1992

Duffy J. Williams dba Purestone Industries v. John Scott Simonich dba Tunes-R-Us: Petition for Rehearing

Utah Court of Appeals

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)CKET NO. 920761 IN THE UTAH COURT OF APPEALS

DUFFY J. WILLIAMS, dba PURETONE INDUSTRIES,	:	920761-CA
Plaintiff/Appellee,	:	Case No. ~~920120~~
v.	:	Priority 16
JOHN SCOTT SIMONICH, dba TUNES-R-US	:	
Defendant/Appellant.	:	

PETITION FOR REHEARING

AN APPEAL FROM THE THIRD JUDICIAL DISTRICT COURT
OF SALT LAKE COUNTY
THE HONORABLE TIMOTHY R. HANSON, PRESIDING

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ISSUE

1. Did this Court overlook or misapply Sawyers, supra.?

PETITION FOR REHEARING

John Scott Simonich dba TUNES-R-US, Appellant ("Petitioner"), by and through counsel respectfully petitions the Court for a rehearing.

Petitioner wishes to draw the Court's attention to the controlling authority in this matter, namely Sawyers v. FMA Leasing Co., 722 P.2d 773 (Utah 1986). Petitioner believes that the Court has overlooked or misapplied Sawyers, supra.

Rule 35, Utah Rules of Appellate Procedure, provides for the filing of this Petition for Rehearing. The purpose of this Rule is to allow for a timely drawing to the Court's attention its omission to consider a decision that was directly controlling in the matter.[1] Ordinarily, rehearing is ordered in a situation where the Court has overlooked controlling authority.[2]

The undersigned hereby declares that this Petition is not made for the purpose of any delay and is presented in good faith.

Petitioner respectfully submits that his argument herein is predicated upon a reasonable presumption as he is without benefit of findings of fact or conclusions of law. Sawyers, supra, places

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[1]Watts v. Seward School Board, 423 P.2d 678, 679 (Alaska 1967).

[2]Yoshizaki v. Hilo Hospital, 429 P.2d 829 (Hawaii 1967).

the burden of proof upon Plaintiff in establishing his damages in the form of lost net profits. The trial record evidences the existence of the Plaintiff and Appellee's ("Plaintiff") "cost of goods sold", but is remiss as to amounts other than $3,000.00 for Plaintiff's PT169's.[3] Petitioner further relies on the fact that Plaintiff testified that he did in fact have overhead expenses, such as shipping[4] (most of his sales were for out-of-state customers), but never provided what the amount of his overhead expenses were except for outside labor expense of $1,800.00. Furthermore, Plaintiff testified that he did not have all of the necessary materials available to supply his orders[5] (requiring additional cost for missing materials, "cost of goods sold" deduction) and Plaintiff further testified that of the materials that he maintained that he took some with him from Petitioner's premises.[6] This amount (whatever it was?) that he took with him would be a "cost of goods sold" deduction from total lost sales.

The trial court found lost net profits. This is an accounting process which requires at least a degree of "reasonable certainty".[7]

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[3]R.226, 228, 249, 252, 258, 361 and 363 to 366.

[4]R.196, 202.

[5]R.191, 193, 196 & 197.

[6]Footnote 3 above.

[7]Sawyers v. FMA Leasing Co., id.

POINT

Court overlooked or misapprehended the controlling authority.

Sawyers, supra. stands for the premise that it is not enough for a Plaintiff to establish that he was damaged, but requires proof of lost net profits. Proof of lost net profits requires an evidentiary basis on which one can calculate net profits with reasonable certainty. The failure to provide this proof is "fatal" to Plaintiff's claim. Awarding of nominal damages to a party that has not proven its damages is not foreign to Utah Courts.[8]

This Court recognized in Price-Orem v. Rollins, Brown & Gunnell, 784 P.2d 475, 479 (Utah App. 1989):

> "the level of certainty required to establish the amount of loss is generally lower than that required to establish the fact of loss, Sampson v. Richins, 770 P.2d 998, 1007 (Utah Ct. App. 1989), but requires more than a mere estimate of net profits to wit: The Plaintiff must provide supporting evidence of overhead expenses and other costs of producing income from which a net income figure can be derived. Sawyers, 722 P.2d at 774".

Arriving at "net profits" is not a creature of the judicial system, but is an accounting procedure applying mathematical computations. Plaintiff himself testified he had overhead expenses

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[8]Turtle Management, Inc. v. Haggis Management, Inc., 645 P.2d 667 (Utah 1992).

necessary to complete the products to fill the "lost sales".[9] Plaintiff's own evidence was that he needed to buy additional materials to complete the subject sales orders or invoices,[10] that he hauled away an undisclosed amount of inventory, and furthermore, that Plaintiff specifically took $3,000 worth of PT169's (would help fill sales orders represented by Plaintiff's Exhibits 13, 14 & 15).[11] It was clear error for the Court not to apply the $3,000 in PT169's as a deduction against "lost sales" in arriving at net profits. This latter item is illustrative of the concern of the Petitioner. The trial court by effectively assessing Petitioner $3,000 in lost sales applicable to the PT169's is allowing double recovery to Plaintiff. Obviously while the Petitioner is being assessed $3,000 as damages Plaintiff may deliver the PT169's and receive a second $3,000 from the buyers (double recovery).

Plaintiff, upon oral argument, contended that Sawyers, supra., and other cases cited by Petitioner stood for future profits. He further argued that the burden was on Petitioner to prove deductions from lost sales based upon mitigation of damages.

As to Plaintiff's first contention, Sawyers, supra. provides; "A party is entitled to recover only lost net profits". The Utah Supreme Court didn't say only lost net "future" profits.

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[9]Footnote 4 above.

[10]Footnote 5 above.

[11]Footnote 3 above.

As to Plaintiff's second contention that Petitioner had the burden of proof, Plaintiff provides no supporting authority. Sawyers, supra., squarely places this burden on Plaintiff, at 774, "Plaintiff of course, has the burden to produce a sufficient evidentiary basis to establish the fact of damages and to permit the trier of fact to determine with reasonable certainty the amount of lost net profits". (Emphasis added).

Petitioner argued before this Court that Plaintiff did not establish a sufficient evidentiary basis to permit the Court to determine with reasonable certainty the amount (emphasis added) of lost net profits. Plaintiff upon oral argument to this Court stated that the Plaintiff did have all of the materials to complete and fill the orders. This is consistent with Plaintiff's Brief at page 23, "Mr. Williams testified that all of the materials necessary for completing the orders had already been purchased and were owned by Mr. Williams". Plaintiff (Mr. Williams) cites in support of this allegation that the Court indicated that it was satisfied that he had sufficient inventory to fill the orders (R. at 552). The only other reference made by Plaintiff claiming to support his contention was Plaintiff's own testimony at 196-201 of the Record. However, this testimony actually supports and is consistent with the fact that Plaintiff had shipping expenses and had to buy additional inventory to complete his sales orders (cost of goods sold deduction). Upon review of this portion of the Record one will note that inquiry is made of the Plaintiff by his

counsel, ". . . other than finishing the orders, and shipping them out, were there any other costs that Pure-Tone would have had to incur to fulfill those orders other than labor. . .". Plaintiff testified, "Not other than what I said I would have to buy to finish some of them". (Emphasis added). When specifically asked on an order-by-order basis, Plaintiff testified that he had about 80% of the material to complete his largest order for Sunset Car Stereo (Exhibit 13)[12] and he further testified that he only had around 60% of the product on hand to fill the order for Audio Video Specialist (Exhibit 14).[13] Keep in mind that Plaintiff testified that he took a U-Haul full of carpet rolls that weren't ruined and stacked wood that the water hadn't damaged[14] and when asked to quantify whether or not he took more than half of all of his inventory and partially finished product, Plaintiff hesitated but indicated that a majority of it was left behind[15] and when again asked about his equipment and inventory that he picked up, Plaintiff responded that he got about half.[16] In addition he testified that he took inventory, including all of the PT169's, worth $3,000.00.[17] The foregoing is an exercise in mathematics. Informing this Court that Plaintiff had all (emphasis added) the

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[12]R. at 191.

[13]R. at 193.

[14]R. at 200.

[15]R. at 252.

[16]R. at 361.

[17]R. at 363-364.

materials necessary to complete the orders, in both his brief and oral argument, contrary to the testimony of the Plaintiff or any other evidence adduced at trial is simply mathematically incorrect. This mathematical application herein is further compounded by Plaintiff further testifying that he took about one-half of the inventory with him, including $3,000 worth of PT169's. Citing the trial court finding as authority without any support from the trial record should not be controlling. "Saying it's so doesn't make it so".

CONCLUSION

This Court should grant the Petition for Rehearing and provide itself an opportunity to revisit Sawyers, supra. Petitioner respectfully submits that this Court should not follow Plaintiff's "future profits" interpretation of Sawyers, supra. with cases cited therein. Petitioner strongly urges the Court to adopt the straight-forward language of Sawyers, supra., "A party is entitled to recover only lost net profits". That this Court should further follow Sawyers, supra., placing the burden upon Plaintiff to provide an evidentiary basis upon which the Court could determine, with reasonable certainty, the amount of lost net profits. Sawyers, supra., further provides at page 774, "In addition to proof of gross profits, there must generally be supporting evidence of overhead expenses, or other cost of producing income from which a net figure can be derived". (Emphasis added).

This matter requires mathematical computations, as would any case involving damages upon lost net profits. Mathematically we have one ascertainable inventory item, the PT169's in the amount of $3,000.00. We further have the fact that Plaintiff only had a portion of the necessary inventory to complete his product to fill the subject orders, requiring him to "buy" (as he puts it) the missing inventory. We further have Plaintiff taking about half of his inventory with him by U-Haul. Without any dollar amounts, Petitioner knows of no way that anyone can compute cost of goods sold from the foregoing. Petitioner does submit that it is mathematically certain that the foregoing cost of goods sold exceeds the $3,000.00 for the PT169's. The foregoing only involves the first stage of the accounting process of arriving at gross profits (gross income minus cost of goods sold = gross profits). The next step required the Plaintiff to provide his shipping costs and other overhead expenses to arrive at "net profits".

Sawyers, supra. at 774 states, "Reasonable certainty requires more than a mere estimate of net profits". Petitioner respectfully submits that based upon the foregoing mathematical exercise, even estimating would be difficult much less arriving at a net profit amount with any degree of certainty..

Affirmance allows Plaintiff double recovery (example: Petitioner and buyers pay $3,000.00 for the same PT169's). Affirmance is inconsistent with accounting principles. Affirmance

is inconsistent with Sawyers v. FMA Leasing Co., supra.

DATED this 3RD day of September, 1993.

David E. Ross II
Attorney for Defendant/Appellant

Certificate of Service

I hereby certify that on this 3RD day of September, 1993, I caused a true and correct copy of the foregoing Petition for Rehearing to be mailed, postage prepaid, to the following:

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IN THE UTAH COURT OF APPEALS

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Duffy J. Williams, dba Pure-Tone Industries, Plaintiff and Appellee, v. John Scott Simonich, dba Tunes-R-Us, Defendant and Appellant.	ORDER OF AFFIRMANCE Case No. 920761-CA

Before Judges Garff, Jackson, and Orme (Rule 31 Hearing).

This matter is before the court pursuant to Rule 31 of the Utah Rules of Appellate Procedure.

IT IS HEREBY ORDERED that the trial court's judgment is affirmed.

Dated this 20th day of August, 1993.

Regnal W. Garff, Judge

Norman H. Jackson, Judge

Gregory K. Orme, Judge