

1957

Lester A. Jones dba Engine & Air Service v. O. C. Allen dba O. C. Allen Co. : Brief of Plaintiff and Respondent

Utah Supreme Court

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Case No. 8709

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IN THE SUPREME COURT
of the
STATE OF UTAH

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OCT 25 1957

LESTER A. JONES, d/b/a ENGINE
& AIR SERVICE,

Plaintiff and Respondent,

—vs.—

O. C. ALLEN, d/b/a O. C. ALLEN
COMPANY,

Defendant and Appellant.

Clerk, Supreme Court, Utah

BRIEF OF PLAINTIFF AND RESPONDENT

KING AND HUGHES

By Dwight L. King

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IN THE SUPREME COURT of the STATE OF UTAH

LESTER A. JONES, d/b/a ENGINE
& AIR SERVICE,

Plaintiff and Respondent,

—vs.—

O. C. ALLEN, d/b/a O. C. ALLEN
COMPANY,

Defendant and Appellant.

Case No. 8709

BRIEF OF PLAINTIFF AND RESPONDENT

PRELIMINARY STATEMENT

Plaintiff and respondent, Lester A. Jones, is unable to accept as fair, accurate and complete the statement of facts set forth in the brief of the defendant and appellant and will therefore restate said facts as plaintiff and respondent views the same.

Throughout this brief the parties will be referred to as in the Trial Court; plaintiff and respondent being referred to as plaintiff; defendant and appellant as defendant. All italics are ours.

STATEMENT OF FACTS

The appeal of defendant is from judgment of the Trial Court which was entered after the jury had returned a special verdict. The special verdict contained six groups of propositions. Based on the special verdict a judgment was entered in plaintiffs favor and against defendant.

Group one presented to the jury the following two propositions:

“Proposition (a) The defendant sold to plaintiff two barrels of oil other than 200 Kendall SAE 140.

“Proposition (b) The oil sold to plaintiff in 1955 was 200 Kendall SAE 140.”

The jury answered the proposition (a) in the affirmative.

There is no dispute that the defendant intended to deliver Kendall 200 SAE 140 gear lubricant. The exhibits 9 and 10 show the intended order and the representations by the O. C. Allen Company concerning what was being delivered.

There does not seem to be any serious disputes but what all parties to the two sales, one on the 6th of November, 1955 and the other one on the 14th of December, 1955, intended the oil sold and received to be 200 Kendall SAE 140 oil.

The evidence concerning the kind of oil which was actually delivered by defendant to plaintiff is disputed but evidence was presented which is of a substantial nature and which directly supports the jury's answer to proposition (a). Mr. George Petty was sworn and testified as an expert and tested a part of the oil delivered to plaintiff. His testimony is that the oil delivered was the equivalent of SAE 40 rather than 140. In addition to the evidence of Petty Exhibit 11 shows that the test done on the oil by Kendall Refining Company at the request of the defendant revealed that the sample sent was not representative of 200 Kendall SAE 140 oil. See Exhibit 11 and (R. 15).

Group two of the interrogatories submitted two propositions to the jury to determine. The propositions were as follows:

“Proposition (a) The plaintiff used the said oil in the two trucks referred to as R 190 and R 191 in reliance on the representation of the defendant that it was 200 Kendall SAE 140.

“Proposition (b) The plaintiff used the said oil in the said trucks without reliance on the defendant's representations that it was 200 Kendall SAE 140.”

The jury answered the proposition (a) in the affirmative.

In addition to the representations appearing on the oil barrel itself and those made by the delivery tickets, at the time the oil was delivered the driver of the defendant's oil delivery truck specifically represented that this was 200 Kendall SAE 140 oil, (R 40).

Group 3 of the interrogatories presented two propositions which read as follows :

“Proposition (a) The use of said oil caused damage to the said trucks.

“Proposition (b) The said oil did not cause any damage to the said truck.”

Again the jury answered the proposition (a) in the affirmative.

The evidence concerning the damage to the truck indicated that the first two trucks in which the oil furnished by defendant was used were placed on the job; that both of said trucks were damaged. As soon as damage was discovered the other trucks in which the oil was used were brought in immediately and a new supply of oil placed in said truck. In addition to the evidence showing the damage to the trucks the plaintiff testifying as an expert and experienced repair man described the kind of damage as damage resulting from failure of the lubricant which had been placed in the gear mechanisms of the trucks (R. 48-49).

Group 4 of the special verdict presented two propositions for the jury to consider. They read as follows:

“Proposition (a) Under all of the conditions surrounding the sale and purchase of the said oil, an ordinary, prudent truck repairman would not have relied on the said oil as being 200 Kendall SAE 140.

“Proposition (b) Under all of the conditions surrounding the sale and purchase of the said oil, an ordinary prudent truck repairman would have relied on the said oil as being 200 Kendall SAE 140.”

The jury answered group 4 propositions as proposition (b) in the affirmative.

The pleadings in the case show that the defendant denied that the oil delivered was not Kendall 200 SAE 140 gear lubricant. The answer further denied that the plaintiff relied upon the warranties and representations by defendant that the oil delivered was Kendall 200 SAE 140. No amendment to the answer was ever made but at the time of the request for instructions submitted by the defendant he requested an instruction numbered No. 3 shown on page 151 of the record. It requested the Court to instruct the jury that if the plaintiff examined the oil or lubricant delivered to him and from such examination he determined or should have determined that the oil or lubricant was not the type that he had ordered then there is no implied warranty and a verdict should be in favor of defendant and against plaintiff for no cause of action.

At no place in the pleadings or in the instructions did the defendant squarely present the defense that plaintiff was contributorily negligent and that an ordinary, prudent truck repairman would not have relied upon the representations of the defendant that the oil delivered was 200 Kendall SAE 140. The Court however submitted the question to the jury and on the proposition the jury

answered that a prudent truck repairman would have relied upon it being the kind of oil that it was represented to be on the barrel and by the invoices and delivery slips.

Group 5 of the special verdict contained two propositions which read as follows:

“Proposition (a) The said damage to the trucks would have occurred with the use of 200 Kendall SAE 140 oil.

“Proposition (b) The said damage would not have occurred to the said trucks with the use of 200 Kendall SAE 140 oil.”

The jury answered the proposition that the damage that occurred to the trucks would not have occurred had the oil furnished by defendant been 200 Kendall SAE 140 oil. The evidence supporting this finding was the expert testimony of the plaintiff and a number of pamphlets both supplied by plaintiff and supplied by the defendant. Exhibit 8 was a chemical lubrication manual put out by Kendall Refining Company, one of the exhibits furnished by defendant. Exhibit 11 likewise was information furnished by Kendall Refining Company. It was a report to defendant showing the results of a test which the Kendall Refining Company conducted on a sample of the oil furnished to it by defendant. The oil came from the rear end of the trucks which were lubricated by plaintiff.

The matter was considerably disputed. The evidence would support a finding on the plaintiff's testimony

alone that the Kendall 200 SAE 140 oil was an oil which would satisfactorily lubricate the kind of truck rear ends into which it was placed.

The last group of the special verdict submitted to the jury was on the amount of damages suffered and apparently defendant has no objection to the amount of the verdict or the manner of said question being submitted to the jury.

The testimony of plaintiff revealed that over a long period of time he had purchased from defendant Kendall 200 SAE 140 gear lubricant and that on prior occasions he had requested the oil to be delivered in 100 pound cans. That on occasion in the past the oil had been placed in said cans by defendant out of larger barrels which he had at his place of business.

The oil can itself was an exhibit before the jury. It was carefully examined and viewed by all of the parties, the Court and the jury.

There was no seal on the can. Defendant would lead the Court to believe that the can was a sealed container. Not so. It was an ordinary type can with a crimped edge, the crimps around the edge being of the kind which could be opened with a pair of pliers and closed in the same manner. There was no other kind of seal which could not be removed and replaced by any person who had the occasion to do so without leaving any sign of his activity.

Contrary to the statement contained in defendant's brief, defendant testified that he could not say who had handled the barrel of oil while it was in his possession or how long it had been there. (R. 133 and 134)

The record also reveals that the defendant was in the business of reprocessing oil, re-refining oil and that he acts as a wholesaler of such oil. (R. 127)

Defendant would not deny that at his place of business he had on occasion filled these kind of cans which had been delivered to plaintiff and represented to contain Kendall 200 SAE 140 gear lubricant. (R. 128)

A sample of the oil which was in the rear end of the trucks repaired by plaintiff was furnished by plaintiff to defendant. Defendant then submitted the sample oil to the Kendall Refining Company. A report on the submitted oil was made to defendant and became Exhibit 11. The report as far as material to the present appeal states as follows:

"This is in follow-up of Mr. Osborne's letter to you of February 10. We received the sample of gear lubricant, taken from one of the Eaton, model 28M, dual, double reduction rear axle assemblies from an unit owned and operated by The Air & Engine Service Company.

"Our laboratory report, number 56156, found the gear lube sample to be an SAE 90 EP Gear Lubricant with a viscosity index of only 89.6. In other words, the sample submitted to us was not representative of Kendall No. 200 Gear Lube, which had been reported as having been used in the above mentioned rear axle."

Exhibit 12 is a copy of the letter forwarded by defendant to Kendall Refining Company requesting a testing of the sample of lubricant submitted to Kendall.

At the time of trial defendant did not disavow the letter. It was identified by defendant and was submitted for the jury's consideration.

SUMMARY OF ARGUMENT

POINT I

THE COURT'S INSTRUCTIONS PROPERLY PLACED THE BURDEN OF PROVING CONTRIBUTORY NEGLIGENCE UPON DEFENDANT.

POINT II

THE COURT PROPERLY INSTRUCTED THE JURY CONCERNING THE WARRANTY OF MERCHANTABILITY.

POINT III

EXHIBIT NO. 11 WAS PROPERLY ADMITTED AND IS SUBSTANTIAL EVIDENCE WHICH COULD BE CONSIDERED BY THE JURY.

ARGUMENT

POINT I

THE COURT'S INSTRUCTIONS PROPERLY PLACED THE BURDEN OF PROVING CONTRIBUTORY NEGLIGENCE UPON DEFENDANT.

The Court in Instruction No. 2 placed upon plaintiff the burden of proving the truth of the propositions letter

(a) in groups 1, 2 and 3 of the special verdict. It required plaintiff to prove, first, that the defendant sold to plaintiff oil which was not 200 Kendall SAE 140. Second, that the plaintiff used the oil furnished in reliance on the representations of defendant that it was 200 Kendall SAE 140. Third, that the oil was the cause of damage to the trucks in which it was used.

These three propositions are the basic and fundamental issues of plaintiff's cause of action. The Court, by instruction No. 2, required defendant to prove the affirmative propositions lettered (a) groups 4 and 5. These propositions required that he prove that under the conditions of sale and purchase of the oil an ordinarily prudent truck repairman would not have relied on the oil as being 200 Kendall SAE 140. This defense would be a defense of contributory negligence. It would seem clear that the burden of proving contributory negligence as in all case of tort liability, would be upon the defendant. If an ordinarily prudent truck repairman would not have relied upon the representations and warranty then plaintiff would have been negligent.

Proposition 5 was that the damage to the trucks would have occurred even had the oil used been 200 Kendall SAE 140 oil. The burden of proving this proposition was likewise placed upon the defendant.

The argument of defendant as contained on pages 9, 10, 11 and 12 of his brief seem to go to a basic factual proposition. He argues that reliance must be established

by evidence. With this plaintiff has no argument. The Court placed the burden of proving reliance on plaintiff, and the burden of showing unreasonableness of such reliance on defendant. The evidence is substantial. The arguments are resolved by the jury rendering its verdict upon the preponderance of the evidence as it viewed it. Witness Petty, an expert on testing of oil stated he could not, by looking at the oil tell its SAE equivalent. (R. 20)

The defense is that no reasonably prudent person would have believed that the oil furnished was No. 200 Kendall SAE 140 oil. That plaintiff, in relying upon the representation that it was such oil was acting as an unreasonable person. Defendant did not plead contributory negligence. He denied that the plaintiff relied upon their representation that the oil furnished was No. 200 Kendall SAE 140.

Throughout the trial, without objection, evidence was received and the instruction was given concerning contributory negligence on the part of the plaintiff. The burden of proving it was upon the defendant. Defendant seemed to admit that if he pleaded contributory negligence he would have the burden of proving it. Certainly the permitting of such defense though not pleaded should not now be claimed by defendant as a way to shift the burden of proving freedom from contributory negligence to plaintiff.

POINT II

THE COURT PROPERLY INSTRUCTED THE JURY CONCERNING THE WARRANTY OF MERCHANTABLE QUALITY.

As plaintiff analyses the position of defendant concerning the warranty, it is to the effect that since the oil was delivered in a container which defendant claims was a sealed container there was no warranty.

The law of Utah seems to be clear that the kind of lid which was on the can in which the oil was delivered, namely, a crimped edge lid with the crimps fitting into the corresponding indentations on the can, does not, as that term is used in sales law, create nor constitute a sealed container. *Jordan v. Coke Cola Bottling Company of Utah*, 117 Utah 578, 218 P. 2d 660.

The provisions of the sales act under which plaintiff views his claim is 61-1-15 (2). It reads as follows:

“Where the goods are bought by description from a seller who deals in goods of that description (whether he is the grower or manufacturer or not), there is an implied warranty that the goods shall be of merchantable quality.”

The provision of the sales act has been considered at great length by the authorities since the uniform sales act was adopted. It has been generally recognized that the quoted portion, as far as liability for the sale of goods which were not of merchantable quality is concerned, has abolished the distinction between a dealer and a manufacturer of the goods sold.

Merchantable quality has been described as being at least average quality. It has been said that it means that the goods sold are of the general kind described and reasonably fit for the general purpose for which it shall have been sold. *Giant Manufacturing Co. v. Yates American Machinery Co.*, 111 Fed. 2d 360. *Botti v. Venice Grocery Co.*, 309 Mass. 450, 35 NE 2d 491, 135 ALR 1387. *Sperry Flour Co. v. DeMoss*, 114 Or. 440, 18 P. 2d 242, 90 ALR 406.

There could be no doubt that a warranty of merchantability would require of the seller that the goods actually be those which were ordered by the buyer. In the present case it is demonstrated that the oil furnished was not Kendall 200 SAE 140 oil. Certainly a warranty of merchantability would require that the seller supply the actual kind of oil ordered and not just that oil be furnished which is branded as the oil ordered.

Probably the leading authority concerning this matter in the State of Utah is *Wright v. Howell*, 46 Utah 588, 150 Pac. 956. In the case the buyer requested raw linseed oil and the seller furnished instead boiled linseed oil. It was held that the seller was responsible for the death of the horses to which the boiled linseed oil was administered.

The most recent Utah case discussing the matter of warranty is *Wasatch Chemical Co. v. Leon*, Utah, 259 Pac. 2d 301, at 303. See also *Thatcher Milling Elevator Co. v. Cambell*, 64 Utah 422, 231 Pac. 621.

It appears that under Utah decisions the container was not a sealed container and even if it were so a warranty would still exist in favor of the buyer that the goods delivered in a sealed container were of merchantable quality, i.e., that they were actually the goods which the seller ordered and which the brand or description on the container described.

POINT III

EXHIBIT NO. 11 WAS PROPERLY ADMITTED AND IS SUBSTANTIAL EVIDENCE WHICH COULD BE CONSIDERED BY THE JURY.

The general rule cited by the evidence text writers is to the effect that letter received or written by a party to a law suit may be received as competent evidence. Such documents are received as admissions against interest or adoptive admission. When a party to a law suit has received a letter, retained it, acted upon it, furnished copies of it to other persons, or has requested the writer to make the report. The receipt, possession, reliance upon and use of such letters is viewed as an acquiescence in the letters content.

For a discussion of such rules see *Jones, On Evidence*, Volume 1, Section 269, Page 504.

The testimony of O. C. Allen revealed that he had received Exhibit No. 11. It was written to him as a result of a request by him for a test of the oil furnished. He relied upon it and acquiesce in its content. He did not

make any kind of a protest to the Kendall people, did not make any claim that the content of the letter was not accurate or that the test did not reveal a true condition as far as the oil is concerned.

The exhibit is material on the question of merchantability. Defendant was required to furnish plaintiff only oil representative of Kendall 200 SAE 140 oil. The Kendall letter shows that the oil was not a representative sample of Kendall No. 200 SAE 140 oil.

The Uniform Rules of Evidence approved by the American Bar Association and adopted as a Preliminary Draft by the Utah State Bar Commission sets down the rule contended for by plaintiff in the following language, Rule 62 Hearsay Evidence Sub-rule 8:

"Authorized and Adoptive Admissions. As against a party, a statement (a) by a person authorized by the party to make a statement or statements for him concerning the subject of the statement, or (b) of which the party with knowledge of the content thereof has, by words or other conduct, manifested his adoption or his belief in its truth."

The basic proposition which plaintiff contends for is discussed at great length by Wigmore in his work on evidence. See *Wigmore on Evidence*, Volume 4, Section 1073, Page 89. The basic rule as set forth reads as follows:

"The written statements of a third person may be so dealt with by the party that his assent

to the correctness of the statements may be inferred, and they would thus by adoption become his own statements."

Wigmore discusses the documents which have been received in many cases as admissions against the party to whom they were addressed under the following basic classifications: (1) Documents seen. (2) Documents found in possession; (3) Documents of demand received but not answered; and (4) Documents made use of. The discussion under the fourth category, namely, documents made use of, seems to be most clearly applicable to the discussion found current in this Court. The general rule under four is as follows:

"The parties use of a document made by a third person will frequently amount to a approval of its statements as correct and thus it may be received against him as an admission by adoption." p. 97.

In *Monsoos v. Eiler, et al.*, 216 Wis. 133, 256 N.W. 630 the receipt by the trial court of an unsigned carbon of a letter from an insurance agency written to the insurance agent of the plaintiff was approved. The insurance agent sent a copy of this letter to the defendant. The defendant took the letter and delivered it to the plaintiff. The letter contained a statement that the defendant felt very bad about the happening of the accident and felt that he was to blame since he had invited the plaintiff to ride with him. The Wisconsin Court held that the

delivery of the unsigned copy of the letter by the defendant to the plaintiff, without repudiation of its content, constitute an adoption of the contents of the letter.

In *Wieder v. Lorenz*, 164 Or. 10, 99 Pac. 2d 38, the Oregon Supreme Court upheld the Trial Court in permitting a letter from defendant's bank. The bank was not a party nor did not appear to be the agent of the defendant for the purpose of communicating or writing a letter, however, the letter was written to the defendant and in it there was discussed certain logs which were referred to as the property of the defendant. Inquiries were made concerning the sale or use of the proceeds from the logs. The Court held that the receipt of the letter and its retention without repudiating the truth of the content therein and without stating that what was set forth therein was not a fact constituted an admission by the defendant that the bank had a correct understanding of the ownership of the property which it wrote about. This case is an example of a party dealing with written instruments of a third person in such a way as to show that he adopted the document and acquiesced in the contents.

In *People v. Burgess*, 244 N.Y. 472, 155 N.E. 745, the New York Appellate Court held that the receipt of auditors report without the auditor who prepared them testifying was proper as an admission by the defendant where counsel for the defendant had submitted the auditor's report to the Grand Jury at a time when defendant's case

was being considered by the Grand Jury. This case is another example of the third party statement being so used, handled or relied upon as to constitute an admission.

One of the most interesting cases is *Cameron v. Cameron*, 232 N.C. 686, 61 S.E. 2d 913. This was a divorce action and there were certain letters received as evidence against the party to whom they were written. The letters were found in the private desk of the party and contained compromising statements from persons to whom the lady had been writing. The Court held that the retention by the party of the letters from the third party and her claim to said letters constituted an assent to the content and acquiescence in the content of the letter. As a consequence the letters were admissible evidence in the divorce action to show that she was guilty of misconduct and breach of her marital vows.

In *Commonworth v. Fuscì*, 153 Pa. Super 617, 35 Atl. 2d 93, p. 96 the rules set forth in Wigmore are specifically approved, the case concerned a letter received but not replied to and acted upon. The Court held that the recipient of the letter had adopted and approved its content.

Exhibit 11 was a response to an inquiry and request for the testing made by the defendant and in making the test and reporting its results Kendall acted for defendant. The exhibit directly states that the Kendall Oil Company

was not responsible for that oil because it was not their brand of oil and was not representative of their 200 SAF 140 oil.

If the defendant disbelieved the letter should such a statement by Kendall go unchallenged? There would logically have been some response to Kendall's statement if it were not conceded to be true. The explanation for his failure to respond would lie in defendant's mouth. If he desired to explain the letter or to show what he had done in response to it other than deliver a copy to the plaintiff he should have come forward with such evidence. If his counsel desired to have the use of the letters by the jury controlled to request an instruction concerning its request was his responsibility.

In Volume 20, American Jurisprudence at page 481 and 482 there is a discussion of the evidentiary rule under topic heading "Failure to Answer Written Communication" and under the heading "Silence Respecting Accident." Both of these sections discuss the rules which we have cited to the Court in Wigmore and Jones under the heading "Tacit Admission by a Party."

The closest case which counsel for plaintiff has been able to discover in the State of Utah is the *State v. Greene*, 38 Utah 389, 115 Pac. 181. In the Green case there was an affidavit by the prosecuting witness. The affidavit was received to show admissions by the defendant of a part of the affidavit. It was admitted over the objection that the affidavit was hearsay. Defendant had

been examined concerning statements in the affidavit of the prosecuting witness by the county attorney and his reaction and admission that certain of the statements made in the affidavit were true constituted the grounds for its admission even though hearsay.

It is respectfully submitted that the Exhibit 11 was properly received as evidence in the above entitled action. Certainly the conduct of the defendant regarding the exhibit showed tacit admission, acquiescence in, and adoption of the report which he had requested from the Kendall Oil Company and which was made for him by the company.

CONCLUSION

It is respectfully submitted that the Court did not error in its instructions; that it did not error in the reception of the evidence received. The verdict of the jury is supported by substantial evidence and the amount awarded plaintiff is a fair sum for the damages suffered. This Court should therefore affirm the judgment of the Lower Court.

Respectfully submitted,

KING AND HUGHES

By Dwight L. King