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William H. Steele and Melva R. Steele v. Denver & Rio Grande Western Railroad Co. and Weyher Construction Co. : Brief of Appellants

Utah Supreme Court

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F. Robert Bayle; Wallace R. Lauchnor; Attorneys for Respondents and Cross Appellant;
Jackson B. Howard; Jerry G. Thorn; Attorneys for Plaintiffs and Appellants;

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114 1964

In the Supreme Court of the State of Utah

WILLIAM H. STEELE and MELVA R. STEELE,

Plaintiffs,
Appellants,

vs.

DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY, and WEYHER CONSTRUCTION COMPANY,

Defendants,
Respondents.

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- 1964

Court, Utah

CASE

NO. 10,063

APPELLANTS' BRIEF

Appeal from Judgment of the Third District Court
of Salt Lake County
Honorable A. H. Ellett, Judge

Jackson B. Howard and
Jerry G. Thorn, for
HOWARD AND LEWIS
290 North University Avenue
Provo, Utah

Attorneys for Plaintiffs-Appellants

F. Robert Bayle, of
BAYLE, HURD AND LAUCHNOR
Continental Bank Building
Salt Lake City, Utah

Attorneys for Defendants-Respondents

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Defendants,
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CASE
NO. 10,063

BRIEF OF APPELLANT

STATEMENT OF NATURE OF CASE

This is an action for personal injuries and property damage arising out of a collision between the Plaintiffs' pickup truck and Defendants', Denver and Rio Grande Western Railroad Company, train at a construction site maintained and controlled by Defendant, Weyher Construction Company.

DISPOSITION IN LOWER COURT

The lower court, upon a motion for summary judgment made by both Defendants and upon oral argument of the same, granted said motion with respect to Defendant, Weyher Construction Company as to both plaintiffs and further granted said motion with respect to Defendant, Denver and Rio Grande Western Railroad Company, as to Plaintiff William H. Steele, and Plaintiffs appeal.

RELIEF SOUGHT ON APPEAL

Plaintiffs seek reversal of the lower court's order granting motion for summary judgment.

STATEMENT OF FACTS

The Plaintiffs are residents of Springville, Utah, and have been for a great number of years. On the day of the accident, October 19, 1961, the Plaintiffs were on their way from their home in Springville to the Wildwood Nursery in Orem, Utah. The purpose of their trip being to pick up some shrubbery and flowers at the Wildwood Nursery and to return to Springville. In order for them to arrive at their appointed destination, they traveled down Highway 91 to Provo, and from Provo down to what is commonly known as the Geneva Road, or Utah Highway No. 114. This highway travels west of Provo in a north-south direction. After traveling north on this highway for a distance of about three miles, they reached what would be 13th South, in Orem, Utah, and they turned on this road east and proceeded toward the Wildwood Nursery, which is located about one mile east of the Geneva

Road. As they proceeded east on 13th South, they observed what appeared to them to be construction work taking place on the 13th South Road. As they drew nearer to the construction area, they saw a sign and barricade across 13th South, which informed them that the road was closed. At the western end of the construction area, the Plaintiffs could see what appeared to be a detour road which turned off to the south of the oiled portion of 13th South and along the southern edge of the construction area, which construction the Plaintiffs later determined to be an overpass over the railroad tracks of the Denver and Rio Grande Western Railroad Company. This graveled road onto which Plaintiffs had turned, thinking it to be a detour around the construction area was constructed in such a manner that a car traveling down the road could not see to the north and observe the approach of any trains which might be traveling south on the said railroad tracks. As the Plaintiffs proceeded down this graveled road, they were unaware of any impending danger and in fact the Plaintiff, William R. Steele, did not realize that there were railroad tracks lying in front of him. The first warning that Plaintiffs had that they were in any danger was at a point about ten feet from the railroad tracks when they heard a noise and looked up and saw the train about to strike their pickup. This warning came too late and the train collided with the pickup, knocking it down the tracks and totally demolishing the truck itself. Both the Plaintiffs suffered serious injury and were taken to the Utah Valley Hospital in Provo, Utah.

ARGUMENT

POINT I

THE COURT ERRED IN FINDING THAT NEITHER OF THE DEFENDANTS OWED A DUTY TO THE PLAINTIFFS INSOFAR AS CONSTRUCTION OF THE BYPASS ROAD WAS CONCERNED.

The record will disclose that the court in its pre-trial order found that the Defendants owed no duty to the Plaintiffs with respect to construction of the bypass road. We respectfully submit that this was in error.

As the Plaintiffs proceeded to drive up 13th South after turning east off from the the Geneva Road, they were confronted with an area which was under construction. The road on which they were traveling was barricaded off and marked "Road Closed". As the Plaintiffs neared the construction area and read the above sign, they observed a graveled road which turned off to the south of the construction area and then proceeded on east. This was a graveled road which was graded off in a level condition and looked like one which was to be used as a detour around the construction site. Subsequent investigation has shown that the road was not a detour, but that it was built for the use of both of the Defendants in connection with the construction of the overpass over the railroad tracks; however, the mere fact that the road was a private one meant for the use of the Defendants in connection with the construction project does not eliminate a duty towards the Plaintiffs.

This graveled road was constructed in such a manner and placed at such a point that it appeared to be a

detour for traffic going east on 13th South, and the Plaintiffs merely acted as reasonable people in assuming this to be the case. By constructing this road in the manner in which they did and in placing it at this particular point, the Defendants had created a situation amounting to a hidden or dangerous trap for the unwary traveler. This seemed to be nothing more than a simple detour road, which was meant for the traveler's use in proceeding around the construction site. After starting down this road, the traveler, as the Plaintiffs in this action found out, was unable to observe the conditions and traffic on the railroad tracks as to those trains proceeding south on said tracks. In fact a clear view north could not be had until the Plaintiffs were almost upon the tracks. This situation existed because of the fill dirt that had been placed as a part of the overpass construction.

Under these circumstances, we respectfully submit that the Defendants did have a duty to the Plaintiffs insofar as construction of the road was concerned. The duty which the Defendants had was that of an owner or occupant of the premises to a licensee or invitee to refrain from leading said licensee or invitee into hidden or dangerous traps and to give timely warning of such peril. The law of this state is clearly to this effect.

Considering the Plaintiffs in the present case as invitees, and we respectfully submit that they may be so considered, the Defendants were under a strict duty to refrain from leading them into dangerous traps and to refrain from exposing them to unreasonable risks; and if such exists, to give them timely notice and warning that such perils were present on the premises. The duty of

which we are speaking is set forth in 38 Am. Jur. 754, Section 96 as follows:

"The rule is that an owner or occupant of land or buildings who directly or impliedly invites others to enter for some purpose or interest or advantage to him owes to such person a duty to use ordinary care to have his premises in a reasonably safe condition for use in a manner consistent with the purpose of invitation, or at least not to lead them into a dangerous trap or to expose them to an unreasonable risk, but to give them adequate and timely notice and warning of latent or concealed peril which are known to him but not to them. Summarily stated to the extent of the invitation given, the property owner owes to an invitee the duty of pre-vision, preparation and look-out". (Emphasis added)

It is important to note that the invitation need not be an express one, but may be made by implication as is noted from the above quotation, and as 38 Am. Jur. 758, Section 98 says:

"A person may become an invitee to whom the owner of the premises is under a duty to maintain them in a safe condition when he is expressly invited to come upon the premises or when from the construction of buildings or use of the premises, such an invitation may be implied and invitation to enter may be implied from conduct of the owner or occupant, or of someone else with his permission, which he knows, or reasonably should know, might give rise to the belief, in the mind of a person ordinarily discerning, that the owner or occupant intended such person to come upon the premises." (Emphasis added)

This is the exact position that Plaintiffs are in in the

present case. Because of the construction area and the "Road Closed" sign, they reasonably discerned that the road which proceeded to the south and around the construction area was a detour road and was put there for the use of traffic proceeding east on 13th South. Under these circumstances, they clearly were invited to come upon these premises by both the Defendants.

This Court in the case of *Erickson v. Walgreen Drug Company*, 120 Utah 31, 232 Pac. 2nd 210, has clearly set forth the duty which an owner or occupant of property owes to an invitee. In determining that duty, the Court quoted with approval from the Restatement of the Law of Torts, Section 343, as follows:

"A possessor of land is subject to liability for bodily harm caused to business visitors by a natural or artificial condition thereon if, but only if, he

(a) knows or by the exercise of reasonable care could discover the condition which, if known to him, he should realize as involving an unreasonable risk to them, and

(b) Has no reason to believe that they will discover the condition or realize the risk involved therein, and

(c) Invites or permits them to enter or remain upon the land without exercising reasonable care (i) to make the condition reasonably safe, or (ii) to give a warning adequate to enable them to avoid the harm * * *". (Emphasis added)

The section just quoted above applies to the circumstances of the present case. The Defendants had constructed a road for use in servicing this construction work. By

so constructing that road, they had created an artificial condition which they knew or should have known by the exercise of reasonable care, was an unreasonable risk to the traveling public. The Defendants, in addition, had no reason to suspect that the Plaintiffs or any other traveler who happened upon that road would realize the risk involved therein, and they further, by clear implication, invited the Plaintiffs upon that road and permitted them to remain there without exercising reasonable care to make the condition safe or to give a warning adequate to enable the Plaintiffs to avoid harm.

A case which we feel is of significance as related to the fact situation in the present case is *Florez v. Groom Development Company*, 348 Pac. 2nd 200. In that case, the Plaintiff was an employee of a sub-contractor. He had brought an action for injuries caused by the negligence of the general contractor. An employee of the general contractor had placed a plank across a ditch that had been dug by a plumbing sub-contractor. The plank was placed in this position in order to assist the painters in the erection of staging for painting the houses being developed. The plank that was used was a bit narrower than those usually used for such a pupose; however, the employee used this particular size of plank at the request of his employer, the general contractor. As the plank was placed by the employee, one end led directly to a water faucet, which was the only source of water within the immediate vicinity. The staging was completed by the painters on Friday, but the plank was left laying across the ditch and leading to the water faucet until the next Monday, when the accident occurred. The employee knew, and there-

fore his employer also knew that the plank, being in such a position, would give those workmen who were in the area the impression that the plank was placed across the ditch to enable them to get from one side to the other, particularly when in need of water. The Plaintiff used the plank and it gave away, causing him to fall into the ditch and suffer severe injuries. The Trial Court held for the Plaintiff, and the Defendant appealed.

On appeal, it was held that there was an implied invitation for workmen to use the plank to cross on. If the plank was placed as the Defendant says, to hold up staging, then after that purpose was fulfilled, the Defendant had a duty to remove the plank or warn invitees of the danger in using it for a cross walk. The Defendant had created this situation and, was, therefore, under a duty to warn workman. In this regard, the Court said:

“Moreover, the invitor, under the law, is required to protect invitees, not only from dangers created by him or of which he has actual knowledge, but from those dangers which, by the use of reasonable care, he should have had knowledge. **And lack of actual notice is no defense if there was an opportunity to inspect and such inspection would have revealed the dangerous situation.**” (Emphasis added)

Applying the facts of the Florez case to the present case, we respectfully submit that they are of real significance to the present case. The Defendants, in constructing this road had created an implied invitation to the Plaintiffs and other travelers upon 13th South to enter thereon and detour around the construction area. The road was placed at such a point that it gave a clear im-

pression that its only purpose was one of detour for the traveling public. Under such circumstances, the Defendants had a duty to warn the Plaintiffs and other travelers that it was not meant for that purpose and that entering thereon would subject the Plaintiffs or others to a dangerous situation. In not doing so, the Defendants were negligent.

If we consider the Plaintiffs as licensees, the Defendants still owe them a duty to refrain from leading them into hidden or dangerous traps, and to give timely warning of such peril. In commenting on this duty, in *Tempest v. Richardson*, 5 Utah 2nd 174, 299 Pac. 2nd 124, this Court quoted with approval from the Restatement of the Law of Torts, Section 342, as follows:

“Dangerous conditions known to possessor. A possessor of land is subject to liability for bodily harm caused to gratuitous licensees by a natural or artificial condition thereon, only if he

(a) knows of the condition and realizes that it involved an unreasonable risk to them and had reason to believe that they will not discover the condition or realize the risk, and

(b) Invites or permits them to enter or remain upon the land without exercising reasonable (i) to make the condition reasonably safe, or (ii) to warn them of the condition and risk involved.”

In the present case, the Defendants clearly knew of the dangerous condition which existed by reason of the fact that the road was constructed where it was and that it involved an unreasonable risk to the traveling public in general and the Plaintiffs in particular, and they certainly

had reason to believe that Plaintiffs would not discover that condition or realize the risk involved therein. Defendants also, by implication, invited and permitted the Plaintiffs to enter and remain upon the land without exercising reasonable care to make the conditions safe or to warn them of the condition and risk involved therein. Under these circumstances, we respectfully submit that even considering the Plaintiffs as licensees, the Defendants were nevertheless under a duty to the Plaintiffs and were negligent in carrying out that duty as set forth above. As the Supreme Court of Oregon said in the case of *McHenry v. Howell*, 272 Pac. 2nd 210, in commenting upon the duties owed to a licensee by an owner or occupant:

“As to Plaintiff, Defendant was subject to the rule of law that liability of an owner or occupant of premises to a licensee may be predicated upon negligence in leaving something in the nature of a trap or pitfall at a place where his presence might have been anticipated without a warning thereon. A trap within the meaning of this rule is a danger which a person who does not know the premises could not avoid by reasonable care or skill.” (Emphasis added)

We respectfully urge to the Court that under either label, invitee or licensee, the Defendants had a duty to Plaintiffs insofar as construction of the road was concerned. That duty being one of refraining from leading Plaintiffs into hidden or dangerous traps and to give timely warning of such peril, and the finding of the lower court that no duty did exist was in error.

POINT II

THE COURT ERRED IN GRANTING MOTION FOR SUMMARY JUDGMENT AS THERE WERE GENUINE ISSUES OF FACT WHICH EXISTED WITH RESPECT TO DEFENDANTS' CONSTRUCTION OF THE ROAD AND WITH RESPECT TO DEFENDANTS' DUTIES UNDER DOCTRINE OF LAST CLEAR CHANCE.

As we indicated in our argument under Point I, the Defendants did have a duty to the Plaintiffs with respect to construction of the road. With this duty owing to the Plaintiffs, issues of fact were present in the case, which could not be decided by summary judgment of the Court. This is clearly the law of this state as evidenced by Rule 56c of the Utah Rules of Civil Procedure, wherein it is said:

"The judgment sought shall be rendered forthwith if the pleadings, depositions and admissions on file together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." (Emphasis added)

Under the wording of this rule, if it appears that there is any genuine issue, of a material fact, then a lower court cannot grant a summary judgment. See *Young vs. Felornia*, 121 Utah 646, 244 Pac. 2nd 682; *In re Williams Estate*, 10 Utah 2nd, 83, 348 Pac. 2nd, 683; *Grant vs. Springville Banking Company*, 10 Utah 2nd 350, 353 Pac. 2nd 460; and *Bullock vs. Deseret Dodge Truck Center Incorporated*, 11 Utah 2nd, 1 354 Pac. 2nd, 559.

The first issue of fact present in the case was, of course, whether the Defendants were negligent in carry-

ing out their responsibilities under the duty which they owed to the Plaintiffs in construction of the road.

The record will disclose that the lower court in its pre-trial order found that the Plaintiff driver, William H. Steele, was negligent as a matter of law. This finding, however, does not eliminate the second issue of fact present in the case. That issue of fact being whether the Defendants, under the Doctrine of Last Clear Chance had an opportunity to avoid this accident after Plaintiff's negligence had begun. In either of the situations where this Court has said the Doctrine of Last Clear Chance applies, the Plaintiff, William H. Steele, should have had the opportunity to present his evidence as bearing upon the issue as follows: Whether the Plaintiff, William H. Steele had, by turning down this apparent detour road placed himself in a position of inextricable peril, or in the alternative, if he had placed himself in a position where he was merely inattentive to the surrounding circumstances, and in either event, if the Defendants or either of them had the last clear chance to avoid this accident. Under these circumstances, the court could not by merely finding the Plaintiff, William H. Steele, negligent as a matter of law, eliminate this subsidiary issue of fact from the case. Therefore, we respectfully urge this Court that this is a genuine material issue of fact, and the summary judgment granted by the Court was in error.

Cases which have been decided by this Court and which set forth the law in this state with respect to the Doctrine of Last Clear Chance are as follows: Teakle vs. Railroad, 32 Utah 276, 90 Pac. 402; Knutson vs. Oregon Shortline Railroad Company, 78 Utah 145, 2 Pac. 2nd 102;

Compton vs. Ogden Union Railway and Depot Company, 120 Utah 453, 235 Pac. 2nd 515; Graham vs. Johnson, 109 Utah 346, 156 Pac. 2nd 230.

Another Utah case which we submit is of particular significance as related to the position Plaintiffs found themselves in, is the Utah case of Lawrence vs. Bamburgh Railroad Company, 3 Utah 2nd 247, 282 Pac. 2nd 335. In this case this Court clearly sets forth the duties of a Defendant railroad company as encompassed by the Doctrine of Last Clear Chance as it applies to a Plaintiff who has negligently placed himself in a situation of peril. In this respect, the Court said:

"The motorman or engineer operating a train may assume and act in reliance on the assumption that a person on or approaching a crossing is in possession of his natural faculties and aware of the situation including the fact that a train is a large and cumbersome instrumentality which is difficult to stop and that the person will exercise ordinary care and take reasonable precaution for his own safety. If consistent with his duty of due care, anything appears so that he either knows or should know that there is a likelihood of danger to a person near the tracks, it becomes his duty to use all reasonable efforts to give warnings to slacken his speed and if possible to stop in time to avert an accident. The duty is measured by the exigencies of the occasion. For instance, danger would be more readily apprehended if the person on or near the tracks were a small child or someone possessing an obvious limitation or disability." (Emphasis added)

It is this latter statement by the Court which is of significance to the present situation. The Plaintiffs found

themselves in a position where it was not possible for them to observe the train as it moved south on the Defendants' railroad tracks. This was a clear and obvious limitation and disability with respect to their ability to avoid the accident, and therefore the duty owed by the Defendant railroad company or Defendant construction company was that much greater, as indicated by this Court in the Lawrence case.

CONCLUSION

The Appellants respectfully urge this Court to find that the granting of the summary judgment in favor of the Defendants was erroneous and without basis for the following reasons:

1. The Defendants had a duty to the Plaintiffs insofar as construction of the road was concerned.
2. There was a genuine material issue of fact in the case with respect to the negligence of Defendants in performing the duty owed to Plaintiffs in construction of the road.
3. There was a genuine material issue of fact present in the case with respect to the duty of Defendants to Plaintiffs with respect to the Doctrine of Last Clear Chance.

Respectfully submitted,

Jackson B. Howard and
Jerry G. Thorn, for

HOWARD AND LEWIS

Attorneys for Plaintiffs

290 North University Avenue
Provo, Utah