

1956

Milan D. Smith v. The Industrial Commission of Utah et al : Petition for Rehearing

Utah Supreme Court

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MILAN D. SMITH, for and on behalf
of KATHLEEN MAY SMITH and
MICHAEL JAY SMITH, minor
children of Roland B. Smith,
Deceased,

Plaintiff,

—vs.—

THE INDUSTRIAL COMMISSION
OF UTAH, SMITH CANNING
COMPANY, BOX ELDER PACK-
ING CORPORATION, SMITH
FROZEN FOODS, INC., and NA-
TIONAL SURETY COMPANY,

Defendants.

Clerk, Supreme Court, U. of U.

Petition For
Rehearing
Case No. 8455

REX W. HARDY

Attorney for Plaintiff

IN THE SUPREME COURT
of the
STATE OF UTAH

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TABLE OF CONTENTS

POINT I. THE PARTNERSHIP SMITH SALES COMPANY HAD NO AUTHORITY TO COMPLETE SALES, BUT COULD ONLY TAKE ORDERS WHICH HAD TO BE CONFIRMED BY THE CORPORATION WHOSE PRODUCTS WERE TO BE SOLD. IN THE CASE OF BOX ELDER PACKING CORPORATION AND SMITH FROZEN FOODS ORDERS HAD TO BE CONFIRMED BY THE DECEASED, RONALD B. SMITH, AND BY HIM ONLY. THEREFORE THE FINDING THAT HE WAS POWERLESS TO REPRESENT THE PRODUCTION CORPORATIONS IS A MATERIAL ERROR WHICH GOES TO MAIN ISSUE OF THE CASE.	1
POINT II. THE PARTNERSHIP, SMITH SALES COMPANY, WAS COVERED BY WORKMEN'S COMPENSATION, BUT THE DECEDENT WAS NOT COVERED UNDER THEIR POLICY, AND THE FINDING THAT THE PARTNERSHIP WAS NOT COVERED IS IN ERROR, AND ALTHOUGH THE ERROR IS NOT MATERIAL TO THE ISSUE THE FACT THE PARTNERSHIP WAS COVERED BUT THE DECEDENT WAS NOT, TENDS TO SHOW THAT THE PARTNERS THEMSELVES DID NOT CONSIDER THE DECEDENT AS THEIR REPRESENTATIVE.	4

POINT I.

THE PARTNERSHIP SMITH SALES COMPANY HAD NO AUTHORITY TO COMPLETE SALES, BUT COULD ONLY TAKE ORDERS WHICH HAD TO BE CONFIRMED BY THE CORPORATION WHOSE PRODUCTS WERE TO BE SOLD. IN THE CASE OF BOX ELDER PACKING CORPORATION AND SMITH FROZEN FOODS ORDERS HAD TO BE CONFIRMED BY THE DECEASED, RONALD B. SMITH, AND BY HIM ONLY. THEREFORE THE FINDING THAT HE WAS POWERLESS TO REPRESENT THE PRODUCTION CORPORATIONS IS A MATERIAL ERROR WHICH GOES TO MAIN ISSUE OF THE CASE.

With all due respect for this Honorable Court, I submit that the decision as heretofore handed down is based upon facts which are incorrect. On page 2 of the opinion we find the following language:

“If it be assumed that the \$200 which decreased drew as travel expense was for use on the trip being taken by himself and wife, it does not follow that he was representing the corporations. The corporations were not engaged in selling. The partnership was exclusive sales representative. *He was powerless to represent the production corporations in selling the surplus tomato crop, but he might properly represent the partnership.* It is not enough to show that Smith was an employee of the production corporations; it must further appear that he lost his life while in the course of his duties as such employee. *It was not his duty as representative of any corporation to remote sales; that was his duty as a general partner.*” (Emphasis added.)

The transcript clearly shows that the converse is actually true. Although the partnership was the exclu-

sive sales representative they had *no* authority to complete a sale but acted as brokers only and each sale had to be confirmed by the producing company before the sale was complete. At page 44 of the transcript, line 18, Mr. Smith states:

“Well, it does not buy and sell products, if that is what you mean. The service is rendered on a brokerage basis.”

And again at page 56, starting at line 26 where Mr. Christensen is continuing his cross examination of Mr. Smith we find the following:

“Q. And on this particular trip might sales be made for the products of the Oregon and Idaho companies as well as the Utah companies?”

“A. Might sales be made?”

“Q. Yes.

“A. No. That is sales as such could not be made *for any of the companies*.

“A. Well, let me put it this way. A contract might be made, but *a sale couldn't be made without being confirmed by the producing plant.*”

In the case of Box Elder Packing Corporation and Smith Frozen Foods, Inc., the deceased, Roland B. Smith, was the only man who had the authority to confirm sales and, therefore, when a sale was completed on this selling trip the deceased would *have* to be representing the corporations and not the partnership.

It appears that both the Commission and this Honorable Court is inclined to take lightly the check for \$200.00

which was introduced into evidence. As previously argued, I feel that this is the strongest possible proof as to whom the deceased was representing. Let's look at it, however, from another standpoint. If the deceased was representing the partnership, why wasn't the partnership paying his expenses? On page 65 of the transcript at line 1 where Mr. Smith was being examined by Mr. Christensen we find:

"Q. The expenses of Robins were paid by Smith Sales Company, weren't they?

"A. Yes.

"Q. Are you quite certain —

"A. Let me put it this way. Mr. Robins was given a check prior to his departure.

"Q. To cover his personal expenses?

"A. To cover his expenses.

"Q. And that check was drawn on the account of Smith Sales Company?

"A. That is right.

"Q. Are you quite certain that Mr. Smith did not also receive a check from Smith Sales Company?

"A. *I am.*

"Q. Did you write the checks?

"A. I do. I don't write them, no. I sign them."

To complete the picture and to remove all doubt on this question, on page 60 of the transcript at line 24 in

response to the question who was to pay the expenses of the deceased, Ronald B. Smith, the witnesses answered:

“A. His expenses were paid by Box Elder Packing Corporation.”

Roland B. Smith was the president and general manager of Box Elder Packing Corporation. As such he was vitally interested in the disposition of the company's products. The very welfare of his companies depended upon the movement of the products out of the warehouse. He and he alone had the authority to represent the corporation in confirming the sales of the products. *He was in fact listed on the report of wages made to the insurance company as an outside salesman*, although he was, of course, more than just an outside salesman, but was general manager, which included his duties as a salesman. (See pages 96 and 98 of transcript.) He was being paid by the corporations and his expenses were being paid by the corporations only, and on the other hand he was *not* being paid by the partnership, and the partnership did *not* pay his expenses. Therefore it is completely beyond my comprehension how it could ever be said that he was *not* representing the corporations at the time of death where all sales had to be confirmed by the producing company and in confirming and making sales he could only have been representing the corporations. This, of course, is the sole issue in this case, it being of no importance that he may also have been representing the partnership, which I still contend is not the fact. Every parcel of evidence introduced at the hearing clearly indicated that Bill Robins only was to represent that partnership and

that the deceased was to represent the companies over which he had complete control and the well-fair of which were of vital interest to him. He was not familiar with the operations of the partnership and had no authority to represent the partnership other than the authority imposed upon all general partners by law, which the record shows he never exercised. A serious error has been made, and if the ruling of the commission is allowed to stand in accordance with this decision, the minor children of the deceased will be deprived of what is lawfully theirs resulting in a gross miscarriage of justice.

POINT II.

THE PARTNERSHIP, SMITH SALES COMPANY, WAS COVERED BY WORKMEN'S COMPENSATION, BUT THE DECEDENT WAS NOT COVERED UNDER THEIR POLICY, AND THE FINDING THAT THE PARTNERSHIP WAS NOT COVERED IS IN ERROR, AND ALTHOUGH THE ERROR IS NOT MATERIAL TO THE ISSUE THE FACT THE PARTNERSHIP WAS COVERED BUT THE DECEDENT WAS NOT, TENDS TO SHOW THAT THE PARTNERS THEMSELVES DID NOT CONSIDER THE DECEDENT AS THEIR REPRESENTATIVE.

Another point which I feel should be mentioned is the finding in the second paragraph of the decision which states, "The partnership was not covered by the Workmen's Compensation Act;" The partnership, Smith Sales Company, was covered by the Act, and in fact compensation is being paid to the dependents of Bill Robins, an employee of the partnership who was killed in the same crash. Also it is my understanding that Victor Smith and

Milan Smith, both members of the partnership, were covered, but an election was not made as required by law on behalf of the deceased because he did not receive a salary from the partnership and the record clearly shows he had nothing to do with the operation of the partnership. This, of course, does not go to the merits of the case as does the error previously noted, but is mentioned in that it would tend to show that the members of the partnership did not consider the deceased to be a representative of the partnership.

CONCLUSION

The finding that the deceased was powerless to represent the production corporations in selling the surplus tomato crop is incorrect, but in fact the production corporations and they only had the authority to complete sales and the deceased alone had the authority to complete sales in their behalf. Even if we completely disregard the fact that this was a general business trip and that the decedent had other contacts to make on behalf of the corporation under his control, this was a selling trip and in making a sale, he would have to be representing the corporations and not the partnership. This error runs directly to the sole issue in the case and, therefore, I earnestly and sincerely request that this petition for rehearing be granted and that after said rehearing the matter be reconsidered.

Respectfully submitted,

REX W. HARDY

Attorney for Plaintiff