1984

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

Defendant-Respondent.

No. 19096

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.

RESPONDENT'S BRIEF

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RESPONDENT'S BRIEF

NATURE OF THE CASE

This is an action for damages resulting from the mis-staking of property owned by the plaintiff.

DISPOSITION IN TRIAL COURT

This matter was tried to a jury, Maurice Harding, District Judge pro tem, presiding, on November 17-19, 1980. The jury returned a verdict for the plaintiff and assessed damages of $30,000.00. R.101, 107. Judge Harding subsequently granted the

defendant's motion for a new trial. R.140. The case was again set for trial, before David Sam, District Judge, on March 1, [illegible]. At the time set for trial, the court ruled, sua sponte, that John Price Associates, Inc., the party with whom the defendant had contracted, was an indispensable party, and ordered that the case be dismissed unless the plaintiff amended its complaint to add John Price Associates, Inc., as an indispensable party to the action. R.147-48. The plaintiff elected not to amend the complaint, and the action was therefore dismissed.

RELIEF SOUGHT ON APPEAL

The respondent urges that the trial court's decision be affirmed in all respects. If, however, this court determines that the trial court's decision should be reversed, the matter should be remanded for a new trial on all issues.

STATEMENT OF FACTS

Sometime during the first part of July, 1973, John Price Associates, Inc., (JPA), contracted with the defendant to have a survey done of the site of the Orem Plaza, a shopping center owned and developed by Price-Orem Investment Company, a limited partnership. R.183, 192, 210. The shopping center was constructed by John Price Associates, Inc. R.192, 208. John Price, the individual, was the sole general partner of Price-Orem Investment Company. The limited partners were controlled corporations of John Price. R.207. Agents of the defendant performed the survey in accordance with the terms of the contract. R.319.

In June, 1974, JPA again contracted with the defendant [illegible]

stake the layout of the shopping center building. R. 209-11, 423. Mr. Brown, a consulting engineer and a principal of the defendant, testified that the starting point for staking the layout of a building is usually furnished by the building owner. R. 375. Mr. Thurgood, the engineer in charge of the surveying crew which staked the building layout, R. 322, met with Mr. Marshall, the job superintendant for the plaintiff, prior to performing the staking. R. 410. Mr. Marshall had already prepared the base for the structure upon which the staking was to be laid out. The base consisted of a gravel bed which had been located from a stake which Marshall had selected as a starting point. R. 421, 426. Mr. Thurgood confirmed Marshall's measurements from a starting point stake labeled "N.W. property corner." R. 413. The stake had been well preserved, and was marked off by flagging and other stakes around it, R. 413-15, and there was other evidence that at least two other persons had used that stake as the northwest property corner. R. 426. Based on that starting point, Mr. Thurgood and his crew staked the building layout. R. 416. The building layout as staked fit properly on top of fill material which had already been placed by JPA. R. 421, 254-55.

Mr. Thurgood testified that the procedures he used in staking the building layout were in accordance with the custom in his profession. R. 424.

Later even revealed that the stake used by Mr. Thurgood was not the corner intended by the owner which by reason of the subsequent property acquisition was about 30 feet to the north.

R. 414. As a result, the building was staked about thirty feet south of the location called for on the site plan.

The problem resulted from these facts. In July of 1973, the plaintiff, by purchase order, employed the defendant to survey the boundaries of plaintiff's property. The defendant made the survey but it was determined that the deed line and fence line did not fit. The plaintiff, therefore, by negotiation acquired additional property north of its fence line. Plaintiff then tore down the fence and graded the property north of the fence line shown on the survey. (See Exhibit 4). The fact that such additional property was acquired and which moved the plaintiff's property north some thirty feet was never revealed to the plaintiff. R. 260. When Mr. Thurgood went to the site to do the staking, he did not take the survey documents with him, believing that he was merely to lay out the construction grid at the place selected by the plaintiff. R. 423-24. That grid, so far as he was concerned, had no bearing on the survey, although he did talk with Mr. Marshall as to how he had developed the location and inspected the stake labeled "N.W. property corner." R. 415-16.

When Mr. Thurgood discovered the error, he notified his superiors and notified the plaintiff. R. 418-19. Mr. Brown testified that he inspected the property about the first of September, 1973, R. 328-30, and noted what aspects of construction had been completed at that time. R. 333. He estimated that the total amount of concrete poured at that time was about thirty-eight cubic yards in the footings and about one hundred fifty-three yards in the slabs. R. 333. He also

observed that no electrical work and very little plumbing had been installed. R.337. Mr. Brown then developed two proposals for correcting the mislocation of the building. R.336. He estimated that the corrections would cost about three thousand dollars, R.340, and would take about ten days to complete. R.341.

Mr. Brown's suggestions and other suggestions for correcting the problem were presented to Mr. Price at a meeting on September 13, 1974. R.341. The original complaint in this matter, seeking $825,000.00 in damages, had been filed a few days earlier. R.436. Mr. Price did not give serious consideration to any of the defendant's proposals, but summarily dismissed each one. R.341-44, 437. JPA redesigned the building to shorten it by thirty feet, R.204, and sought to recover for the resulting loss of twenty one hundred square feet.

Substantial competent evidence was presented concerning the amount of parking required for the complex. Both Mr. Brown, who spent his full time as a consulting engineer for Orem City and was familiar with the ordinances relating to shopping center construction, R.349, and Mr. Deschamps, the planning director for Orem City during the relevant time period, R.389, testified that 596 parking spaces were required for the shopping complex as finally constructed.

R.360, 397. The number of parking spaces actually provided, however, was only 490. See also R.401.

The matter was submitted to the jury, which returned a verdict for the plaintiff and assessed the damages of thirty thousand dollars. R.101. The defendant moved for judgment N.O.V., or in the alternative for a remittitur or a new trial, R.126, and the court granted a new trial. R.140. The plaintiff then moved for reconsideration of the grant of a new trial, and the defendant moved to amend its answer. On May 15, 1981, the court granted the defendant's motion to amend, denied the plaintiff's motion to reconsider, and reaffirmed its grant of a new trial, stating as the basis therefor that "the damages were excessive" and that there was "no culpable negligence on the part of the engineers."

Prior to the second trial this defendant was allowed to file an amended answer wherein it denied any mis-staking and among other defenses alleged the failure to join real parties in interest.

The new trial was scheduled before Judge David Sam on March 1, 1983. On the suggestion of the defendant, the court ruled, sua sponte, that John Price Associates, Inc., was a necessary and indispensable party to the action. The court ordered that the plaintiff could amend its complaint within ten days, or the action would be dismissed. R.147-49. The plaintiff elected not to amend, and thereafter perfected its appeal. R.150.

A R G U M E N T

POINT I

SUBSTANTIAL COMPETENT EVIDENCE WAS PRESENTED WHICH WOULD SUPPORT A VERDICT FOR THE DEFENDANT; THE TRIAL COURT'S GRANT OF A NEW TRIAL SHOULD THEREFORE BE AFFIRMED.

After reviewing the trial transcript and two rounds of briefs submitted by the parties, and after hearing oral arguments on the matter, Judge Maurice Harding determined that the defendant's motion for a new trial should be granted. The reasons given were that the damages were excessive and that there was no culpable negligence on the part of the defendant. That decision should be upheld on appeal if the record contains "substantial competent evidence" which would support a verdict for the defendant. Nelson v. Trujillo, 657 P.2d 730 (Utah 1982).

"Substantial competent evidence" is of course not capable of precise definition. Dairyland Insurance Co. v. Holder, 641 P.2d 136 (Utah 1982), supports the inference that any admissible evidence greater than a mere scintilla constitutes substantial competent evidence. See also Helman v. Sacred Heart Hospital, 62 Wash. 2d 136, 381 P.2d 605, 612-13 (1963). In Utah State Road Commission v. Steele Ranch, 533 P.2d 888 (Utah 1975), the court defined "substantial evidence" as follows:

> In dealing with that problem, we recognize that neither the trial court, nor this reviewing court, should trespass upon the prerogative

> of the jury by applying a subjective measure of our own ideas of "reasonableness" and rejecting as not "substantial" any evidence which fails to meet that test. Allowance should be made for the fact that there is a comparatively wide orbit through which reasonable minds may swing; and that what may be considered reasonable in the broad sense need not necessarily fit into the exact pattern of our own thought. In the time honored and universally accepted rule that a finding or verdict must be supported by substantial evidence, the modifying adjective "substantial" has been used advisedly to indicate a higher degree of proof than just any evidence of any kind. The requirement is that the evidence must be sufficient in amount and credibility that, when considered in connection with the other evidence and circumstances shown in the case, would justify some, but not necessarily all, reasonable minds acting fairly thereon, to believe it to be the truth. And conversely, if when so considered, the court is convinced that it is so inconsequential, or so clearly lacking in credibility, that no jury acting fairly and reasonably could so believe, it cannot properly be regarded as substantial evidence.

533 P.2d at 890 (emphasis added, footnotes omitted).

The record in this case clearly contains substantial competent evidence which would justify a verdict for the defendant.

A. The Defendant Was Not Negligent. One of the bases for the trial court's ruling was that "there was no culpable negligence on the part of the engineers." The court's conclusion certainly finds substantial supporting competent evidence in the record; indeed, there is no substantial evidence to the contrary.

The plaintiff states on page 16 of its brief that "[t]he evidence is undisputed that the [northwest property corner] rebar and wooden stake were placed by the defendant," and that "[t]he evidence is likewise undisputed that the northwest property corner was marked about thirty feet south of the

point indicated by the survey." The plaintiff then argues that because the defendant in its original answer admitted making a mistake, the defendant is liable for any consequences of that mistake.

The defendant now denies having made a mistake. Assuming, arguendo, that a mistake was made, the plaintiff's contention might be valid if this were a contract case, and if the proper party were the plaintiff. The defendant might then be liable, even if not negligent, for breach of contract. The plaintiffs stoutly maintained, however, that its case sounded in tort, not contract (R. 192), and it was so treated by the trial court (R. 456). The plaintiff was, therefore, required to prove not just that the defendant made a mistake, but that the defendant was negligent, and that the negligence proximately caused injury to the plaintiff.

Mr. Thurgood, the engineer in charge of the survey crew which staked the building, testified that he, in conjunction with Mr. Marshall, the job superintendant for the plaintiff, selected a stake marked "N.W. Property Corner" as the starting point for staking the building. R.413-16, 428. Mr. Thurgood and Mr. Marshall selected that stake as a starting point because it had been set off and preserved by flagging. R.413. There were several other indications which led Mr. Thurgood to believe that he was working with the correct starting point, including the fact that the property corners as staked fitted neatly on top of the fill work which had already been completed by the contractor. R.421, 426.

Later events revealed that the starting point used was actually thirty feet south of the new northwest property

corner. R.418. The plaintiff claims that this thirty foot offset was a result of the defendant's negligence in failing to select the correct starting point. The plaintiff also apparently argues that the defendant was negligent at a much earlier stage, in doing the initial survey of the property and in placing the survey pegs relied upon by Mr. Thurgood. The fact is that the plaintiff had already used the erroneous stake for laying out the construction base and all the defendant was required to do by its purchase order was to stake the foundation dimensions. It was not employed to locate the foundation upon the plaintiff's property. R.256, ex. 7.

No expert testimony (or other evidence) was presented by the plaintiff concerning the standards of care applicable to the surveying and engineering professions. The standard of care required for a surveyor is not within the common knowledge of lay persons, and expert testimony on the subject was therefore necessary to establish a prima facie case of negligence. National Housing Industries, Inc. v. E.L. Jones Development Co., 118 Ariz. 374, 576 P.2d 1374 (Ct. App. 1978); Carter & Company, Inc. v. McGee, 213 So. 2d 89 (La. Ct. App. 1968). See also Marsh v. Pemberton, 10 Utah 2d 40, 347 P.2d 1108 (1959).

Mr. Thurgood, an expert witness qualified to testify on the subject, testified for the defendant that the procedures that he used to stake the building were correct (R.424), and that, if presented with the same situation again, he would perform the staking exactly as he did the first time. R.426.

With the exception of Mr. Price's argumentative outburst, that there was "no engineer in the world that would stake out a building without a survey" (R. 258), there was no evidence that the survey was not performed with due care in accordance with established surveying techniques, or that it was in any other respect negligently performed.

In addition, there was also evidence from which reasonable minds could have concluded that, arguendo, regardless of any alleged problems with the initial survey, the ultimate misstaking was the proximate result of the plaintiff's failure to preserve all the stakes from the initial survey, or that the plaintiff had itself mislocated its foundation or had consented and approved the use of the "incorrect" stake for that purpose. R.413-15, 418 (l. 22-24), 426. There was no evidence as to whether the stake marking the correct northwest property corner was still in existence at the time Mr. Thurgood performed the staking of the building grid. Mr. Thurgood testified he observed nothing in the area of the correct northwest corner. R.415.

Where the plaintiff presented no expert testimony as to the appropriate standard of care, and where there was substantial evidence from which a jury could have concluded that misstaking, if any, was not the defendant's fault, the trial court's grant of a new trial must be upheld.

B. The Plaintiff Failed To Mitigate Its Damages. The other ground given by the trial court for its grant of a new trial was that the damages were excessive. The jury awarded

damages of $30,000.00. The trial court apparently made this ruling either because it was convinced that the plaintiff had failed to mitigate its damages, or that the plaintiff simply did not suffer that great of damage. The latter issue will be addressed in subparagraph "C" of this Point.

The defendant presented evidence that, at the time the error was discovered, in July 1974, the costs of correcting the error would have been approximately $3,000.00, and that repairs would have taken approximately ten days to complete. R.340-41. This proposed repair essentially involved shifting the building about thirty feet to the north, removing some of the concrete which had been poured, and pouring an additional pad of concrete on the north end of the building. R.336. The testimony concerning the costs of repair was given by Mr. Brown, who was a consulting engineer and who regularly designed buildings and did cost estimates. R.315, 339.

This proposal, along with several others, was presented to Mr. Price, the principal of the plaintiff, on September 13, 1974. The plaintiff had commenced this action, seeking damages of $895,000.00, a few days earlier, on September 9. R.220, 328, 436. At the September 13 meeting, Mr. Price summarily dismissed each of the proposals of the defendant, R.437, 341-44, and proceeded at full steam to build the shopping center, making no other effort to mitigate the damages.

The plaintiff objected to the evidence concerning the cost of correcting the error at the time it was discovered, contending that the defendant had not pleaded the plaintiff's

failure to mitigate damages as an affirmative defense, and had therefore waived that defense. A similar issue was addressed by this court in Cheney v. Rucker, 14 Utah 2d 205, 381 P.2d 86 (1963). Justice Crockett, speaking for the court in that case, commented as follows:

> Plaintiff also raises the procedural point that since defendants did not plead the subsequent agreement as an affirmative defense, they should not have been permitted to rely thereon. It is true, as plaintiff insists, that Rule 8(c), U.R.C.P., requires that affirmative defenses be pleaded. It is a good rule whose purpose is to have the issues to be tried clearly framed. But it is not the only rule in the book of Rules of Civil Procedure. They must all be looked to in the light of their even more fundamental purpose of liberalizing both pleading and procedure to the end that parties are afforded the privilege of presenting whatever legitimate contentions they have pertaining to their dispute. What they are entitled to is notice of the issues raised and an opportunity to meet them. When this is accomplished, that is all that is required. Our rules provide for liberality to allow examination into and settlement of all issues bearing upon the controversy, but safeguard the rights of the other party to have a reasonable time to meet a new issue if he so requests. Rule 15(b), U.R.C.P., so states. It further allows for an amendment to conform to the proof after trial or even after judgment, and indicates that if the ends of justice so require, "failure so to amend does not affect the result of the trial of these issues." This idea is confirmed by Rule 54(c)(1), U.R.C.P.: "[E]very final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings."
>
> Although the plaintiff did object to evidence on the issue of subsequent agreement, when it was overruled, he made no request for a continuance nor did he make any representation to the court that he was taken by surprise or otherwise at a disadvantage in meeting that issue. The trial court not only did not abuse his discretion in allowing the issue to be raised and receiving the contract in evidence, but he would have failed the plain mandate of justice had he refused to do so.

381 P.2d at 91 (emphasis added, footnote omitted). See also Williams v. State Farm Insurance Co., 656 P.2d 966 (Utah 1982).

Rule 8(c) does not specifically list "failure to mitigate" as an affirmative defense, however, arguendo, even if such were the case, the plaintiff clearly was aware well in advance of the trial that the defendant intended to assert that defense. For example, in answers to interrogatories submitted to the plaintiff over three years before the trial, the defendant stated that it would call witnesses to testify that "the problem complained of by the plaintiff could have been eliminated with a moderate expenditure of time and money." R. 17-18.

With good reason, the plaintiff did not claim surprise or request a continuance as a result of the evidence concerning mitigation, but merely objected because of the procedural technicality. The court overruled the objection. "[Q]uestions of material and prejudicial variance between pleadings and proof, [citation], are peculiarly within the province of the trial court, and will be reversed only for an abuse of discretion." Williams v. State Farm Insurance Co., 656 P.2d 966, 973 (Utah 1982). There is no indication that the court abused its discretion in allowing proof of the plaintiff's failure to mitigate its damages.

The plaintiff had a duty to use reasonable care and diligence to avoid loss and to minimize its damages. Morrison v. Perry, 104 Utah 151, 140 P.2d 772, 780 (1943). Competent evidence established that the officers and employees of the defendant, consulting engineers who were experienced in

designing such buildings and in estimating the construction costs, R.339, presented several possible means of curing the problem to Mr. Price. Mr. Price summarily dismissed each suggestion. R.437, 341-44.

The defendant readily acknowledges that the plaintiff was not required to enter into other risky contracts, incur unreasonable inconvenience or expense, disorganize its business, or incur other serious harm in the attempt to avoid harm. (Plaintiff's brief at 19.) The plaintiff was required, however, to take reasonable steps, in accordance with the rules of common sense and fair dealing, and to incur necessary trifling expenses, to mitigate the damages. Jankle v. Texas Co., 88 Utah 325, 54 P.2d 425, 428 (1936). "The word 'trifling' in this connection has reference to the situation of the parties. It means a sum which is trifling in comparison with the consequential damages which the plaintiff is seeking to recover in the particular case." 22 Am. Jur. 2d Damages § 32 (1965).

The test, again, on appeal, is not whether there was evidence from which a jury could have concluded that the plaintiff acted reasonably in rejecting the defendant's suggestions for repair, but rather whether there was substantial competent evidence from which a jury could have determined that the plaintiff acted unreasonably in summarily dismissing all suggestions as to how it might mitigate its damages. Nelson v. Trujillo, 657 P.2d 730 (Utah 1982).

Reasonable jurors could have concluded, based on the

evidence presented, and Mr. Price did not act reasonably, did not use common sense, and did not act fairly in summarily and without serious consideration rejecting each of the defendant's proposals for repair. There were no time commitments with respect to the area of the building from which the space was lost. R.250. The jurors could therefore have also concluded that an extra expense of ten days and $3,000.00 would be a trifling expense when compared with damages which were claimed at the time to be $825,000.00, R.436, and which were later claimed to be at least $83,000.00, R.11. Jurors could have concluded that it was not reasonable for Mr. Price to not even ask his architect to redesign the project to include the lost space. R.234-35, 250, 277-78. The trial judge, who heard all the evidence, determined that a new trial should be granted, and his decision should be affirmed.

C. The Plaintiff Suffered No Damages. Substantial competent evidence was presented at trial that the shopping center as finally constructed, was in violation of Orem City Ordinances, in that it had too few parking spaces for the amount of retail and restaurant space. Although the plaintiff argued that it had been deprived of an additional 2100 square feet of floor space, construction of the additional space would have been illegal.

It is well-established that an award of damages based on violation of the law is against public policy. There are numerous occasions in which courts have had an opportunity to deal with an illegal use. One such area is that of eminent

domain. It is well-established that any evidence relating to an unlawful use of the property when condemnation proceedings are instituted is not admissible to prove the value of the land. 4 Nicholas on Eminent Domain § 12.3143 (3d ed. 1981). As stated by the Arizona Supreme Court in Gear v. City of Phoenix, 93 Ariz. 260, 379 P.2d 972 (1972):

> If the ordinances are a reasonable exercise of the City's police power . . ., . . . the availability of land for a use which is prohibited by law cannot be considered in determining its value in eminent domain proceedings.

379 P.2d at 974 (citations omitted).

In this case, the ordinances of Orem City were established and the agents and employees of Orem City testified to their implementation. In tort, the plaintiff is prohibited from putting on evidence of damages which result from activities or situations prohibited by statutes or ordinances. Further, illegal contracts cannot be enforced nor can damages be awarded based upon the implementation or performance which results from the contract. 17 Am. Jur. 2d Contracts § 155-73 (1964).

The plaintiff attempted to prove damages by establishing the value of an imaginary 2100 square feet of retail space which was not constructed and which, if constructed, would be a patent violation of the Orem City Ordinances. It is clear that the plaintiff in fact suffered no damage in the eyes of the law. The trial court was therefore correct in stating that the damages awarded were excessive, and in ordering a new trial.

POINT II

JOHN PRICE ASSOCIATES, INC., WAS AN INDISPENSABLE PARTY AND THE TRIAL COURT'S DECISION

TO DISMISS THE ACTION UPON PLAINTIFF'S ELECTION NOT TO AMEND ITS COMPLAINT WAS PROPER.

To the extent that plaintiff's claim against defendant sounds in contract, John Price Associates, Inc., (JPA) is a necessary and indispensable party, and the trial court was proper in dismissing the action for plaintiff's failure to join JPA.

It is undisputed that the only binding contract involving the defendant was a purchase order issued by JPA requiring defendant "to stake building layout with twenty five (25) foot offsets, stake parking lot and rain water sump. Not to exceed $330.00. Stake curb and gutter not to exceed $270.00. R.256, 209-11. Defendant did not enter into any contract with plaintiff and was under no contractual duty to plaintiff to perform the survey. On the basis of these facts, there is simply no privity of contract between plaintiff and defendant, and there is no way plaintiff can sue on a contract theory without bringing in JPA.

Rule 17(a) of the Utah Rules of Civil Procedure requires every action to be prosecuted "in the name of the real party in interest." The real party in interest is the party who has the right to sue under the substantive law applicable to the case. John Price Associates and the defendant, Rollins, Brown, & Gunnell, were the only parties that had privity of contract; therefore, the plaintiff, Price-Orem Investment Company, is not the real party in interest and it does not have standing to bring this action against the defendant.

The very foundations of contract law prevent one who is

not a party to a contract from maintaining a suit on it unless the contract expressly provides that it is for the benefit of a third party. This fundamental rule is recognized in Staley v. New, 56 N.M. 756, 250 P.2d 893 (1952), wherein the court held that in absence of a contractual relation between the owners of a home and the architect who drew up plans and specifications for a heating system, the owners could not sue the architect for breach of contract or warranty when the system failed to heat the house adequately. See also Ekstrom United Supply Co. v. Ash Grove Lime & Portland Cement Co., 194 Kan. 634, 400 P.2d 707 (1965) (there is no privity of contract between a subcontractor and an owner); Watson v. Aced, 156 Cal. App. 2d 87, 319 P.2d 83 (1957) (the general rule is that one may not sue upon contract unless he is party to that contract).

In its brief, plaintiff claims that a contract existed between plaintiff and defendant on the grounds that defendant admitted this fact in its pleadings. This allegation, however, fails to recognize that following the District Court's grant of a new trial, the court granted defendant's motion to amend its answer. In the amended answer, the defendant set forth as its sixth affirmative defense the fact that the plaintiff is not the real party in interest. This pleading denies the existence of a contract between plaintiff and defendant. Furthermore, substantial evidence was presented and accepted by the court at the first trial establishing that defendant's obligation to survey the property was with JPA and no one else. R. 209-11. Plaintiff did not object

to this line of questioning, and, therefore, is precluded now from raising that issue on appeal.

As the real party in interest, JPA is a necessary and indispensable party under Rule 19 of the Utah Rules of Civil Procedure:

> (a) Necessary Joinder. Subject to the provisions of Rule 23 and 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 as 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.

Plaintiff argues that because JPA was not damaged it had no interest with plaintiff and, therefore, is not an indispensable or necessary party. This construction of the "joint interest" requirement, however, is far too narrow and should not be applied. Incurring damage is certainly not the only thing that creates a joint interst. Obviously, if JPA is the one that contracted with defendant to do the surveying and the contract was not performed according to its terms, JPA has an interest in enforcing its contract rights. Furthermore, the federal rules, which merely incorporate the case decisions reached at common law, further support the position that inasmuch as the plaintiff is suing on contract, JPA is an "indispensable or necessary" party. Rule 19(a) of the Federal Rules of Civil Procedure states that a party shall be joined in an action if:

> (1) in his absence complete relief cannot be accorded among those already parties, or
> (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may

> (i) as a practical matter impair or impede his ability to protect that interest, or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest.

Under the common law, therefore, as reflected in the federal rules, complete relief cannot be accorded Price-Orem Investment, since it had no privity of contract with Rollins, Brown & Gunnel, and its only course of action would be against John Price Associates, Inc. The continuation of the suit without John Price Associates would also leave Rollins, Brown & Gunnell subject to a substantial risk of incurring a double or inconsistent obligation because of the possibility of an action on its contract with John Price Associates.

As an alternative basis for liability, plaintiff contends that even in the absence of a contract between it and the defendant, it may nevertheless recover for negligence. To the extent, however, that the defendant's cause of action sounds in tort, it must fail for lack of duty.

It is axiomatic that "[a] finding of negligence requires the presence of certain elements, one of which is a duty running between the parties." Hughes v. Housley, 599 P.2d 1250, 1253 (Utah 1979).

In Bushnell v. Sillitoe, 550 P.2d 1284 (Utah 1976), which involved a surveying error similar to that in the instant case, property owners brought an action against the encroaching property owner, the title company, which had also constructed the offending home, and the engineering firm responsible for surveying the property. The surveyor had negligently located the

property boundary, and as a result, the defendants' home encroached nine feet four inches (9'4") into the plaintiffs' land. The Bushnell court held that the surveyor "owed no duty to the adjoining landowners" because the surveyors' duty "arose out of a contract to survey the premises." 550 P.2d at 1285. Due to the procedural posture of the case, the court was not presented with the issue which is critical in the instant case, that of whether the surveyor owed a duty of care to the landowner. On that issue, the court simply stated that "[t]his 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." 550 P.2d at 1286.

The defendant submits that, particularly under the facts of this case, privity of contract is necessary in order to find a duty owed by the defendant in performing the survey. If a contractual relationship did not exist between the defendant and the plaintiff, Price-Orem Investment Company, no duty existed on the part of Rollins, Brown, & Gunnell toward Price-Orem Investment, and a cause of action of negligence will not lie.

In its brief, plaintiff cites a Utah case and a California case to support his contention that defendant, a surveyor, owed a duty to plaintiff, owner of the land. As set forth below, a review of these cases reveals that they are distinguishable and the fact that a duty was found in those cases does not compel a finding of duty in the case at bar.

Even though the court in Bushnell, supra, expressly left open the question of duty between a surveyor and a party not in privity of contract, plaintiff relies on this case as authority by claiming that the court in its opinion adopted Restatement of Torts, 2d § 552, which reads as follows:

> 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.

550 P.2d at 1286 4.

From the above-cited language, it is clear that the touchstone of this rule is reliance. One who supplies information is liable only if another relies on the information and is harmed as a result of that reliance. Thus, it appears that in this narrow context where one supplying information may have a duty to one not in privity, reliance on the information is a prerequisite to the existence of that duty. This construction is supported not only by the above-cited Restatement rule, but also by the cases cited in plaintiff's brief.

In Milliner v. Elmer Fox and Co., 529 P.2d 806 (Utah 1974), the court denied recovery to plaintiff purchasers of stock as being part of an unlimited class, and stressed the

element of reliance in formulating its holding:

> 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.

592 P.2d at 808 (emphasis added). Thus, it is evident that the court was willing to waive the privity requirement, but only to the extent of allowing recovery by those that the accountant knew would rely on his information.

The same element of reliance is present in Kent v. Bartlett, 49 Cal. App. 3d 724, 122 Cal. Rptr. 615 (1975), and Rozny v. Marnul, 43 Ill. 2d 54, 250 N.E.2d 656 (1969), which the plaintiff also cites. In both these cases, as in the instant case, the landowners brought actions against the surveyors for damages resulting from faulty surveys. However, the courts held that the defendants owed a duty to the plaintiffs even though no privity was present only because the plaintiffs had purchased their property in reliance on the faulty surveys.

By contrast, the plaintiff in the instant case was not harmed as a result of reliance on defendant's survey, because the plaintiff did not rely on the survey. Indeed, it had no cause to rely. Furthermore, although there is conflicting evidence, it was established at trial that the plaintiff knew about the mistake in the survey before any substantial action was taken. It is submitted, therefore, that the lack of reliance on plaintiff's part prevents these cases from controlling the instant action. This is not a case of a third party not in privity taking some detrimental action in ignorant reliance

on defendant's survey. Plaintiff chose its course of action with full knowledge of the error in the location of the building. In contrast to the plaintiffs in Kent who purchased land relying on the validity of the survey, the plaintiff in this case was already the owner of the land. If anyone relied on this survey, it was John Price Associates, Inc., which ordered the survey and for whose guidance the survey was made.

If the court follows the elements of Restatement (Second) of Torts § 552, even if all of the other elements of the rule are satisfied, the plaintiff cannot in good faith claim that it relied on this survey in taking any action and, therefore, the defendant was not under any duty to the plaintiff. While this Court may at some future time extend the duty of surveyors to those who justifiably rely on their professional judgment, it would be manifestly unjust to find such a duty absent reliance. To do so would be to distort the same rule to achieve two anomalous results; namely, denying recovery to purchasers of stock who innocently relied on the information of an accountant, Milliner, supra, while permitting recovery by a landowner who exercised no reliance. Such a result would be manifestly unjust and inconsistent and the defendant respectfully requests that the Court reject the specious argument in this case.

Another real mischief of the plaintiff's failure to join John Price Associates is that it, by procrastination or design,

allowed the case to set dormant for more than five years before being activated over the defendant's motion to dismiss for failure to prosecute. By that time the pleadings had become stale, and the defendant had been led to believe that the plaintiff was not sincere in its claim. After five years the defendant could not then raise its defenses or third-party complaints against John Price Associates, Inc. Certainly if the plaintiff's claim is founded in tort, it would be reasonable to compare the negligence of JPA, which is another good reason for finding JPA a necessary and indispensable party.

CONCLUSION

The trial court's grant of a new trial should be upheld, as there was substantial competent evidence which would support a judgment for the defendant. No expert or other evidence was presented to show that the defendant was negligent, and, in fact, the evidence established that the defendant performed the staking and survey in accordance with the standards in the industry. Substantial evidence showed that the plaintiff could have cured the problem with a very minimal expenditure of time and money, but that the plaintiff failed to mitigate its damages. Finally, there was substantial competent evidence that the plaintiff suffered no damage, as the plaintiff did not have adequate parking for the structures which were built, and any additional space would have been in violation of the applicable zoning ordinances.

The trial court's order of dismissal for failure to join an indispensable party was also correct. John Price Associates, Inc., was the only party with whom the defendant had contracted, and to whom the defendant owed a duty. The defendant owed no duty to the plaintiff, and the plaintiff did not reasonably rely on the work performed by the defendant.

The respondent-defendant therefore respectfully submits that the trial court's judgment should be affirmed in all respects.

DATED this 31st day of October, 1983.

Jackson Howard

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MAILING CERTIFICATE

I hereby certify that I mailed two (2) true copies of the foregoing brief to Mr. George A. Hunt and Mr. Bryce D. Panzer, Attorneys for Plaintiff-Appellant, 10 Exchange Place, 11th Floor, P.O. Box 3000, Salt Lake City, Utah 84110; postage prepaid, this 3rd day of October, 1983.

Leslie Slaugh