

1972

Louis J. Monter v. Kratzer's Specialty Bread Company, A Corporation : Respondent's Petition and Brief For Rehearing

Utah Supreme Court

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CASES CITED

1. *Newton v. Hackett*
 1 Utah 2d 389, 360 P. 2d 176 (1961)
2. *Way Park Building, Inc. v. Western States Wholesale Supply*
 2 Utah 2d 266, 451 P. 2d 778 (1969)

IN THE SUPREME COURT
OF THE
STATE OF UTAH

MRS. J. MONTER,

Plaintiff-Appellant,

vs.

Case No.

KRATZER'S SPECIALTY BREAD
COMPANY, a corporation

12810

Defendant-Respondent.

RESPONDENT'S PETITION
AND
BRIEF FOR REHEARING

Respondent respectfully petitions this court for a re-
viewing in this matter on the grounds set forth below and
in support thereof submits the following brief:

- 1) This court erred in assuming that Continental Bak-
ery Company terminated its business with Kratzers for rea-
sons other than the tort committed by Monter. The only
reason given was the closing of the business by Monter.
- 2) This court erred in stating that the monthly sales
of Kratzers to Continental were reduced "so that the
average was only \$2,000.00 per month." The evidence was
that sales to Continental were \$2,000.00 per month in
November, 1971 although they had been higher in the past.
- 3) This court erred in holding that the lower court's
decision was based upon speculation.

STATEMENT OF FACTS

A more complete statement of facts is found in Respondent's Brief but most of the facts important to this petition are briefly given here.

This action was initially brought by Monter under the unlawful detainer statute for default in rent payments. A default judgment was entered giving Monter possession of the property. No judgment was given for rent nor was it prayed for. Monter caused an execution to be served upon Kratzers and had the sheriff close the business, evict all employees and change the locks on the doors. This court has upheld the lower court's determination that the judgment was void for failure to determine the amount of rent due and the execution was a violation of Kratzers' rights under the unlawful detainer statute. Kratzers is therefore entitled to any resulting damages.

While Kratzers place of business was closed down, Continental Baking Company, a customer of Kratzers for more than fifteen years, was unable to call its orders into Kratzers. Continental's Sales Manager, Jack Hart, thereupon personally went to Kratzers' Bakery, found the premises locked and not open for business and then placed their orders with another bakery. On that day on, in spite of Kratzer's attempts to regain its business, Continental has refused to buy from Kratzer's bakery. Because, in view of the closing of the business, it had no assurance that it would continue to get products from Kratzers. Although Continental had experienced some quality and delivery problems with Kratzer's, Mr. Hart testified that these were considered normal and typical of other bakers as well. He further testified that Continental would not have terminated its long-standing relationship with Kratzer's except for his inability to obtain products on November 8, 1971, and that had this incident on November 8, 1971, been the only incident to occur, Continental would still have terminated the relationship.

It was stipulated at the trial that sales by Kratzer's to Continental were \$2,000.00 per month and that \$1,060.00 of that was profit. Based upon the evidence that the business relationship between Kratzer's and Continental would not have

terminated except for the actions of Monter, the lower court entered judgment for the present value of \$1,060.00 a month over ten years into the future.

By its opinion filed December 5, 1972, this court reversed the judgment for damages for loss of business claiming it was based upon speculation. The opinion makes certain statements which are in error and the court's reliance upon them caused an improper reversal of the judgment for damages.

ARGUMENT

POINT I

THIS COURT ERRED IN ASSUMING THAT CONTINENTAL BAKING COMPANY TERMINATED ITS BUSINESS WITH KRATZERS FOR REASONS OTHER THAN THE TORT COMMITTED BY MONTER. THE ONLY REASON GIVEN WAS THE CLOSING OF THE BUSINESS BY MONTER.

This court's opinion referred to some prior quality and delivery problems that Continental had with Kratzers and a statement that this entered into the decision to terminate the account with Kratzers in assuming that Monter was not entirely responsible for Kratzer's loss of business. In doing so this court ignores the trial court's discretion to believe or disbelieve the testimony of a witness whose demeanor and other factors are observed by it. This court also ignores all of the other evidence proving that Monter's actions were the sole reason for terminating the account. Following the testimony Jack Hart quoted in this court's opinion is this statement (129):

"Q Had this incident on November the 8th been the only incident to occur in your experience, would you have terminated the account?

A I think, under the conditions that existed that day, yes."

On page 125 of the record Mr. Hart testified as follows:

" He called me while I was in Provo, Utah, and wanted me to give him more business, or give him back the business that we had switched over that particular day; and I stated that I didn't feel that we

could, because I had no assurance that we would continue to get products from him, in view of what had happened."

Further on page 128 of the record Mr. Hart stated that the quality and delivery problems were normal and that they had the same problems with other bakers as well. Then it was stated:

"Q In spite of those other problems you have mentioned was your inability to get products on November the 8th the reason for your termination of your business with Kratzer's?

A Yes, I'd say so.

Q Would it be fair to say that you would not have terminated that relationship then except for that inability?

A Yes."

There can be no other conclusion from the above testimony that the sixteen-plus year relationship with Continental would have continued indefinitely into the future except for wrongful actions of Monter. There was absolutely no evidence to the contrary offered by Monter. The trial court was fully justified in finding that Monter was the cause of this loss of business and it was error for this court to disturb that finding on appellate review. See Charlton v. Hackett, Utah 2d 389, 360 P. 2d 176 (1961).

POINT II

THIS COURT ERRED IN STATING THAT THE MONTHLY SALES BY BAKERS TO CONTINENTAL WERE REDUCED "SO THAT THE AVERAGE WAS \$2,000.00 PER MONTH." THE EVIDENCE WAS THAT SALES TO CONTINENTAL WERE \$2,000.00 PER MONTH IN NOVEMBER, 1971 ALTHOUGH THEY HAD BEEN HIGHER IN THE PAST.

In three separate places the court's opinion refers to the expectation of the parties that average monthly sales to Continental were \$2,000.00 per month and then assumes that, because sales had been \$5,000.00 per month at one time in the past, sales must have been substantially below \$2,000.00 in November, and therefore the future sales might be even less or nonexistent.

In the first place the stipulation of the parties was that the average gross business done with Continental throughout the year would be \$2,000.00 per month (R. 153). This stipulation was made for the purpose of avoiding the necessity of lengthy and detailed proof and to allow the court to rely on that figure as the monthly loss to Kratzer's to occur in the future if the court found in favor of Kratzers on the issue of liability. The court should not go beyond this stipulation of the parties. It takes the place of a finding of fact that the loss to Kratzer's would be \$2,000.00 per month in the future. It involves no speculation by the court as to the agreed upon figure to be used in calculating damages after the issue of liability is determined. The parties themselves considered all of the factors involved in arriving at the stipulated figure, any increases or declines throughout the year, seasonal variations, etc. The stipulation itself removed all matters of speculation from the court. It is only the stipulated figure to rely upon.

To further counter the court's assumption that sales in November, 1971 were substantially less than \$2,000.00 per month, the testimony of Mr. Yeck on page 159 of the record expressly states that \$2,000.00 per month was the volume of business done with them "now" - meaning at the time of termination of the account.

POINT III

THIS COURT ERRED IN HOLDING THAT THE LOWER COURT'S JUDGMENT WAS BASED UPON SPECULATION.

It is general law that future damages cannot be based on speculation. There must be some basis upon which to calculate those damages. However, this court enters into a high degree of speculation when it decides that, because the relationship between Kratzers and Continental could have been terminated at any time, it would have been terminated and therefore Kratzers is not entitled to any damages. There is no evidence to indicate that either party would have terminated the relationship. All the evidence is to the contrary. As shown by the testimony quoted in Point I above, it was terminated because of Monter's actions and would not have been terminated except for Monter's actions. That indicates only that the long-standing relationship would have continued indefinitely.

It should be kept in mind that Monter committed a wrong against Kratzer's and it is obvious that Kratzer's suffered a loss because of it. No one can know how long Continental would have done business with Kratzer's just as no one can know how long the family "breadwinner" would have lived in a wrongful death action. Yet, it is the prerogative of the trier of facts to determine that question in assessing damages. Here, the trier of facts determined that the relationship would have continued for at least ten more years and assessed damages accordingly. This court might decide that five years or two years or even twenty years was a more likely period of time. But it would have continued for some period of time and therefore some damages should be allowed.

Reference is made to the authorities cited in Point III of respondent's brief to the effect that uncertainty merely as to the amount of lost profits does not prevent recovery and the defendant is not allowed to insist on absolute certainty when his wrongful act prevents determination of exact damages. In that situation lost profits can be determined by reasonable inference as the lower court did here. In Freeway Park Building, Inc. v. Western States Wholesale Supply, 22 Utah 2d 266, 451 P.2d 778 (1969), this court stated that the jury should be allowed to determine lost profits where there was less evidence in support thereof than there is present here. Prior earnings were not known exactly and no evidence of future earnings was given yet the jury should be allowed to "infer" the amount of damages. The court's opinion here amounts to an overruling of that case and therefore should be reconsidered in a rehearing of the matters referred to herein. "Reasonable inference" is not speculation in the legal sense.

CONCLUSION

For the reasons above stated, respondent respectfully asks that this court grant a rehearing in order that it may consider its opinion herein and allow respondent damages for the wrongful actions committed by appellant.

Respectfully submitted,
BACKMAN, BACKMAN & CLARK

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