1966

Super Tire Market, Inc. v. Clyde Rollins, D.B.A. Rollins Mine Supply : Appellant's Brief

In the Supreme Court
State of Utah

SUPER TIRE MARKET, INC.,
Plaintiff-Respondent,

v.

CLYDE ROLLINS, d.ba
ROLLINS MINE SUPPLY,
Defendant-Appellant.

APPELLANT'S

Appeal from the District C
State of U
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SUPER TIRE MARKET, INC.,
Plaintiff-Respondent,

v.

CLYDE ROLLINS, d.b.a
ROLLINS MINE SUPPLY,
Defendant-Appellant.

CASE NO. 10,531

APPELLANT'S BRIEF

NATURE OF CASE

This action was brought on an open account for tires sold, with a defense interposed of a right to setoff for breach of warranty of mileage to be received from such tires.

DISPOSITION IN LOWER COURT

The trial court granted plaintiff-respondent judgment upon the claim asserted in the complaint, without set-off.

RELIEF SOUGHT ON APPEAL

Defendant-appellant requests reversal with order to dismiss the complaint, on the ground that there is no evidence whatsoever to support the finding of the trial court

that there was no warranty given by respondent in connection with the sale of the tires, or damages for breach of that warranty, that substantial believable, competent, evidence shows a breach of an express warranty, and damages for that breach exceed the sum claimed by respondent.

STATEMENT OF FACTS

Appellant, doing business as Rollins Mine Supply, operates five large diesel tractor trucks on the highway between Provo, Utah, and Carbon County, each truck usually making two trips per day (R. 102). Tires for these trucks constitute a major operating expense (R. 67, 102). From the time he began purchases from respondent until the facts developed out of which this dispute arose, appellant purchased approximately one hundred tires from respondent (R. 68, 103).

About the middle of 1962, appellant began complaining to Mr. Jack Jensen, salesman for respondent, that the tires he had purchased were not giving adequate mileage (R. 89, 90). In response to these objections, Mr. Jensen, on behalf of respondent, gave appellant an oral warranty that the brand known as "Motrack" would give 75,000 miles wear, and the brand known as "Mighty Mo's" would give 100,000 miles wear, or respondent would re-cap them (R. 81, 85, 90, 104-5). Mr. Mike Billus, one of the owners of respondent, (R. 156) instructed Mr. Jensen to make the warranty (R. 85). The only representative of respondent with which appellant dealt prior to the dispute on which this action is founded, was Mr. Jensen (R. 139). The authority of Mr. Jensen to speak for respondent was not questioned at the trial.

Subsequently, in early 1963, respondent refused to honor the warranty as to mileage for thirty-two of the tires which had given less than 50% of the mileage warranted, and appellant thereupon refused to pay the balance owing upon the open account (R. 109-112). This action was brought to recover on that open account. Appellant's defense is a set-off for breach of an express warranty, the set-off exceeding the amount of the claim.

The theory of appellant's defense is that there was a breach of an express warranty as that term is defined in Section 12 of the Uniform Sales Act, Section 60-1-12, Utah Code Annotated 1953. (It is remembered that this case arose and was tried prior to the effective date of the Uniform Commercial Code.)

Over objection, the trial court permitted a Mr. Ken Stika to testify that as long as he had worked at the Provo store, there had not been to his knowledge any warranty on the brand of tire known as "Motrack", that there had been a 100,000 mile warranty on the brand known as "Mighty Mo", that this warranty had been discontinued, but he did not know when with respect to the sales to appellant (R. 152-4). He had nothing to do with the transactions between appellant and respondent and made no sales to appellant (R. 153); Mr. Jensen did not work under Mr. Stika and Mr. Stika had no supervisory position over Mr. Jensen (R. 155-6); Mr. Stika did not know whether Mr. Billus, an owner of respondent, and Mr. Jensen had any conversations concerning warranting mileage to appellant (R. 156); and he knew nothing as to what went on between management, other salesmen, and their customers (R. 156).

It is our position that Mr. Stika's testimony in rebuttal on the trial was inadmissible, and in any event it had no bearing on the question of the making of an express warranty to appellant.

On that record, the trial court (in one of the two sets of findings of fact signed and entered by it), found that there was no warranty as claimed by appellant, and entered judgment (again in two of three judgments entered by it) for respondent.

ARGUMENT

POINT I

THERE IS NO EVIDENCE TO SUPPORT THE TRIAL COURTS FINDING OF FACT ON THE ISSUE OF BREACH OF WARRANTY.

In the second set, chronologically, of findings of fact and conclusions of law signed and entered by the trial court is the following finding:

> "3. That on tires purchased during the above stated period (the time when appellant purchased from respondent) the tires were not covered by any type of waranty (sic) by Plaintiff." (R. 29)

Our position is that there is simply nothing in the record to support that finding.

We are cognizant of the rule as stated in **Lowe v. Rosenloff,** 12 Utah 2d, 190, 364 P 2d 418:

> "This court has stated on numerous occasions that findings of fact made by the trial court will not be disturbed so long as they are supported by substan-

tial evidence. Therefore, the findings of the lower court must be affirmed unless there was no reasonable basis in the evidence on which the court could fairly and rationally have thought the requisite proof was met."

The cases we have found applying this rule generally affirm the trial court in its finding based upon conflicting evidence, sometimes observing, in passing, that the rule applies, though the appellate court may be inclined to believe that testimony which conflicts with the facts as found by the trial court.

In the case before this court there is no conflict in the evidence. The record does not show a dispute of fact.

Counsel for respondent, on argument before the trial court, belabored Mr. Stika's testimony. Our response is (1) that it was inadmissible and objected to, and (2) it does not raise any conflict as regards the evidence supporting appellant's position that he was given an express warranty that he would receive a guaranteed mileage from tires sold.

It is remembered that Mr. Stika was merely another employee of respondent, that he had nothing to do with the sales to appellant or any business arrangement or transaction between respondent and appellant, that he knew nothing of possible arrangements or conversations between Mr. Jensen, respondent's salesman, and either respondent or appellant, and that he and Mr. Jensen had no business connections other than a common employer (R. 153-6). His testimony would have no bearing at all on the question whether, at a specfic time, and with express authority from respondent, through one of its owners, Mr. Jensen gave appellant an express warranty, or "guaranty", that

appellant would receive a minimum mileage per tire, at no cost over the purchase price. The record is replete and uncontradicted, showing this latter statement to be the fact (R. 80-87, 88, 90, 104-5).

It is of note, also, that when appellant, after this dispute arose, discussed settlement of the account with Mr. Stika and also with Mr. Billus, an owner of respondent, neither denied the warranty (R. 117, 119, 70).

POINT II

RESPONDENT'S AGENT HAD ACTUAL OR APPARENT AUTHORITY TO WARRANT.

No evidence was offered to challenge Mr. Jensen's authority as agent for respondent to warrant mileage appellant should obtain from tires it sold to him. We therefore believe this question may not be raised on appeal. However, counsel for respondent argued this before the trial court, and we anticipate him here on the merits.

The subject of implied or apparent authority of an agent selling personal property to make warranties is thoroughly treated by this court in **Park v. Moorman Mfg. Co.**, 121 Utah 339, 241 P 2d 914, 40 A. L. R. 2d 273. See also 2 Williston on Sales (Rev. Ed.) 660-664, Sec. 445 and Sec. 445b.

We are not here concerned, as this court was concerned in the case of **Park v. Moorman,** supra, with an implied authority to warrant mileage to be given by the tires sold. On cross examination Mr. Jensen testified:

> "Q. Why did the one have 100,000 miles guaranty and these 75,000 miles guaranty?
>
> A. Because Mike Billus (an owner of respond-

ent, see R. 156) gave me instructions to give that warranty.

Q. When?

A. When the tires were sold, before they were sold.

Q. When did Mike Billus tell you this?

A. Just before I sold them, over the telephone." (R. 85).

It is our position respondent's agent had express authority to warrant mileage of tires sold appellant. He was the only agent of respondent to deal with appellant. Had Mr. Gill or Mr. Billus, owners of the respondent at the time complained of and at the time of the trial (R. 156), or anyone on their authority disputed this evidence, we would not be on appeal. As with the evidence on the warranty, the evidence on Mr. Jensen's authority to give it is undisputed.

POINT III

APPELLANT'S DAMAGES FOR BREACH OF WARRANTY EXCEED RESPONDENT'S CLAIM.

Appellant computed the amount he claims as set-off by taking from the purchase price the same percentage thereof as the actual miles obtained from each brand of tires sold bore to the total mileage warranted in each case (R. 11-156). The theory was that the amount thus left represented the value of the mileage not delivered. This amount is $1,431.60. The difference between this amount and that of respondent's claim appeared, to appellant at least, as nominal, and he asserted his right by way of a plea in abatement rather than by way of counterclaim. This, we submit, he had a right to do.

Section 60-5-7, Utah Code Annotated 1953, provides:

"(1) Where there is a breach of warranty by the seller, the buyer may, at his election:

(a) Accept or keep the goods, and set up against the seller the breach of warranty by way of recoupment in dimunition or extinction of the price;

(b) Accept or keep the goods and maintan an action against the seller for damages for the breach of warranty;

* * * *

(7) In the case of breach of warranty of quality, such loss, . . . is the difference between the value of the goods at the time of delivery to the buyer and the value they would have had if they had answered to the warranty."

Appellant received forty-five percent of the mileage warranted (R. 126). He ought not to be required to pay for one hundred percent of the merchandise as warranted.

CONCLUSION

The post trial proceedings in this case are of interest. On January 21, 1965, the court signed and entered a judgment for respondent, unsupported by findings of fact and conclusions of law (R. 19). On February 24, 1965, the court apparently signed findings of fact and conclusions of law, finding the warranty was given, and signed and entered a judgment of no cause of action (R. 26-8). On March 1, 1965, the court signed and entered findings of fact and conclusions of law, finding no warranty and concluding respondent was entitled to judgment (R. 29-30), and on March 23, 1965, he signed and entered a judgment pursuant thereto (R. 33).

This appears irresolute; a careful analysis of the judgment roll, including minute entries, would disclose its basis.

The significance of this here is its disclosure of the lack of attention given this case by the trial court.

The record presents no evidence refuting appellant's position that he was given an express warranty as to quality of the tires sold him by one with authority so to do, and that he received a product not possessing this quality. If this court will affirm a finding where there is some competent evidence to support it, then we believe it should reverse a finding of fact when made in the face of competent, admissible, substantial and unrefuted evidence.

Respectfully submitted,

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