1957

Walker Bank & Trust Company v. Eugene R. Thorup and Ida Viola Thorup Layton : Reply Brief of Appellant

Utah Supreme Court

Elias Hansen; J. Grant Iverson; James M. Carlson; Attorneys for Appellant;

IN THE SUPREME COURT of the STATE of UTAH

WALKER BANK & TRUST COMPANY, a corporation,
Plaintiff and Respondent,

vs.

EUGENE R. THORUP,
Defendant and Appellant,

IDA VIOLA THORUP LAYTON,
Defendant.

Case No. 8691

REPLY BRIEF OF APPELLANT

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CASES CITED

TEXTBOOKS

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FURTHER STATEMENT OF FACTS

Respondent's attorneys attempt to improve on the facts of this case. But they do so by omitting testimony that is vital and controlling as to ultimate conclusions. The plaintiff's case depends exclusively on testimony of a so-called expert on hand-

writing, or an opinion of non-expert brother of appellant. What is the expert's opinion based on? It is on differences between endorsements on two exemplar checks of Utah Power & Light Company, and signatures on the two Deeds. The first rule of such comparison is that the signature on the exemplar checks must be actual and natural signature of the party, Mrs. Thorup. That was not proved and were admitted for comparison over defendant's objections that they were not properly identified for such purpose. (R. 63,R. 20, R. 53, R.66)

Who identified them? Louis Thorup, who obtained the checks from Nettie N. Thorup. He testified that the endorsements were obtained at night and that he helped her sign. A guided or helped movement is, of course, different from a free hand. Legally it may be her endorsements, just as an "x" might be, but it is not a signature to be used for comparison. May we quote the testimony in this regard:

On page 23 of the Transcript and Record 33 of Louis Thorup's testimony:

"Q. I believe in the direct examination at one time you said you witnessed and helped her, your mother, sign many papers?

"A. I have helped her.

"Q. Now by 'helped' what did you mean?

"A. I guided her hand, helped her, guided her hand. She couldn't see the line so I would have to help her.

"Q. Many times?

"A. Many times.

"Q. Now how many times would you have to do that?

"A. Well I would say 90% of the time I would have to help her."

On page Transcript 20 and Record 30:

"Q. You say without her glasses her vision was very, very small?

"A. Very small."

On page Transcript 16, Record 26, Louis Thorup testified:

"Q. Did or did not your mother write a 'T' with a broken back on the top, or non combined top 't' that would extend it right beyond the bottom part of the 'T'?

"A. O, she has written them both ways.

"Q. And it just happens that the ones you have here does not have the top part of it extended to the right?

"A. Yes, It happens that she wrote them—

"Q. Both ways?

"A. Both ways.

On page Transcript 20, Record 30:

"Q. Now were those signatures you are familiar with and were signed at night?

"A. Yes.

"Q. After dark?

"A. Well yes — That is because that is about the only time I would see mother.

Louis Thorup again testified, Transcript 14, Record 24:

"Q. Mr. Thorup, your mother had told you on several occasions that she was deeding the home and the property next door to Eugene and Ida, didn't she?

"A. That was talked about, yes.

"Q. Now these checks that you have shown and receipts, they were signed right after, shortly after your father's death, were they not?

"A. Yes, sir.

"Q. And she at that time was pretty much upset, was she not?

"A. Yes, sir."

Louis H. Thorup also testified as follows: (T.17, R. 27)

"Q. For years there had been talk of what your mother planned on doing with these two properties involved in this lawsuit, wasn't there?

"A. Well yes. I will say that my sister was supposed to get the home that she has deeded to her, but, of course, the other deal was never consumated or came to a head, to my knowledge."

Merle Hinds, a neighbor, testified to a conversation with Mrs. Nettie N. Thorup in 1951: (On cross examination, R. 44)

"A. She said, 'I have given this home to Genie.' Now that is the words.

"Q. And not that 'I am giving this home'?

"A. No. I don't recall any such thing as 'giving.'

"Q. All right, that is all."

Mr. Beattie (attorney) (R. 50):

"Q. You do represent Mr. Louis Thorup?

"A. I so represented to the court and I so stand on my representation.

"Q. And you represent him at the present time.

"A. Yes, sir.

"Q. And your objection was made for his protection and not as an interest in the occurence of this trial?

"A. That's correct.

(NOTE: Mr. Goddard evidently had not seen many of the documents at 12 noon on the day of trial. But he had picked out two endorsements and had them photographed to use as grounds for his conclusion. He evidently made the choice of exhibits before he saw many of the exhibits. See R. 51, T.41)

Admission — plaintiff's attorneys admit delivery of the deed to Ida Viola Thorup Layton. (R. 97) That is, he admits the Warranty Deed, (Ex. 2), was delivered to grantee, Mrs. Layton.

Now with the foregoing testimony omitted by Respondent we contend that Point III of Respondent's Brief is entirely refuted. The exhibits used

as a basis of comparison, (1) were not the free hand writing of Nettiee N. Thorup. They, by all the evidence of identification, were written by Louis H. Thorup's guiding hand. And some were written one way and others another way. As many exhibits contradict the particularities relied on by Goddard than uphold Goddard's distinctions. To establish a writing as exemplar it must be proved to be the free hand of the author. Plaintiff's own testimony proved otherwise.

The facts of actual execution of the two Deeds, Exs. 1 and 2, were proved by two witnesses present and corroborated by a neighbor and by admission of plaintiff's witness, Louis H. Thorup, that he and Mrs. Thorup had talked about the deeds. If she executed none, there would be none to talk about, and if the Layton Deed, declared a forgery by Goddard on the same ground as the Eugene Thorup Deed, were delivered by Mrs. Thorup, it is absurd to conclude it to be a forged deed. Certainly, she would not deliver a fraudulent or forged deed. And an examination of the only checks cashed by Louis Thorup that were also endorsed by him, show the signature of Mrs. Thorup is very near the same as on Exhibits 1 and 2. Also, Exhibit 11 shows Louis Thorup's 'T', the united 'T' corroborating his testimony as to helping her in signing. And it is interesting that of the twelve endorsements of

Mrs. Thorup on checks in Exhibit A, not one of them has an 'r' as in Exhibits 7A and 8A, the ones used as exemplars by Goddard, but are the same as on the deeds. Also, as to Mr. Goddard's testimony, he had picked the two endorsements or had them picked for him to photograph as 7A and 8A, 9A and 10A, before seeing all other exhibits. Why? Because Counsel asked for a recess so he could examine the others. (R. 51, T. 41)

From the foregoing evidence it seems clear that the testimony of Goddard is based on false or incomplete evidence, and, therefore, of no effect. His reasons for his conclusion were given and based on the two enlarged endorsements, and nowhere on other signatures. Nor did he consider testimony as to guiding Mrs. Thorup's hand, or the signing in different ways. (R. 26)

Exhibit A of twelve checks were admitted and examined by the Court as part of the Motion for a New Trial.

As to Point IV of Respondent's Brief, let us say in response to the statements of Counsel about the affidavit of bias, they are astounding. We think the affidavit proved extreme bias and a violation of our Rules of Ethics by the Court. Counsel writes that the Motion is frivolous. Yes, the affidavit on bias recites the conclusion is based on information and belief. But the facts upon which the belief is

based are not disputed, nor are they disputable. Those facts are a matter of public record or in public print. It is almost inconceivable that under the law, especially *Rule* 63(*b*) the Judge should say the facts recited show no bias on his part, and under the Rule he is not authorized to judge himself. Respondent's Counsel say *Rule* 63(*b*) does not apply to Motions for New Trial. The language is that it applies to any 'action or proceeding'. Certainly the making of and hearing and decision on a Motion is a legal 'proceeding'. Dictionaries define in law 'proceeding' thus:

> "Any action at law or equity instituted in court: (1) As a judicial proceeding (2) and of the various steps taken in a cause by either party."

Likewise, Judge Van Cott had no right to refuse to refer the affidavit of bias to another Judge for the Rule provides:

> "If the judge against whom the affidavit is directed questions the sufficieny of the affidavit, he shall enter an order directing that a copy thereof be forthwith certified to another judge . . . "

As to Point 1 of Respondent's Brief:

In cases cited the acts of invalidity were specifically alleged as a basis of proof and the question was not raised. In the case of *Burnham* v. *Eschler*, 116 Utah 61, 208 P. (2d) 96, defendant's questioned deed was upheld. And in the case of *Bertoch*

v. *Gailey*, 116 Utah 101, 208 P. (2d) 253, the issue of nondelivery was joined in the pleadings.

As to the case of *Gibson* v. *McMurrin*, 37 Utah 158, the Court only holds that in the absence of proof to the contrary one proved to be title owner is presumed to be in possession. But in the case at bar pleadings and proof show defendant-appellant in actual possession under claim of title.

There is a Utah case in point on pleadings: *Rawson* v. *Hardy*, 39 P. (2d) 755 at 758:

> " ' Fraud, when relied upon as a defense, must be specifically pleaded in an answer, as well as in a complaint; the facts and circumstances relief upon should be set out, in order that the court may know whether there was such fraud as will be of avail to the pleader, and also that the party charged with fraud may know the nature of the charge, and be prepared to meet it.' Wilson v. Sullivan, 17 Utah 341, 53 P. 994, 996; Muldoon v. Brown, 21 Utah 121, 59 P. 720."

We contend that the whole judgment should be set aside as to both defendants. The judgment against both defendants is based on the same insufficient evidence and involves ~~the~~ and concerns exactly the same people.

See: 9 *Code Practice and Remedies*, pp. 9724-5:

> "A reversal of a judgment as to parties appealing will not operate as a reversal as to parties not appealing, *where their* rights are separated and are *not equally affected by the same judgment.* But a judgment will be re-

versed in toto where a reversal in favor of the appellant may result in a miscarriage of justice." (*Italics ours*)

9 *Bancroft, Sec.* 7404, p. 9735:

> "Ordinarily a reversal of part of a judgment affects only the part appealed from; but there are cases where the part appealed from may be interwoven and connected with the remainder, or so dependent thereon, that the reversal should extend to the entire judgment."

See Note 4.

Respectfully submitted,
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