1981

Gail Billings, Et Al. v. Stanley T. Farley, Et Al. : Brief of Appellants Stanley T. And Ora Farley, Garn L. And Peggy Baum

Utah Supreme Court

SUPREME COURT OF UTAH

Gail Billings, et al., Plaintiffs and Respondents,	
v.	No. 17336
Stanley T. Farley, et al., Defendants and Appellants.	

BRIEF OF APPELLANTS STANLEY T. AND ORA FARLEY, GARN L. AND PEGGY BAUM

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APPEAL FROM JUDGMENT IN DISTRICT COURT OF UTAH COUNTY, STATE OF UTAH
HONORABLE GEORGE E. BALLIF, JUDGE

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Statement of Case

Plaintiffs in 1974 organized themselves together to complain about the settlement received from Defendants Garn L. Baum and his wife, and against Defendant Garm Baum's sister and brother-in-law for purchase made by Defendants of Plaintiffs' tart cherries. Plaintiffs claim they should have got more; Defendants respond by having declared that all Plaintiffs received the bargained-for price.

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Disposition in Lower Court

The Decree and Findings of Fact in this case were dated March 31, 1980. The Fourth Judicial District Court, George E. Ballif, Judge, found that Defendant-Appellants were liable to various of the Plaintiff-Respondents for 6½¢ per pound surcharge on the tart cherries they had delivered to Defendants Baum in 1973, plus interest from 1974. Motions to Amend and for a New Trial were timely filed and denied after a hearing September 12, 1980.

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Relief Sought on Appeal

Appellants petition this Court for a reversal of the Decree entered by Judge Ballif for the reason that no legal interpretation of the facts supports a Decree such as one being appealed herein.

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Statement of Facts

The Plaintiffs which remain, those who received judgment in this case, are fruit growers in Utah Valley. Defendant-Appellant Garn Baum was a processor or fruits operating in Provo, Utah. Over the years the Plaintiffs herein and scores of other growers sold their harvest of fruit to Defendants Baum.

In 1973, because of several bad crops, Defendant Garn Baum w in financial difficulty. Hearing of this difficulty, his brother-i Stan Farley put up his land as collateral to permit Mr. Baum to co operating his plant, and aided him in securing a bond and a licens

During most of 1973 a nationwide price-freeze had been impose the federal government in an early effort to lick inflation. Duri harvest season of 1973 such a price freeze was in operation and w lifted until September, 1973. Defendant Baum purchased the last o tart cherries which are the subject of this suit in July.

Defendant Baum had circulated a letter to growers informing t he was in business and would be purchasing tart cherries at 15¢ a or more if the price freeze was lifted.

Defendant Baum had one major competitor in Utah Valley which tart cherries, namely Muir-Roberts. Muir-Roberts is licensed to o as a "commission merchant" (5-1-2 (e) Utah Code Annotated). Defen Baum is licensed as a "dealer" (5-1-2 (g) Utah Code Annotated).

Defendant Baum purchased the cherries from Plaintiffs and had sold within July, 1973. Competitor Muir-Roberts purchased the che during the same harvest time but held them for sale, as his licens until after the price freeze had been lifted.

Although the Plaintiffs had been happy with the price of 15¢ which was almost double what they had received in the immediate pa when they heard Muir-Roberts was paying 21½¢ a pound, they tried t Defendant Baum to pay more. They even approached Defendant herein about joining them in a lawsuit against Baum for more money.

Through the offices of Plaintiffs Gillmans, and with the will help of competitor-processors (and attorneys herein) Dave McMullin Dallas H. Young, Jr. the remaining Plaintiffs, and other persons i

ad not asked to be included during the recruiting campaign of Plaintiffs ere named as Plaintiffs against Defendants in this suit.

Not incidentally, most of the Plaintiffs herein are Defendants in federal anti-trust suit which Defendants Baum filed in 1975 and which as dismissed in Federal District Court, but which dismissal is currently being reviewed by the Circuit Court of Appeals in Denver.

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ARGUMENT

Point 1

NO EVIDENCE OF A CONTRACT TO PAY 21½¢/lb. AMONG EACH PLAINTIFF AND DEFENDANTS (or their agents) HAS BEEN ESTABLISHED. EVIDENCE SUGG

The entire contract issue in this appeal may be encapsulated Judge Ballif's question during the trial which question appears i record on page 569, line 24 et seq., as follows:

> THE COURT: Mr. Black (former defense attorney), let me ask you this: What is the significance of Mr. Baum having sold prior to the lifting of the price freeze? Isn't that a bit imprudent, as far as business practice is concerned from the standpoint of the people who are depending upon him to mark their product?

The fact is, only Mr. Baum was concerned with the price of t product. He was representing no one. He had purchased the produ as he is required to do under the terms of his license. He is a processor/dealer defined in 5-1-2- U.C.A., subsection (6) as fol

> The term "dealer" means any person other than a commission m who for the purpose of resale obtains from the producer there possession or control of any farm products, except by payment to the producer at the time of obtaining such possession or of the full agreed purchase price . . .

Mr. Baum bought the fruit during the price freeze. All pers testified (except the aforementioned competitor-attorney Dave Mc agreed that the price freeze was on at the time in question. The letter to the growers (Plaintiff's Exhibit 2) told that the freez and that the price was frozen at 15¢. Many of the witnesses agre had heard the price freeze was on and defense witnesses agreed th heard the price quoted as 15¢. (See Evidence Summary at the com of this Point.

It has been established that the recruitment of growers int suit was underwritten by the Gillmans (Record at 480, lines 5-16 a.fra), and not even Plaintiffs who named had never given the

permission to be included in the suit and were subsequently dropped (Record at 481, lines 27-29) and that the whole suit was engineered by shrewd competitors in a cut-throat market.

Still, the lower court in its decision perpetuated its misunderstanding of the contract principles involved by awarding the Plaintiffs the amount they would have realized from their tart cherries if they had sold not to a dealer/processor but to a commission merchant.

A commission merchant is defined in 5-1-2 (e) U.C.A., as follows:

> The term "commission merchant" means any person who shall solicit from the producer thereof any farm product for sale on commission on behalf of such producer or who shall accept any farm product in trust from the producer thereof for the purpose of resale . . .

There is no legal justification for the Court's award in the absence of a contract between the parties and no evidence was before that court or this that such a contract was ever formed. The theory of the decision carries with it the effluvium of "detrimental reliance" though the reliance was based only on the expectations of those who relied and hidden motivations and not at all on any representations by Defendants Baum.

As Plaintiff Dean Gillman said in his deposition, page 22, he "had faith" he'd get more than 15¢ per pound.

As Mr. Black, Defendant Baums' attorney during trial said in his closing argument, pages 566 and 567 of the Record:

> It's like trying to compare two different things. Muir-Roberts (the commission merchant) is one thing and Baum (a dealer/processor) is another.
>
> " . . .(i)t boils down to a man that takes something on consignment. He is working on commission. He says, "I'll take your product. I'll process it. I'll sell it, then I will later account to you and you'll get a fair price." All right. Baum didn't operate that way. His was a fast operation, and for reasons of his own, he's entitled to do it. He chose to make a firm offer.

Proof that Mr. Baum had operated this way throughout the hi of his operation is clear. (e.g., testimony of Peggy Baum, Reco 473 et seq.) When the fruit market went bad in 1971, after he h promised growers 8¢/lb., he took the loss and paid the 8¢. In l he called in his bond to cover his bid price. If he had been a merchant he would have been entitled to force the growers to suf loss and to take his commission right off the top.

This writer does not wish to belabor this crucial point, bu misunderstood at the trial level and Defendants wish to be sure it is not misunderstood today.

What follows is an evidence summary from the Record which d exactly what the knowledge and expectations of the victorious Pl were:

MERRILL GAPPMAYER: "The only conversations that we had as to th price that I would be paid was that I would be paid what anybody was paid."[1] (Record at 352). He was paid 15¢/lb., which is what else, except Defendant herein Farley was paid, and he is awarde plus interest by the Court below. Gappmayer admitted he knew th was frozen when he sold his cherries (Record at 355, line 17 et s He had earlier tried to buy Baum out (Record at 352 lines 20-30).

1. Note that in Gappmayer's interrogatories he claims there no such contracts (Record at 364 lines 6-24) and that his reason for joining this lawsuit was because he was asked do so (Record at 364 lines 28-30 and page 365 lines 1-12).

PAUL HANSEN: Didn't receive letter (Exhibit 2) (Record at 380,8 Didn't know anything but that the price freeze was on. Paid by Roberts for the cherries he brought them in April, paid by Baum preceeding November in full,(although an advance upon delivery ha made.) (Record at 379 lines 20-28).

GAIL BILLINGS: Never had a price quoted (Record at 384 lines 1-

(Gail Billings, con't) "Not sophisticated" in business. (Record at 384 line 29). Felt he didn't get enough. (Record at 387 lines 22-30). Awarded a total judgment of $8,028.69. (Decree).

HARLEY GILLMAN: accustomed to Baum's price being close to other processor's payments (Record at 391 lines 20-26). No firm price quoted (Record at 392 lines 4-7). Didn't construe the letter which quoted 15¢/lb. as being firm price. (Record at 392 lines 15-20). Was paid an advance by Baums after picking and received settlement check in same calendar year (Record at 294 lines 16-32). Knew about price freeze (Record at 395 lines 22-26) but didn't know when it was lifted (Record at 395 lines 24-28). Says he didn't want to embarass Defendant Peggy Baum by asking price (Record at 396 lines 1-15). However Peggy Baum testified she did remember him asking and that she quoted 15¢/lb. to him as she did to other scores of growers. (Record at 476 lines 19-27).

MORRIS ERCANBRACK: Didn't receive Exhibit 2 letter. Didn't ask about price (Rec. at 399 lines 3-7). Went to Baums for processing because they were handy (Record at 399 lines 10-15). Joined lawsuit because recruited from list of 120 growers who sold to Defendant Baum (Record at 399 lines 21-29). Told 15¢/lb. by Defendant Baum (Rec. at 535 in passim.) Received advance from Baum and settlement in calendar year (Rec. at 400 lines 16-21 Never discussed price with Baums (Record at 401 lines 1-5). Joined suit to force Fantasy Fruit to "reconsider" price paid. (Rec. at 401 lines 9-12). Does not know whether either Defendant Baum or his competitor Muir-Roberts sold fruit before or after the price freeze (Record at 401 lines 25-28). No price representations made (Record at 401 lines 29-30 and 402 line 1). Received no award of judgment.

DEAN GILLMAN AND GILLMAN BROTHERS; Never received firm price quote previously (Record at 404 line 27-29; see also, Record at 410, lines 4-10)

(Gillman, con't) Was told it was a good year (Rec. at 404 lines
Testified he was told many times Baum would pay as well as Muir
(Rec. at 404 lines 11-22). Never received letter (Exhibit 2).
and partners may have received letter (Rec. at 407 lines 8-14).
his brothers and others, tried to get good deal to buy Baum out
fell through). Party Defendant in pending anti-trust suit (Reco
406 lines 21-30 and 407 line 1). Knew about price freeze (Record
407 lines 15-23). Paid later by Muir than by Baum (Record at 40
3-22) Awarded $10,079.35.

Point 2

THE PLAINTIFF'S ATTORNEY ASKED FOR AGENCY, THE JUDGE FOUND PARTNE
BUT NO EVIDENCE EXISTS FOR EITHER INTERPRETATION OF THE RELATION
BETWEEN DEFENDANTS GARN BAUM AND STAN FARLEY.

Defendant Garn Baum is Defendant Stan Farley's brother-in-l
Stan is married to Garn's sister. Defendant Farley is a Defend
only because he would not join Plaintiffs' recruitment drive ag
his brother-in-law. He was asked by other Plaintiffs to be a Pl
(Record at 425, lines 8-25), he refused, so Plaintiffs made him
Defendant. This is not surprising in this otherwise extraordin
because as has been mentioned earlier, Plaintiffs entered as Pl
persons who had no complaints against the Baums.

Stan Farley testified that he intervened when he heard his
in-law was in trouble because the Gillman Brothers, Plaintiffs h
subsequently defendants in the Baums' anti-trust action, were t
get his property. He purchased the property on behalf of the R
ord at 417 et seq.) Gillmans' attorney in his trial brief repre
that Baum was in fact an agent of his brother in law, which wou
that every mortgager, in his reasoning, is an agent of the mort

Despite the vociferous objections of Plaintiffs' attorney (Record at pp. 429-430) Stan Farley was able to testify to the exact nature of his relationship with his brother-in-law, as follows:

> MR FARLEY: We had a verbal agreement wherein the business would be turned over to the Baums, they would operate it. On my part I was given control of the checking account, this was so I could keep track of what was going on . . .

The Court recognized in its decision the position of the Farleys to the Baums in its Finding of Fact wherein it quoted the letter (Exhibit 2) which stated "Through the help of Ora and Stanley A. Farley, the processing plant will be operating this year." The letter also acknowledged that Farley owned the plant.

This financing arrangement the Court held to be a partnership.

In 1975 this Court declared, "A 'partnership' refers to a continuous business relationship or association which extends beyond a single transaction or venture and may include the innumerable transcations or ventures typical of an ongoing business." Koesling v. Basamakis 539 P.2d 1043. It is widely acknowledged that the existence of a partnership depends on the intent of the parties. See, e.g., Myers v. Rollette, 439 P.2d 497.

Clearly Defendant Farley had not intended to form a partnership with his brother-in-law and in fact had attempted to help his brother-in-law behind the scenes. Nor had Defendant Baum contemplated a partnership with Defendant Farley. What happened was one family member put up his property as security so another family member wouldn't be ruined financially.

What "profits" from the partnership did Defendant Farley share? Practically, none. Although it was a very good year for the Baums, all that Mr. Farley received from the business was a 2¢ premium on the tart cherries he brought to the Baum's plant. He thus received 17¢ a pound. The 17¢ payment figure per pound serves as oblique proof for the content-

ion that 15¢ was in fact the firm price offered to growers in Ut... Valley. (Record at 421. See also Record at 555).

Did Plaintiffs believe there was a partnership so as to ju... their making Farley a co-defendant? The question can best be ans... by reference to the opening paragraph of this section wherein Sta... quoted from the transcript as stating he was first asked by Plai... to be one of them.

Referring again to this Court's decision in Koesling v. Bas... "Defendant's receipt of share of profits from laundry and drycle... business did not give rise to the presumption of partnership in r... the finding that the payment constituted partial reimbursement fo... expended by Defendant in connection with the business premises."

The above cited case, incidentally, raised the point that th... of fact was able to believe whoever he wished when there was shar... agreement. A similar problem occurs here. In Finding of Fact #1... District Court Judge stated, (The Court) chooses to believe the ... of Plaintiffs and to disbelieve the testimony of Garn L. Baum and ... Baum on those issues where their testimony conflicts."

We are, of course, sorry for the judge's choice, but we are ... debating questions of fact herein: rather, question of law on whi... should be no disagreement.

As in Koesling, there was an explanation more reasonable in ... of all the facts why Stan Farley secured the license for the pre... plant than the torturedly process of assuming the existence of a ... ship. As Stan testified, "At the time (I applied) Garn Baum was ... bondable . . ."

Point 3

BOTH STATE and FEDERAL LAWS PRECLUDE ENFORCEMENT OF A 21...

Briefly, Defendants have demonstrated that their license required them to pay a fixed cash price. This is the law of the state of Utah.

Secondly, it is on the record that a price freeze has been establishe by the Federal Government and that all parties to this suit were aware of it. Further, it is of record that Garn Baum purchased and subsequently resold the fruit in question long before the price freeze, which set the price of tart cherries at 15¢/lb., was released. Further, that Muir-Roberts, whose price was held to be determinative by the trial court, had the option to hold the cherries, as a commission merchant, until the price was unfrozen.

If Garn Baum had purchased as Plaintiffs maintain he did --- offering cherry pie in the sky --- he would have been operating ultra vires his state license and would have been acting illegally in the context of the price freeze.

It is a maxim that the courts of the land cannot uphold illegal contracts. This is not to say that Mr. Baum actually did make such a contract: 115 of the 120 growers he purchased from in 1973 support the fact he offered and paid 15¢ a pound.

Point 4

CONCESSION ON THE ISSUE OF THE INTRODUCTION OF JOHN GILLMAN TESTIMONY.

When this attorney entered the various cases which embroil many of the major characters in the fruit industry in Utah Valley, he found that depositions and affidavits in one case related to depositions and affidavits in another.

Specifically, he found in an anti-trust case deposition a witness who reported on the activities of one of the Defendant Gillman brothers, John, formerly a high ranking official in the Utah State Dept. of Agri-

culture, since deceased.

In that deposition, Mr. Gillman is reported as ing very at the 15¢ per pound price he received for his tart cherries f Baum in 1973. This was before the price freeze lifted and befo Roberts unloaded its cherries at a higher price.

In his Motion for Amendment to Findings of Fact and Motion Trial, this attorney attempted to have this evidence introduced how spurious the claims being advanced by Defendants Gillman, at were and, because the Gillmans had underwritten the suit, how sp and fraudulent all the claims were. The Judge refused to admit new evidence in and Defendants made this part of their Complaint.

In re-reading the transcript of the trial, this writer has that John Gillman's appreciation of the price is already in evi specifically, in his testimony Garn Baum states, "I was real pro this price of fifteen cents (.15¢) because it was --- John Gill it was a fantastic price. He sold all of their cherries to us, did. So even up in the Department of Agriculture he had my lett letters were sent, the one that Dean said he didn't receive. Jo the letter where it said fifteen cents (.15¢). He said it was price, and we got all of his cherries. And he was afraid that w pay the fifteen cents (15¢)" (Record at 533, lines 5-13).

Based on the fact that the evidence is before this Court, longer argue that it is not admitted.

Point 5

MORE ON THE CONTEXT OF THE CASE.

Off the record, the evidence is substantial that compe the Utah fruit business is cut-throat. Lawrence Smith, Mr. Jim and Mr. John Fowers, and Kamel Kader testified to that. Mr. Pettingill testified too. Although he believes his testimony was (See reduced affidavit, page 13 herein.)

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IN THE SUPREME COURT OF UTAH

GAIL BILLINGS, et al., Plaintiffs/Appellees	AFFIDAVIT
vs.	Civil No. 41,479
STANLEY T. FARLEY, et al., Defendants/Appellants	S. Ct. No. 17336

COMES NOW REED PETTINGILL, under oath, to declare:

1. I was a witness and testified at the trial of the above captioned matter in Fourth District Court in Provo.

2. I have seen a transcript of the trial which I am told was recently transcribed.

3. Curiously, testimony which I clearly remember having given from the witness stand during the trial is absent from the transcript.

4. Specifically, I remember giving testimony which should appear within my testimony on page 163 of the transcript in which I was asked how much I had received from Muir-Roberts, a consignment buyer, for my pie cherries during the 1973 growing season. I testified that I had received 10¢ a pound. I also remember clearly after testifying to this that Mr. Young, who was attorney for Plaintiffs, jumped up and said, "Then those must have been culls." I was quite indignant and replied that this was the price Muir paid for my A grade fruit from my very best orchard.

5. None of this interchange appears in the transcript and I do not know why. I testified to it because it was true and execute this affidavit now for the reasons that are above enumerated.

Dated the 10 day of January, 1981.

Reed Pettingill
Reed Pettingill

State of Utah)
County of Salt Lake) ss.

Reed Pettingill did appear personally before me and did declare that the above statements are true and then did subscribe his name hereto this 12 day of January, 1981.

Robert Macri
Robert Macri, Notary Public
State of Utah MCE: 9/27/82

The reason Mr. Pettingill was brought to testify at this ... was to demonstrate that Muir-Roberts paid various amounts and t... because it was such a large concern, it had a dramatic ability t... manipulate competition. Thus, if as Mr. Pettingill says he tes... in trial, and as others have said they remember him saying, Muir-Roberts paid 10¢ a pound up in Willard in 1973, the whole questi... of value becomes an issue and the motives for Muir-Roberts payi... little bit more than Garn Baum was able by law to pay that year,

Further, it raises an issue why the trial judge chose to ig... this testimony and assign the then arbitrary 21.5¢ figure to the... contract.

Why this testimony did not appear in the transcript is a m... The tape is garbled at the point in question.

The motives and actions of the Gillmans are, presently being... igated in the anti-trust suit, along with Harley Gillman and Mel... pmayer.

Appellants herein have filed a suit against Harley Gillman f... interview he gave to an American Fork newspaper in 1980 accusing... Baum of arson.

Garn Baum was driven out of business in 1974, because of a ... against him, and his property worth several million was sold at ... for $500,000.

A suit against Plaintiffs' attorneys McMullin and Young was ... by Defendants Baum charging them with barratry, which charges w... missed as having been filed prematurely. Charges against the at... ed were also filed with the Utah State Bar because these attorn... included unwilling participants on the lawsuit. It should be ... that the aforementioned are competitive rocessors in Utah Va... gained much by the Baums's business demise.

Conclusion

There was no contract to pay Plaintiffs 21½¢ a pound; there was a strong contract that everyone but the Plaintiffs seemed to understand that during the price freeze, 15¢/lb. was a good price for tart cherries.

There was no partnership or even agency relationship between Defendants Baum and Farley. They were relatives who helped and were helped when times got hard.

The reason for this lawsuit, and its methods, are base and unworthy and the lower court Decree should be dissolved forthwith.

DATED THIS 12th day of February, 1981.

Robert Macri

Robert N. Macri, Esq.
Attorney for Defendants.

Table of Authorities

Cases

Statutes

Certificate of Mailing

I certify that on this 13th day of February, 1981 I caused to have mailed two copies of the foregoing Brief of Appellant to Dallas H. Young, Jr., Esq. and Dave McMullin, Esq., Attorneys at Law, at their address: IVIE AND YOUNG, 48 North University Avenue, P.O. Box 672, Provo, Utah 84601.

Robert Macfarlane