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Debry and Hilton Travel Services, Inc. v. Capitol International Airways, Inc. : Reply Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT

OF THE STATE OF UTAH

DEBRY AND HILTON TRAVEL SERVICES, INC.,	)	
Plaintiff and Appellant,	)	
vs.	)	Case No. 15219
CAPITOL INTERNATIONAL AIRWAYS, INC.,	)	
Defendant and Respondent.	)	

REPLY BRIEF OF RESPONDENT

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REPLY BRIEF OF RESPONDENT

POINT I.

DEBRY MAY NOT MAKE ASSIGNMENTS OF ERROR TO JURY INSTRUCTIONS NOT EXCEPTED TO AT TRIAL.

DeBry is now attempting, on appeal to this court, to complain of an error in one of the jury instructions where no objection thereto was made during the trial. After the instructions were read to the jury, DeBry specifically objected to Instruction Nos. 13, 18, and 29. (Tr., Day 4, p. 38).

DeBry made certain other objections at that time and then stated: "That is all. No others." (Tr., Day 4, p. 38, l. 26). Although no objection was made during trial, DeBry now objects to Instruction No. 28 given by the court, dealing with the subject of mitigation of damages.

It has long been the rule that a party to litigation may not complain of improper jury instructions on appeal unless proper objection was made to the court during trial. In the ca of Cooper v. Clinger's, 15 Utah 2d 85, 387 P.2d 685 (1963), defendant was claiming on appeal that the evidence did not sup the verdict and that the jury was improperly instructed. The court reviewed its rule for assignments of error on jury instru tions. The court stated:

> The assignments of error have been examined in the light of our rules, (a) requiring the submission of correct requests, (b) that proper and timely objections be made to those claims to be in error, and (c) that objections to them cannot be raised for the first time on appeal. 387 P.2d at 686.

The court may allow exceptions to this rule, but only very limited circumstances. In the case of McCall v. Kendrick 2 Utah 2d 364, 274 P.2d 962 (1954), plaintiff was complaining o appeal of improper jury instructions given during trial. Those instructions had not been objected to at trial. This court cit Rule 51 of the Utah Rules of Civil Procedure and held that the rules must govern in most cases. That rule requires a party to make his exceptions to a jury instruction along with the groun for that exception if he wishes to assign that as error. The found that although the rules do allow an exception "in the interests of justice", they will not allow an exception unless the result would be gross inequity. The burden of showing t gross inequity is upon the party complaining about the instruc

The result that follows is obvious. DeBry may not complain of the instruction because no objection was made to the complained-of instruction during the trial. DeBry has shown no gross inequity that would result and has shown no reason why an objection was not made to the instruction at trial. In light of this, the court should not consider DeBry's arguments regarding the validity of this instruction and should uphold the decision rendered by the jury with respect to mitigation of damages.

POINT II.

THE LAW REGARDING MITIGATION OF DAMAGES WAS CORRECTLY STATED IN THE JURY INSTRUCTIONS BY THE LOWER COURT.

DeBry has made much of Jury Instruction No. 28 given by the lower court regarding mitigation of damages in its briefs to this court (Brief of Appellant, p. 10, Reply Brief, p. 2). It has already been shown by Capitol that DeBry may not complain of this instruction because no objection was made to the instruction at trial. Even so, an examination of the instruction reveals that it was proper and a correct statement of the law. DeBry has used an interesting technique to distort the meaning of the instruction in an attempt to bolster its case. The instruction in its entirety is as follows:

> The law imposes the duty to minimize or mitigate damages. A plaintiff is not entitled to recover damages which with reasonable effort he could have avoided.
>
> The law imposes upon everyone engaged in the performance of a contract the duty of doing everything reasonably within his power to prevent loss to himself

> from a breach of a contract by the other party. If he cannot prevent it altogether, he must make reasonable exertions to render it as light as reasonably possible, and if by his own negligence or wilfulness he allows the damages to be unnecessarily enhanced, the increased loss must fall on him and not the party breaching the contract.
>
> Thus, as soon as the aggrieved party learns that the other party, or should have learned that the other party, will not perform, that party must begin to mitigate his damages. The party cannot uselessly abide his time but must make other arrangements if at all possible.
>
> Therefore, if you find that the plaintiff could have found a cheaper or more economical way of flying the flight but that he failed to do so, then the plaintiff would not be entitled to claim the excess damages.
>
> In this regard, you are instructed that the burden is on the defendant to prove by a preponderance of the evidence that the plaintiff did not mitigate such damages. (R., p. 586).

DeBry has attempted to remove one sentence from the instruction and have the court read that and declare the entire instruction improper. DeBry states:

> . . .If you find that the plaintiff could have found a cheaper or a more economical way of flying the flight, but that he failed to do so, then the plaintiff would not be entitled to claim the excess damages. . . . (Reply Brief of Appellant, p. 2).

DeBry contends that this sentence imposes upon DeBry absolute duty to find the cheapest method of transportation available. It is a fundamental proposition that when examin-

jury instructions, the entire instruction must be read to determine whether it was proper under the circumstances. An examination of Instruction No. 28 reveals that the word "reasonable" was used in the instruction no less than four times, and it is clear from reading the instruction that a duty of reasonable mitigation was imposed upon DeBry. DeBry cannot take one sentence out of context and complain that it was error. Read in its entirety, the instruction is a proper statement of the law and was not prejudicial to DeBry. Thus, should the court allow DeBry to complain of this instruction on appeal, even though no complaint was made at trial, the court should not sustain their objection as there was no misstatement of the law.

Respondent, therefore, submits that this court should grant the relief sought by the respondent.

Respectfully submitted this ____ day of December, 1977.

STRONG & HANNI

By _____
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CERTIFICATE OF HAND-DELIVERY

Hand-delivered a copy of the foregoing Reply Brief of Respondent to the following counsel this ____ day of December, 1977:

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