

2000

Lloyd Lewis v. Lynn S. Porter dba Lynn S Porter Housemovers : Brief of Appellant

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_sc2



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Supreme Court; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

Preston, Harris, Harris and Preston; George W. Preston; Attorneys for Defendant-Appellant.
Olson, Hoggan and Sorenson; David W. Sorenson; Attorneys for Plaintiff-Respondent.

Recommended Citation

Brief of Appellant, *Lewis v. Porter*, No. 14486.00 (Utah Supreme Court, 2000).
https://digitalcommons.law.byu.edu/byu_sc2/337

This Brief of Appellant is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

UTAH
DOCUMENT
KFU
459
89
DOCKET NO.

UTAH SUPREME COURT

BRIEF

144 86 A

RECEIVED
LAW LIBRARY

IN THE SUPREME COURT OF THE STATE OF UTAH 17 JUN 1977

LLOYD LEWIS)

Plaintiff and Respondents)

vs.)

LYNN S. PORTER dba LYNN S PORTER)
HOUSEMOVERS

Defendant and Appellant)

BRIGHTON YOUNG UNIVERSITY
J. Reuben Clark Law School

BRIEF OF APPELLANT

Appeal from the District Court of Cache County, Utah

Honorable VeNoy Christoffersen

OLSON, HOGGAN & SORENSON
David W. Sorenson
56 West Center
Logan, Utah 84321

Attorneys for Plaintiff and
Respondent

PRESTON, HARRIS, HARRIS & PRESTON
George W. Preston
31 Federal Avenue
Logan, Utah 84321

Attorneys for Defendant and
Appellant

FILED

MAY 25 1976

14486

TABLE OF CONTENTS

| | PAGE |
|--|------|
| Statement of Kind of Case. | 1 |
| Disposition in Lower Court | 1 |
| Relief Sought on Appeal. | 2 |
| Statement of Facts | 2 |
| Argument | 4 |
| Statement of Points: | |
| Point I: The Trial Court erred in refusing to grant the Defendant's motion to reopen the trial for the purpose of hearing additional evidence.. . . | 4 |
| Point II: The Trial Court erred in entering findings of fact, conclusions of law, and the judgment against Plaintiff, Lynn S. Porter dba Lynn Porter Housemovers, an individual. | 8 |
| Conclusion | 8 |

AUTHORITIES AND CASES CITED

| | |
|--|---|
| Rule 59. U.R.C.D.. | 5 |
| 6A Moore's Federal Practice. | 5 |
| Haugen vs. U.S. 153 F.2d 850 | 6 |
| Bowles vs. Six States Coal Corporation | 6 |

IN THE SUPREME COURT OF THE STATE OF UTAH

LLOYD LEWIS

)

Plaintiff and Respondent

)

vs.

)

APPELLANT'S BRIEF

LYNN S. PORTER dba LYNN PORTER
HOUSEMOVERS

)

)

Case No. 14486

Defendant and Appellant

)

STATEMENT OF THE KIND OF CASE

This is an action brought by Lloyd Lewis alleging a contract between the parties for the performance of services in moving houses and for an accounting between the parties in the performance of the contract.

DISPOSITION IN LOWER COURT

The case was tried by the Court without a jury on the 3rd and 4th day of December, 1973. Thereafter, the Court on the 11th day of December, 1975, made and entered its Findings of Fact, Conclusions of Law, and Judgment. At the same time, receiving the Defendant's Motion to Reopen the case or in the alternative, Plaintiff's Motion for a New Trial.

The District Court of Cache County on the 20th day of January, entered its memorandum decision followed by an order of the District Court on Jan 27th denying the Defendant's motion.

RELIEF SOUGHT ON APPEAL

Defendant seeks reversal of the Trial Court's Order, reopening the trial and for an order to reopen or in the alternative, for a new trial.

STATEMENT OF FACTS

The Defendant and the Plaintiff of June of 1973, entered into an agreement whereby Defendant would aid the Plaintiff in the moving of pre-built homes from the factory to the construction site of the home. Pursuant to the agreement, the Plaintiff moved a substantial number of homes for the defendant and as a result thereof, there is between the Plaintiff and the Defendant, sums due and owing, and offsets and discounts against said sums.

The parties were unable to resolve their difference amicably. Therefore, on the 20th day of March, 1974, the Plaintiff filed a Complaint in the above and entitled matter alleging that there was due and owing the sum of \$11,922.30.

The Defendant through the Law Firm of Hillyard & Gunnell in Logan, Utah filed an answer on April 16, 1974. One year later on April 17, 1975, depositions were taken of the parties and on October 20, 1975, Mr. Gordon Low of the firm of Hillyard & Gunnell withdrew as the attorney for the Defendant. Following the withdrawal of counsel of October 20, 1975, on October 22, 1975, a Notice of Trial was forwarded to the Court and the following day, a Notice of Change of Attorney was filed. The

the parties, a Notice of Setting, wherein this matter was set as a second setting for December 3, 1975.

Following the Notice of Setting, various attempts were made to resolve the case without success and on December 3, 1975, the Court convened for the trial of the matter. The Plaintiff was present being represented by his attorney, David W. Sorenson and Defendant's attorney was present, however, the Defendant and the Defendant's witnesses were conspicuously absent. Defendant's attorney, as the record shows (See Pages 1 through 4) was unable to explain the absence of Defendant and Defendant's witnesses and moved the Court for a continuance. The Trial Court denied the motion and the trial started in the absence of the Defendant and the Defendant's witnesses.

Following a partial trial, the Court reconvened on December 4, 1975, with the Defendant still absent from court; however, with some of the Defendant's witnesses present in Court. The entire matter was tried before the court without the presence of the Defendant and the Court rendered judgment for the Plaintiff and against the Defendant in the sum of \$9,078.27, together with Cost of Court. On December 11th, 1975, the court received from the Defendant, a Motion to Reopen Defendant's portion of the case for the purpose of introducing additional testimony, to which there was attached the Affidavit of Lynn S. Porter, the defendant, in the above entitled matter or in the alternative a Motion for a New Trial. The same date as the motion was filed, the Court entered the Findings of fact,

the Defendant. On December 22, 1975, twelve days after the filing of the motion, Plaintiff objected to the motion. On January 6, 1976, the Defendant filed a brief containing memorandum and authorities.

On January 20, 1976, the District Court entered its memorandum decision followed by an order of the Court denying the Defendant's motion for a new trial. On January 27, 1976, the Defendant filed notice of appeal of February 20, 1975, requesting the present review of the Court's refusal to reopen the case.

ARGUMENT

POINT I: THE TRIAL COURT ERRED IN REFUSING TO GRANT THE DEFENDANT'S MOTION TO REOPEN THE TRIAL FOR THE PURPOSE OF HEARING ADDITIONAL EVIDENCE.

It will be noted that the Defendant first seeks to reopen the case for the taking of additional testimony, rather than a motion for a new trial. The motion for a new trial is a alternative remedy requested by the Defendant.

The motion to reopen was made after the conclusion of the evidence and at the same time or prior to the signing of the Findings of Fact, Conclusions of Law, and Judgment by the Court. Viewing the facts in favor of the Plaintiff at the same time as the entry of the Findings of Fact, Conclusions of Law, and Judgment. The motion is not only timely made, but prior to the rights, liabilities of either party being jeopardized.

It is recognized by the Defendant that Courts must, in the orderly conduct of their business, fix a trial date, conduct the trial, and have a conclusion to the matter within a reasonable time. Recognizing this premise, the Defendant as soon as practicable following the trial, moved to reopen the trial at a time when neither party would be jeopardized by the taking of additional testimony, at a time when the facts were fresh in the parties mind and at a time prior to the entry of judgment and the rights of the prevailing parties to proceedings for the enforcement of judgment were commenced.

Rule 59 of the Utah Rules of Civil Procedure states that "on a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law and make new findings and conclusions, and direct the entry of a new judgment:" The rules themselves create a distinction between a new trial and a motion to reopen. The grounds being the same, but the impact upon the court and its procedures being different.

Moore's Federal Practice Volume, 6A, Page 59.04, states as follows:

"..... While the motion to reopen has certain similarities to a motion for a new trial on the ground of newly discovered evidence, its purpose is different in that the additional testimony may or may not be newly discovered; and the motion does not seek a retrial but the right to offer the additional testimony and evidence before the present tryer of

facts has rendered the decision so the tryer, jury, or court may proceed to render a decision on the testimony that has been taken and the proposed additional testimony. Of course, the similarity between the two motions becomes more pronounced as the case nears actual decision. For instance, in a court case where the judge has not rendered a decision, but has indicated by an opinion or otherwise how he intends to decide, a motion to take additional testimony to supply in effect formal proof need not be treated as a motion for a new trial; that if the additional testimony goes beyond that, then the motion to take the additional testimony closely approaches that of a motion for a new trial on the grounds of newly discovered evidence and the trial court may, if it sees fit, test the priority of the motion by the standards applicable to the latter motion."

"Like the motion of a new trial on the grounds of newly discovered evidence, a motion to reopen the case to take additional testimony is normally addressed to the discretion of the trial court and its discretionary denial or grant of the motion will be interfered with by an appellate court order only for abuse....."

At the time of the Defendant's motion to reopen the District Court had committed itself with respect to the decisions but had signed neither Findings of Fact or Conclusions of Law,. Neither party was jeopardized by the petition and the time element involved in taking additional evidence would have been nominal.

See Haugen vs. U. S., 153 F. 2d 850 and the case of Bowles vs. Six States Coal Corporation 64 Federal Supplement 651, where the Plaintiff's motion to reopen was granted although there was not justification for Plaintiff's oversight in offering proof where the Defendant's would not be injured and the reopening is in the interest of substantial justice.

The rules governing the motion to reopen versus a motion for a new trial appeared to be substantially different. In a motion for a new trial, the Court appears to have broader grounds of discretion

or denial and rightly so in that a new trial can be lengthy, time consuming, and a economic detriment to the parties involved. Whereas, a motion to reopen, timely made, is neither lengthy, or does it have the economic disadvantages of a new trial. The Court upon granting a motion to reopen can limit the testimony and scope, and therefore, effectively control the destiny of the trial. It would appear, therefore, that the range of the Court's discretion is more limited in an motion to reopen than in a motion for a new trial. Therefore where a trial court may abuse its discretion in refusing to grant a motion to reopen an appellant court might reasonably find no abuse of discretion in refusals to grant a new trial where the fact are exactly the same.

It is, therefore, the Defendant's contention that the trial court abused its discretion in failing to reopen the above entitled matter to hear evidence illicited from the Defendant concerning matters of defense to the claims of the plaintiff which were not available at the time of trial because:

1. Not all of the documentary evidence had been re-searched by the parites. (See transcript, P. 15) That Plaintiff did not have all the evidence available to him. (see transcript p. 20)

2. That the Defendant's personal presence at the trial would materially aid the Court in reaching a decision.

POINT II: THE TRIAL COURT ERRED IN ENTERING FINDINGS OF CONCLUSIONS OF LAW, AND THE JUDGMENT AGAINST PLAINTIFF, LYNN S. PORTER dba LYNN S. PORTER HOUSEMOVERS, an individual.

The transcript throughout its entirety until page 53 indicated that there was a transaction between the Plaintiff and the Defendant, Lynn S. Porter. However, at page 53 of the transcript, it is noted by Pauline McMillen, a employee of Lynn Porter Housemovers, Inc., a Corporation. Her testimony is supported by Randall Yeates. TR 93 testimony that the Corporation is owner of the equipment involved in the litigation and was the real entity which did business with the plaintiff and by reason it appears from the record that plaintiff should have brought in as a party to the action, Lynn S. Porter Housemovers, Inc., and the trial court erred in granting judgment against the Defendant who is neither a proper party to the action nor the entity that the testimony shows to be the party liable.

CONCLUSION

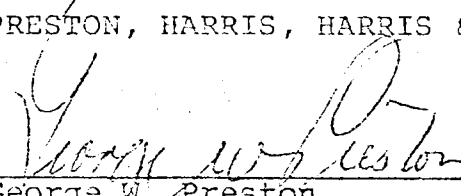
The defendant concedes that his absense from the trial alone does not justify a reversal by this Court. However, the Defendant's absense coupled with the fact the the Defendant made a timely motion to reopen the case for additional testimony should have been given additional consideration by the trial Court. The trial court abused its discretion in failing to reopen the case to include the defendant's testimony as to

such pertinent matters as the real party in interest, matters of defense, unknown till the trial of the case.

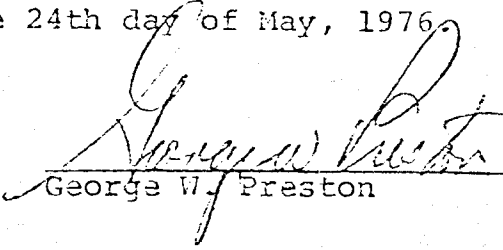
In an event, a new trial should be granted based upon the grounds that the evidence clearly shows the proper party in interest to be a corporation entitled Lynn S. Porter Housemovers, Inc., and not the Defendant as an individual.

Respectfully submitted this 24th day of May, 1976.

PRESTON, HARRIS, HARRIS & PRESTON


George W. Preston
Attorney for the Defendant-
Appellant
31 Federal Avenue
Logan, Utah 84321

I hereby certify that I mailed ten (10) copies of the foregoing appellant's brief to Allen E. Mecham, Clerk of Supreme Court of the State of Utah, and two(2) copies of the foregoing brief to David W. Sorenson, of Olson, Hoggan & Sorenson, Attorney for Plaintiff, 56 W. Center, Logan, Utah, on the 24th day of May, 1976.


George W. Preston

RECEIVED
LAW LIBRARY

13 JUN 1977

BRIGHAM YOUNG UNIVERSITY
J. Reuben Clark Law School