

1980

Penelko, Inc., A Utah Corporation v. Price Rentals,
Inc., A Utah Corporation And John Price
Associates, Inc., A Utah Corporation, Et Al. :
Appellant's Reply Brief

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

PENELKO, INC., a Utah Corporation,)	
)	
Plaintiff-Appellant,)	
)	
vs.)	
)	
PRICE RENTALS, INC., a Utah Corporation,)	
)	
Defendant-Respondent,)	No. 16601
)	
and)	
)	
JOHN PRICE ASSOCIATES, INC., a Utah Corporation, et al.,)	
)	
Defendants.)	

APPELLANT'S REPLY BRIEF

APPEAL FROM JUDGMENT OF THE THIRD
JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY
HONORABLE BRYANT H. CROFT

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FILED
JUL 1960

IN THE SUPREME COURT OF THE STATE OF UTAH

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Plaintiff-Appellant,)	
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NATURE OF THE CASE

Action for damages and injunctive relief and attorney's fees for alleged willful violation of appellant's lease.

DISPOSITION BY THE LOWER COURT

In a jury trial a general verdict was rendered in favor of appellant in the amount of \$65,000. The judgment on this verdict is the subject of respondent Price Rentals, Inc. appeal in Appeal No. 16588. Following the jury's verdict and judgment thereon, the lower court, the Honorable Bryant H. Croft presiding, on July 2, 1979, denied plaintiff's motion for injunctive relief and by an order filed September 12, 1979, denied appellant's motion to assess attorney's fees. [1216, 1659]

RELIEF SOUGHT ON APPEAL

Appellant, Penelko, Inc. seeks reversal of the lower court's order filed July 2, 1979, denying plaintiff's motion for injunctive relief and an order of the Supreme Court ordering injunctive relief as prayed for in the complaint.

Appellant, Penelko, Inc. also seeks reversal of the lower court's order filed September 12, 1979, denying appellant's motion for attorney's fees and an order of the Supreme Court directing the lower court to fix appellant's attorney's fees including reasonable attorney's fees for work on Price Rentals, Inc. Appeal No. 16588, and Penelko, Inc. Appeal No. 16601.

MATERIAL FACTS OF THE CASE

The facts of this cause are set forth in Penelko, Inc.'s Respondent's Brief in Appeal No. 16588. We adopt these facts by reference and set forth below only such additional facts as are particularly relevant to this appeal by Penelko, Inc. (appellant) seeking reversal of the trial court's orders denying it equitable relief and denying it attorney's fees.

1. Particular Facts Relating to Appellant's Motion for Injunctive Relief

On March 24, 1979, the jury brought in a general verdict in favor of plaintiff, Penelko, Inc., the appellant herein, on this appeal. [1104]

Based on this verdict, which constituted a finding by the jury that Price Rentals, Inc. had violated appellant's lease, appellant on June 14, 1979, moved for injunctive relief. [1134] The motion for injunctive relief was denied by the court on July 2, 1979. [1216, 1217]

2. Particular Facts Relating to Appellant's Motion for Attorney's Fees

The jury's findings by its general verdict was that Price Rentals, Inc. had violated appellant's lease. Paragraph 20 of the lease provided that in the event either party shall fail to perform this lease and agreement according to its terms, such party hereby agrees to pay all costs and expenses (including reasonable attorney's fees). [See paragraph 20 Exh. 1-P]

Paragraph 2 of Malstroms' lease to Price Rentals, Inc. dated December 1, 1977, provides that respondent lessee Price

Rentals, Inc. shall be in full possession and control of the leased premises and that the Penelko lease described in Exhibit "A" attached to the agreement is sold, assigned and transferred in its entirety by the lessor to lessee Price Rentals, Inc. [Paragraph 2 page 3 of Malstrom's lease to Price Rentals, Inc. Exh. 7-P]

Exhibit "A" of Malstrom's lease to Price Rentals, Inc. provides that Price Rentals, Inc. is subject to Penelko's lease. [See page 2 Exhibit "A" of Exh. 7-P] The lease is signed by the Malstroms and by Price Rentals, Inc. by John Price, president. John Price guarantees the prompt and faithful performance of all of the obligations of the tenant in the lease. [See page 20 of Exh. 7-P]

All the violations of appellant's lease were committed by respondent Price Rentals, Inc. as are set forth in "MATERIAL FACTS OF THE CASE" in Penelko's respondent's brief, Appeal No. 16588 incorporated herein by reference.

Prior to the conclusion of the trial in this cause, appellant submitted instructions to the jury on attorney's fees. These instructions were not given by the court. The court writing on the instructions: "Denied--to be determined by the court." And this was reiterated in chambers by the court. [See Judge Croft's memorandum decision, 1653] Consequently, appellant adduced no evidence to the jury regarding attorney's fees.

After the jury's verdict and the judgment thereon, and on July 9, 1979, appellant moved for attorney's fees.

[1104 - 1108, 1221] Thereafter, on July 19, 1979, Price Rentals, Inc. filed its Notice of Appeal. [1231]

Appellant's attorney, William H. Henderson, filed a detailed affidavit showing the services performed in this cause and requesting attorney's fees for his work in the amount of \$15,000. [1225 - 1230] Co-counsel Mark Miner also filed a like affidavit in support of attorney's fees for his services in the amount of \$15,000 making a total amount requested for attorney's fees of \$30,000. [1245 - 1247]

On September 11, 1979, Judge Croft filed his memorandum decision denying appellant's attorney's fees. [1645 - 1649]

In Judge Croft's memorandum decision the court found that appellant had not waived its claim for attorney's fees by not submitting evidence inasmuch as appellant was in effect precluded from submitting evidence by reason of the court's denial of its instruction on attorney's fees. [1654]

The court also found that it did not lose jurisdiction to rule on attorney's fees because Price Rentals, Inc. had filed its notice of appeal before it had ruled on appellant's motion for attorney's fees. The court ruled that it retained jurisdiction on this undecided issue. [1653 - 1654]

The court also ruled that the issue of attorney's fees was for the court. [1653]

The court further found that the cause was submitted to the jury, "Based upon a breach of plaintiff's [appellant's] lease". And in such case it mattered not "whether the alleged breach of the lease smacks of tort or contract." [1655]

The lower court, per Judge Croft in his memorandum decision, denied appellant's motion for attorney's fees on the sole ground that there was lack of privity between appellant and Price Rentals, Inc. and that as the covenant for attorney's fees in appellant's lease was not one running with the land, it was not binding on Price Rentals, Inc., citing Latses v. Nick, Inc. 99 Utah 214, 104 P 2d 619, [1655-1656].

On September 14, 1979, formal order denying appellant's motion for attorney's fees was filed with the court. The court wrote in this order denying attorney's fees, "For the reason set forth in the memorandum decision." [1659]

ARGUMENT

- I. ANSWERING PRICE RENTALS' POINT I THAT THE LOWER COURT PROPERLY REFUSED TO GRANT A MANDATORY INJUNCTION AND, IN ANY EVENT, THE QUESTION CONCERNING INJUNCTIVE RELIEF IS MOOT BECAUSE APPELLANT HAS SOLD ITS THEATER AND LEASEHOLD PROPERTY.

A. Answering Price Rentals' claim that Penelko's claim for a mandatory injunction is moot. This contention relates to Price Rentals' statement on page 3 of its brief that following the trial, Penelko has assigned its theater lease reciting the recordations of an assignment June 19, 1980.

Trial was concluded in this case on March 24, 1979 [1104]. The last entry in this cause was September 11, 1979, when the court denied Penelko's motion for attorney's fees

[1645-1649]. Consequently, the lease transaction of June 19, 1980, was after the trial was concluded and after the record for appeal was transmitted to the Supreme Court. Consequently, Price Rentals refers and relies on facts Dehors the record.

The well-established rule is that happenings and evidence not presented in the trial court and not in the appellate record are not considered by an appellate court. The cause must be decided solely on the evidence presented at the trial and reflected in the record on appeal.

Re Marriage of Folb, 53 Cal. App. 3d 862 (1966),

But we must reiterate that matters occurring after judgment are generally not reviewable on appeal.

Metropolitan Ry Co. v. District of Columbia, 195 U. S. 322 (1904), "An appellate court considers only such matters as appear in the record."

Anderson v. Shannon, 146 Kan. 704, 73 P. 2d 5 (1937),

"Syllabus by the Court"

. . .

3. Where it does not affirmatively appear a question raised on appeal was presented to and determined by the trial court, this court does not consider it on review.

Ohio v. Ishmair, 54 Ohio St 2d 402 (1978),

"Syllabus by the Court"

1. A reviewing court cannot add matter to the record before it, which was not a part of the trial court's proceedings, and then decide the appeal on the basis of the new matter.

Lendsay v. Cotton (Fla), 123 So 2d 745 (1960),

Admittedly the record presented to this court contained exhibits which were not presented to the trial judge at the time of his decision and no motion to strike the improper exhibits was made in this court. Since it is not the practice of this court to consider exhibits or other matters not considered by the trial court, our conclusions are therefore based solely upon those exhibits which were before the trial court. See Tyson v. Aikman, 159 Fla. 273, 31 So. 2d 272.

Wilmington Trust Co. v. Baldwin, 38 Del. 595, 195 A. 287 (1937).

5 Am. Jur. 2d, Appeal and Error,

§736. New or Additional Evidence.

Except in the case of trial de novo in the traditional sense,³ the principle is generally followed that new or additional evidence cannot be considered on an appeal, which must be decided solely in the light of the evidence produced in the court below.⁴

§491. Generally; Limitation to Matters in Record.

The rights of the parties to an appellate proceeding must be determined on the record before the appellate court.⁶

5 C. J. S. Appeal and Error,

§ 1487, pp. 777, 778

So, as a general rule, matters subsequently communicated or brought to light¹⁴ or happening after the ruling objected to,¹⁵ and hence not considered by the lower court in connection with the ruling complained of, will not be considered on appeal. So the appellate court will ordinarily consider an appeal only on the evidence before the trial court at the time of the ruling in question.¹⁶ Affidavits filed after the ruling of the lower court will not be examined¹⁷ and new facts of which the trial court had no knowledge will not be introduced into the record by judicial notice.¹⁸ Pleadings

filed after the ruling complained of will likewise be disregarded on appeal.¹⁹

Without waiver of the point above, that Price Rentals cannot add to the record and have a re-trial of facts not passed on by the appellate court we do, nevertheless, point out the true facts on the transaction; namely: the recordation referred to on page 3, Price Rentals' brief, shows an assignment of Penelko's theater lease to Albertsons, Inc. However, Albertsons specifically agreed in writing with Penelko to reserve from the property assigned all property rights relating to equitable relief. This was omitted from the recorded documents at the request of Albertsons. But it being indicated that Price Rentals thereafter might be buying the assignment from Albertsons, Penelko served on Price Rentals and its attorney on this appeal, a notice of this reservation.

Consequently, Price Rentals has accomplished its threat to drive Penelko out of business [1738-1740, 1943-1944, 2030-2317]. The jury, in its holding against Price Rentals, found that it did.

Uptown Appliance Radio Co. v. Flint, 122 Utah 249, 249 P. 2d 826, 829, (1952).

Under these circumstances a court of equity would not in any event rescue Price Rentals from equitable relief.

Deweese, Jr. v. Reinhard, 165 U. S. 386, 41 L. Ed. 757 (1897),

. . . A court of equity acts only when and as conscience commands, and if the conduct of the

plaintiff be offensive to the dictates of natural justice, then, whatever may be the rights he possesses and whatever use he may make of them in a court of law, he will be held remediless in a court of equity.

Providence Rubber Co. v. Goodyear, 9 Wall (U. S.) 788,
19 L. Ed. 566 (1870),

The conduct of the defendants in this respect has not been such as to commend them to the favor of a court of equity. Under the circumstances, every doubt and difficulty should be resolved against them. . .

. . . The controlling consideration is, that he shall not profit by his wrong. A more favorable rule would offer a premium to dishonesty, and invite to aggression.

B. Answering Price Rentals' contention that Penelko has failed to show that it is entitled to a mandatory injunction. It is true, as Price Rentals states on page 8 of its brief, that it is Penelko's position that it is entitled to a mandatory injunction as a matter of law in view of the fact that Price Rentals' construction of the restaurant, the curb and the driveway was intentional and there was involved a continuing trespass and irreparable damage which impaired the just enjoyment of the property. This was established without contradiction by the evidence and by force of the jury's findings in favor of Penelko. Uptown Appliance Radio v. Flint, 122 Utah 249, 249 P. 2d 826, at 829 (1952), Flynn v. Harlin Construction Co., 29 Utah 2d 327, 509 P. 2d 356 (1973).

We submit that the authorities we cite on page 7 in Appellant's Brief support Penelko's position and represent

the prevailing law under such facts. Most certainly it is a law as in Utah as ruled in Henderson v. Ogden City Railway Co., 7 Utah 199, 26 P. 286 (1891). In Henderson a mandatory injunction was issued when defendant piled obstructions on plaintiff's roadbed. Price Rentals, Inc. did more than pile obstructions. It built a roadway and striped and usurped plaintiff's leased parking spaces and built a restaurant flatly in contradiction of the lease. As is stated in 43A C. J. S. §78, Injunctions,

. . . Repeated or continuous trespasses may be enjoined, even though each individual act of trespass is in itself trivial, or not destructive, or the damage is trifling, nominal, or insubstantial. Furthermore, injunctive relief may be granted despite the fact that on one trespass causes irreparable injury. The financial solvency of the trespasser will not preclude injunctive relief, . . .

Salt Lake County v. Kartchner, 552 P. 2d 136, (Utah 1976) cited on pages 7 and 8 of Price Rentals' brief, is manifestly distinguishable. In Kartchner there was involved removal of part of a carport in violation of a setback zoning ordinance. The court held injunction should be denied for the reason that said ordinance had been enforced in a discriminatory manner. The other cases cited on page 6 of Price Rentals' brief are likewise irrelevant.

II. ANSWERING PRICE RENTALS' POINT II THAT APPELLANT
PENELKO IS NOT ENTITLED TO ATTORNEY'S FEES IN
THE PRESENT ACTION

A. Answering Price Rentals' contention that plain-
tiff's claim to attorney's fees is barred by lack of privity.

There was privity. Price Rentals, in securing from the Malstroms the rights under Malstroms' lease to Penelko, signed the transfer from the Malstroms to Price Rentals and President John Price guaranteed the performance of all the obligations of the Penelko lease [page 20 of Exh. 7-P]. This gave privity under the decisions of Pickler v. Mershon, (Iowa) 236 N. W. 382, (1931), Schmidt v. Louisville & NR Co. 139 Ky. 81, 129, 322. Realty and Rebuilding Co. v. Rea, 184 Cal. 564, 194 P. 1024, (1920), cited and quoted pages 8-10, Penelko's Appellant's Brief.

Latses v. Nick Floor, Inc. 99 Utah 214, 104 P. 2d 619, (1940), cited pp. 5, 14 Price Rentals' brief, is not in point. In Latses there was no sale or assignment of the original lease, no prior contract whatsoever between the property. [See page 10 and 11 of appellant's opening brief.]

B. In subsection B of Price Rentals' Point II, it contends that appellant's claim for attorney's fees is barred for failure to produce evidence of attorney's fees during the trial.

But as pointed out, page 14, of Penelko's opening brief, the trial court foreclosed Penelko from adducing evidence to the jury. The trial court, in refusing to accept Penelko's

proposed instruction on same, stated that the issue was for the court. The fixing of attorney's fees is traditionally for the court. See decisions cited on page 14 and 15, Penelko's opening brief.

Affidavits for attorney's fees in the amount of \$30,000 were filed by Penelko's attorneys and stand uncontradicted [1225-1230, 1245-1247].

C. Under subsection C of Price Rentals Point II, it contends that Penelko's claim for attorney's fees cannot be sustained because it is impossible to determine whether the verdict was based upon tortious conduct for breach of lease and that attorney's fees are not allowed in the absence of a contractual provision.

But paragraph 20 of the Penelko lease does specifically provide that the party that fails to perform the lease agrees to pay all costs and expenses including reasonable attorney's fees. [See paragraph 20, Exh. 1-P]

Price Rentals also contend on pages 21 and 22 of its brief that the Complaint contains two causes of action. One, that the respondent had violated the lease and second, that Price Rentals had entered into a willful and malicious contract designed to destroy plaintiff's business.

This is not correct. Plaintiff's Complaint alleges a single cause of action, alleging that all the conduct complained of was in violation of plaintiff's lease. [See paragraph 8 of Complaint] Further, as pointed out on pages 12

and 13 of Penelko's opening brief, tortious violation of a lease entitles a party to attorney's fees when so provided in the lease, as clearly as a non-tortious violation, if not more.

D. In subsection D, page 22 et seq. of Price Rentals' Point II, it argues that the court lacked jurisdiction to consider Penelko's motion for attorney's fees because both parties filed notices of appeal before the motion was heard by the court. As pointed out by the court in its Memorandum Decision and in Appellant's Brief, page 11, the motion for allowance of attorney's fees was filed July 9, 1979, before Price Rentals' Inc. filed its Notice of Appeal. Price Rentals, by the device of filing a notice of appeal before Penelko's motion for attorney's fees could be heard, could not deprive the trial court of jurisdiction to rule on this undecided issue of attorney's fees [1649].

Consequently, the appeal did not deprive the trial court to rule on plaintiff's pending motion for attorney's fees. See Morrison v. Morrison, 93 N. J. Super 96, 225 Atl. 2d 19 (1966), where the court ruled:

. . . The general rule is that trial court retains jurisdiction of the matter on appeal to make determinations collateral or supplemental to the judgment appealed from. 4 Am. Jur. 2d, Appeal and Error, § 355 (1926).

Further, Penelko, in order to bring the issue of attorney's fees before this Supreme Court, filed a timely amended notice of appeal and had all proceedings and evidence on

plaintiff's motion for attorney's fees made part of the record on this appeal.

4 Am. Jur. 2d Appeal and Error §306-307 cited by Price Rentals on page 23 of its brief is irrelevant to the point of frivolity. These sections deal with the effect of a motion for new trial extending the time to appeal. Likewise, frivolous is Price Rentals' reliance on Rule 72(a) Utah Rules of Civil Procedure. Rule 72(a) provides,

. . . that when other claims remain to be determined in the proceedings, a party may preserve his right to appeal on the decided issue until the determination of the other claims by filing and serving . . . a notice of his intention to do so.

Penelko did not seek to preserve a right to appeal on a decided issue. It duly appealed from the decided issues as soon as they were decided. On July 25, 1979, Penelko filed a timely notice of appeal from the lower court's judgment of May 23, 1979, and its order of July 2, 1979, denying Penelko's motion for injunctive relief [1234]. On October 9, 1979, Penelko filed a timely amended notice of appeal from the lower court's order denying Penelko's motion for attorney's fees [1674].

CONCLUSION

Penelko respectfully requests the Supreme Court for its orders on Appeals Nos. 16588 and 16601 (same case below) as follows:

1. Reversal of the lower court's order of July 2, 1979, denying Penelko equitable relief and directing a mandatory injunction against Price Rentals' removing the roadway, and landscaping over Penelko's leased parking space and removal of the Perkins Cake & Steak Restaurant (Appeal No. 16601).
2. Reversal of the lower court's order of September 12, 1979, denying Penelko's motion for attorney's fees in the amount of \$30,000 and for order of the Supreme Court allowing such fees, plus reasonable attorney fees for work on both appeals (Appeals No. 16588 and 16601).

Respectfully submitted December 15th, 1980.

WILLIAM H. HENDERSON and
MARK S. MINER, Attorneys for
Penelko, Inc.

By


WILLIAM H. HENDERSON

CERTIFICATE OF SERVICE

I hereby certify that I served two copies of the foregoing Appellant's Reply Brief by mailing the same, postage prepaid, to the office of Snow, Christensen & Martineau, 700 Continental Bank Building, Salt Lake City, Utah, 84101, this 16th day of December, 1980.

Leslie A. Nielsen