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Dora H. Stevens, Connie Joy Leigh, Jack Holt Stevens and Alice Dayle Esplin v. Colorado Fuel & Iron, a Corporation, For Whom United States Steel Corporation Has Been Substituted, and Employers Mutuals of Wausau : Brief of Respondents

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IN THE

SUPREME COURT

OF THE

STATE OF UTAH

DORA H. STEVENS, CONNIE JOY LEIGHT, JACK HOLT STEVENS and ALICE DAYLE ESPLIN,
Plaintiffs-Appellants,

vs.

COLORADO FUEL & IRON, a corporation, for whom UNITED STATES STEEL CORPORATION has been substituted, and EMPLOYERS MUTUAL OF WAUSAU, a corporation,
Defendants-Respondents.

Case No.
~~11818~~
11808

PRELIMINARY STATEMENT

Before answering any arguments made by the Appellants to support their claim, the Respondent United States Steel Corporation invites the Court's attention to the fact that this appeal is taken from a memorandum decision rendered by Judge Nelson Day of the District Court of Iron County, State of Utah, dismissing the action for the reason that the Complaint as amended did not state a cause of action. Appellants' principal thrust against the holding in the memorandum is on the grounds that the Trial Court failed "to grasp the situation that the Plaintiffs are faced

with". If the Trial Judge did fail in that regard, which we doubt, the situation he faced was the difficult task of interpreting the allegations of a Complaint which is not a model of clarity. Its style of structure is such that immaterial, irrelevant and confusing subjects are blended with redundant facts in such a manner that Counsel for Respondent find themselves in the same situation as the Trial Judge.

As amended, the Complaint remotely suggests two possible legal theories for recovery: (1) That Utah Construction, decedent's employer and hereafter referred to as "Utah", was an agent of Respondent, and as principal is chargeable with Utah's negligence; and (2) that because Respondent had some interest in ore stocked by Utah on Utah's own land, Respondent had a duty continuously to inspect Utah's operations, and if they resulted in creating unsafe conditions on Utah's Low Grade Dump #8, then Respondent had a duty to have them rendered safe.

STATEMENT OF MATERIAL FACTS

Respondent is the owner of certain mining claims located in the Lindsay Hill Mine area, Iron Springs Mining District, Township 35, Range 12 West, Salt Lake Base and Meridian, known and designated as the Little Allie and Cora Groups. Utah is the owner of numerous other mining claims in the same District and it uses some of them for the purpose of dumping and storing low-grade ore. Of particular importance to this decision is that Low Grade Dump #8, the place of the accident, is located on lands

owned by Utah and not the Respondent. (A map for illustrative purposes will be used at the arguments.)

The Amended Complaint correctly alleges that decedent was an employee of Utah and that he had been employed by that Corporation for a substantial period of time. He was familiar with the area. On the particular day of the tragedy, he was performing his duties as a driver of a large dump truck. The method of operation used by Utah in handling ore in the area involved was to dig the ore from mining claims of Respondent, claims owned by other companies and from its own property. After the ore was severed from the ground, it would be loaded on one of Utah's trucks and from there, the vehicle would be driven to one of a number of low-grade dumps, which was designated by Utah, and then dumped. The mining, loading, hauling and dumping were by personnel employed by and under the exclusive control and direction of Utah, and the land upon which the ore was placed was owned by it. There are no averments that the Respondent had any right, title or interest in or to the land upon which the dumps were located.

The Amended Complaint contains some conclusions to the effect that the contract placed responsibility for mining, moving, stockpiling and shipping on Respondent, but fails to aver any fact which shows that the Respondent had any duty to control, supervise and direct the operation. Apart from the conclusions of the Amended Complaint that its practical effect is otherwise, the language of the document as alleged cannot be tortured to mean anything other

than that Respondent's only obligation was to pay Utah for the ore after its value had been determined.

Utah Construction and Mining Company is a large company with qualified employees in charge of its mining operations. It was unfettered in its control and method of extracting, hauling and piling of ore in the Iron Springs Mining District. There is no averment in the Amended Complaint which charges Respondent with knowledge that Utah was not qualified to perform mining operations in a careful and proper manner, or that Respondent was careless in selecting Utah as an independent contractor.

According to the Complaint as amended, a few days before the accident Utah had undercut Low Grade Dump #8, and by virtue of this undercutting, the dump was left in a dangerous condition. Furthermore, it is alleged that the Respondent knew, or should have known, that during the few days of this undercutting, Utah had weakened the east end of the dump and thus made the unloading of trucks on that portion of the stockpile dangerous. Facts are not stated which support that naked conclusion. The following allegations seem to be pertinent as to Appellant's claim that Respondent was chargeable with any actual knowledge, other than such as might be imputed through Utah:

> "The Utah Construction and Mining Company actually did the earth moving and the ore moving on a contract basis at a stated price per ton, although the instrument under which this was being done contained language of a lease. Said Utah Construction and Mining Company *was at all times an agent of the United States Steel Corporation,* for

the sole purpose of furnishing iron ore to the Geneva Works . . ."

"and the practical effect of said agreement has been that it is an operating agreement for the mining of iron ore by Utah Construction and Mining Company *as an agent for United States Steel Corporation.*"

"That the above entitled court set aside what is claimed to be a lease agreement between Columbia Iron Mining Company and Utah Construction & Mining Company, and designate said instrument to be nothing but an operation *agreement by the terms of which Utah Construction & Mining Company is an agent of United States Steel Corporation to mine, stockpile and load iron ore* on railroad cars at a stated price per ton." (Emphasis added.)

ARGUMENT

POINT I.

UNDER THE ALLEGATIONS OF THE COMPLAINT, APPELLANTS ARE LIMITED TO THE RELIEF PROVIDED FOR BY TITLE 35, CHAPTER 1, SECTION 60, UTAH CODE ANNOTATED 1953 (WORKMEN'S COMPENSATION).

Appellants must fail on their contention that the Respondent is liable under the doctrine of principal and agent or employer-employee, for the reason that under that theory they would be limited to the exclusive relief provided for by Title 35, Chapter 1, Section 60, Utah Code Annotated (1953). This section is as follows:

> "The right to recover compensation pursuant to the provisions of this title for injuries sustained by an employee, whether resulting in death or not, shall be the exclusive remedy against the employer . . . and the liabilities of the employer imposed by this act shall be in place of any and all other civil liability whatsoever, at common law or otherwise, to such employee or to his spouse, widow, children, parents, dependents, next of kin, heirs, personal representatives, guardian, or any other person whomsoever, on account of any accident or injury or death in any way connected, sustained, aggravated because of or arising out of his employment, and no action at law may be maintained against an employer . . . based upon any accident, injury or death of an employee."

The Supreme Court of Utah has recognized the exclusiveness of the Workmen's Compensation remedy provided by the statute. In the case of *Halling* v. *Industrial Com'n*, 71 Utah 112, 263 Pac. 78 (1927), the Court construed an early Utah Workmen's Compensation Law which was worded similar to the language in the present Code. The earlier law provided that compensation would be the exclusive remedy with the exception, that if the injury was caused by the employer's willful misconduct, a negligence action could be maintained. In setting out its interpretation of that act, the Court said:

> "[Under Utah's law], it is only in the case of an injury caused by the employer's willful misconduct that an injured employee, or, in case the injury results in death, his dependents, may recover damages in an action at law for a wrongful injury. When the injury is caused merely by the negligent

> act of the employer, the injured employee, or, when the injury causes death, his dependents, must be content to accept the compensation provided for in the act."

Again, in *Masich* v. *United States Smelting, Refining & Mining Co.*, 113 Utah 101, 191 P. 2d 612, 616 (1948), this Court interpreted the meaning of a later law which reads similar to the present statute. The language therein used was this:

> "Many decisions have indicated that the act operated on the employer-employee relationship, and that coexistence with the charge was an abrogation of the employee's common law right to sue the employer for any and all injuries suffered while in the course of his employment, except in those cases where the employer was not subject to the act or the common law remedy of the employee was expressly reserved by the act."

The exclusive remedy rule is not unique to Utah. Many other jurisdictions have recognized that Workmen's Compensation is in lieu of any other common law remedy. For brevity reasons, we cite only from decisions in two neighboring states. The Nevada Supreme Court in the case of *Las Vegas - Tonopah-Reno State Lines, Inc.* v. *Nevada Industrial Com'n*, 81 Nev. 626, 408 P. 2d 241, (1965) construed Nevada's Workmen's Compensation Law as follows:

> "Once it is determined by the commission or by a court that a covered employee has sustained a personal injury arising out of and in the course of his employment, compensation therefor is limited to that provided by the act." 408 P. 2d at 243.

In *In Re Lockard*, 76 Idaho 506, 285 P. 2d 473, 476 (1955), the Idaho Supreme Court has given the Idaho statute a like construction:

> "We have consistently held that the remedy provided by the compensation law is exclusive in all cases arising out of employment not excepted from its provisions."

The foregoing discussion could terminate this brief if it were not for the exception which is provided in Title 35, Chapter 1, Section 62, Utah Code Annotated, which provides:

> "When any injury or death for which compensation is payable under this title shall have been caused by the wrongful act or neglect of another person not in the same employment, the injured employee or in case of death his dependents, may claim compensation and the injured employee or his heirs or personal representative may also have an action for damages against such third person."

Since compensation bars recovery against the employer, but not against third parties who are not connected in with the employment, it becomes important to determine who is an "employer". The Utah Workmen's Compensation Act Utah Code Annotated §35-1-42 provides the appropriate answer:

> ". . . Where any employer procures any work to be done wholly or in part for him by a contractor over whose work he retains supervision or control, and such work is a part or process in the trade or business of the employer, such contractor and all persons employed by him, and all subcontractors under

> him, and all persons employed by any such subcontractors shall be deemed, within the meaning of this section, employees of such original employer."

The same statute then goes on to provide that when the contractor is an independent contractor, he and not the original employer is deemed the employer within the meaning of the Act. An independent contractor is then defined as one who —

> "Is not subject to the rule or control of the employer, is engaged only in the performance of a definite job or piece of work, and is subordinate to the employer only in effecting a result in accordance with the employer's design."

It is interesting to note that in this jurisdiction the same criteria is used in determinng both the master and servant relatonship under the act and the principal-agent relationship which Appellants claim exists between U. S. Steel and Utah Construction Company. For example, the Utah Supreme Court said in *Thiokol Chemical Corp.* v. *Peterson,* 15 Utah 2d 355, 393 P. 2d 319 (1964) :

> "The line of demarcation between one who operates as an independent contractor as opposed to one who is the servant or agent of another is sometimes a bit blurred. This court has on a number of occasions confronted this problem and set forth various criteria to be considered in making the proper classification. The most fundamental one relates to the extended control by the one who hires over the one who performs the service. If the employer's will is represented only by a desired result, the indication is of an independent contractor; whereas, if the employer exercises control over the means of

> accomplishing the result, this points toward an agent or servant relationship." 15 Utah 2d at 358.

This holding is consistent with that reached by the Utah Court in *Parkinson* v. *Industrial Comm'n,* 110 Utah 309, 172 P. 2d 136, 139 (1946) which discusses the exact meaning of the Workmen's Compensation Act and states:

> "From these definitions it is apparent that whether a workman is an 'employee' or an 'independent contractor' is dependent on (1) whether the employer has the right to control his execution of the work, (2) whether the work done or to be done is a part or process in the trade or business of the employer, and (3) whether the work done or to be done is a definite job or piece work . . . The most important of the determinatives of the relationship between workmen and employer is that of control."

The Court again used almost precisely the same language in the more recent case of *Plewe Const. Co.* v. *Industrial Com'n.* 121 Utah 375, 242 P. 2d 561, 562 (1952):

> "[Even though the relationship of the contractor to the company] 'might be characterized by some of the elements incident to the relationship of independent contractors' the test of whether the company is deemed the employer where the work is a part or process in its trade or business, is whether it retains the supervision and control over the work of the contractor."

The next two cited cases have indicated that where the relationship is found to be within the meaning of the Act, the sole remedy of the employee is Workmen's Compensation.

In the case of *Maryland Casualty Co.* v. *Industrial Com'n and John F. O'Brien*, 12 Utah 2d 223, 364 P. 2d 1020 (1961), the Supreme Court of Utah had before it a case involvitng an independent contractor who was performing work for Dames and Moore in a drilling operation. The Industrial Commission had found O'Brien was an employee covered by compensation, and that was the issue before the Supreme Court. The important principle announced in that case is found in the following language:

> "There is some dispute in the evidence, but more so as to the interpretation thereof, as to the facts bearing upon the relationship Mr. O'Brien bore to Dames and Moore. The latter, Soil Engineers, were engaged by the Utah Power & Light Company to do some testing to determine why its power plant at Castle Dale was sinking. Dames and Moore engaged Mr. O'Brien and his partner, brother-in-law, James Phizackles, to provide and operate a cable tool drilling rig and crew for drilling and sampling the soil strata underlying the power plant. It is to be conceded that as between the parties, Mr. O'Brien was not considered as an employee by Dames and Moore. They did not so carry him on their books, nor withhold any income tax or social security for him, nor make any other deductions from the money paid for his services. Nevertheless, there is evidence concerning the manner of carrying out this project which supports the Commission's finding that Mr. O'Brien should be regarded as an employee: the payment was to be made by the shift, rather than for a completed job; Dames and Moore kept a supervisor, Mr. Donald E. Nelson, on the job and he was there 95% of the time and perform-

> ing that function; he fixed the length of the shift to be worked and determined whether they would work on weekends. He gave directions where to set up the rig and to dig the hole; how deep they should dig, when to bail out and clean the hole; when and where to take samples and when not satisfied to take a new one; when to stop and when to resume drilling.
>
> "It is our opinion that this evidence, in the light of the rules hereinabove discussed, provides a reasonable basis for the conclusion that Mr. O'Brien was an employee within the meaning of Sec. 35-1-42 quoted above, and therefore covered by the Industrial Compensation Act." 12 Utah 2d at 226.

A slight variation in the principles above discussed can be found in *Cook* v. *Peter Kiewit & Sons Co.*, 15 Utah 2d 20, 286 P. 2d 616 (1963), where the Court laid down the rule that when companies or individuals are united for a common purpose for their mutual benefits they each may be held employers and subject to the coverage and protection of the Workmen's Compensation Act. The Coker Construction Company had obtained a contract for the construction of a diversion tunnel at the Flaming Gorge Dam. Coker entered into an agreement with the defendant Kiewit to pool their efforts in constructing the diversion tunnel, sharing in the profits and losses as a result. The plaintiff Cook was an employee of Coker and was injured in the course of his employment. He recovered compensation from Coker and then commenced a negligence action against Kiewit. There was little or no evidence that Kiewit in fact had any control over the actions of Cook as an employee of Coker. The Court, however, denied Cook's cause of action. The Court placed

the emphasis not upon any element of control, but upon the fact that both companies were united in a common purpose or goal.

> "Being so united for a common purpose for mutual profit, these companies became partners in a venture just the same as if two individuals had entered into it, and whatever one company and its employees did in furthering the project would enure to the benefit of the other. Accordingly, it would seem that Coker's act in paying premiums for workmen's compensation to protect itself against loss should also enure to the benefit of Kiewit and vice versa. It also follows that under such arrangement, the partnership entity should be regarded as the employing unit; and the employees of both companies as engaged in the same employment." 15 Utah 2d at 23.

The Court then went on to point out that a recovery in such a situation would be in effect an unjust windfall to the employee or his dependents.

> "Another facet of the situation which should not be overlooked is that to permit the employee to sue the defendant Kiewit under these circumstances, where it is part of the employing unit, would not be in conformity with the design of the Act insofar as the employee is concerned. It is obviously intended that in consideration of the *certainty* of compensation the Act affords him, he should forego the right to sue the employer for injury. Sanctioning this action will allow him in effect to 'have his cake and eat it too' by getting the certain Workmen's Compensation and also the right to sue the employing unit for another and possibly greater recovery for his injury." 15 Utah 2d at 24.

In concluding this facet of the brief, we reemphasize that Appellants have alleged facts and conclusions which bring them within the sweep of the foregoing authorities.

POINT II.

RESPONDENT DID NOT OWE A DUTY TO DECEASED TO MAINTAIN UTAH'S PREMISES IN A SAFE CONDITION OR IN THE ALTERNATIVE, IF THEY WERE DANGEROUS, TO WARN HIM OF THEIR CONDITION.

The second legal basis which appears possibly raised by the Appellants' Amended Compaint is that the Respondent owed some duty to the deceased to keep Utah's premises safe; or in the alternative, to make regular inspections and if unsafe conditions were observed, to notify deceased of the danger.

For the purpose of argument, Respondent will take the position that the decedent may have been a business visitor for a limited purpose. However, that is just the beginning of the proposition and not the end. Conceding the relationship, it existed only as to Utah, and not as to Respondent. The deceased was an employee of Utah and the relationship of employer and employee existed. That would entitle deceased to a reasonable assurance by Utah as his employer that he was working under safe conditions, but it would not saddle any obligation on the Respondent. Implicit in the theory that premises must be kept reasonably safe for a business visitor is the proposition that the person responsible for the dangerous condition must own, lease or control

the premises and have the authority to extend an invitation to the party injured for the purposes for which the visit is being made. In the instant case, the deceased at the time of his injury was on Utah's land at Utah's invitation. Certainly the Respondent did not have the right to hold out any invitation to him to go on his employer's land; nor is it asserted that it did so directly or indirectly. Protection afforded by the status of invitee can be created only by the owner of the land or one charged with the responsibility of maintaining the premises for those rightfully thereon, and here the Respondent is not in the class of an invitor.

There are no allegations that Respondent had any authority to determine when and where the deceased would work, the area where ore would be dumped, the position on the dump where the load would be dropped, and the area from which the ore would be removed each day, or to direct the movement of Utah's vehicles. While it is alleged that Respondent had engineers somewhere in Southern Utah, it is not averred that they were employed on the property involved and neither is it alleged that they performed any duties for Utah. There are no facts stated which show they had any reason or duty to travel to Utah's land and there to inspect that corporation's premises, and direct it to take any action to render the premises safe. There is no allegation that they had any right or power to interfere with the directions Utah gave its employees to operate in any specific manner or to work in specific places. In the absence of averments showing to the contrary for the Court to hold otherwise would be to take management and control

away from the officers, directors and managers of Utah and place those responsibilities on Respondent.

Finally, in regards to this aspect of the case, Appellants do allege that Respondent owned the ore which was stored on Low Grade Dump #8, and for the purposes of this appeal we must assume that to be the case. However, that does not establish that the owner is liable for any injuries arising out of its storage. Surely it follows as a matter of law that when the ore no longer was a part of the land, it became personal property, and when it was hauled beyond the boundaries of Respondent's claim, Utah was solely responsible for the manner in which it was handled.

These are the relevant allegations in the Complaint which bring the last proposition into issue:

> ". . . United States Steel Corporation became the true owner of the Little Allie mining claim from which said ore was being hauled and the other claims identified herein and *was the owner of the ore in the stockpile known as Low Grade Stockpile* #8." (Emphasis added.)

And

> "Said agreement allowed Utah Construction Company to stockpile ore and to turn it to the United States Steel Corporation, defendant, at a later date, and as a matter of practice, said Utah Construction Mining Company would place the ore in stockpiles *in which the ownership and identity of the same are maintained,* until said ore was shipped and used." (Emphasis added.)

It is significant to note that there is no allegation that Respondent owned the land where Low Grade Stockpile #8 was located; the reason for that omission is that it was owned by Utah. Fairly construing the language in the last quotations in favor of Appellants, it raises a possible issue involving the duties and obligations of a bailor of property to a third party who has been injured by the negligence of the bailee. We, therefore, look to the law of negligence growing out of that status.

A bailor of property is not chargeable with the negligence of a bailee. *Conklin* v. *Walsh*, 113 Utah 276, 193 P. 2d 437 (1948), *Glenn* v. *Gibbons & Reed*, 1 Utah 2d 308, 265 P. 2d 1013 (1954). The rule enunciated in the above-cited case is further enunciated in *Bailments*, 8 Am. Jur. 2d § 259 at 1144:

> "The relationship of bailor and bailee is not, as such, within the doctrine of respondeat superior; the general rule at common law, both in bailment for gratuitous use and in lettings for hire, is that the bailor cannot be held responsible to a third person for injuries resulting from his bailee's negligent use of the bailed property in the absence of any control exercised by the bailor at the time or of negligence of his own which proximately contributed to the injuries. Such a liability could only be sustained on the theory that a bailor stands in the relation of principal or master to the bailee."

Perhaps a short hypothetical situation based on facts different from those alleged in this case will suffice to show that if Appellants are relying on ownership of the ore as placing a duty on Respondent, their trust is bottomed on a

broken reed. If an owner turns over his household furniture to a van and storage company to be later returned to him, it is improperly stored, and an employee of the company is injured because of the negligent storage, we suggest that the bailor of the property is not liable.

It would indeed be a great departure from the rule of any known case to have this Court burden an owner of inert personal property piled on a third party's real property with a responsibility to regularly inspect and reassess the possibility of third parties being injured by the manner of storage. While it is true an owner of real property is charged with the duty to keep his land reasonably safe for invitees, that rule cannot be extended to cases of bailees and bailors. Common sense dictates that the duties of a bailor should not be expanded to require constant vigilance over personal property and to make certain it is handled and stored in such a way that injury will not result to third parties. Personal property is transitory and an owner could not reasonably follow it from place to place. Here the bailee and the possessor was Utah, and it alone would be responsible for the death of the decedent. To hold otherwise would overturn a long and well established line of authorities.

Very little need be said about the authorities cited by Appellants for the reason that if they are material, they support Respondent. For example, in *Rogalski* v. *Phillips Petroleum Co.*, 3 Utah 2d 203, 282 P. 2d 304 (1954), the defendant maintained a platform for use in cleaning its trucks.

Plaintiff stumbled into a vat of caustic soda which was only two inches from the platform. Defendant had acquiesced in the use of the steam-cleaning equipment. Plaintiff claimed he was a business visitor and Defendant answered that he was a trespasser. The jury found for the Plaintiff, and this holding placed responsibility on the Defendant because by acquiescing in the use of its premises, it invited the injured party to use its facilities. That rule, if it could be applied in this case, would place the blame on Utah and not on the Respondent, for any acquiescence here was by Utah.

CONCLUSION

Respondent respectfully submits that the Complaint herein as amended does not state a claim upon which relief can be granted, and the decision of the Court below dismissing the case was correct.

Respectfully submitted,

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