

1989

John W. Jarman and Helene B. Jarman v. Reagan Outdoor Advertising Company : Brief of Respondent

Utah Court of Appeals

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DOCKET NO. 89-0106

IN THE UTAH COURT OF APPEALS

JOHN W. JARMAN and HELENE B.
JARMAN,

Plaintiffs/Respondents,

vs.

REAGAN OUTDOOR ADVERTISING
COMPANY,

Defendant/Appellant.

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Docket No. 890106-CA
Priority No. 14b

RESPONDENT'S BRIEF

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DEPOSITED BY THE
STATE OF UTAH

AUG 17 1990

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JUN 30 1989

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JARMAN,

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TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	ii
JURISDICTIONAL STATEMENT	1
ISSUES PRESENTED FOR REVIEW	1
DETERMINATIVE PROVISIONS OF LAW	2
STATEMENT OF THE CASE	3
SUMMARY OF ARGUMENTS	5
ARGUMENT	6
<u>POINT I.</u> THE TRIAL COURT PROPERLY DETERMINED THAT THE REAGAN LEASE IS AMBIGUOUS	6
<u>POINT II.</u> THE TRIAL COURT'S JUDGMENT WAS BASED ON A PROPER AND ACCURATE ASSESSMENT OF THE FACTS PRESENTED AT TRIAL	9
<u>POINT III.</u> THE TRIAL COURT'S FINDINGS OF FACT AS SUPPORTED BY THE EVIDENCE AND SUPPORT ITS CONCLUSIONS OF LAW AND ITS JUDGMENT IN FAVOR OF THE JARMANS	12
CONCLUSION	16

TABLE OF AUTHORITIES

CASES CITED

	<u>Page</u>
<u>American Bonding Co. v. Nelson,</u> 763 P.2d 814, 816 (Utah App. 1988)	8
<u>Copper State Leasing v. Blacker Appliance & Furniture,</u> 770 P.2d 88, (Utah App. 1988)	10
<u>Crowther v. Carter,</u> 767 P.2d 129, 131 (Utah App. 1989) ..	12
<u>General Glass Corp. v. Mast Const. Co.,</u> 766 P.2d 429 (Utah App. 1988)	13
<u>Power Sys. & Controls v. Keith's Elec.,</u> 765 P.2d 5, 9 (Utah App. 1988)	9
<u>Sampson v. Richins,</u> 770 P.2d 998 (Utah App. 1989)	13
<u>Sorenson v. Beers,</u> 614 P.2d 159, 160 (Utah 1980)	13

STATUTES AND RULES CITED

Rule 52, <u>Utah Rules of Civil Procedure</u>	2
Rule 52(a), <u>Utah Rules of Civil Procedure</u>	12, 14
<u>Utah Code Ann.,</u> § 78-2-3(j), (Supp. 1988)	1

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RESPONDENT'S BRIEF

JURISDICTIONAL STATEMENT AND NATURE OF THE PROCEEDINGS

This Court has jurisdiction over this action by virtue of the provisions of Utah Code Ann. § 78-2-3(j). This is an appeal from a final judgment of the Third District Court ordering defendant to remove its billboards from plaintiffs' property and from an order denying defendants' Motion to Amend Findings of Fact and Conclusions of Law.

ISSUES PRESENTED FOR REVIEW

There are only three issues presented to this Court for review:

1. Was the District Court correct in its determination that the Reagan lease was ambiguous?

2. Was the District Court's judgment that the facts presented at trial preponderated in favor of the plaintiffs clearly erroneous?

3. Are the District Court's Findings of Fact supported by the evidence presented at trial?

DETERMINATIVE PROVISIONS OF LAW

Rule 52, Utah Rules of Civil Procedure which reads as follows:

Rule 52. Findings by the court.

(a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58A; in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. It will be sufficient if the findings of fact and conclusions of law are stated orally and recorded in open court following the close of the evidence or appear in an opinion or memorandum of decision filed by the court. The trial court need not enter findings of fact and conclusions of law in rulings on motions, except as provided in Rule 41(b). The court shall, however, issue a brief written statement on the ground for its decision on all motions granted under Rules 12(b), 50(a) and (b), 56, and 59 when the motion is based on more than one ground.

(b) Amendment. Upon motion of a party made not later than 10 days after entry of judgment the court may amend its findings or make additional findings and may amend the judgment accordingly. The motion may be made with a motion for a new trial pursuant to Rule 59. When findings of fact are made in actions tried by the court without a jury, the question of the sufficiency of the evidence to support the findings may thereafter be raised whether or not the party raising the question has made either a motion to amend them, a motion for judgment, or a motion for a new trial.

STATEMENT OF THE CASE

This is an action in trespass wherein the plaintiffs alleged that certain billboards were relocated by defendant to an area not contemplated in their lease agreement. The matter was presented to the trial court and tried without a jury. The court entered judgment for the plaintiffs on October 18, 1988.

John W. Jarman and Helene B. Jarman purchased the subject property in 1980. (R. 209, p. 10) The property is located adjacent to State Highway 224 near Kimball Junction in Summit County, Utah. (R. 209, p. 8) At the time the Jarmans purchased the property, two advertising signs were already located on the property. (R. 209, p. 10)

Eventually, Mr. Jarman contacted Galaxy Outdoor Advertising, Reagan's predecessor in interest, to inquire about ownership of the signs. (R. 209, p. 10; R. 47) Sometime in early 1982, Mr. Jarman entered into discussions with Terry Reid, Reagan's representative, in an attempt to reach an agreement regarding the signs. (R. 209, p. 11)

Galaxy had originally erected the signs in 1971 pursuant to two leases entered into between Galaxy and the owner of the property at that time, one Swindle. (R. 44 and 45) The description incorporated into the 1971 lease to define the location of the signs was the same description used in the 1982 lease between Jarman and Reagan. (R. 209, p. 30).

At the time Mr. Jarman entered into the lease agreement with Reagan, he believed that the property description contained in that agreement limited the signs to the locations they occupied at that time. (R. 209, pp. 12, 28, 29) Reagan admitted that once the billboards were in place, their locations were defined. (R. 209, pp. 47, 48) It was never Mr. Jarman's intention to permit Reagan the option of moving the signs. (R. 209, pp. 28, 29) Reagan never communicated to Mr. Jarman that it believed it could use portions of Mr. Jarman's property other than those upon which the signs were originally situated. (R. 209, p. 13).

In 1987, pursuant to the widening of State Highway 224 adjacent to the Jarman property, the State of Utah acquired a strip of the Jarman's property approximately 10 to 30 feet wide. (R. 209, p. 16) The State's right-of-way took a portion of the property upon which the signs were located. (R. 209, pp. 41, 42) The State informed Reagan that it would have to remove the signs from the right-of-way. (R. 209, p. 39)

Instead of removing the signs, Reagan, without negotiation with Mr. Jarman or notice, moved the signs to a portion of the Jarmans' property not contemplated by the lease agreement. (R. 209, pp. 28, 19) Mr. Jarman did not give Reagan his consent to relocate the signs. (R. 209, p. 19)

The Jarmans filed their Complaint against Reagan seeking redress for Reagan's trespass on December 10, 1987. Prior to trial on the merits, Reagan brought a motion for summary judgment which the trial court denied. Trial was held before the Honorable Michael R. Murphy on September 9, 1988. Both parties were represented by counsel and presented evidence in the form of testimony and documentary evidence.

The trial court determined that the critical terms of the lease were ambiguous and, based on the extrinsic evidence presented by the parties at trial, entered judgment in favor of the Jarmans and ordered that the billboard structures be removed. The Court entered its Findings of Fact and Conclusions of Law. Reagan moved to amend the Court's Findings and Conclusions. A hearing was held November 21, 1988 on Reagan's Motion. The motion was denied. (R. 209, pp. 102-106)

SUMMARY OF ARGUMENTS

The 1982 lease agreement is ambiguous. The description of the leasehold, drafted by Reagan, can only be understood through the examination of extrinsic evidence.

The trial court examined extrinsic evidence, presented by both parties, and determined that the leasehold was limited to the specific location occupied by Reagan's billboards at the time the 1982 Lease was executed. The evidence presented was more than sufficient to allow the Court to reach that conclusion. No error was committed by the trial court.

The trial court's findings of fact were sufficiently based upon the evidence presented at trial. Reagan has failed to meet its burden in showing that the trial judge committed clear error.

ARGUMENT

POINT I

THE TRIAL COURT PROPERLY DETERMINED THAT THE REAGAN LEASE IS AMBIGUOUS

The lease entered into by the Jarmans and Reagan was drafted by Reagan. The description of the leasehold, contained therein, was also drafted by Reagan. (R. 209, pp. 18, 30) The leasehold description states:

. . . in the County of Summit, State of Utah
and more particularly described as follows:
State Hwy. 224 across from State Hwy. sheds
s/o Kimball Jct. & State Hwy. 224 300' s/o
State Hwy. shed, s/o Kimball Jct.

Because the signs were already in place when the Jarmans purchased the property (R. 209, p. 10) and because, during negotiation of the lease, Reagan did not indicate that it believed the leasehold included property not already occupied by the signs (R. 209, p. 13), the Jarmans reasonably understood

the leasehold description to include only that portion of the property actually occupied by the signs (R. 209, p. 12)

Reagan, on the other hand, has contended that the lease allowed it to utilize any other portion of the Jarmans' property in the event the portion occupied by the signs should be sold or developed. Reagan relies for this contention upon a clause in the lease which purports to define the specific events under which the lessor may terminate the lease. That clause reads:

Lessor shall have the right to terminate this lease at any time during the term of this lease if: (a) Lessor builds or develops the property where the sign(s) structure(s) is situated; or (b) in the event Lessor sells the premises, the buyer of said premise has the right to terminate this lease within thirty (30) days immediately following recordation of deed of sale, if buyer gives lessee written notice of termination. Lessee will remove its sign(s) within thirty (30) days after receiving a written copy of the deed or valid building permit together with prepaid unearned rent. If any portion of the property is not utilized for such buildings, Lessee has the option to use the remaining portion on the same terms.

That language is ambiguous. It states that the "[l]essor shall have the right to terminate [the] lease . . . if:" and follows up the "if:" with part "(a)" and part "(b)." Part "(a)" arguably provides that the lessor may terminate the lease in the event the lessor develops the property where the billboards are located. Part "(b)" arguably provides that the eventual purchaser of the property may terminate the lease upon thirty

(30) days written notice within thirty (30) days after recordation of the deed of sale. It was Reagan's position at trial, and continues to be Reagan's position that what parts "(a)" and "(b)" give, the last sentence of the clause, apparently included under part "(b)," takes away. That sentence uses the term, "such buildings" but part "(b)" addresses sale of the land, not development. Even the portion of part "(b)" which appears to rather clearly grant a purchaser of the property a right to terminate is apparently not clear; at least not to Reagan. At trial, Reagan's vice president, Terry Reid, testified that part "(b)" only "gives the lessor a right to grant to a purchaser the right to terminate. (R. 209, p. 62). Reagan's lease is so written that it is subject to numerous contradicting interpretations. Without examination of extrinsic evidence the meaning of the Reagan lease, like beauty, is in the eyes of the beholder.

Language is considered ambiguous if the words used to express the meaning and intention of the parties are insufficient in a sense that the contract may be understood to reach two or more plausible meanings.

American Bonding Co. v. Nelson, 763 P.2d 814, 816 (Utah App. 1988).

Contrary to Reagan's conclusion, two or more meanings are plausible from the language of the lease. The leasehold description provides that one sign would be located "300' s/o State Hwy. shed. . . ." The 300' distance was only an

approximation; the actual distance never having been measured.
(R. 209, p. 39) Mr. Jarman, applying the same method of
approximation, judged that distance to be 1,000 feet or more.
(R. 209, p. 16)

Reagan never obtained a metes and bounds measurement
to more closely define its leasehold nor did it ask Mr. Jarman
to provide one. (R. 209, pp. 37, 16) Without the actual
physical presence of the signs to define the extent of the
leasehold, the leasehold description is simply too ambiguous to
define Reagan's rights in the Jarmans' property without
examining extrinsic evidence.

POINT II

THE TRIAL COURT'S JUDGMENT WAS BASED ON A PROPER AND
ACCURATE ASSESSMENT OF THE FACTS PRESENTED AT TRIAL.

The Reagan lease agreement is ambiguous. This Court
has stated that:

. . . when a contract is ambiguous because
of uncertainty or incompleteness concerning
the parties' rights and duties under the
contract, extrinsic evidence is permissible
to ascertain the parties' intent.

Power Sys. & Controls v. Keith's Elec., 765 P.2d 5, 9 (Utah
App. 1988). The trial court examined the extrinsic evidence
presented by both parties and, weighing that evidence, entered
judgment in the Jarmans' favor. This Court has articulated a
standard granting significant deference to the trial court's
factual assessment.

On appeal of a judgment from the bench after trial, we defer to the trial court's factual assessment unless there is clear error.

Copper State Leasing v. Blacker Appliance & Furniture, 770 P.2d 88, (Utah App. 1988).

The trial court's determination was supported by the facts presented by both parties. In its brief, Reagan argues that the extrinsic evidence presented at trial was "more than sufficient to establish that Reagan had the right to relocate its structures. . . ." This assertion, even if true, is irrelevant. The question is not whether the court could have found for Reagan had it credited Reagan's evidence, but rather whether there was an evidentiary basis for finding for the Jarmans.

Even when Reagan attempts to marshall the evidence which could have supported a judgment in its favor, it points to facts which actually support the judgment as entered. For example, the second "fact" upon which Reagan relies is that "no exact description for the location of the Reagan structures was affixed to the 1971 leases and no attempt to fix their exact locations was made at the time the 1982 lease was executed." (Appellant's brief at p.14). This statement is as much as an admission by Reagan that the agreement's leasehold description is ambiguous and does not adequately define the exact location of the billboards. It also ignores testimony by Reagan's own agent that the property description was written into the 1971

leases before the signs were erected and that the eventual erection of the signs then defined their precise location. (R. 209, pp. 47, 48).

Reagan also states that Mr. Jarman admitted that the leasehold description contained in the 1982 lease agreement still describes the present location of the signs. Reagan makes this assertion twice in its brief, neither time citing to the record or any other authority. However, Mr. Jarman's testimony, which apparently was believed by the trial court, was just the opposite. (R. 209, pp. 26, 27).

Reagan's other contentions do not support reversal of the judgment. The assertion that it was Mr. Jarman's intention to allow Reagan to maintain two billboards on his property, while true, adds no weight to Reagan's argument. The two signs which Mr. Jarman intended to allow Reagan to maintain were the two signs already in place when the 1982 agreement was entered into. (R. 209, p. 12). He intended that they would remain precisely where they were. (R. 209, pp. 12, 28, 29).

The fact that the state paid Reagan to "relocate, not remove," the structures is irrelevant. The state was not a party to the lease agreement nor could the state authorize Reagan's trespass to the Jarmans' property.

Reagan suggests that it "never understood that it was strictly limited with regard to the location of its signs." Reagan presented testimony to that effect which was properly considered and weighed by the court.

Finally, Reagan argues that only a portion of each sign was relocated. The trial court correctly ruled that the relocation, to the extent it took place, constituted a trespass. The defendant presents no authority for the proposition that this ruling is erroneous. In short, instead of detailing why the Court's findings were not supported by the evidence, as is the appellant's burden, Reagan simply reargues his case and requests that this Court substitute its judgment for that of the trial court. That is not the function of an appellate court.

POINT III

THE TRIAL COURT'S FINDINGS OF FACT ARE SUPPORTED BY THE EVIDENCE AND SUPPORT ITS CONCLUSIONS OF LAW AND ITS JUDGMENT IN FAVOR OF THE JARMANS.

Rule 52(a) of the Utah Rules of Civil Procedure provides in pertinent part that:

Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses.

The Reagan contract is ambiguous. The trial court found facts regarding the parties' intentions from evidence extrinsic to the contract itself. "Those findings may not be set aside on appeal unless they are clearly erroneous under Utah Rule of Civil Procedure 52(a)." Crowther v. Carter, 767 P.2d 129, 131 (Utah App. 1989).

The trial court's findings are supported by competent and sufficient evidence and conform to that evidence. Under these circumstances, the appellate court must regard those findings as sufficient. Sampson v. Richins, 770 P.2d 998 (Utah App. 1989).

Reagan argues that the trial court should have amended its findings because Reagan, in its motion, pointed to evidence which was contrary to the court's findings. Reagan, in essence, argues that the trial court should have amended its findings, not because they lacked evidentiary support, but merely because Reagan had presented certain conflicting evidence which the court had not addressed in its findings.

A trial court need not resolve every conflicting evidentiary issue, "[n]or is the court required to negate allegations in its findings of fact."

Sampson, supra at 56, quoting Sorenson v. Beers, 614 P.2d 159, 160 (Utah 1980).

In bringing its Motion to Amend before the trial court and its appeal before this Court, Reagan simply has not met its burden in attacking the trial court's findings. Reagan must do much more than simply show the existence of conflicting evidence. In General Glass Corp. v. Mast Const. Co., 766 P.2d 429 (Utah App. 1988), a case cited in Reagan's brief, this Court repeated what it has "said on numerous occasions;" that:

in order to challenge a finding of fact, it is appellant's burden to marshal all the evidence that supports the court's finding

and then demonstrate why even viewing it in the light most favorable to the court below, it is insufficient to support the finding made.

Id. at 433. Reagan has fallen far short of meeting this burden. It addresses virtually none of the evidence supporting the trial court's findings. It would, in fact, have this Court believe that the only evidence in opposition to the "facts" supporting Reagan's position is "the mere statement by Mr. Jarman that he 'intended' the lease to be limited to sign locations of 1982. . . ." (Reagan's Brief, p. 15). Reagan's insinuation is that Mr. Jarman's testimony was untrustworthy. Utah Rule of Civil Procedure 52(a) recognizes the trial court's superior opportunity to judge the credibility of the witnesses.

Reagan specifically challenges the trial court's findings of fact numbers 2, 3, 4, 5 and 8. Evidence was presented at trial to support each of those findings.

The trial court found that the lease describes two specific locations upon which Reagan was authorized to locate two billboards. The court had sufficient evidence upon which to base that finding. It is, first of all, uncontroverted that the billboards were already in place when the Jarmans purchased the property and later entered into the lease agreement with Reagan. (R. 209, p. 10, 14, 39, 48, 52). At the time the lease was negotiated there was no discussion concerning the extent of the leasehold. (R. 209, p.12). Mr. Jarman did not feel there was a need to discuss the extent of the leasehold

which he felt was defined by the actual placement of the billboards. (R. 209, p.12). Mr. Richard Paxman, Jarmans' representative, testified that once the billboards were erected, their locations were defined. (R. 209, p.47, 48).

The trial court also found that the 1971 leases between Galaxy and Swindle each authorized the placement of one billboard on a specific site -- "the site occupied by the billboards at the time the lease between the plaintiffs and defendant was signed." The testimony discussed above, and particularly Mr. Paxman's testimony, supports this finding.

The trial court provides its own evidentiary support for its next finding, which states:

Based upon the property description in the February 1982 Lease, the fact that the billboards were in place at the time the Lease was signed, and based upon the testimony of Mr. Jarman that he intended to lease defendant only the property upon which the billboards were situated, the Court finds that the parties intended the Lease to continue the right of defendant to maintain the billboards in their existing locations.

Reagan also challenges the trial court's finding that the 1982 Lease is ambiguous and subject to the introduction and consideration of parol evidence to aid in its interpretation. The correctness of this finding is discussed in part I of respondents' argument, above.

The only other finding challenged by Reagan in this appeal is the court's finding that:

Defendant removed the billboards from the locations they occupied upon the execution of the 1982 Lease then moved them to other locations on plaintiff's property without the knowledge or consent of the plaintiffs.

Reagan implies in its brief that the court believed Reagan moved the billboards to a significantly different portion of the Jarmans' 103 acre property and that the signs were moved in their entirety. That clearly was not the trial court's understanding. The court heard Mr. Paxman's testimony of exactly how the billboards were relocated and that one beam of each remained in place on Reagan's leasehold. (R. 209, pp. 41-44). The one critical fact remains; that Reagan, without notice to the Jarmans or their consent (R. 209, pp. 19, 32), moved the billboards onto a portion of the Jarmans' property not contemplated under the terms of the agreement reached by the parties. That action constituted a trespass as much as if Reagan had moved each billboard a mile.

Each of the trial court's findings are supported by the evidence and judgment entered below should be affirmed by this court.

CONCLUSION

If Reagan's appeal of the trial court's judgment has merit, it has failed to show where that merit lies. Instead of addressing the evidence relied upon by the trial court in reaching its decision, and demonstrating why that evidence was

insufficient to support the trial court's findings, Reagan has simply reargued to this Court the case which it argued below. As much as Reagan might desire to have its appeal proceed as a trial de novo, it is this Court's duty only to determine whether the trial court's judgment was clearly erroneous. Reagan has failed to show that the trial court committed any error. The Jarmans have, on the other hand, shown that each of the trial court's findings which are disputed by Reagan are supported by the evidence. This Court should, therefore, rule in favor of the respondents by affirming the trial court's findings and judgment.

DATED this 29th day of June, 1989.

PRINCE, YEATES & GELDZAHLER

By Don R. Schow

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CERTIFICATE OF HAND DELIVERY

I hereby certify that, on the 29th day of June, 1989,
I caused to be hand-delivered true and correct copies of the
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