1962

Lee R. Barton v. Dick Carson dba Carson Trucking Company et al : Brief of Appellants

Utah Supreme Court

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IN THE SUPREME COURT
of the
STATE OF UTAH

LEE R. BARTON,
Plaintiff and Respondent,

vs.

DICK CARSON, dba CARSON TRUCKING COMPANY, et al,
Defendants and Appellants.

Case No. 9720

APPELLANTS' BRIEF

APPEAL FROM ORDER OF THE THIRD DISTRICT COURT FOR SALT LAKE COUNTY
HONORABLE STEWART M. HANSON, JUDGE

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TABLE OF CONTENTS

CASES CITED

STATUTES CITED

UTAH RULES OF CIVIL PROCEDURE CITED

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NATURE OF CASE

Motion by defendants to strike plaintiff's memorandum of costs and disbursements.

DISPOSITION IN LOWER COURT

The trial court denied defendants' motion to strike plaintiff's memorandum of costs and disbursements.

RELIEF SOUGHT ON APPEAL

Appellants seek reversal of the lower court's order.

STATEMENT OF FACTS

On June 8, 1962, the trial court entered judgment in this case in favor of the plaintiff and against

the defendants. On June 9, 1962, defendants received from the plaintiff an unverified memorandum of costs and disbursements (R. 5). No other memorandum of costs and disbursements in the action was received by the defendant by the close of business on June 14, 1962. Defendants filed a motion to strike plaintiff's memorandum of costs and disburements and an affidavit in support thereof (R. 1-6).

A hearing was held June 20, 1962 on defendants' motion and the matter was taken under advisement by the trial court. On June 22, 1962, an order (R. 9) was entered denying defendants' motion and defendants thereafter prosecuted a timely appeal to this court.

Defendants appreciate that the amount involved in this appeal is rather nominal, being only $110.00, but feel that an important point of law is involved which should be resolved to determine the sufficiency of notice which must be given an unprevailing party in order to make him liable for costs incurred and filed in a court possibly 200 or 300 miles from where he or his counsel are situated when the cost bill is filed.

STATEMENT OF POINTS

POINT I.

PLAINTIFF HAVING FAILED TO SERVE UPON THE DEFENDANTS A VERIFIED MEMORANDUM OF HIS COSTS AND DISBURSEMENTS WITHIN FIVE

DAYS FROM THE ENTRY JUDGMENT IS NOT ENTITLED TO RECOVER COSTS FROM THE DEFENDANTS.

Rule 54(d)(2), Utah Rules of Civil Procedure, requires that:

> "The party who claims his costs must within five days after the entry of judgment serve upon the adverse party against whom costs are claimed and file with the court a verified memorandum of the items of his costs and necessary disbursements in the action. . . ."

The requirement that a *verified memorandum* be served upon the adverse party is in sharp contrast to the prior statutory provision governing the matter of claiming costs, Section 104-44-14, U.C.A., 1943 which merely required that the party claiming costs serve a *copy* of the memorandum of costs upon the adverse party. The statute did not specify whether or not the copy served on the adverse party need be verified. However, Rule 54(d)(2) states that a verified memorandum of costs must be served upon the adverse party and filed with the court. Thus, the rule requires that both memoranda be verified.

By Section 78-2-4, U.C.A., 1953, the State Legislature delegated to the Supreme Court authority to prescribe rules of practice for all courts of the State of Utah, and, therefore, Rule 54(d)(2) as promulgated by the court should be considered to have equal status with any other statutory provision passed or promulgated by authority of the legislature.

One principle of statutory construction is that a change in wording must have been made for a purpose and that each word and phrase should be accorded its reasonable and logical meaning. In *Robinson* vs. *Union Pacific Railroad Company*, 70 U. 441, 261 Pac. 9, this court stated:

> ". . . It is our duty, when possible, to give every word, phrase, clause and sentence a consistent, reasonable meaning . . ."

and in *Lagoon Jockey Club, et al* vs. *Davis County, et al*, 72 U. 405, 270 Pac. 543:

> ". . . But such method violates the cardinal rule of construction that every word, phrase and sentence must be given effect, if possible, in order to ascertain the meaning and intent of the act. . . ."

Thus, the change in the requirement of service upon the adverse party from a *copy* as expressed in Section 104-44-14, U.C.A., 1943 to a *verified memorandum* as stated in Rule 54(4)(2), Utah Rules of Civil Procedure, clearly evidences the meaning and intent of the legislature and the court through which the rule was promulgated to require that the prevailing party serve upon the adverse party a verified memorandum of his costs before the latter would be held liable therefor.

Since costs were not recoverable at common law, statutory requirements governing the mode by which they may be claimed must be strictly con-

strued. In *Houghton, et al* vs. *Barton*, 49 U. 611, 165 Pac. 471, the court approved and recited the following rule stated in *State* vs. *District Court*, 33 Mont. 533, 85 Pac. 368:

> "Costs, as costs, are allowed only by statute, and can be collected only by the method pointed out by the statute (auth. cited). When, therefore, the party claiming costs has failed to claim them as directed by the statute, his right to them has not attached, and the court has no other power in the premises than to strike out and disallow them on motion of the adverse party."

This rule was reaffirmed in the recent case of *Walker Bank & Trust Company* vs. *New York Terminal Warehouse Company*, 10 U. 2d 210, 350 P. 2d 626, wherein the prevailing party filed an unverified memorandum of costs within the required time period and later filed a supplemental memorandum of costs which was verified and upon which the trial court allowed recovery. On appeal the Supreme Court stated:

> ". . . We believe this was error. Costs were not recoverable at common law, and the right to recover them is purely statutory. The plaintiff, having failed to file a verified memorandum of costs after entry of judgment, is not entitled to an award for costs."

CONCLUSION

It is appellants' position that Rule 54(d)(2), Utah Rules of Civil Procedure, is just as explicit in requiring that the adverse party be served with a verified memorandum of casts as it is that one should be filed with the court. The rule is clearly stated and not susceptible of any other interpretation; for if *a verified memorandum* is not the object of the verb *serve*, then the verb has no object and the phrase relating to service upon the adverse party would be meaningless. The rule in providing for the recovery of costs abrogates the common law and therefore must be strictly complied with as stated in *Houghton* vs. *Barton*, *supra*, and *Walker Bank & Trust Company* vs. *New York Terminal Warehouse Company*, *supra*.

In view of the foregoing, we pray that the order of the trial court denying defendants' motion to strike plaintiff's memorandum of costs and disbursements be reversed and the appellants awarded their costs on appeal.

Respectfully submitted,

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