Denver Law Review

Volume 32 | Issue 6 Article 6

January 1955

Civil Procedure: Trial of Issues by Implied Consent, Negligence as a Defense to Mutual Mistake

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NOTES AND COMMENTS

CIVIL PROCEDURE: TRIAL OF ISSUES BY IMPLIED CONSENT, NEGLIGENCE AS A DEFENSE TO MUTUAL MISTAKE. The case of *Carpenter v. Hill* seems to have had its inception in a comedy of errors.[1] Plaintiff brought suit for rescission of a contract for the exchange of land on the basis of mutual mistake.

The contract provided for the exchange of a filling station owned by plaintiff for defendant's peach orchard. Apparently in good faith defendant informed plaintiff that the land was subject to a mortgage, but that payments were to be made only out of one-half each year's crop. Actually the entire balance fell due later in that year. Before signing the contract plaintiff went to the bank where the note and mortgage were in escrow and inquired as to the balance due. He did not ask to see the note, although had he done so, his belief in the wondrous crop payment arrangement would have been shattered.

Some time after the completion of the exchange, plaintiff learned the true facts about the payments. This suit for rescission followed. Although defendant pleaded only a denial, the issue of plaintiff's failure to pursue his investigation with due diligence was brought out in the testimony without objection. The trial court rendered judgment for the defendant on the theory that plaintiff's negligence barred his recovery.

On appeal the Court said, "If negligence was a defense, defendants were deprived thereof by failure to file an affirmative pleading." Rule 8(c) provides that any matter constituting an avoidance or affirmative defense must be affirmatively pleaded in order to be available to the defendant.[2] Clearly the decision was correct in holding that the nature of negligence as a defense to mutual mistake is such that it should be specially pleaded.

However, it is possible that the Court overlooked the effect of Rule 15(b) which provides for trial of issues by implied consent. The record in the case discloses that on direct examination of the plaintiff's own witnesses the facts upon which the trial court based its finding of negligence were established. On cross-examination this aspect of the case was developed in detail; hence the rule in question would seem to be applicable.

A long line of federal cases establishes the principle that under this rule issues which are raised during the trial without objection

[1] Carpenter v. Hill, ... Colo. ...., 1954-55 C.B.A. Adv. Sh. No. 11, p. 379.
[2] Colorado Rules of Civil Procedure, 8(c).

are to be treated as though they had been pleaded.[3] Of particular interest is *Swift & Co. v. Young* which said that the doctrine of last clear chance could be introduced in this manner. Likewise in *Rogers v. Union Pacific R.R. Co.* the court ruled that a set-off could be allowed when tried by implied consent saying, "That in itself would require us to treat it as raised by the pleadings."

A number of Colorado cases following this same principle.[4] In the course of the dissent in *Borga v. Hendrickson* mention was made of these results:[5]

> In construing our rule 15(b) we have held that in the absence of motions or objections any issue which the parties see fit to present may be considered and determined by the trial court and that the pleadings become *functus officio.*

Another issue of interest in the instant case was raised by the fact that the decision without any comment quoted section 508 of the *Restatement of Contracts:*

> The negligent failure of a party to know or to discover the facts, as to which both parties are under a mistake does not preclude rescission or reformation on account thereof.

The Colorado Annotation on this section contends that Colorado disagree in theory, but agrees in result by a refusal to recognize negligence in cases of mutual mistake. Three cases are cited in support of this proposition.[6]

Lloyd v. Lowe was an action by the mortgagee of property on which defendant had unintentionally assumed the mortgage. The case is not in point since it was not an action between the parties to the contract, and the plaintiff was merely denied an unintended windfall.

Hitchens v. Milner decided shortly thereafter cited *Lloyd v. Lowe* as authority. The negligence alleged was failure to read before signing a contract which the persons's attorney had prepared. In view of the relationship of trust and confidence between

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[3] Colorado Rules of Civil Procedure, 15(b); Swift & Co. v. Young, 107 F. 2d 170 (4th Cir. 1939); Rogers v. Union Pacific R. R. Co., 145 F. 2d 119 (9th Cir. 1944); Franklin v. Columbia Terminals Co., 150 F. 2d 667 (8th Cir. 1945); Scott v. Baltimore & Ohio R. Co., 151 F. 2d 61 (3rd Cir. 1945); Continental Illinois National Bank & Trust Co. v. Erhart, 127 F. 2d 341 (6th Cir. 1942).

[4] Toy v. Rogers, 114 Colo. 432, 165 P. 2d 1017 (1946); Carlson v. Bain, 116 Colo. 526, 182 P. 2d 909 (1947); Scheller v. Mawson, 117 Colo. 201, 185 P. 2d 1009 (1947); Craft v. Stumpf, 115 Colo. 181, 170 P. 2d 779 (1946); Rose v. Roso, 119 Colo. 473, 204 P. 2d 1075 (1949); U.S. Nat'l Bank v. Bartges, 120 Colo. 317, 210 P. 2d 600 (1949); Rogers v. Funkhouser, 121 Colo. 13, 212 P. 2d 497 (1949); Hopkins v. Underwood, 126 Colo. 224, 247 P. 2d 1000 (1952).

[5] Borga v. Hendrickson, 120 Colo. 303, 209 P. 2d 543 (1949).

[6] Lloyd v. Lowe, 63 Colo. 288, 165 P. 609 (1917); Hitchens v. Milner Land, Coal and Townsite Co., 65 Colo. 597, 178 P. 575 (1919); Home Insurance Co. v. Gaines, 74 Colo. 62, 218 P. 907 (1923).

attorney and client it may well be true that there was no negligence.

Home Insurance Company v. Gaines was a case in which the defense presented to the court was laches rather than negligence. In addition each of the these cases is distinguishable from the instant case by the fact that no independent investigation was undertaken and left half-finished. More in point is an early case in which plaintiff sought to rescind a conveyance of more acres than he had intended.[7] It developed that prior to the conveyance he had assisted in making a survey of the land and easily could have ascertained the results. It was held that this neglect prevented his recovery.

Similar facts were present in a recent case which reached the same result.[8] Defendant's agent innocently misrepresented to plaintiff the extent of the boundaries of some lots in Denver. Plaintiff made his own measurement of the frontage on the property, but neglected to measure the depth which had been misrepresented. The court held that this negligence was a defense to a suit for rescission brought after he had acquired the property. Comparison of that case with the instant case reveals that on similar facts, but on different theories, opposite results were reached. This fact prompts a comparison between the two theories —one in contract, the other in tort.

Negligence is almost uniformly held to be a defense against misrepresentation, and under certain circumstances, such as where the means of knowledge is equally available to both parties, it is a defense to deceit.[9] For an action based upon misrepresentation the plaintiff must prove that he relied upon the falsehood. It is also essential that the plaintiff be justified in so relying, and it is on this basis that negligence is held to be a defense.

Turning to an examination of the cases on mutual mistake, it is discovered that while there is much language in the decisions to the effect that "one must bear the consequences of his own folly"[10] the courts are becoming less insistent upon this maxim.[11] But where special circumstances exist such as a failure to take ad-

[7] Wier v. Johns, 14 Colo. 493, 24 P. 262 (1890).

[8] Taylor v. Arneill, 129 Colo. 185, 268 P. 2d 695 (1954); noted in 27 Rocky Mtn. L. Rev., Dec., 1954, p. 115.

[9] Hanks v. McNeil Corp., 114 Colo. 478, 168 P. 2d 256 (1946); Pestal v. O'Donnell, 81 Colo. 202, 254 P. 2d 764 (1927); Troutman v. Stiles, 84 Colo. 597, 290 P. 281 (1930); Slide Mines v. Denver Equipment Co., 112 Colo. 285, 148 P. 2d 1009 (1944); Bosick v. Youngblood, 95 Colo. 532, 371 P. 2d 1119 (1934); Emerson-Brantingham Co. v. Wood, 63 Colo. 130, 165 P. 263 (1917); Jasper v. Bicknell, 62 Colo. 318, 162 P. 144 (1916); Sellar v. Clelland, 2 Colo. 532 (1875); 2 Pomeroy's Equity Jurisprudence (4th ed.) sec. 893. But *cf.* Pattridge v. Youmans, 107 Colo. 122, 109 P. 2d 646 (1941).

[10] Grymes v. Sanders, 93 U.S. 55 (1876); Roller v. California Pacific Title Ins. Co., 206 P. 2d 694; Muchow v. Central City Gold Mines Co., 100 Colo. 58, 65 P. 2d 702 (1937).

[11] Corbin on Contracts, sec. 606.

vantage of a readily accessible means of knowledge,[12] failure to carry forward an investigation which had been commenced, or a situation in which the parties could no longer be restored to the status quo,[13] negligence is still a valid defense. Thus it would seem that in tort actions where some degree of culpability is usually involved, the negligence of the plaintiff is more often successful as a defense than in actions for mutual mistake where the defendant's good faith is assumed. This marvelous anomaly deserves further study.

At any rate, in the instant case strong equities urge the adoption of the trial court's findings. Where the means of ascertaining the truth was readily at hand, plaintiff commenced an investigation. The trial court found that he failed to carry it through with reasonable diligence. Since the mortgage had been foreclosed, the parties could no longer be restored to the status quo. A judgment for damages resulted against a defendant who had been acting in good faith in favor of a negligent plaintiff. The Court easily could have arrived at a more desirable result had it applied Rule 15(b).

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[12] Muchow v. Central City Gold Mines, *supra;* Eitel v. Alford, 127 Colo. 341, 257 P. 2d 955 (1953).

[13] Grymes v. Sanders, *supra;* Corbin on Contracts, *supra.*

Notes from the Secretary

(Continued from Page 372)

CANON 8. ADVISING UPON THE MERITS OF A CLIENT'S CAUSE

A lawyer should endeavor to obtain full knowledge of his client's cause before advising thereon, and he is bound to give a candid opinion of the merits and probable result of pending or contemplated litigation. The miscarriages to which justice is subject, by reason of surprises and disappointments in evidence and witnesses, and through mistakes of juries and errors of Courts, even though only occasional, admonish lawyers to beware of bold and confident assurances to clients, especially where the employment may depend upon such assurance. Whenever the controversy will admit of fair adjustment, the client should be advised to avoid or to end the litigation.

OPINION 82—A lawyer may bring an action for divorce when necessary grounds exist irrespective of the underlying cause; and he may advise against reconciliation if he believes it to be against the best interests of his client.

CANON 9. NEGOTIATIONS WITH OPPOSITE PARTY

A lawyer should not in any way communicate upon the subject of controversy with a party represented by counsel; much less should he undertake to negotiate or compromise the matter with him, but should deal only with his counsel. It is incumbent upon

the lawyer most particularly to avoid everything that may tend to mislead a party not represented by counsel, and he should not undertake to advise him as to the law.

OPINION 58—It is improper for a lawyer to confer with the adverse party for the purpose of securing an agreement to a divorce.
OPINION 108—It is improper to interview an adverse party who is represented by counsel, in the absence of such counsel.
OPINION 124—A lawyer may not negotiate a settlement with the adverse party without the knowledge of the adverse counsel.