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William R. Mccurtain v. Interstate Construction Company, A Corporation : Brief of Respondent

Utah Supreme Court

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IN THE
SUPREME COURT
OF THE
STATE OF UTAH

WILLIAM R. McCURTAIN,
Plaintiff and Respondent,

v.

**INTERSTATE CONSTRUCTION
COMPANY, a Corporation,**
Defendant and Appellant.

Case No.
12083

BRIEF OF RESPONDENTS

Appeal from judgment of the
District Court of Salt Lake County, State of Utah
HONORABLE STEWART M. HANSON, Judge

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BRIEF OF RESPONDENTS

STATEMENT OF FACTS

The plaintiff does not adopt the statement of facts set forth in the defendant's brief.

On December 18, 1967, the plaintiff,, William R. McCurtain purchased from Jessica L. Longston, a D-8 Caterpillar Crawler Tractor model No. 2U9559 for \$800.00 (R. 34). At that time he received a bill of sale (Exhibit 1-R). The plaintiff McCurtain visited the area in the Uintah Mountains where the tractor was located. The second time he viewed the tractor was with a mechanic (R. 36). Although McCurtain did not make a complete inspection of the tractor, his examination indicated that the track on the left side was off, and that the starting motor needed repairing (R. 36). McCurtain made arrangements with the Selena Construction Company to pull the tractor out and to

haul it to Salt Lake City (R. 36). The Selena Construction Company had large tractors and equipment within twenty miles from the location of the tractor (R. 36). By use of the equipment of the Selena Construction Company, the estimated cost to get the left track back on the tractor and to haul it to Salt Lake City was \$500.00 (R. 41). McCurtain estimated that it would cost an additional \$200.00 to repair the starter motor (R. 41).

Sometime in July, plaintiff McCurtain with Mr. Jack Scores of the Selena Construction Company were in the area where the tractor was located (R. 36). At this time McCurtain discovered that the tractor in question had been removed from its initial position and was on a dirt road in the general area. The tractor had been driven some distance on the road (R. 37). McCurtain verified that the tractor was his by inspecting its serial number (R. 37). Three miles from this location McCurtain found Richard Smith, the foreman and part owner of the defendant, Interstate Construction. McCurtain told Smith that the tractor was his and that he had a bill of sale for the tractor. Mr. Smith replied that the defendant had purchased the tractor from Wheeler Machinery Company (R. 36, 37), but that they had no bill of sale or other document of title (R. 64, 48). Smith testified that in order to get the tractor running he had to replace the left track and did some work on the oil filter, after which they were able to drag the tractor and get it started (R. 66). Smith agreed with McCurtain that the tractor would not be moved until it could be resolved who owned the tractor (R. 38). Thereafter, Mr. Smith made no attempt to verify ownership of the tractor, made no contact with his office nor called Mr. McCurtain (R. 69). Four or five days later the defendant moved the tractor to its yard in American Fork, Utah (R. 69).

Prior to the removal of the tractor, the plaintiff had sold the tractor for \$4,500.00 to Harold Breitling, delivered

in Salt Lake City, Utah (R. 39). Breitling testified that he had purchased the tractor on the basis that at the time of delivery, it would be in operating condition (R. 69). Donald C. Morrison, a buyer and seller of heavy equipment, testified that a tractor of this make, model and year of manufacture in average operating condition at the time of the sale was worth \$5,000.00. Mr. Morrison testified that it would cost \$1,000.00 to remove the tractor to Salt Lake City, if two caterpillar D-8 units had to be brought into the area from Salt Lake in order to remove it (R. 54). Richard Smith also testified that it cost the defendant \$1,100.00 to remove the tractor to Salt Lake City, Utah (R. 97). Alvin J. Carlson, of Eureka Sales Company, an affiliated company of Wheeler Machinery Company, testified that the removal and transportation cost to Salt Lake City would be \$1,200.00 (R. 92), although his prior estimate was \$700.00 to \$1,000.00 (Exhibit D-3).

On July 30, 1968, the defendant delivered a check in the amount of \$300.00 payable to Jessica Longston and Wheeler Machinery Co. (R. 73). William Preece, the credit manager of Wheeler Machinery, testified that he did not tell the defendant that he had authority to sell the tractor (R. 86), and that in the presence of Wilson Smith, the president of the defendant, he attempted to call Jessica Longston to see if she still wanted to sell the tractor, but was unable to reach her (R. 86, 87). Preece told Mr. Wilson Smith that Mrs. Longston probably would accept \$300.00, and that Smith knew that the sale of the tractor depended on her accepting that sum (R. 86). Mr. Preece testified that two weeks after he received the check he called Wilson Smith and told him that he was returning the defendant's check and that he had been in telephone communication with Mrs. Longston who had indicated that she had sold the tractor to someone else (R. 78, 87). Mr. Wilson Smith testified that prior to the time that he had received the check back and been notified that Mrs. Longston could not

sell the tractor that no repairs were made on the tractor at American Fork (R. 79). Notwithstanding the fact that Wilson Smith as president of the defendant had received his check back and was advised that the tractor had been sold to someone else, he nevertheless went ahead and expended approximately \$1,800.00 to \$2,000.00 in repairs on the tractor as listed on Exhibit 5-P (R. 79). Mr. Carlson further testified that if the repairs indicated on the Exhibit 5-P were made that the tractor would then have a fair market value of between \$4,500.00 to \$6,500.00 (R. 94).

ARGUMENT

POINT I

THERE IS A REASONABLE BASIS IN THE EVIDENCE TO SUPPORT THE FINDING OF THE TRIAL COURT THAT THE PLAINTIFF WAS DAMAGED IN THE AMOUNT OF \$2,800.00.

The defendant in its brief fails to set forth the appropriate rule of law by which the evidence adduced at trial should be evaluated in order to determine whether or not the findings and judgment entered by Judge Hanson should be affirmed or reversed.

In the case of *Nauman v. Harold K. Beecher and Associates*, 24 Utah 2d 172, 467 P. 2d 610 (1970), this Court set forth the applicable rule of law¹ at page 612:

"The trial court having found for the plaintiff upon our review we must survey the evidence in the light most favorable thereto to determine whether there is substantial evidence to support the findings; or, to state it conversely, if there is no reasonable

¹See also, *Memmott v. United States Fuel Company*, 22 Utah 2d 356, 453 P. 2d 155 (1969) and *Smith v. Gallegos*, 16 Utah 2d 344, 400 P. 2d 570 (1965)

basis in the evidence to support the findings, they cannot be sustained."

The finding of the Court that the tractor of the plaintiff at the time of its conversion by the defendant was worth \$2,800.00 is supported by testimony elicited from the defendant's own witnesses.

The trial court found that the defendant had expended \$1,000.00 to remove and transport the tractor to American Fork, Utah (R. 14, 21). Richard Smith testified that it cost the defendant "about \$1,100.00" (R. 97). Morrison estimated the cost of transportation to Salt Lake City to be \$1,000.00 (R. 54). Alvin J. Carlson testified that the cost of removal to Salt Lake City was \$1,200.00 (R. 92), but previously his estimate was \$700.00 to \$1,000.00 (Exhibit D-3).

Richard Smith, a foreman and part owner of the defendant, testified that the cost of the actual repairs to the tractor as listed on Exhibit 5-P was \$1,800.00 to \$2,000.00.

"Q. (By Mr. Ellett) Would you state your opinion as to the cost of repairs you made for this piece of equipment to put it in the running condition it in now in?

A. \$1,800.00, \$2,000.00.

Q. And is this piece of equipment now in operating condition?

A. Yes." (R.101)

Mr. Alvin Carlson of Eureka Sales Company, the used equipment affiliate of Wheeler Machinery Company, called as a defense witness, testified on cross examination that after the repairs which Mr. Smith testified were made on

the tractor, had been made, that the market value of the tractor would be between \$4,500.00 and \$6,500.00.

“Q. (By Mr. Baker) Mr. Carlson, I show you what the reporter has marked as “Exhibit 5-P,” and I think you are generally acquainted with what is on that list, and maybe you can glance at that and maybe refresh your recollection. Now, assuming you had this tractor that we are talking about, also assuming that the items that were on this list were either missing or were not in proper working condition, with a repair as indicated on that list, and then assuming that those were—assuming that the tractor was put back into operating condition so that it could be used and worked with, do you have an opinion as to the value of that tractor in July or August of 1968, an operating tractor having those things repaired, what it would be worth?

A. Yes. I would say from anywhere from \$4,500.00 to \$6,500.00.

Q. \$4,500.00 to \$6,500.00?

A. Yes.”

(R. 94)

The foregoing testimony elicited from the defendant's own witnesses in and of itself is a reasonable basis for the finding of the trial court that at the time of the conversion of the tractor by the defendant, it had a market value of \$2,800.00. Based upon the testimony of the defendant's own witnesses, the court could have found that the cost of removing and transporting the tractor was \$1,000.00, that the cost of repairs was \$1,800.00, and that the value of the tractor as repaired was as much as \$6,500.00. Deducting the cost of repairs and transportation, the trial Court under the evidence could have determined that the value of the tractor at the time of conversion was as much as \$3,700.00, well above the \$2,800.00 figure found by the Court.

The defendant in its brief ignores the foregoing evidence and argues that the trial court should have accepted Mr. Carlson's testimony that the value of the tractor at its location was \$1,500.00 (Appellant's Brief, page 9). However, this testimony of Mr. Carlson was with respect to its value as parts and not as a repairable or operable tractor.

"Q. (By Mr. Baker) Now, you have also stated that the value to you, if you had this caterpillar in Salt Lake, would be \$1,500.00 to part out. I take it your purpose was to take it and dismantle it and recover what you could for parts, is that right?

A. That is right.

Q. So that \$1,500.00 is based on your value of dismantling rather than on your value of repairing it and fixing it up, is that right?

A. That is correct." (R.95)

In any event, the trial court as the trier of fact chose not to accept the foregoing evidence of the defendant.

The defendant argues that the trial court should have awarded the plaintiff the sum of \$300.00. This would mean that the defendant which was admittedly guilty of converting a tractor belonging to the plaintiff would, through its unlawful action, own a tractor valued between \$4,500.00 and \$6,500.00, for which it would have expended \$1,000.00 in transportation costs, \$1,800.00 to \$2,000.00 in repairs, and \$300.00 in payment to the plaintiff, or a total cost of between \$3,200.00 and \$3,400.00. It is understandable why the trial court rejected the defendant's argument and its interpretation of the evidence.

Point I of the defendant's brief in its entirety is an argument based upon the defendant's interpretation of the evidence which it feels the trial court should have adopted.

Nowhere in its brief does the defendant deal with the basic issue as to whether or not there was a reasonable basis in the evidence from which the trial court could have arrived at the \$2,800.00 figure. The complaint of the defendant that the trial court did not adopt its view of the evidence is understandable, but under the prior decisions of this Court it does not justify a reversal of the trial court's determination and evaluation of the evidence.

POINT II.

THERE IS A REASONABLE BASIS IN THE EVIDENCE TO SUPPORT THE COURT'S FINDING THAT THE DEFENDANT SHOULD NOT BE AWARDED ITS COSTS IN REPAIRING THE TRACTOR.

In Point II of its brief the defendant argues that if its position that damages be limited to \$300.00 is rejected, that the defendant should be awarded its expenditures for repairing the tractor and transporting it to American Fork, Utah (Appellant's Brief, page 10). The plaintiff assumes that this would be on the basis of the defendant returning the tractor to the plaintiff. In the Court's memorandum decision the Court held that the plaintiff was entitled to either the return of the tractor upon the payment of \$1,000.00 to the defendant or a money judgment in the amount of \$2,800.00 (R. 14, 22). Judgment was entered for money damages of \$2,800.00 and accordingly, the alternate remedy of the trial Judge at this point is perhaps moot. In any event, the Court's alternate remedy can be sustained by the evidence.

The plaintiff cites from the *Restatement of Torts*, § 927, Comment f., page 651, with respect to the right of an innocent converter to receive a credit for the value of his services or expenses in repairing the subject matter converted. The following quotation includes the first part of comment f which was not referred to in defendant's brief:

“f. *Additions to chattels.* Where a converter has made additions to or otherwise improved a chattel, the owner may be able to recover for its value thus increased, this being dependent upon the state of mind of the converter.

If suit is brought against one who converted the chattel with knowledge of the facts, the owner is entitled to the exchange value of the chattels in their changed and more valuable condition. . . * * * The increased liability of the intentional wrongdoer is imposed irrespective of how or by whom the additions were made, as where value is added by a converter who sells the subject matter to another converter who has knowledge of the facts.

An innocent converter who is sued in an action for conversion, or in a proceeding in equity for specific restitution, is entitled to a credit for the value of his services or expenses in repairing or adding to the subject matter to the extent that these have increased its value to the owner. * * *

The Court, in accordance with its memorandum decision, found that at the time the defendant expended \$1,000.00 in removing the tractor, it thought it was the owner of the tractor (R. 13, 14) and therefore would be entitled to reimbursement of the removal cost upon the return of the tractor to the plaintiff. However, after the tractor arrived in the defendant's yard in American Fork, and prior to repairs being made thereon, the Court was of the opinion that the defendant knew that the plaintiff was the owner of the tractor (R. 14).

Mr. Preece, of Wheeler Machinery testified:

“Q. (By Mr. Baker) After you called her [Mrs. Longston] and found out she had sold the tractor to Mr. McCurtain, you contacted Mr. Smith?

A. I believe I remember of phoning him.

Q. That would have been two weeks after the July 30th check?

A. Approximately.

Q. What did you tell Mr. Smith?

A. I don't remember, except I told him I was returning the check. Unless she gave me permission to sell, I couldn't sell." (R.87)

Wilson J. Smith, president of the defendant, testified:

"Q. (By Mr. Ellett) Did you have any further conversation with Mr. Preece relative to this particular unit?

A. Later he said that she [Mrs. Longston] had sold it to somebody else, and that is when he sent the check back.

Q. And you said it was about three weeks or a month after you gave him the check this happened?

A. Yes. (R. 77, 78)

* * *

Q. (By Mr. Baker) At the time you got the check back this tractor was in your yard, is that right?

A. That is right.

Q. And nothing particularly had been done with it, I take it, at that time?

A. Well, there was very little done on it.

Q. But it was essentially in the same condition that it had been taken out of the mountains and brought down, is that right?

A. Pretty much so. (R. 75)

* * *

Q. (By Mr. Baker) Certainly. Then this check you got from Mr. Preece, was on July 30th, and you said it was maybe three weeks or so, three or four weeks when you got the check back, and, of course, the machine had to be brought back from the mountains during this interim, so that by the time you received the check back from Mr. Preece no repairs had been made on the machine itself there?

A. No." (R. 79)

The foregoing evidence supports the finding of the Court that the defendant was not entitled to any credit for the repairs, inasmuch as at the time the repairs were made it actually knew that it had no ownership interest in the caterpillar tractor and that in fact it was owned by the plaintiff. The Court certainly was justified in its alternate remedy that if the tractor was returned to the plaintiff, he would be required to repay the transportation costs of \$1,000.00 and not the cost of the repairs.¹

¹Under the *Restatement of Torts*, § 927, Comment f, Page 651, (See Illustration 5) previously referred to, the appropriate case law and the finding by the court that at the time the repairs were made the defendant knew that the tractor belonged to the plaintiff, the Court in addition to awarding the plaintiff the value of the tractor at the time of conversion could have added thereto the cost of the repairs of \$1,800.00 to \$2,000.00. In *J. Oswald Boyd*, 53 F. Supp. 103 (E.D. Mich., 1943), the Court stated the rule at page 105:

Where the suit is brought against the original converter who has increased the value of the property by his efforts and expenditures subsequent to the conversion, the decision as to whether the owner can recover the original or augmented

CONCLUSION

There is substantial evidence in the record to support the findings of fact and accordingly, under the prior opinions of this Court, the findings of fact and judgment of the trial judge must be sustained by this Court.

Respectfully submitted,

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value is dependent upon whether the conversion was innocent or wilful. (Citations omitted) If wilful, the owner is permitted to recover the enhanced value of the property.