

1970

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

Utah Supreme Court

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In The Supreme Court of the State of Utah

WILLIAM R. McCURTAIN,

Plaintiff-Respondent,

vs.

**INTERSTATE CONSTRUCTION
COMPANY, a Corporation,**

Defendant-Appellant.

APPELLANT'S BRIEF

**On Appeal from the District Court of Salt Lake
State of Utah**

Honorable Stewart M. Hanson, District Judge

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In The Supreme Court of the State of Utah

WILLIAM R. McCURTAIN,

Plaintiff-Respondent,

vs.

INTERSTATE CONSTRUCTION
COMPANY, a Corporation,

Defendant-Appellant.

} Case No.
12083

APPELLANT'S BRIEF

Nature of the Case

Action by plaintiff-respondent for conversion of Model 2-U D-8 Caterpillar Tractor by defendant-appellant, with counterclaim by defendant-appellant for services performed upon and in connection with the tractor.

Disposition in Lower Court

This matter was tried to the Lower Court, without a jury. The court entered its memorandum de-

cision finding that defendant committed a technical conversion of the subject tractor, but that it was not wilful or malicious. The court further found that defendant had expended the sum of \$1,000 to remove the tractor from its location at American Fork, Utah, and there expended funds to put it in operable condition, but that defendant was not entitled to the expenses of repairing the the tractor. The court further found that plaintiff was the owner of the tractor and entitled to have it returned to his place of business in Wyoming upon payment of \$1,000 to defendants, or, in the alternative, that defendants could keep the tractor and pay plaintiff the sum of \$2,800. Findings of fact, conclusions of law and decree were entered accordingly. Defendant filed a motion to amend findings, conclusions and decree, or, in the alternative, for a new trial, which motion was denied. Thereafter, this court entered an amended decree granting plaintiff judgment in the sum of \$2,800, and providing further that upon satisfaction of the judgment, title to the tractor shall be transferred to defendant.

Nature of Relief Sought on Appeal

Defendant seeks to have the decree and amended judgment of the trial court reversed and to have it determined that defendant is entitled to judgment against the plaintiff for \$1,100 transportation, and \$1,800 repairs to the tractor.

Facts of the Case

Prior to the year 1968, Mrs. Jessica Longston was the owner of the D-8 Model 2-U Caterpillar Tractor that is the subject of this lawsuit. In April, 1967, Mrs. Longston owed Wheeler Machinery Company some money, and by letter asked them to look at the tractor to determine its worth and to also determine if its value could be applied to her bill (R-81). The tractor was located in a remote and rather inaccessible spot in the high Uinta Mountains of Utah (R-35, 59, 31). In response to the request of Mrs. Longston, Wheeler Machinery requested Mr. Alvin J. Carlson, a dealer in buying and selling used equipment (R-88), to locate and examine the tractor. In September, 1967, Mr. Carlson located and inspected the tractor (R-89) in an area that was scheduled to be burned by the Forest Service (R-82 90,). Mr. Carlson testified that he placed a value of \$1,500 on the tractor if it had been in Salt Lake City, noting many missing items of equipment (R-91). He testified that the cost of removing the tractor from its location and transporting it to Salt Lake City would be \$1,200 (R-92). He further stated that in his opinion it would cost about \$3,500 to rebuild and make the tractor operable (R-92).

In 1967, prior to December, the plaintiff was approached by a representative of Worthen Machinery Company concerning the possible purchase of Mrs. Longston's tractor. Plaintiff was advised as to the location of the tractor, and agreed to purchase the

same, sight unseen (R-34). The purchase was consummated in December, 1967 (R-34), and plaintiff received a bill of sale from Mrs. Longston's attorney. Thereafter, in early spring of 1968, plaintiff, through his agent, agreed to sell the tractor to Harold Breitling, representing it to be in good running condition (R-28), and to be delivered in Salt Lake City.

Plaintiff did not locate or see the tractor until late spring of 1968 (R-35), after it had been sold to Mr. Breitling. Later, during the summer of 1968, plaintiff made arrangements to have the tractor moved to Salt Lake City (R-36).

In July, 1968, the defendant had some equipment working in the area where the tractor was located, observed it, and contacted Wheeler Machinery relative to it. Mr. Bill Preece, Credit Manager of Wheeler Machinery, discussed the tractor with Mr. Wilson Smith of defendant company, and stated that he had been in letter contact with the owner of the tractor, and advised that it was not worth the cost of sending another tractor from Salt Lake City to get it out (R-83). Mr. Preece further stated that he would be happy to get anything they could get out of it (R-83). Mr. Preece attempted to telephone Mrs. Longston at that time but he was unable to contact her. Mr. Smith was advised to make out a check to Mrs. Longston so that Wheeler could send it to her and get a bill of sale back (R-93). A check in the sum of \$300 was issued and delivered to Wheeler Machinery Company. Prior to this date, Wheeler had not been advised by Mrs. Longston that she had sold

the tractor to the plaintiff (R-84); in fact, at this time, Mr. Preece told Mr. Smith:

“Someone has got to get it out, and if it has any value at all and you have your equipment, I think it would be a very good idea to get out” (R-86).

Mr. Smith then instructed his men to remove the tractor. With the use of two other and larger tractors, the Longston tractor was moved to a road where it was pulled until it started. Removal of the tractor took about 12-13 hours (R-67). After it was removed from the side of the mountain to the roadway, Mr. McCurtain, the plaintiff, arrived and questioned Mr. Richard Smith of defendant company, who was at the job site, about the tractor. Mr. McCurtain told Mr. Smith that he owned the tractor, whereby Mr. Smith stated that Interstate Construction Company had purchased the tractor from Wheeler Machinery Company (R-68). Plaintiff stated that he would obtain his bill of sale and return to the area where the tractor was located. After approximately five days, when the plaintiff did not reappear, the defendant removed the tractor to its yard at American Fork, Utah. After transporting the tractor to its yard, the defendant made a thorough inventory of the repairs required to place the equipment in operating condition, determining that extensive repairs would have to be made. These repairs were in fact made at a cost of \$1,800 to \$2,000,

plus spare parts that the defendant company had at its yard.

Thereafter, but before the repairs were completed, Mr. Wilson Smith, President of the defendant company, was advised by Wheeler Machinery Company that the check given for the purchase of the tractor had been returned by Mrs. Longston, and that she had advised that she had previously sold the tractor. Thereafter, this present action was commenced for the conversion of the tractor by the defendant. At the time defendant was contacted relative to this matter, he advised plaintiff of the expenditures made on behalf of plaintiff, and requested reimbursement from plaintiff.

ARGUMENT

POINT I

THE TRIAL COURT ERRED IN FINDING THAT PLAINTIFF WAS DAMAGED IN THE AMOUNT OF \$2,800, AND AWARDING JUDGMENT AGAINST THE DEFENDANT IN THAT SUM; AND THAT THE JUDGMENT IS NOT SUPPORTED BY THE EVIDENCE.

In its findings of fact, the court found that defendant had removed the subject tractor from its high Uinta Mountain location to American Fork, Utah at a cost of \$1,000. The court also found that after the tractor was in the possession of defendant, defendant was advised that plaintiff was the owner. This, according to his testimony, took place at the

location of the tractor in the high mountain area (R-38). If, in fact, there was a conversion by the defendant, as found by the court, the conversion would have been at that time and location, and plaintiff's damages would be determined at that time. Under the general rule of law, as set forth in 18 Am. Jur. 2d, Conversion, Paragraph 82, Page 208, damages should be determined as follows:

"The general rule is that in an action for the conversion of personal property, plaintiff may recover the fair, reasonable market value thereof."

This rule has been determined by this court in the case of *Lowe vs. Rosenlof*, found at 12 U. 2d. 190, 364 P.2d 418, wherein the court stated:

"This court has stated the measure of damages for conversion to the market value of the item converted, at or near the time of the conversion, and furthermore that proof of the value of the converted property is essential to recovery of damages under the theory of conversion."

See also *Lynn vs. Thompson*, 112 U 24, 184 P.2d 667; and *Allred vs. Hinkley*, 8 U 2d. 73, 328 P.2d 726.

From the evidence before the court, plaintiff purchased the tractor "as is and where is" (See Exhibit 1-P) for the sum of \$800. The tractor was then in a remote and desolate area of mountainous country, and in a condition where, in the words of Mr. Al Carlson, a dealer in equipment of this type:

"After looking at it, I knew I couldn't afford to rebuild it . . ." (R-91).

In its "as is, where is" condition, the tractor required the expenditure of \$1,200 to recover it and transport it to Salt Lake City, Utah (R-92); it required parts and repairs to put it into operating condition, estimated by Mr. Carlson at \$3,500 (R-92). Thus, the unseen purchase by plaintiff of the tractor meant that in order to put it into operating condition at Salt Lake City, he would expend not only the initial cost of \$800, but an additional \$4,700, or a total of \$5,500.

Plaintiff, having purchased sight unseen, proceeded to sell the tractor to Mr. Harold Breitling, likewise sight unseen (R-29). However, plaintiff was required to deliver the tractor to Salt Lake City in an operating condition before the sale to Mr. Breitling was complete (R-29). For the tractor to be delivered in Salt Lake City in good operating condition, Mr. Breitling agreed to pay the sum of \$4,500 (R-29) which would have been within the value range of a similar tractor in good operating condition in Salt Lake City, as estimated by the witnesses appearing before the Lower Court (R-94). It therefore appears that had the plaintiff changed the tractor from its "as is, where is" condition to its required reasonably good running condition, delivered in Salt Lake City, he would have had a net loss of \$1,000.

To determine the true market value at the time of the claimed conversion, the best evidence, and in fact the only real evidence, is that of Mr. Al Carl-

son, who inspected the tractor at its location and in its then condition, for the sole purpose of determining its value. Neither plaintiff nor his witnesses ever saw the tractor in the condition under which plaintiff purchased it, to-wit: "As is, where is." The witness, Carlson, a disinterested party, who is a dealer in equipment of this nature, did in fact view the equipment in its location and its condition as when sold and when purchased by the plaintiff. At page 91 of the record, Mr. Carlson, in connection with this, stated as follows:

"Q. (By Mr. Ellett) What would be the value there in that location?

A. I valued the tractor at \$1,500 if I had it in Salt Lake. In order to part it out, that is what I valued it at."

Carlson further testified that his estimate of the cost to remove the tractor from its mountainside location and transport it to Salt Lake City, Utah, was the sum of \$1,200 (R-92).

It is therefore more than evident that the only value the tractor had at the time the defendant exerted its conversionary control, was not \$2,800, as determined by the Trial Court, nor the \$800 paid by the plaintiff for the equipment, but the sum of \$300.

Since it is the object of the law in all cases to compensate an injured person for his loss—no more, no less—it would seem only appropriate that plaintiff here should not be awarded a \$2,000 profit on a piece of equipment which, when sold under his own

terms and conditions, would have resulted in a \$1,000 loss to him. This is what the Lower Court by its judgment proposes to do. Were the judgment to stand, plaintiff would be entitled to receive \$2,800 for his \$800 investment, for a neat \$2,000 profit. Considering that the costs involved in completing the sale with Mr. Breitling would have resulted in a loss of \$1,000 to the plaintiff, the judgment, as determined by the Lower Court, certainly turns a "sow's ear into a silk purse."

POINT II

THE COURT ERRED IN NOT AWARDING TO THE DEFENDANT ITS COSTS OF REMOVING AND REPAIRING THE TRACTOR.

In its discussion of conversion, the restatement of the Law of Torts on Damages, at Pages 651 and 652, states as follows:

"An innocent converter, who is sued in an action for conversion . . . 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."

Under the circumstances found here, the plaintiff made claim of ownership of the equipment after its removal from its precipitous location. This removal and the transporting from that location to Salt Lake City, Utah, were expenses that plaintiff was required to expend in order to benefit from his sale

to Breitling. He was also required to put the tractor in good running condition, which, if done by Wheeler Machinery Company, would have cost \$3,500. Those repairs were actually made by the defendant at its cost of \$1,800-\$2,000, plus the parts used from its own supply. These certainly increased the value of the tractor for the plaintiff.

In the Trial Court's memorandum decision, he acknowledged the repairs made by the defendant, but determined that since the repairs were made after defendant had been advised of the claimed ownership of the plaintiff, that defendant would not be entitled to the repairs, even though they enhanced the value of the equipment. The Trial Court did determine, however, that the sum of \$1,000 represented the transportation costs, should be paid to the defendant, or, in the alternative, that the defendant should pay to the plaintiff the sum of \$2,800 for the equipment. The inequity of the court's alternate proposal lies in the facts set forth in Point I of the Argument made herein, and that being that the repairs made by the defendant enhanced the value of the equipment far in excess of its value at the time of the alleged conversion. It would seem that the only value the equipment had at the time of the alleged conversion was in the sum of \$300, and that if its value, as repaired, was \$4,500, it would certainly appear that the repairs and transportation furnished by the defendant would reasonably be

worth \$4,200. It therefore appears evident that the court erred in not awarding to the defendant its costs in making the necessary repairs to the equipment, which repairs were required by the plaintiff to complete the contract sale of the equipment to Harold Breitling.

CONCLUSION

In attempting to do what he considered justice, the Trial Court, in making his judgment, failed to follow the law in determining damages. By some formula, he attempted to give the plaintiff the profit the plaintiff anticipated in selling the tractor to Mr. Breitling. Unfortunately, both plaintiff and the Trial Court did not consider the problems involved in transforming the "as is, where is" tractor into a tractor in good, operable condition at Salt Lake City. Had this been considered, it is evident that the actions of the defendant in removing and repairing the equipment saved plaintiff some substantial money loss. Plaintiff did not, in fact, stand to make a profit on his unseen purchase and sale, notwithstanding the court's attempt by judgment to create one. Thus, plaintiff's only damage would be the loss of a piece of equipment valued at \$300, in its "as is, where is" condition.

If this Honorable Court believes a conversion was made by the defendant, then judgment should

be given only for the value of the tractor at the time of the conversion, to-wit: \$300; otherwise, defendant should be awarded the expenditures made, which increased the value of the equipment to the plaintiff, these expenditures being in the sum of \$300.

Respectfully submitted,

DANSIE, ELLETT AND HAMMILL

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