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D. W. Nichol v. Henning Wall, Virginia Wall : Brief of Appellant

Utah Supreme Court

Skeen, Thurman, Worsley & Snow; John H. Snow; Attorneys for Appellant;

7881

In the Supreme Court

of the State of Utah

D. W. NICHOL,

Plaintiff and Respondent,

vs.

HENNING WALL,

Defendant and Appellant.

VIRGINIA WALL,

Defendant.

Case No. 7881

BRIEF OF APPELLANT

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STATEMENT OF FACTS

This is an appeal by defendant Henning Wall from a judgment made and entered by the District Court of Salt Lake County, Clarence E. Baker, Judge, following trial of the cause by the Court without a jury, and from the denial by the Court of appellant's Motion for a New Trial. The judgment recovered was a money

judgment in the amount of $847.51, which amount was found to be due and owing by appellant to respondent for labor and materials furnished, after allowance had been made by the Court of certain offsets contained in appellant's counterclaim (R. 2).

Respondent, a building contractor, and appellant had been acquainted for many years. They were "old friends" (R. 25). After appellant's house had been largely constructed and required only finishing work the parties entered into an oral agreement whereby respondent was to furnish certain labor and materials for the house, and was to receive in return therefor certain materials and the use of certain equipment owned by appellant (R. 8). Respondent testified that each party would pay the other the "reasonable charge" for the use of the other's equipment, that they were "passing equipment back and forth" and that the charge of one would offset the other (R. 24, 25). Materials and labor were furnished as detailed by respondent (R. 8 et seq.), and he received materials and use of equipment in exchange. He did not receive enough to offset his charges, and appellant refused to pay the difference, apparently because appellant and his wife believed the respondent's charges were unreasonable (R. 35, et seq.).

When respondent instituted this action appellant

and his wife were named defendants, but at the conclusion of plaintiff's evidence the Court granted the motion of defendant, Virginia Wall, for a Judgment of Dismissal since no case had been proved against her, and the action proceeded against appellant alone (R. 32).

The respondent's complaint was disputed by appellant only to the extent that he did not belive that respondent was reasonably entitled to as much as was claimed. Since the Trial Court found against appellant on this phase of the matter, and since there is evidence to support the Trial Court's finding, no question is being raised on this appeal concerning the reasonableness of respondent's claims.

Respondent, in turn, did not dispute the items claimed by appellant in his counterclaim except that the sum of $680.00, claimed by appellant for the rental of a Disston chain saw, was resisted and disputed by respondent, who testified that he did not "agree" with that sum but that he would be willing to pay a "fair rental on it" (R. 24). The Trial Court found the rental value to be the sum of $100.00, or $580.00 less than asked by appellant. Therefore, this appeal concerns itself solely with the question of the reasonable rental value of the chain saw.

No evidence was produced by either party from dis-

interested sources as to the reasonable rental value of such equipment at the time such equipment was rented, which was in September and October, 1948. Respondent produced no evidence on the subject whatever, but appellant, after being properly qualified (R. 48) stated that because such saws were so difficult to obtain and because the hazards entailed in their use in the forests were so great, the reasonable rate of rental of such saws in the area in question at the time in question was $20.00 per day (R. 48). It was established without doubt that respondent had been in possession of appellant's chain saw for a period from September 20, 1948, to October 29, 1948, a period of 39 days, and while the saw was not being used throughout that time appellant finally was required to retrieve the saw from respondent (R. 50). Appellant allowed five days off the total period and billed respondent for 34 days rental at $20.00 per day (Exhibit A).

At the conclusion of the evidence Counsel for respondent made a "tender of proof" (R. 60) concerning an O. P. A. regulation and claimed that such regulation would show "twelve per cent per month of the purchase price" as the maximum rental allowed under O. P. A. regulations. This "tender of proof" was made despite the fact that Counsel had no such proof available, in that there was no O. P. A. regulation in his possession or in court, and no witness available to

testify concerning the regulation even if the Trial Court had felt that such proof was proper. The tender was made after some colloquy between the Court and Counsel in which it was made to appear that the regulations referred to by Counsel had no application to any particular area, were out of date, and were not shown to be related to the type or kind of saw in question, or to the use to which this saw was put (R. 59, 60).

Following argument the Court ruled orally that respondent would be entitled to judgment of $1136.39, less the admitted offsets claimed by appellant, together with the sum of $100.00 rental for the chain saw. Counsel inquired of the Court as to the basis for the finding of $100.00 chain saw rental, to which the Court responded that he regarded that figure as "a fair and reasonable rent" for the saw and "***that is twelve per cent of the purchase price or thereabouts anyhow." Counsel for appellant then inquired if the Court in referring to the twelve per cent figure was using evidence which had been rejected, to which the Court replied: "I am not saying. ***" (R. 60A).

Following the preparation of Findings of Fact and Conclusions of Law and entry of Judgment appellant moved the Court for a new trial, urging that the findings and judgment were against the weight of the evidence, and specifically urging that the Court, in concluding that

$100.00 was a reasonable value for rental of the chain saw, made such a finding without any support in the evidence, and on the basis of rejected evidence, and in total disregard of the only evidence admitted in the case, which was to the effect that a reasonable rental was the sum of $680.00. The Motion for New Trial was denied and this appeal resulted (R. 68).

STATEMENT OF POINTS RELIED UPON

THE COURT ERRED IN FINDING THE REASONABLE VALUE OF THE RENTAL OF THE CHAIN SAW, SINCE ITS FINDING IS WITHOUT SUPPORT IN THE EVIDENCE AND DISREGARDS UNCONTROVERTED EVIDENCE, AND A JUDGMENT BASED ON SUCH A FINDING SHOULD NOT BE SUSTAINED.

ARGUMENT

THE COURT ERRED IN FINDING THE REASONABLE VALUE OF THE RENTAL OF THE CHAIN SAW, SINCE ITS FINDING IS WITHOUT SUPPORT IN THE EVIDENCE AND DISREGARDS UNCONTROVERTED EVIDENCE, AND A JUDGMENT BASED ON SUCH FINDING SHOULD NOT BE SUSTAINED.

A thorough examination of the record in this case reveals that there was no evidence before the Court to sustain a finding of $100.00 as being reasonable value of the rental of the chain saw. The only evidence on the subject which was admitted in the case was evidence by the appellant, who testified that he had been in the business of cutting timber for approximately seven years

and had had occasion to try to rent chain saws, and was aware of the prevailing practices in the equipment industry at the period in question. He stated that because of the extraordinary hazards to such machinery when it is used in the mountains and forests to cut timber the owners of chain saws have felt it necessary to receive a high rental. If a tree being cut by the saw should bind, or if it should fall at an unexpected time or in an unexpected direction, the saw could be severely damaged and, in fact, could be crushed and destroyed. Such factors obviously cause rentals to increase and, in view of these factors, the evidence of appellant that a proper rental charge for the saw was $20.00 a day is readily understandable.

Respondent did not bring any evidence to the trial of this case on this subject. He was, of course, aware that appellant had claimed the sum of $20.00 per day, since he had received a bill from appellant long before trial (Exhibit A). If such rental is, in fact, not proper and not in accord with the custom in the industry, it seems to appellant that the burden of establishing those facts and of overcoming appellant's proof was upon respondent after the appellant had produced his testimony. The only attempt by respondent to satisfy this burden consisted of the so-called "tender of proof" made by Counsel for respondent after all the evidence had been received. There can be no valid reason for this "tender"

except that it was designed to influence the Trial Court, because Counsel knew that he had no evidence to back up his "tender" if the Court had overruled appellant's objection to the proferred proof. It seems clear that Counsel was successful in this connection because the Trial Court, when asked for a basis for his ruling, resorted to the formula suggested by Counsel, which formula had been rejected as evidence by the Court a matter of moments before.

It is our position that a finding based upon rejected evidence, and which totally disregards uncontroverted evidence in the case, is finding which cannot support a judgment and a judgment based on such finding should be reversed.

We believe the general rule is as stated in 3 *American Jurisprudence* 464:

> "Findings not supported by any competent evidence, or which disregard uncontroverted, credible evidence, cannot be sustained on appeal and a judgment based thereon will be reversed."

Research indicates that this rule has been applied by the Supreme Court of Utah on many occasions, but it is customarily stated conversely, as the Court said in the recent case of *Buckley vs. Cox,* 247 Pacific (2d) 277, (1952):

> "If there is competent evidence in the record to support the court's findings, the judgment should not be disturbed."

However, in the case of *Hathaway vs. United Tintic Mines Company,* 42 Utah 520, 132 Pacific 388, decided in 1913, the headnote states the rule to be:

> "The Trial Court should not make a finding of fact where there is no evidence to support it, and its judgment thereon will be reversed."

In that case the action was brought to foreclose a mechanic's lien against certain mining property. There was no evidence in the record from which the Court could legally determine that the respondent had complied with the terms of the mechanic's lien statute. Notwithstanding this lack of evidence, the Trial Court found that the statute had, in fact, been followed, and that the respondent was entitled to a lien. In addition, without any evidence whatever, the Court found that the respondent was entitled to costs for preparing and filing a lien and $25.00 attorneys' fees for foreclosing the lien.

This Court, in reversing the judgment, commented that the lower court might just as well have entered a judgment against any other citizen of the state as

against appellant, so far as the evidence justified such a judgment. The Court went on to say:

> "No court should permit itself to make a finding of fact where the record is conclusive . . . that there is absolutely no evidence to support such findings."

Research indicates that this case, and its companion case decided the same day and upon the same principles, have never been overruled and are still the law of this state.

In a later case analogous in principle to the case at bar is *Stringfellow vs. Botterill Automobile Company,* 63 Utah 56, 221 Pacific 861, (1923). In that case plaintiff brought suit to recover damages arising out of the sale to him by defendant Company of a 1921 automobile, in which sale defendant had represented that the car was a 1922 model.

The Trial Court found the issues against plaintiff and in favor of defendant despite the fact that the evidence on the question of the model of the car was conclusive against defendant. The Supreme Court stated the rule to be that a finding of the Trial Court that a buyer sustained no damage through the seller's breach

of contract is not binding on appeal, if opposed to all the evidence.

The Court concluded by saying that the Trial Court's finding on the issue of damage "had no evidence whatever to support it and was against all the evidence." The judgment was reversed and the case was remanded for a new trial.

In *Miller vs. Manhattan Fire & Marine Insurance Co.*, 76 Utah 540, 290 Pacific 937, decided in 1930, the judgment of the lower court was reversed because there was no support in the evidence for its findings. The Supreme Court, in disposing of the case, commented that since the action was one at law the Court was not authorized to make or direct findings or to render a judgment, but the Court said:

> "We, finding, as we do, that the findings of the Trial Court in the particulars indicated are not supported by the evidence and that the judgment is erroneous, are authorized only to reverse the judgment and to remand the case for a new trial."

The principles of law discussed in the foregoing argument have never been seriously questioned so far as can be determined, and it is appellant's contention

that the facts of this case require the application of these principles. If this judgment is allowed to stand, it will be a recognition and approval of the act of a trial court in deciding a case and assessing damages without regard to the evidence and on the basis of facts and figures not lawfully and properly before the court or admitted as evidence in the case.

CONCLUSION

This judgment is excessive in the amount of $580.00 because of the manifest error committed by the Trial Court. While this is not an imposing sum it nevertheless represents considerably more than one-half of the judgment now entered against appellant. The size of the judgment, however, should have no bearing on the question of the principle involved in this case and appellant respectfully submits that a judgment which is based either upon no evidence, or a judgment which completely disregards the evidence admitted in the case, should not be sustained by this Court.

Respectfully submitted,

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Received two copies of the within brief this 24th day of November, 1952.

Critchlow, Watson & Warnock,

by Ned Warnock
Attorneys for Respondent.