

1967

## Richard Nolan Jardine v. Brunswick Corporation : Petition For Re-Hearing

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### Recommended Citation

Petition for Rehearing, *Jardine v. Brunswick Corp.*, No. 10631 (1967).  
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IN THE SUPREME COURT  
OF THE STATE OF UTAH

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RICHARD NOLAN JARDINE,

Plaintiff-Respondent,

vs.

Case No.  
10821

BRUNSWICK CORPORATION,

Defendant-Appellant,

---

PETITION FOR RE-HEARING

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FILED  
MAR 10 1954

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The opinion of the Court purportedly states the facts briefly, then states that the propositions of law advocated by the plaintiff and adopted by the trial court are sound and comments that the plaintiff's facts do not live up to his legal propositions.

The opinion then states:

"Taking the evidence in the light most favorable to plaintiff's position, as we are obliged to do on this review, there are certain aspects of the situation thus presented which indicate

persuasively that it does not meet the requirement of the doctrine just set forth."

Plaintiff respectfully suggests that the Court's resume' of facts does not take "The evidence in the light most favorable to plaintiff's position" but ignores some of the plaintiff's evidence, makes some statements which are contrary to the record, and does not resolve any of the factual propositions where there is evidence on both sides in favor of the plaintiff.

Begging the Court's indulgence, we suggest that some of the statements in several of the paragraphs, starting with the second paragraph of the opinion, be analyzed and re-considered in the light of the evidence.

The second paragraph states that plaintiff had been "a successful business man in the State of Washington." It is true that he had operated a saw mill in Washington and made a little money, but the real success he had was his good fortune in

buying some land at Moses Lake, Washington before it had water on it, holding it until the water came, and then selling out for what he described as "quite a lot of money" (R. 122). Purely fortuitous!

The next sentence states that plaintiff had "operated variously a cafe, barber shop, grocery store" etc. His testimony was that he built the cafe, barber shop and grocery store (R. 122) but no testimony that he operated them and he testified that he built them at a total cost of \$27,000.00 R. 183). The paragraph suggests that he sold out and retired in 1959 because his wife passed away (R. 187) but his testimony was that he contracted asthma and became too ill to carry on his work and was compelled to become a farmer (R. 122, 123 and 125) and it was this illness which made him rather slow witted and dulled his intellect, as he frankly testified in the case (R. 123, 145). In this

paragraph the Court states that a plan was devised under which "Brunswick would help Jardine find someone." The record discloses that this was not Brunswick's proposal but that Brunswick told plaintiff that it was no problem to find a builder and that Brunswick said there were several contractors available to finance and build the building for plaintiff (R. 129-130). This is a rather fundamental distinction. If Brunswick had simply offered to give assistance to the plaintiff, it would be reasonable to say that the plaintiff should have looked out for himself. But, Brunswick took him over when he called on them and demonstrated to the plaintiff that their end of the job would be to find the person to build the building and the plaintiff's only problem was to learn the business and finance the bowling equipment (R. 131). The opinion then states that "Brunswick's interest was in getting customers to sell its equipment." But actually,

according to the record, their man Dinius was their real estate man and had no other duties than that of finding locations, and arranging builders to provide bowling establishments (R. 128, 130, 137). He continued in this until after August, 1962 (R. 262).

The next paragraph of the opinion refers to "the first builder-financier recommended by Brunswick" which is most unfair to the plaintiff's evidence. The plaintiff didn't even meet Dr. King until after he was told by the Brunswick people that Dr. King would build his building (R. 131). Plaintiff had gone to Chicago to take the special school for bowling managers upon the assurance of Brunswick that the building would be under way when he got back and only then did he learn that Dr. King was not going to go forward (R. 131). Brunswick undertook the entire responsibility for setting up this plan.

Likewise, it is unfair to the plaintiff to say that "defendant Brunswick arranged

for a meeting between Jardine and Jack Charlesworth" whom the plaintiff had barely met, could have known nothing about and was compelled to accept implicitly and finally upon the representations and urging of the Brunswick people who spoke of him as though they knew all about him (R. 133-134).

That third paragraph states that the building site recommended by Brunswick "was rejected by Jardine" but a perusal of the evidence discloses that Jardine made no such decision and carefully presented the matter to Messrs. Tracy and Dinius who approved the change for reasons which appealed to the plaintiff (R. 137 and 139).

The fourth paragraph states that Charlesworth "was purportedly relying on money coming from a housing project." This is only partially true. This fact was of no significance to the plaintiff. He relied on Brunswick's recommendations (R. 148, 157, 219, 220, 232, 235). The plaintiff positively testified that Charlesworth's



housing project was of no interest to him (R. 210, 211) because Brunswick had told him that Charlesworth was able to build the building (R. 209) and he also testified that he understood that Charlesworth would have to obtain mortgage money (R. 209, 215). The thing that collapsed Charlesworth's project was his inability to obtain mortgage money, which would have been easy had he been the man Brunswick represented him to be. Brunswick's attitude toward Charlesworth and confidence in him is displayed by the statements of Tracy and Dinius that if Charlesworth were unable to obtain money on his own, they would help him with his financing (R. 269). And also that Brunswick planned to finance Charlesworth after this building (R. 232). This is significant in that it shows the implicit confidence Brunswick had or pretended to have in Charlesworth. They represented themselves as being acquainted

with him, (R. 122) having done business with him, (R. 252, 272) whereas in truth and in fact when Charlesworth had written to them in the preceding November he had explained that he would need financial help (R. 292).

It is important also that although the Court states in its penultimate paragraph on page 3 that Jardine relied on income from Hill Field, Mrs. Ida Young testified that the meeting where Hill Field was discussed took place after the \$9,000.00 was advanced in reliance on Brunswick's representations (R. 272). Jardine testified that his real reliance in advancing the money was on Brunswick, its reputation, and its backing of Charlesworth. If the evidence is to be taken most favorably to plaintiff, this testimony of plaintiff and the testimony of Ida Young should have been accepted by this Court as it was by the trial court.

The fourth paragraph then states that Charlesworth met with Jardine and Brunswick to discuss the problem of down payment and

purchase of the land. This again is unfair to the plaintiff who testified, as did Charlesworth, (R. 146 and 294) that Charlesworth met with Dinius and discussed the problem, Dinius disclosed the existence of some money which Jardine was holding for the purchase of equipment and it was Dinius and Charlesworth who decided to make a try for some of this money. They set up the appointment (R. 146) and came to the meeting together (R. 147 and 294) and jointly presented the plan which had Brunswick's approval and urging from the very inception. Again, it would have been vastly different if Jardine and Charlesworth had wrestled with the problem and Jardine had made the decision indicating some independence of thought. But the proposal was made by Brunswick, the release of money was money which was held for Brunswick and plaintiff took no step in the entire project without implicit reliance on the statements, recommendations and decisions

of the Brunswick people. This impressed the trial court and caused it to write in the Memorandum Decision:

"The Brunswick personnel played this active role notwithstanding they did not have personal knowledge concerning Charlesworth's background as a builder, or fact thereof; did not obtain either a financial statement from or a credit report on Charlesworth which if obtained would undoubtedly have revealed to defendant the long list of judgments against Charlesworth as set forth in case File No. 138888, that is the Conesco file mentioned above.

In doing so, the Brunswick personnel not only negligently or recklessly made the assertion that Charlesworth was able to construct the needed building to house the Brunswick equipment to be purchased by plaintiff without reasonable grounds to believe it to be true, but thereafter by their continued presence and guidance influenced plaintiff's actions in advancing money to Charlesworth in such negotiations with knowledge that plaintiff was relying on defendant's employees for such guidance to a material extent. In my opinion these factors constitute more than a negligent or reckless expression of opinion concerning Charlesworth's ability to build and in my judgment formed the basis for liability for the consequent and proximate damage to the plaintiff."

The fifth paragraph refers to the letter which Charlesworth obtained from Dobbs referring to it as a letter which "Brunswick wrote Jardine". Actually, this letter was written for Charlesworth and was handed to Charlesworth and it was only Charlesworth who talked to Dinius and Dobbs about writing it (R. 298-300). If the evidence were taken favorably to the plaintiff, it would have to be accepted that Dinius and Charlesworth conceived the plan to obtain the release of this \$23,000.00 and Dinius insisted that Charlesworth see Dobbs, the head man, to whom also it was plainly apparent that unless Brunswick gave its approval to the withdrawal of the equipment funds, Jardine would not let Charlesworth have the money. That was the only purpose of Dinius and Charlesworth taking the matter up with Dobbs.

The sixth paragraph says that Charlesworth requested a stronger statement but was

refused. This is true (R. 300) but the statement of that fact in the opinion is misleading. Jardine knew nothing about the planning of Dinius and Charlesworth, and knew nothing about the visit of Charlesworth to Dobbs and had no idea that anyone had examined the letter and considered it inadequate or that there was ever any reluctance on the part of Dobbs to sign a letter, or that Dobbs or Charlesworth regarded the letter as being safeguarded or "a little soft". If the evidence is taken most favorably to the plaintiff, it will appear that the letter was brought to Jardine by Charlesworth pursuant to Charlesworth's statement that he would get such a letter. Jardine read the letter, noted that it did not specifically state what amount of money should be released and did not specifically state how the transaction should be handled. The plaintiff, therefore, telephoned Dobbs. At this point it again becomes important to take the evi-

dence in the light most favorable to the plaintiff. Dobbs and Charlesworth had already discussed this letter and Charlesworth had told Dobbs the letter was a little soft. Dobbs knew very well that Charlesworth was relying on the letter as a means of extracting some money from Jardine. When Jardine telephoned Dobbs, Dobbs should have run completely away from the transaction and told Jardine that Brunswick would have nothing to do with this decision and that this was a matter for Jardine to resolve himself. Instead of doing this, and knowing how implicitly Jardine was relying on the Brunswick people, Dobbs told him "he thought it was all right" and then added that he should "protect" himself without indicating in any way what that meant (R. 156 and 261-262). Jardine did in fact protect himself, not simply by taking as security an assignment of life insurance, as the opinion states, but the plaintiff also required Charlesworth's personal signature (Exhibit P-10).

Again, the Court should consider the evidence most favorably to the plaintiff. Brunswick had suggested that Charlesworth seek this money and the plaintiff had put the matter squarely in Brunswick's lap. What did the phrase "protect yourself" mean? It couldn't mean taking a mortgage on the land, as the plaintiff knew that Charlesworth was going to have to mortgage the property to construct the building. It could not mean taking a security interest in some other property or Dobbs would have mentioned that. Jardine protected himself in three ways: He had the agreement reduced to writing, he had Charlesworth guarantee the loan personally, as well as in behalf of the corporation, and he had Charlesworth secure the note by assignment of some life insurance. Far from being minimal protection, as the Court's opinion suggests, it appeared to the plaintiff that he was doing everything possible to protect himself, consistent with the approval of Brunswick to



let Charlesworth have the money. Mrs. Young, an experienced real estate broker (R. 238) and mortgage officer (R. 237) also testified that she thought Jardine protected himself in the only possible ways (R. 261-263).

On page 3 of the Court's opinion the Court says Jardine "was a man of considerable business experience." Jardine had an 8th grade education worked in a spud warehouse (R. 120) hauled mine props (R. 120) operated a small saw mill (R. 121) built three shops (R. 121) and was a farmer (R. 122). He hired a lawyer for zoning (R. 182) for a lease (R. 185) and to take care of a defaulted contract (R. 185). But usually used no lawyer (R. 181). He was ill from asthma and not as alert as he had been (R. 123). These facts were apparent to the people at Brunswick at every step of this project. Brunswick knew this and had a duty to use appropriate care. It could not with impunity make careless statements, knowing that Jardine was relying on it and its statements.

The law supports the cause of action.  
The facts support the cause of action, when  
taken favorably to the plaintiff, as they  
should be in this case.

Plaintiff respectfully petitions this  
Court to re-examine the evidence, interpret  
it favorably to the plaintiff and grant a  
re-hearing.

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