

1989

Western Fiberglass, Inc. v. Kirton, McConkie & Bushnell : Brief of Appellant

Utah Court of Appeals

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**UTAH COURT OF APPEALS
BRIEF**

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890407

IN THE SUPREME COURT OF THE STATE OF UTAH

WESTERN FIBERGLASS, INC.,
a Utah corporation,

Plaintiff-Appellant

Appellate No. 880032

vs.

KIRTON, MCCONKIE & BUSHNELL,
a professional corporation,

BRIEF OF APPELLANT

Defendant-Respondent.

APPEAL FROM A JURY VERDICT TAKEN BEFORE THE HONORABLE
LEONARD H. RUSSON, JUDGE OF THE THIRD DISTRICT COURT, SALT LAKE
COUNTY, UTAH.

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Clerk, Supreme Court, Utah

IN THE SUPREME COURT OF THE STATE OF UTAH

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Plaintiff-Appellant : Appeal No. 880032

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JURISDICTION

The Utah Supreme Court has jurisdiction over this matter pursuant to Section 78-2-2(3)(i) as this is an appeal from a final judgment and order in a civil matter of the Third District Court of Salt Lake County, State of Utah.

NATURE OF PROCEEDINGS

Plaintiff brought an action against the defendant law firm for negligence in representing its interests in the sale of certain manufacturing equipment.

A jury trial was held beginning December 1, 1987 and concluding December 9, 1987.

The jury returned a verdict for the defendant and the plaintiff appeals to recover its damages and for a new trial.

ISSUES ON APPEAL

1. Whether the jury's finding that the plaintiff was 50% negligent was proper.

2. Whether the jury was justified in reducing the damages from that stated in the evidence where no evidence of mitigation or reduction was offered by the defense.

3. Whether the exclusion of evidence of what the plaintiff could have done had it been properly advised of its rights under paragraph 6.03 of the contract was prejudicial error.

4. Whether the exclusion of prior statements of a witness

who testified at the trial was prejudicial error.

STATEMENT OF THE CASE

The plaintiff brought this action against the defendant law firm to recover damages for negligence of its attorney's in representing its interest in the sale of certain manufacturing equipment to a firm known as Untied Fiberglass.

The basis of the plaintiff's claim was that the defendant failed to file the appropriate financing statements to perfect its security in the accounts receivable of United Fiberglass, and that the defendant failed to inform the plaintiff that its rights to retake possession of the equipment in the event of United Fiberglass's default was subject to a lien of Sovran Bank, which took a secured position in the equipment as collateral for the purchase price.

At the conclusion of the trial, the jury returned a verdict in favor of the defendants and the plaintiff appeals on the grounds set forth below.

FACTS RELEVANT TO THE APPEAL

In 1982 plaintiff was a manufacturer of fiberglass insulation. (RT. Vol. 1 of 6 days, pages 27-32, and Vol. 3 of 6 days, pages 29 and 35).

Ivan Radman was the president of plaintiff and the person who represented the the plaintiff in the transactions giving rise to matters now pending before the court. (RT. Vol. 1 of 6 days, page 22, and Vol. 3 of 6 days, page 35).

Neither the plaintiff nor Ivan Radman had any prior

experience in buying or selling equipment where part of the purchase price was deferred and payment secured by accounts receivable of the purchaser. (RT. Vol. 1 of 6 days, pages 25-26, 30, 34-35, 37-38, and Vol. 3 of 6 days, pages 43-45 and 114-115).

Plaintiff contracted in January 1983 for the sale of certain fiberglass manufacturing equipment to a Virginia Firm known as United Fiberglass (OR. Exhibit 11; and RT. Vol. 1 of 6 days, pages 39-48, 72, 82).

Plaintiff employed defendants' attorneys to represent and protect its interests in the negotiations and closing of the contract (Vol. 1 of 6 days, pages 51-59, and 66; Vol 2 of 6 days, pages 3; Vol. 3 of 6 days pages 134, 139, 140-141; and Vol. 5 of 6 days, pages 133-134).

The contract provided for deferred payments of a portion of the purchase price, which payments were to be secured by the accounts receivable of United Fiberglass (Exhibit 11, paragraph 2.03; RT. Vol. 1 of 6 days, page 86-87).

The defendant attorneys failed to inform or advise the plaintiff or its agents of the need to file financing statements in order to perfect its security interests in the accounts receivable of United Fiberglass (OR. Exhibit 83; RT. Vol. 2 of 6 days, pages 12-15; Vol. 3 of 6 days, pages 161-162; and Vol. 4 of 6 days, pages 34-37, 75-76, and 79).

Defendant attorneys, knowing of the need to file financing statements, did not cause such statement to be filed covering the

accounts receivable of United Fiberglass (RT. Vol. 1 of 6 days, page 34; Vol. 3 of 6 days, pages 99-100, 156-165; and Vol. 4 of 6 days, pages 29-31, and 140).

The contract provided, further, at paragraph 6.03, that in the event of default by United Fiberglass, the plaintiff would have the right to retake possession of its equipment (OR. Exhibit 11, paragraph 6.03; and RT. Vol. 2 of 6 days, pages 4-8).

Although the evidence was in dispute whether Mr. Radman was informed that the plaintiff's right to take back the equipment was subject to the liens of Sovran Bank, the Court excluded testimony of R. Bailie which would have supported the plaintiff's contention that the plaintiff was not so informed (RT. Vol. 4 of 6 days, pages 32, 51, and Vol. 5 of 6 days, pages 63-64).

The only other evidence of whether the plaintiff was informed that its rights to take back the equipment under 6.03 were subject to the liens of Sovran Bank, was the self serving statements of Dwight Williams (RT. Vol. 4 of 6 days, pages 85-87, 101-105).

Further, the Court refused to allow Mr. Radman to testify regarding what could have been done to modify the agreement to protect the equipment had he known that the plaintiff's rights to retake possession were subject to the liens of the bank (RT. Vol. 3 of 6 days, pages 27-28).

During the period between September 1984 and February 1985, the accounts receivable of United Fiberglass which were not subject to a prior lien by Sovran Bank ranged between \$190,000.00

and \$240,000.00 (OR. Exhibits 116 and 117; RT. Vol. 5 of 6 days, pages 22-28 and 54).

In response to the special verdict, the Jury found that the defendant had a duty to perfect a security interest in the accounts receivable on behalf of the plaintiff; that the defendant breached that duty to the plaintiff; and that the plaintiff suffered damages in the sum of \$84,000.00 (RT. Vol. 6 of 6 days, page 79-82).

The Jury found, also, that the plaintiff was 50% negligent in the damages thus assessed (RT. Vol. 6 of 6 days, page 81).

Further, the Jury found that the defendant had a duty to advise the plaintiff that its rights under paragraph 6.03 of the contract were subject to the liens of Sovran Bank; and that the defendants had not breached that duty (RT. Vol. 6 of 6 days, page 81 and 82).

SUMMARY OF ARGUMENTS

The Jury should not have found the plaintiff 50% negligent with regard to the failure to file the financing statements over the accounts receivable of United Fiberglass. The Courts cited have consistently held that a client may not be contributorily negligent with regard to matters entrusted to their attorney, where there are not facts of interference or failure to follow instructions on behalf of the client.

The breach of duty in failing to file the financing statements was so clear that as a matter of law the attorney was negligent, and the plaintiff did nothing to interfere with or

contribute to the fact that the financing statements were not filed.

The defense did not put on any evidence to reduce or mitigate the damages alleged by the plaintiff. Those damages were measured by the level of accounts receivable during the period between September 1984 and February 1985. Having found that the defendants negligent for failing to file the financing statements, the Jury should have found that the evidence was uncontradicted that the plaintiff was entitled to damages in the sum of approximately \$200,000.00.

The trial court erred in excluding the statements of R. Bailie with regard to conversations with, and affidavits given to the plaintiff, qualifying his deposition testimony regarding the plaintiff's knowledge of its rights under 6.03. The strongest evidence in this regard in favor of the defendant was the testimony of Bailie and Williams. Because Bailie was a disinterested witness, his testimony was critical the plaintiff, and its exclusion was detrimental.

The trial court erred in excluding evidence of what the plaintiff could have done had it known the true import of 6.03. An essential element of the plaintiff cause of action was how it would have benefited had the attorney advised it properly. Since this element was excluded by the Court, the plaintiff was denied a full hearing on the merits and should be given a new trial in this regard.

ARGUMENT

I.

The Jury should not have found the plaintiff 50% negligent with regard to the failure to file financing statements over the accounts receivable of United Fiberglass.

Utah's Comparative Negligence statute, UCA 78-27-38, states as follows: "The fault of a person seeking recovery shall not bar recovery by that person. He may recover from any defendant or group of defendants whose fault exceeds his own. However no defendant is liable to any person seeking recovery for any amount in excess of the proportion of fault attributable to that defendant."

Where the defense rests on contributory negligence, the attorney has the burden of proving every element of such contributory negligence. Hansen v. Wightman, 538 P2d 1238; R. Mallen and V. Levit, Legal Malpractice 416, (2nd Ed. 1981).

The courts have usually refused to impose upon the client the duty of supervising the very subject matter of the retention. Legal Malpractice, Section 172, p. 222.

It has been held that the failure to observe statutory requirements in the preparation of a security document, the failure to record it in the proper county, the failure to record it at all, or the failure to inform the client of the necessity for recordation constitute acts of negligence sufficient to hold an attorney liable to his client, if the negligence can be proved and damages shown to be the result of such acts or omissions.

Theobald v. Byers, 13 Cal. Rptr. 864; 87 ALR 2nd 991.

Such omissions by the attorney have been found to be negligence as a matter of law. Practical Offset v. Davis, 404 N.E.2d 516; Degen v. Steinbeck, 142 N.E.2d 328; George v. Caton, 600 P2d 822; Kane, Kane & Kritzer v. Altager, 165 Cal. Rptr. 534.

In the Utah case, Acculog, Inc. v. Keith Peterson, 692 P2d 728, the Supreme Court discussed the elements of comparative negligence, and the Court stated: "The ultimate facts in a comparative negligence case embrace only negligence, causation and the percentages of negligence attributed to the plaintiff and defendant. (Citations omitted). A plaintiff cannot be held to be contributorily negligent unless his negligence is causally connected to the plaintiff's injury."

In Acculog the Court explains, a page 730, that: "We are not concerned in comparative negligence law with the cause of the damages, but with the cause of the injury instead.

"The term injury is sometimes used in the sense of damage, as including the type of harm or loss for which compensation is sought and has been defined as damage resulting from an unlawful act; but in strict legal significance, there is, properly speaking, a material distinction between the two terms, in that injury means something done against the right of the party, producing damage, whereas damage is the harm, detriment, or loss sustained by reason of the injury."

In that case, the Court determined that the cause of a truck fire was the injury and the loss to the truck and its contents

was the damage. And that, although the jury had found that the plaintiff was contributorily negligent, the Court set aside the verdict on the grounds that there was no evidence that the plaintiff had in any way caused the truck fire.

So it is in the case now before the Court. The plaintiff did nothing to prevent or hinder the attorney from filing the financing statements to perfect its secured interests in the accounts receivable of United Fiberglass. The evidence is uncontroverted that the attorneys were aware of the need to file the financing statements; that the plaintiff was not aware of such a need; that the plaintiff was relying upon the security for the payment of the deferred purchase price; that the attorneys did not advise the plaintiff of the need to file the statements; and that, in fact, no statements were ever filed.

Therefore, there being no evidence that the plaintiff was contributorily negligent in the failure to file the financing statements, the jury verdict in that regard should be set aside.

II.

The defense did not put on any evidence to reduce or mitigate the damages alleged by the plaintiff.

It is uncontradicted in the record that during the period between September 1984 and February 1985, while United fiberglass was in default, the accounts receivable over which the plaintiff's security would have applied was approximately \$190,000.00 to \$240,000.00.

It is evident from the disparity between the state of the

evidence and the finding of the jury that the jury's decision in assessing damages was prejudiced by its assessment of liability.

Therefore, the finding limiting the plaintiff to \$84,000.00 in damages should be set aside also.

III.

The trial court excluded the affidavit of R. Bailie and evidence of his conversations with the plaintiff after his deposition.

At trial the defense relied upon both the oral and deposition testimony of R. Bailie as evidence that the plaintiff knew that its rights under paragraph 6.03 were subject to the lien of Sovran Bank (RT. Vol. 5 of 6 days, pages 50-51 and 63-64).

Subsequent to the deposition and prior to trial, R. Bailie had given an affidavit to the plaintiff further explaining his testimony which supported the plaintiff's position that it did not know that its rights under 6.03 were subject to the liens of the bank. However, when the plaintiff attempted to introduce such testimony and affidavit the Court excluded it. This was error.

Rule 613, Utah Rules of Evidence, permits the use of such testimony and affidavits as long as the witness has the opportunity to explain or deny the statement and the opposing party has the opportunity to cross examine the witness.

Mr. Bailie was present at trial; he would have been able to explain or deny the statements; and he was subject to the

examination of the defense counsel. Therefore, his statements should have been admitted.

Rule 103, Utah Rules of Evidence, states in pertinent part that: "Error may not predicated upon a ruling which admits or excludes evidence unless a substantial right is affected, and

(1) ...

(2) Offer of Proof. In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer or was apparent from the context within which the question was asked."

The defense relied principally upon two witnesses for its defense that the plaintiff had notice of its rights under 6.03. One of those witnesses was Mr. Bailie and the other was Dwight Williams. Since Mr. Bailie was a disinterested witness, the exclusion of his testimony favorable to the plaintiff was prejudice, and the jury's finding that the plaintiff had been advised of his rights under 6.03 should be set aside.

IV.

An essential element of the plaintiff's case was its burden to show how it would have benefited had it known its rights under paragraph 6.03.

Where the error is an omission, the test of causation is: had the attorney performed the act, would the plaintiff have benefited. Dunn v. Mckay, Burton, McMurray & Thurman, 584 p2d. 894, 895 (Utah 1978); Legal Malpractice, Section 102.

During the course of the trial, when the plaintiff attempted

to show how the agreement could have been changed had it known that its rights under 6.03 were subject to the lien of Sovran Bank, the Court sustained the objection of the defense, thus precluding the plaintiff from a full and fair hearing on the merits of its claim.

The court's exclusion of evidence of what the plaintiff could have done had it known the true nature of its rights under paragraph 6.03 was prejudicial in that the plaintiff was precluded from presenting a full and complete case.

Therefore, the verdict in this regard should be set aside and the matter remanded for an new trial.

CONCLUSION

For the reasons stated herein, the jury verdict finding the plaintiff 50% negligent was not supported by the evidence and was improper as a matter of law and should be set aside and new trial ordered.

The jury's reduction of the damages from that shown by the evidence was arbitrary and capricious and should be set aside and a new trial ordered.

The Courts exlcusion of evidence regarding how the plaintiff would have modified the agreement had it known that its rights under paragraph 6.03 were subject to the liens of Sovran Bank was prejudicial error, and the verdict in that regard should be set aside and a new trial ordered on that issue.

Further, the Courts exlcusion of the testimony of the R. Bailie and his affidavit given to the plaintiff subsequent to his

deposition was prejudicial to the plaintiff's case entitling the plaintiff to an new trial.

Dated: July 5, 1988.

Respectfully Submitted,

Joseph R. Fox
Attorney for Plaintiff/Appellant