

1991

Harold O. Bjork, Herman A. Bjork, Beatrice A.
Wilcox and Arthur Anderson v. April Industries :
Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT
OF THE STATE OF UTAH

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J. Reuben Clark

HAROLD O. BJORK, HERMAN A. :
BJORK, BEATRICE A. WILCOX :
and ARTHUR ANDERSON, :

Plaintiffs-Respondents, :

vs. : Case No. 14620

APRIL INDUSTRIES, INC., a :
Deleware corporation, :

Defendant-Appellant.

BRIEF OF RESPONDENTS

APPEAL FROM JUDGMENT
of the
DISTRICT COURT OF THE THIRD JUDICIAL
DISTRICT IN AND FOR SALT LAKE COUNTY,
STATE OF UTAH

Honorable Gordon R. Hall, Judge

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BEATRICE A. WILCOX and ARTHUR ANDERSON

NATURE OF CASE AND STATEMENT OF FACTS

Respondents (hereinafter referred to as plaintiffs)
agree with the statement of facts as set forth in the brief of
appellant (hereinafter referred to as April).

ARGUMENT

I.

QUESTIONS RELATING TO THE REMOVAL OF RESTRICTIVE
LEGEND AND THE AWARD OF DAMAGES ARE RES JUDICATA

Appellant argues under its present Point I. that "The trial court awarded plaintiffs inconsistent remedies and unjustly enriched them."¹ This argument was presented to and rejected by this court on the prior appeal.² Thereafter this argument was again presented to and rejected by this court in April's petition for rehearing.³ The petition for rehearing was denied.

1. April's Brief, p.5

"Plaintiffs are to receive an amount in damages virtually equivalent to what they would have received had they sold their shares in the public offering. The trial court also told plaintiffs that they could keep their shares. Thus, plaintiffs are to receive the proceeds from the sale of their stock without actually selling that stock."

2. For comparison purposes we quote from April's prior brief, p.19

"Thus, plaintiffs will now have their stock without restrictive legend, making the stock fully marketable. Should the price increase and should plaintiffs decide to sell, they would be entitled to whatever benefit they could obtain from the value of the stock. But, of course, plaintiffs are not satisfied with just the stock. They also want to keep the stock and obtain damages for the failure to include the shares in the 1972 public offering."

3. For comparison purposes we quote from April's Brief on petition for rehearing (ps.12-16) which it reiterates in its present brief (as footnote 3, ps.10-13) almost verbatim:

III. The Court's opinion awards plaintiffs inconsistent remedies and unjustly enriches them.

This Court has awarded plaintiffs damages because their shares were not sold in the 1972 public offering. Though this Court's opinion does not deal with the issue, plaintiffs are still the owners of their shares and are still entitled to possession of them. If the price for these shares should rise, plaintiffs will be able to take advantage of that price increase by selling their shares. They will thus enjoy the double benefit of the sale of their stock and a substantial damage award. The law does not permit double recovery.

April argues under its present Point II., "Plaintiffs are foreclosed from recovering damages because of a ruling of the trial court from which plaintiffs took no appeal." The crux of plaintiffs' prior appeal was that damages should have been awarded. This court's prior decision was that damages should have been awarded, which is res judicata.

They are entitled to their shares without restrictive legend; they are not entitled to the double recovery afforded by money damages.

Plaintiffs' claims are perhaps best analogized to the law of sales. Plaintiffs claim that they are entitled to what they would have received had their shares been included in the 1972 offering; they are seeking the equivalent of specific performance of an action for the price. If they are asking for what is in effect specific performance, plaintiffs must give up the ownership of their shares. The same is true of action for the price. Under both the Uniform Commercial Code and pre-Code law an action for the price is only possible where the seller has delivered goods to the defaulting buyer or the risk of loss has passed from the seller to the buyer. See U.C.C. §2-709. A seller is not entitled to sue for the sales price and at the same time keep the goods to be sold. The obvious reason for this rule is to prevent the seller from being unjustly enriched by being paid for goods which he is going to keep.

In Murray v. Americare Medical Designs, Inc. 123 Ga. App. 557, 181 S.E.2d 871 (Ga. App. 1971), the plaintiff, who had supplied plans and supervised construction of a medical building being erected by the defendants, brought suit for breach of the construction agreement.

On a petition for rehearing after judgment for the plaintiff the issue concerned the ownership of certain cabinets and hardware items to be placed in the building. The court found that the evidence as to the location and ownership of the cabinets was conflicting. It resolved the dilemma by stating that the defendant would, by paying the judgment, be entitled to take possession of the cabinets and other hardware items. As the Court stated:

None of these issues is properly before the court.

II.

INCONSISTENT REMEDIES WERE NOT AWARDED

Plaintiffs were awarded specific performance of the agreement that they should have unrestricted stock and were also awarded damages for having been prevented from selling the stock. Those awards are not inconsistent. As stated in 71 Am.Jur.2d Specific Performance, §216 p.277, "A court of equity, having jurisdiction for the purpose of specifically enforcing performance of a contract, has full jurisdiction, in addition to decreeing specific performance, to award compensation for delay of the defendant in the performance of the contract, as, for example, for loss of rents and profits resulting from delay in the conveyance of land, for loss resulting from delay in the purchase of corporate stock, or for business losses resulting from delay in the performance of the contract by the defendant."

April argues that, "Plaintiffs are to receive an amount in damages virtually equivalent to what they would have

"It is obvious, however, that when this defendant pays off the judgment against him representing damages equivalent to the purchase price of the casework and hardware he becomes by that fact the owner of the merchandise and entitled to whatever value it may have, since to allow the plaintiff or the manufacturer full payment plus goods involved would result in an unjust enrichment. In this connection see Code Ann. 109A-2-709. [The Georgia Provision of Section 2-709 of the Uniform Commercial Code]." (181 S.E.2d at 873-874.)

received had they sold their shares in the public offering."⁴ April then concludes that, since they still have their shares, "...plaintiffs are to receive the proceeds from the sale of their stock without actually selling that stock."⁵ The fallacy with that argument is that the reason the amount of damages resulting from not being able to sell was "virtually" the value of the shares, is that during the period April refused to recognize the validity of the shares, or their tradeability, the value of the shares declined "virtually" to zero. The full value of the shares at time of judgment, 87 1/2 cents, was deducted in computation of damages.⁶ The coincidence that the shares became nearly worthless does not create a double recovery situation. There is no more double recovery here than there would have been had the stock only declined slightly and an amount in damages, much less than the equivalent value of the shares, had been awarded. So long as the actual value of the shares at time of judgment was deducted, whatever it may have been, there is no double recovery.

If there had been an award of the value of the shares, because April had converted them, then plaintiffs' retention of shares would have constituted a double recovery. Plaintiffs proffered to treat the shares as having been converted. April objected thereto, and the trial court refused the proffer.⁷

4. April's Brief, p.5 (emphasis added)

5. April's Brief, p.6

6. April's Brief, p.5

7. (R-381)

Had it been accepted, plaintiffs would then have received an additional award of damages of 87 1/2 cents per share and would no longer have their shares. Instead, that amount was deducted from the damage award and plaintiffs kept their shares.

III.

DAMAGES WERE PROPERLY AWARDED

April argues that plaintiffs should have appealed the trial court's refusal of their proffer to surrender their shares and to recover their value in a claim for conversion.⁸ April is confusing the recovery of damages for decline in value with recovery of damages for conversion of the remaining value of the shares. The latter has never been awarded. Plaintiffs still have their shares, worth 87 1/2 cents, as of the date of the prior decree, and they have not been paid 87 1/2 cents. Therefore, there was no need to appeal.

April asserts that, "If defendant has to pay for plaintiffs' stock, it should not be deprived of that stock..."⁹ April has not paid for the stock. It refused to pay the 87 1/2 cents value and objected to plaintiffs' tender of the shares into court.

April, in this appeal, is attempting a second petition for rehearing of the former decision. This court's decree

8. April's Brief, p.13

9. April's Brief, p.15

"...remanded for the entry of judgment against defendant for damages for breach of contract, which damages would be the difference between the present market value and the highest price obtainable during the period of the breach..." (emphasis added). That was done. The deduction of the present market value precludes any unjust enrichment.

April's argument that the stock may appreciate in value and plaintiffs would then be unjustly enriched is not persuasive. The stock may also decline.

The Utah cases cited by April¹⁰ on election of remedies are distinguishable because they do involve election of the inconsistent remedies of either rescinding or of enforcing the contract. Plaintiffs here sued to specifically enforce the contract and to recover damages for breach, which remedies are not inconsistent.

The Colorado case cited by April, Thornburg v. Homestead Minerals Corporation, 513 P.2d 219 (Colo. App. 1973),¹¹ is only an appellate court opinion. Furthermore, it is distinguishable because in that case, in a prior action, the plaintiff had sued only to get clear title to the shares and not for damages. The corporation asserted plaintiff was thereby estopped from later claiming damages. The appellate court

10. April's Brief, p.6, Farmers & Merchants Bank v. Universal C.I.T. Credit Corp., 4 Utah 2d 155, 289 P.2d 1045 (1955); Rogers v. United Western Minerals Co., 8 Utah 2d 1, 326 P.2d 1019 (1958); Midvale Motors, Inc. v. Sanders, 19 Utah 2d 403, 432 P.2d 37 (1967)

11. April's Brief, p.7

said that, "By asking only for clear title in the first action, she thereafter assumed the risk of market fluctuation."

April cites an appeals court decision from Georgia,¹² Murray v. Americare Medical Designs, Inc., 123 Ga. App. 557, 181 S.E.2d 871 (1971), which simply held that a supplier was not entitled to both the value of materials supplied and the return of the materials furnished because it would result in unjust enrichment. With this we agree, but plaintiffs here are not unjustly enriched because they have not recovered the value of the shares.

April cites Owen v. Merts, 240 Ark. 1080, 405 S.W. 2d 273 (1966)¹³ for the proposition that one cannot recover both specific performance and damages. We would agree with that proposition where such remedies are inconsistent as they sometimes are. In Owen v. Merts, the plaintiffs were suing to acquire shares of stock, rather than to sell them or to make them saleable. In our case, plaintiffs did not seek to acquire stock. They already had it. A buyer may have an election of remedies, to sue for damages or for specific performance of the contract of sale. Here, instead of wanting to acquire shares, plaintiffs wanted to sell the shares they already had and which April refused to allow to be traded. Plaintiffs here asked the court to make their shares saleable. The inconsistency claimed in Owen v. Merts of wanting to acquire shares and get damages also is not present. Plaintiffs

12. April's Brief, p.11, footnote 3

13. April's Brief, p.8

here seek the right to sell their shares and damages because April prevented a sale, which are entirely consistent.

Owen v. Merts relies upon Virginia Public Service Co. v. Steindler, 166 Va. 686, 187 S.E.353 (1936).¹⁴ The Virginia facts are also distinguishable. There, plaintiffs sought and were awarded not only registration of their shares but also past accrued dividends and interest thereon. The court there found that it would be inconsistent to rule that plaintiffs were owners as of a previous date and thus entitled to benefits of ownership, and not be subject to detriments of such ownership, such as value fluctuation. Here, no dividends are involved.

Further, in Virginia the court relied upon the fact that plaintiffs could have sold at any time, saying the alleged loss was "entirely predicated on the date on which complainants might have sold the stock according to their whim," and that plaintiffs could have sold their shares at any time including a time prior to trial, and that the claimed damages were therefor uncertain and speculative. Here, plaintiffs could not sell their shares.

The court in Virginia was considering two alternatives for plaintiffs, either a suit for conversion, in which event the company would become the owner of the shares and plaintiffs would be awarded damages, or a suit for specific performance

14. April's Brief, p.9

to have shares registered, in which event plaintiffs would become the owners, and said, "It is elementary that the complainants were not entitled to both the stock and its value." The distinction is that here, plaintiffs have not been awarded the value of the shares. They did not sue for conversion. The value of the shares was deducted from the award. The action was to force April to perform its agreement to make the shares tradeable and for damages because they had not been able to sell their shares.

Unlike the Virginia situation where plaintiffs could have sold at any time, plaintiffs here still haven't been able to sell. Not only is the relief granted here not inconsistent, both facets of the relief granted are essential for adequate recovery. If plaintiffs had to elect between an award for decline in value of shares and an award that the shares be made tradeable, they would not obtain full relief. They would wind up with shares of no value because they could not be sold. As stated in 71 Am.Jur. 2d Specific Performance, §216, p.278 "...equity may, when decreeing specific performance, award pecuniary compensation along with specific performance when the decree would otherwise not give complete and full relief,..."

Professor Moore recognizes that both specific performance and damages may be awarded. He states, "...in a suit

for specific performance the plaintiff may demand '(1) that defendant be required specifically to perform said agreement, (2) damages in the sum of one thousand dollars,...'

Footnote 9. Demand (1) for specific performance is a claim for equitable relief; and demand (2) for \$1,000 in damages is incidental and cumulative to demand (1) and is within equitable jurisdiction.¹⁵

This court, in its prior decision in this case, recognized that complete recovery should be granted by ordering the award of damages in addition to the removal of the restrictive legend. Prior to that decision this court had recognized that both specific performance and damages could be decreed. In Johnson v. Jones, 109 U.92, 164 P.2d 893, 896, this court, in a case wherein specific performance was awarded to a contract buyer of a duplex as well as damages for loss of rental from failure to convey, said:

The third general argument is that the court erred in awarding damages for loss of rentals in an amount of the entire rental value of the property, even if specific performance could be decreed. In view of what we have said hereinabove, this contention is unsound, for if appellant had performed, the respondents would either have enjoyed the actual possession of the apartment occupied by appellant and collected the rent from the tenants occupying the other apartment, or if both apartments had been rented they would have collected the rent on both.

15. Moore's Federal Practice 2A, ¶8.18, ps. 1802-1804

IV.

APRIL CANNOT NOW OBJECT TO
THE AWARD OF SPECIFIC PERFORMANCE

The original decree ordered April to remove the restrictive legend, but did not award damages. Plaintiffs appealed from the refusal to award damages. April did not appeal from the order that the legends be removed. Both the award of damages and order to remove legends are now res judicata.

V.

THERE IS NO VIOLATION OF DUE PROCESS

There is no double recovery, hence there is no violation of due process.

VI.

PREJUDGMENT INTEREST AWARD IS NOT EXCESSIVE

April argues that prejudgment interest should run only from the date of this court's ruling.¹⁶ Such interest would be post-judgment interest.

16. April's Brief, p.16

April quotes from the early case of Fell v. Union Pacific Railway Co., 32 Utah 101, 88 Pac. 1003 (1907), which allowed prejudgment interest.¹⁷ Plaintiffs have no quarrel with the holding in that case, but cannot go along with April's conclusion that, because interest would vary depending upon amount of deduction for the residual value of the shares at time of judgment, it should not be awarded. The amount of prejudgment interest is never ascertained until date of judgment because the amount thereof would vary depending upon the date of trial. The residual value was ascertainable at any given judgment date. The fact that it was not ascertained until the court entered judgment because only then can the credited residual value be determined, should not bar the award of interest. The rationale of the rule allowing interest is that plaintiffs should, as nearly as possible, be placed in a position comparable to that in which they would have been had the wrong not occurred. As stated in Fell,

Is there any reason why a person sustaining injury and damage to his property from the negligent act of another should not receive just what he has lost as nearly as this may be accomplished in a court of justice? If a person's property is destroyed or damaged, why is he not entitled to be compensated to the full extent of its value in money so that he may replace the same with other property of a like

17. April's Brief, p.16

nature? If on the day of its injury or destruction he restores or replaces it with his own money, why is he not entitled to interest on that money to the date of repayment? If he had loaned the money to some one, he certainly would be entitled to interest, and, if he borrowed it from some one, he would likely have to pay interest for its use. By being awarded legal interest, therefore, he is simply placed in statu quo, and nothing short of this is full compensation, and that is just what the law aims to accomplish. Is it an answer to say that the damages are unliquidated, and therefore interest is not to be allowed? This, to our minds, is no reason at all in case of injury to or destruction of property.¹⁸

It would be unreasonable to say that if the stock had become worthless, and therefore there were no residual value with which April was credited, that April should be exonerated from paying interest.

The ultimate goal of making plaintiffs whole should be achieved. Plaintiffs are only made whole by awarding them interest for the period during which they could have been using the net proceeds of sale of the stock.

All of the cases on which April relies in arguing that interest should not be awarded, actually award prejudgment interest. If any language used in the decisions indicated recovery of interest should be allowed under the facts of the particular case, that is not a holding that interest should not be awarded under other facts, such as those in this case. Any such language would be dictum.

18. Fell v. Union Pacific Railway Co., P.88 ps. 1005-06

April is really arguing that plaintiffs should not recover interest because the damages were unliquidated until date of judgment. Such contention has been rejected by Fell and by all other subsequent decisions relied upon by April. In Fell the court did not say that prejudgment interest should commence to run from the date the amount of damages is actually ascertained. Rather, it said that damages must be ascertained as of a particular time by applying fixed rules of evidence and known standards of value. Here, the particular time that damages were ascertained was at the time of the entry of judgment. The Fell decision was differentiating between a situation on the one hand in which damages had all accrued at time of judgment and on the other hand, a situation in which post-judgment damage would be accruing, compensation for which was to be included in the award. In the latter case prejudgment interest would not be allowed. Plaintiffs are not in the latter situation. The court said,

The true test to be applied as to whether interest should be allowed before judgment in a given case or not is, therefore, not whether the damages are unliquidated or otherwise, but whether the injury and consequent damages are complete and must be ascertained as of a particular time and in accordance with fixed rules of evidence and known standards of value, which the court or jury must follow in fixing the amount, rather than be guided by their best judgment in assessing the amount to be allowed for past as well as for future injury, or for elements that cannot be measured by any fixed standards of value...As the case at bar falls

clearly within the rule where the amount is computed as of a fixed time, and in accordance with fixed rules of evidence as to value, the court did not err in computing, on the amount of damages found, interest at the legal rate.¹⁹

In Uinta Pipeline Corp. v. White Superior Co., ___ U.2d 546 P.2d 885, 887, this court's most recent decision on prejudgment interest,²⁰ it is clearly shown that the important criterion is whether or not damages are complete at the time of trial. The court quoted that language of Fell allowing interest except where damages are continuing and may reach beyond the time of trial. If complete at time of trial, and if amounts can be computed at the time of trial, interest should be awarded. The court in Uinta after quoting Fell said:

In the class of cases, therefore, where the damage is complete, and the amount of the loss is fixed as of a particular time, there is--there can be--no reason why interest should be withheld merely because the damages are unliquidated. There are certain cases of unliquidated damages where interest cannot be allowed. In all personal injury cases, cases of death by wrongful act, libel, slander, false imprisonment, malicious prosecution, assault and battery, and all cases where the damages are incomplete and are peculiarly within the province of the jury to assess at the time of the trial, no interest is permissible. But this is so because the damages are continuing and may even reach beyond the time of trial.

There can be no question about the propriety of allowing interest for the destruction of personal property prior to judgment where value can be measured by facts and figures. In the instant matter the cost of rebuilding the compressor stage

19. Fell v. Union Pacific Railway Co., supra, p.1007

20. An even more recent case allowing prejudgment interest because the amount due was ascertainable is Jack B. Parson Construction Co. v. Utah ___ U ___, 552 P.2d 107

was subject to computation. Therefore it was error for the court to fail to award interest from the time of destruction.

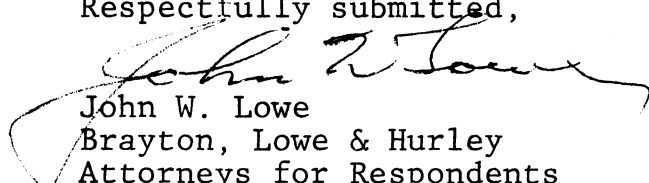
Applying the above rationale, prejudgment interest should be awarded because:

1. The damage was complete at date of judgment and no damages are to be allowed for future injury or for elements that cannot be measured by fixed standards of value.
2. The amount of loss is fixed as of date of judgment.
3. Damages are not peculiarly within the province of the trier of fact to assess at time of judgment, but are awarded in accordance with fixed rules of evidence and known standards of value.
4. Value can be measured by facts and figures and damages are subject to computation.
5. Plaintiffs can only be made whole by an award of interest on the sums they should have been able to realize by sale of the shares at the time of April's public offering.

CONCLUSION

This court has already adjudicated the issues now raised by April other than the award of interest. Utah's long line of cases awarding interest, regardless of whether or not damages were liquidated, support the award of interest here. The judgment should be affirmed.

Respectfully submitted,


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