1976

Harold Done v. Ronald L. Bushman : Brief of Appellant

Utah Supreme Court

Eldon A. Eliason; Attorney for Plaintiff and Appellant;
Tex R. Olsen; Attorney for Defendant and Respondent;

IN THE SUPREME COURT

OF THE

STATE OF UTAH

HAROLD DONE, dba,
DONE EQUIPMENT COMPANY,

Plaintiff and Appellant,

vs. Case No. 14623

RONALD L. BUSHMAN, dba,
SMOOT'S CORNER,

Defendant and Respondant.

BRIEF OF APPELLANT

Appeal From Judgment Of District

Court Of The Fifth Judicial District Of

Millard County, Utah

Honorable J. Harlan Burns, Judge

Eldon A. Eliason, Esq.
Attorney for Plaintiff and Appellant

Tex R. Olsen, Esq.
Attorney for Defendant and Respondant

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IN THE SUPREME COURT

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STATE OF UTAH

HAROLD DONE, dba, DONE EQUIPMENT COMPANY, Plaintiff,	)	
vs.	)	BRIEF OF PLAINTIFF-APPELLANT
RONALD L. BUSHMAN, dba, SMOOT'S CORNER, Defendant.	)	Case No. 14623

STATEMENT OF THE NATURE OF THE CASE

This case was filed by Harold Done, dba, Done Equipment Company of Delta, County of Millard, State of Utah, who is a dealer in farm equipment and machinery, vs. Ronald L. Bushman, dba Smoot's Corner, of Marysvale, Piute County, State of Utah, also a machine dealer.

The action involves the sale of certain used tractor and trencher which the plaintiff had available for sale. The plaintiff alleges that on the 16th day of March, 1974, the defendant called plaintiff about the purchase of said equipment. On the 18th of March, defendant made a trip to Delta and examined the equipment. On the 20th day of March, he negotiated on the telephone, the sale of the MF202 Everett trencher for $4,350.00 to be delivered. On the 22nd of March, 1974, plaintiff delivered the tractor and trencher to the defendant at Marysvale, and demonstrated it as desired by the defendant, and received the check which had been made out by the defendant after the telephone conversation of March 20th; that sales tax was waived because the sale was to the defendant, a dealer. The termination of the sale came only as a result of the check being subsequently dis-

honored or the funds stopped.

The defendant's Answer admits the equipment was examined by the defendant on the 18th day of March, 1974 and purchase was discussed on the 20th of March, and the equipment demonstrated on March 22nd, when it was accepted and paid for. Defendant claims that was upon the false and fraudulent representations of the plaintiff.

DISPOSITION OF THE LOWER COURT

The District Court rendered judgment: No cause of action against the plaintiff.

RELIEF SOUGHT ON APPEAL

For Reversal of the Judgment of the District Court.

STATEMENT OF FACTS

The plaintiff, Harold Done, dba, Done Equipment Company was at all times a dealer in farm equipment and machinery, and was an owner of a certain FM 200 Everett trencher and tractor.

That on or about March 16th, 1974, the defendant Ronald L. Bushman phoned plaintiff from his place of business at Smoot's Corner at Marysvale, Utah, asking if the trencher and tractor were for sale. (TR 4, Line 10) The defendant, after examining equipment at Delta on the 18th of March, called the plaintiff, Harold Done on the telephone on or about the 20th of March, and asked plaintiff if he would accept $3,000.00, which he had offered employee at the time he examined the equipment in Delta. Plaintiff advised he would not. That he would sell it for $4,350.00. The defendant asked if plaintiff would deliver equipment; that he would like to see it run. (TR 7, Lines 8 through 15th) The equipment was delivered by

the plaintiff and his mechanic, Eldon Shurtz to the defendant at Smoot's Corner at Marysvale on March 22, 1974.

After the machinery was unloaded, defendant wanted to see it run. (TR 9, Lines 8 through 16). Plaintiff's version of the incident was according to his testimony:

Q: Describe who did what.

A: Eldon, my mechanic backed it off the truck, then Ron and I was standing off to the side, talking. Eldon and the two men run the machine and Mr. Bushman never got on it. I never got on it. We dug a trench, I would say 15 feet maybe 20, and then one of the men took the front-end dozer and filled two trenches in and Ron asked me if it was in good shape and I said, "Yes, it is in good shape." He said, "Will it dig rocks," and we had just been digging rocks and gravel, and I said, "Sure, within limitation, if you get a rock bigger than the bucket it won't, you have to shove your clutch in and get that rock out of it." All machines have a limitation; it has a limitation too, it can only take a certain size rock through the bucket. (TR 9 Lines 15 through 30)

Q: Now when you say you have got parts, from where?

A: "There is a place in California and one in Illinois. I don't have the addresses but my wife has the information or the telephone numbers and we got parts there." And he says, "Fine, Come up and I will give you a check." And then the other men drove it, (the trencher) back around the front of the building. (TR 10, Lines 5 through 9)

A Bill of Sale, Exhibit No. One, dated March 22, 1974 was delivered to defendant, which provided for no sales tax because of the dealers' status of the defendant. (TR 10, Line 22) The defendant delivered to the plaintiff, a check drawn on the account of Smoot's Corner at the Valley Central Bank, Richfield, Utah.

Exhibit No. Two, a check, which is dated '3-20-74', which is a date following the telephone conversation and two days previous to the delivery of the equipment, (TR 11, Line 2) was given by defendant to the plaintiff following the

demonstration on March 22, 1974.

On the following dav, Saturday the 23rd of March, plaintiff's bookkeeper, Ruth Done mailed the check for deposit. (TR 37, Lines 28 through Page 38, Line 1) Subsequently and on the 23rd of March, 1974, defendant telephoned the plaintiff relative to the addresses of the parts houses and the plaintiff referred him to the bookkeeper. The bookkeeper, Ruth Done testified that on the 23rd of March, 1974, she had a telephone conversation with Ronald L. Bushman, who wanted the name of the company or the telephone number where he could get parts. The conversation according to the plaintiff was as follows:

Q: And do you remember what you said to him and what he said to you on that occasion?

A: I just told him, "Wait a minute and I will go get the paper that had the information on it. It was Peoria, Illinois and Costa Mesa, California.

Q: And what had been your experience so far as those companies were concerned, what had been your relationship with them on parts and equipment?

A: We had ordered some chainlinks and a little digger, I don't know what you call them, knives from those when we came in off the job from Gyser Ranch when we repaired it, got it back, but as far as the bearings, I think we got those out of Salt Lake, which we get chainlinks there as well.

Q: Had you had any problem at that time getting any equipment or parts for the equipment that you had requested at any time?

A: We hadn't needed anything other than the little digger knives and the chainlinks which are wear items.

Q: So, as far as you know, are you still able to get them?

A: Still able to get those, they are universal type parts. Any bearing supply house in Salt Lake, I think, can get you the chainlinks, belt, as well as the chainlinks and the bearings.

Q: Did you have any other discussion or conversation with Mr. Bushman relative to what parts were or were not available?

A: No. I just gave him the number where we obtained these parts. (TR 39, Lines 14 through 23)

The address of the parts house as read to the defendant from catalog supplement was and is: Little Giant Products Inc., 1600 Northeast Addms Street, Peoria, Illinois, 61601, Telephone: 309-673-9091.

On cross-examination defendant asked Mrs. Done if there was a discussion in which she was requested not to deposit the check, and she answered: "No Sir, there wasn't." (TR 40, Line 21)

The action of the defendant was louder and more convincing than is even the statements of the defendant, such actions are:

A. Defendant wanted to see the equipment and make his appraisal of its suitability for his purposes. He drove to Delta and found the plaintiff's employee and made such personal inspection as he cared to and offered the plaintiff's employee $3,000.00 purchase price. (TR 44, Line 11)

B. Defendant telephoned the plaintiff on March 20, advising that he had seen the equipment and negotiated with the plaintiff for its delivery for the sum of $4,350.00, which excluded sales tax. (TR 46, Lines 20 through 22)

C. When equipment was delivered on March 22, 1974, plaintiff's mechanic showed the defendant's operator how to operate the gears and dig a trench. The defendant's operator filled in a 22 foot trench and the defendant expressed satisfaction and delivered to the plaintiff, the check for $4,350.00. Defendant has made several references in his testimony that the trencher was going to be used in Marysvale, Utah, apparently with the inference that the plaintiff was guaranteeing a specific performance which is contrary to the testimony. The defendant, in his

testimony stated that the demonstration made of the equipment on March 22, 1974 at defendant's place of business was "..rather an easy demonstration." (TR 48, Line 10) But it is important to note that the plaintiff complied with every request made by the defendant at the time that it was delivered and that there was not and could not be an express warranty on used equipment sold on inspection. Both were dealers of machinery and equipment and both knew that all machinery has limitations with regards to performance. The defendant's allegations of express warranty and/or fraud are no stronger than his own testimony as determined on cross-examination. (TR 71, Line 10)

Q: You wanted to see it operate when you talked to him on or about the 20th of March, is that right?

A: Yes.

Q: And so he brought it over for you to see it operate, is that correct?

A: Yes, he brought it over. He had assured me that the machine would do what it would do.

Q: But did he bring it over and show you like he said he would?

A: Yes, he did.

Q: And did you have your equipment operator there?

A: Yes, I did.

Q: And did you see it operate?

A: Yes, I did.

Q: And did your equipment operator operate it?

A: No, they did not.

Q: Did they have an opportunity--

A: The trencher part?

Q: Any part.

A: Yes, one of my equipment operators did use the backfill blade on the front of the machine to push the trench back in.

Q: Did they deny you any use of the machine that you wanted to make of it with your operators?

A: No, they did not, the machine itself did, however.

Q: So you were given a free use of the equipment?

Comment by the Court.

Q: Did he permit you the full use and demonstration that you wanted of the equipment?

A: Did Mr. --

Q: Did MR. Done?

A: Yes.

Q: All right. And when he got over there did you tell him that you were satisfied and that there was a check up at the station for him?

A: Yes, I did.

Q: And is this the check that had been made out on March 20th, the date that you had talked to him on the telephone?

A: Yes I did.

Defendant further testified on cross-examination as to a conversation he had with Richard G. Spurlin who was an associate with Dixon Corporation, relative to repair parts. Mr. Spurlin had been referred to him by the Little Giant Products Company of Peoria, Illinois, whom the Done Equipment Company bookkeeper had advised defendant that they had received parts from. The following is the testimony of a conversation that the defendant Ronald Bushman had regarding parts: (TR 75, Line 15 through 30)

Q: Have you ever had correspondence with Richard Spurlin?

A: Yes. I talked to Mr. Spurlin Friday on the telephone.

Q: And did you ask him relative to replacements, chains, sprockets, bearings, conveyor belting, hydraulic motor, pump cylinder, repair bushings and shafts?

A: Yes sir, I did.

Q: And did he tell you that those are the main items we try to have made up and on hand?

A: Yes sir, they do that now.

Q: Then these parts are available, are they not?

A: They are now, sir, yes.

Q: Well, if they are now they would be then, if you had made the proper inquiry, would they not?

A: I talked to the same man then, they were not then available sir.

Q: Is that Mr. Done's fault if the parts man was temporarily out of something that you wanted, is that Mr. Done's fault?

A: Dixon Corporation had just taken over the line, sir. LIttle Giant Products had gone out of business and Dixon Corporation had just taken over the line.

Q: It is not your contention, is it, that Mr. Done made any fraudulent statement to you; he told you that he had been able to obtain parts. Parts are still obtainable. The equipment can still be operated by these items which you have described as wanting when you caused the equipment to break, isn't that a fact?

THE COURT: Is this a question?

Q: Let me rephrase that. Bushings can be obtained, can they not?

A: Some of them, yes sir.

Q: Bearings can be obtained?

A: Yes sir.

Q: Shafts can be obtained?

A: Yes sir.

Q: Sprockets can be obtained?

A: Yes sir.

Q: Conveyor belting?

A: Yes sir.

Q: What else do you need?

A: We need a specific bushing that goes inside the slip clutch which Dixon Corporation has not been able to obtain. (TR 75, Line 13 through 30, page 76, Line 1 through 30, page 77, Line 1 through 3)

It is submitted that by any reasonable effort, defendant could have obtained repair parts or have had them made by a precision machine shop. The testimony of the defendant does confirm that the plaintiff Harold Done did not make any false or fraudulent representation, either as to where he obtained parts or as to his use and the condition he knew of the equipment.

The defendant Ronald Bushman made no reasonable effort to operate the equipment or to mitigate any damages. He was a dealer, yet after the bucket had been sprung he merely took some pictures to show that some gears or bearings or some other part of the equipment had been worn. He took a picture marked Exhibit No. 6, by which he attempts to establish the removal of a slip clutch but when asked on cross-examination, about Exhibit No. 6, makes the following reply: (TR 78, Lines 23 through 30) (TR 79, Lines 1 through 30)

Q: Now, what are some of the reasons or purposes that this piece of equipment or part here, (indicating) couldn't be replaced with a larger bearing?

A: Could be, yes.

Q: Not necessarily the removal of any slip clutch or so forth?

A: Well, not necessarily.

Q: So this Exhibit No. 6, where you have pointed to some cutting in the framework here, (indicating), is not necessarily indicative of removing a slip clutch, is it?

MR. OLSEN: We will object to this line of testifying and that it isn't material, isn't getting us anyplace.

COURT: Well, you went into the slip clutch and whether or not it had been removed, it is cross-examination, overruled. Do you understand the question? Restate the question.

Q: This cutting could have been for several reasons, to replace this sprocket or gear (indicating) could it not?

A: Could have been.

Q: To place a larger one there?

A: Yes.

Q: Repair the bearing?

A: Yes.

Q: Now, is it not possible that in this area (indicating) there are, and I point out here (indicating), that there are shearer bolts which would have been in lieu of a slip clutch?

A: Yes sir.

Q: And shear bolts right here (indicating) would have served the same purposes as a slip clutch, would they not?

A: No sir, they would not.

Q: But they would have stopped the equipment if there had been shear bolts here, (indicating), it would serve the same purpose that a slip clutch would, is that correct?

A: If there had been, yes.
(TR 78, Lines 23 through 30, page 79, page 80, Lines 1 and 2)

Neither defendant or plaintiff knew whether equipment had slip clutch or shear pins--nor was it discussed by them. The facts are that the defendant, damaged the bucket while he was letting the equipment self-operate, then permitted the trencher and tractor to remain on his premises, doing nothing to repair it or to mitigate loss or damage until December 5, 1974, eight months later, when he delivered the equipment back to the plaintiff in a gesture of concluding his responsibility and without any consent for redelivery by the plaintiff, placing the plaintiff at a financial disadvantage. The only notice of terminating the agreement was return of the check, (Exhibit No. 2) marked insufficient funds on or about March 26th, and the return of the Sales Tax Waiver April 5, 1976.

ARGUMENT

POINT ONE: The Court erred in making the following Findings of Fact and Conclusions of Law, which findings are not supported by the evidence:

1. Finding number one, the "Everett trencher was sold for the defendant's use at Marysvale, Piute County area."

2. Finding number two, that the trencher was in good condition, and parts and materials for the machine were readily available.

3. Finding number three, that the machine was suitable for use in the Marysvale area and could work in rocky ground.

I-A There was no clear and convincing evidence of fraud.

The defendant in his Answer in paragraph "C" and "D" asks for termination of the contract on the grounds of fraud and misrepresentation. (File B^3) But there is great variance in his pleading and his proof.

The defense of fraud and misrepresentation is an affirmative defense and in order to have a sale voided for fraud, the defendant has the burden of establishing by clear and convincing proof and not by suspicion or innuendo, (Lundstrom vs. Radio Corporation of America, 17 Utah 2d 114, 405 P 2d 339) that the seller had a preconceived intention to practice deception upon the buyer.

The Supreme Court has in numerous cases, including Pace vs. Parish, 122 Utah 141; 247 P 2d 273; and in Fleming vs. Fleming Felt Company, 7 Utah 2d 293; 323 P 2d 712, has stated that the essential elements of fraud include a knowing false representation made by the seller of a presently existing material fact, upon which the buyer relied to his peril. That the buyer did, infact, not rely on independant inspection or inquiry. That the buyer did, infact, exercise reasonable care and prudence before entering into the transaction. (Schow vs. Guardstone, Inc., 18 Utah 2d 135; 417 2d 643)

The defendant, a dealer in equipment, first on March 16, 1974, asked to see and examine the equipment. (TR 6, Line 9 and 10) He next did examine it on plaintiff's yard on March 18, 1974. (TR 44, Line 12 through 15) He made an offer

to buy the tractor and trencher in a telephone call initiated by him on March 20th, 1974, (TR 45, Lines 7 through 30), and he wanted the equipment delivered to Marysvale and wanted to see it run. (TR 46, Line 20)

The equipment was delivered to Marysvale on March 22, 1974. He did see it run. He also had two operators present who participated in operating the equipment. The plaintiff did not deny him any use, demonstration or inspection he wanted to make. (TR 72, Line 14) He told plaintiff he was satisfied, to come and get his check. (TR 72, Line 1 through 15) The defendant had every reasonable opportunity to inquire about the equipment from March 16th through March 22nd. There was no high pressure or persuasive or agressive sales pitch used on the defendant nor could there have been. He knew what he wanted and how to obtain it. He, infact, made every approach. And if the court should set aside this sale because the defendant subsequently thought he had made a bad bargain, few dealers could sell used equipment.

The Supreme Court has said that the mere fact that the party may have made a bad bargain will not support a charge of fraud. (Schow vs. Guardstone, Ibid)

Quoting from 37 Am Jur 2d, Section 237, where a party to whom representations are made is put upon inquiry by his knowledge of the facts and undertakes to make an investigation of his own, and the other party does nothing to prevent this investigation from being as full as the investigator chooses to make it, and in the transaction the true facts are equally open to both upon investigation, the investigator will not usually be heard to say that he had the right to rely on such representations. The doctrine of caveat emptor is recognized and applied where there is investigation or inspection by a purchaser.

I-B <u>There is insufficient preponderance of evidence from which the Court could find warranty.</u>

B: The pleadings and the evidence were insufficient to justify a finding of express or implied warranty.

Even though the defendant did not plead a specific breach of warranty in his Answer, or set it up as an allegation of defense, his testimony alluded to breach of an express or implied warranty as a defense along with his claim of fraud and misrepresentation and objection is raised to the variance between the allegations and the proof, but breach of warranty didnot exist in the instant case. The law respecting express and implied warranties has been modified by the provisions of the Uniform Sales Act and more especially by the Uniform Commercial Code. And the Code at 70 A-2-316 provides:

> "When the buyer before entering into a contract, has examined the goods or the sample or model as fully as he desires, or has refused to examine the goods, there is no implied warranty with regard to defects which an examination ought, in the circumstances, to have revealed to him."

Defendant examined the equipment as fully as he desired (TR 72, Line 14) and told plaintiff to come and get the check. (TR 73, Line 1 through 15) On the nearest thing to a warranty the plaintiff described to the defendant orally, uses that he had made of the equipment, reporting it to be in good working condition. The defendant determined that it was in working condition and even if there had been no inspection or examination, there were no express warranties made by the plaintiff on this second hand equipment upon which the defendant relied at his peril.

> In a similar case of Tibbetts & Pleasant v. Fairfax, 145, Oklahoma 211, 292, P 9, it was held that the principle that there is no implied warranty in the purchase of second hand machinery was applicable in the case under consideration, wherein it appeared that a highway contractor purchased a second hand road-oiler wagon from a municipality after its representative had seen and inspected the machine, the court observing that it appeared from the nature of the purchaser's business that he would have a better judgment than the municipality as to the performance of the machine in the work for which it was purchased.
>
> Where a second hand aeroplane was purchased by an expert on aeroplane motors, and it appeared that before making the purchase he knew that it was a second hand machine used as a demonstrator, and that he inspected and flew the plane, it was held in Aeronautical Corporation of America v. Gossett (1938, Tex Civ App) 117 SW

(2d) 893, that the purchaser could not avoid payment of the note forming a portion of the purchase price upon the ground of a breach of an implied warranty, the court saying: "Where an expert, buying a second hand article, tests the article and relies on his own knowledge, he deals with equal opportunity with the salesman, and there is no implied warranty. A warranty may be implied only where the buyer has no opportunity to inspect the article before accepting it."

And it was held in American Soda Fountain Company v. Palace Drug Store (1922; Texas Civ App) 245 SW 1032, that there was no implied warranty in the sale of a used soda fountain where there was no misrepresentation and no concealment of any facts known to the seller, the seller was not the manufacturer thereof, and the buyer knew that he was buying a second hand fountain, and that the fountain delivered was of the kind and description sold, the court saying that the case under consideration was subject to the general rule that there is no implied warranty in the sale of second hand goods. The court took this view, notwithstanding the fact that the buyer didnot inspect the fountain before it was accepted, it appearing, however, that he accepted and used it and merely complained that the syrup cups were out of order by reason of certain screws being worn, and that the ice cream cabinet leaked. It is pointed out that it was not shown that the buyer ever lost a sale by reason of these minor defects, which could have been repaired in a short time and at a small cost. (Compare Buffalo Pitts Co. v. Alderdice (1915); Tex Civ App) 177 SW 1044 infra, II c 6.)

There is no implied warranty of the condition of a second hand automobile. Moore v. Switzer, 78 Colo 63, 239 P 874; Williams v. McClain (1937) 180 Miss 6, 176 So 717. 151 ALR 448.

And it was said in Henry v. Kennard (1936) 178 Okla s68, 62P (2d) 1184, that the doctrine of caveat emptor applies in the sale of a second hand automobile, and there is no implied warranty of quality or fitness.

Another case where the facts are very similar is Morely v. Consolidated Manufacturing Company, 81 NE 993, where plaintiff purchased an automobile which he was informed had been used as a demonstrating car, and the amount paid therefor was about one half the price for a new one of the same make. There was no implied warranty as to the length of time the crankshaft in the automobile would last when sold by the company, which dealt in the sale of automobiles, the court saying: "The subject of sale was an automobile. Even if it be assumed that the plaintiff had the right to think the sale was made by the manufacturer, still the machine was not made especially for the plaintiff, but on the contrary, was which had been considerably used and knew was a sum below the usual price. If it be said that he had the right to suppose it was fit to run, the answer is that it was fit to run. Every part essential to the running of the machine was there at the time of the purchase. In other words, the machine was an automobile in running order, and after the purchase was actually used by the plaintiff nearly if not quite two months before the shaft broke. If the shaft had been stronger it might have lasted for a longer time. Under these circumstances

we think that there was no implied warranty as to the length of time the shaft would last, but as to that, the doctrine of caveat emptor is applicable." 67 Am Jur 2d; Section 433, page 595

POINT TWO: Defendant is estopped by inaction and latches.

It was March 16, 1974 when defendant inquired about purchasing equipment.

It was March 18, 1974 when defendant made a trip from Marysvale to Delta to examine the equipment.

On March 18th he made an offer to plaintiff and his employee of $3,000.00 to purchase the tractor and trencher.

On March 20, 1974 in a telephone conversation to the plaintiff he agreed to pay $4,350.00 for the equipment if delivered and demonstrated.

On March 22, 1974 the tractor and trencher were delivered and demonstrated. And on the same date delivered the check for the purchase price.

Plaintiff sent the check to the bank on March 23, 1974. On the 26th it was returned dishonored. Defendant drew his money out of the bank rather than settle his differences with plaintiff.

Defendant called plaintiff's wife in June, 1974, and advised her that he would return the equipment. She told him those arrangements would need be made with the plaintiff. Defendant returned the tractor and trencher without arrangement on December 5, 1974, and should be estopped from damaging plaintiff by his vacillating.

CONCLUSIONS

Defendant admits the purchase of the equipment at the price represented. He has the affirmative burden of establishing a defense by a preponderance of clear and convincing evidence. In this he failed and the lower Court should be reversed.

Respectfully submitted,

ELDON A. ELIASON
Attorney for Plaintiff-Appellant