1972

Mark C. Doyle v. Facilities, Inc. : Brief of Appellant

IN THE SUPREME COURT OF THE STATE OF UTAH

MARK C. DOYLE,
Plaintiff-Appellant,

vs.

FACILITIES, INC.,
a Utah corporation,
Defendant-Respondent.

Case No. 12912

BRIEF OF APPELLANT

Appeal from the Summary Judgment of the Third District Court of Salt Lake County Honorable Ernest F. Baldwin, Judge

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STATEMENT OF NATURE OF CASE

This appeal is from a summary judgment granted on the 6th day of April, 1972, by the Honorable Ernest F. Baldwin, one of the judges of the District Court of Salt Lake County, State of Utah, wherein the plaintiff-appellant's complaint was dismissed with prejudice. (R. 85) Appellant brought an action against the respondent claiming that damages he suffered while engaged in

laying roof sheeting on the Hooper Elementary School in Hooper, Utah, were a direct and proximate result of the negligence of the respondent.

DISPOSITION OF THE LOWER COURT

Respondent moved the lower court for a summary judgment dismissing the appellant's complaint and amended complaint. Respondent's motion was granted.

RELIEF SOUGHT ON APPEAL

Appellant seeks review and reversal of the Trial Court's Order Granting Defendant-Respondent's Motion for Summary Judgment (R. 89) and Judgment of Dismissal With Prejudice (R. 87) further requesting that the case be remanded to the Lower Court for a trial on the merits.

STATEMENT OF FACTS

The facts herein are simple and relatively uncontested.

The appellant herein, Mark C. Doyle, was in the fall of 1969, employed by Steel Components Inc.

Reid L. Oyler, contractor, obtained the contract for the construction of the Hooper Elementary School in Hooper, Utah, from the Weber County School District.

(Exhibit D-3) Mr. Oyler subcontracted with Tech Steel, Inc. for the roofing on the school, including steel joists, structural steel, steel roof decking and the installation of the same. (Exhibits D-1 and D-2) Although the contract is not a part of the record, Tech Steel entered into a subcontract with the respondent under the terms of which respondent was to install the steel superstructure for the roof. The respondent further subcontracted with Steel Components, Inc. for the installation of the steel roof decking.

On the 20th day of October, 1969, while engaged in the installation of the steel roof decking the appellant stepped upon a steel joist that had been negligently placed by the employees of the respondent. The joist rotated and fell causing the appellant to fall some 12-14 feet to the cement floor below. The accident necessitated immediate and prolonged hospitalization of the appellan and from which appellant has suffered permanent, irrepairable injury to his hearing, shoulder and back.

Observation and analyzation of the steel joist from which the appellant fell evidence extreme negligence by the respondent's employees in the manner of erection and placement of the joist.

ARGUMENT

THE TRIAL COURT ERRED IN GRANTING DEFENDANT - RESPONDENT'S MOTION FOR SUMMARY JUDGMENT, THERE

EXISTING AT THAT TIME SUFFICIENT QUESTIONS OF FACT AND LAW UPON WHICH REASONABLE MINDS COULD DIFFER AND UPON WHICH THE FINDER OF FACT COULD REASONABLY GRANT JUDGMENT IN PLAINTIFF - APPELLANT'S FAVOR.

The defendant relies exclusively upon two recent decisions handed down by the Utah Supreme Court. In the first case of *Smith vs. Alfred Brown Company, ... Utah, ...* 493 *P.2d* 994 (*Feb.* 1972), *involved an em*ployee of a subcontractor who sued the general contractor for alleged negligence that resulted in damages to the employee. The Supreme Court in construing *Sections* 35-1-62, *Ut ah Code Annotated,* 1953, and *Section* 35-1-42, *Utah Code Annotated,* 1953, felt that a significant factor in determining whether or not an injured employee was in the same employment as the defendant or whether the defendant was a bona fide third person was the degree of control exercised by the third person over the injured plaintiff. In the *Smith vs. Brown* case the defendant, Brown, had a subcontract with the plaintiff's employer, Ashton Construction Company, which provided that the general contractor would retain some degree of control over the subcontractor whereas in the present case the subcontract agreement between Facilities and Steel Components makes no reference whatsoever to any degree of control that would be exercised by Facilities over Steel Components or its employees. The facts are and as testified to by Mr. Reid Oyler, the gen-

eral contractor on the Hooper Elementary School job, are to the effect that Mr. Oyler was not aware of who in fact was engaging in the steel erection and decking until he received notice of the pending action. It is also a fact that Facilities did not in fact exercise any control or supervision over the work described in the subcontract given by it to Steel Components.

It must be remembered that in the *Smith vs. Brown* case we are dealing with an employee of a first tier subcontractor who is suing the general contractor. The court in finding that the "defendant general contractor, Brown" had sufficient control over the subcontractors under him, held that the employee should be deemed an employee of the general contractor and thus precluded from maintaining the suit. Whereas, in the present case we have an employee of a fourth tier subcontractor who is suing not the general contractor but his employer's immediate contractor or a third tier subcontractor. There are at present only disputed facts that would give rise to an indication of any degree of control or supervision exercised by Oyler Construction Company over the employees of Facilities and Steel Components. To hold that the plaintiff herein and the employees of Facilities Inc. were fellow servants and controlled and supervised under direct authority of the general contractor would be extending the rational of the Smith case a good deal further than the Supreme Court has set forth.

In the case of *Peterson vs. Fowler*, ... Utah ....., 493 P.2d 997 (Feb. 1972) the court discussed at some

length the definition and terminology denominated as "same employment." The court stated that:

> "In determining what constituted fellow servants the courts were in practical uniformity (referring to common law history) in holding that unless they were engaged in the same employment at the same time they were not fellow servants so as to prevent an action against their common employer. If they were employed in separate departments of the same enterprise, they were not considered fellow servants unless their work was so related that they were likely to be in such proximity to one another that some special risk could be anticipated towards one of the other were negligent."

We would contend that in the present case the defendant, Facilities Inc., and Steel Components, the employer of the plaintiff, were engaged in separate and distinct operations. Facilities was to erect the structural ironwork and Steel Components was engagedin laying the decking on the roof. It is difficult to rationalize the fact that Mr. Doyle was engaged in the same employment as Facilities when all the facts herein indicate that the operation of erecting the structural steel and of laying the steel decking were two separate and different operations.

The testimony of Mr. Doyle also indicates that there would be no presumption that the employees of the defendant would come in contact with Mr. Doyle inasmuch as the steel erection was to take place prior to the decking being laid and therefore the employees of the defendant and the employees of Steel Components would

not come into contact with one another so as to create a special risk that could be anticipated by those employees.

CONCLUSION

There is no argument that all persons engaged in the erection of a structure such as the Hooper Elementary School are engaged in the same general purpose. That being the erection of the building. The Smith and Peterson cases, however, deal with only employees in direct contact with the general contractor to hold that all persons engaged at any time and in any capacity in the construction of a building are all engaged in the "same employment" is extending the rational of the above cases much further than the Supreme Court indicates therein.

The plaintiff herein, Mark Doyle, was an employee of a fourth tier subcontractor who had no relationship with the general contractor, Reid Oyler, was not controlled or supervised in any manner whatsoever by Mr. Oyler and who were at the time of the construction of the building unknown by the general contractor, Reid Oyler. Again to extend the rational of the two recent cases to the degree and extent that the defendant contends herein would be to in fact prohibit any action whatsoever by an injured employee where such injury results from the negligence of any one working for the common cause of erecting a building or a similar superstructure. This in fact would amount to a judicial repeal

of Section 35-1-62, Utah Code Annotated, 1953, which we would contend the court was not prepared to do in the Smith and Peterson cases.

Respectfully submitted,

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