

2001

Valley Oil Transportation, Inc. v. Union Pacific Railroad Company : Petition for Rehearing

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

VALLEY OIL
TRANSPORTATION, INC.,

Plaintiff and Appellant,

vs.

UNION PACIFIC RAILROAD
COMPANY, a Delaware
corporation,

Defendant and Appellee.

Case No. 20010163-CA

(Priority Category 15)

APPELLANT VALLEY OIL TRANSPORTATION, INC.'s
PETITION FOR REHEARING

ON APPEAL FROM THE THIRD DISTRICT COURT
Hon. J. Dennis Frederick

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Paulette Stagg
Clerk of the Court

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COMES NOW Plaintiff / Appellant, Valley Oil Transportation, Inc. (“Valley”), by and through counsel and pursuant to Utah R. App. P. 35, hereby Petitions for Rehearing this Court’s Memorandum Decision in the above-captioned matter. Counsel for Petitioner, by his signature below, hereby certifies that this Petition is presented in good faith and not for purposes of delay.

**POINTS OF LAW OR FACT WHICH
HAVE BEEN OVERLOOKED OR MISAPPREHENDED**

1. The Court of Appeals affirmed the trial court based on the doctrine of “Waiver by Estoppel.” That doctrine, however, was not available as a basis for decision because Union Pacific did not allege either waiver or estoppel as affirmative defenses in its Answer, thereby waiving them under Utah R. Civ. P. 8 before this case ever reached the appellate level.
2. The doctrine of “Waiver by Estoppel” is inconsistent with Utah case law.
3. The decisions do not address how billing instructions that never refer to the Rail Contract, could permit Union Pacific to bill a third party at Valley’s confidential Contract rate. The question of which rate Union Pacific should apply is a factual issue.
4. Disputed facts, undisputed facts, and the proper inferences therefrom Precluded Summary Judgment.

ARGUMENT

I. The Affirmative Defenses of Waiver and Estoppel Were Waived Under Utah R. Civ. P. 8 and Cannot be Applied.

This Court affirmed under the “doctrine of waiver by estoppel,” presumably based on the rule that an appellate court can affirm a trial court’s decision on alternative grounds that were not addressed by the trial court. *E.g. Dipoma v. McPhie*, 2000 UT App 130, ¶ 4, 1 P.3d 564, *aff’d* 2201 Ut 61, 29 P.3d 1225. But both waiver and estoppel are affirmative defenses under Utah R. Civ. P. 8(c). They are waived unless set forth in a responsive pleading. *Id.*; *Manger v. Davis*, 619 P.2d 687 (Utah 1980) (estoppel); *Beznel v. Continental Dry Cleaners, Inc.*, 548 P.2d 898, 901 (Utah 1976) (as an affirmative defense, waiver itself is deemed waived if not pleaded).

Union Pacific raised neither waiver nor estoppel as affirmative defenses in its Answer. Record on Appeal (“R.”) 23 - 25. Nor did it argue waiver or estoppel in its Motion for Summary Judgment. R. 138 - 155; R. 401 - 410; R. 477. Had Union Pacific done so, Valley would have objected, and the trial court would have been obliged to strike or, in the alternative, consider whether to allow an amendment of its answer. *See Valley Bank & Trust Co. v. Wilken*, 668 P.2d 483 (Utah 1983) (affirmative defenses cannot be raised by affidavit for the first time to oppose a motion for summary judgment). That did not happen. Because neither waiver nor estoppel were properly issues below, no party briefed those doctrines, or their elements or application to the case on appeal. Indeed, the

first mention of waiver or estoppel appears in this Court’s Memorandum Decision.¹

Valley submits that, while this Court may uphold a trial court’s decision on alternative grounds, it cannot do so where those grounds were waived below and unavailable for the trial court to consider. *See Wilson v. Valley Mental Health*, 969 P.2d 416, 418 (Utah 1998) (appellate court “may affirm a grant of summary judgment on any ground *available* to the trial court”) (emphasis added); *see also Wilken*, 668 P.2d. 483 (Utah 1983) (affirmative defenses that have been waived not available for first time in summary judgment). That is particularly true where, as noted below, the theory relied on treads onto new judicial territory. Accordingly, this Court should reconsider its decision in light of the facts and legal theories that were available.

II. The Memorandum Decision Departs From Established Utah Law.

The doctrine of “waiver by estoppel” is not part of Utah’s common law jurisprudence and none of the cases relied on by the majority are controlling Utah cases. More importantly, the doctrine departs markedly from established Utah law on waiver and conflicts with the Utah Supreme Court’s previous efforts to simplify the law in that area.

Up to 1993, Utah had “developed hopelessly inconsistent elaborations on the basic statement of waiver principles.” *State v. Pena*, 869 P.2d 932, 938 (Utah 1994). In the

¹Accordingly, it is not surprising that Valley did “not adequately address the reasonableness of Defendant’s reliance in its briefs” as noted in the Court’s Memorandum at p. 2.

case of *Soter's Inc. v. Deseret Federal Savings & Loan Association*, 857 P.2d 935 (Utah 1993), the Utah Supreme Court resolved those earlier ambiguities and conflicts in Utah case law concerning waiver. The decision in *Soter's* was implemented to strip conflicting descriptions back to basics: "A waiver is the intentional relinquishment of a known right. To constitute waiver, there must be an existing right, benefit or advantage, a knowledge of its existence, and an intention to relinquish it." *Geisdorf v. Doughty*, 972 P.2d 67, 72 (Utah 1998) (quoting *Soter's*, 857 at 942 (Utah 1993)).

Under the cases since *Soter's*, waiver is not only highly fact-sensitive, *Living Scriptures, Inc. v. Kudlik*, 890 P.2d 7 (Utah App. 1995), it "is foremost a question of intent and 'the intent to relinquish a right must be distinct.'" *Olympus Hills Shopping Center, Ltd. v. Smith's Food & Drug Centers, Inc.*, 889 P.2d 445, 461 (Utah App. 1994) (quoting *Soter's*, 857 P.2d at 941). Thus, although waiver may be implied, it still requires a distinct showing of the waiving party's intent. *Id.*

This Court's Memorandum Decision, however, departs from that standard. Under its decision, waiver is not "foremost a question of intent," but a question of another party's reliance, which shifts the inquiry away from the intent of the party alleged to have waived. In short, it conflicts with the analysis required under *Soter's* and *Olympus Hills*, and moves back to the fragmented analyses the Utah Supreme Court tried to correct in *Soter's*.

Not surprisingly then, the Memorandum Decision cites no Utah state cases. It does

however, cite to one Utah federal district court case, *Lone Mountain Production Co. v. Natural Gas Pipeline of America*, 710 F. Supp. 305 (D. Utah 1989). *Lone Mountain*, however, was decided three years before the Utah Supreme Court's decision in *Soter*'s. This Court should reconsider its adoption of a waiver analysis that is contrary to the Utah Supreme Court's, especially in light of the "retroactive" nature of implementation here.

III. The Manifests Never Refer to the Rail Contract in Any Way and, Therefore, it Must be Disputed Whether Union Pacific Could Just Bill Laidlaw at Valley's Confidential Contract Rate.

The undisputed facts showed there was no specific instruction to Union Pacific allowing its disclosure of Valley's confidential rate. This would be a different case if the billing instruction in the Manifest said "bill Laidlaw at the confidential rate specified in Valley's Contract number C- 33895" or anything similar. It did not; In fact it did not reference a rail contract at all. But both courts' decisions rest on the premise that Union Pacific could rely on the billing instruction in the Manifest and send a bill to Laidlaw. Even if that's true, however, it does not follow that the Manifests allowed Union Pacific to bill Laidlaw at Valley's confidential Contract rate. Whether it could is a disputed fact.

Union Pacific admits it must bill at either the applicable published tariff rate or special contract rates. *See* R. 150 (Union Pacific's Memorandum in Support). Accordingly, Union Pacific has always maintained (and it is undisputed) that all billing instructions must refer to the Rail Contract's number for that rate to be applied; Without a reference to that number "there is no way to properly verify in the manner required by the

Contract that any of these shipments identified in the billing notices were made . . .

pursuant to the Contract in question, as opposed to a published tariff rate.” R. 150 (Union Pacific’s Memorandum in Support, emphasis in original); Brief of Appellee p. 11 (noting contract number required). Because the Manifests never referred to the Contract number, Union Pacific could not verify shipments were “pursuant to the Contract in question, as opposed to a published tariff.” R. 150. If Union Pacific cannot properly verify this, it cannot be an undisputed fact that the Manifests’ billing instruction led it to believe it could just bill Laidlaw at Valley’s confidential rate. Whether it should have applied its published tariff is a factual question and beyond the scope of summary judgment.

IV. The Decision Ignores Undisputed and Disputed Facts and Reasonable Inferences That Precluded Summary Judgment.

Central to the Court of Appeals’ decision was the fact that Valley sent eleven hazardous waste manifests to Union Pacific. Those eleven Manifests, however, related to just three railcars. Apparently based on that, the majority determined that, as an undisputed fact, this led Union Pacific to believe the billings were to be sent to Laidlaw, which then supported this Court’s finding of “waiver by estoppel.

It was undisputed though that Union Pacific helped Valley set up the billing and shipping system under which Valley faxed the eleven Manifests to Union Pacific. Also undisputed was Union Pacific and Valley’s operation under that same system for several months, during which Union Pacific shipped about 160 railcars. R. 331, 145. Each truckload had its own Manifest and each railcar could hold four truckloads. R. 166, 330.

Accordingly, Union Pacific had already received *hundreds* of Manifests during that period (as many as 640). All of them contained the same billing instruction that Union Pacific later claimed allowed it to bill Laidlaw for three railcars. Yet Union Pacific not only billed Valley properly for each of those first 160 railcars, it never once objected to the billing instructions or the hundreds of Manifests, nor did it contact Valley about any confusion. The reasonable inference is that Union Pacific received precisely the billing instructions it needed for 160 railcars, which were no different than for the three later railcars. Given those circumstances, it cannot be an undisputed fact that eleven Manifests led Union Pacific to believe it could suddenly begin sending billings under the Rail Contract to Laidlaw.²

Several other facts cut against summary judgment: The Rail Contract required parties to adhere to all laws regarding the Manifests. In turn Federal law and Union Pacific's Rail Contract required the Manifests be given to Union Pacific. 49 C.F.R. 172.205(e); R.14. Union Pacific knew it would be receiving such Manifests when it helped design the system. Finally, Manifests are a special creation of federal laws for *tracking*

²Nobody argued waiver, but under these facts, waiver by estoppel applies with perhaps greater force to Union Pacific. 13 Samuel Williston, Williston on Contracts § 39:29 at 628 - 631 (4th ed. 2000). That same conduct also constitutes a "waiver by course of performance," which "may be established by a party's conduct which is inconsistent with the assertion of a right to performance allegedly waived." *Id.* § 39:30 at 631 -637. Union Pacific's conduct in setting up the system, accepting the Manifests and billing Valley for 160 cars is simply inconsistent with its assertion that it had the right to then have different billing instructions for three cars.

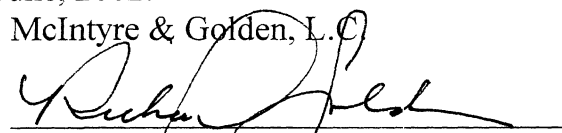
hazardous waste. Contrary to Union Pacific's argument, none of them says they can be relied on for billing instructions. *See* 49 C.F.R. 172.202 - 172.205. Union Pacific says it does so regularly, but just the 160 cars shipped and properly billed show that "fact" is disputed fact in this case.

CONCLUSION

This Court should reconsider its Memorandum Decision and reverse the trial court. The Court of Appeals' decision was based on a legal theory that could not have been relied on by the trial court and that is at odds with Utah precedent. Furthermore, under all the circumstances, it is not an undisputed fact that Valley's acts led Union Pacific to a reasonable belief that it could bill Laidlaw. Even if it was, it is not an undisputed fact that the Manifests' language would lead Union Pacific to believe it could simply bill Laidlaw at Valley's confidential contract rate.

Respectfully submitted this 6th day of June, 2002.

McIntyre & Golden, L.C.


Richard R. Golden,
Attorney for Plaintiff and Appellant,
Valley Oil Transportation, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on the 7 day of June, 2002, I caused two true, correct and complete copies of the foregoing Appellant Valley Oil Transportation, Inc.'s Petition for Rehearing to be hand delivered to the following:

J. Clare Williams
Union Pacific Railroad Company
280 South 400 West
Sale Lake City, Utah 84101-1151

Attorney for Appellee

A handwritten signature in cursive script, reading "Leslie J. Allen", is written over a horizontal line.