

1977

M. B. Powers v. Gene's Building Materials, Inc. : Appellant's Brief

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

M. B. POWERS,
Plaintiff and Respondent,

v.

No. 14812

GENE'S BUILDING MATERIALS, INC.,
Defendant and Appellant.

APPELLANT'S BRIEF

**Appeal from the Judgment of the Third
District Court for Salt Lake County
Honorable Bryant H. Croft, Judge**

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IN THE SUPREME COURT OF THE STATE OF UTAH

M. B. POWERS,
Plaintiff and Respondent,

v.

No. 14812

GENE'S BUILDING MATERIALS, INC.,
Defendant and Appellant.

APPELLANT'S BRIEF

STATEMENT OF THE KIND OF CASE

This is an action for damages arising from a breach of contract and from negligence resulting out of the manner in which an account was handled.

DISPOSITION IN LOWER COURT

The case was tried to a jury. From a verdict and judgment for the plaintiff, defendant appeals.

RELIEF SOUGHT ON APPEAL

Defendant seeks reversal of the judgment and judgment in its favor as a matter of law, or that failing, a new trial.

STATE OF FACTS

On April 30, 1973, [Respondent] entered into a contract with one James Hartwell and Clearfield Realty, who would act as the general contractors, to construct two 6-plex

apartment units in Brigham City, Utah. [Transcript 158: Exhibit 1P] Approximately one week later, Hartwell and two officers from Gene's Building Materials [Appellant] met with Powers in Brigham City. [Transcript 158, 159] There, Gene's gave Powers a letter offering to supply the materials for the Brigham City apartments at a guaranteed price if Powers would pre-pay for the materials. [Transcript 160, 166; Exhibit 2-P] Nothing in the agreement stated how the materials were to be delivered or the unit price, only that "Gene's Building Materials will furnish material, or materials specified for Mr. Jim Hartwell, by Mr. Jim Hartwell, for the building of a 12 unit apartment house in Brigham City. . ." [Transcript 172; Exhibit 2-P] The \$54,000 bid was based on a materials list submitted to Gene's by Hartwell. [Transcript 172] Powers then executed an Authorization for Payment and Gene's received the \$54,000.00 from the Box Elder County Bank. [Transcript 161, 162; Exhibit 3-P, 4-P]

Following the agreement, Gene's set up a separate ledger account entitled "Jim Hartwell Brigham City Apartments". During this period of time, Gene's had two other ledger accounts entitled "Jim Hartwell Sunset Utah" and "Clearfield Realty c/o Ed Heagley Clearfield Utah". [Transcript 179; Exhibits 7-P, 8-P, 9-P]

Jim Hartwell commenced construction on the apartments in May 1973, and at the direction of Hartwell, Gene's delivered materials to the Brigham City job site from May 7, 1973, through February 25, 1974 [Transcript 170, 199; Exhibit 5-P] Although Gene's, at the direction of Hartwell, delivered a total of \$54,000.00 worth of materials, approximately \$11,679.45 [by stipulation] went to other Hartwell job sites. [Transcript 155; Exhibit 6-P]

On September 14, 1973, Hartwell directed Gene's to consolidate the "Jim Hartwell Sunset Utah" account and the "Clearfield Realty c/o Ed Heagley Clearfield Utah" account with the "Jim Hartwell Brigham City Apartments" account. [Transcript 164, 165, 199] Gene's general practice was to charge individual accounts as directed by the contractors. [Transcript 202] Because there were several hundred accounts it was impossible for Gene's to police individual accounts. [Transcript 200] Further, during this period of time, Gene's had no contact with Powers, nor had Gene's received any specific instructions as to the account from Powers. [Transcript 170, 171, 198]

Because of "errors and waste", Hartwell did not complete the job, and in November

1973, Powers requested someone else to complete the job. [Transcript 175, 200] Powers never notified Gene's of Hartwell's dismissal [Transcript 175, 176] Construction of the apartments was completed in April or May of 1974, but it was not until after the completion of the apartments the following Spring of 1975 [note conflict in testimony] that Powers asked for an accounting from Gene's even though Power had to purchase approximately \$13,000.00 to \$14,000.00 in building materials from a third party in order to complete the apartments. [Transcript 165, 166, 173; Record 123]

After the trial, Gene's learned that Powers had entered into an agreement with Edwin Higley of Clearfield Realty whereby Higley agreed to pay Powers \$21,000.00, which sum represented the difference between the original contract price and what Powers ultimately had to pay for the construction of the Brigham City apartments. [Record 120, 121, 123]

ARGUMENT

POINT I

THE TRIAL COURT ERRED IN DENYING APPELLANT'S REQUEST UNDER RULE 63) OF THE UTAH RULES OF CIVIL PROCEDURE THAT THE TRIAL JUDGE DISQUALITY HIMSELF.

Counsel for Appellant was notified by the District Court Clerk's Office on September 1, 1976, approximately 15 minutes before the trial commenced, that the case had been assigned to Judge Bryant H. Croft. Counsel, in chambers before the trial commenced, asked the judge to withdraw under Rule 63(b) of the Utah Rules of Civil Procedure because of prejudice against counsel based on counsel's prior experience with the trial judge. The trial judge denied the request stating that an Affidavit of Prejudice had not been filed and that therefore the request was untimely. Further, the court stated that any prejudice that may or may not exist would be negated by the fact that the case would be tried to a jury. Trial commenced over Appellant's objection and Appellant's request for a continuance. [Record 126]

The issue raised is whether Appellant's request was timely so that the trial court erred in refusing to allow Appellant leave to file an Affidavit of Prejudice within a reasonable time, where, because the case was not assigned to a trial judge until the morning of the trial it was impossible to file an affidavit before the trial commenced.

Rule 63(b) reads, "Whenever a party, to any action or proceeding, civil or criminal, or

his attorney shall make and file an affidavit that the judge before whom such action or proceeding is to be tried or heard has a bias or prejudice, either against such party or his attorney or in favor of any opposite party to the suit, such judge shall proceed no further therein, except to call in another judge to hear and determine the matter.

“Every such affidavit shall state the facts and the reasons for the belief that such bias or prejudice exists, and shall be filed as soon as practicable after the case has been assigned or such bias or prejudice is known. If the judge against whom the affidavit is directed questions the sufficiency of the affidavit, he shall enter an order directing that a copy thereof be forthwith certified to another judge . . .”

The rule does not distinguish between jury and non-jury trials nor does it give the trial judge discretion to grant or deny the request, if it is timely. Assuming the request is timely and the affidavit filed “as soon as practicable after the case has been assigned” the trial judge, if he questions the legal sufficiency of the affidavit, must enter an order directing that a copy of the affidavit be given to another judge for such a determination, but he himself can proceed no further.

The determination of whether Appellant’s request was timely involves the inter-related question of what effect, if any, has the fact that Appellant never filed an affidavit.

The question of timeliness was dealt with generally by the Utah Supreme Court in *Lapasioteo v. Dinsdale*, 24 P.2d 287 (Utah 1952). The case held that an Affidavit of Prejudice was not timely where it was filed after the trial had commenced and its contents alleged matters which existed long before the trial. But the Court looked beyond the contents of the affidavit and the question of timeliness, and looked at the possibility of prejudice.

“This does not imply that had the affidavit been timely made a decree adverse to the party who claimed prejudice would nevertheless be sustained if there was evidence to support it. There may be cases where under the evidence no conclusion would be reached other than against the party who claims prejudice. In such cases, we could hold that prejudice, if any, could not have been in any part responsible for the judgment. But in other cases where two or more views or interpretations of the evidence or the credibility or lack of credibility accorded to witnesses might turn the case one way or the other, there is present the possibility that the prejudice of the judge, if any, could have influenced his judgment. *In such cases we might, if the affidavit were timely*

filed or even if it were not, desire to reverse the case in order to avoid any possibility that prejudice influenced the decision."
[Ibid at 297, 298] [emphasis added]

Therefore, the paramount consideration is whether there exists a possibility that the trial judge's prejudice influenced his rulings on Appellant's Motion for a New Trial and his denial of Appellant's requested instructions which in effect left Appellant without a defense. This possibility of prejudice exists whether Appellant filed the affidavit, or not, especially where the trial judge refused to grant Appellant leave to file the affidavit.

"Whether an affidavit of bias and prejudice is timely filed depends upon the law of waiver and before one can be said to have waived the right, he must first have had an opportunity to exercise it. The right to a fair and impartial judge is a valuable substantive right." [*Newson v. Superior Court of Maricopa County*, 102 Ariz. 95, 425 .2d 422 at 42]

Before Appellant could arguably be deemed to waive his rights under Rule 63(b) because an affidavit was not filed, Appellant must first have had an opportunity to exercise his right, which because of the procedure in which the case was assigned for trial and the trial court's actions, Appellant never had.

Roberts v. State, 458, P.2d 340 (Alaska 1969) held that an Affidavit of Prejudice was timely even though it was not filed within five days after the issue was assigned to a judge as required, where court practice makes such a filing impracticable, stating,

"There is nothing in the record to show when this case was assigned to Judge Taylor for trial, or indeed if such an assignment had even been made. As appellant points out in his brief, the practice of the Fourth Judicial District is to not make an assignment until the date of trial or hearing. If this true, then a party who wishes to disqualify a judge under A S 22.22.022 is unable to file his affidavit until the date of the trial or hearing because until then he has no way of knowing which judge will hear the case. The statute requires at the latest the affidavit of disqualification be filed within five days after an issue has been assigned to a judge. The obvious purpose of this five day requirement is to avoid a waste of judicial time which would result if an affidavit of disqualification were not filed until the day of trial, because this would mean that the case would have to be continued until another judge could be assigned, and the disqualified judge would probably not be ready at that time to start the trial of another action. *A method should be devised and utilized to make assignments of cases to judges sufficiently in advance of trial or hearing, with notice of the assignments being given to the parties, so that the parties can be afforded their rights under AS 22.20.022 without interfering with scheduled hearing or trial dates.*" [Ibid. at 346] [emphasis added]

Later, the same court in *Hartford Accident and Indemnity v. State*, 498 P.2d 247

(Alaska 1972), reiterated its position in *Roberts v. State*. After holding that “assigned to a judge” means that the issue or case must be assigned to a particular judge and a reasonable attempt made to notify the parties of such assignment, the court went on to state,

“The disqualification is preemptory, i.e. it is at once decisive and conclusive and does not admit of any question. *Id.* (footnote omitted) See also *Roberts v. State* 458 P.2d 430, 345-346 (Alaska 1959) Therefore, if petitioner’s affidavit was timely filed, the judge involved is without power or jurisdiction or proceed further with the action.” [Ibid. at 275]

Appellant submits that where the Third District Court Clerk’s Office did not notify Appellant until 15 minutes before the trial commenced of the assigned trial judge, it was error for the trial judge to not continue the trial and give Appellant leave to file an affidavit under Rule 63(b), when requested so by Appellant’s counsel. Appellant submits that it did not waive its rights under Rule 63(b) by not filing the affidavit where because of the time sequence and the trial judge’s action in commencing the trial and the court’s announcement, Appellant never had an opportunity to exercise its rights under Rule 63(b). Appellant submits further that a review of the trial court’s subsequent rulings as discussed more fully in Appellant’s Argument Points II and III, substantiate the possibility that Appellant was prejudiced in its defense by the trial court.

POINT II

THE TRIAL COURT ERRED IN NOT GRANTING APPELLANT’S MOTION FOR A NEW TRIAL.

Appellant, Gene’s Building Materials, under Rule 59(a) (4) of the Utah Rules of Civil Procedure, filed a Motion for a New Trial based on the newly discovered evidence that one Edwin Higley of Clearfield Realty had entered into a settlement agreement with the Respondent, Powers, to pay Powers \$21,000.00 in damages, which sum represented the difference between the final cost to Powers to complete the Brigham City apartments and the original Hartwell/Clearfield Realty contract price. Appellant asked that Clearfield Realty and Edwin Higley be joined as necessary parties under Rule 19(b) of the Utah Rules of Civil Procedure. [Record 121, 123, 124, 125, 126]

The importance of this evidence is that it is critical to a fair and equitable determination of the rights and liabilities between Powers, Gene’s Building Materials and

It is clear that Clearfield Realty and Hartwell received the benefit of the materials delivered by Gene's to job site other than Brigham City, and which at the direction of Hartwell were charged to the "Jim Hartwell Brigham City Apartments account". Consequently, Gene's has a cause of action against Hartwell and Clearfield Realty for goods sold and delivered. [Transcript 155, 164, 165, 199] This fact was even recognized by the trial judge. [Transcript 231]

It is also clear that the basis for Powers' claim against Gene's was that because Gene's charged the "Clearfield Realty c/o Ed Heagley, Clearfield Utah" and the "Jim Hartwell Sunset Utah" accounts against the "Jim Hartwell Brigham City Apartments" account, Powers had to purchase \$13,000.00 to \$14,000.00 worth of building materials from a third party in order to complete the apartments, and therefore Powers sued Gene's for the difference, i.e. the basis for Powers' breach of contract theory. [Record 123, Transcript 165, 166, 173]

It is equally clear that the Higley/Powers settlement agreement on its face includes any amount Powers had to pay to the third party for the additional building materials.

Consequently, the logical conclusion must be, that since Gene's has a claim against Clearfield Realty and Jim Hartwell that it must pursue now in a separate action, and because the Higley/Powers settlement agreement encompasses and compensates for the same damages as the Powers judgment against Gene's, Gene's is entitled to an offset in the amount of the judgment for any such amounts paid by Higley to Powers under that settlement agreement. This fact was acknowledged by the trial judge, yet still the trial court refused to grant the new trial. [Transcript 231] Unless a new trial is ordered directing Clearfield Realty and Edwin Higley to become parties, the result will be a new action filed by Gene's against Clearfield Realty and Edwin Higley which still will not completely adjudicate the liabilities between the parties, for if a judgment is granted against Clearfield Realty and Edwin Higley in favor of Gene's, then Powers will still have to be involved in an accounting in that action in order to avoid Clearfield Realty and Edwin Higley having to pay both Gene's and Powers for the same damage.

Rule 19(b) states, "Where persons who are not indispensable, but who ought to be parties if complete relief is to be accorded between those already parties, have not been

made parties and are subject to the jurisdiction of the court as to service of process, the court shall order them summoned to appear in the action.”

Clearfield Realty and Edwin Higley ought to have been made parties to a new trial because they are essential to a full, fair and equitable determination of the liabilities between Powers, Gene’s and Clearfield Realty/JimHartwell, Any person whose interests and rights are involved in the subject matter in such a way that their presence is necessary to a full and equitable determination of their rights are necessary parties. [*Stone v. Salt Lake City*, 11 Utah 2d 196, 356 P.2d 631 (1960)]

The trial court abused its discretion in refusing to grant Appellant’s Motion for a New Trial where the newly discovered evidence of the Higley/Powers settlement agreement clearly is material to the rights of the parties, is not cumulative, is something that could not have been discovered prior to the trial through reasonable dilligence and there is a reasonable likelihood that it would effect the results of the judgment in a new trial. [*Crellin v. Thomas*, 122 Utah 122, 247 P.2d 264]

POINT III

THE TRIAL COURT ERRED IN ITS INSTRUCTIONS TO THE JURY.

The case was submitted to the jury on two alternate legal theories. Gene’s Building Materials breached its contract with Powers by not delivering \$11,679.45 worth of materials that Gene’s had agreed to deliver to the Brigham City apartments and Gene’s negligently charged to Powers’ account materials amounting to \$11,679.45 that had been delivered to Hartwell job sites other than the Brigham City apartments. [Record 104, 107]

Appellant requested an instruction on contributory negligence which was denied by the court over Appellant’s objection. [Recod 91; Transcript 217, 218]

Contributory negligence is defined as conduct on the part of the plaintiff which falls below the standard to which he should conform to for his own protection. It must be a legally contributing cause, that, cooperating with the negligence of the defendant, assists in bringing about the plaintiffs harm. The conduct must fall short of the standard to which a reasonable man should conform to in order to protect himself from harm. [From *Guerra v. Jaeger*, 204 Kan. 309, 461 P.2d 737 (1969)]

The determination of whether it is justified to submit the issue of contributory

negligence to the jury is dependant on whether there is a basis in the evidence upon which reasonable minds could conclude that a plaintiff was negligent by failing to exercise that degree of care which an ordinary, reasonable and prudent person would have observed under the circumstances. [*Simpson v. General Motors Corporation*, 24 Utah 2d 301, 470 P.2d 399 (1970) at 401]

The evidence establishes that the only contact Powers had with Gene's Building Materials was in May 1973, when the agreement was entered into. [Transcript 170, 171, 198] From that date onward until after the completion of the apartments in April or May of 1974, or even possibly as late as Spring of 1975 [note conflict in testimony] Powers never notified Gene's of Hartwell's dismissal, never gave Gene's any specific instructions regarding the account or even notified Gene's that Powers had to order \$13,000.00 to \$14,000.00 worth of extra materials from a third party in order to even complete the job. [Transcript 175, 176, 165, 166, 173, 200]

These facts considered with the fact that throughout this period Gene's dealt exclusively with Hartwell, that Gene's charged the "Jim Hartwell Sunset Utah" and "Clearfield REalty c/o Ed Heagley Clearfield Utah" accounts to the "Jim Hartwell Brigham City Apartments" account at the direction of Hartwell, and that it was impossible for Gene's to police individual accounts, could raise the question of Powers' contributory negligence in the mind of the jury. The jury could have found that Powers' complete failure to either control or check on his account even after dismissing Hartwell and having to spend a substantial amount for other materials to complete the apartments fell short of the standard to which a reasonable man should conform to in order to protect himself from harm, and thus, Powers contributed to the loss.

The evidence of contributory negligence seems at least as strong as the evidence of negligence which the court instructed the jury upon. The only evidence of negligence was that Gene's consolidated the three accounts at the direction of Hartwell which was contrary to the May 1973 agreement. Yet the court instructed the jury on negligence setting forth a standard of "reasonable care in the observance of reasonable commercial standards" without instructing the jury what was meant by a reasonable commercial standard. (Record 107,108)

Appellant also requested an instruction on estoppel which the court again refused.
[Record 88; Transcript 217]

While the law of agency is such that a person who knowingly receives money from an agent in payment of the latter's debt, when the agent acts without authority, the principal on proof of these facts may recover against that person, a principal may be estopped from recovering such payment if he waits an unreasonably long time before questioning the unauthorized payment. [3 Am Jur 2d Agency § 292]

Thus, even though Powers could recover from Gene's the \$11,679.45, that Gene's received through Hartwell's unauthorized act, Powers could be estopped from recovering such sum if the jury found that Powers had waited an unreasonably long time to question the unauthorized consolidation of the three Hartwell accounts.

In *Gordon v. Pettingill*, 105 Colo 214, 96 P.2d 416 (1939), the Colorado Supreme Court held that an employer could not recover the amounts of checks drawn on the employer's account by an employee and given by the employee in payment for rent because the employer had waited a period of 18 months after the employee had taken the first check to question the validity of the payments and was consequently estopped. Following the general rule that when one of two innocent parties must suffer for the fraud of the third, he who placed the wrong-doer in a position to perpetrate it is chargeable [recognized in Utah under *Heaston v. Martinez*, 3 Utah 2d 259, 282 P.2d 833 (1955)] the court stated,

"It is said that here there can be no equitable estoppel because Pettingill [the landlord], when he received the checks, had knowledge of the fraudulent use of Gordon's [the employer] money. The statement is too strong. 'Fraudulent' must be omitted. Unquestionably he [the landlord] had notice to put him on inquiry, failing which and assuming Gordon's reasonable diligence of in his own interest, Pettingill would lose. But it is absence of the diligence which creates estoppel. Counsel say a principal can be held to ratify only where full knowledge is shown. That is also too strong. In all similar cases the law presumes whatever reasonable diligence would disclose. A litigant will not be heard to say he was ignorant of facts which it was his interest to know, and which, if awake, he would have known." [Ibid. at 418]


By analogy, the case is directly in point. It is Powers' complete lack of diligence in knowing that Hartwell was doing with his account and what charges were made to his account that give a factual basis for the doctrine of equitable estoppel and it was error for the trial court to not allow for such an instruction.

By denying Appellant its requested instructions, the trial court stripped Appellant of all its legal and equitable defenses. The Record establishes that there was sufficient evidence for the jury to consider these defenses and by not allowing the requested instructions, the jury had no reasonable alternative other than to find against Appellant.

CONCLUSION

For the foregoing reasons the judgment should be reversed and a new trial granted.

Respectfully submitted.


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CERTIFICATE OF MAILING

Mailed a copy of the foregoing to Richard Thornly, Attorney for Respondent, 2610 Washington Boulevard, Ogden, Utah, postage prepaid, this 8th day of February, 1977.

