RALPH FOSTER AND ROGER ROBILLARD (*Plaintiffs*) ..... APPELLANTS;

AND

C. A. JOHANNSEN & SONS LIMITED (*Defendant*) ..... RESPONDENT.

1963

*June 17, 18
Dec. 16

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

*Negligence—Construction contract—Inspection of work clause—Right of owners to access and proper facilities for access and inspection—Owners injured by fall while inspecting unfinished roof—Whether contractor liable.*

The defendant construction firm was engaged in erecting a shopping centre for a company of which the plaintiffs were respectively the president and general manager. Article 13 of the construction contract provided that the plaintiffs should have access to the work wherever it was in preparation or progress and obligated the contractor to provide proper facilities for such access and for inspection. The plaintiffs visited the premises on a holiday and as no workmen were present arrangements were made with the superintendent that they would return the following week. When the plaintiffs returned on the next working day the superintendent was not on hand, but with the assistance of some workmen they climbed to the roof. There they walked about taking photographs and eventually came to an area where metal sheets were laid out preparatory to being put in their permanent place to be welded. They stepped on the butt ends of metal sheeting not supported by a girder and fell to the ground, suffering serious injuries. The trial judge held that the defendant was liable in tort for its negligence and in contract for implied breach of its obligation. He also found the plaintiffs negligent and apportioned the fault 75 per cent against the defendant and 25 per cent against the plaintiffs. The Court of Appeal allowed an appeal and held that the defendant did not fail in any duty it owed to the plaintiffs. The plaintiffs appealed to this Court.

*Held:* The appeal should be dismissed.

There was no basis for the application of the doctrine of *volenti non fit injuria* in this case. *Lehnert v. Stein*, [1963] S.C.R. 38, referred to.

In exercising their rights under Article 13 of the construction contract, the appellants had to act reasonably and with reasonable care on their own part for their own safety. The situation in this case could not be described as one arising from an unusual danger in relation to the appellants. They did not seek out the superintendent but went alone to the partially finished roof. They were in no danger until they ventured upon the unfinished area and that area did not have the appearance of safety and, as found by the trial judge, they should have realized and appreciated this condition.

*PRESENT: Cartwright, Fauteux, Abbott, Judson and Hall JJ.

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FOSTER AND ROBILLARD v. C. A. JOHANNSEN & SONS LTD.

APPEAL from a judgment of the Court of Appeal for Ontario[1], reversing a judgment of Landreville J. Appeal dismissed.

*J. J. Robinette, Q.C.*, and *R. W. McKimm*, for the plaintiffs, appellants.

*B. J. Thomson, Q.C.*, and *R. K. Laishley, Q.C.*, for the defendant, respondent.

The judgment of the Court was delivered by

HALL J.:—This is an appeal from a judgment of the Court of Appeal for Ontario[1] which reversed a judgment of Landreville J. in which he awarded the appellant Foster damages in the sum of $18,273 and the appellant Robillard the sum of $11,859.19 against the respondent, a construction firm which was erecting a shopping centre for McArthur Plaza Shopping Centre Limited in Eastview, Ontario. Foster was President of McArthur Plaza Shopping Centre Limited and Robillard was General Manager. The two men had worked closely together for some three years chiefly with the development of the shopping centre.

Construction had progressed to the point that the Structural Steel Company, a sub-contractor, was in the course of laying the roof.

The roof was of sheet metal construction, the sheets having a length of fourteen to sixteen feet. The process of laying this roof was in three stages. First the sheets were hauled to the roof, then these sheets were placed crosswise on the steel girders which were six feet apart and lastly the sheets were adjusted in their permanent position, *viz.*: tongue and lap together on the sides and an overlap at the ends in which position they were spot-welded by an electric welding machine.

In the construction contract the following provision appeared:

> Article 13. Inspection of work.—The Owner or the Architect on his behalf and their representative shall at all times have access to the work wherever it is in preparation or progress and the Contractor shall provide proper facilities for such access and for inspection.

[1] [1962] O.R. 343, 32 D.L.R. (2d) 261.

Verification and approval of the work of construction was carried out from time to time by the architect. In addition the plaintiff, Robillard, came to the premises almost daily and the plaintiff, Foster, was said to have visited from time to time. Accommodation in a shack at the site was provided for the architect and the owner's representatives.

The facts as found by the learned trial judge are as follows:

1. On Good Friday, March 27th, 1959, Foster, Robillard, and John Doherty, Secretary-treasurer of the company, attended at the job. This being a holiday, no workmen were there. However, Alcide Thelland, the construction superintendent for the defendant company was present.
2. That it was arranged between Foster and Thelland that Foster and Robillard would return the following week. He did not accept Thelland's evidence that on their return Foster and Robillard were not to go on the roof unless escorted by Thelland or an assigned employee.
3. Foster and Robillard returned the following Monday, March 30th. Thelland was not on hand. Foster busied himself with certain matters and Robillard climbed to the roof. He walked about for approximately 15 minutes without anyone speaking to him. He took a number of photographs.
4. Robillard returned to ground level where he met Foster. Both then went to a mezzanine floor by way of a ladder being helped by some workmen who assisted them from the mezzanine floor to the roof.
5. They walked about the roof taking photographs and eventually came to the area where the sheets were laid out preparatory to being put in their permanent place to be welded.
6. That Foster and Robillard fell to the ground because they walked on the butt ends of the metal sheeting not supported by a girder and in teeter-totter manner they fell to the ground and both were seriously injured.
7. That the sheets which fell with Foster and Robillard were not in their final place and it was not negligence on the part of the appellants to have so placed the sheets in the then transitory stage of construction.
8. That the area where Foster and Robillard fell as distinct from other areas of the roof did not have the appearance of safety and Foster and Robillard should have realized and appreciated this condition. The learned judge says of this area "this area was abnormally dangerous".
9. That the area in question was not a trap or a concealed danger, but the sheets were in a position which did not present a situation of obvious danger to Foster and Robillard although the workmen would know it was dangerous to walk on those sheets.

On these facts, the learned trial judge held, having regard to Article 13 quoted above, that the respondent was liable

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Hall J.

in tort for its negligence and in contract for implied breach of its obligation. He also found Foster and Robillard negligent and apportioned the fault 75 per cent against the respondent and 25 per cent against the appellants.

The learned trial judge also held that the doctrine of *volenti non fit injuria* did not apply in this case and with this I agree. The circumstances under which the doctrine applies were fully explored in *Lehnert v. Stein*[1]. No basis for the application of the doctrine exists here on the facts so found.

McGillivray J.A., with whom Porter C.J.O. and Roach J.A. concurred, held that on the facts as found by the learned trial judge the respondent did not fail in any duty it owed to the appellants. With respect, I agree with this conclusion. While the appellants had the right under Article 13 of the construction contract to have access to the work wherever it was in preparation or progress and the contractor was under obligation to provide proper facilities for such access and for inspection, the fact remains that in exercising their rights under this article, the appellants had to act reasonably and with reasonable care on their own part for their own safety. The situation in the instant case cannot be described as one arising from an unusual danger in relation to these appellants. They did not seek out the foreman Thelland but went alone to the roof. Once on the roof, the situation was plain for them to see. Certain areas were totally uncovered, other areas were in an unfinished state, while in a certain portion the sheets had been welded into place. They were in no danger until they ventured upon the unfinished area and that area did not have the appearance of safety and, as found by the learned trial judge, they should have realized and appreciated this condition.

The appeal must, accordingly, be dismissed with costs.

*Appeal dismissed with costs.*

*Solicitors for the plaintiffs, appellants: Mirsky, Soloway, Houston, Galligan & McKimm, Ottawa.*

*Solicitors for the defendant, respondent: Hughes, Laishley & Mullen, Ottawa.*

[1] [1963] S.C.R. 38, 36 D.L.R. (2d) 159.