

1979

Perry Messick v. Pho Trucking Service, Inc : Brief of Respondents

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

PERRY MESSICK, :
Plaintiff-Appellant, :
vs. : Supreme Court No. 16605
PHD TRUCKING SERVICE, INC., :
Defendant-Respondent. :
:

BRIEF OF RESPONDENTS

APPEAL FROM THE JUDGMENT OF THE
FOURTH JUDICIAL DISTRICT COURT OF UTAH COUNTY
HONORABLE ALLEN B. SORENSEN, PRESIDING

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FILED

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Plaintiff-Appellant, :

vs. :

Case No. 16605

PHD TRUCKING SERVICE, INC., :

Defendant-Respondent. :

BRIEF OF RESPONDENTS

STATEMENT OF THE NATURE OF THE CASE

This was an action for an accounting between a truck driver-operator and a trucking service to determine whether monies were due and owing or whether a settlement had been effected.

DISPOSITION IN THE LOWER COURT

The case was tried on April 19, 1979, before the Honorable Allen B. Sorensen, Judge of the District Court of Utah County. The court found that the parties had reached an accord and satisfaction on October 22, 1976, and entered judgment against the plaintiff-appellant, no cause of action.

RELIEF SOUGHT ON APPEAL

Defendant-Respondent prays the court to affirm the findings and judgment of the trial court.

STATEMENT OF FACTS

From January, 1973, to December, 1973, plaintiff-appellant was an employee truck driver of PHD Trucking Service, Inc. R. 122, 8-10. Toward the end of 1973, plaintiff approached Verl Davies and Ray Hiatt, the owners and principal officers of PHD Trucking, and asked if he could buy a truck from them. R. 122, 19-30; R. 123 1-14.

On December 7, 1973, plaintiff entered into a buy-sell agreement with Verl Davies and Ray Hiatt, owners and principal officers of PHD Trucking, for the purchase of a 1963 Kenmore Tractor. Plaintiff paid \$2,000.00 down and gave a note for the balance of \$8,000.00 to Davies and Hiatt. It was further agreed that the revenue from the truck operation would be handled through PHD Trucking Service and that the cost of fuel, license plates, property tax, highway use tax, repair parts and insurance premiums were to be deducted from the proceeds earned by the operation of the truck. Also charged as an advance to the operation of the truck was \$175.00 per week to plaintiff. Plaintiff agreed to lease a dump trailer from Davies and Hiatt to use on the job, at the rate of 5 cents per mile, and also to provide certain insurance on the trailer. Ex. 9.

Shortly after that, in January, 1974, plaintiff orally agreed that, rather than receive the \$175.00 per week, he would instead be paid for whatever he earned for driving the truck. R. 143, 5-27.

All hauling done by the plaintiff for the defendant, PHD Trucking, was performed on a per job tonnage basis. R. 186, 10-13; R. 190, 16-21; R. 193, 20-30; R. 194, 16-23; R. 208, 20-29; R. 212, 24-30, 213, 1-22 (See also Ex. 26, 27).

Plaintiff kept Exhibits 26 and 27 as his only daily record of the trips which he made in the truck. R. 132, 19-26. By his own records, which were introduced at trial, plaintiff only kept track of the invoice number, the point of origin and the weight of each load which he carried as he operated the truck. Ex. 26, 27. From these daily records, the plaintiff turned in his invoices to PHD Trucking Service, Inc., for credit to his account. R. 150, 8-20. In fact, all of the driver-operators working through PHD Trucking Service were paid on a tonnage hauled basis. R. 169, 18-30, 170, 1.

So that plaintiff could continue to operate the truck, the parties signed a lease form dated January 1, 1974, (Ex. 3), for the purpose of meeting the Public Service Commission's authority requirements. R. 95, 24-30, 96, 1-4; R. 167, 16-30, 168, 1-9; R. 186, 6-9; R. 193, 19,20; R. 223, 8-21; R. 224, 19-30, 225, 1.

The lease form signed on January 1, 1974, was for a period from January 1, 1974, to July 1, 1974. However, during this time the plaintiff continued to operate the truck on a per trip tonnage basis, and continued to do so for the entire time that he was an owner-operator of the truck. Ex. 3, 26, 27.

On or before November 22, 1974, plaintiff was pulled over at the Price Port of Entry and cited because the first lease

form had expired. This precipitated a new lease form to give plaintiff authority to operate under PHD Trucking Services Certificate of Authority. Exhibit 4 R. 125, 11-30, 126, 1-4.

In May of 1975, the plaintiff ceased hauling for the defendant and leased his truck out to other companies, and had the income from the truck paid directly to him instead of PHD Trucking, in contravention of the buy-sell agreement. Ex. 9. The reason the plaintiff gave for this action was that he believed that he had paid for the truck under the terms of the buy-sell agreement. R. 126, 8-12.

Throughout this period and into the Fall of 1976, the defendant made numerous requests that plaintiff account to them for the expenses incurred by plaintiff in operating the truck. The defendant gave plaintiff Exhibits 5 and 6 in the Spring of 1976, again requesting that he verify his expenses. R. 220, 221.

An accounting of plaintiff's payments on the truck, the money he had been paid for operating the truck, and his obligation to defendant under the buy-sell agreement was given to plaintiff in early October, 1976. R. 123. After receiving the accounting, the plaintiff offered to return the truck to Davies and Hiatt, asking for a settlement of \$2,500.00. On October 22, 1976, the plaintiff accepted a counter-offer settlement in the amount of \$2,000.00 minus \$473.97 for a fuel bill charged by plaintiff to defendant, and reconveyed all of his interest

in the truck. R. 130; Ex. 7.

Plaintiff continued working for defendant for some time after the settlement was reached. R. 184, 11-15. In July, 1977, nine months after the settlement was reached, and several months after plaintiff quit driving for defendant, this lawsuit was brought in an attempt to raise again the issues of the accounting between plaintiff and defendant, which had been settled by the parties in October, 1976. R. 2.

Having received evidence and having heard the testimony of the witnesses and considered their credibility during the trial of this matter, the Honorable Allen B. Sorensen found that the dealings between the parties had been settled in the settlement agreement on the accounting in 1976, and entered judgment against the plaintiff, no cause of action. R. 47.

Plaintiff's Motion for a new trial was denied (R. 69) and his appeal ensued.

A R G U M E N T

POINT I

THE TRIAL COURT'S FINDINGS OF FACTS SHOULD BE
ACCEPTED UNLESS CLEARLY ERRONEOUS.

Plaintiff asserts in his brief that this court, "must conduct an independent evaluation of the evidence in the record." Brief of Plaintiff-Appellant, 12. However, a careful analysis of the scope of review in equity cases by this court reveals that it can modify the trial court's findings or make new findings only

if the record compels it. First Security Bank of Utah vs. Demiris, 10 Utah 2d 405, 354 P2d 97 (1960).

The general rule on the scope of review of the findings of a trial court in equity is clearly set forth by the court in the following cases:

In an equity case in which the Supreme Court reviews the Findings of Fact of the trial court, it over turns them only where it is manifest that the trial court has misapplied proven facts or made findings clearly against the weight of evidence. Metropolitan Investment Co. vs. Sine, 14 Utah 2d 36, 376 P2d 940, (Emphasis added).

In equity cases the Supreme Court reviews the evidence keeping in mind that the trial court heard and saw the witnesses, and reverses if the court concludes the the evidence clearly preponderates against the decision. Barker vs. Dunham, 9 Utah 2d 244, 342 P2d 867, (Emphasis added).

Although the question of a boundary line by acquiescence is a matter of equity, the Supreme Court will reverse the trial court's Findings of Fact only if it concludes that they are clearly erroneous. Hunley vs. Walker, 13 Utah 2d 105, 369 P2d 117, (Emphasis added).

The above cases set forth the requirment that before this court can reverse the Findings of Fact of the trial court in an equity case, this court must first find the trial court's Findings of Fact to be "clearingly against the weight of evidence" or "clearly erroneous."

Although there was considerable conflict in the testimonies of plaintiff and defendant from which the trial court had to decide in order to make its Findings of Fact, this court should keep in mind that the trial court heard and saw the witnesses and could first hand observe their demeanor, candidness, or lack thereof. This is in keeping with the rule stated in

Stone vs. Stone, 19 Utah 2d 378, 431 P2d 802, in which the court stated that, "Even though the Constitution states that in equity cases the court may review the facts, the court will nevertheless take into account the advantaged position of the trial judge."

A review of the entire record of this case adequately supports the trial court's Findings of Fact that the parties came to a settlement agreement as to the amount of monies due and owing to plaintiff for operating the truck and monies due and owing the defendant under the purchase agreement on the truck. Although there was conflicting testimony as to these material facts, the record is entirely adequate to support the trial court's conclusion that the parties reached an accord and satisfaction in October, 1976. The decision of the trial court was neither "clearly erroneous" or "clearly against the weight of the evidence," and this court should affirm the Findings of Fact of the trial court.

POINT II

THE FACTS AS SET FORTH IN THE RECORD AMPLY SUPPORT THE TRIAL COURT'S DECISION.

While there were many conflicting factual allegations made by the plaintiff and defendant, some of the facts were undisputed by the parties. Both plaintiff and defendant agreed that all monies earned by the operation of the truck would be paid to PHD Trucking Service. Certain expenses were to be deducted for the costs of operation, and included in the deductions

would be all payments made to the plaintiff for operating the truck, and the difference was to be credited or debited to the plaintiff for the purchase of the truck. Both parties also agreed that an accounting was offered by the defendant to the plaintiff in October, 1976, including the monies credited to the truck for its operation, the expenses of operating the truck, including payments made to plaintiff as driver, and the balance due and owing on the truck under the terms of the buy-sell agreement. The dispute arises as to whether the settlement which was reached in October of 1976 was a settlement of the accounting given to the plaintiff by defendant, or whether the plaintiff was merely selling the truck back.

It is clear from the record that the accounting on the operation of the truck was a dispute. In this disagreement, defendant claimed \$8,971.02 still owing on the truck after crediting plaintiff with net earnings from the operation of the truck. Ex. 2. Plaintiff claimed that he had earned enough to pay for the truck. R. 126, 7-12.

The disagreement was really over whether plaintiff owed defendant on the truck as per Exhibit "Q" or whether the truck was paid for and defendant owed plaintiff. Realizing that the truck was the central object of the accounting, the trial court upon examining Exhibit 7 and the testimony of the witnesses, made a findings of fact that the parties had entered into a settlement and agreement on October 22, 1976.

As stated by the Supreme Court of the State of Kansas:

"an accord and satisfaction is the adjustment of a disagreement as to what is due from one party to another and the payment of the agreed amount." Manning vs. Woods, Inc., 182 Kan. 640, 324 P2d 136.

Therefore, it was just and proper for the trial court to conclude that the parties had an accord and satisfaction, whereby the truck was returned to defendant and a settlement of \$1,526.03 was paid to plaintiff.

POINT III

PAROL EVIDENCE IS ADMISSIBLE TO SHOW THAT THE PARTIES DID NOT INTEND THE PROVISIONS OF THE LEASE FORMS TO BE VALID.

Plaintiff asserts that the court erred in admitting parol evidence to modify the terms of the lease forms used by the parties to confer operating authority on plaintiff. However, a careful review of the record reveals no instance where defendant sought to modify the terms of the lease forms. Defendant asserted that it was not intended or understood by either party that the lease forms be binding as such.

"Evidence is admissible, at least in equity, to show that a writing which apparently constituted a contract was not intended or understood by either party to be binding as such. The oral testimony in such a case does not vary the terms of the writing but shows that it was never intended to be a contract or to be a binding force between the parties.

"The parol evidence rule presupposes an action based on an existing valid contract, and if the issue is as to the validity or legality of the contract, the rule, by its very terms, has no application, and extrinsic evidence is admitted to determine that issue, whether such evidence tends to establish the

validity or invalidity of the contract in question. Such evidence does not vary or contradict the writing, but serves to establish that it has no force or efficacy." 30 Am Jur 2d 1034, 35.


There was clear and convincing evidence that the leases were only used to meet public service commission authority requirements. R. 95, 24-30, 96, 1-4; R. 167, 16-30, 168, 1-9; R. 186, 6-9; R. 193, 19, 20; R. 223, 8-21; R. 224, 19-30, 225, 1. And that the only reason the second lease form was prepared was because plaintiff has been cited for driving without public service commission authority. R. 125, 11-30, 125, 1-4.


CONCLUSION

The record in this case is entirely adequate to support the trial court's findings of fact that the parties came to a settlement agreement concerning the truck and its operation. The court did not error in permitting parol evidence as to the intention of the parties concerning the lease forms. The oral testimony in this case was not to vary the terms of the lease, but showed that the leases were never intended to be a contract or to be a binding force between the parties. The findings of the trial court were not clearly against the weight of evidence nor clearly erroneous, and this court should affirm the findings of fact of the trial court. Having found a settlement agreement obtained the parties in October, 1976, with payment to the plaintiff of a disputed sum and reconveyance to the defendant of the truck, the court's conclusion that the parties have an accord and satisfaction is supported by its findings of fact in the record in this case.

For the above reasons, defendant respectfully submits that the findings and judgment of the trial court should be affirmed.

DATED this 10th day of December, 1979.


ROBERT L. MOODY


STEPHEN R. MADSEN
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CERTIFICATE OF MAILING

MAILED two copies of the foregoing Brief of Respondents to Jackson Howard, Howard, Lewis & Petersen, Attorneys for Plaintiff-Appellant, 120 East 300 North, Provo, Utah 84601, postage prepaid, this 14 day of December, 1979.

