1983

Walker Bank & Trust v. Betty Jones : Brief of Respondent in Opposition to Appellants' Petition for Rehearing

Utah Supreme Court

Utah Legal Services, Inc; Attorneys for Appellants;
Roy Williams; Jones, Waldo, Holbrook & McDonough; Attorneys for Respondent

IN THE SUPREME COURT

OF THE STATE OF UTAH

WALKER BANK & TRUST, Plaintiff/Respondent, vs. BETTY JONES, Defendant/Appellant.	:	Case No. 18110
WALKER BANK & TRUST, Plaintiff/Respondent, vs. GLORIA HARLAN, Defendant/Appellant.	:	Case No. 18111

BRIEF OF RESPONDENT IN OPPOSITION TO APPELLANTS' PETITION FOR REHEARING

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NATURE OF THE CASE

This is an action to recover money for purchases made with credit cards issued by Respondent to Appellants. Appellants contend that their liability for the purchases is limited to $50.00 under 15 U.S.C. § 1643. Respondent contends that Appellants' liability is governed by contract. The two cases involve identical contracts and nearly identical facts.

DISPOSITION OF THE CASES

The District Court granted summary judgment to Plaintiff against each Defendant. This Court affirmed the decisions of the District Court in its opinion issued September 8, 1983.

RELIEF SOUGHT HEREIN

Respondent seeks denial of Appellants' Petition for Rehearing, dated September 28, 1983.

STATEMENT OF FACTS

The facts of these cases are set out in Respondent's original brief, and the majority opinion of this Court.

ARGUMENT

POINT I

THE AUTHORITIES CITED BY APPELLANTS HAVE BEEN THOROUGHLY PRESENTED TO AND REVIEWED BY THIS COURT, AND THUS THE PETITION FOR REHEARING SHOULD BE DENIED.

This court has stated the following rule for review of a petition for rehearing:

> The petition for rehearing states no new facts or grounds for a reversal of the judgment of the lower court. It is mainly a reargument of the case. We have repeatedly called attention to the fact that no rehearing will be granted where nothing new and important is offered for our consideration. We again say that we cannot grant a rehearing unless a strong showing therefor be made. A reargument, or an argument with the court upon the points of the decision, with no new light given, is not such a showing.

Ducheneau v. House, 4 U. 483, 11 P. 618 (1886); Jones v. House, 4 U. 484, 11 P. 619 (1886); Hansacker v. House, 4 U. 484, 11 P. 619 (1886).

Appellants' Brief in Support of Petition for Rehearing (hereinafter, "Appellants' Brief") places great emphasis on the Federal Trade Commission's analysis of the Truth-In-Lending Act In the Matter of Shell Oil Company 95 F.T.C. 357 (1980) (Appellants' Brief, p. 1-3). Yet the FTC rule and analysis were thoroughly discussed in the original Briefs filed in this

appeal, at oral argument, and in the dissenting opinion of Justice Durham. Appellants have also cited a few new authorities for other propositions, but they are generally mere reinforcements of authorities previously cited, or are items already brought to the Court's attention by Justice Durham's dissent (e.g. Standard Oil Co. v. State Neon Company, Inc., 171 S.E. 2d 777 (Ga. App. 1969), and Weistart, Consumer Protection in the Credit Card Industry: Federal Legislature Controls, 70 Mich. L. Rev. 1475 (1972), both cited by Justice Durham at page 7 of the slip opinion).

Appellants' Brief must be judged by the standard this Court set out in 1886. Appellants' Brief merely reargues the case and the authorities previously considered , shedding no new light. For that reason, Appellants have failed to meet the standard, and their Petition for Rehearing should be denied.

POINT II

THE FEDERAL TRADE COMMISSION IS NOT DELEGATED BY CONGRESS WITH ANY RESPONSIBILITY TO ENFORCE THE TRUTH-IN-LENDING ACT WITH RESPECT TO BANKS.

Enforcement of the Truth-In-Lending Act is delegated by Congress to at least nine Federal agencies. 15 U.S.C. § 1607 (a) and (c). At least three different agencies have the authority to apply the Act to banks (The Comptroller of the

Currency, the Federal Reserve Board, and the Board of Directors of the Federal Deposit Insurance Corporation). 15 U.S.C. § 1607(a)(1)(A)-(C). The Federal Trade Commission has no concurrent or other authority to apply the Truth-In-Lending Act to banks. 15 U.S.C. § 1607(c).

Thus the order of the FTC In the Matter of Shell Oil Co., 95 F.T.C. 357 (1980), must be viewed in the following light. More than three years after the Shell Oil proceeding, none of the other eight regulatory agencies have copied the F.T.C. approach. In particular, none of the three agencies which regulate banks have followed the Shell Oil ruling. This is all the more relevant, since at least the Federal Reserve Board staff was closely involved in the FTC's proceedings. (Appellants' Brief, Exhibit B, p. 2).

Thus despite Appellants' claims to the contrary, there is no directly applicable rule or regulatory interpretation which supports Appellants' position. There is therefore nothing to which this Court should "defer". Furthermore, the fact that no other agency has followed the F.T.C. approach in more than three years suggests it has been generally rejected by those to whom Appellants direct this Court to defer. For these reasons, Appellants' Petition for Rehearing is without merit and should be denied.

POINT III

APPELLANTS' POINT II IS IRRELEVANT.

In the cases at bar, the majority opinion has correctly noted that the credit card use at issue was not unauthorized use (Slip op. p. 4). In their Point II, Appellants contend that credit card issuers should bear the risk of loss for unauthorized use of credit cards. They already do. 15 U.S.C. § 1643. Respondent is therefore unable to see the relevance of this portion of Appellants' argument.

POINT IV

APPELLANTS' POINT III SHEDS NO LIGHT ON THE ISSUE OF APPARENT AUTHORITY.

To begin with, Appellants fail to note that the credit card involved in the Transamerica case was not an "accepted" card, and hence the parameters of liability for its use are completely different from the cases at bar. Transamerica Insurance Company v. Standard Oil Co., 325 N.W. 2d 210, 214 (N.D. 1982). The case is therefore much more on point with respect to stolen or lost cards, not cards in the present fact situation.

Furthermore, Appellants argue throughout their discussion of apparent authority on the assumption that they

acted reasonably. (Appellants' Brief, p. 4-5). There has been no such finding of fact. Rather, the uncontroverted facts apparently suggest at least one Appellant lied to Respondent in attempting to limit her liability for her husbands' charges (Harlan R. 34, 36, 37). In any event, this Court cannot make findings of fact regarding reasonableness in any context, let alone in the context of a Petition for Rehearing. Without such findings of reasonableness, Appellants' Third Point provides no basis for rehearing the issue of apparent authority. It is therefore without merit.

CONCLUSION

Appellants have attempted to reargue the same cases and theories already considered by the Court in reaching its decision. They have presented nothing new. Appellants have therefore failed to meet the standard required for the granting of a rehearing. Their petition should be denied.

DATED this 18th day of October, 1983.

JONES, WALDO, HOLBROOK & McDONOUGH

By: Roy A. Williams
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MAILING CERTIFICATE

I hereby certify that on the 18th day of October, 1983, I caused to be mailed, postage prepaid, two true and correct copies of the foregoing Brief of Respondent in Opposition to Appellants' Petition for Rehearing to:

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