

1989

Kelly Howard v. Robert E. Buhler : Reply Brief of Appellant

Utah Court of Appeals

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Donald J. Purser; M. Taylor Florence; Purser, Overholt and Okazaki; Attorneys for Respondent.
Robert B. Hansen; Attorney for Appellant.

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UTAH COURT OF APPEALS

KELLY HOWARD,)	
Appellant,)	
v.)	Case No. 890073
ROBERT E. BUHLER,)	Category - 14b
Respondent.)	

REPLY BRIEF OF APPELLANT

Appeal from Judgment of the
Third Judicial District Court of Salt Lake County
State of Utah
Honorable James S. Sawaya

DONALD J. PURSER
M. TAYLOR FLORENCE
PURSER, OVERHOLT & OKAZAKI
Attorneys for Respondent
39 Post Office Place
Third Floor
Salt Lake City, Utah 84101
Telephone: (801) 532-3555

ROBERT B. HANSEN
Attorney for Appellant
838-18th Avenue
Salt Lake City, Utah 84102
Telephone: (801) 322-5804

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COURT OF APPEALS

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39 Post Office Place
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Salt Lake City, Utah 84101
Telephone: (801) 532-3555

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Attorney for Appellant
838-18th Avenue
Salt Lake City, Utah 84102
Telephone: (801) 322-5804

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Telephone: (801) 532-3555

ROBERT B. HANSEN
Attorney for Appellant
838-18th Avenue
Salt Lake City, Utah 84102
Telephone: (801) 322-5804

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STATUTES, RULES AND OTHER

None

STATEMENT OF FACTS

Howard, the Appellant, objects to Buhler's stating as a fact that Howard had settled his claim previously for \$2,834.00 when the trial court expressly ruled otherwise (R293).

Howard further objects to Buhler inserting argument among the "facts" ("Plaintiff wholly mistates Ms. Kirchoff's testimony at trial with respect to the \$8,000 settlement") P.10 et sic.

Howard further objects to the "facts" stated on P.12 as to what Howard said in regard to the \$2,834.00 "settlement" when the trial court determined that no such settlement was made. There was no cross appeal in this case and reference to it could only be for the purpose of prejudicing the appeal as the \$8,000 "settlement".

Howard further and most strenuously objects to Buhler citing as evidence to sustain the judgment in question an excerpt from a deposition when said excerpt was not admitted in evidence (P.12). Furthermore, because the question to which Howard responded was a hypothetical one and one that did not state all the facts and particularly the fact that Howard wanted to receive a written offer of \$8,000 in order to reduce his attorney's fees if the offer was inadequate as compared to a probable jury verdict and the claim was sued upon.

Howard objects to further argument commingled with "facts" on P.13. Furthermore, the argument implied that silence is an acceptance of the offer and that at a point in time prior to

Howard having an opportunity to consult with his counsel to ascertain whether more could be obtained by suit. That situation quite understandably caused him to testify truthfully at trial that he "might have settled for \$8,000" (and would have if his attorney was unwilling to pursue the claim on a contingent percentage of recovery of the sum collected in excess of \$8,000).

Howard likewise objects to the argument in the guise of facts on page 14 when he asserts "a reasonable person would have understood that Plaintiff had settled his claim." Certainly a reasonable person who knew that Plaintiff had an attorney who would not charge any fee on the sum that Buhler's insurance carrier was willing to pay before suit was filed would not believe he had settled. The only comment Howard made regarding settlement was that he was ready to settle. He certainly did not say he was then willing to settle for \$8,000. The fact that he did not disclose that he was going to consult a certain attorney who had already committed himself to an advantageous fee arrangement if in the attorney's opinion the offer was not a fair and reasonable one did not breach any duty owed to the adverse party. The parties were dealing at arm's length. To require such disclosure under penalty of converting such silence into acceptance is to arm insurance adjustors with a dangerous weapon indeed. The fact that the proposed fee arrangement is not the usual and customary one does not alter the principle in question, the principle being that the claimant must manifest his acceptance of an oral settlement offer in an unambiguous manner

that can not be misunderstood if an oral accord is to result therefrom.

SUMMARY OF ARGUMENTS

Under No. 1 on page 14 Buhler still insists, as in his brief to the trial court that, "all credible evidence ** supports the trial court finding (of an accord)." Immediately thereafter he characterizes as "unexpressed and improper" the motive that Howard had in obtaining an offer in writing of the insurance company to pay \$8,000. The motive in question was clearly established by documentary evidence to wit exhibits 43 and 44 both of which clearly attest to Howard's intention to not settle his case before consulting with counsel. No ipse dixit assertion to the contrary precludes such evidence as being credible.

Under No. 2 Buhler characterizes the issues on appeal as "meritless." Howard respectfully submits that that does not make them so and begs the questions so raised. Buhler appears to argue that only cases of first impression warrant common law changes in the law. This is clearly erroneous. The doctrine of sovereign immunity has been either abolished or drastically restricted in most states. The law in many of those states were altered, by judicial decision rather than by legislation. The cases where sovereign immunity was abolished or modified by judicial decision were not grounded on the fact that they were cases of original impression. Quite the contrary, those courts had faced that same issue too many times in the past that they

could not do an injustice one more time.

As to No. 3, to characterize this appeal as "frivolous" does not make it so. Buhler, under this summary, argues that Howard seeks to "retry the facts of the case" which a review of Howard's Appellant Brief and this one shows is not so.

ARGUMENT I

THIS APPEAL WAS FILED IN GOOD FAITH AS THERE WAS NO EVIDENCE THAT HOWARD ACCEPTED THE \$8,000 OFFER ORALLY OR OTHERWISE.

The parties are agreed that on appeal (at least on this point) the issue is "whether there was sufficient evidence for the trial court to so find" (P.16).

Likewise, the parties are agreed that under the present law Buhler has only the burden of preponderance (this does not alter at all Howard's urging the higher standard of "clear and convincing") and that the trial court must be affirmed if "there is competent evidence to support the findings . . ." (P.17 quoting from Search v. Union Pacific Railroad Co., 649 P2d 48 (Utah, 1982)).

Howard respectfully submits that Buhler's only claim for such competent evidence is a self-serving conclusion of his insurance adjuster that she made in response to a question directed to what the adjustor's understanding was as to whether Howard's claim had been "concluded by both parties" and she responded: "I believe it was concluded. I offered, he accepted" (P.11). Since it is the conclusion of the trier of fact that

determines what the facts are rather than the conclusion of the witness, the witness should state only the facts so that the trier of fact can reach his, her or their own independent conclusions and not adopt the witnesses' conclusion which may be erroneous. In this case the witness did both. When asked, "What was discussed during the conversation?" she quoted Howard as saying only, "I am ready" (P.11). Is a statement as to readiness to settle competent evidence of acceptance of a specific offer? To so argue is to urge acceptance of a non sequitor and particularly so in this case when the trier of fact knew that Howard did not intend to settle until he obtained his attorney's opinion as to whether \$8,000 was a fair and reasonable settlement (in fact it wasn't fair or reasonable since Buhler offered \$16,000 prior to trial - R116-118).

On page 17 Buhler notes that Howard has made "no suggestion that the trial court abused its discretion. No such suggestion of that has been or will be made as Howard respectfully submits that no judge has discretionary power make a finding of fact which is not supported by competent evidence. Where, as here, there is no competent evidence of Howard accepting an \$8,000 offer, the trial court had no discretion to find that he had.

Buhler contends that the term "agreed" in the Ex. 12 means Howard agreed to accept \$8,000 in full settlement. It does not say that; however, it does say, "Please send me my release form on which we agreed" (underscoring added). Had he settled for \$8,000 he would be asking for the \$8,000 not for the form. This

sentence must not be read out of context if justice is to be done. It must also be emphasized that the trial court did not base its finding on this piece of evidence because the trial court found that the agreement was entered into on July 8 (the date of the phone conversation between Howard and the adjuster) not 31 days later when the adjuster received that note (R288, Finding No. 2). It is important to note that it was not until after the adjuster responded to this request to exchange documents (school contract for \$8,000 release form) that Howard met with his counsel, learned that \$8,000 was not a fair and reasonable settlement and signed the contingent fee contract to start the lawsuit (Ex. 44).

Buhler next claims that Ex. 12, received August 8th "memorialized" the prior oral "settlement" of July 8th. The fact is that the two-sentence written communication in question really memorialize the prior oral agreement of July 8th to exchange documents so that the insurance adjuster had the computer school contract to justify her increasing her offer from \$2,834 to \$8,000 in exchange for a written release form so that Howard would receive \$8,000 clear of any fee claim if his attorney elected to sue on his claim. As noted in Buhler's brief at page 21 and 22, the evidence in this case as to Howard's acceptance is entirely oral with respect to the accord found by the court and hotly disputed, whereas in Allen v. Bissinger, 62 Utah 226, 219 P539 (1923) the critical evidence was in writing and not substantially in conflict.

Howard has never claimed and does not claim now that an accord under present law must be in writing to be valid. Howard does claim that the existing standard of oral proof as a matter of good public policy is not adequate and a "clear and convincing" standard should be established by an advance in the common law of Utah where the subject matter of the accord is the settlement of an insurance claim. This argument logically should be reserved for Point II, but is inserted here to address Buhler's i (sic) on P.22. Thus, Howard has no quarrel with the decisions cited by Buhler in this section. This is not to say, however, that the unsigned release form as to both the \$2,834 settlement offer and the \$8,000 are not relevant evidence in weighing whether or not there was an accord. In this case, however, on this point the issue is not whether the weight of Buhler's evidence was greater than that of Howard, but rather, as noted above, whether there is any competent evidence to sustain the finding of accord, i.e., can the court base a finding on an interested witness's conclusion when the facts on which that conclusion is based do not sustain it.

No case on the precise issue of whether or not a witness's conclusion of law is evidence and, if it is, whether it is sufficient to sustain a finding challenged on appeal. The Supreme Court of Pennsylvania in the case of Presbytery of Beaver Butler v. Middlesex 489 A2d 1317 (Pa. 1985) said:

"The standard of review for an appellate court in reviewing the findings of a court in equity is well established. Facts found by the chancellor, when supported by competent evidence in the record, are

binding. However, no such deference is mandated for conclusions of law and we are at liberty to review such conclusions."

An earlier Pennsylvania case in 1976 expressed the principle thusly:

"It is fundamental that this Court will not overturn a chancellor's factual conclusions if they are supported by competent evidence. Hatalowich v. Redevelopment Authority of City of Monessen 454 Pa. 481, 312 A.2d 22 (1973); Silver v. Silver, 421 Pa. 533, 219 A.2d 659 (1966). This is especially the case where the credibility of the witnesses must be determined. Hankin v. Goodman, 432 Pa. 98, 246 A.2d 658 (1968). On the other hand, it is equally well established that the chancellor's conclusions, whether of law or fact, being no more than his reasoning from the underlying facts, are reviewable. Van Products Co. v. General Welding & Fabricating Co., 419 Pa. 248, 213 A.2d 769 (1965); Hoffman v. Rittenhouse, 413 Pa. 587, 198 A.2d 543 (1964)."

The cases support Howard's claim and the instant case is an afortiori one since here the conclusion of law (that Howard had "accepted" the offer) was that of witness who had much at stake as to the outcome of the case whereas in the other cases the conclusion was that of the judge appealed from.

ARGUMENT II

A STANDARD OF "CLEAR AND CONVINCING" EVIDENCE SHOULD HERE IN AND HENCEFORTH BE ESTABLISHED TO PROVE AN ACCORD WHEN THE SUBJECT MATTER OF THE ACCORD IS THE SETTLEMENT OF AN INSURANCE CLAIM.

The implication of Buhler's argument under this point is there can be no judicial changes of law by decisions which are not cases of original impression. This is not so in either principle or practice (as to details of latter see P.7,8 supra).

Even if this were true, however, Buhler has not cited any cases even remotely similar where the following elements were present (a) the insurance adjuster took a tape-recorded statement of the claimant's initial contact and statement of facts, but did not tape record a later conversation which she claims resulted in an oral acceptance of her offer even though the latter conversation was much more critical, nor did she offer any explanation for not doing so (b) between the two conversations referred to in (a) the insurance adjuster contended and testified in support thereof that the claimant had orally settled the same claim for about one third of the later offer, had sent to claimant the usual release form which was not returned and concerning which the adjuster made no effort to enforce the earlier claimed accord (c) about a month later the adjustor wrote a letter indicating that the claimant's options to settle or not were still open.

Under the foregoing facts the application of a higher standard of proof in such a case would not be a decision with widespread applications, but would have the salutary result of requiring insurance adjusters to document exactly what was said to avoid the uncertainties and ambiguities which have plagued this case. On the contrary, an affirmation of the judgment on this accord will certainly be a "green light" for oral settlements and an awesome temptation to take advantage of an unwary claimant.

As for Holder v. Holder, 340 P2d 761 (Utah, 1959) Howard stands by his claims for that case. If the standard of proof

necessary to overcome the presumption of legitimacy prior to Holder was proof beyond a reasonable doubt would not Buhler have cited such cases? In any event, each advance in the common law by judicial decision must be based on considerations of policy and Howard has not contended that the policy reasons for our Supreme Court advancing the common law in Holder are applicable to the policy consideration here involved which are obviously very different.

ARGUMENT III

THIS IS NOT A FRIVOLOUS APPEAL

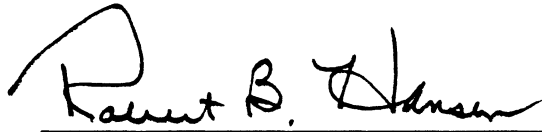
Howard respectfully submits that his appeal is not frivolous. Litigation necessarily costs money in dollars and in time. Many appeals are settled by compromises before decisions are rendered. In this point Buhler is requesting that this court speculate as to Howard's motives in prosecuting this appeal and to penalize him if they are found to be unworthy. To rule in favor of Buhler on this point would set a very dangerous precedent as a very high percentage of plaintiff appeals are for the same purpose as this one to obtain a judgment or a larger judgment where none or a smaller one was the result of the trial in the lower court.

CONCLUSION

The judgment appealed from should be vacated and the matter remanded to the trial court to enter findings of facts and

conclusions of law as to liability and damages based on the evidence produced at the trial of this cause.

RESPECTFULLY SUBMITTED this 2nd day of October, 1989.



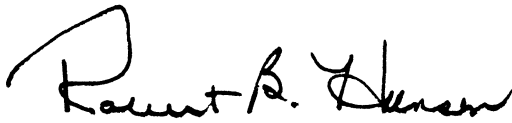
Robert B. Hansen
Attorney for Appellant

CERTIFICATE OF SERVICE

This is to certify that on the 2nd day of October, 1989, four true and correct copies of the foregoing BRIEF OF APPELLANT were hand-carried by undersigned, to:

Donald J. Purser
M. Taylor Florence
PURSER, OVERHOLT & OKAZAKI
39 Post Office Place
Third Floor
Salt Lake City, Utah 84101

Attorneys for Robert E. Buhler



Robert B. Hansen