

1977

Juanita J. Meyer v. General American Corporation
A Corporation, Paul J. Angelo v. William R.
Mccurtain : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT OF THE
STATE OF UTAH

- - - - -

JUANITA J. MAYER,	:	
	:	
Plaintiff-Appellee,	:	
	:	
vs.	:	
	:	
GENERAL AMERICAN CORPORATION	:	Case No. 14805
a corporation, PAUL J. ANGELOS,	:	
	:	
Defendants,	:	
	:	
vs.	:	
	:	
WILLIAM R. McCURTAIN,	:	
	:	
Intervenor-Appellant.	:	

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BRIEF OF APPELLANT

- - - - -

STATEMENT OF THE NATURE OF THE CASE

The petitioner respectfully appeals from the Findings of Fact and Conclusions of Law as entered, and the Judgment entered by the Honorable Peter F. Leary in the Third Judicial District Court of Salt Lake County that the Appellee's security interest was superior to Appellant's ownership.

DISPOSITION IN THE LOWER COURT

The District Court decided that Appellant's purchase was a fraudulent sale within the Utah Fraudulent Conveyance Act and was, therefore, void.

RELIEF SOUGHT ON APPEAL

Appellant respectfully submits that the case should be reversed and judgment entered in favor of Appellant.

STATEMENT OF THE FACTS

This is an action to determine rights in a D-9 Caterpillar tractor. Appellee claims an interest by virtue of a security interest while Appellant claims ownership through a bill of sale.

The Appellee loaned money to General American Corporation. General American purchased a caterpillar with part of this money and granted a security interest in the tractor to Appellee at that time. The security interest was never perfected in the manner provided by Utah law (R-243).

Subsequently, on May 1, 1974, a company named Terra Corporation, loaned \$2,000 to General American Corporation. A promissory note was executed in favor of Terra Corporation as well as a security interest in the tractor with General American Corporation as debtor and Terra Corporation as creditor (R-305). This security interest was recorded October 25, 1974 (R-241).

On July 8, 1974, Terra Corporation gave General American Corporation another \$500 and cancelled the \$2,000 promissory note dated May 1, 1974. In return, General American Corporation signed a bill of sale for the caterpillar to Terra Corporation.

On July 9, 1974, Terra Corporation sold the caterpillar to Appellant, a Dodge dealer in Rock Springs, Wyoming (R-273). Appellant had bought and sold equipment of this type in the past (R-275). The caterpillar was hauled to Wheeler Machinery Company's yard in Salt Lake City, Utah on July 18, 1974 (Exhibit 2-D). Discovering this on July 26, 1974, Appellee's attorney advised Wheeler Machinery that Appellee owned the caterpillar and requested that it not be delivered to anyone, including Appellant (R-248).

The Appellant was unaware of any claims against the caterpillar. He first learned of Appellee's claim when he brought a prospective buyer to Wheeler's yard to inspect the equipment. An employee of Wheeler informed Appellant at that time (R-291). Plaintiff filed a complaint in the District Court of Salt Lake County on October 11, 1974, against General American Corporation and had a prejudgment attachment issue against the caterpillar. On learning of this, Appellant intervened on April 22, 1975.

A trial was had to determine the priority of rights in the tractor.

ARGUMENT

POINT I

A PURCHASER'S INTEREST TAKES PRECEDENCE OVER
AN UNPERFECTED SECURITY INTEREST IN CHATTEL.

The Utah Uniform Commercial Code - Secured Transactions
sections -- should have governed the trial court's decision.

Utah Code Annotated, §70A-9-102 provides:

"Except as otherwise provided in §70A-9-103 on multiple state transactions and in §70A-9-104 on excluded transactions, this chapter applies so far as concerns any personal property and fixtures within the jurisdiction of this state,

- a. to any transaction (regardless of its form) which is intended to create a security interest in personal property or fixtures including goods, documents, instruments, . . ."

None of the excluded transactions in Utah Code Annotated, §70A-9-104 apply to the instant case and it is not a multiple state transaction within Utah Code Annotated, §70A-9-103.

The Appellee loaned money to General American Corporation and a security interest in personal property was granted in her favor (R-323). Therefore, the Uniform Commercial Code - Secured Transactions statutes were applicable to this transaction. (See UCC sections cited above.)

Under the Utah Uniform Commercial Code a security interest may either be perfected or unperfected. In most instances, a financing statement must be filed to perfect a security interest.

Utah Code Annotated, §70A-9-302 provides:

"A financing statement must be filed to perfect all security interests except the following:"

None of the enumerated exceptions are applicable to the case at bar.

The Appellee did not file a financing statement, and thus, did not perfect her security interest in the caterpillar. This is pointed out in the testimony of Vera Duglietta, Supervisor of the Uniform Commercial Code Department of the Secretary of

State's Office:

Q. And did you examine the files and records of the Secretary of State's Office for a filing on the same caterpillar tractor by Juanita Meyer?

A. Yes.

Q. Did you find such a file?

A. No. (R-243).

It is clear that while the Appellee had a security interest in the caterpillar tractor, such security interest was not perfected. The issue, therefore, is whether the Appellee's unperfected security interest takes precedence over the interest of Appellant.

The Appellant's interest can be described as either an owner's interest or a purchaser's interest. The Appellant purchased the tractor from Terra Corporation for \$2,500 together with a promise of the division of profit on resale (R-287). Appellant did, in fact, pay the \$2,500 (Ex. 15-D), and a bill of sale in favor of Appellant was executed by Terra Corporation (Ex. 16-D).

Utah Code Annotated, §70A-9-301 designates who takes priority over unperfected security interests as follows:

"Except as otherwise provided in subsection (2) an unperfected security interest is subordinate to the rights of

(c) in the case of goods . . . a person who is not a secured party and who is a transferee in bulk or other buyer not in ordinary course of business to the extent that he gives value and receives delivery of the collateral without knowledge of the security interest and before it is perfected."

Thus, it would appear that the Appellant should have prevailed over the Appellee if:

1. He was a buyer, not in the ordinary course of business;
2. He gave value for the caterpillar;
3. He received delivery of the caterpillar;
4. He was without knowledge of Appellee's interest and before Appellee's security interest was perfected.

There is no question that Appellant was a purchaser of the caterpillar and, inasmuch as Terra Corporation was not in the business of selling equipment, Appellant would be considered to be a buyer, not in the ordinary course of business, Utah Code Annotated, §70A-1-301(9).

There is also no question that the Appellant gave value as he paid \$2,500 and gave a promise to split the profits (R-287). Furthermore, after purchase, the caterpillar was delivered to Wheeler Machinery yard for an estimate on repairs for Appellant (Ex. 2-D) and that further delivery to Appellant personally was prevented by the letter from Appellee's attorney dated July 26, 1974 (Ex. 4-D), and the prejudgment writ of attachment. Exhibit 4-D is a letter by Appellee's attorney to Wheeler Machinery to demand from them that they not deliver the tractor to Appellant, or anyone, on the grounds of Appellee claiming an interest in the tractor. Appellant, in his testimony, stated he came to Salt Lake City, Utah, to take possession of the tractor at Wheeler's yard and was refused by an employee of Wheeler (R-291). Therefore, Appellant would ask this Court to find delivery within the meaning of Utah Code Annotated, §70A-9-301 by virtue of the fact that the caterpillar was

delivered to Wheeler's yard, or to find that delivery was not a requirement inasmuch as Appellee prevented the same. There is also no question that Appellant did not have knowledge of Appellee's interest at the time he paid the consideration and received the bill of sale. (The only evidence in the record regarding this issue is Appellant's own testimony at R-295). Finally, it is clear that Appellee's interest was not perfected.

Therefore, under the provisions above pleaded, Utah Code Annotated, §25-1-13, Appellant's ownership interest should take precedence over Appellee's unperfected security interest.

POINT II

THE TRIAL COURT ERRED IN ITS FINDING THAT APPELLANT'S PURCHASE WAS VOID WITHIN THE MEANING OF THE UTAH FRAUDULENT CONVEYANCE ACT.

In the Findings of Fact, which incidentally were prepared by Appellees counsel and submitted two months after the trial without prior consultation, approval, or even notice to Appellant's counsel, the trial court found that the purported sale of the D-9 Caterpillar from Terra Corporation to Appellant was not made for a fair equivalence within the meaning of Utah Code Annotated, §25-1-3 (1953), since the sale price of \$2,500 was less than thirteen (13%) percent of the fair market value of the D-9 Caterpillar (R-211).

The evidence does not support this Finding. The testimony of expert witness Leo G. Bateman was as follows:

Q. Do you have an opinion as to its value?

- A. Yes, the tractor needs a little work on it, I estimate about \$2,000 worth of work. And I would say that the tractor should be worth between \$10,500 and \$11,000 with that much work on it.
- Q. And you base your estimate not only on your own knowledge, but on a book you brought with you to court?
- A. Yes.
- Q. What is that book?
- A. This is the "Thorpe Auction Price Guide for 1976" that we use as a blue book in equipment.
- Q. And doesn't the book that you've described show two D-9 tractors similar to the one in this action being sold, one for \$10,500 and one for \$10,750.
- A. (On line 28 of R-259) Yes.
- Q. Isn't it true Mr. Bateman, these auctions are dealer auctions, that the prices which are reflected here are wholesale prices? (Emphasis added.)
- A. Yes. If we bought at this price, we would have to add a fee to it (R 259-260).

This is the only evidence offered by either party as to the wholesale value of the tractor.

The testimony of Appellant shows he is a dealer in used equipment (R-272). Therefore, the trial court should have used the wholesale value of the tractor within the meaning of Utah Code Annotated, §25-1-3 (1953). This was not done. Instead the trial court confused the wholesale value of \$10,500 and the resale value of approximately \$20,000. Thus, the Court erred in its Finding of Fact that Appellant paid only thirteen (13%) percent of the fair market value of the subject caterpillar. Another error in the thirteen (13%) percent computation was the trial court's Finding of Fact that Appellant paid a total of \$2,500 for the caterpillar (R-211). The testimony of H. E.

Utah Code Annotated, §78-25-16 provides:

"There can be no evidence of the contents of the writing other than the writing itself, except in the following cases:

- (1) when the original has been lost or destroyed in which case proof of the loss or destruction must first be made,
- (2) when the original is in the possession of the party against whom the evidence is offered and he fails to produce it after reasonable notice.

The Appellee was allowed to testify about her knowledge of the books and records of General American Corporation over the Appellant's objection (R-341). There was no foundation that the books and records were lost, or destroyed. The only foundation laid was that Appellee was unable to inspect the books and records in 1974 because a Mr. Paul Angelos had the books and records (R-340). Subsection (2) of Utah Code Annotated, §78-25-16 provides that oral testimony is allowed only when the original is in the possession of the party against whom the evidence is offered. The evidence was offered against Appellant and he did not have possession of these records. Therefore, the Court erred in allowing this testimony. Thus, the trial court erred not only by not using the Utah Uniform Commercial Code provisions but also in finding a fraudulent conveyance under general Utah law. There is simply no evidence as to insolvency of General American Corporation and the Court's computation of the consideration paid was inaccurate and, thus, the finding of no fair equivalence of consideration is in error.

POINT III

THE CASE SHOULD BE REVERSED AND JUDGMENT ENTERED
ON BEHALF OF APPELLANT.

Damages for abuse of process is a proper remedy where
one with a subordinated interest wrongfully attaches property
against a rightful owner. Williams v. Western Surety Company
(1972) 10 UCC Rept. 122. Prime Bus Company v. Drinkwater (1966)
350 Mass. 642, 216 N.E. 2d 105.

In the case at bar, the Appellee caused a writ of
attachment to be levied against the caterpillar (R 8-9).
This was done merely on the strength of an unperfected security
interest. Appellant had superior rights in the caterpillar as
evidenced by his bill of sale. (See Argument, Point I.)
Therefore, wrongful writ of attachment damages should be
awarded to Appellant.

When the trial court erroneously decides a case, the
Supreme Court normally remands for a new trial and new Findings.
However, in this case, the evidence is clear that the market
value of the tractor is from \$20,000 to \$25,000. This is
evidenced from the Findings prepared by the Appellee and
part of the basis for Appellee's argument. Therefore, if this
court were to determine the priority of interests in favor of
Appellant and determine that under the Utah Uniform Commercial
Code, Appellant's ownership interest takes precedence over
Appellee's unperfected security interest, then Appellant should
be entitled to damages based on the market value of the tractor.
This is particularly true when the subordinate interest wrong-
fully issues a prejudgment attachment. See Williams v. Western

Surety Company, supra, and Prime Bus Company v. Drinkwater, supra.
By exercising the dominion and control over the caterpillar as Appellee did at the yard of Wheeler Machinery, a conversion occurs. Damages are properly the market value of the converted property. Therefore, using the Findings of the lower court that the market value would be \$20,000, this case should be reversed with instructions to enter judgment in favor of the Appellant in the amount of \$20,000.

CONCLUSION

The Appellant's ownership interest in the caterpillar tractor in question prevailed over an unperfected security interest. The trial court erred in finding that the Utah Fraudulent Conveyance Act prevailed. The Court also erred in making a conclusion of fraud based upon a finding that the Appellant failed to pay a fair equivalent for the caterpillar tractor. The trial court, in this regard, erred in two particulars: First, the trial court erred by finding that \$2,500 was the full purchase price Appellant paid for the tractor when, in fact, the evidence showed that he paid \$2,500 plus a promise to split one-half of the profits. Further, the trial court erred in using the retail price in computing the percentage which Appellant paid for the tractor. When properly computed, the evidence showed that Appellant paid slightly more than the evidence of wholesale value of the caterpillar. Also there is no evidence of insolvency. Therefore, the conveyance to Appellant was in no way fraudulent.

The trial court erred in not using the statutes of the Uniform Commercial Code - Secured Transactions. The issue in this case was who held a superior right to the caterpillar. Appellee had an unperfected security interest and Appellant had a bill of sale. The trial court should have used the applicable Uniform Commercial Code statutes to decide whose interest was superior. If this would have been done, then the damages for wrongful writ of attachment would clearly have been the last issue to be decided.

This case should be reversed and remanded, not with instructions for a new trial, but to enter judgment in accordance with the evidence in favor of the Appellant in the amount of \$20,000.

Respectfully submitted

Richard J. Leedy
Attorney for Appellant

CERTIFICATE OF MAILING

I hereby certify that on this 29th day of January, 1977
I mailed a copy of the foregoing Brief of Appellant to Jerry
W. James, Attorney for Plaintiff-Appellee, 225 South 200 East
#100, Salt Lake City, Utah 84111.


