

**IN THE DISTRICT COURT OF HOLT COUNTY, NEBRASKA**

**EDWARD O. SLAYMAKER,**  
Plaintiff,

vs.

**KENNETH BREYER and ELAINE  
BREYER, husband and wife,**  
Defendants and Third-Party  
Plaintiffs,

vs.

**GREEN VALLEY IRRIGATION, INC., a  
Nebraska corporation, successor in  
interest to GREEN ACRES, an unknown  
entity,**  
Third-Party Defendant.

Case No. 20293

**INTERLOCUTORY ORDER  
ON BIFURCATED TRIAL**

**DATE OF TRIAL:** June 4, 2001.  
**DATE OF RENDITION:** July 18, 2001.  
**DATE OF ENTRY:** Date of filing by court clerk (§ 25-1301(3)).  
**APPEARANCES:**  
For plaintiff: William A. Wieland.  
For defendants:  
Breyer: Ronald E. Temple without defendants.  
Green Valley: Daniel M. Placzek.  
**SUBJECT OF ORDER:** Bifurcated trial on issues relating to third-party petition.  
**PROCEEDINGS:** See journal entry rendered June 4, 2001.  
**FINDINGS:** The court finds and concludes that:

1. The defendants and third-party plaintiffs, Kenneth Breyer and Elaine Breyer (Breyer), filed a third-party petition to seek allocation of negligence pursuant to NEB. REV. STAT. § 25-21,185.10 (Reissue 1995). The third-party defendant, Green Valley Irrigation, Inc. (Green Valley), resists the third-party petition.

2. Breyer and Green Valley previously filed motions for summary judgment on certain issues relating to the third-party petition. The court denied both motions, finding the existence of material issues

of fact. During the course of a pretrial conference, Breyer and Green Valley elected to waive a jury and submit specified issues for bifurcated trial to the court without a jury on the record made at the hearing on the motions for summary judgment. The court as the trier of fact on these issues is not bound by the restrictive rules relating to summary judgment motions and is authorized to determine the issues upon its findings regarding the factual matters as governed by the applicable rules of law.

3. The parties stipulated to submission of the issues of: (1) whether Green Valley is the successor to and liable for the liabilities of Green Acres Irrigation, Inc., notwithstanding its purchase of the assets of Green Acres, because: (a) Green Valley impliedly agreed to assume Green Acres' liabilities; (b) the transaction amounts to a consolidation or merger of the two corporations; or, (c) Green Valley is merely a continuation of Green Acres; and, (2) whether the accepted work doctrine bars any liability of Green Valley, as successor to Green Acres, to the defendants Breyer.

4. A corporation that purchases the assets of another corporation does not succeed to the liabilities of the selling corporation. *Jones v. Johnson Machine and Press Co.*, 211 Neb. 724, 320 N.W.2d 481 (1982). However, four exceptions may apply to the rule: (1) when the purchasing corporation expressly or impliedly agreed to assume the selling corporation's liability; (2) when the transaction amounts to a consolidation or merger of the purchaser and seller corporation; (3) when the purchaser corporation is merely a continuation of the seller corporation; or, (4) when the transaction is entered into fraudulently to escape liability for such obligations. See 19 C.J.S. *Corporations* § 657 (1990); *Shane v. Hobam, Inc.*, 332 F. Supp. 526 (E.D. Pa. 1971); *Copease Mfg. Co. v. Cormac Photocopy Corp.*, 242 F. Supp. 993 (S.D.N.Y. 1965) (citing 6A FLETCHER, CYCLOPEDIA OF CORPORATIONS, 681 and 717-18 (Perm. Ed.)).

5. It is immediately apparent that the parties' stipulation does not submit all of those potential issues. The record of the hearing on June 4, 2001, perhaps leaves unclear the reasons for so doing. In order to assure that all of these issues are considered as having been fully disposed, the court will partially reverse its prior denial of Green Valley's motion for summary judgment to dispose of those matters. Viewed in the light most favorable to the defendants and third-party plaintiffs, there is no genuine issue as to any material fact or facts or as to the ultimate inferences that may be drawn from those facts regarding: (1) the nonexistence of any express agreement of Green Valley to assume Green Acres' liability; or, (2) that the transaction was not entered into fraudulently to escape liability for such obligation. The evidence

cannot be viewed to apply either of these exceptions to the general rule. As to those matters, Green Valley is entitled to judgment as a matter of law, and its motion for summary judgment will be granted in that regard. As the parties recognized at the time of the June 4 hearing, the remaining issues constitute those susceptible of inferences favoring each party, and which the court must decide as the trier of fact.

6. Breyer bears the burden of proof. *Miller v. Westwood*, 238 Neb. 896, 472 N.W.2d 903 (1991); *Benson v. Barnes & Barnes Trucking*, 217 Neb. 865, 354 N.W.2d 127 (1984); *Bishop Buffets, Inc. v. Westroads, Inc.*, 202 Neb. 171, 274 N.W.2d 530 (1979).

7. If the established facts give equal support to two inconsistent inferences, then the judgment must go against the party having the burden of proof. *In re Estate of Severns*, 217 Neb. 803, 352 N.W.2d 865 (1984).

8. After the June 4 bifurcated trial, the court has carefully reread and considered the evidence, and particularly the depositions of William Dodd and Charles Shane, in light of the standard applicable to the trier of fact at trial. In general, the court finds the testimony of Charles Shane more persuasive than that of William Dodd. That finding derives from Shane's more accurate recall consistent with the documents and other undisputed facts, and does not cast aspersion upon Dodd in any way. The testimony relates to events occurring many years ago, concerning which memory would be expected to fade. The court does not suggest or imply that Dodd intentionally lied or omitted any material fact. Rather, his testimony is wholly consistent with a genuine effort to testify truthfully. But his memory differed from the documented facts in many instances, and even after being confronted with the documents, the language of his testimony demonstrates a reliance upon and acceptance of the documents rather than any actual refreshment of memory.

9. The first *Jones* exception considers any implied agreement to assume the liability.

a. The written sale agreement expressly assumes certain debts and expressly disclaims assumption of all others. Exhibit 8 at 2.

b. The court finds Dodd's testimony that Green Valley took over paying the debts of Green Acres unpersuasive and unreliable.

c. Green Valley came into existence when Valmont, the manufacturer of Valleybrand center-pivot irrigation systems, informed Shane that Green Acres' franchise was about to be cancelled. The evidence shows considerable debt owed by Green Acres to Valmont. Green Valley did not assume

that debt. Valmont entered into a new franchise agreement with Green Valley, bolstered by personal guarantees of the five principal shareholders of Green Valley. The evidence does not show that any agreement with Green Acres required Green Valley to assume any of Green Acres' obligations regarding previously installed irrigation systems. Indeed, the record does not establish that Green Valley did so.

d. The evidence does not show that Green Valley actually assumed any liabilities of Green Acres to former customers under the Valmont franchise agreement. Shane alluded to a requirement of the Valmont franchise agreement with Green Valley requiring service of Valley irrigation equipment already in the fields. But nothing shows that such requirement was limited to Valley equipment installed by Green Acres. And the court finds it much more likely that the Valmont-Green Valley franchise agreement, which is not included in the record or otherwise discussed in the testimony, required Green Valley to service Valley irrigation equipment without regard to the identity of the installer.

e. Otherwise, Shane's testimony demonstrates that Green Valley did not assume those obligations. He disclaimed any such undertaking. He also discussed his personal efforts to collect Green Acres' receivables because of his personal guarantee of Green Acres' other indebtedness to the Ord State Bank. His testimony persuasively demonstrates that Green Valley was not involved in those collection efforts or in the resolution of counterclaims by former Green Acres customers relating to those supposed receivables.

f. Breyer would also infer an agreement to assume obligations by the continued occupancy by Green Valley of premises leased by Green Acres. The inferences supporting an assumption of liability are no stronger than those opposed. For example, there may have been new lease agreements. The landlords may have explicitly discharged Green Acres and accepted Green Valley. The evidence does not demonstrate convincingly either way. The mere occupancy of the same premises does not establish assumption of lease agreement liabilities. Breyer does not sustain the burden of proof where the inferences each way equally support opposite conclusions.

g. The court concludes that Breyer failed to prove that Green Valley impliedly assumed Green Acres' obligations.

10. The second *Jones* exception considers whether the transaction amounts to a consolidation or merger of the purchaser and seller corporation.

a. In a merger a corporation absorbs one or more other corporations, which thereby lose their corporate identity. *Knapp v. North Am. Rockwell Corp.*, 506 F.2d 361 (3rd Cir. 1974). A merger of two corporations contemplates that one will be absorbed by the other and go out of existence, but the absorbing corporation will remain. *Id.* In a consolidation all the combining corporations are deemed to be dissolved and to lose their identity in a new corporate entity which takes over all the properties, powers, and privileges, as well as the liabilities, of the constituent companies. *Id.*

b. In *Knapp*, the court described the decisive factor as whether, immediately after the transaction, the selling corporation continued to exist as a corporate entity and whether, after the transaction, the selling corporation possessed substantial assets with which to satisfy the demands of its creditors. *Id.*

c. In this case, the sale occurred in September of 1980. Exhibit 8. Green Acres continued to have corporate existence for almost two years thereafter. Exhibit 7. Its dissolution occurred by operation of law for nonpayment of annual fees. *Id.* After the sale, Green Acres retained its accounts receivable, having a stated value of over \$100,000.00. At least \$60,000.00 of those receivables was collected and applied on Green Acres' remaining obligations.

d. The court finds that Green Acres continued to have separate corporate existence and after the sale possessed substantial assets with which to satisfy the demands of its creditors. The court concludes that the merger or consolidation exception does not apply.

11. The third *Jones* exception inquires whether the purchaser corporation is merely a continuation of the seller corporation.

a. In *Timmerman v. American Trencher, Inc.*, 220 Neb. 175, 368 N.W.2d 502 (1985), the Nebraska Supreme Court recognized that the fact that a purchasing corporation continues the business operations of a selling corporation does not, in and of itself, establish that the purchasing corporation is a continuation of the corporate entity of the selling corporation.

b. In this case, Green Valley continued in the irrigation equipment business. But it did not continue in the grain bin installation or the home lawn sprinkler businesses formerly engaged in by Green Acres. Thus, Green Valley continued only part of the business operations of the selling corporation.

c. The *Timmerman* court also declared that commonality of officers, directors, or stockholders is an important consideration in determining whether the a purchasing corporation is but a continuation of the corporate entity of a selling corporation. *Id.*

d. The court accepts Shane's testimony that, although he was originally a shareholder of Green Acres, he sold his stock to the corporation two or three years before the sale of assets to Green Valley. The sale agreement definitively states that Dodd was the sole shareholder. Exhibit 8. Dodd's testimony that Shane was a shareholder conflicts with the documentary evidence and is rejected. Dodd was never a shareholder or otherwise the owner of any beneficial interest in Green Valley.

e. Although Dodd did perform some function as a commission salesman for Green Valley for a short time, his role differed substantially from that in Green Acres. In Green Acres, he was the sole manager and made all the management decisions. Green Valley hired a different manager. Dodd never served as a manager, officer, or director of Green Valley. Green Valley hired some of the same servicemen who had worked with Green Acres, but the testimony demonstrates that this occurred under a new employment arrangement in each instance.

f. The *Timmerman* court cited the lack of commonality of ownership, not the fact of an involuntary reorganization, as a substantial basis for rejecting an assertion of the mere continuance exception. *Id.* The arguments for mere continuation are not compelling without a finding that the equitable owners of the new corporation had an ownership interest in the predecessor corporation. *Id.* (citing *People ex rel. Donahue v. Perkins & Will*, 90 Ill. App. 3d 349, 413 N.E.2d 29 (1980)). At the time of the transaction and for a substantial period of time prior to the transaction, none of the equitable owners of Green Valley had any ownership interest in Green Acres. See also *Earl v. Priority Key Servs., Inc.*, 232 Neb. 584, 441 N.W.2d 610 (1989).

g. The court concludes that Green Valley was not a mere continuation of Green Acres.

12. Because the court concludes, either as the trier of fact upon bifurcated trial on certain issues or by summary judgment as a matter of law on certain issues, that none of the *Jones* exceptions applies, the court determines that Green Valley did not, and does not, succeed to the liabilities of Green Acres. Thus, Green Valley is not considered in law as the contracting party with Breyer.

13. The parties also stipulated to the submission of the accepted work doctrine. Because the accepted work doctrine applies only to the contractor which installed the bin, it is not strictly necessary to consider that issue. However, because of the subsequent potential for appellate review and to avoid the necessity of further proceedings on that issue, the court considers that issue under the assumption (albeit rejected) that Green Valley did succeed to the liabilities of Green Acres.

14. Under the accepted work doctrine, a construction contractor is not liable for injuries or damage to a third person with whom he is not in contractual relation resulting from the negligent performance of his duty under his contract with the contractee where the injury or damage is sustained after the work is completed and accepted by the owner. *Dvorak v. Bunge Corp.*, 256 Neb. 341, 590 N.W.2d 682 (1999); *Parker v. Lancaster Cty. Sch. Dist. No. 001*, 254 Neb. 754, 579 N.W.2d 526 (1998).

15. The accepted work doctrine finds a long history in Nebraska jurisprudence. The earliest reference found by this court is the decision in *Haynes v. Norfolk Bridge & Constr. Co.*, 126 Neb. 281, 253 N.W. 344 (1934). The cases do not expressly discuss the allocation of the burden of proof regarding the accepted work doctrine. However, the Nebraska Supreme Court seems to consider the issue as a question of the existence of any legal duty from the defendant to the plaintiff. *Stover v. Ed Miller & Sons, Inc.*, 194 Neb. 422, 231 N.W.2d 700 (1975). See also 65A C.J.S. *Negligence* § 601 (2000) (contractor does not owe duty of care to third parties after owner has accepted work).

16. In *Haselhorst v. State*, 240 Neb. 891, 485 N.W.2d 180 (1992), the Supreme Court stated that, in order to succeed in an action based on negligence, a plaintiff must establish the defendant's duty not to injure the plaintiff, a breach of that duty, proximate causation, and damages. Whether a legal duty exists is a question of law dependent on the facts in a particular situation. *Merrick v. Thomas*, 246 Neb. 658, 522 N.W.2d 402 (1994). These rules dictate that the plaintiff bears the burden of proof of facts sufficient to establish a duty.

17. In the recent case of *Cerny v. Cedar Bluffs Jr./Sr. Pub. Sch.*, 262 Neb. 66, \_\_\_ N.W.2d \_\_\_ (2001) (citations omitted), the Nebraska Supreme Court extensively discussed the issue of duty:

The question of what duty is owed and the scope of that duty is multifaceted. First, and foremost, the question of whether a duty exists at all is a question of law. . . . A court must determine whether

upon the facts in evidence, [does] such a relation [exist] between the parties that the community will impose a legal obligation upon one for the benefit of the other – or, more simply, whether the interest of the plaintiff which has suffered invasion was entitled to legal protection at the hands of the defendant.

. . . .

Once a court determines that a duty is owed by one party to another, it becomes necessary to define the scope and extent of the duty. In other words, the necessary complement of duty – the standard of care – must be ascertained. . . . That standard is typically general and objective and is often stated as the reasonably prudent person standard, or some variation thereof; i.e., what a reasonable person of ordinary prudence would have done in the same or similar circumstances. . . .

This basic standard, however, is not invariably applied in all negligence cases. For example, the standard is modified in circumstances in which the alleged tort-feasor possesses special knowledge, skill, training, or experience pertaining to the conduct in question that is superior to that of the ordinary person. Such a person is not held to the standard of a reasonably prudent person, but, rather, to a standard consistent with his or her specialized knowledge, skill, and other qualities. . . .

Although we have never explicitly stated as much, determining the standard of care to be applied in a particular case is a question of law. . . .

The legal standard of care is necessarily articulated in general terms, such as a duty “to conform to the legal standard of reasonable conduct in light of the apparent risk.” [citation omitted.] “Since it is impossible to prescribe definite rules of conduct in advance for every combination of circumstances that may arise, and the fact situations are infinitely variable, the law resorts to formulae which state the standard in broad terms without attempt to fill it in in detail.” [citation omitted.] We have recognized that negligence and the duty to use care do not exist in the abstract, but must be measured against a particular set of facts and circumstances. . . . Therefore, while the existence of a duty and the identification of the applicable standard of care are questions of law, the ultimate determination of whether a party deviated from the standard of care and was therefore negligent is a question of fact. . . .

*Id.* at 73-75, \_\_\_ N.W.2d at \_\_\_.

18. The law requires a practical acceptance, not a formal, legalistic gesture. *Haynes v. Norfolk Bridge & Constr. Co., supra*. In the present case, there is no other way to view the evidence. Thus, as to the issue of acceptance, the allocation of the burden of proof makes no difference. Even if Green Valley was required to meet the burden of proof, it unquestionably did so.

19. An exception to the accepted work doctrine exists in situations where the parties dealt with inherently dangerous elements or the defect at issue was latent and could not have been discovered by the owner or employer. *Parker v. Lancaster Cty. Sch. Dist. No. 001, supra*.

20. The Nebraska Supreme Court has described “inherently dangerous” in terms of being a special or peculiar risk. *Id.* Such a risk has been defined as one that differs from the common risks to which persons in general are commonly subjected by the ordinary forms of negligence which are usual in the community. *Id.* It has been held that generally, stairs, steps, and unmarked curbs are not inherently dangerous. *Id.* This court concludes that a ladder on a grain bin is not inherently dangerous. Answer of Breyer, ¶ II.B.

21. To meet the other exception to the accepted work doctrine, Breyer had the burden to plead and prove that the defect was latent and could not have been discovered by the owners. As the trier of fact, the court concludes that Breyer failed to meet that burden. Even if Green Valley was required to meet that burden, the greater weight of the evidence shows that a reasonable inspection would have revealed the defect and that it was not latent.

22. Thus, if it was necessary to reach the issue, the court would determine that the accepted work doctrine applies to preclude any determination that Green Valley was negligent.

23. The third-party petition must be dismissed with prejudice at Breyer’s cost.

24. This determination obviously affects the remaining issues to be tried on the plaintiff’s petition. As the Nebraska Supreme Court even more recently decided in *Maxwell v. Montey*, 262 Neb. 160, \_\_\_ N.W.2d \_\_\_ (2001), the proper time to consider whether there are multiple defendants in a case is when the case is submitted to the finder of fact. If there is only one defendant in a particular case at the point the case is submitted to a jury, the jury will not be allowed to allocate a percentage of damages or negligence to a phantom defendant who is no longer a part of the proceeding. *Id.* Only when there are multiple defendants in a case at the time the case is submitted to the finder of fact can there be the possibility of an allocation of damages between defendants under the comparative negligence statute. *Id.*

25. Pursuant to NEB. REV. STAT. § 25-1315 (Cum. Supp. 2000), this order is interlocutory in character and does not constitute a final order.

**ORDER:** IT IS THEREFORE ORDERED that:

1. The court's prior interlocutory order denying the third-party defendant's motion for summary judgment is reversed in part, and the motion is granted to the extent set forth below. Except to such extent, the prior order denying the summary judgment motion remains effective.

2. Interlocutory summary judgment is entered in favor of the third-party defendant, Green Valley Irrigation, Inc., and against the defendants and third-party plaintiffs, Kenneth Breyer and Elaine Breyer, determining that:

a. there was no express agreement by Green Valley to assume Green Acres' liability as to this matter; and,

b. the sale from Green Acres to Green Valley was not entered into fraudulently to escape liability for such obligation.

3. Interlocutory judgment is entered in favor of the third-party defendant, Green Valley Irrigation, Inc., and against the defendants and third-party plaintiffs, Kenneth Breyer and Elaine Breyer, on the amended third-party petition, and the said amended third-party petition shall be dismissed with prejudice at the cost of said defendants and third-party plaintiffs.

4. Pursuant to the stipulation of June 4, 2001, and the order entered thereon, the deadline for filing of final pretrial motions is extended for thirty days after the date of entry of this interlocutory order.

5. Subject to continuance for disposition of any final pretrial motions, the final pretrial conference is rescheduled for **Monday, September 10, 2001, at 1:35 p.m.**, or as soon thereafter as the same may be heard. The pretrial conference will be held in the District Judge's chambers, Holt County Courthouse, O'Neill, Nebraska. All other provisions of the prior progression order(s) remain fully effective.

6. This order is interlocutory in character and does not constitute a final order.

Signed in chambers at Ainsworth, Nebraska, on July 18, 2001.

DEEMED ENTERED upon filing by court clerk.

If checked, the Court Clerk shall:

- Mail a copy of this order to all counsel of record and to any pro se parties.  
Done on \_\_\_\_\_, 20\_\_ by \_\_\_\_.
- Note the decision on the trial docket as: [date of filing] Signed "Interlocutory Order on Bifurcated Trial" entered.  
Done on \_\_\_\_\_, 20\_\_ by \_\_\_\_.

Mailed to:

BY THE COURT:

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William B. Cassel, District Judge