

1977

Registered Physical Therapists, Inc. v. Robert N. Jepson : Brief of Respondents

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

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)
REGISTERED PHYSICAL)
THERAPISTS, INC., a)
Utah corporation,)
) Case No. 15395
Plaintiff-)
Respondent,)
)
vs.)
)
ROBERT K. JEPSON,)
)
Defendant-)
Appellant.)
)

BRIEF OF RESPONDENTS

STATEMENT OF THE NATURE OF THE CASE

This is an action brought by Registered Physical Therapists for damages for breach of a fiduciary duty and for destruction of its business arising out of Robert K. Jepson's malicious and intentional acts.

DISPOSITION IN THE LOWER COURT

Beginning on May 26th, 1977, this case was tried without a jury before the Honorable Don V. Tibbs. The Lower Court found that an employer-employee relationship existed between respondent, Registered Physical Therapists (RPT) and appellant, Robert K. Jepson (Jepson), under an employment agreement and that Jepson not only breached said agreement but also breached his fiduciary duties as an employee and maliciously and intentionally converted and/or destroyed RPT's personal property and physical therapy

business. Judgment including punitive damages was granted against Jespon totalling a value of \$32,315.00. RPT was also awarded as additional punitive damages all credits and offset due to Jepson from RPT.

RELIEF SOUGHT ON APPEAL

Respondent seeks an affirmation of the findings and conclusions of the Lower Court and the judgment therein.

STATEMENT OF FACTS

A. Rule 75 (p) (2) Statement.

Appellant, Jepson, has set forth in its brief a statement of facts. In compliance with Rule 75 (p) (2), respondent, RPT, indicates below to what extent appellant's statement is inconsistent with the facts.

1. Respondent agrees with most of appellants first and second paragraphs on page 2; however, there was a specific verbal employment agreement that contained specific terms which are hereinafter stated in respondent's statement of facts.

2. Respondent agrees with most of appellant's third paragraph on page 2 except appellant failed to mention that he advised RPT in November 1975 not only that he was terminating but that he was going to keep all the equipment (Exhibit PL 13, TR 105). As a response to Jepson's notification, Don Vernon and Larry Brown, officers of RPT, went to Richfield on December 9, 1975, to make preparations to continue their physical therapy business and secure the personal property of RPT. (TR 106) It was only after Vernon and Brown discovered that Jepson had removed all important and necessary information and documents needed to continue RPT's business in Richfield that they secured their equipment. (TR 107-110, 113) RPT did not permanently close their Richfield business or bank account at that time. (TR 110, 112-114 & 154)

3. Appellant's fourth paragraph of his statement of

facts appearing on page 3 is correct except for the additional fact stated by Don Vernon that if the equipment was brought back to the office could be operated the same as before. (Tr 154)

4. Appellant's fifth and sixth paragraphs of his statement of facts appearing on pages 3 and 4 are somewhat correct, however, all of Jepson's efforts were done as an employee of RPT and it was only with the financial assistance of RPT that any good will was acquired. (Tr 317)

B. Respondent's Statement of Facts.

1. Jepson was employed by RPT from August 1973 through December 9, 1975, to conduct and operate RPT's physical therapy business in Richfield, Utah, (Findings No. 1, Tr 57)

2. The terms of the employment agreement were as follows:

a. That plaintiff would provide all of the financing and pay for all expenses to establish a physical therapy business in Richfield, Utah. (Tr 60-63, Exhibit PL-13, Findings No. 2)

b. That the plaintiff would pay for all expenses incurred by the Richfield operation until sufficient funds were deposited in the Richfield checking account from services performed in Richfield to pay for said expenses. (Tr 60-63, Exhibit PL-13, Findings No. 2 (b))

c. That defendant would receive a beginning salary of \$700.00 to manage the Richfield operation and further receive costs of living increases in said salary. (Tr 57-59, Findings No. 2 (c))

d. That defendant would receive, to begin with, 10% of the net profit generated by the Richfield operation and that said percentage would increase by 5% increments every quarter until defendant's share of the profits reached 50%. (Tr 65-70, Findings No. 2 (d))

e. That 10% of the gross income placed on the books of the Richfield operation would go to plaintiff's corporation for development of corporate business. (Tr 65-66, Findings No. 2 (e))

f. That on the sales of all items from the Richfield operation including corsets and appliances defendant would receive 70% of the net profit plus 20% in the event said items were not purchased through an independent jobber and plaintiff would receive 10% of the net profit on all sales. (Tr 73-74, Findings no. 2 (f))

g. That plaintiff would furnish all of the initial equipment to begin the physical therapy business in Richfield, Utah. (Tr 61, Findings No. 2 (g))

3. RPT fully performed under all of the terms of said agreement but Jepson breached said agreement as follows:

a. Paid to himself RPT's share of the profits from sales of items in Richfield. (Findings No. 5, Tr 86-87)

b. Used corporate funds for his own personal use. (Findings No. 6, Tr 90-92)

c. Withdrew monies from RPT's account for profit sharing

4. On November 26, 1975, Jepson notified RPT that he was terminating his employment and keeping RPT's equipment for himself. (Exhibit PL-18)

5. On December 9, 1975, Vernon and Brown, officers of RPT, went to Richfield to straighten out the problem of the equipment and if necessary run RPT's office in Richfield. (Tr 108-110)

6. RPT was unable to continue its physical therapy business in Richfield (Tr 110) for the reason that Jepson had not only breached his fiduciary duty as an employee, but also had destroyed RPT's business by committing the following malicious and intentional acts: (Findings No. 9)

a. Destroyed or converted to his own use active treatment cards and other materials containing confidential information about RPT's customers. (Tr 108-110, 113)

b. Opened his own checking account and deposited RPT monies therein. (Tr 26-27)

c. Prior to his termination date he kept RPT's confidential information, to-wit, treatment cards, accounts receivables, daily worksheets and transferred said confidential information to his own treatment cards. Shortly thereafter destroyed RPT's materials; collect \$7,999.00 of RPT's accounts receivables and converted said money to his own use; kept other accounts receivables of RPT; and solicited and continued to treat customers of RPT. (Tr 28-34, 278-279, Exhibit D-34)

7. Jepson converted all of RPT's physical therapy business in Richfield, Utah to his own business and subsequently grossed \$60,000 in 1976 from said business. (Findings No. 13, Tr 35-36)

8. In approximately February, 1976, RPT finally decided that they could not continue their business in Richfield due to the loss of necessary information to Jepson and the head start he received to solicit patients of RPT. (Tr 113-114)

9. The RPT's Richfield physical therapy business had earned the following net profits:

1974 - \$6,945.32 (Exhibit D-26)

1975 - \$1,748.45 (Exhibit D-27, PL-12
(Does not include December)

ARGUMENT

POINT I

APPELLANT'S APPEAL FOR LEGAL RELIEF LIMITS THIS COURTS SCOPE OF REVIEW.

It is a well settled law in Utah that this court, in cases at law tried before the court without a jury, will only examine evidence as is necessary to determine question of law. Further, this court will not pass upon the sufficiency of the evidence to justify the findings or judgment, or substitute another evaluation of the evidence, unless there is no legitimate proof to support the findings or judgment. In no cases at law, either with or without a jury, will this

court determine questions of fact, but may in equity cases. Lyman v. Town of Price, 63 Utah 90, 222 P. 599; Sine v. Salt Lake Transport Co., 106 Utah 289, 147 P. 2d 875; Pixton v. Dunn, 120 Utah 658, 233 P. 2d 409; and Article VIII Section 1 of Utah Constitution.

Since under Utah law both actions at law and actions in equity can be consolidated in one action it is sometimes difficult to ascertain whether the case on appeal is one of equity or law. Such is not the case here for it is clearly evident that the relief sought on appeal by appellant is legal relief from damages awarded for a breach of fiduciary duty and destruction of respondent's business. Respondent did not seek equitable relief in the lower court and appellant does not seek it in this court. Further, the distinction as to whether legal relief is sought rather than equitable is mentioned in 27 Am Jur 2d Sec 112 at page 637 where it states:

"... That the suit is held to be judicable at law, and not in equity, where the purpose thereof is the recovery of damages which have been sustained by reason of fraud, a fraudulent conspiracy or a breach of a fiduciary duty."

(See also Ambler v. Choteau, 107 US 586, 27 L ed 322, 5 Ct 556 and Koeon v. Corpeiro, 200 A2d 708.)

Appellant is seeking relief from damages sustained by a breach of a fiduciary duty and this kind of relief is clearly legal relief and as such limits the scope of review on appeal.

Appellant presents two issues to this court. One is whether the lower court's award of \$10,000 was in conformity with its findings. The other issue is whether there was any legitimate evidence to support the figure of \$10,000. This court is not required to review the evidence and make its inferences therefrom, however, respondent submits that the evidence and the inferences therefrom clearly support the findings and the lower court's judgment which was in conformity with its findings and should not be disturbed. (Mason v. Mason, 160 P. 2d 730 [1945])

POINT II

THE AWARD OF DAMAGES FOR LOSS OF BUSINESS WAS IN CONFORMITY WITH THE TRIAL COURT'S FINDING THAT JEPSON BREACHED HIS FIDUCIARY DUTIES AS AN EMPLOYEE OF RPT.

Appellant urges upon this court the argument that since there was no written agreement between Jepson and RPT an award for loss of business could not be founded in contract. However, some courts have read into the employment at will at least a contractual obligation to perform services for the best interest of the employer and that where a key employee acts to the detriment of his employer prior to the time that he terminates gives rise to a cause of action founded upon breach of fiduciary duty. This fiduciary duty arises out of the employer-employee relationship and is present in all employment contracts whether written or oral as an implied covenant. Concerning this duty the court stated in C.E.I.R., Inc. v. Computer Dynamics Corp., 229 M.D.

357, 133 A. 2d 374 at 380, "that any breach of an employee's fiduciary duty to the employer will entitle the employer to an accounting in equity for the fruits of the wrongful action."

Further, in Restatement of Agency it clearly states:
in an employer-employee relationship:

"... after the termination of the agency, unless otherwise agreed, the agent has no duty not to compete with the principal; however, during the continuance of the agency, an agent has a duty not to do disloyal acts looking to future competition..."
Restatement of Agency 2d §396, Comment: (a)

The court in State Export Co. v. Mol Shipping & Trade
155 NY S 2d 188, also stated a similar rule of law:

"...a former employee is not free to exploit the trade of his former employer if the opportunity is facilitated by acts of preparation and disloyalty during his employment and before resignation, and by the breach of his obligation to use his best efforts in the interest of the employer; and that if the opportunity acquired after resignation is the opportunity lost to the employer because of disloyal acts done during the employment, the loss is actionable."

It is not necessary to argue that Jepson's oral employment contract contained an implied covenant of loyalty and good faith for the law is clear that a fiduciary duty exists and a breach of this duty is actionable whether it is classified in contract or tort.

The lower court found numerous disloyal acts done intentionally and maliciously by Jepson looking to future competition.

The opportunity of treating patients in Richfield that Jepson received and RPT lost was a direct result of Jepson's disloyal acts while employed. All of the information necessary for the operation of the Richfield business belonged to RPT and the destruction and conversion of said information by Jepson was not only an actionable wrong as a breach of his fiduciary duty but the proximate cause of the damages suffered by RPT. Numerous cases have awarded damages for similar breaches of fiduciary duties. (28 ALR 3d § 24, p. 120)

The critical factor for which damages have been awarded has been the existence of intentional acts committed by employees while still employed, looking for future competition, that were not consistent with the employees obligation to exercise the utmost good faith and loyalty in the performance of their duties. A case on point is Hoggan & Hall & Higgins, Inc., v. Hall, 18 Utah 2d 3, 414 P.2d 89 (1969) where officers, while still employed by the corporation, committed acts to secure and solicit customers of the corporation for their new and competing business. This court stated that a duty of loyalty is required of officers (employees) and then cited with approval Duane Jones Company, Inc. v. Burke, 306 N.Y. 172, 117 N.E. 2d 237 (1954) where, in a similar set of facts, the court also awarded damages for lost profits. Although the acts of the defendants in these two cases are somewhat different than the acts of Jepson in the present case many similarities exist. The major similarity is

the result obtained. The court in Duane Jones, supra, p.12 stated as follows:

"... that the individual defendants-appellants, who were employees of plaintiff corporation, determined upon a course of conduct which, when subsequently carried out, resulted in benefit to themselves through destruction of plaintiff's business, in violation of the fiduciary duties of good faith and fair dealing imposed on defendants by their close relationship with plaintiff corporation."

Appellant further attempts to argue that if the foundation for the award of damages cannot be squeezed into contract law, plaintiff only has one alternative left and that is the tort of taking a customer list which constitutes a trade secret. By attempting to limit the alternatives appellant hopes to dismiss his claim. However, the law allows other alternatives, as mentioned above, and the finding by the lower court of Jepson's breach of a fiduciary duty would be sufficient to support an award of damages for loss of business.

Not only can the lower court's award of damages for loss of business be founded in contract and agency law as mentioned above but a strong position can be presented for foundation in tort law based upon the taking of confidential information. Respondent agrees with the cases cited in appellant's brief and the fact that Jepson had the right to compete and solicit customers or patients of RPT after Jepson's termination as an employee. The tortious destructions of

business was not caused solely by the subsequent competition and solicitation by Jepson, but the malicious acts done prior to termination that rendered RPT incapable of competing at all. Jepson was under a fiduciary obligation to conduct himself so as to not cause injuries to RPT, and not to take documents and information belonging to RPT.

Appellant in his brief stresses the fact that most courts do not protect customer names and addresses unless they are considered confidential information. However, in none of the cases cited by appellant has a court condoned or allowed the taking of personal property of the employer which contained information necessary for the employer to conduct its business. An excellent case on point is Southern California Disinfecting Co. v. Lomkin, 183 Cal. App. 2d 431, 7 Cal Rptr. 43 (1960), where the defendant while employed as a route salesman removed from a route book sheets containing information on plaintiff's customers. The defendant replaced the sheets taken with blank sheets and then after his termination used the information on the sheets taken to solicit customers of the plaintiff before plaintiff could again acquire the lost information necessary to deal with its customers. The court held that such conduct by Lomkin amounted to "stealthy connivance to pirate business unfairly" and awarded damages for loss of business and punitive damages. The court also held that the information taken was confidential information.

71 A 802, where an employee who examined eyes and prescribed glasses for patrons of the employer copied names and addresses of customers from the records of the employer prior to leaving and then used said information to solicit their business for himself. The court rejected the argument that copying and using only those names of customers that the employee had personally examined was not a breach of confidence, and further stated that an employee has no more right to copy records made by himself for the employer than to copy other records to which he had access.

In the present case Jepson's acts of taking of the telephone cards and other information and transferring said information to his own cards and then destroying RPT's cards were tortious acts from which damages flow. Jepson's acts were a malicious effort to interfere with and destroy RPT's business thus making it easier for Jepson to compete and acquire RPT's business. This court would be hard pressed to find a better example of disloyalty and breach of a fiduciary duty, unfair competition and tortious taking of confidential information.

POINT III

THERE WAS MORE THAN SUFFICIENT EVIDENCE BEFORE THE TRIAL COURT TO SUPPORT THE AWARD IN THE SUM OF \$10,000 FOR PLAINTIFF'S LOSS OF BUSINESS.

It is well settled law that damages can be awarded for loss of business. The main problem that has appeared in most cases, however, is how to measure the damages for

said loss of business. In 25 CJS, Damages, Section 90, it states:

"Where your regular and established business is injured, interrupted or destroyed the measure of damages is the diminution in value of the business by reason of the wrongful act, with interest; it is the net loss, and not diminution in gross income. In order to establish the diminution in value, it is necessary, or proper to show the usual, or past, profits from the business."

It appears then, that the law suggests that the loss of future profits from a regularly established business may in proper cases be established by showing that the profits after the wrong were less than past profits.

It is evident that RPT's business in Richfield, Utah was a regular and established business. There is also no contention with the fact that the value of RPT's Richfield business was diminished to zero subsequent to Jepson's malicious and intentional acts. Further, the lower court found that said acts of Jepson were the specific cause of the injury to and the destruction of RPT's business in Richfield. Therefore, the only issue before this court in regards to the award of \$10,000 is whether the trial court had sufficient evidence before it to determine the value of RPT's Richfield business prior to its destruction by Jepson.

The lower court had the following evidence before it to establish the value of RPT's business in Richfield:

1. The testimony of Don Vernon who was the president

and major stockholder of RPT and the best qualified person to know the value of said business. He indicated that the value of said business was Fifty Thousand Dollars (Tr 131). His determination of said value was based upon the actual profit structure of said business during the three years prior to its destruction, the amount of accounts receivable (placed in evidence) and Mr. Vernon's own personal involvement with said business.

2. The testimony of Robert Cameron, RPT's accountant who prepared all financial statements showing the profit and loss status of the Richfield business for the time period involved.

3. The testimony of the defendant, Jepson, who indicated that with essentially the same patients and referrals that he took from RPT grossed \$60,000 the following year.

4. The best evidence before the trial court was Exhibits D-26, D-27 and PL-12 which indicated the exact amount of profit earned by the subject business during the three year period prior to its destruction.

The aforesaid exhibits indicate that RPT made a net profit in 1974 and 1975 of approximately \$9,000.00, and a gross profit of approximately \$50,000.00. The net profit is less than actual due to the unauthorized expenses incurred by Jepson.

It is apparent from the record that the lower court had before it all of the available evidence as to the value

RPT's business in Richfield. Said evidence established a value a lot higher than \$2,000.00 per year, but under the general rule in the majority of the jurisdictions the trier of the fact is not required to mathematical exactness in the amount but only a reasonable approximation based upon the evidence. In U.S. v. Griffith, 210 F 2d 11, the Tenth Circuit Court stated that

"...although perspective profits are somewhat uncertain and problematical, in cases where damages are definitely attributable to the wrong of the defendant and are only uncertain as to amount, they will not be denied even though they are difficult of ascertainment."

RPT contends that its prospective profits are not that uncertain based upon the past performance of its business. The court goes on to state that in order for the trial court to reach a reasonable approximation of future damages that have been lost it must have such facts and circumstances before it to enable it to make an estimate of damage based upon judgment not guess work. In the present case the trial court had all the available facts and circumstances upon which to make a reasonable approximation of the loss suffered by RPT due to the destruction of their business. The lower court did not use guess work to arrive at the figure of \$2,000.00 per year for the next five years as the value of the lost business. This figure represents the lowest amount of net profit made in Richfield by RPT during any one year and does not include any value for good will or accounts receivable lost. It is interesting to note that Mr.

Vernon, based his estimate of the value of RPT's business on a five year basis of \$6,000.00 per year for a total of \$30,000. (Tr 131)

This court in Gould v. Mt. States Telephone and Tele 309 p. 2d 802, 6 Utah 2nd 187 stated the true rule on the subject of determining damages from lost profits. This court stated on page 806 as follows:

"Shall the injured party be allowed to recover no damages (or merely nominal), because he cannot show the exact amount with certainty, though he is ready to show to the satisfaction of the jury, that he has suffered large damages by the injury? Certainty, it is true, would be thus attained; but it would be the certainty of injustice. * * * Juries are allowed to act upon probable and inferential as well as direct and positive proof. And when, from the nature of the case the amount of the damages cannot be estimated with certainty * * * we can see no objection to placing before the jury all the facts and circumstances of the case having any tendency to show damages, or their probable amount, so as to enable them to make the most intelligible and probable estimate which the nature of the case will admit."

RPT contends that the lower court had all of the facts and circumstances and made an intelligible and probable estimate as to the amount of damages RPT suffered due to the destruction of their physical therapy business in Richfield, Utah.

Another case on point is Vickers v. Wichita State Univ. 518 P 2d 512, 213 Kansas 614, where the court stated as follows:

"unquestionably the method of establishing the loss of profits with reasonable certainty is showing a history of past profit ability. Past profit ability of a particular business is not, however, the only method of establishing lost future profit. The evidence necessary in establishing

future profits with reasonable certainty must depend in a large measure upon the circumstances of a particular case... absolute certainty in proving loss of future profits is not required..."

In the Vickers case the court reversed a lower court decision to restrict the evidence of the plaintiff to past business experience for the purpose of showing loss of profit and allowed additional evidence as to what future profits might have been. In the present case future profits can be and were determined solely upon the past business experience of RPT.

This court made an important point in the Gould case where it stated that the rule against the recovery of uncertain damages is generally directed against uncertainty with respect to cause rather than to measure or extent. The lower court found in the present case that there was no uncertainty as to the cause of RPT's damage. Their loss of business was directly caused by the malicious and intentional acts of Jepson. Appellant argues that RPT should be denied recovery of damages for loss of profit based solely on the uncertainty with respect to the measure or extent of damages. As was previously mentioned, in regards to the measure or extent of damages, this court and other courts have stated that mathematical exactness as to the amount of damages is not required but only that the evidence formed a basis for a reasonable approximation by the trier of fact. Respondent submits that the lower court had all the necessary evidence and made a reasonable approximation of the

damages incurred by RPT as a result of Jepson destroying business.

One final point is that the lower court's award of \$2,000 per year seems to be based on net earnings and not gross earnings. RPT contends that said award could have been based on gross earnings of approximately \$30,000.00 per year. This court in the Hogan case, supra at p. 92, stated in regard to ascertaining the value of loss of business:

"A year's earnings, gross or net, cannot determine damages where agents solicit others to take their business away from their principals in favor of such agents, otherwise agents employed in a principal's banner year might designedly Pied Piper the customer pay the profit for the past year, intending to enjoy a handsome reward for many years to come,--a rather mousy gesture upon which courts frown."

The lower court was not bound to calculate the damage to RPT on net earnings and its determination of the amounts of \$10,000.00 was not only extremely conservative in comparison to RPT's gross earnings but also a super bargain for the \$60,000.00 business that Jepson acquired.

SUMMARY

The present case is a case at law. The lower court evaluated the evidence and made its findings. From those findings it concluded that Jepson destroyed RPT's physical therapy business in Richfield through malicious and intentional acts that were a breach of his fiduciary duty.

The lower court had at least the three following alternatives upon which to base its award of damages for loss of profit:

1. A breach of contract and fiduciary duty while an employee.
2. The unlawful conversion and tortious taking of confidential information and materials.
3. The intentional destruction of RPT's business through unfair competition.

The case law clearly supports the award of damages for loss of business when the lower court finds that the defendant's acts were the proximate cause of said loss. In the present case, the lower court had more than sufficient evidence before it to support its findings of a breach of a fiduciary duty and judgment of \$10,000 for loss of business.

It is also clear from the record that the lower court had before it all of the financial data of RPT's Richfield Business for the period in question and from said data made a reasonable approximation of the damages suffered due to

RPT's loss of business. The law does not require anything more. The judgment of the lower court should be affirmed.

Respectfully submitted



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CERTIFICATE OF MAILING

I hereby certify that on the 15 day of February, 1978, two copies of the within and foregoing Brief of Respondent, Registered Physical Therapists, Inc., were served upon Appellant by mailing to its attorney, Tex R. Olsen, Attorney at Law, 76 South Main Richfield, Utah, 84701.



Richard S. Nemelka
Attorney for Appellant
Registered Physical Therapist

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