1980

Carl H. Powell v. S. Tony Cox, Director, Drivers License Division, Department of Public Safety For the State of Utah : Appellant's Reply Brief

Utah Supreme Court

IN THE SUPREME COURT

OF THE STATE OF UTAH

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CARL H. POWELL,

Plaintiff/Appellant,

vs.

Case No. 16660

S. TONY COX, Director
Driver License Division
Utah Dept. of Public
Safety,

Defendant/Respondent.

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APPELLANT'S REPLY BRIEF

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Appellant's Reply Brief
to Respondent's Brief on
Appeal

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OF THE STATE OF UTAH

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Plaintiff/Appellant, :

vs. : APPELLANT'S REPLY BRIEF

S. TONY COX, Director :
Driver License Division Case No. 16660
Utah Dept. of Public Safety, :

Defendant/Respondent. :

Since appellant is willing to submit this matter on the briefs of appellant and respondent, appellant submits this brief in reply to respondent's Brief on Appeal.

REPLY

There is no questions that appellant supplied the testing officer with a cylinder full of breath air and the uncontroverted evidence is:

"Q. And Officer Curtis never turned to analyze the 55 c.c.'s that was provided?

A. No, he did not?" (R 29)

41-6-44 Utah Code Annotated grants to a peace officer the right to select the testing mechanism to be used. Nowhere in that section of the code nor in 41-6-44.10(b) Utah Code Annotated is the manner of administering a breathalyzer test outlined by our legislature.

It is apparent from all citations that a sample was

obtained in sufficient quantity to analyze although this sample may not have met with the subjective desires of the arresting officer, it was he whose chose not to analyze the sample.

Cahall v. Dept. of Motor Vehicles, 94 Cal, Rptr. 182, 185 (Cal. App.-1971) is not applicable as Utah differs from California in that only a single test is required of a validly arrested driver who ". . . shall be deemed to have given his consent to a chemical test . . ." (Emphasis added.)

DATED this 16 day of January, 1980.

Respectfully submitted,

McRAE & DeLAND

ROBERT M. McRAE
Attorney for Appellant

CERTIFICATE OF MAILING

I hereby certify that I mailed, postage prepaid, a copy of the foregoing to Bruce, M. Hale, Assistant Attorney General, 236 State Capitol, Salt Lake City, Utah 84114 on this 16 day of January, 1980.

ROBERT M. McRAE

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AUTHORITIES CITED

IN THE SUPREME COURT OF THE STATE OF UTAH

THOMAS T. THOMPSON and LULA THOMPSON, his wife, Plaintiffs-Respondents, -vs- Q. KEITH SMITH and ROSSLYN SMITH, his wife, DEFENDANTS-APPELLANTS.	)	Case No. 16662

STATEMENT OF NATURE OF CASE

This is an action between Sellers (Plaintiffs-Respondents) and Purchasers (Defendants-Appellants) of a business, including certain real estate upon which the business was located.

The Sellers sought, alternatively, to reform or rescind the sale agreement, while the Purchasers sought its specific enforcement. The dispute centered around the interest provision of the contract.

DISPOSITION IN LOWER COURT

Following trial below, the Court entered a decree of reformation in favor of the Plaintiff-sellers and against the Defendant-purchasers.

RELIEF SOUGHT ON APPEAL

Appellants seek to overturn the decree of reformation, on the grounds that the judgment entered was contrary to law and wholly unsupported by the evidence.

STATEMENT OF FACTS[1]

In December, 1976, the parties entered into a Uniform Real Estate Contract for the sale by Plaintiffs to Defendants of a cafe, store and motel in Virgin, Utah. The contract provided for a sale price of $51,000, payable by a $22,000 initial deposit and monthly $200.00 installments, said installments applying to interest accruing at 8% per annum and then to principal.

Defendants could not sell their home and certain personal property to fund the substantial down payment, and sought to renegotiate the contract. The parties agreed on a reduction in the down payment provided that the Defendant-purchasers would assume obligations of the contract by which Sellers were themselves purchasing the business (Severson contract). At trial the parties disputed the amount which was to be paid down but all admitted a reduction was agreed upon.

In March, 1977, the parties went to a title company and met with Mr. Allan Carter. They informed him of the terms of the transaction and requested he prepare the necessary documents. He informed them it would take a very,

[1]Except where specifically noted, facts are stated as found by the lower court.

very long time to pay the contract off due to the large principal balance and small monthly payments. T 22:5-10. The parties left the title company. Mr. Carter and Mr. Smith later discussed the matter. Mr. Smith instructed Mr. Carter to prepare the contract to provide for interest on the unpaid balance at 8% per annum, through the first year only, with no interest thereafter. Only 12 years of payments would be required.

Mr. Carter's uncontradicted testimony was that he contacted Mr. Thompson to verify the acceptability of this change, and that Mr. Thompson did not object. T 74:27 - 75:17; see T 39:14 - 40:8

The parties met March 29, 1977, in a bank in Hurricane, Utah, to execute the papers. The bank was to act as escrow agent.

The closing was not uneventful. There was argument and discussion. Defendant testified the meeting was one and one-half to two hours in length. The contract (or at least parts related to interest and down payment) was read by the bank officer to the Sellers. T 42:23 - 43:18; 64:6-14. The bank officer attempted to call Mr. Carter to question him about the contract but was unable to reach him. T 26:30 - 27:19. There was heated discussion of the reduced down payment and interest rate. Finally Mrs. Thompson said "Let's sign it; we've been on this for so many months; lets get it over with; let us be done with it." T 30:1-3;

47:16-18; 96:15-16. The parties executed the document and left the bank.

A few days later the Thompsons requested the title company draw up another contract providing for interest throughout the term of the contract, at 8% per annum. When Smiths refused to sign it, suit was filed.

Purchaser-appellants contended at trial and now contend that the only interpretation of the evidence is that the seller-respondents knew the nature of the document they signed, did so freely and voluntarily and should not now be allowed to renege, rewriting the agreement in their favor.

ARGUMENT

POINT I THE DECREE FOR REFORMATION WAS CONTRARY TO LAW, BEING BASED UPON A FINDING OF "NO MEETING OF THE MINDS."

The findings of the Court below reflect that the language of the contract was reformed because the Court felt there was no "meeting of the minds" on the interest term.

> 17. That the agreement entered into by and between the parties on March 29, 1977 did not contain the agreement between the parties as it pertained to the payment of interest and the parties had previous had a meeting of minds on the payment of interest in the amount of 8 percent per annum simple interest

> 18. That because of the same, there was no meeting of the minds between the parties in the agreement of March 29, 1977 wherein the Plaintiffs were Sellers and the Defendants were Buyers of the above described real property regarding the payment of interest.

> 19. That the actual meeting of the minds between the parties was to the effect that interest would be paid on the outstanding balance of said contract at the rate of 8 percent per annum simple interest from the date of execution of the same until the outstanding principal balance plue interest was paid in full, and that each payment would be applied first to the payment of accrued interest and second to the reduction of principal. Findings of Fact, ¶¶ 17-19 (emphasis added)

While it is true that reformation is granted in cases in which there has been no meeting of minds on the written document, that lack alone will not justify reformation. The lack of meeting of minds is a result of the specific circumstances which justify reformation. But a lack of meeting of minds may also result from mere unilateral mistake which does not justify reformation. Reformation will only be granted in a case of mutual mistake or in a case of unilateral mistake brought about by fraud or concealment.

> There are two basic grounds for the reformation of written instruments which do not correctly state and embody the intention and pre-existing agreement of the parties to the instrument, namely, (1) mutual mistake of the parties and (2) ignorance or mistake of the complaining party coupled with or induced by the fraud or inequitable conduct of the other or remaining parties. 66 Am.Jur. 2d Reformation of Instruments §12 (1973).

The Findings, Conclusions and Judgment make no mention of mutual mistake nor do they mention unilateral mistake and fraud. These doctrines were ignored by the Court. Reformation was declared simply because in the Court's view, Plaintiffs either did not understand or did not agree with the terms of the document they signed though they knew its nature.

POINT II THERE WAS NO EVIDENCE TO SUPPORT FINDING MUTUAL MISTAKE OR UNILATERAL MISTAKE AND FRAUD.

Even if it is assumed that the Court's findings and conclusion were based on the correct legal doctrines, (though unstated in the pleadings) there is no evidence to support those doctrines; there is in fact substantial contrary evidence.

Mutual Mistake

At the outset, it is clear that any mistake was not mutual. Mr. Smith knew the nature and import of the interest provision. T 116:28 - 117:1 It was stipulated that he informed Mr. Carter to draft that provision. T 117:29 - 118

Unilateral Mistake and Fraud

While the record clearly shows Mr. Thompson's suspicions were aroused, it may be that he still did not understand the interest provision after he signed the agreement and left the bank, and that he labored under a unilateral mistake.

However, there is no evidence to show fraud or any misconduct on Mr. Smith's part. Thompson's testimony never mentions Smith stating anything deceptive at the bank. He knew Smith's position. If Thompson was misled, it was by the bank officer, Mr. Nackos. Under direct examination by his counsel Thompson states something caught his eye while arguing with Smith about the down payment:

A. During this process, I just glance sideways, or just glanced at the amount, the amount printed in the contract concerning interest.

Q. What caught your eye in that regard?

A. Well, the standard contract, approximately a sentence and a half, eight percent per annum on unpaid balance, and that is what it was, and the quantity that was in there.

Q. What did you see regarding interest?

A. I didn't read it at that time; I was arguing with him, with Mr. Smith. I turned the paper and I said, "Nick, there looks like something -- Mr. Nackos, it looks as if something is wrong there on the interest." As we continued talking about this. I finally agreed to the 6,500, to make a long story short. T 25:29 - 26:13

* * * *

Q. Then what occurred after that, after you made that agreement?

A. Mr. Nackos attempted to get hold of Allan Carter, Mr. Carter.

Q. Do you know for what reason?

A. To clarify this.

Q. What do you mean by "clarify this"?

A. This is my assumption, clarify the interest set up here, what it meant. T 26:28 - 27:6

* * * *

Q. (By Mr. Foremaster) So then what occurred after this attempt to get ahold of Mr. Carter on the part of Mr. Nackos?

THE COURT: What happened?

Q. (By Mr. Foremaster) What happened?

A. He went through it again.

Q. What do you mean by "went through it," what did he do?

A. He studied it.

Q. Then what occurred?

A. Here again, it's hard for me to keep within the Judge's --

Q. No, you are all right. Did anyone say anythi to you?

A. My recollection was, that he said that it would be all right, that the first year was --it would be all right from then on.

Q. Now, who said that to you?

A. Mr. Nackos. T 28:11 - 29

See also Mrs. Thompson's corroborating testimony at T 95:28 - 96:8. Both Plaintiffs testified that they were aware of the problem.

And the Court specifically found Thompsons were aware of the interest problem; that there was a dispute.

> 13. That on March 29, 1977 at the meeting in the office of Nick Nackos at Zions First National Bank in Hurricane, Utah between the parties, the contract was read to the parties, and some discussion was had regarding the payment of provisions for interest as called for thereby as the same was difficult if not impossible for the Plaintiffs to understand or for the bank officer to understand.
>
> 14. That pursuant to said negotiation, the parties attempted to contact Allan Carter, the preparer of said agreement, to ask him to explain the terms and conditions of said contract as it pertained to interest, however it was found impossible to contact Allan Carter, and therefore the provisions of said contract regarding the payment of interest was not explained by the preparer of the agreement. Findings of Fact ¶¶ 13, 14.

It is important to note that the Court found only that the provision "was not explained by the preparer." There is no finding as to Mr. Thompson's understanding or Mr. Nackos' explanation. While carefully avoiding any

statement that he "advised" the Thompsons (see T 54:27 - 55:3; 68:24 - 69:14) Mr. Nackos stated he understood it and questioned Thompsons about it. T 64:28 - 65:6. Thompsons stated Nackos advised them. T 28:11-29. The Thompsons testified they just wanted to sign and get out of there, even though they did not understand it. T 98:7-20.

Even allowing for interpretation of the ambiguous evidence to support a finding of unilateral mistake by Thompsons it is clear that Mr. Smith did not lie to Mr. Thompson; nor did he conceal the nature of the provision. He was guilty of no misconduct. There is no evidence in the record to establish any inequitable conduct on his part.

POINT III THOMPSONS WERE GUILTY OF INEXCUSABLE NEGLIGENCE.

A basic principle of the reformation doctrine is that reformation will be denied to one guilty of inexcusable negligence in executing an instrument.

In Smith v. Whitlaw, 268 P.2d 1031 (Colo. 1954) a corporation president sought to escape personal liability on a contract, though he was named personally as purchaser. He claimed that the corporate attorney, in revising the form presented by the seller, failed to delete personal references, and that the seller was aware that the purchase was corporate, not personal.

The Colorado Court reviewed the evidence and stated the applicable law.

> A study of the testimony briefly summarized herein clearly discloses that there was no mutual mistake made by both Smith and Hendrickson in the matter of the capacity of the parties; and accepting Smith's and his attorney's testimony, at best it would be only a unilateral mistake on the part of Smith, and further, there is no fraud or wrongful conduct disclosed in the evidence on the part of Hendrickson. It further is shown that Hendrickson fully complied with every part of the contract. It must be remembered that Smith had an opportunity to read the second and final draft of the contract, but neglected to do so . . .
>
> . . . In the case of Muchow v. Central City Gold Mines Co., 100 Colo. 58, 65 P.2d 702, our Court, in effect, said that a contract, such as is now before us, will not be reformed on the ground of mistake at the instance of the party who prepared it when it appears that his alleged lack of knowledge was due to his failure to exercise reasonable diligence; and further, that equity will not relieve a party from the ill effects of a contract voluntarily executed, on the ground of mutual mistake, where he could have been fully advised by the exercise of reasonable diligence. 268 P.2d at 1034, 1035

Admittedly, each case must be decided upon its own facts. However, some similarities must be noted.

Thompsons were aware of the interest provision; aware at least that they did not understand it and aware that it did not mean eight per cent per annum. They executed the document fully aware of these factors, took the down payment, were relieved of the obligation of the Severson contract and only later changed their minds.

Their actions, viewed objectively, establish their acquiescence and agreement, barring any claim for relief.

CONCLUSION THE CONTRACT SHOULD BE ENFORCED AS WRITTEN

While Thompsons acted quickly to correct their mistake, they did not act -- or refuse to act -- quickly enough. They should have refused to sign at the closing rather than acquiesce, sign and file suit.

Mr. Smith is guilty of no reprehensible conduct; rather, he made a proposal which reduced his total liability eliminating additional years of payments. Thompsons were aware, accepted, but reconsidered. Their reconsideration should not be allowed at his expense.

Respectfully Submitted March 10, 1980.

DAVID NUFFER
Attorney for Defendants-Appellants

MAILING CERTIFICATE

I hereby certify that on the 10th day of March, 1980, I served a copy of the foregoing BRIEF OF APPELLANT on Phillip L. Foremaster Attorney for Plaintiffs-Respondents, by depositing a copy in the U.S. Mail, addressed to 494 East Tabernacle, St. George, Utah, 84770.

Secretary