1979

Paul Christensen v. Weldon S. Abbott : Brief of Respondent in Answer to Petition for Rehearing

Utah Supreme Court

Wallace D. Hurd; James W. Beless; Attorneys for Respondent;
George E. Mangan; Edward W. Clyde; Attorneys for Appellant;

IN THE SUPREME COURT OF THE STATE OF UTAH

PAUL CHRISTENSEN, :

Plaintiff-Appellant, :

vs. : Civil No. 15574

WELDON S. ABBOTT, :

Defendant-Respondent. :

RESPONDENT'S BRIEF IN ANSWER TO PETITION FOR REHEARING

Wallace D. Hurd
1011 Walker Bank Bldg.
Salt Lake City, Utah 84111

James W. Beless
1011 Walker Bank Bldg.
Salt Lake City, Utah 84111

Attorneys for Respondent

George E. Mangan
P. O. Box 246
Roosevelt, Utah 84066

Edward W. Clyde
Clyde & Pratt
351 South State Street
Salt Lake City, Utah 84111

Attorneys for Appellant

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George E. Mangan
P. O. Box 246
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Edward W. Clyde
Clyde & Pratt
351 South State Street
Salt Lake City, Utah 84111

Attorneys for Appellant

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BRIEF IN ANSWER TO PETITION FOR REHEARING

Defendant-Respondent Abbott submits this brief in answer to Plaintiff-Appellant Christensen's petition and brief for rehearing.

OPENING STATEMENT

Our review of appellant's petition for rehearing and brief in support thereof fails to show that this Court in its majority opinion did not consider all points on the appeal; that there are any newly discovered matters; that this Court misconstrued or overlooked any material matters of fact; or, that the Court based its decision on any wrong principle of law or that it misapplied or overlooked any material matter.

On the contrary, appellant's redundant complaints go to a proliferation of charges of "inferences," "speculations," and "unbelievable and unreasonable" constructions and improper "deference" by the majority of this Court.

Respondent's answer will respond to these charges by separate points.

POINT I.

THE ABBOTT TO CHRISTENSEN NOTE WAS AN INTEGRAL PART OF THE RANCHING BUSINESS OPERATION

Appellant complains that the Abbott-Christensen note was never any part of the joint venture, and he would limit the scope of "joint venture" to the Haslem ranch and the red cattle operation, thus fragmenting the whole business and ranching operation between the parties.

We submit that the note was alleged and proved by Abbott and accepted and believed by the trial court to be one facet of the financing arrangement in operation of the whole joint ranching operation. The note (Exhibit P-1) was non-negotiable, and it was intended to be operable only between Abbott and Christensen. All cattle, black Angus and red Haslem, were run together on the Haslem ranch and BLM lands by Christensen, with an agreement between the parties for their sharing equally the income from the calf crop (R-50). When the settlement was made on April 28, 1976, all of the cattle, black and red, were divided equally between the parties, not just the Haslem cattle as appellant claims, and Abbott assumed the delinquencies on the Haslem ranch mortgage.

After a two-day trial where the details of the entire ranching operation and finances were fully examined, Judge

Sorenson stated in his memorandum decision (R-40).

> It would appear that, no matter what the business arrangement was between the parties prior to April 28, 1976, on that date both parties concluded the business had failed, and they therefore settled between them a division of the property and debts. The court finds that Exhibit 4 covers only a part of that settlement.
>
> The court concludes that on April 28, 1976, there was an accord and satisfaction, and therefore finds no cause of action. (emphasis added)

The trial court's Findings of Fact (R-41) stated that the parties were engaged in a "business enterprise"; that the the "business venture" failed; and, that on April 28, 1976 the parties made a division of the property and debts of their "business operation."

In examining the business enterprise; that is, the whole joint ranching operation, the trial court properly received and allowed proof and testimony regarding the Abbott note as part of the business financing between the parties and as part of the final settlement in the accord and satisfaction. Appellant called Abbott as his witness, and at that time and also later when Abbott testified on direct examination, no objection going to the parole evidence rule was ever made by Appellant to Abbott's testimony to the effect that the note was an integral part of the whole business arrangement and that it was to be cancelled as part of the final settlement (R-116, 117, 118, 242, 243). Judge Sorenson stated in his memorandum

opinion (R-40) that the assignment and assumption instrument (Exh. P-4) was only a part of the accord and satisfaction settlement, and in allowing testimony regarding the intended cancellation of the note, the trial court was proper in following Bullfrog Marina, Inc. v. Lentz, 28 U.2d 261, 501P.2d 266 (1972), which case allowed parole evidence to show the whole and complete agreement of the parties.

The trial court accepted as competent and credible the testimony of Abbott regarding his clear understanding that the joint business arrangement included the running of all cattle, red and black, that the note was an integral part of part of the whole business arrangement; and that cancellation of the notes was a part of the whole accord and satisfaction settlement. On the appeal, four justices of this Court, with the full record before them, concurred with Judge Sorenson in his decision and findings.

POINT II.

THE SUPREME COURT MADE A FULL REVIEW OF THE RECORD AND THE MAJORITY CONCURRED WITH THE TRIAL COURT'S FINDINGS MADE AFTER A TWO-DAY TRIAL

Appellant complains that the majority of the Court "infers" facts, makes "speculations outside of the record," makes "deference to the trial court to allow the patent injustice, fraud or inequitable result," and "perpetuates the error of the trial court," all of which is "unreasonable, unconscionable, and unthinkable and defies all credibility."

On appeal this Court had before it the full record, including the transcript of the two-day trial. The trial court and four justices of this Court accepted the testimony of Abbott as competent, credible and believable.

We submit that appellant tortures the words "infer" and "deference." The accepted judicial use of "inference" is not as a guess or surmise, but as a logical conclusion and as used in Prudential Federal Savings v. Hartford Acc. & Ind. Co., 7 U2d 366, 325 P2d 899 (1958), which states:

> Inasmuch as the trial court found in favor of the plaintiffs, they are entitled to have us review the evidence and every reasonable inference fairly to be drawn therefrom in the light most favorable to them. (emphasis added)

Judicial "deference" is in no way blind complaisance, but can best be defined in the language of Memmott v. U.S. Fuel Co. 22 U2d 356, 453 P2d 155:

> On appeal we apply the traditional rules of review: we assume that the trial court believed those aspects of the evidence which may be deemed to support his finding and judgment; and we survey the evidence in the light favorable thereto.

POINT III.

ALL CONDUCT OF ABBOTT AND HIS TESTIMONY WAS REVIEWED BY THE SUPREME COURT

Appellant complains (1) that because the record shows no demand by Abbott for the 200 black cattle awarded to him after the settlement, therefore he was not sincere in claiming that the note was to be cancelled as part of the settlement;

(2) that it Abbott's testimony had been excluded by the trial court, then the note could not be inferred to be a part of the whole business arrangement; and, (3) that the reference to the trial court's findings and decision perpetuates an "unjust, harsh, cruel and debacling result to Christensen."

Any lack of showing in the record of subsequent demand by Abbott for his 200 black cattle goes to the continuing controversy as to which party should pay for the care of those cattle after the date of settlement, April 28, 1976. The trial court decided that the note was part of the whole business arrangement and was one facet of the whole settlement by accord and satisfaction on the basis of competent evidence and credible testimony. The question of Abbott's failure to demand the cattle immediately after the settlement was not raised in the trial, nor on appeal, by appellant. Consideration of such fact should be barred now by the ruling of State v. Gandee, 587 P2d 1064 (1978), where Justice Crockett said:

> The invariably accepted rule of appellate review is that no issue will be considered by the appellate court unless it was properly raised in the lower court in order to give the parties and the court notice and fair opportunity to meet, consider and pass upon that issue.

The question of care for the cattle after date of settlement was remanded by this Court and will be further litigated. Abbott in no way acquiesed in Christensen's keeping the 200 black cattle awarded to Abbott. The record shows that

Christensen proceeded by Order to Show Cause (R-16) to enforce an agistor's lien, asking sale of the black cattle and their calves. The parties thereafter stipulated that those cattle should be sold under the direction of Abbott, with the sale proceeds to be deposited in a joint bank account and to be released only on order of the Court (R-35). The sale was made and the proceeds of sale were deposited in such joint bank account. The judgment of the trial Court (R-43) awarded the proceeds of the bank account to Abbott.

Appellant speculates as to what the result would have been if Abbott's testimony regarding the note had been excluded. The fact is that the trial court properly allowed that testimony following the Bullfrog Marina, Inc. case, supra.

Appellant complains of the net dollar effect of the judgment on Christensen, claiming "shocking unfairness and gross disparity," with a result that "is unjust, unreasonable, unconscionable and defies all credibility."

The record shows a two-day trial, with Judge Sorenson and on appeal with four justices of this Court accepting the testimony of Abbott as competent, substantial and credible to show that the note was a vital part of the whole business arrangement; that the note was intended to be cancelled; that the assignment and assumption instrument was only a part of the settlement; and that there was a valid accord and satisfaction agreement between the parties, with good consideration for that settlement.

POINT IV.

THE TRIAL COURT HAD BEFORE IT COMPETENT, CREDIBLE PROOF OF SATISFACTION OF THE ABBOTT NOTE

Appellant complains that "reasonable men would surely conclude" that Christensen would not have assented to cancelling the Abbott note as part of the accord and satisfaction in settlement of the ranching operation, and he cites Tates, Inc. v. Little America Refining Co., 535 P2d 1228 (1975). Respondent cited the Tates case (Res. Br. 9,10) to show that the party asserting the accord and satisfaction has the burden of proof to show an agreement in settlement.

The two-day trial was entirely devoted to proofs by respondent and rebuttal by appellant of respondent's allegation of accord and satisfaction. The trial court's finding, after hearing all of the evidence, was that there was an accord and satisfaction agreement between the parties (R-40), thus concluding that respondent had met his burden of proof. If there were any variances in the evidence, the trial court weighed all of that evidence and the credibility of the witnesses in finding for respondent. On the appeal, with the full record before them, the majority of this Court concurred with the trial court's assessment of all of the evidence. This Court did not have to "defer" to the trial court. This Court reviewed the testimony of the parties and four justices agreed with the trial judge in accepting Abbott's testimony as credible, competent and believable.

CONCLUSION

Appellant's petition and brief for rehearing show nothing new, overlooked or misconstrued in fact or law. The full record and the transcript of the two day trial were reviewed by this Court in determining that the trial court was correct in its findings of fact and its application of the law.

Appellant's petition for rehearing should be denied.

Respectfully submitted,

Wallace D. Hurd

James W. Beless

Attorneys for Respondent