1984

Price-Orem Investment Company, A Limited Partnership v. Rollins, Brown & Gunnell, Inc : Appellant's Brief

IN THE SUPREME COURT OF THE STATE OF UTAH

PRICE-OREM INVESTMENT COMPANY, A Limited Partnership,

Plaintiff-Appellant,

vs.

ROLLINS, BROWN & GUNNELL, INC., No. 19096

Defendant-Respondent.

APPEAL FROM THE JUDGMENT OF THE FOURTH JUDICIAL DISTRICT COURT, UTAH COUNTY, STATE OF UTAH

HONORABLE MAURICE HARDING, JUDGE, and HONORABLE DAVID SAM, JUDGE, presiding.

APPELLANT'S BRIEF

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COMPANY, A Limited Partner-
ship,

Plaintiff-Appellant,

vs.

ROLLINS, BROWN & GUNNELL, INC., No. 19096

Defendant-Respondent.

APPEAL FROM THE JUDGMENT OF THE FOURTH JUDICIAL
DISTRICT COURT, UTAH COUNTY, STATE OF UTAH

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HONORABLE DAVID SAM, JUDGE, presiding.

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CASES AND AUTHORITIES CITED

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NATURE OF THE CASE

This is an action by an owner of land against an engineering firm for damages proximately caused by the negligent surveying and staking of the owner's property.

DISPOSITION BELOW

This matter was tried to a jury, Maurice Harding, District Judge pro tem, presiding, on November 17, 18, and 19, 1980. The jury returned a verdict in favor of plaintiff and assessed damages of $30,000. R. 101, 107. Judge Harding subsequently granted defendant's motion for a new trial. R.

140. The case was again set for trial, before David Sam, District Judge, on March 1, 1983. At the time set for trial, the District Court ruled that John Price Associates, Inc., the plaintiff's contractor, was an indispensable party, and later dismissed the action upon plaintiff's election not to amend the complaint to add John Price Associates, Inc. as a party. R. 147-48.

RELIEF SOUGHT ON APPEAL

Plaintiff requests that the District Court's order granting a new trial be reversed and the matter remanded with instructions to enter judgment for the plaintiff, or, in the alternative, that the District Court's order granting a new trial be reversed and the matter remanded for a new trial on the issue of damages only, or, in the further alternative, that the District Court's order dismissing the action for failure to join an indispensable party be reversed and the matter remanded for trial.

STATEMENT OF FACTS

The following facts are established by the pleadings and the evidence adduced at the trial of this matter. Sometime during the first part of July, 1973, the defendant agreed to survey and stake the corners of certain property belonging to the plaintiff in preparation for the construction of the Orem

Plaza Shopping Center in Orem, Utah. Plaintiff's Amended Complaint alleged that defendant agreed to survey and stake the property for plaintiff. R. 10. The defendant's Answer to Amended Complaint admitted that the plaintiff retained the services of Rollins, Brown & Gunnell, Inc. R. 13.

The defendant performed the survey and staked the property corners. Tr. Vol. I at 202, R. 366. In fact, the defendant staked two sets of property corners, one for a fenceline and one for the title line. Tr. Vol. I at 216, R. 380. Russell Brown testified that defendant knew the difference between the two sets of stakes and that the survey's field notes reflected the difference. Id. Mr. Brown also testified that plaintiff relied upon defendant to stake the property corners. Id. Following the survey, the defendant certified, on July 27, 1973, by and through its agent Carr F. Greer, that plaintiff's property had been properly staked to represent the boundaries shown on the signed surveyor's certificate, dated July 27, 1973. Tr. Vol. I at 153, R. 317. Pltf. Ex. 4.

During the fall of 1973, John Price Associates, Inc. ("JPA"), the contractor for the project, began grading, placing fill, and compacting, in order to have the site prepared for construction in the spring of 1974. Tr. Vol. I at 27, R. 191. On June 6, 1974, JPA issued a purchase order

to the defendant for, among other things, staking of the building corners of the Skaggs building. Tr. Vol. I at 45-46, R. 209-10. Def. Ex. 7. The Skaggs building was the first portion of the Orem Plaza Shopping Center scheduled for construction. The Skaggs building was to be followed by construction of a large restaurant area, small shop space, and two free-standing buildings, all as part of the development of the shopping center.

On June 14, 1974, David Thurgood, an engineer employed by defendant, took a surveying team to the site and contacted the superintendent, Jim Marshall. Tr. Vol. I at 246, R. 410. Mr. Thurgood took with him a copy of the construction plans, a site plan and other drawings dealing with construction of the building, but did not take the survey done by defendant the previous summer or the survey field notes. Tr. Vol. I at 246, 259, R. 410, 423. Mr. Marshall requested Mr. Thurgood to stake the four corners of the building and then place offset stakes from those four corners to permit excavation for the footings. Tr. Vol. I at 248, R. 412.

Because of the proximity of the Skaggs location to the northwest corner of the property, Mr. Thurgood used that corner as a starting point to lay out the building. Tr. Vol. I at 248-49, R. 412-13. The corner was marked with a one inch diameter rebar, and a one inch by two inch wooden stake.

"N.W. property corner" was written on the wooden stake, indicating that the rebar marked the northwest property corner. Tr. Vol. I at 264, R. 428. The survey performed by defendant the previous summer indicates that the property corners were marked with one inch diameter rebars. Tr. Vol. I at 265, R. 429. Pltf. Ex. 4. Although Mr. Thurgood did not know specifically who put the wooden stake by the one inch diameter rebar, he testified that it would have been the same person that placed the pin, i.e., "representatives of persons that performed the survey of Rollins, Brown & Gunnell . . ." Tr. Vol. I at 267, R. 431. Russell Brown testified that some of the reference points shown on the survey were used in staking the building corners, Tr. Vol. I at 154, R. 318, and that defendant had in fact staked the property corners. Tr. Vol. I at 202, R. 366.

Using the northwest corner as a starting point, Mr. Thurgood and his crew sighted along the west boundary line and came down the line the indicated distance. They then turned ninety degrees to the west property line and staked the buidings corners and placed offset stakes. Tr. Vol. I at 251-52, R. 415-16. The crew then traversed back to the northwest corner. Id.

On July 15, 1974, the defendant was requested by Mr. Marshall, the construction superintendent, to stake the curb

and gutter along the south side of 200 North Street (which was directly north of the Orem Plaza Shopping Center project). Tr. Vol. I at 252, R. 146. On July 17, 1974, Mr. Thurgood and his crew began to perform that work. Id. Once again, the northwest corner was used as the starting point. Id. The defendant's crew proceeded to stake the curb and gutter until Mr. Thurgood noticed that the line which was being staked would intersect the east boundary of the property farther south of the northeast corner than it should have. Tr. Vol. I at 253, R. 417. After obtaining the survey from defendant's office and verifying the distances and property corners as shown thereon, Mr. Thurgood discovered that the northwest corner, which had been used as the starting point to stake the Skaggs building, was 30 feet south of the northwest corner shown on the site plan. Tr. Vol. I at 253-54, R. 417-18. Russell Brown admitted that the Skaggs building was not staked out in proper relation to the property corners as shown on the plot plan. Tr. Vol. I at 201, R. 365.

Defendant contacted JPA and informed it of the error on July 17, 1974. Tr. Vol. I at 255, R. 419. A couple of days later, representatives of defendant and JPA met at the job site to discuss the problem. Id. During the month between the time the building corners were staked and the time the

error was discovered, construction had moved forward considerably on the Skaggs building. For example, between June 14 and July 17, approximately 235 cubic yards, or 20 to 25 truckloads, of concrete were poured. Tr. Vol. I at 101-02, R. 266-67, Def. Ex. 8. Most of the concrete poured was for footings and the slab for the Skaggs building. Tr. Vol. I at 31, 72-73, R. 195, 236-37. Most of the interior footings were completed, including re-enforcing steel and bolts. Id. A large number of the slabs, approximately fifteen to twenty thousand square feet, had been poured. Id. Plumbing and electrical work was in place under the slabs since that work could not be installed after the slabs were poured. Id. A small amount of concrete was poured for curb and gutter. Tr. Vol. I at 75, R. 239. On July 18, 1974, the day after defendant discovered the staking error, the first tilt-up panels were poured. Tr. Vol. I at 102-03, R. 266-67. Other tilt-up panels had been formed. Tr. Vol. I at 31, R. 195.

After discovering the staking error and consulting with representatives of JPA, defendant was requested to prepare a survey showing the actual location of the Skaggs building with respect to the property boundaries. Tr. Vol. I at 256, R. 420. Defendant prepared this survey, which showed that the Skaggs building was located approximately 30 feet south of its intended location. Tr. Vol. I at 256, 258, R. 420,

422, Pltf. Ex. 5. If plaintiff had continued to build the shopping center as planned, the building would have extended over the south property line. Tr. Vol. I at 38, R. 202.

Several possible remedial measures were explored, Tr. Vol. I at 72, R. 236; however, due to financing, costs, and lease limitations, plaintiff ultimately decided to absorb the 30 foot error by shortening the shop space planned for the south end of the shopping center. Tr. Vol. I at 39-40, R. 203-04. In order to allow for the surveying error and to avoid building the shopping center across the south property line, in the latter part of July, 1974, plaintiff instructed the architect to redesign the shop space. Tr. Vol. I at 40, Vol. II at 58, R. 204, 524. Since the shop space was designed for a depth of 70 feet, Tr. Vol. II at 52, R. 518, this resulted in the loss of 2100 square feet of shop space. Tr. Vol. II at 59, R. 525.

Other alternatives suggested by defendant and considered by the plaintiff in attempting to minimize the damage caused by the surveying error were rejected as incompatible with the time constraints imposed by plaintiff's financing commitment, excessively expensive in terms of increased construction costs, and/or economically impracticable. The primary consideration in determining what to do was the completion deadline imposed by Aetna Life Insurance Company, which had com-

mitted to provide a 30-year mortgage loan of $1,900,000, with interest at 8.75%. Tr. Vol. I at 39, R. 203, Pltf. Ex. 2. The commitment expired on January 30, 1975, and Aetna was not required to disburse any funds prior to November 18, 1974. Pltf. Ex. 2. As a means of paying the commitment fee of $38,000 to Aetna, the plaintiff provided two letters of credit payable to Aetna, each in the amount of $19,000. Tr. Vol. I at 25-26, R. 189-90, Pltf. Ex. 3. In the event the loan closed on or after November 18, 1974, but on or before November 30, 1974, the entire commitment fee of $38,000 was to be returned to the plaintiff. Id. In the event the loan closed on or after December 1, 1974, but on or before December 30, 1974, one-half of the commitment fee, or $19,000, would be returned to the plaintiff. Id. If the loan closed after December 30, 1974, but before the commitment expired on January 30, 1975, Aetna was entitled to retain the entire commitment fee. Id.

In order to close on the Aetna loan, plaintiff was required, by the loan commitment and mortgage loan application, to have the Skaggs building substantially completed. Tr. Vol. I at 25, R. 189, Pltf. Ex. 1 and 2. Thus, delays in construction could risk the loss of up to $38,000 in commitment fees, and perhaps the entire funding commitment. Tr. Vol. I at 34-35, R. 198-99. John Price, the general partner

of plaintiff, was seriously concerned that the delay caused in construction by attempting to move the Skaggs building 30 feet to the north would jeopardize the Aetna loan commitment. Id. In actual fact, the funding deadline was barely met. Tr. Vol. II at 63, R. 529.

Lease restrictions prevented plaintiff from recouping the lost frontage at any other economically feasible area on the property. Skaggs, the anchor tenant for the shopping center, would not permit any building to be built on its north side or directly in front of the Skaggs store, the only available locations. Tr. Vol. I at 62-63, Tr. Vol. II at 30-31, R. 226-27, 496-97, Pltf. Ex. 11. In short, there was no way to find an additional 30 feet of frontage.

Since the economic value in the shopping center is found in the frontage available, and not purely in the size of the structure, plaintiff did not consider it feasible to deepen the shop space or build additional space in the back of the mall. Tr. Vol. I at 99, R. 263. The shops were planned to be 70 feet deep. Adding additional depth to the shops was not economically practicable since the additional space would have been unleaseable. Tr. Vol. I at 39, 54, 71, 127-28, R. 203, 218, 235, 291-92. Two free-standing sites had already been planned for the area in front of the shop space and

restaurant; therefore, that space was unavailable to pick up the lost frontage. Tr. Vol. I at 55, R. 219.

Finally, defendant suggested and plaintiff considered the option of resituating the Skaggs Drug Center 30 feet north of where it had actually been built. Russell Brown, one of the principals of the defendant, testified that there were no electrical installations in the concrete at the time he observed the project in early September, 1974. Tr. Vol. I at 172-73, R. 336-37. There was one plumbing stub. Tr. Vol. I at 173, R. 337. Mr. Price testified that some electrical and plumbing work had been set in the concrete that had been poured. Tr. Vol. I at 75, 115, R. 239, 279.

Mr. Brown made an estimate of the cost involved in implementing the repairs he contemplated. Tr. Vol. I at 173, R. 337. The work generally involved removing the south 30 feet of concrete of the Skaggs buiding, disposing of that concrete in some manner, regrading that area, grading the north 30 feet of the Skaggs building, pouring concrete along the north 30 feet of the building, including laying in reinforcing steel, and moving any electrical and plumbing equipment which had been put in place. Tr. Vol. I at 173-74, R. 337-38. Mr. Brown estimated that all of the foregoing work could be accomplished at a cost of approximately $3,000. Tr. Vol. I at 173-76, R. 337-40. Mr. Brown also testified that this

work could be accomplished in ten working days, assuming a contractor, the equipment and the personnel were immediately available to perform the work. Tr. Vol. I at 208-09, R. 372-373.

Mr. Price testified that the remedy advocated by Russell Brown was not feasible since the column spacings and footings were not placed at uniform distances corresponding to the thirty foot surveying error. Instead, the footings were set at varying distances corresponding to the placement of the tenant's gondolas, aisles and refrigeration equipment. Tr. Vol. I at 100-101, R. 264-65. The footings could not be moved. Tr. Vol. I at 76, R. 240. Only total replacement would cure the problem. Tr. Vol. I at 76, 103, R. 240, 267. Moving the whole building would require 30 to 90 days, depending upon negotiations with subcontractors and tenants, and securing authorization from the tenant. Tr. Vol. I at 103, R. 267.

Mr. Price estimated the total cost of repair at approximately $100,000. Tr. Vol. I at 75, R. 239. The repairs would cost thirty to forty thousand dollars for repouring the concrete alone. Id. In addition, the costs of repair had to include the risk of increased cost resulting from renegotiating with contractors and materialmen. Tr. Vol. I at 36, 39, R. 200, 203. The bids upon which JPA relied had been

submitted six months previously and the costs of construction had gone up substantially in the meantime. Tr. Vol. I at 75, R. 239. Thus, asking the subcontractors to do additional work on the project would subject JPA to a possible escalation of the cost of other work to be performed under the subcontracts and materials to be supplied. Tr. Vol. I at 36, R. 200.

At the trial of this matter, a real estate appraiser testified as to plaintiff's damages. Ralph Wright, an MAI appraiser, examined the property and prepared a report, which was admitted into evidence. Tr. Vol. II at 42, R. 508, Pltf. Ex. 12. Mr. Wright used two methods to assess plaintiff's loss. First, using an annuity approach over the probable economic life of the project, Mr. Wright estimated the present value of the plaintiff's lost net income at $80,598. Tr. Vol. I at 125, R. 289. Second, by comparing the value of the property as built to the value of the property if constructed as planned, Mr. Wright estimated the present value of the loss at $72,351. Tr. Vol. I at 126, R. 290. In the second approach, Mr. Wright concluded that the land alone would have increased in value $30,000 had the plaintiff fully developed the property as planned. Pltf. Ex. 12. Based upon these figures, Mr. Wright concluded that the present value of plaintiff's loss was $75,000. Tr. Vol. I at 126, R. 290. Defen-

dant offered no direct evidence on the loss of value of the land or future net income.

At the trial of this matter in 1980, the jury returned a verdict in the amount of $30,000 in favor of the plaintiff. R. 101, 107. Several days later, the defendant moved for judgment n.o.v. or, in the alternative, for a remittitur or a new trial. R. 126. On January 12, 1981, Judge Maurice Harding granted the motion for a new trial on the ground "that the evidence was insufficient to justify the verdict". R. 140. After further briefing by the parties, the court reaffirmed its decision of January 12, 1981, and noted "that a new trial should be granted in this case on the basis that the damages were excessive and on the basis that there was no culpable negligence on the part of the engineers." Thereafter, the case was set for a new trial.

On March 1, 1983, the day set for trial, Judge David Sam, upon consideration of a trial brief filed by defendant, concluded, sua sponte, that John Price Associates, Inc. (the contractor for the Orem Plaza Project) was an indispensable party in the matter. R. 147-48. The district court granted the plaintiff ten days within which to amend its complaint and add John Price Associates, Inc. as an indispensable party, or suffer a dismissal of the action. Id. The plain-

tiff elected not to amend the complaint, and the action was dismissed pursuant to Judge Sam's order.

ARGUMENT

POINT I

THE TRIAL COURT ERRED IN GRANTING DEFENDANT A NEW TRIAL.

As noted above, at the trial of this matter the jury returned a verdict in favor of the plaintiff and assessed damages of $30,000. Later, Judge Harding granted the defendant's motion for a new trial. The district court's ruling was erroneous since the record contains no substantial competent evidence to support a verdict for the defendant.

The standard under which this court will review a trial court's decision on a motion for a new trial depends upon whether the trial court has denied or granted the motion. Nelson v. Trujillo, 657 P.2d 730, 731 (Utah 1982). Where, as in this matter, the trial court has granted a motion for a new trial, the Supreme Court will affirm on appeal if the record reflects "substantial competent evidence which would support a verdict for the [moving party]." King v. Union Pacific R. R. Co., 117 Utah 40, 53, 212 P.2d 692, 698 (1949).

In granting defendant's motion for a new trial, the district court held "that the evidence was insufficient to justify the verdict." R. 140. A review of the record, how-

ever, reveals that there is no substantial competent evidence to support a verdict for defendant, either on the issue of liability or the amount of damages suffered by plaintiff.

The negligence of defendant in staking the corners of plaintiff's property was well established by the pleadings and the evidence at trial. The undisputed testimony was that defendant staked the property corners for plaintiff in the summer of 1973. The northwest property corner was marked by one inch diameter rebar and a wood stake. The evidence is undisputed that the rebar and wooden stake were placed by the defendant. The evidence is likewise undisputed that the northwest property corner was marked about thirty feet south of the point indicated by the survey. In fact, the defendant admitted, in its answer to plaintiff's amended complaint, that it "erroneously set the stakes on plaintiff's property." R. 10-11, 13-14. Defendant also stated, in its answer to the amended complaint: "The defendant, Rollins, Brown & Gunnell, Inc., admits that a mistake was made in staking of the plaintiff's property by one of its agents and employees, but denies that the plaintiff has suffered damaged by reason thereof." R. 14. At the trial, defendant requested that the court instruct the jury that the defendant, Rollins, Brown & Gunnell "has admitted liability in this case." R. 32. This instruction was not given by the court.

Considering all the evidence adduced at the trial of this matter and the admissions contained in the pleadings, the record lacks substantial competent evidence to support a verdict for defendant on the issue of liability.

On the issue of damages, substantial competent evidence to support a verdict for the defendant is likewise absent. The defendant's evidence respecting damages was solely on the issue of mitigation. The trial court erred in considering and submitting to the jury the defendant's evidence respecting mitigation of damages, since the issue was not raised as an affirmative defense as required by the Utah Rules of Civil Procedure. In Pratt v. Board of Education of Uintah County School District, 564 P.2d 294, 298 (Utah 1977), the Utah Supreme Court held that mitigation of damages is an affirmative defense required to be pleaded under Utah R. Civ. P. 8(c), or the defense is waived, Utah R. Civ. P. 12(h). Consequently, this evidence was not relevant, not admissible, and not competent to support a verdict for the defendant.

Defendant presented no direct evidence on the value of the rental space or use of land lost as a result of defendant's mis-staking of the property corners. Instead, defendant argued that at the time the error was discovered the Skaggs building could have been moved about 30 feet to the north at a cost of approximately $3,000. The defendant did

not contend that at the time of trial moving the Skaggs building was feasible. The issue presented was whether the plaintiff acted reasonably, at the time the error was discovered to minimize the damages resulting from defendant's negligence. Plaintiff objected to defendant's testimony on mitigation on the grounds that it was not placed in issue by the pleadings and was inadmissible under the rules set forth in Pratt, supra. The objection was overruled by the trial court, Tr. Vol. I at 171, R. 335, and the issue was submitted to the jury. R. 95.

The trial court erred to the extent it relied upon such evidence and considered issues beyond the pleadings in granting defendant's motion for a new trial. In determining whether there was substantial competent evidence to support a verdict for defendant on the issue of damages, this court should disregard evidence relating to mitigation of damages.

Even if one assumes that the defendant properly raised the issue of mitigation of damages, defendant failed as a matter of law to demonstrate that the plaintiff did not act reasonably to avoid the consequences of defendant's negligence. The general rule is that an injured party may not recover damages flowing from a defendant's act which reasonably should have been avoided. Jankele v. Texas Co., 54 P.2d 425, 428 (Utah 1936). However, the plaintiff is only re-

quired to act as "an ordinarily prudent man" would be expected to act under like circumstances. Id. Thus, the defendant has the burden of showing not only that the plaintiff could have reduced its damages, but that doing so was reasonable under the circumstances.

An injured party's duty to minimize damages does not require it to "enter into other risky contracts, incur unreasonable inconvenience or expense, [or] disorganize [its] business." Barbara Oil Co. v. Patrick Petroleum Co., 566 P.2d 389, 393-94 (Kan. App. 1977) (quoting Restatment of Contracts § 336, Comment (a)). The Restatement also notes, "It is not reasonable to expect the plaintiff to avoid harm if at the time for action it appears that the attempt may cause other serious harm." Id. See also Restatement (Second) of Contracts § 350, Comment (g) (1981).

When analyzed under the foregoing standard, plaintiff, as a matter of law acted reasonably to avoid the damages flowing from defendant's negligence. Perhaps more importantly, defendant presented no substantial competent evidence that plaintiff acted unreasonably. Mr. Brown testified that the repairs would take ten working days, assuming that the contractor, equipment and personnel were immediately available to perform the work. Tr. Vol. I at 208-09, R. 372-73. The fact that plaintiff had a deadline to substantially complete

the Skaggs building in order to meet a commitment for long term financing was not contested by defendant. Failure to complete the building by November 30, 1974, would have meant the loss of $19,000 (one-half of the loan commitment fee). Failure to deliver a substantially complete building by December 30, 1974, would have meant the loss of an additional $19,000. If the building was not substantially complete by January 30, 1975, the entire funding commitment would have been lost. Plaintiff did not act unreasonably in refusing to risk its financing by moving the Skaggs building and delaying its completion.

In addition, it was plaintiff's judgment that the repairs advocated by defendant were not feasible and that the only way to change the location of the Skaggs building was to tear out all of the concrete which had been poured for the footings and slab. Instead of defendant's suggested cost of $3,000, plaintiff estimated that it would cost $100,000 to repair the consequences of the error. Defendant presented no evidence that plaintiff's judgment as to cost of repair was unreasonable.

Even if one assumes that plaintiff could have moved the Skaggs building thirty feet north at a cost of $3,000 and still completed the building on time; nevertheless, defendant presented no evidence that plaintiff acted unreasonably in

failing to do so. The acts of plaintiff must be judged in light of the circumstances prevailing at the time action was needed. As a matter of law, the plaintiff was not required to take the risk advocated by defendant.

The pleadings and the evidence presented at trial demonstrate that there was no substantial competent evidence to support a verdict for defendant on either the issue of liability or damages. In short, the district court erred in granting defendant a new trial. This Court should reverse the district court's order granting a new trial and remand with instructions to reinstate the jury verdict for plaintiff. Alternatively, the Court should reverse the district court's order granting a new trial and remand for a new trial on the issue of damages only.

POINT II

THE TRIAL COURT ERRED IN RULING THAT JPA WAS AN INDISPENSABLE PARTY AND IN DISMISSING THE ACTION UPON PLAINTIFF'S ELECTION NOT TO AMEND ITS COMPLAINT.

John Price Associates, Inc. ("JPA") was the contractor for plaintiff on the Orem Plaza Shopping Center. JPA issued the purchase order pursuant to which defendant staked the corners of the Skaggs building. At the time set for the second trial of this case, defendant submitted a trial brief arguing, in part, that, under Utah R. Civ. P. 19, JPA was an

indispensable party to the action. The district court ruled, sua sponte, that JPA was a indispensable party and granted plaintiff ten days within which to amend its complaint to name JPA as a party, or suffer dismissal of the complaint. Plaintiff elected not to name JPA as a party; consequently, the amended complaint was dismissed.

Since JPA was neither a necessary nor indispensable party, the district court erred in dismissing the action. Utah R. Civ. P. 19(a) states:

> Subject to the provisions of Rule 23 and of subdivision (b) of this rule, persons having a joint interest shall be made parties and be joined on the same side as plaintiffs or defendants. When a person who should join is a plaintiff refuses to do so, or his consent cannot be obtained, he may be made a defendant or, in proper cases, an involuntary plaintiff.

Defendant argued that JPA had a joint interest with plaintiff, since JPA issued the purchase order to defendant to stake the Skaggs building and was the real party in interest. Although there is some confusion in the defendant's use of labels, it appears that the district court believed that there was no privity of contract between plaintiff and defendant and, therefore, plaintiff had no cause of action. However, since there was a contract between JPA and defendant, JPA had a cause of action and, in turn, was liable to plaintiff.

JPA cannot be considered to be a necessary or indispensable party under Rule 19, since it has no joint interest in the action with plaintiff. The only party damaged by the defendant's failure to properly stake the property corners was plaintiff, the owner of the property. Since JPA suffered no damage, it has no joint interest in the action. Also, the defendant admitted in its pleadings that it had been retained by plaintiff to stake the property corners. The damages suffered by plaintiff were proximately caused by the erroneous staking of the northwest corner of the property, since that corner was used as the starting point to stake the the corners of the Skaggs building. Thus, the negligent act for which plaintiff seeks damages arises out of a contract between plaintiff and defendant, not between JPA and defendant.

Assuming, arguendo, that the contract out of which plaintiff's damages arose was between defendant and JPA, rather than between defendant and plaintiff, plaintiff's amended complaint nevertheless states a cause of action against defendant in tort. Plaintiff may independently maintain an action against defendant, notwithstanding the fact that the circumstances giving rise to the tort claim may also justify a breach of contract claim.

In Bushnell v. Sillitoe, 550 P.2d 1284, 1286 (Utah 1976), the court stated: "This court has never ruled as to whether

there must be privity of contract between a surveyor and a party who sustains damage, because of a surveyor's negligent misrepresentation." While the opinion in Bushnell is somewhat unclear, the court appears to adopt the rule of Restatement of Torts § 552:

> One who in the course of his business or profession supplies information for the guidance of others in their business transactions is subject to liability for harm caused to them by their reliance upon the information if (a) he fails to exercise that care and competence in obtaining and communicating the information which its recipient is justified in expecting, and (b) the harm is suffered (i) by the person or one of the class of persons for whose guidance the information was supplied, and (ii) because of his justifiable reliance upon it in a transaction in which it was intended to influence his conduct or in a transaction substantially identical therewith.

Id. at 1286 n. 4. In Bushnell, the court noted that the plaintiffs (adjacent property owners) were not within the class of persons for whose guidance the information was supplied by the surveyor.

The court adopted a similar rule in Milliner v. Elmer Fox & Co., 529 P.2d 806 (Utah 1974). In Milliner, purchasers of stock brought an action against an accountant to recover for the loss of value of the stock. The plaintiffs alleged that they purchased shares of stock in a company in reliance upon financial statements prepared by the accounting firm, that the financial statements were false, and that the accountants

were negligent in the preparation of the financial statements. The accountants raised lack of privity of contract as a defense; however, the court held:

> We are of the opinion that the lack of privity is not a defense where an accountant who is aware of the fact that his work will be relied on by a party or parties who may extend credit to his client or assume his client's obligations. A future purchaser of shares of stock of a corporation, however, belongs to an unlimited class of equity holders who could not be reasonably foreseen as a third party who would be expected to rely on a financial statement prepared by an accountant for the corporation.

Id. at 808. Thus, the existence of a duty does not depend upon a contract, but upon the foreseeability of injury to a specific party. Certainly, it is foreseeable that the owner of real estate will be injured by a surveyor's negligence. If a duty is owed to plaintiff in this action, JPA can in no way be construed as a necessary or indispensable party.

The California Court of Appeals considered the issue raised by Rollins, Brown & Gunnell in Kent v. Bartlett, 49 Cal. App. 3d 724 (1975), wheren the plaintiffs-land owners brought an action for damages caused by defendant-surveyor's negligent performance of a contract to survey property. The trial court granted judgment for defendant after plaintiffs' opening statement on the ground that there was no privity of contract. The California court reversed, holding that defendant could reasonably anticipate that the survey would be

relied upon by plaintiffs, subsequent purchasers of the property, and therefore owed a duty to plaintiffs. See Rozny v. Marnul, 43 Ill. 2d 54, 250 N.E. 2d 656 (1969).

Although denominated a dismissal for failure to join an indispensable party, it appears that the trial court's decision was based upon the erroneous belief that plaintiff had no independent cause of action against defendant for negligence. The damage to plaintiff, as owner of the property surveyed and staked, was foreseeable; therefore, defendant owed a duty to plaintiff to refrain from negligent acts. The court's order dismissing plaintiff's complaint for failure to join JPA was in error and should be reversed.

CONCLUSION

The trial court erred in grantng defendant a new trial since there was no substantial competent evidence to support a verdict for defendant. The district court likewise erred in ruling that JPA was a necessary and indispensable party. The Court should reverse the orders of the district court and remand with directions to reinstate the jury verdict, or,

alternatively, remand for a new trial on damages only, or, in the further alternative, remand for a new trial.

DATED this 29th day of July, 1983.

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CERTIFICATE OF SERVICE

I hereby certify that on the 29th day of July, 1983, I served two true and correct copies of Appellant's Brief by placing them in an envelope addressed to Jackson B. Howard and Richard B. Johnson and mailing the same, postage prepaid, to:

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