

1969

Leo R. Casey v. Nelson Brothers Construction Company : Brief of Defendant and Appellant In Support Of Its Petition For Rehearing

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IN THE SUPREME COURT
OF THE STATE OF UTAH

LEO R. CASEY,)

)
)
Plaintiff-Respondent,)
and Cross-Appellant,)

vs.)

) Case No.

) 11721

NELSON BROTHERS)
CONSTRUCTION COMPANY,)

)
)
Defendant and Appellant.)

BRIEF OF DEFENDANT AND APPELLANT IN
SUPPORT OF ITS PETITION FOR REHEARING.

Appeal from the Judgment of Third District Court
for Salt Lake County.
Honorable Marcellus K. Snow, Judge

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Appellant

IN THE SUPREME COURT
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LEO R. CASEY,)
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Plaintiff and Respondent,)
)
vs.) Case No.
) 11721
NELSON BROTHERS)
CONSTRUCTION COMPANY,)
)
Defendant and Appellant.)

PETITION FOR REHEARING

NELSON BROTHERS CONSTRUCTION

COMPANY, defendant-appellant and cross-respondent,
petitions the court for rehearing of its appeal.

This petition is based upon the ground that
the court erred in finding that the defendant ordered
the road grader off the job, and by implication that
plaintiff could keep in unavailable for defendant's
use and charge it for rent for the entire period.

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Salt Lake City, Utah 84111

LEO R. CASEY,

Plaintiff-Respondent
and Cross-Appellant,

vs.

Case No.
11721

NELSON BROTHERS
CONSTRUCTION COMPANY,

Defendant and Appellant.

BRIEF OF DEFENDANT AND APPELLANT IN
SUPPORT OF ITS PETITION FOR REHEARING.

PRELIMINARY STATEMENT

Defendant-Appellant bases its appeal on the fact revealed by the record that Defendant-Appellant did not order the motor grader off the job and, therefore, the plaintiff was required to have the grader available for defendant-appellant's use for a reasonable time. The cases cited in briefs previously filed support this contention and only the facts are argued here.

ARGUMENT

A conversation between plaintiff, Leo R. Casey, his father, Robert Casey and Orin Nelson, vice-president of defendant prior to removing the motor grader was heated (R168 Line 25).

Plaintiff testified that Orin Nelson, officer of defendant referring to plaintiff's motor grader said, "You can get this grader the hell off the job." (R90 Line 7, 8) The quoted statement tends to substantiate that the conversation was heated.

Robert Casey, the plaintiff's father in telling of the same incident, testified, "He (Orin Nelson) said, 'We could get the patrol (grader) the hell out of there', that's the words he said." Thus appears clear in this heated conversation that defendant through its officer, Orin Nelson, did not order the removal of the motor grader but authorized the removal, and plaintiff then had it removed. This despite his protestations that he was ordered to remove it from the job.

The plaintiff was difficult to contact, and denied receiving a letter from defendant dated

December 17, 1966 to the plaintiff addressed to Zia Motel, Gallup, New Mexico, (R177 lines 20-30) where he admitted he was residing at that time (R108 lines 16-25). Thereafter, it was impossible to locate the plaintiff.

The defendant sent a copy of a letter dated January 2, 1967 addressed to the plaintiff at Zia Motel, Gallup, New Mexico, and this letter was returned marked, "Moved, left no address," and then in handwriting the words, "Not Here." (R179, lines 7-11) There was no place defendant could contact the plaintiff in order to use the motor grader. The defendant's letter addressed to plaintiff at the only possible known address, as returned with the stamp, "Moved, left no address."

After removal of the motor grader, there was no time, however short, that it was available for defendant's use. The defendant had no opportunity to use it and no way of knowing where the plaintiff was located so his permission could be obtained.

It thus appears that the plaintiff, despite his protestation that he was ordered to remove the motor grader (patrol) was, in anger, only authorized to remove it, and plaintiff did remove it taking it to an unknown and unannounced destination without ever informing the defendant of the location of the motor grader, and that the plaintiff by his own actions had made himself unavailable by moving and leaving no forwarding address, and that he could not be reached.

This action by the plaintiff as stated in defendant-appellant's original brief was, "Wholly inconsistent with the existence of the contract". Defendant is entitled to a judgment reversing that portion of the judgment of the District Court based on damages in the amount of \$6,123.00 "for defendant's breach of rental agreement on motor grader".

Respectfully submitted,

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