1990

International Recovery Systems v. Nancy Kinzer, Nancy Gortsema, Gordon Kinzer : Brief of Appellee

Utah Court of Appeals

Joseph N. Nemelka; Attorney at Law; Attorney for Appellee.
Jody L. Howe; Martin S. Tanner; Potter and Berry; Attorneys for Appellants.

IN THE UTAH COURT OF APPEALS

INTERNATIONAL RECOVERY SYSTEMS, a Utah corporation,	)	
Plaintiffs-Appellee,	)	Appellate No. 900486-CA
vs.	)	
NANCY KINZER f/k/a NANCY GORTSEMA and GORDON KINZER,	)	Priority No. 16
Defendants - Appellants.	)	

APPELLEE'S BRIEF

Appeal from an Order and Judgment
of the Third Circuit Court
Salt Lake County, State of Utah

Honorable LeRoy H. Griffiths

Jody L. Howe (A4743)
Martin S. Tanner (A4419)
POTTER & BERRY
5284 So. 320 West, Suite C-274
Salt Lake City, Utah 84107
Attorneys for Appellants

Joseph N. Nemelka, Jr.
7001 South 900 East, Suite 210A
Midvale, Utah 84047
Attorney for Appellee

IN THE UTAH COURT OF APPEALS

INTERNATIONAL RECOVERY SYSTEMS, a Utah corporation,	)	
Plaintiffs-Appellee,	)	Appellate No. 900486-CA
vs.	)	
NANCY KINZER f/k/a NANCY GORTSEMA and GORDON KINZER,	)	Priority No. 16
Defendants - Appellants.	)	

APPELLEE'S BRIEF

Appeal from an Order and Judgment
of the Third Circuit Court
Salt Lake County, State of Utah

Honorable LeRoy H. Griffiths

Jody L. Howe (A4743)
Martin S. Tanner (A4419)
POTTER & BERRY
5284 So. 320 West, Suite C-274
Salt Lake City, Utah 84107
Attorneys for Appellants

Joseph N. Nemelka, Jr.
7001 South 900 East, Suite 210A
Midvale, Utah 84047
Attorney for Appellee

TABLE OF CONTENTS

TABLE OF AUTHORITIES

COURT RULES

CASE LAW

TREATISES

JURISDICTION

Jurisdiction to hear this appeal is conferred by Utah Code § 78-2a-3-(2)(d) (1953, as amended).

NATURE OF PROCEEDINGS

This is a contract action on a rental agreement culminating in a bench trial. Judgment was entered against Nancy Gortsema ("Appellant") by the Honorable LeRoy H. Griffiths for rental payments, costs and attorney's fees. This judgment is being appealed here.

ISSUES PRESENTED FOR REVIEW

1. Did the trial court err in refusing to admit as evidence a notarized statement on hearsay grounds?

2. If the trial court did err in refusing to admit the notarized statement, was the error reversible as required by Utah law?

DETERMINATIVE PROVISIONS

Rules 801(c) and 802, Utah Rules of Evidence.

> "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. (Rule 801(c))
>
> Hearsay is not admissible except as provided by law or by these rules. (Rule 802)

Rule 61, Utah Rules of Civil Procedure.

> No error in either the admission or the exclusion of evidence, and no error or defect in any ruling or order or in anything

> done or omitted by the court or by any of the parties, is ground for granting a new trial or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect which does not affect the substantial rights of the parties.

Rule 61, Utah Rules of Civil Procedure (emphasis added).

SUMMARY OF ARGUMENTS

The evidence appellant attempted to enter at trial amounted to hearsay because it carried with it the implied assertion that the document had been mailed to appellee. At trial, the preparer of the statement was not available for cross-examination as to the implied assertion, i.e., that it had been mailed to appellee. The evidence was, therefore, properly excluded by the court.

Even if the statement had been admitted, it was not evidence that it had been mailed, as asserted by appellant. On the face of the document, there is no evidence of mailing and the document could be evidence only that the notarized statement had been prepared, not that it had been mailed. The ultimate outcome of the trial would not have been affected by the evidence. There was, therefore, no substantial prejudice arising from the court's refusal to enter the evidence. Lacking substantive prejudice and the likelihood that the outcome would have been different, any error in refusing to admit the evidence is harmless error and is not reversible.

ARGUMENT

POINT I

THE NOTARIZED STATEMENT OF APPELLANT'S EMPLOYER WAS PROPERLY EXCLUDED FROM EVIDENCE AS HEARSAY.

Appellant attempted at trial to offer into evidence a notarized statement prepared by appellant's employer, stating that she was being transferred. A statement of this type was, pursuant to the terms of the rental agreement, required to be mailed to Property Management Services.

Had the statement been offered into evidence for the purpose of proving that it had been prepared, the hearsay rule would not apply and the statement would be admissible. E.g., State v. Sorensen, 617 P.2d 333 (Utah 1980). Likewise, offering the statement as evidence that appellant had obtained it from the employer would not give grounds for a hearsay objection. The hearsay problem arose when appellant attempted to introduce the statement as evidence that it had been mailed as required by the rental agreement. (Appellant's Brief, page 5.) (Note: Appellant also appears to assert that because appellee received a copy of the statement during discovery, the notice requirements of the rental agreement had been met. Appellant's brief, page 5. This assertion is irrelevant to either the trial or this appeal.)

Using the statement for purposes of proving its mailing attaches implied significance to the document which cannot be determined from its face or the circumstances of its preparation. The implication is that because the document exists, it must certainly have been mailed. McCormick in his work on evidence discusses implied assertions and notes

that non-verbal communication intended to be an assertion is hearsay. McCormick, Evidence 3d, § 250, p. 739 (1984).

To properly admit the statement for evidence of anything beyond the fact of its existence requires the proper foundation. Further the preparer must be available for cross examination of any assertions, implied or otherwise, e.g., that the document had been mailed. Appellant did not provide proper foundation nor was the preparer available for cross examination. These are the circumstances where a party must be protected from out of court statements, the very purpose for which the hearsay rule evolved.

The notarized statement, as intended for use by appellant, carried with it an implied assertion which the appellant intended to prove the truth of. As such, the trial court properly excluded the document as hearsay.

POINT II

APPELLANT WAS NOT PREJUDICED BY THE TRIAL COURT'S EXCLUSION OF THE HEARSAY EVIDENCE. IF AN ERROR OCCURRED, IT DID NOT AFFECT SUBSTANTIVE RIGHTS AND DID NOT CONSTITUTE REVERSIBLE ERROR.

Assuming for argument that the trial court erred in refusing to admit the notarized statement into evidence, that error is not reversible. Where an exclusion of evidence does not affect the substantial rights of the parties, a judgment cannot be disturbed and the court must disregard the error. Rule 61, Utah Rules of Civil Procedure. The Court of Appeals may only reverse the trial court's judgment "if there is a reasonable likelihood that, absent the error, there would have been a result more favorable to the [appellant]." Matter of Estate of Kesler, 702 P.2d 86, 96 (Utah 1985), citing Lee v. Mitchell Funeral Home

Ambulance Serv., 606 P.2d 259, 261 (Utah 1980) and Rowley v. Graven Bros, 26 Utah 2d 448, 451, 491 P.2d 1209, 1211 (1971). A reversible error must be "substantial and prejudicial." Rigtrup v. Strawberry Water Users Ass'n, 563 P.2d 1247, 1251 n. 11 (Utah 1977). The appellant has the burden of showing the substantial and prejudicial error. Redevelopment Agency of Salt Lake City v. Barrutia, 526 P.2d 47, 51 (Utah 1974).

Even if the trial court had admitted the notarized statement, it did not, on its face, offer evidence of its mailing. The issue in dispute at trial was not whether the statement had been obtained, but whether it had been mailed as required by the rental agreement. Appellant testified that she had mailed the statement and the trial court chose not to believe her. The face of the statement contained no evidence of mailing, either by the preparer or by appellant. The statement had no evidentiary value as to the issue of its mailing. There is no indication in the record that admission of the evidence would have, with reasonable likelihood, led to a different judgment by the trial court.

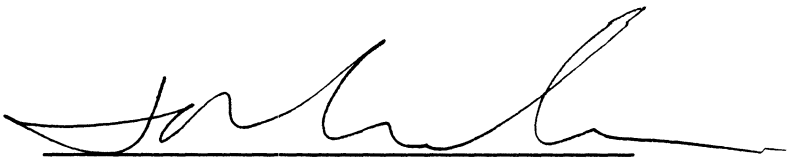
Appellant has also failed to show on appeal that she was prejudiced by the trial court's refusal to admit the evidence. The only implication that the outcome would be otherwise is in the appellant's conclusory statement that the "judgment would not have been awarded in favor of plaintiff." (Appellant's Brief, page 10.) Not only has appellant failed to show prejudice, she has failed to demonstrate the substantial prejudice required by Rule 61, U.R.C.P. and by Utah case law. Therefore, even if the Court of Appeals finds error in the trial court's exclusion of the evidence, that error is not reversible.

CONCLUSION

The trial court properly excluded the notarized statement as hearsay. Even if the

exclusion were in error, however, appellant has failed to show substantial and prejudicial impact of that error, making the error not reversible. The judgment of the trial court should, therefore, be affirmed.

Respectfully submitted this 11 day of April, 1991.



Joseph N. Nemelka, Jr.
Attorney for Appellee

CERTIFICATE OF SERVICE

I, Joseph N. Nemelka, Jr., hereby certify that, on the 11 day of April, 1991, I caused four copies of this Appellee's Brief to be delivered to:

Jody L. Howe
Martin S. Tanner
POTTER & BERRY
5284 So. 320 West, Suite C-274
Salt Lake City, Utah 84107