

1983

Paul Christensen v. Weldon S. Abbott : Brief in Support of Petition for Rehearing

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

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

BRIEF IN SUPPORT OF PETITION
FOR REHEARING

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BRIEF IN SUPPORT OF PETITION
FOR REHEARING

The Appellant respectfully submits the following brief in support of petition for rehearing filed herein. In referring to the transcripts, the record of the first trial will be designated TR I and the second trial TR II.

ARGUMENT

Point I

CHRISTENSEN WRONGFULLY RETAINED
ABBOTT'S CATTLE

Appellant, (hereafter Abbott), respectfully urges that neither the majority opinion nor the trial court gave due consideration to the record and the testimony of the parties regarding the demands made by him for the return of his cattle and the position taken by the Respondent, (hereinafter Christensen), with regard to those cattle.

It should be noted that the Black Angus cattle for whose feeding Christensen claims an agistor's lien belonged to Abbott (Exhibit P 14). Christensen had agreed that he would receive half of the calf crop for his care of and feeding of the calves (TR I-98). Christensen admitted that the calves from the Black Angus cows were sold in 1974 and he received one-half of the proceeds of sale (TR I-100). He also admitted that in 1975 the calf crop was sold and he received one-half of the proceeds of sale (TR I-104).

It is respectfully submitted that upon this state of the record, Christensen had been paid for feeding the cattle and Abbott was entitled as the owner to the possession thereof. In December 1975, Abbott demanded delivery of his cattle and sent someone to bring them to his own land. Plaintiff refused to allow him to do so (TR I-47, TR I-56, TR I-58), also when the calves were sold in 1975 Defendant asked that the cows be returned to him (TR II-65). Oral demand was made in December of 1975 when the plaintiff took the cattle away (TR II-65 line 5).

It is significant that the record contains no statement of the reason given by Christensen for refusing to deliver Abbott's cattle to him in the fall of 1975 following the sale of the calves. Christensen did not testify at the second trial. In the first trial he stated that on March

19, 1976, he first notified Abbott of his intention to claim a lien:

Question: "Did you tell Dr. Abbott that you would deliver the cattle to him when he settled 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." TR I-107

In addition to the foregoing demands, as noted in the dissenting opinion of Justice Howe, on the date the accord and satisfaction was signed, April 28, 1976, Abbott made further demand as appears in TR I-62 line 5:

"... and I looked at it, and, of course, read it through and saw that I was assigning them the Haslam cattle, which is fine, but I was getting the black ones which they didn't put in, and I said to Paul at that time 'now I will go ahead and sign this thing if you will simply go ahead and keep our oral agreement and let me have the black cows and tear up that note and no tricks.' And he said, 'fine.' So I signed it."

At the second trial, Abbott repeated his testimony as to demands made:

Question: "Were there oral demands."

Answer: "Yes."

Question: "When were those, if you know."

Answer: "Of course, the demands made at the time when they took the cattle away."

Question: "You are speaking now of December-"

Answer: "December of 1975 *** there were continuing multiple demands over the telephone both

from Salt Lake and when I was out here at my ranch. I would call and demand and ask if I could come and get them then. When the calves were sold on October 29 and 30, of 1976, I asked in person at that time that the cows be returned to me." (TR II-65)

Notwithstanding the refusal of Christensen to return the cows, Abbott continued to telephone him and demand delivery of the cows, having made phone calls April 27, 1976 (TR II-66 line 24), April 28, 1976, May 6, 1976, June 22, 1976, and July 30, 1976 (TR II-67 line 1). Abbott further testified "and in between those I was frequently out to my ranch which is only a mile from Paul Christensen's place and I called when I came out here to demand that they be returned" (TR II-67 line 2).

It should be noted that the very day the accord and satisfaction was signed, April 28, 1976, Abbott telephoned demanding delivery of his cows. A second demand was made approximately a week later with further demands up to the time suit was filed.

It is respectfully submitted that the record as the trial court found is "replete" with demands for return of Abbott's cattle and the finding by the trial court that "defendant was entitled to possession at least from and after that date (April 28, 1976) and plaintiff's retaining possession thereafter was wrongful." (Parenthetical

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expression added), was supported by ample evidence in the record.

It is respectfully submitted that the record is clear that Abbott was always entitled to possession of his cattle. Christensen had been paid for their care by receiving one-half of the proceeds of sale of the calf crop for two years, including the year 1975 in which Abbott first made demand for return of his cattle. This the trial court implied in the finding that Abbott was entitled to possession of the cattle "at least" from and after April 28, 1976.

The trial court found that the retention was wrongful and to permit Christensen to recover for his own wrong is unconscionable and contrary to the decisions of this and other courts.

Point II

CHRISTENSEN SHOULD NOT PROFIT FROM HIS WRONGFUL ACTS

Under the factual circumstance as revealed under Point I, the equity principal of quantum meruit should not be applied since Christensen comes into court with unclean hands. The doctrine of clean hands is described in various ways 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."

The doctrine that he who comes into equity must come with clean hands is described in 30 C.J.S. Equity paragraph 93 as being a:

"Cardinal maxim and the expression of the elementary and fundamental conception of equity jurisprudence. *** It means that equity refuses to lend its aid in any matter to one seeking its active interposition who has been guilty of unlawful or inequitable conduct in the matter with relation to which he seeks relief."

This Court expressly recognized the doctrine in Park vs. Jameson 12 Utah 2d 141, 364 P.2d 1, quoting from Walsh, Equity section 353 (1930):

"*** The doctrine that the plaintiff must come into equity 'with clean hands' *** turns on the principal of reserved power of equity to deny relief where under the special facts, justice demands that relief usually given in such cases be withheld."

We should also point out a further evidence of the conduct of Christensen as revealed by the complaint filed herein. Paragraph 5 (R 2) alleges that the plaintiff had "at the request of the defendant" fed and cared for two hundred head of cattle from March 1974 to July 4, 1976, the latter being the date the complaint was filed, and seeks recovery of \$37,200 for these services. This allegation was made despite the fact that Christensen had received one-half of the calf crop for the years 1974 and 1975. We suggest that this is most revealing as to Christensen's intentions and state of mind.

Christensen complains that if he is not paid for the care and feeding of Abbott's cattle, Abbott will be unjustly enriched. The answer to this contention is that he who does wrong, does so at his own peril. Or as stated in Pacific Metals Co. vs. Tracy Collins Bank and Trust Co. (1968) 21 Utah 2d 400, 446 P.2d 303:

"*** 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 a later case Battison vs. American Land Development Co. (1980) 607 P.2d 837, this court expressed the same principal in slightly different language saying: "A court of equity will not generally assist one in extricating himself from circumstances which he has created."

The principal there laid down has also been followed in Tuttle vs. Henderson (1981) 628 P.2d 1275, this court stating: "Furthermore, in any equitable proceeding, the fundamental rule is that he who seeks equity must do equity (*italics in original*)."

In the case of Jensen vs. Brown (1981) 639 P.2d 150, this court set out the standards of conduct which will be considered to determine whether a party is entitled to equitable relief stating that the court should consider whether the party has been engaged in fraud or deceit in the business under consideration; whether he comes into court

with clean hands; and whether the relief granted or sought to be granted is contrary to fairness and good conscience.

We again call the courts attention to the decisions in Jacobson vs. Jacobson (1976) 557 P.2d 156, wherein it was stated:

"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."

Also in Coleman Co., Inc. vs. Southwest Field Irrigation Co. (1978) 584 P.2d 883, this court stated: "It is also to be noted that, having sought equity, it is incumbent upon Plaintiff to do equity."

In discussing the maxims of equity, it is stated in 30 C.J.S. Equity paragraph 90 that:

"It is a maxim of courts of equity that he who seeks equity, must do equity." This maxim as has been variously stated in decisions dealing with it expresses a cardinal, elementary, and fundamental principle. It is one of the oldest, best settled and most familiar maxims in equity jurisprudence and has been considered the source of every doctrine and rule of equity jurisdiction. It lies at the heart of equity. It is a favorite maxim with the court of equity and has been called its first maxim and is of extensive application not being limited to any particular class of cases, but being applicable to all classes of cases whenever necessary to promote justice, and in every kind of litigation and to every species of remedy."

CONCLUSION

In conclusion and by way of summary, it is respectfully submitted that the evidence is clear and in fact the trial court found, that the retention by Christensen of Abbott's cattle "at least" from and after April 28, 1976, was wrongful. We suggest that the evidence clearly shows that the refusal to turn over possession of the cattle from and after the fall of 1975 when the calves were sold and proceeds divided equally between the parties was also wrongful.

Since the retention of the cattle was wrongful, under the equitable doctrines that he who comes into equity must have clean hands and he who asks equity must do equity, it would be unjust and inequitable to give Christensen a judgment for the care and feeding of these cattle. The plea by Christensen of unjust enrichment should arouse no sympathy for him since his own unlawful conduct placed him in the position that he finds himself today.

It is respectfully urged therefor, on the foregoing grounds, that the judgment of \$29,851.66 in Christensen's favor should be reversed.

RESPECTFULLY SUBMITTED.

By


Wallace D. Hurd
Attorney for Appellant

CERTIFICATE OF MAILING

This is to certify that on the _____ day of _____, 1983, two copies of the foregoing Brief in Support of Petition for Rehearing were mailed postage prepaid to George E. Mangan, P.O. Box 246, Roosevelt, Utah 84066.
