Sterling B. Cannon, George H. Maxwell, Dave Davis, Art Van Luyx, and Terry Teeples v. Stevens Schools of Business, Inc. : Response to Petition for Rehearing

Utah Supreme Court

IN THE SUPREME COURT OF THE STATE OF UTAH

STERLING B. CANNON, GEORGE H. MAXWELL, DAVE DAVIS, ART VAN LUYK, and TERRY TEEPLES, Plaintiffs and Respondents,	
vs.	Case No. 14378
STEVENS SCHOOLS OF BUSINESS, INC., Defendant and Appellant.	

RESPONDENTS' REPLY TO APPELLANT'S PETITION FOR RE-HEARING AND SUPPORTING BRIEF

Appeal from a Judgment of the District Court
of Salt Lake County
Honorable Stewart M. Hanson, Sr., Judge

DEL B. ROWE
Attorney for Respondents
425 South 400 East, Suite 100
Salt Lake City, Utah 84111

BRYCE E. ROE
Roe and Fowler
Attorney for Appellant
340 East Fourth South
Salt Lake City, Utah 84111

TABLE OF CONTENTS

AUTHORITIES CITED

Cases

Constitution

IN THE SUPREME COURT OF THE STATE OF UTAH

STERLING B. CANNON, GEORGE H. MAXWELL, DAVE DAVIS, ART VAN LUYK, and TERRY TEEPLES,	)	
Plaintiffs and Respondents,	)	
vs.	)	Case No. 14378
STEVENS SCHOOLS OF BUSINESS, INC.,	)	
Defendant and Appellant.	)	

RESPONDENTS' REPLY TO APPELLANT'S
PETITION FOR RE-HEARING
AND SUPPORTING BRIEF

REQUEST TO DENY APPELLANT'S PETITION FOR RE-HEARING

Sterling Cannon, et al, plaintiffs and respondents respectfully petition the court to deny a re-hearing on the following grounds:

1. The court's action concerning Justices Henriod and Hall was constitutional.

2. Whether the court calls Stevens obligation to receive and protect student tuitions a "special fund" or "any fund" is irrelevant. Appellant had a duty to respond-dents to protect their commissions when it sold the colleges.

3. The primary issue of the case was decided squarely by the court, viz: p. 2 of opinion:

> "...(Williston)...it is a principle of fundamental justice that if a promisor is himself the cause of the failure of performance of a condition upon which his liability depends, he cannot take advantage of that failure." (Emphasis added.)

4. The court's holding with respect to accord and satisfaction accepted the well established principle that where there is no meeting of the minds, there is no accord and satisfaction.

CONCLUSION: The court's 5-0 decision was sound and upheld a trial which based its decision on overwhelming evidence in favor of judgment for the plaintiffs; and further, on appeal, by traditional appellate rules, this court interpreted the trial record and evidence in a light favorable to sustaining the judgment of said trial court.

BRIEF IN SUPPORT OF DENYING PETITION FOR RE-HEARING

NATURE OF CASE

This is an action by five former employees against an employer for vested commissions when the employer "sold" its colleges for $460,000. It should also be emphasized that appellant never did cease doing business after said "sales."

DISPOSITION IN LOWER COURT

The court entered judgment in favor of the plaintiffs and against defendant for $36,398.78.

DISPOSITION IN THIS COURT

This court unanimously affirmed the judgment of the trial court on March 9, 1977.

RESPONDENTS REQUEST THE COURT TO DENY RE-HEARING

Plaintiffs and respondents ask the court to deny appellants petition for re-hearing, deny re-argument and reaffirm the decision of this court and judgment of the trial court.

STATEMENT OF FACTS

Plaintiffs were admissions counselors for defendant's well known schools, Stevens-Henager, Ogden and Salt Lake City, Utah. In 1973 appellant "sold" these schools for $460,000. The contract between the parties provided plaintiffs would be paid ongoing commissions on their students' tuitions after termination. All plaintiffs terminated and the commissions were therefore due but not paid by defendant.

ARGUMENT

I

The court's action concerning Justices Henriod and Hall was proper and constitutional.

Judge Henriod submitted his resignation effective December 31, 1976, and under Article VIII, Section 2, Utah Constitution:

"...If a justice of the Supreme Court shall be disqualified from sitting in a case (a district judge shall be appointed)." (emphasis added)

Judge Henriod was not disqualified when the case was heard; therefore, this section does not apply. The submission of a request for retirement is not a disqualification.

Judge Hall's appointment to the court became effective January 3, 1977. Appellant had from that date until the decision in this case was filed (March 9, 1977), a total of 65 days, in which to request an oral argument before Judge Hall.

Further, the fact that Judge Hall did not hear oral argument is irrelevant when four other justices heard argument and still decided in favor of plaintiffs unanimously.

II

Whether the court calls Stevens obligation to receive and protect student tuitions a "special fund" or "any fund" is irrelevant. Appellant had a duty to respondents to protect their commissions when it sold the colleges.

It is common sense and all the demands of fair justice sustain the principle that where salesmen generate a fund, in this case almost one-million dollars in one year alone, 1973, (See page 23, respondents' brief), the receiving business has a duty to those salesmen to protect said fund. And, particularly the law will not permit a receiving business to obliterate said fund by merely exchanging the assets of the business (ongoing student tuitions) for cash.

Really, Stevens never did quit doing business. The corporate entity still does business. The $460,000. was received by appellant which replaced tuitions. Respondents had a "vested" interest in those funds as held by Judge Stewart M. Hanson, Sr., and affirmed in this court's decision of March 9, 1977.

III

The primary issue of the case was decided squarely by the court, viz: p. 2 of opinion:

> "...(Williston)...<u>it is a principle of fundamental justice that if a promisor is himself the cause of the failure of performance of a condition upon which his liability depends, he cannot take advantage of that failure</u>." (Emphasis added).

IV

The court's holding with respect to accord and satisfaction accepted the well established principle that where there is <u>no</u> meeting of the minds, there is <u>no</u> accord and satisfaction.

The Hintze v. Seaich case, 20 Utah 2d 275, 437 P. 202, cited in the main opinion, was decided January 3, 1968. This attorney represented Hintze in that case who endorsed a check which stated "this is the balance of your account in full."

The facts in Hintze are almost identical with this instant case. There Hintze sold Seaich's picture post cards and stationary and depended on his employer to account and pay for his efforts by commissions on sales. Then, as here, the employer tendered and the employee indorsed and cashed a check with the restrictive endorsement. Hintze held:

> "...the employee was not fully apprized of his commission accounts by Seaich and this court sustained the trial court stating:"
>
> (Emphasis added.)
>
> "...it is clear that there was no meeting of the minds that the acceptance of the check was to be in complete settlement of the dispute..."

The record reflects that Stevens likewise failed to submit required commission printouts before tendering said checks to plaintiffs. (R 198, line 14).

Further, neither the statements on the Hintze check nor on the Van Luyk, Teeples and Maxwell checks stated the express intention of the drawer that the payment was offered upon condition it be accepted in full satisfaction, "or not at all." See main opinion, Justice Maughn, page 3. (Emphasis added.)

CONCLUSION

This court's 5-0 decision was sound and upheld a trial court which based its decision on overwhelming evidence in favor of judgment for the plaintiffs; and further, on appeal, by traditional appellate rules, this court interpreted the trial record and evidence in a light favorable to sustaining the judgment of the trial judge. There has been no error raised by appellant in this court's decision of March 9, 1977.

DATED this 5th day of April, 1977.

Respectfully submitted,

Del B. Rowe

DEL B. ROWE
Attorney for plaintiffs and Respondents
425 South 400 East, Suite 100
Salt Lake City, Utah 84111

CERTIFICATE OF DELIVERY

Two copies of the foregoing Respondents'reply to Appellant's petition for re-hearing and supporting brief were delivered this 5th day of April, 1977, to Bryce E. Roe, 340 East Fourth South, Salt Lake City, Utah, Attorney for appellants.

Del B. Rowe

Del B. Rowe