

1982

Paul Christensen v. Weldon S. Abbott : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

PAUL CHRISTENSEN, :
Plaintiff-Respondent, :
vs. : Case No. 18115
WELDON S. ABBOTT, :
Defendant-Appellant. :

APPELLANT'S BRIEF

APPEAL FROM JUDGMENT
of the
FOURTH JUDICIAL DISTRICT COURT
DUCHESNE COUNTY, STATE OF UTAH

The Honorable Allen B. Sorensen, Judge

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Plaintiff-Respondent, :
vs. : Case No. 18115
WELDON S. ABBOTT, :
Defendant-Appellant. :

BRIEF OF APPELLANT

NATURE OF THE CASE

Plaintiff-Respondent Christensen sued to enforce payment of a \$111,000.00 promissory note executed by the Defendant Abbott and to recover \$37,200.00 for the feeding and care of 200 head of Angus cattle which had been purchased by Abbott from Christensen in connection with the joint ranching operation of the parties.

Respondent Abbott pleaded the affirmative defense of accord and satisfaction, in settlement of all accounts between the parties as to their joint ranching venture.

The matter was tried to the court and after a two-day trial the District Court held that the parties had entered into an accord and satisfaction on April 28, 1976, which was comprised of a written assignment and assumption

agreement and an oral agreement to cancel Abbott's \$111,000.00 note which fully settled the liabilities of the parties to each other.

The matter was thereafter appealed to this court and on May 11, 1979 this court rendered it's opinion which is reported in 595 Pacific 2d 900. The opinion affirmed the finding of the trial court as to accord and satisfaction. In the opinion however, this Court held that the trial court had failed to make a finding as to Christensen's claim for reimbursement of expenses of feeding Abbott's cattle and that there was nothing in the record showing a demand by Abbott after the date of settlement, for the return of his cattle which Christensen was feeding.

The matter was remanded for the limited purpose of a determination by the trial court regarding Christensen's claimed agistor's lien.

DISPOSITION IN THE LOWER COURT

The trial court found that there had been repeated demands by Abbott to Christensen for the return of the cattle following the April 28, 1976 settlement date. The court also found that "Defendant's 200 head of cattle were fed by the Plaintiff at his expense from April 28, 1976 to April 19, 1977". The court further found that the Plaintiff was entitled to judgment in the amount of \$122.53 per cow,

for the care and feeding of 200 cows together with interest at 6% per annum from and after April 19, 1977.

Based upon such findings and conclusion the court enter judgment in favor of the Plaintiff and against the Defendant in the amount of \$29,851.66, including interest.

RELIEF SOUGHT ON APPEAL

Appellant seeks a Judgment of this Court:

1. Reversing the judgment of the lower court awarding the Plaintiff judgment for the care and feeding of the Defendant's cattle.

2. In the alternative, a judgment that the court was in error in arriving at the amount of the judgment because:

a) The court did not use the correct number of cows to compute the judgment amount.

b) The cost figure used for the care and feeding is not correct.

In citing the transcript we shall refer to Tr I (the trial of May 1977) and Tr II (the trial of July 1980).

STATEMENT OF FACTS

This action arose out of a business relationship between the Plaintiff and the Defendant. There were two separate but related business transactions. On March 6, 1974 Abbott purchased from Christensen, 200 head of Black

Angus cattle. Abbott received a bill of sale (Exhibit P-14) and gave Christensen a promissory note for \$111,000.00 (Exhibit P-1).

In April 1974, Christensen and Abbott jointly purchased a property known as the Haslem Blue Mountain Ranch for a total price of \$703,500.00. Included in the sale of the real property were 250 head of red cattle. The initial payment was \$173,500.00 which at the request of the sellers was applied to payment in full for the cattle (Tr I-40). Of the down payment, Christensen furnished \$85,000.00 and Abbott furnished \$88,500.00. The balance of the purchase price was represented by a promissory note to the sellers jointly executed by Christensen and Abbott in the amount of \$529,500.00 payable over a ten year period in annual installments (Exhibit P-35). Following the closing of the sale the parties received a bill of sale for the Haslem cattle (Exhibit P-10) and Christensen gave Abbott a bill of sale for the same cattle (Exhibit P-11).

Both the Angus cattle and the Haslem cattle were placed on the Haslem ranch and the BLM range land under the operation and supervision of Christensen until April, 1976. The parties had agreed that they would each receive half of the calf crop (Tr I-158). In April, 1976, it became apparent to both parties that the ranching venture was a

failure. Payments on the Haslem note were delinquent and Haslems had brought suit to foreclose the mortgage (Tr I-161). The parties executed an assignment and assumption agreement (Exhibit P-4) which was prepared by the law partner of Christensen's attorney (Tr I-210). Following the execution of the assignment and assumption agreement, Abbott returned to Salt Lake City and met with the Haslem interests. By virtue of the assumption agreement, Abbott became liable for 2-1/1 years of payments in the amount of \$204,500.00 and also \$56,000.00 or past due interest and \$35,000.00 of current interest (Tr I-197-198).

In July, 1976, Christensen filed this action seeking to recover on the \$110,000.00 note and also claiming an agistor's lien on the 200 head of Black Angus cows for his expenses and services in feeding and caring for those cows both before and after the execution of the assignment and assumption agreement.

A two-day trial was held before Judge Allen Sorensen who signed Findings of Fact (R-41) and a judgment (R-43) holding that there was an accord and satisfaction between the parties which settled the division of the property and the debts of the business operation. The complaint for recovery on the \$111,000.00 note and for care of the Angus cattle was dismissed.

On appeal, this Court affirmed the trial court's finding of accord and satisfaction holding that the \$111,000.00 note was discharged (See 595 Pacific 2d 900). This Court also held in the opinion that no findings were made regarding the claimed agistor's lien and remanded the case for the limited purpose of a determination regarding the claimed lien for the period from April 28, 1976 to April 16, 1977.

Following a one-day trial, the court directed counsel to submit a review of the transcript of the previous trial to call attention to any testimony regarding demands for delivery of the cattle made by the Defendant Abbott. Pursuant to such direction, the court's attention was directed to five demands which appeared in the transcript of the original trial and four additional demands testified to by the Defendant in the later trial (R-103).

Following submission of memoranda by respective counsel, the court rendered a memorandum decision stating among other things:

"Plaintiff admits, and the record of the first trial is replete with evidence, that Defendant made numerous demands for possession of the livestock prior to April 28, 1976. Under the law of this case, Defendant was entitled to possession at least from and after that date, and Plaintiff's retaining possession thereafter was wrongful."

"The record at that hearing also shows that after April 28, 1976 Defendant made repeated demand of

Defendant (sic) for possession by telephone, personal confrontation, and by letter and the court so finds. See testimony of the Defendant and exhibits 40, 41 and 42." (R-97)

Based on the memorandum decision, the court entered findings of fact and conclusions of law (R-151) and a judgment (R-154). In the findings of fact the court found that demands were made both before and after April 28, 1976 for the return of the Defendant's cattle and that said cattle were fed by the Plaintiff from April 28, 1976 to April 19, 1977. The court further found that Plaintiff was entitled to judgment of \$122.53 per cow for 200 cows with interest at 6% per annum from and after April 19, 1977 until the day of judgment. Judgment was entered for the Plaintiff and against the Defendant in the principal amount of \$24,605.00, and interest of \$5,345.66 for a total of \$29,851.66.

ARGUMENT

Point I

PLAINTIFF IS NOT ENTITLED TO RECOVER FOR FEEDING AND CARE OF CATTLE WRONGFULLY RETAINED

To put the matter in proper prospective a brief review of the facts would be helpful. Abbott testified that the operating agreement of the parties was that Abbott was

to own the cattle and that Christensen was to take care of them for half of the calf crop (Tr I-158). Christensen's version of the operating agreement was that they would split the calf crop and the expenses and he would receive a wage for managing the ranch (Tr I-98). Christensen admitted that the calves were sold in 1974 and he received 1/2 of the proceeds of the sale (Tr I-100). He further admitted that the calf crop was sold in 1975 and he received his share, 1/2 (Tr I-104).

When we compare the Plaintiff's own testimony with the allegations of the complaint, it is clear that Plaintiff was being less than candid and truthful in the allegations of his pleadings. In paragraph three of the complaint it is alleged "the Defendant continued to exercise control and ownership over said cattle in that he did sell and realize the profits of the annual calf crops from said cattle for the years 1974, 1975..."(R-2)

In paragraph five of the complaint is an allegation that the Plaintiff had "at the request of the Defendant" fed and cared for 200 head of cattle and alleges the reasonable value thereof to be \$37,200.00 to July 4, 1976. It is further alleged that "the Plaintiff has demanded that the Defendant remove said cattle from Plaintiff's premises, but the Defendant has failed and refused to do so...."

The truth of the matter of course is shown by Plaintiff's testimony, that he and the Defendant mutually agreed that the Plaintiff would care for the cattle and that he was to be paid for such care, with one-half of the proceeds of sale of the calf crop. The only difference in the position of the parties in this regard is that Plaintiff maintains he was also to receive 1/2 of the expenses while the Defendant maintains that the Plaintiff was to pay all expenses.

With regard to the allegation that Plaintiff has "demanded that the Defendant remove said cattle" the Plaintiff's own testimony is most revealing. At page 107 of the transcript vol I:

Question: "Did you tell Dr. Abbott that you would deliver the cattle to him when he settle with you on the lien for the cattle?"

Answer: "That is right."

Question: "What did Dr. Abbott say?"

Answer: "He said he didn't owe me nothing and he wasn't going to pay nothing."

Thus the true facts appear by Plaintiff's own testimony, he was in effect holding for ransom the Black Angus cows belonging to the Defendant and demanding payment of items which the court found were not owing him.

Under these circumstances it is submitted that the equity principal of quantum merit should not be applied, as the Plaintiff comes into court with unclean hands. The doctrine of clean hands is variously described in 27 AM JUR 2d page 666 (Equity, para. 136) as:

"He who comes into equity must come with clean hands" and "He who has done inequity shall not have equity" or "That a litigant may be denied relief by a court of equity on the ground that his conduct has been inequitable, unfair and dishonest or fraudulent and deceitful as to the controversy in issue."

In *Jacobson vs. Jacobson* (1976) 557 Pacific 2d 156 this Court said:

"It is inherent in the nature and purpose of equity that it will grant relief only when fairness and good conscience so demand. Correlated to this is the precept that equity does not reward one who has engaged in fraud or deceit in the business under consideration but reserves its rewards for those who are themselves acting in fairness and good conscience, or as is sometimes said, to those who have come into court with clean hands."

See also *Carbon Canal Co. vs. Sanpete Water Users Association* (1967) 19 Utah 2d 6, 425 Pacific 2d 405 and *Coleman Co. Inc. vs. Southwest Field Irrigation Co.* (1978) 584 Pacific 2d 883 where the court observed:

"It is also to be noted that, having sought equity, it is incumbent upon Plaintiff to do equity."

Plaintiff complains that if he is not paid for the feeding and care of the Defendant's cattle the Defendant will be unjustly enriched at his expense. A similar position was taken by the Defendant in Pacific Metals Co. vs Tracy Collins Bank and Trust Co. (1968) 21 Utah 2d 400, 446 Pacific 2d 303 where the court said:

"We are not very much impressed with the equity of Tracy's position thus essayed: That even though it committed a wrong in cashing the check it was the responsibility of the drawee Bank of Salt Lake to promptly refuse to pay the check and warn Tracy so it could save itself from loss. It is a general principal that one who commits a wrong must take the consequences and cannot complain that someone else doesn't rescue him therefrom."

In this regard, it should be remembered that the Plaintiff admitted receiving 1/2 of the proceeds of the sale of the calf crop in October of 1975. It should also be noted that in December of the same year the Defendant demanded delivery of his cattle and sent someone to bring the cattle to his own land and Plaintiff refused to allow him to do so (Tr I-47 Tr I-56 Tr I-58). Also when the calves were sold on October 29 and 30 of 1975 Defendant asked that the cows be returned to him (Tr II-65). In addition a demand was made orally in December of 1975 when the Plaintiff took the cattle away (Tr II-65 Line 5).

Thus it appears that the Defendant made timely demand for return of his cattle and the Plaintiff whose

possession the court determined was wrongful (R-97) nevertheless continued to refuse peaceably to deliver the cattle but continued to hold them and to incur the necessary expense incident to their feeding and care.

POINT II

THE TRIAL COURT ERRED IN COMPUTING THE AMOUNT OF THE JUDGMENT

(A) THE WRONG NUMBER OF COWS WAS USED IN COMPUTING THE JUDGMENT.

In arriving at the amount of the judgment entered against the Defendant and in favor of the Plaintiff, the trial court adopted the testimony of Grant Bleazard that 15 pounds of hay per day was sufficient to feed a cow during the winter time. This same witness testified that during the winter in question he had purchased hay at \$45.00 a ton in the Duchesne area. In computing the total amount due, the court ignored the fact that from October 25, 1976 until April 19, 1977 there were 185 head of cows in the possession of the Plaintiff rather than 200 head (Tr-II 9-10). The computation adopted by the court appears at page 104 of the record and shows that the cost of feed, \$14,377.50 was based on having fed 200 cows for the entire seven months. It appears from the stipulation of the parties that there were 185 cows in the Plaintiff's possession from October 15, 1976 until April 19, 1977 a period of 5 3/4 months or 176 days. (Tr II 9-10)

This figure yields the following computation:

$$\begin{array}{r} 15 \text{ lbs.} \times 176 \text{ days} = 2,640 \times 185 \text{ cows} = 488,400 \\ 15 \text{ lbs.} \times 37 \text{ days} = 5,555 \times 200 \text{ cows} = \underline{111,000} \\ 599,400 \text{ lbs.} \\ 599,400 \div 2,000 = 299.7 \text{ tons} \times \$45 = \$13,486.50 \end{array}$$

The difference between the amount shown in the computations adopted by the court, \$14,377.50, and the above computation, \$13,486.50, is \$891.00. This amount seems small in comparison to other items involved in this matter and yet when several years interest is added even this amount becomes of consequence.

It should also be pointed out that in the original complaint filed herein, Plaintiff made a claim in the amount of \$37,200.00 as a reasonable reimbursement for having cared for the Defendant's cattle from March of 1974 to July 4, 1976, a period of two years, four months. We see that the Plaintiff's own allegation of the reasonable cost of the services he performed is by the following computation:

$$\begin{array}{l} \$37,200 \div 28 = \$1,328.57 \text{ per month} \\ \$1,328.57 \times 12 = \$15,942.84 \text{ (yearly cost)} \end{array}$$

The reason the one-year period is now used is that the lower court found at the first trial that the parties reached an accord and satisfaction on April 28, 1976 and this court affirmed such finding. Thus the only time period for which Plaintiff can recover is the time from the date of

the accord and satisfaction to April 19, 1977 when the cattle in question were no longer in the Plaintiff's possession. It is respectfully submitted that by the Plaintiff's own complaint he should not recover more than \$1,328.00 per month or a total of \$15,942.84 for the one-year period.

It should further be noted that while the original complaint in paragraph 5 (R-2) alleges that the Plaintiff is entitled to claim the value of his services from March 1974 to July 1976 for feeding and caring for Defendant's cattle, the Plaintiff's own testimony is that in accordance with the agreement of the parties he received the value of 1/2 of the calf crop for the years 1974 and 1975 (Tr I-100, 104). It becomes obvious from the complaint and the Plaintiff's own testimony that he was seeking to recover not once but twice.

(B) THE COURT USED INCORRECT COST FIGURES IN COMPUTING THE JUDGMENT.

At the time of the first trial, in May 1977, the Defendant had possession of the Angus cows. They were being fed by a sixteen year old boy who was paid \$2.50 an hour. (Tr I-196; 200) It thus appears from the record that the Defendant had a place to care for the cattle and had the means of doing so and in fact at the time of the first trial was caring for and feeding the cattle.

In computing the judgment the court included a figure of \$10 per feeding for 213 feedings or \$2,130 for labor.

It is respectfully submitted that at the very most, especially, in view of the Plaintiff's wrongful retention of the cattle, the court should have used the figure of \$2.50 an hour as testified to by the Defendant. The Defendant further testified that on an average the boy caring for the cattle takes about an hour and a half to feed them every day. For the cost per day the computation would be:

$$\$2.50 \times 1.50 \text{ hrs.} = \$3.75 \text{ per day}$$

Thus it appears that for the period of time in question, 213 days, the computation should have been:

$$\$3.75 \times 213 \text{ days} = \$798.75$$

It appears therefore that the court's computation of \$2,130.00 for feeding is excessive by \$1,331.25. Particularly is this true where the testimony adduced by the Plaintiff as to feeding costs necessarily included some factor for a profit from the labor performed. It is respectfully submitted that when the Plaintiff wrongfully retained the Defendant's cattle, to allow him to recover an amount for labor which would give him a profit would indeed

be unjust enrichment of the Plaintiff and at the same time unjust impoverishment of the Defendant.

It should be remembered that the record shows and the court found numerous demands were made for return of the cattle by letter, by telephone and by personal confrontation and notwithstanding these many demands and the accord and satisfaction which the parties had reached the Plaintiff wrongfully refused to return the Defendant's cattle to him (R-97). He now seeks the Court's aid in making a profit from his own wrongdoing.

CONCLUSION

The foremost issue before this Court is whether the Plaintiff may profit by his own wrong in retaining the cattle of the Defendant.

It is respectfully urged that where the inequitable or wrongful conduct of a party causes the damage complained of, the equitable doctrine of clean hands applies. Therefor the Court should leave the parties as it finds them and not lend the power of equity to reward one who is guilty of unfair or unjust conduct.

It is respectfully urged that the judgment of the trial court be reversed with the instruction to enter a

judgment against the Plaintiff and in favor of the Defendant, no cause of action.

Should this court determine that the Plaintiff is entitled to some award against the Defendant, the amount thereof should be limited to the sum of ^{\$15,942.84} \$37,200.00 which the Plaintiff himself alleged constituted adequate reimbursement.

In the alternative this Court should direct that the judgment be amended by deducting therefrom the sum of \$891.00 and the sum of \$1,331.25 or a total of \$2,222.25. The items thus deducted are the difference resulting from fewer cows being cared for and a lower feeding cost.

Respectfully Submitted


Wallace D. Hurd
Attorney for Appellant

MAILING CERTIFICATE

I hereby certify that I mailed two copies of the foregoing Brief of Appellant to George E. Mangan, Mangan & Gillespie, APC, P.O. Box 246, Roosevelt, Utah 84066 on this _____ day of April, 1982.