

1970

Gordon Berlant v. John S. Mcallister, Adminis- Trator of the Estates of Grant Kimball Mower and Altha Mower, His Wife, Deceased : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT
OF THE
STATE OF UTAH

GORDON BERLANT,
Plaintiff and Appellant,
vs.

JOHN S. McALLISTER, Admin-
istrator of the Estates of Grant
Kimball Mower and Altha Mower,
his wife, deceased,

Defendant and Respondent.

Case No.
12076

BRIEF OF RESPONDENT

Appeal from Judgment of the Seventh Judicial
District Court for Sanpete County,
Honorable Ferdinand Erickson, District Judge

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Clock, Supreme Court, Utah

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Defendant and Respondent.

Case No.
12076

BRIEF OF RESPONDENT

STATEMENT OF THE KIND OF CASE

In this action, arising from an automobile collision, the plaintiff seeks to recover from the defendant for personal injuries and the defendant seeks to recover from the plaintiff for wrongful death of two persons.

DISPOSITION IN LOWER COURT

The lower court granted summary judgment dismissing the plaintiff's complaint and the defendant's counterclaim.

RELIEF SOUGHT ON APPEAL

Defendant seeks affirmance of the judgment in his favor.

STATEMENT OF FACTS

The appellant's statement of facts is not accurate. The plaintiff filed the complaint prepared for him by J. Rulon Morgan, an attorney, on November 7, 1968, nearly three years after the accident (R. 1). A counterclaim in excess of the amount of the plaintiff's liability insurance and in the amount of \$103,000 was filed for wrongful death by the defendant on January 21, 1969 (R. 12). The counterclaim was served on Gordon Berlant at his address in San Mateo, California, and was not served on Farmers Insurance Exchange (R. 18). The plaintiff delivered the counterclaim to Farmers Insurance Exchange (hereinafter called Farmers) and it employed Don J. Hanson, an attorney, to file a reply to the counterclaim. To protect the plaintiff Mr. Hanson, in his reply to the counterclaim, pled as a defense a compromise settlement including a release of all claims signed by the defendant in April 1966 (R. 23, 24). The defense was not limited to the extent the counterclaim was covered by liability insurance issued by Farmers to the plaintiff.

After the settlement was pled as a reply to the counterclaim the defendant moved for summary judgment dismissing the complaint. This motion was noticed up for hearing on February 12, 1969, (R. 25, 26) and later the hearing on the defendant's motion for summary judgment was continued until April 10, 1969, in order to give the plaintiff, a non-

resident, an opportunity to appear or to arrange for legal counsel to appear on his behalf (R. 36). At the hearing on the defendant's motion for summary judgment on April 10, 1969, Udell R. Jensen, as personal attorney for Mr. Berlant, appeared along with Mr. Edward Garrett, an attorney employed by Farmers to represent Mr. Berlant in the action. In this hearing the settlement was relied upon as a defense to the counterclaim. In contradiction to what appellant says in his brief the appellant relied on the settlement and ratified it as a personal defense to the counterclaim. During the hearing on April 10, 1969, Udell R. Jensen, the personal attorney for Mr. Berlant, sought and received permission from the court to file a memorandum in opposition to defendant's motion for summary judgment. The memorandum was filed by Udell R. Jensen, the personal attorney for Mr. Berlant, on May 29, 1969 (R. 49). In this memorandum Udell R. Jensen ratified the release and claimed the release unequivocally as a defense. Mr. Jensen said:

“Upon the basis of the contents of the insurance policy, the contents of the court order, and the contents of the release, plaintiff maintains the release is a bar to the counterclaim; that it may stand as such herein; and is not an accord and satisfaction of the claim of the plaintiff against the defendant. If the plaintiff must make any election after becoming aware of his situation, he should not be required at this time to so do.” (R. 51, 52).

On May 5, 1969, the court signed an order giv-

ing Udell R. Jensen additional time to investigate the facts and problems connected with the case (R. 53). On September 2, 1969, the lower court granted the defendant's motion for summary judgment dismissing the complaint (R. 71-73). After the lower court signed an order on September 2, 1969, granting defendant's motion, Udell R. Jensen, on September 5, 1969, moved to vacate the September 2, 1969, order and to file an amended reply to the counterclaim. September 5, 1969, was the first time the plaintiff did not claim the compromise settlement, including the release taken by Farmers, as a defense. On March 12, 1970, the lower court granted summary judgment in favor of the defendant and against the plaintiff, no cause of action, and dismissed the action as to all parties with prejudice denying plaintiff the right to amend his reply (R. 92).

ARGUMENT

POINT I

THE PLAINTIFF ELECTED TO AND DID RATIFY THE SETTLEMENT MADE BY FARMERS TO PROTECT HIM.

The plaintiff must accept the burdens that go with the release obtained by Farmers as well as the benefits the settlement provides.

In the lower court the defendant did not claim the release constituted admission of negligence as a matter of law on the part of the plaintiff. In this court the defendant does not claim the release constitutes an admission of negligence as a matter of

law. In presenting Proposition A. under Point I appellant in his brief has presented to the court an immaterial issue.

The position of the defendant in the lower court and in this court is that the compromise and settlement made by Farmers is a mutual settlement of all claims between the plaintiff and the defendant because the plaintiff, after he learned of the settlement and compromise made on his behalf by Farmers, ratified the settlement and compromise by claiming the settlement, including the release taken by Farmers, as a defense to defendant's counterclaim.

The evidence is clear that plaintiff elected to and did ratify because:

1. He delivered the counterclaim to Farmers to defend.

2. At the hearing on April 10, 1970, the plaintiff claimed the benefit of the settlement, including the release.

3. Again on May 29, 1970, the plaintiff through his personal attorney in submitting a memorandum to the court, again claimed benefit of the settlement, including the release.

The defendant concedes that if the plaintiff had not elected to ratify and set up the release as a defense of the counterclaim, the release would not constitute a proper defense.

Keith vs. Glenn, 262 N.C. 284, 136 S.E. 2d 665

(1964), is a leading case. In this case the plaintiff brought an action to recover for personal injuries and property damage. The defendant counterclaimed seeking to recover for personal injuries and property damage sustained in the collision. The plaintiff, in reply to the counterclaim, alleged his liability insurer had paid defendant \$1,250 in full settlement of the defendant's claim against the plaintiff and that the defendant executed a release barring defendant's counterclaim. The court dismissed the complaint and counterclaim. The court said where the plaintiff elected to plead the receipt of \$1,250 by the defendant and an execution of the release by the defendant for the compromise and settlement of the disputed claim, the settlement barred the counterclaim and the plaintiff by pleading the release ratified the insurer's settlement and compromise and the parties each had to accept the burdens of the release as well as the benefits of settlement. In response to plaintiff's argument that sound legal principles should not be applied in controversies between insured motorists, the court said:

“Plaintiff argues this sound legal principle should not be applied in controversies between insured motorists. He has, he says, purchased and paid for insurance which will compensate those he may injure. A payment by his insurance carrier for injuries he inflicts should not impair his right to compensation for injuries he sustains. The contention would have merit if his insurance provided for payment irrespective of fault or liability. It does

not. It is liability, not accident insurance. Plaintiff's insurance carrier was under no obligation to pay unless plaintiff was legally liable. The insurance carrier had the right to compromise and settle claims asserted against its insured"

The cases cited by appellant in his brief are not in point. They involve factual situations in which it is clear that the insured made no effort to ratify the settlement or compromise made by his liability insurer.

In the cases cited by the appellant, in each instance the plaintiff did not have knowledge of the settlement made by the insurer and did nothing to show consent or ratification of the settlement.

In this case, Berlant, the plaintiff, claimed the fruits of the settlement agreement after discovering it. Mr. Berlant did not instruct Farmers to withdraw the release as a defense to the counterclaim. He did not instruct Mr. Jensen to move to amend the reply and vacate the release as a settlement. Instead, Mr. Berlant, through his attorney, Mr. Jensen, and through Farmers' attorney, relied on the release as a defense to the counterclaim until they were notified summary judgment was being granted dismissing the action. Mr. Berlant consented to the settlement made by Farmers and ratified it by standing on the release as a defense. Mr. Berlant is in the position of a principal trying to ratify a part of the agreement and repudiate the rest. He cannot take the rose without the thorns.

POINT II

THE PLAINTIFF'S RATIFICATION OF FARMERS' SETTLEMENT AND COMPROMISE IS IRREVOCABLE.

Since the counterclaim was greatly in excess of the plaintiff's liability insurance, it is understandable that he wanted to rely on the fruits of the compromise and settlement agreement. In this instance, Berlant, the plaintiff, did not act timely in seeking to revoke the ratification. Instead, he waited until the court ruled on the defendant's motion for summary judgment and then sought to obtain leave to amend his pleadings in order to withdraw the settlement as a defense.

White vs. Perry, 7 N.C. App. 36, 171 S.E. 2d 56 (1969), involved a factual situation similar to the case of Mr. Berlant. In the *White* case the plaintiff endeavored to withdraw a reply to avoid having it constitute a ratification of plaintiff's liability insurer's settlement. In *White vs. Perry, supra*, an action was brought by the plaintiff for personal injuries and property damage and a counterclaim was asserted by the defendant. In reply to the counterclaim the plaintiff asserted a release was obtained by his liability insurer from the defendant. Thereafter, apparently to avoid ratification of his liability insurer's settlement the plaintiff obtained an order from the court and withdrew the reply setting up the release as a defense. After an amended answer was filed the defendant again pled the release to be a bar to the plaintiff's claim. The lower court granted judg-

ment in favor of the defendant holding the release to bar plaintiff's claim. On appeal the court of appeals said:

"This leaves us with the proposition of whether the withdrawal by the plaintiff of the further reply constituted a revocation of the ratification. The answer is no. In *Norwood vs. Lassiter*, 132 N.C. 52, 43 S.E. 2d 509, it is said: 'When a party has the right to ratify or reject, he is put thereby to his election, and he must decide once and for all, what to do; and when his election is once made it immediately becomes irrevocable. This is an elementary principle. *Austin vs. Stewart*, 126 N.C. 525, 36 S.E. 2d 37.' See also Breckenridge, *Ratification in North Carolina*, 18 N.C. L. Review 308. Although the further reply has been withdrawn as a pleading, it was proper for Judge Bundy to consider it in making his findings of fact and conclusions of law. *Davis vs. Morgan*, 228 N.C. 8, 44 S.E. 2d 593 (1947).

Utah requires a principal to accept the entire contract negotiated by an agent and does not permit the principal to accept that portion only that he deems beneficial. In *Moses vs. Archie McFarland & Son*, 119 Utah 602, 230 P. 2d 571 (1951), an agent for Archie McFarland & Son purportedly, without authority, entered into a contract to deliver 30,000 pounds of mutton at the rate of 3,000 pounds or more per week as agreed to by the plaintiff. The defendant, after shipping approximately 6,625 pounds of a 30,000 pound order, tried to disaffirm its agent's order. In deciding the case in favor of the purchaser

Moses this court said it was too late for Archie McFarland & Son to repudiate the agreement after making the first shipment. Further the court said that where an agent has entered into a contract without authority and purportedly on behalf of his principal, the principal cannot confirm such part of the contract as is beneficial to him and reject the part which is claimed to be detrimental.

If Berlant did not want to accept the detriment of having the release obtained by Farmers bar his claim against McAllister, he should not have claimed the benefit of it to bar McAllister's counterclaim until the lower court ruled on McAllister's motion for summary judgment. If the plaintiff, Berlant, did not want to be bound by Farmer's agreement, he should have repudiated the release agreement promptly and should not have elected to stand on it until he knew the court's ruling on the defendant's motion for summary judgment.

In *Grandi vs. LeSage*, 74 N.M. 799, 399 P. 2d 285 (1965), a horse trainer as an agent employed by the seller registered a horse as a chestnut colt indicating it to be a stallion. In fact the horse was a gelding and after the buyer claimed it upon the official program showing it as a stallion the buyer demanded his money back upon discovering immediately the misrepresentation. In deciding the case the court said that upon acquiring knowledge of an agent's unauthorized act the principal should properly repudiate it or otherwise he will be presumed to

have ratified it and affirmed it. This court also said that when a principal expressly or impliedly elects to ratify an unauthorized act he must so far as it is entire, ratify the whole of it, and he will not be permitted to accept its benefits and reject its burdens.

Ratification is equivalent to an original grant of authority. Presumably, Berlant ratified the settlement when he did not immediately repudiate it. Clearly, between April 1969 and September 2, 1969, he did nothing to reject it.

POINT III

THE LOWER COURT PROPERLY DENIED PLAINTIFF'S MOTION TO AMEND HIS REPLY.

The lower court awarded summary judgment in favor of the defendant dismissing the plaintiff's cause of action on September 2, 1969. The plaintiff's motion to amend the reply was not filed until September 5, 1969, or three days after the order was entered dismissing the plaintiff's action. Farmers, plaintiff's insurer, paid only \$5,150 for the deaths of two persons. The plaintiff stood on the release obtained by Farmers as a defense to the counterclaim. Udell R. Jensen, the personal attorney for Berlant, told the lower court they should have the benefit of the release. He did not repudiate it between April 1969, and September 2, 1969, the date the court ruled.

In *Goeltz vs. The Continental Bank & Trust Co.*, 5 Utah 2d 204, 299 P. 2d 832 (1956), an action

was brought against the bank to recover stock certificates delivered by the plaintiff to the bank. The plaintiff's former husband had forged plaintiff's endorsement on the certificates as security for a loan. During the trial the bank asked leave to amend its answer and set up the defense of the statute of limitations. The trial court refused to allow the amendment. In this case, facts upon which the statute of limitations defense was based were known to the bank prior to the bringing of the action. The court said that under Rule 15(a), Utah Rules of Civil Procedure, which provides that leave to amend shall be freely given when justice requires, the bank was not entitled to amend. The court said the bank was willing to waive the defense of the statute of limitations in the beginning and since the facts upon which the statute of limitations defense were known from the start to the bank there was no abuse of discretion in failing to permit the bank at trial to amend and plead the statute of limitations.

In *Hein's Turkey Hatcheries, Inc. vs. Nephi Processing Plant, Inc.* 470 P. 2d 257 (Utah 1970) a defendant moved to file an amended answer to be presented and this court held the amended answer was properly refused, saying that the motion to amend should have been pursued in advance of trial, not at the trial.

In another case, *Summerhays vs. Holm* 468 P. 2d 366 (Utah 1970), this court stated a controvert-

ing affidavit proffered at trial on a motion for summary judgment was not timely and without merit as a defense.

POINT IV

THERE WAS A VALID ACCORD AND SATISFACTION.

An accord and satisfaction is the giving of money paid over in payment or extinguishment of a claim. To constitute an accord and satisfaction there must be a proper subject matter, competent parties and the assent or meeting of the minds of parties and a consideration. An accord is an agreement between parties, one to give or perform, the other to receive or accept, such agreed payment or performance in satisfaction of a claim and the satisfaction is a consummation of such agreement.

Farmers' payment to Mr. McAllister consummated an accord and satisfaction. Utah recognizes this principle. In *Badger & Co. vs. Fidelity Building & Loan Association*, 94 Utah 97, 75 P. 2d 669 (1938), this court said that where the parties are in disagreement and, in good faith, thereafter reach a compromise settlement of the unliquidated and disputed claim, the settlement constitutes an accord and satisfaction.

The settlement between Farmers and the defendant McAllister in April, 1966, constituted an accord and satisfaction. The plaintiff, when he adopted the benefits of the settlement as a defense to the counterclaim ratified the accord and satisfac-

tion and was bound by the detriments in it as well as the benefits it gave him. The plaintiff takes the accord and satisfaction in its entirety, the thorns go with the rose.

CONCLUSION

The summary judgment in favor of the defendant should be affirmed because :

1. There is a valid accord and satisfaction.
2. The plaintiff elected to and did ratify the compromise and settlement made by Farmers.
3. The plaintiff did not repudiate or reject the compromise settlement timely after discovering it.
4. The lower court did not abuse its discretion in refusing to permit the plaintiff to amend his reply to revoke the ratification after making its ruling.

Respectfully submitted,

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MAILING NOTICE

I hereby certify by United States Mail, postage prepaid, I mailed two copies of the foregoing Brief to Nielsen, Conder, Hansen & Henriod 410 Newhouse Building, Salt Lake City, Utah 84111, two copies to Udell R. Jensen, 125 North Main Street, Nephi, Utah 84648, and two copies to Hanson and Garrett, 520 Continental Bank Building, Salt Lake City, Utah 84101 thisday of, 1970.

Raymond M. Berry