaintiff relies upon the testimony of Robert Wright. Mr. Erickson testified that he had employed 12 inch spikes in prior railroad tie walls and found the result to be unsatisfactory. (R-83)

During Robert Wright's testimony, under cross-examination, he was asked:

> Q. Have you ever built a wall with a fifty or sixty penny nail, using it to tie the walls in together?
>
> A. Not a railroad tie wall, No.
>
> Q. So you don't have any idea then how that would hold up?
>
> A. No, I don't. (R-126, lines 23-25; R-127, lines 1-3)

Mr. Wright obviously could provide no assistance to the Court relative to the use of nails rather than spikes.

Plaintiff also claimed that Mr. Wright compacted the soil he worked on. That compaction was performed by equipment in the process of building a boulder wall. Nowhere in the record is there any evidence by a landscape contractor that indicates it is a breach of duty not to compact soil when installing a railroad tie wall.

Finally, the plaintiff relies upon the testimony of George Aposhian in establishing that Erickson Landscaping's wall was defective. As stated previously, Mr. Aposhian had no expertise in the field of landscape contracting. His viewpoint is one

of an engineer. Erickson Landscaping was not hired to do engineering work.

Once again the record is devoid of any evidence establishing that the defendant had done anything wrong.

CONCLUSION

At the trial the plaintiff failed to establish what a Landscape Contractor's duty of care was. As a result it was impossible for her to establish that a breach of that duty occurred. Similarly, no proximal connection between the alleged breach and the plaintiff's resulting damages could be found.

Returning again to the Court's record in this case is helpful. The trial Judge held:

> THE COURT: You have got the burden of proving by a preponderance of the evidence that he is responsible for that happening. And we talk in terms of negligence. Negligence requires a breach of duty and a breach of duty with respect to the work like of a physician. That is a breach of a physician's duty in performing an operation. It is to use the standard of care of physicians in the business. A landscape architect's duty is to landscape with the same degree of care that other landscapers in the community might use, you see. And he isn't [illegible] a landscaper's duty by a civil engineer who spends his lifetime in [illegible] structures and retaining walls [illegible]

tures and so on in fixing what that duty is.

Mr. Aposhian says that the only landscaping experience I have had is in doing my own yard. Well, we can't put this man's duty of responsibility up against a civil engineer's whose experience has something to do with fields not connected with landscaping of property.

I am reluctant at the end of the plaintiff's evidence in cases to dismiss if there is any belief on my part that the defendant has any degree of liability for what has happened. I fail to see that in this case. I don't know that anybody could have predicted or foreseen what happened here. I think maybe somebody who simply pushes dirt back and doesn't pack it down and tap it as a builder has a responsibility to do, that sort of a person might foresee in due time that fill dirt might give way. But it wasn't, as I stated, a gradual sluffing off from the front. It was the whole piece that fell at once. To say he had a duty of tying that slope through the use of dead men back into the dirt underneath the house, I just don't think that that is his responsibility at all.

I have, having in mind right from the start what a plaintiff's responsibility is in a case like this, watched carefully for any proof of what the standard of care is here and I just don't think that we can say that a landscaper has a responsibility of coming in and landscaping our properties and putting in, and you see all over the valley on the foothills a lot of railroad tie landscaping. I don't think that he has the duty of doing any more than landscaping the yard he is called in to landscape. And he has no duty to guarantee that after he gets through landscaping that some hidden, unforeseeable thing is going to just wipe out the whole front yard and destroy the work that he has done. It isn't the work that he did or the work that he didn't do that caused that massive dirt

> to give way, based upon the evidence pres
> here. We have no evidence to show what ma
> give way. The evidence to me is clear th
> was the total massive give-away, you see.
> is like the face of a cliff breaking off.
> it happens, we don't know, but I just don't
> see from the evidence that you have shown
> a preponderance of it that this defendant
> a duty which was breached and his breach of
> duty was a proximate cause of what happened.
> just can't see, based upon any evidence here
> that we can say what he did or didn't do was
> proximate cause of that massive dirt giving
> (R-195, line 25; R-196, 197; R-196, lines

The trial court had in mind the proper burden of
by plaintiff from the very beginning of this matter. The
after carefully listening to all the evidence, ruled for
defendant. That was the only proper ruling that could have
made. Defendant respectfully submits that this Court should
affirm the trial Court's decision.

DATED this 2nd day of August, 1983.

HANSON, RUSSON & DUNN

SCOTT W. CHRISTENSEN
Attorney for Defendant-

CERTIFICATE OF SERVICE

I hereby certify that I caused to be mailed, postage prepaid, this _____ day of August, 1983, two true and correct copies of Brief of Defendant-Respondent to Keith F. Oehler, Attorney for Plaintiff-Appellant, 2020 East 3300 South, Suite 22 - Ivy Place, Salt Lake City, UT 84109-2699.