1977

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

Utah Supreme Court

IN THE SUPREME COURT OF THE STATE OF UTAH

REGISTERED PHYSICAL THERAPISTS, INC., a Utah corporation, *Plaintiff and Respondent,* vs. ROBERT K. JEPSON, *Defendant and Appellant.*	) :) :) :) :) :	BRIEF OF APPELLANT, ROBERT K. JEPSON No. 15395

STATEMENT OF KIND OF CASE

This was an action commenced by the Plaintiff seeking to determine Defendant was an employee and not a partner and to recover monies collected by Defendant after employment termination and to recover damages for the value of a physical therapy business in Richfield, Utah.

DISPOSITION OF LOWER COURT

The District Judge granted Plaintiff a judgment of $7,999.00 for funds collected by the Defendant and did further award the total sum of $10,000.00 for loss of a physical therapy business in Richfield, Utah, making a total judgment of $17,999.00.

RELIEF SOUGHT ON APPEAL

Defendant seeks reversal of that part of the judgment awarding the Plaintiff the sum of $10,000.00 for the loss of its physical therapy business in Richfield, Utah.

STATEMENT OF FACTS

Robert K. Jepson was employed by Registered Physical Therapists, Inc. for a period of time commencing in August of 1973 and continuing to December 9, 1975. During the period of employment, Robert K. Jepson was paid a salary and also was entitled to a share of the profits which increased each quarter to 50% of the profit prior to termination of the employment agreement.

The parties had no written employment agreement setting conditions or term of employment. The employment was simply at the pleasure of the parties.

Difficulty developed between officers of the Plaintiff and Mr. Jepson. Mr. Jepson advised the officers that he was terminating his employment as of December 25, 1975. Officers of the Plaintiff then came to Richfield on December 9, 1975 and took over all of the office and physical therapy equipment and

terminated Mr. Jepson. They posted upon the door of the physical therapy office a sign which read, "Robert K. Jepson is no longer working for Registered Physical Therapists, Inc." Officers of the corporation, President, Ronald Don Vernon and Vice President, Larry Brown loaded a U-Haul Trailer with all of the physical therapy and office equipment and furniture and did further close the Richfield business bank account.

The President of Plaintiff company acknowledged the equipment was taken so that Robert K. Jepson or no one else could operate the office (TR154 L3). Further he said there was nothing in their working relationship with Mr. Jepson which would prohibit him from opening another office in Richfield (TR155 L11-15).

Any good will acquired in Richfield was acquired solely by Mr. Jepson's efforts. In August of 1973 and continuing thereafter, Robert K. Jepson, without assistance, made extensive efforts to introduce the new physical therapy business in the Richfield area. He visited all physicians; called upon Hospital Administrators; joined local clubs (TR254 L17-26). He became the trainer and physical therapist for the atheletic departments of Richfield High School, North

Sevier High School and South Sevier High School (TR255 L11-21). He taught a prenatal class for young expecting mothers (TR256 L29). Mr. Jepson produced all the revenue which was produced in the Richfield office from his personal services (TR258 L3-10). He worked from 10 to 12 hours per day and on holidays when the need arose (TR259 L4-28).

No one from the Salt Lake Office assisted Jepson at Richfield except on one occasion Ronald Don Vernon treated three patients in 1974 while in Richfield for a hunting trip. Vernon was not acquainted with the referring doctors and hospitals in the area (TR169 L1-30 and TR166 L5).

ARGUMENT

POINT I.

NO COMPETENT EVIDENCE EXISTS FOR THE AWARD OF $10,000.00 FOR THE DESTRUCTION OF PLAINTFF'S THERAPY BUSINESS IN RICHFIELD, UTAH.

It is acknowledged by all parties that Robert K. Jepson was not employed under written contract to operate a physical therapy business in Richfield, Utah. Mr. Jepson had the free and absolute right to compete with the Plaintiff at any time he elected to do so. The Plaintiff through its President readily acknowledged this fact by stating: (TR155 L11-15)

(MR. OLSEN) "Q So there was no written agreement?

(RONALD DON VERNON) A No.

Q So there was nothing to prohibit him from going across the street and opening an office?

A No.

Q So that was perfectly available to him?

A Fine. We had no objection to that."

Mr. Vernon also describes what was done on December 9, 1975 in regard to the closing of the office in answer to the following questions:

(TR154 L3-10)

(MR. OLSEN) "Q . . . but you took all of the equipment back to Salt Lake?

A Yes.

Q So Bob Jepson nor no one else could operate the office?

A Correct. Unless we brought it back.

Q Unless you brought it back?

A That's right."

Since there was no agreement between the parties which would restrain Robert K. Jepson from competing in the Richfield trade area, the $10,000.00 judgment for loss of business by the Plaintiff could not be

founded in contract.

Therefore, the award cannot be supported unless the Defendant can be found to have committed the tort of taking from the Plaintiff a customers list which constituted a "trade secret".

The president of the Plaintiff corporation stated that Robert K. Jepson retained some of the "treatment cards", and for this reason the company elected not to continue the office in Richfield. The treatment cards as shown by Exhibits "D29, D30 and D31" are no more than cards listing the name of the patient, date of treatment and amount due. This record is duplicated in the daily records which were filed with the Plaintiff. It is acknowledged that the Defendant, Robert K. Jepson was the only Physical Therapist to whom patients were referred and that he knew the customers personally from having met them and having worked upon them. Any information placed upon the "treatment cards" was placed upon those cards by Mr. Jepson. Under this fact situation it is readily seen that treatment cards could not qualify as a customer list constituting a "trade secret" of the employer. The Oklahoma case of *Central Plastics Company vs. Goodson, 537 P.2d 330* defines a trade secret as follows:

"Trade secrets and confidential information, in order to be protected against disclosure by employees, must be the particular secrets of the employer as distinguished from the general secrets of the trade in which he is engaged. *Aetna Bldg. Maintenance Company, vs. West, 39 Cal.2d 198, 246 P.2d 11 (1952).*

The Oklahoma Court further stated:

"It is usually held that an employee's knowledge of any employer's customer acquired by him as an ordinary employee . . . is not a trade secret, and in the absence of an express or prohibitory agreement, the employee may on a change of employment solicit such customer . . ."

The Oklahoma Court also quotes with approval the case of *Brenner vs. Stavinsky, 184 Okl. 509, 88 P.2d 613* wherein the court stated:

"Generally, in the absence of a contract of the contrary, a former employee may upon entering the competitive field with his erstwhile employer either as an employee of another or on his own initiative solicit the business of the latter's customers."

Colorado follows the general law concerning trade secrets. It is outlined in the case of *Suburban Gas of Grand Junction, Inc., vs. Bockelman, 401 P.2d 268* where it is stated:

"The rule is quite clear that solicitation of customers and the use of customer lists is permissable unless there is a breach of express contract or a violation of some confidence.

> There must be some element of fraud or trade secrecy . . . but equity is not protecting mere names and addresses easily assertainable by observation or by reference to directories."

The case also cites with approval the following language expressed in the *American Window Cleaning of Springville vs. Cohen, 178 NE.2d 15:*

> "That Cohen was a director did not make information, otherwise properly acquired, confidential. It was in his employee capacity that Cohen acquired the information about customers. The inforamtion was of the kind which would be used by anyone working for his living in the window cleaning business - one in which Cohen was experienced and free to work."

In the Washington case of *Jewett-Gorrie Insurance Agency vs. Visser, 531 P.2d 817,* the court stated:

> "Visser was admittedly not bound by a covenant not to compete and his communications were with individuals whose identities were well known or easily assertained by the public, he was free to solicit business from customers of his former employer, even if he did not gain knowledge of such customers while in the Plaintiff's service."
> (Citing other cases.)

The evidence which was before the Lower Court appears to more clearly follow the stituation where the local patients who had never seen anyone other than Robert K. Jepson and who were referred by local

hospitals and physicians continued to go to Robert K. Jepson.

The comment in *Suburban Gas vs. Bockelman (Supra)* appears to be appropriate here:

> ". . . the evidence here indicates that most of these customers seemed to consider themselves as attached to their route salesman rather than to the employer."

The philosophy of the cases cited is clearly upheld by the Utah Legislature in the *Unfair Practices Act* found in *Title 13, Chapter 5, Utah Code Annotated.* The legislature clearly expresses the following language in *Section 13-5-17 Utah Code Annotated, 1953,* in which the policy of the act is stated to:

> "Foster and encourage competition, by prohibiting unfair and discriminatory practices by which fair and honest competition is destroyed or prevented."

It is further appropriate here to point out that the Plaintiff did not produce any evidence to show that the "treatment cards" were used by Bob Jepson to solicit any customers. He continued to carry on a physical therapy business at another location from the referrals he continued to receive. The cards were only used for collection purposes. After his services were terminated on December 9, 1975 he continued to collect accounts and did collect

$7,999.23 (TR279 L28). He held these funds as an offset against profit sharing he thought was due him and the separate collection by Plaintiff of accounts receivable which were collected after December 9th from patients treated by Mr. Jepson in the amount which was then unknown to him but proved at the time of trial to be $2821.85 (TR195 L28-30).

POINT II.

NO COMPETENT EVIDENCE OF DAMAGES BEFORE THE COURT WHICH WOULD SUPPORT PLAINTIFF'S AWARD IN THE SUM OF $10,000.00 FOR BUSINESS LOSS OR ANY OTHER AMOUNT.

The Plaintiff called two witnesses to testify in its behalf. They were its President, Ronald Don Vernon and its accountant, Robert Wesley Cameron. Mr. Vernon stated that the office was closed and that a definite decision was not made to go back to Richfield until after a period of three months (TR114 L. He placed a notice on the door of the physical therapist office in Richfield which read Bob Jepson was no longer working for Registered Physical Therapists (TR112 L13). He also closed the corporation's bank account in Richfield on December 9, 1975 by drawing out all of the funds (TR114 L21-27).

Mr. Vernon attempted to show the business would

have had a profit in 1976 if it was continued. There was no foundation for his answers but over considerable objection the following questions and answers were placed in the record (TR137 L3-21):

(MR. NEMELKA): "Q Mr. Vernon, taking the figure that there was a twenty-seven thousand gross in 1975 and the Defendant testified a sixty-thousand gross in '76, can you testify that there was a six thousand net profit in 1976, what would be the projected net profit on those figures in 1976?

A Six percent of twenty-seven, we're talking about twelve thousand or something.

Q Based upon those figures, if you were to continue under your agreement to receive ten percent of the gross, which is six thousand, and also sixty thousand of the net profit, which would be twelve thousand, would be six thousand, your projected profit over that year's period of time would have been approximately twelve thousand dollars; is that correct?

A That's right."

It is seen that there was no foundation for the figures being used. There was no inquiry into the $60,000.00 gross figure testified to by Mr. Jepson as to whether it was gross receivables without discount for uncollected accounts; or whether the amount entailed considerable additional expense because of additional

personnel being employed by Mr. Jepson or whether there was some carry over collections from the preceding year. No consideration was given to a plan for continuing the business with personnel other than Mr. Jepson.

In reviewing the testimony of Robert Wesley Cameron it was noted that he was a Public Accountant and not a Certified Public Accountant (TR230 L9). Mr. Cameron was not an expert and had never bought nor sold a business comparable to the Registered Physical Therapy Business in Richfield. He had never bought and sold any business (TR230 L14-18).

It was noted that his assumptions were that if his clients had operated the business in 1976 it would have had gross receipts of $60,000.00. He made no inquiry as to the expenses involved in that gross figure. The witness did not have any foundation for the opinion he gave to the court.

No experts in the field of buying and selling businesses or handling businesses of similar types were offered. The question of value has been considered by this court in various condemnation cases where it has been consistently held that the value of the loss is the fair market value before the taking and the loss shown by deducting its fair

market value after the loss. See *State Road Commission vs. Nobel, 335 P.2d 831, 8 U.2d 405; State Road Commission vs. Williams, et al, 552 P.2d 548, 22 U.2d 301.*

On the evidence offered the District Court made a finding the Plaintiff had been damaged by the loss of its business and found the damage to be two thousand per year for five years or ten thousand dollars (TR318 L29-30 and TR 319 L1-2). No attempt was made to require Plaintiff to midigate its damage by opening and operating its business or to assign a current value to the anticipated five year loss.

CONCLUSION

We respectfully submit that the trial court errored in assessing $10,000.00 damages against Robert K. Jepson upon a finding that employment termination and the retention of some treatment cards destroyed the Plaintiff's business. On the contrary, Plaintiff had a complete list of all of the customers treated and was able to compile and submit to the District Court an accounting based upon daily records held by it. The District Court erroneously held that the good will consisting

of the development of the business by Robert K. Jepson was an asset of the Plaintiff and wrongfully assessed judgment for it. There was no contract and no tort was committed which damaged Plaintiff's right to continue the business.

The judgment of the trial court should be reversed and the judgment reduced by the sum of $10,000.00 which was awarded to Plaintiff for business loss.

Respectfully submitted,

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CERTIFICATE OF MAILING

I hereby certify that on the 16th day of December, A. D., 1977, two copies of the within and foregoing Brief of Appellant, Robert K. Jepson, were served upon Respondent by mailing to its attorney, Mr. Richard S. Nemelka, Attorney at Law, 455 East 400 South, Suite #401, Salt Lake City, Utah 84111.

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