

1978

Rocky Mountain Giant Tire Service, Inc. v. Brad Ragan, Inc. : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT
OF THE STATE OF UTAH

ROCKY MOUNTAIN GIANT
TIRE SERVICE, INC.,

Plaintiff and
Respondent,

vs.

Case No. 15553

BRAD RAGAN, INC.,

Defendant and
Appellant.

BRIEF OF RESPONDENT

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Appellant.

BRIEF OF RESPONDENT

STATEMENT OF CASE

This is an action by Rocky Mountain Giant Tire Service to recover for tires sold to Brad Ragan, Inc.

DISPOSITION IN LOWER COURT

The matter was tried to the Honorable James S. Sawaya, District Judge, and judgment was entered for plaintiff for the sum of \$5,575.00 plus costs and interest.

RELIEF SOUGHT ON APPEAL

Respondent seeks affirmance of the judgment entered in the lower court.

STATEMENT OF FACTS

This is a case where the testimony of the respondent's witness differed sharply with the testimony of appellant's two witnesses. Appellant's Statement of Facts sets forth the version of the transaction favorable to it and virtually ignores the facts favorable to respondent's position and the facts supporting the trial court's judgment.

Ralph Albertson, an employee of Rocky Mountain Giant Tire Service, and Arlo Murkin, an employee of Brad Ragan, entered into an oral agreement wherein Brad Ragan agreed to purchase from Rocky Mountain certain tires which had been used and discarded by Kennett Copper Corporation. Mr. Albertson and Mr. Murkin traveled to the Kennecott Mine in Salt Lake City and inspected the tires which Mr. Albertson had previously selected (R. 101, 115-116, 127). The price and freight rate were agreed on by both parties (R. 127). Mr. Murkin testified that the sale was subject to additional inspection in Arizona (R. 127-128), while Mr. Albertson testified that the sale was "as is," with the exception of eleven tires which will be discussed below (R. 116).

Seven shipments totaling 70 tires were made to Brad Ragan.

and billed by invoices dated September 16 through November 6, 1975 for a total purchase price of \$15,100.00 (Plaintiff's Exhibit 1, R. 101-102). Brad Ragan made three payments on the tires totaling \$7,525.00 (Plaintiff's Exhibits 3, 4 and 5, R. 104-105). In addition, Rocky Mountain gave Brad Ragan credit for eleven tires (Plaintiff's Exhibit 2, R. 98). Thus, the total purchase price less payments and credit was the \$5,575.00, which the court awarded to the respondent.

Mr. Albertson testified that he had been in the tire business since 1950 and he had been selling these tires to re-capping shops on an "as is" basis for ten to fifteen years and that other people in the industry were doing business the same way (R. 116-117). Brad Ragan attempted to show that industry practice was not to buy used tires without making machine inspections. However, on cross-examination, appellant's witness, Mr. Murkin, admitted that every transaction in the industry was different and that there was not really anything that could be considered industry practice in the buying of used tires (R. 148).

On October 14 and 15, 1975, Mr. Albertson was in Tucson, Arizona and was told by appellant's employees that they were satisfied with the tires which had been shipped by respondent (R.107).

On November 28, 1975, Mr. Albertson was again in Tucson to collect for the tires which had been delivered (R. 107-108). At this time, Brad Ragan had made two payments on the tires as follows: October 24 in the amount of \$2,025.00 and November 7 in the amount of \$2,375.00 (Plaintiff's Exhibits 3 and 4). These payments are for the identical amounts of the first two invoices for the first two shipments to Brad Ragan.

The background on the credit memo for eleven tires was established in response to the questions of the court to Mr. Albertson. Mr. Albertson stated that when he and Mr. Murkin were looking at the tires, there were eleven tires which were marginal but which Mr. Murkin said he might be able to do something with because of the type of shop he had in Tucson. The tires were then shipped on the chance that they would be usable but when it was discovered they were too far gone, a credit memo was issued (R. 124). These eleven tires were shipped on November 6, 1975 and the respondent was informed by a telephone call on November 10, 1975 that the tires were not usable, and the credit memo issued (Plaintiff's Exhibits 1 and 2, R. 124).

POINT I

THE PREVAILING PARTY IN THE TRIAL COURT IS ENTITLED ON APPEAL TO ALL REASONABLE INFERENCES TO BE DRAWN FROM THE EVIDENCE IN THE LIGHT FAVORABLE TO THE JUDGMENT.

The appellant properly points out and the trial court correctly identified the central issue in this law suit was whether the tires were sold "as is" or subject to inspection (R. 177). Appellant claims the trial court findings are inconsistent or incomplete because an express finding on whether the contract was conditional was not made and because credit for eleven unusable tires was given. These findings are clearly consistent with the evidence and clearly demonstrate what the court found.

For the appellant to argue that the findings are fatally incomplete is to ask the Court to ignore the well-established rule of review. This standard is set forth in Olsen vs. Park Daughters Investment Company, 29 Utah 2d 421, 511 P.2d 145 (1973), as follows:

"Further, the trial court having refused to be so persuaded, this court on appeal would not upset his findings and judgment, and order findings and judgment to the contrary, unless the evidence were such that all reasonable minds must necessarily so find; and in making that determination,

we review the evidence and all reasonable inferences fairly to be drawn therefrom in the light favorable to his findings and judgment."

This standard of review is especially appropriate in this case. The trial judge observed the witnesses and was in a position to judge their credibility. The witnesses told markedly different versions of how the transactions developed and the court's findings and judgment clearly demonstrate that the court accepted the respondent's version. The trial court entered a judgment for the total purchase price of all tires shipped, less the three payments by appellant and the credit for the eleven tires. This is what the respondent's invoices show and what the respondent's testimony demonstrated (Plaintiff's Exhibits 1 to 5, R. 98-105, 124).

The only reasonable inference to be drawn from this evidence is that appellant was obligated to pay for all tires regardless of their recap ability, i.e., the agreement was not conditional. The credit invoice for the eleven tires was the subject of a separate agreement in accordance with Mr. Alberts' testimony (R. 124).

POINT II

THERE IS A REASONABLE BASIS IN THE EVIDENCE TO SUPPORT THE FINDINGS OF THE TRIAL COURT.

THE STANDARD OF REVIEW

This Honorable Court has consistently held that where there is "any reasonable basis" in the evidence to support the findings of the trial court, the findings will not be overturned. In Holman vs. Sorenson, 556 P.2d 499 (Utah 1976), Justice Ellett said:

"The policy of this Court has been, after reviewing the record, not to disturb the trial court's findings if there is a reasonable basis in evidence to support it. Appellants carry out the burden of showing from the record that the lower court erred."

Also, see First Western Fidelity vs. Gibbons & Reed Co., 27 Utah 2d 1, 492 P.2d 132 (1971).

The recent case of Hanover Ltd. vs. Fields, 568 P.2d 751 (Utah 1977), explains the standard which appellants must meet if the trial judge's findings are to be reversed. The Court said:

"In regard to the remaining assertions of error, this court is constrained to look at the whole of the evidence in the light favorable to the trial court's

findings, including any fair inferences to be drawn from the evidence and all of the circumstances shown. The trial court's findings shall not be disturbed unless the evidence is such that all reasonable minds would be persuaded to the contrary."

When the parties to an action each produce evidence supporting its action, this Court has consistently refused to reverse the trial court unless the evidence is so convincing that reasonable men could not differ as to the results which the evidence dictated. For example, in Koesling vs. Basamaklis, 539 P.2d 1043 (Utah 1975), this Court upheld the trial court's determination and made these comments:

"Plaintiff produced evidence tending to prove the existence of a partnership. Defendant produced opposing evidence and further produced evidence which tended to prove a joint venture of the nature heretofore described. The trial court, exercising its prerogative as a trier of fact in a nonjury case, weighed the credibility of the witnesses and was not persuaded by plaintiff's evidence. This court will not disturb such a determination when reasonable men could differ as to the weight to be given to conflicting evidence."

Thus, it is clear that the trial court will not be over-
turned if there is any reasonable basis in the evidence to
support the findings. At the same time, the appellant must

show that "all reasonable minds would be persuaded to the contrary" before the lower court can be reversed.

THE EVIDENCE

There is clearly a reasonable basis in the evidence to support the findings of the trial court. Respondent's employee, Ralph Albertson, testified that he had been selling used tires on an "as is" basis for ten to fifteen years (R. 116-117). On cross-examination, appellant's witness, Arlo Murkin, admitted buying practices vary widely in the used tire business. Mr. Murkin said "Every transaction is different. There is no two transactions that are anything that would be considered industry practice in buying of used tires." (R. 148). The appellant was paying between one hundred and two hundred fifty dollars plus freight per used tire and would sell the tire for as much as \$7,000.00 after it had been recapped (Plaintiff's Exhibit 1, R. 129, 148). When Mr. Albertson traveled to Tucson on October 14 and 15, he was told by appellant's employees that they were satisfied with the tires which had been shipped (R. 107). By this date, at least twenty-seven of the total of seventy tires had been shipped to Tucson. It is reasonable to conclude that when a

\$200.00 used tire can be recapped and sold for \$7,000.00, the purchaser would be willing to make this small investment on the tire on an "as is" basis and take the chance that some of the tires would not be usable. This is a simple economic decision that is made daily by businesses which purchase products "as is." Appellant claimed that fifty per cent of the tires were not usable, but at the same time, Mr. Murkin admitted that nothing was said to Mr. Albertson about rejected tires during the October 14 and 15 visit (R. 146).

On September 16, 1975, appellant was invoiced for nine tires in the sum of \$2,025.00 and the second invoice on September 23, 1975 was for ten tires in the sum of \$2,375.00. The first payment to respondent was made October 24, 1975 for the sum of \$2,025.00 and the second payment was made November 7 for the sum of \$2,375.00. Thus, after the October 14-15 meeting in Tucson, it is reasonable to conclude appellant paid the first two invoices and made no complaints about the quality of the casings. This is consistent with the nature of the agreement since appellant had nothing to complaint about for tires which were purchased "as is."

The credit memo for the eleven tires supports respondent's

position. The background on the credit memo was established by questions from the court.

"THE COURT: Mr. Albertson, what gave rise to the Credit Memo of November 10th for twenty-three hundred and seventy-five dollars for eleven tires? How did that come about?

"THE WITNESS: Those were eleven tires that were marginal. When we were up here looking at these tires, these eleven were marginal, didn't know whether they could go or not but Mr. Murken told me with his type of a shop that he could do more with the tires than most anybody else in the same type of business because he was so diversified now. I said 'Well, take these on a chance that they will go,' so I billed them out and then come to find out that they were too far gone and issued him credit for the full amount per tire.

"THE COURT: How did you become aware that they weren't useable?

"THE WITNESS: He notified me by phone.

"THE COURT: All right. But as I understand it, this was prior to the conversation you had with regard to disposing of junk tires?

"THE WITNESS: Correct." (R. 124)

These eleven tires were shipped within one or two days from the November 6th invoice date and by November 10, the appellant had notified Mr. Albertson that the tires were not recappable and a credit memo was issued (R. 121). According to respondent's invoices, these eleven tires were the last of

the seventy tires shipped. The obvious question is why was nothing said regarding the other twenty-four tires appellant claimed were rejected at the time of the pre-November 10th telephone call, or otherwise. The only reasonable answer is that appellant knew it had purchased all but the eleven tires "as is" and did not have the right to complain. Mr. Murkin admitted that all tires were inspected within a few days of arrival and that appellant's policy was to notify the shipper of any rejected tires (R. 145). At the same time, he admitted there was no notice of any rejected tires although the shipments were all received over a three-month period prior to the November 29th meeting (R.145-146).

There is considerable discussion in appellant's brief about the November 29th visit of Mr. Albertson to Arizona to collect money. Mr. Albertson denied seeing any inspection sheets for tires at that time (R. 117). Mr. Albertson was looking for the balance due based on his invoices (R. 118). There was some discussion about discarding the eleven tires but no reference to any other tires being junked (R. 122-123).

At the time of this meeting, Mr. Albertson was handed a copy of defendant's Exhibit 15, but he was not aware of the

exact amount owing inasmuch as he did not have his invoices with him. However, he did not agree that the amount shown on defendant's Exhibit 15 was the amount owing (R. 112, 158-159, 164-165). A fair reading of the record on Mr. Albertson's testimony regarding the November 29th meeting shows that he was at one point confused about the discussion on the amount due and the court recognized as much (R. 119, 123). Mr. Murkin did admit that he did not have Mr. Albertson sign defendant's Exhibit 15, which is what would be expected if any entirely new bargain was made at that point (R. 163). The best evidence of the fact that Mr. Albertson did not agree to the accounting urged by appellant is that on November 30, 1975, a Sunday and the day he returned to Salt Lake City, he had prepared a statement showing the full amount due (Plaintiff's Exhibit 6). The original of this statement was mailed to appellant and when the subsequent payment made on the account is subtracted from the balance shown on this statement, the sum of the judgment, \$5,575.00, is reached.

Appellant cites the Uniform Commercial Code as though it supports its position, when the Code clearly recognizes "as is" sales and the specific section relied on by appellant begins

"unless otherwise agreed." Sections 70A-2-316 and 513, Utah Code Annotated, 1953, as amended. That is precisely the situation here. The parties agree that the sale was to be "as is" and the trial court so found.

Appellant would justify its employees' conduct in this case by attempting to change the underlying agreement after all the tires had been shipped. Except for the eleven tires which were part of a separate agreement, as the facts clearly indicate, the witnesses all agreed that respondent was never notified of rejected tires prior to November 29. At this time, the appellant attempted to avoid paying its just obligation by making a separate accounting. Thus, appellant would have this Court ignore the entire history of the transaction to the date of November 29, and then on the basis of a self-serving accounting, unsigned by respondent, avoid paying for the tires as per the agreement. The trial court had the benefit of observing the witnesses during their testimony and found that appellant's attempt to avoid payment was not justified. The trial judge should be affirmed in so finding.

POINT III

INTEREST WAS PROPERLY AWARDED ON THE JUDGMENT.

The trial court found that even after the appellant's last

payment on December 19, 1975, there was owing to respondent \$5,575.00. Interest was then awarded from that date to judgment at the legal rate of six per cent per annum and from the date of judgment at eight per cent per annum. Interest at 8% per annum on the judgment is mandated by Section 15-1-4, Utah Code Annotated, 1953.

The Utah Supreme Court established the guideline for awarding pre-judgment interest in Bingham Coal & Lumber Co. vs. Board of Education, 61 Utah 149, 211 P. 981 (1922). The test was whether the damages were complete and could be ascertained as of a particular time and in accordance with known standards of value. Here, the court determined that the additional \$5,575.00 was due when the last payment was received and was therefore justified in awarding the pre-judgment interest at the legal rate.

The fact that the complaint does not specifically pray for pre-judgment interest is of little consequence. Rule 54(c), Utah Rules of Civil Procedure provides "...every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in its pleadings."

Other jurisdictions have applied similar rules and allowed

the awarding of interest even when not specifically sought in the complaint. Arizona Title Insurance and Truck Co. vs. O'Malley Lumber Co., 14 Ariz. App. 486, 484 P.2d 639 (1971); Checker Incorporated vs. Zaman, 467 P.2d 100 (Nev. 1970).

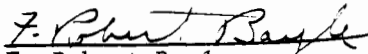
CONCLUSION

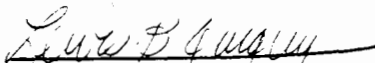
There is substantial evidence to support the court's findings and judgment. Certainly, there is a reasonable basis for the findings and the clear inference from the specific findings is that the agreement was unconditional. The weight of the evidence favors the trial court's findings and this court should not reverse based on the re-argument of the evidence by appellate.

Only on appeal has the appellant decided that what it was arguing for at trial did not even make sense mathematically. Accordingly, the trial court should be affirmed.

Respectfully Submitted,

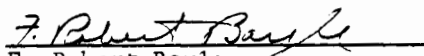
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I hereby certify that three (3) copies of the Brief of Respondent were mailed, postage prepaid, to Kay M. Lewis, Esq. and Lawrence E. Corbridge, Esq. of Jensen & Lewis, Attorneys for Appellant, 320 South 300 East Street, Suite 1, Salt Lake City, Utah 84111 this 17 day of June, 1978.


F. Robert Bayle