1966

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

IN THE SUPREME COURT OF THE STATE OF UTAH

SUPER TIRE MARKET, INC.,
Plaintiff-Respondent,

vs.

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

Case No. 10531

RESPONDENTS' BRIEF

Appeal from the District Court of Utah County, State of Utah
Honorable Joseph E. Nelson, Judge

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STATUTE

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RESPONDENT'S BRIEF

The statement of the Nature of the Case and Disposition in Lower Court are adequate as stated in Appellant's Brief.

RELIEF SOUGHT ON APPEAL

Respondent seeks sustainment of the Lower Court's judgment upon its claim as stated in the complaint.

STATEMENT OF FACTS

Respondent is a corporation in the retail business of selling tires. The Appellant purchased certain tires in the fall of 1962, and during said period of time there were charges made by the Appellant in the sum of $1,876.70. On February 6, 1963, the Appellant returned certain items he had purchased and received a credit of $643.68, leaving a balance owing of $1,233.02. There is no contention by the Appellant that this is not the correct amount, the only argument that the Appellant puts forth is that he is entitled to certain set-offs because of the failures of alleged warranties on the tires.

It should be noted in the facts that Mr. Jack Jensen, the salesman for the Respondent, was a very close friend of the Appellant and had sold tires to the Appellant prior to the time he was employed with the Respondent.

The Respondent did not give any warranties on the tires purchased by the Appellant, in that the Respondent testified that the company had given warranties on the tires as to mileage at one time, but the retail prices of the tires were reduced and the Respondent no longer continued to give warranties.

It should be pointed out to the Court that the Appellant alleges that the tires he purchased from the Respondent were not lasting as long as expected, although the Appellant never mentioned this fact to the

Respondent and even continued to purchase tires from the Respondent even though he thought the tires were not lasting.

POINT I

THERE IS SUFFICIENT EVIDENCE TO SUPPORT THE TRIAL COURT'S FINDING THAT THE RESPONDENT DID NOT WARRANT THE TIRES PURCHASED BY THE APPELLANT.

ARGUMENT

An expressed warranty may be oral or written and it is not essential that a warranty in the sale of chattels be in writing, but in relying upon a warranty the Appellant has the burden of proof.

The evidence put forth by the Respondent indicates that no warranties were given on the tires purchased by the Appellant. The manager of the Respondent corporation in Provo, Utah, testified that at one time there had been warranties on the tires as to the mileage, but the prices of the tires had been reduced and the warranties were no longer given to the purchaser. On the other hand, is the evidence put forth by the Appellant and Mr. Jack Jensen, the salesman who sold the tires, that the tires would be good for one hundred thousand miles or they would be recapped at the expense of the Respondent. The record is barren of any evidence

that the Respondent was told of the failure of the tires by the Appellant or any evidence that the Respondent refused to recap the tires if there was a failure in the tires. The Appellant did not rely upon the alleged representations by Mr. Jack Jensen in that he continued to purchase tires from the Respondent up until the fall of 1962. The record indicates that the Appellant purchased approximately one hundred tires from the Respondent.

POINT II

IF THERE WAS A WARRANTY, THE APPELLANT FAILED TO GIVE TO THE RESPONDENT NOTICE OF THE DEFECTS WITHIN A REASONABLE TIME.

ARGUMENT

In Section 60-3-9, Utah Code Annotated, 1953, it is stated:

> . . . "But if after acceptance of the goods, the buyer fails to give notice to the seller of the breach of any promise or warranty within a reasonable time after the buyer knows, or ought to know of such breach, the seller shall not be liable therefore."

In reviewing the record in this matter, we find that the Respondent was never given any type of notice of the alleged defects in the wear of the tires purchased

by the Appellant pursuant to the alleged warranty until the filing of the Respondent's complaint. The Appellant in his testimony as seen in the record indicated that his personal records would show when tire changes were required. Some of the tire changes were made on the tires purchased from the Respondent approximately one year prior to the filing of the complaint. Surely if the Appellant believed that the tires were defective, he would have given notice to the Respondent at the time of observing the defects rather than continuing to repurchase the same type and size of tires from the Appellant.

POINT III

IF THERE WAS A WARRANTY, THE APPELLANT'S TESTIMONY CONCERNING HIS DAMAGES BASED UPON THE BREACH OF WARRANTY, WAS AMBIGUOUS, VAGUE AND CONTRADICTORY.

ARGUMENT

The Appellant failed to prove his damages in that the Appellant's testimony concerning the dates as to when the tires were changed on his trucks and the amount of miles the tires had gone, to say the least, was entirely confusing and contradictory as the record will indicate. The Appellant himself did not have sufficient

facts as to when the tires were changed and the distance the tires had traveled. The evidence produced by the Appellant was so vague and ambiguous it was impossible to allow the Appellant any type of a set-off.

POINT IV

THE TRIAL COURT USED ITS DISCRETION IN BELIEVING OR DISBELIEVING THE TESTIMONY OFFERED IN EVIDENCE AND DID NOT COMMIT ERROR GRANTING TO THE RESPONDENT JUDGMENT AS PRAYED IN THE RESPONDENT'S COMPLAINT.

ARGUMENT

It is the duty of the trier of facts to determine the truth or falsity of the testimony presented in evidence and he may believe one over many or many over one. The evidence presented in this case was in direct conflict as to whether or not the Respondent had made certain warranties to the Appellant. The trial court was in the best position to observe the demeanor of the witnesses and determine whose testimony was most worthy of belief.

CONCLUSION

It is respectfully submitted that because the Lower Court found that there was not a warranty and in grant-

ing judgment to the Respondent, the facts should be stated most favorably to the party who prevailed below and that the decision of the Lower Court should be affirmed.

Respectfully submitted,

ALAN D. FRANDSEN
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