1984

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

IN THE SUPREME COURT OF THE STATE OF UTAH

PRICE-OREM INVESTMENT COMPANY,
a limited partnership,

Plaintiff-Appellant,

vs.

No. 19096

ROLLINS, BROWN & GUNNELL, INC.,

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 REPLY BRIEF

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STATEMENT OF FACTS

Several of respondent's statements of fact find no support in the record. First, the record does not support respondent's assertion that Mr. Marshall, the job superintendent for John Price Associates, selected the starting point of respondent's staking of the corners of the Skaggs' building. Respondent's brief at 3, 11. In fact, David Thurgood, the witness relied upon by respondent to establish this point, stated that Mr. Marshall did not point out the stake as being the correct stake.

Q. Mr. Marshall didn't go out there and say this stake is the northwest property corner and used to stake the building, did he?

A. I don't have any recollection he said that, no.

Q. You assumed that the flagged rebar was the property corner, didn't you?

A. Yes.

R. 423-24.

The record also fails to support respondent's assertion that appellant acquired additional property (due to a discrepancy between the fence line and title line) after Rollins, Brown & Gunnell staked the property corners and, therefore, the survey was no longer correct. Respondent's brief at 4. The testimony cited by respondent as supporting this assertion does not do so. In fact, Russell Brown testified that property corners had been staked for both the fence line and title line descriptions. R. 380. Mr. Brown further testified that he was aware of the difference between the two stakes and that the field notes of the survey reflected which stake marked the fence line and which stake marked the property line. R. 380. In short, the respondent's assertion that property was acquired north of the fence line after the survey was conducted, creating a new northwest property corner, is contrary to the testimony of Mr. Brown and is not supported by the record.

Finally, the record does not support respondent's contention that it was not hired to locate the foundation for the Skaggs building on appellant's property. Respondent's brief at 10. The evidence is undisputed that Rollins, Brown & Gunnell was hired to stake the property corners of appellant's property. Respondent did so, marking the property corners with 1-inch diameter rebars. R. 429. Pltf. Ex. 4. Mr. Thurgood testified that the corner he used as a starting point to lay out the building was marked with a 1-inch diameter rebar and a 1-inch by 2-inch wooden stake. "N.W. property corner" was written on the wooden stake, indicating that the rebar marked the northwest property corner. R. 428. Mr. Thurgood also stated that the wooden stake and rebar would have been placed by "representatives of persons that performed the survey of Rollins, Brown & Gunnell . . ." R. 431.

When respondent returned in 1974 to stake the corners of the Skaggs building, it used the northwest corner that it had previously staked as a starting point. R. 412-13. Unfortunately, the northwest corner had been staked 30 feet south of the point shown on the site plan, resulting in defendant locating the Skaggs building 30 feet south of its intended location.

ARGUMENT

POINT I

THE TRIAL COURT ERRED IN GRANTING RESPONDENT A NEW TRIAL.

The parties apparently agree that the district court's order granting a new trial should be affirmed if the record contains substantial competent evidence which would support a verdict for respondent. However, the parties disagree on whether the record contains such substantial competent evidence.

At the time this matter was tried, the pleadings established that Rollins, Brown & Gunnell erred in staking the northwest corner of appellant's property when it performed the survey in 1973. While respondent "now denies having made a mistake" [Respondent's brief at 9], the mistake was admitted at trial. Respondent now contends that admission of the mistake does not necessarily admit negligence. Instead, respondent argues that Mr. Marshall, the job superintendent, assisted Mr. Thurgood in selecting the stake to be used as a starting point. As indicated above, this argument has no basis in the record. In fact, Mr. Thurgood stated that Mr. Marshall did not select the stake as a starting point. R. 423-24. In any event, the stake was placed and marked as the "N.W. property corner" by respondent. It is this initial

mistake in surveying the property and marking the corners that caused the erroneous staking of the Skaggs building.

Respondent also contends that there was no expert testimony on the standard of care applicable to the surveying and engineering professions and, therefore, appellant failed to establish prima facia case of negligence. By admitting the mistake in the answer, the elements of duty and breach in the negligence case were no longer at issue. All that remained were the issues of proximate cause and damage. Were respondent's argument to be accepted, the trial court would have granted its motion to dismiss at the close of appellant's evidence. This was not done, the motion was denied.

Respondent fails to note that the survey was certified as being accurate by its agent, Carr Greer. R. 317. In addition, expert testimony is not necessary in this sort of case. By analogy, a surgeon's negligence in leaving a sponge in a patient may be established without expert testimony. If the act is clearly negligent, no expert testimony is necessary to establish the standard of care. See Nauman v. Harold K. Beecher & Associates, 467 P.2d 610 (Utah 1970). No expert testimony is necessary to establish that a surveyor has failed to exercise ordinary care when he erroneously stakes a boundary corner by thirty feet, especially when the survey is certified as being accurate. The idea behind this notion is

that, in some cases, the mistake is so obvious that even a layman can recognize the error. Such is the case here.

In any event, the record contains expert testimony demonstrating the standard of care required and breach of that standard by respondent. For example, Russell Brown testified that two sets of property corners were staked, indicating the fence line and title line. The survey field notes reflected which stake was a fence line and which stake was a property line. R. 380. Unfortunately, the field notes differ from reality, since Mr. Thurgood testified that the northwest property corner was located south of where it should have been.

John Price, who holds an engineering degree and has extensive experience in construction, testified, "There is no engineer in the world that would stake out a building without a survey." R. 238, 258. However, David Thurgood did not have a copy of the survey with him at the time the Skaggs building corners were staked. R. 418. The evidence developed at trial, from both parties' witnesses, demonstrated that it was not the custom and practice in the surveying profession to erroneously stake a boundary corner or to stake a building 30 feet south of where it was shown on the site plan. Moreover, respondent admitted, at trial and in its pleadings, that it erroneously staked the boundary corner of

appellant's property. It was this act of negligence which resulted in damages. In short, there is no substantial competent evidence in the record which would support a verdict for respondent on the issue of negligence.

Respondent also argues that appellant failed to act reasonably to mitigate its damages. First, as noted in Appellant's Brief, respondent failed to plead this issue and mitigation was not properly before the trial court. This court held in Pratt v. Board of Education of Uintah County School District, 564 P.2d 294 (Utah 1977), that a party must plead the affirmative defense of failure to mitigate damages or be barred from litigating the issue at trial. An answer to an interrogatory does not sufficiently raise the issue to permit the rule requiring pleading to be ignored.

Secondly, appellant acted reasonably as a matter of law. Although respondent suggests that the jury reasonably could have concluded that Price acted summarily in rejecting the alternatives offered by respondent, it is clear that appellant would have incurred substantial inconvenience and risk by attempting to remedy the damage in the fashion suggested. For example, a delay of 10 days, the time estimated by Russell Brown to correct the problem (assuming that a con- tractor, the equipment and the personnel were immediately available), would have cost appellant one-half of

its loan commitment fee, or $19,000. If Mr. Brown was mistaken and the repairs actually took over 30 days, appellant would have lost an additional $19,000. As a matter of law, appellant was not required to assume these risks, simply to attempt to minimize the damages caused by respondent's negligence.

In addition, there was substantial disagreement between the parties as to the costs of repairing the damage and moving the Skaggs building 30 feet to the north. The issue is whether appellant acted reasonably at the time action was required. The information available to appellant indicated that it would cost approximately $100,000 to repair the damage. There was no evidence that this estimate was unreasonable or was arrived at in an unreasonable manner. Thus, appellant acted reasonably given the information available to it at the time action was required.

Respondent also contends appellant suffered no damages, since there is insufficient parking to permit the construction of an additional 2,100 square feet of shop space at the shopping center. First, there is no substantial competent evidence to support this allegation. Randall Deschamps, the Orem City Planning Director from 1972 to 1978, testified that the parking requirements for a shopping center vary with the use to which the property is put. R. 402-03. On this issue, Russell Brown testified as follows:

Q. So depending on the use to which the space in the center is being put at a given point in time, it may have sufficient parking at one point in time and yet insufficient parking at another point in time, depending upon the particular use that is being made of the space at that time, isn't that correct?

A. I suppose that would be right, yes.

Q. In other words, if the whole thing was one big restaurant it would require significantly more parking than if it's one big Skaggs store, isn't that correct.

A. That is true.

R. 364. Respondent's evidence merely indicates that as of the time its witnesses examined the shopping center, in 1980, there was insufficient parking for the current use of the buildings. There is no substantial competent evidence demonstrating that an additional 2,100 square feet in shop space could not be built (if current usage was altered) and could not have been built in 1974.

Secondly, the issue of parking availability is irrelevant since appellant's damages were fixed as of the date of the injury, i.e., 1974. The evidence is undisputed that there was sufficient parking at the shopping center in 1974 to construct the shopping center as planned and, in fact, building permits were issued for all of the buildings on the site plan. R. 397-98.

There was no substantial competent evidence to support a verdict for respondent on either the issue of liability or damages; consequently, the district court erred in granting respondent a new trial. This court should reverse the order granting a new trial and remand with instructions to reinstate the jury verdict for appellant, or, in the alternative, 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.

John Price Associates, Inc. ("JPA") was the contractor on the construction project. JPA issued the purchase order pursuant to which Rollins, Brown & Gunnell staked the Skaggs building. Prior to the second trial of this matter, the district court held, sua sponte, that JPA was a necessary and indispensable party to the action, apparently because of its contractual relationship with respondent. This ruling was erroneous since appellant may maintain a negligence action against the respondent, and such was the nature of the Complaint in this matter.

In order for a duty to arise between respondent and appellant, it must be reasonably foreseeable that appellant may be injured as a result of respondent's negligence. The rule set forth in Restatement of Torts, § 552, is merely a

species of foreseeability. In order to impose liability for damages, Section 552 requires: (1) that the actor fail to exercise that care and competence in obtaining and communicating the information which its recipient is justified in expecting, and (2) that the harm be suffered by a person for whose guidance the information was supplied and as a result of his justifiable reliance upon the information. The second prong of this test is merely a requirement that the injury be foreseeable.

In the instant matter, the injury to Price-Orem Investment is reasonably foreseeable. Respondent incorrectly surveyed and staked the corners of appellant's property. Respondent later staked the building corners of the shopping center, using the incorrect boundary corner as a starting point. Certainly it is foreseeable that the owner of the property, the entity for whose benefit the building is being built, will be injured by the surveyor's negligence.

A rule requiring an owner to sue its contractor, who in turn may sue the surveyor, creates an unnecessary complexity. The damage to appellant was reasonably foreseeable and, therefore, respondent owed a duty to refrain from negligent acts. The court's order dismissing the complaint for failure to join JPA was in error and should be reversed.

CONCLUSION

There was no substantial competent evidence to support a verdict for respondent; consequently, the trial court erred in granting a new trial. The district court also erred in ruling that JPA was a necessary and indispensable party. This court should reverse the orders of the district court and remand with instructions to reinstate the jury verdict, or, in the alternative, remand for a new trial on damages only, or, in the further alternative, remand for a new trial.

DATED this 4th day of November, 1983.

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CERTIFICATE OF SERVICE

I hereby certify certify that on the 4th day of November, 1983, I serve two true and correct copies of Appellant's Reply 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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