1963

James Manufacturing Co. v. E. J. Wilson : Appellant's Reply Brief

Utah Supreme Court

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In the Supreme Court of the State of Utah

JAMES MANUFACTURING COMPANY, a corporation,

Plaintiff-Appellant,

vs.

E. I. WILSON,

Defendant-Respondent.

CASE NO. 9887

APPELLANT'S REPLY BRIEF

Appeal from Judgment of the Fifth District Court of Juab County
HON. C. NELSON DAY, Judge

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NEW CENTURY PRINTING CO., PROVO UTAH

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POINT I

ERROR IN ORDERING JURY TRIAL OVER PLAINTIFF'S OBJECTION.

The plaintiff recognizes the fact that this Court on many occasions has held that the granting or denial of a jury trial is within the sound discretion of the trial court, and this fact is not disputed herein. The plaintiff, however, does submit that the respondent has cited to this Court on Pages 12 and 13 of his Brief, a case which was decided by this Court in 1914 which should no longer be persuasive in determining the proper procedures nor the purpose for

which demand for jury trial is required. That case was decided under a statutory provision, Compiled Laws of Utah 1917, Section 6782 which provides as follows:

> "Either party to an action of the kind enumerated in the preceding section (6781) who desires a jury trial of the same or of any issue thereof may demand it, **either by written notice to the clerk** prior to the time of setting such action for trial, or within such reasonable time thtreafter as the court may order; or orally in open court at the time of such setting. * * * *" (Emphasis added)

In the case cited by the respondent on Page 12 of his brief, Davis vs. D & R G Railroad Company, 45 Utah 1, 142 P. 705, this Court determined that the provisions of the statute quoted above were not for the benefit of the adversary, but were for the benefit of the court in having a jury panel on hand when a case was to be decided by a jury. Under the particular wording of the statute which the court was called upon to interpret, this decision seems to be the proper one. Nothing is said in the statute about notifying the adverse party or making any demand on him in order for the case to be tried by a jury; therefore, it is reasonable to assume that the purpose for which the legislature required demand under the prior statute was to allow the court the necessary time to have a jury panel on hand and thus not delay those cases called for trial.

This satutory provision, however, is no longer the applicable law with regard to the demand for jury trial in the State of Utah. The demand for jury trial is now governed by Rule 38(b) of the Utah Rules of Civil Procedure. That rule provides as follows:

"'DEMAND. Any party may demand a jury trial of any issue trialable of right by a jury by paying the statutory jury fee and **serving upon the other parties a demand therefor in writing** at any time after the commencement of the action and not later than shall be fixed by rule of the court in which the action is pending. Such demand may be endorsed upon a pleading of the party." (Emphasis added)

Under this provision the plaintiff respectfully submits that the requirement of demand is no longer solely for the benefit of the court, but is also for the benefit of the adverse party. This seems abundantly clear on the face of the provision in 38(b), where it is provided that demand must be served upon the other parties involevd in the litigation. Undoubtedly the legislature felt that the other parties involved should have the opportunity of reviewing the jury panel and have the further opportunity to investigate that panel and look into the backgrounds of those who were to be available for jury duty. In light of such a purpose, it is clear that the plaintiff in this case was not given this opportunity. As was stated in the appellant's previous brief, it was not known to the appellant's counsel that the trial was to be by jury until five days before the date for which trial had been set. Because of other commitments, the appellant's counsel was unable to converse with the court concerning this matter and was precluded from carrying out the necessary interviewing and investigation of those persons who were on the jury venire. Under these circumstances, the plaintiff believes that the trial court abused its discretion in permitting a trial by jury.

POINT II

ERROR IN ADMITTING EXHIBIT 8 OVER THE OBJECTION OF THE PLAINTIFF.

Appellant is aware of the Utah case DeMichele vs. Insurance Company, 40 Utah 312, 120 P. 846, which is cited by the respondent on Page 18 of his brief; however, the appellant submits that the Utah court, by this decision, has not gone to the extreme which the respondent seeks to take us in his brief. The respondent's position seems to be that by this decision, the Utah Court has abolished all necessity for laying the proper foundation for admitting a copy of a document into evidence either by showing a demand to produce upon the adverse party or by showing that the original document has been lost or destroyed. This should not, and the appellant respectfully urges is not, the law of this State. If this were the case, the exception for admitting some carbon copies would indeed be not an exception, but the rule, and there would be no necessity for requiring the original as best evidence. Clearly there has been an exception carved out for admitting some carbon copies of documents which are sought to be introduced into evidence, however, this does not apply to every carbon copy of any document. The reasoning which lies behind the exception for some carbon copies is clearly set forth by McCormick in his work on evidence, where it is said:

> "Here the copy is made by the same stroke of the pen or pencil as the original and there is an anology to the practice of signing counterparts where each copy was intended to be an equal embodiment of the contract or other transaction. Indeed today counterparts usu-

> ally consist of an original and one or more carbons, all duly signed in multiplicate. What makes them counterparts is the signing with intent to make them equal; **consequently, the doctrine of counterparts can hardly apply to the retained carbon copy of a letter—the writer does not intend the copy to a communication at all."** McCormick on Evidence, page 419-20. (Emphasis added)

This, then, brings us to the extent to which the exception for some carbon copies should be extended. It should only apply to those documents which were intended to be of equal stature; such as contracts between various parties when carbons are a necessity and all involved feel that the carbons are of equal stature with the original, and each party takes his signed copy with this understanding; or, as the Utah Court said in DeMichele vs. Insurance Company, supra, cited by the respondent, where business records such, as a proof of loss, are made in duplicate, then these carbon copies are clearly meant to be of equal stature and are, therefore, to be treated as duplicate originals. This exception should not be extended to the mere carbon copy of a letter which was never intended to be a communication itself, but was retained in files or as in this case allegedly retained in the files of the sender. Were this not the case, there would be a clear invitation for the litigants to manufacture their own evidence without ever accounting for the original which was allegedly sent. Appellant respectfully submits that this is not the law of the State of Utah and that this Court, by the decision in the DeMichele case, did not intend for the exception for carbon copies to extend to this situation.

POINT III

ERROR IN THE TRIAL COURT'S FAILURE TO GRANT THE PLAINTIFF'S MOTION TO DISMISS AT THE CLOSE OF THE DEFENDANT'S CASE IN CHIEF AND IN ITS FAILURE TO GRANT THE PLAINTIFF'S MOTION FOR A DIRECTED VERDICT.

Appellant, in its previous Brief, listed five reasons supporting its contention that there was no breach of warranty involved in this case. The third reason of that particular list is attacked by the respondent on Page 23 of his Brief.. In seeking to discount, the fact that Mr. Wilson was an experienced turkey grower who had over the years faced a problem of feeding his turkeys with various types of equipment, the counsel for respondent cites to this Court the Utah case of Carter vs. Dunn, 117 Utah 180, 214 P.2d 118. This case does absolutely nothing but cloud the issues involved. The appellant here is not trying to avoid the breach of implied warranty on the grounds that it was not the seller of the equipment, nor upon the grounds that the equipment sold was sold under a brand or tradename, on the contrary, the appellant says merely that no implied warranty ever arose under the circumstances here involved. Mr Wilson did not rely upon the experience and advice and the judgment of Mr. Tuttle in selecting this type of equipment. He made the choice himself for his own particular purposes. Therefore, the case which respondent cites in his Brief is not in point as applied to the facts as they exist in our case.

POINT IV

ERRORS IN INSTRUCTING THE JURY.

Respondent, on Page 31 of his Brief, takes the position that because of the fact that the financial transactions and arrangements between the respondent and the appellant and third parties was a material part of the litigation that the court's instruction No. 18 was, therefore, called for. Respondent seems to overlook the context in which that instruction was given. It is appellant's contention that the instruction not only permitted the jury to investigate and to delve into the financial arrangements between the parties involved, but the instruction clearly indicated to the jury that the Court felt that the financial transactions and arrangements were as the respondent represented them to be. It is not for the Court to comment on the weight and sufficiency of one party's evidence as it pertains to a particular issue in the case. Indeed to do so is error. By giving this particular instruction, the Court clearly influenced the jury as to this material part of the litigation, and in doing so error was committed.

On Page 28 of his brief respondent cites to this Court a part of Rule 51, which provides that no error may be assigned for the giving or failure to give an instruction unless an objection is made thereto. The rule goes on to provide, however, that "notwithstanding the foregoing requirement, the appellate court, in its discretion and in the interests of justice, may review the giving or failure to give an instruction." The respondent seeks to avoid this provision by saying that this Court does not have before it all the evidence upon which the instructions were based. Appellant submits that the errors which its claims were

committed are fully supported by the evidence available to the Court. Indeed many of the errors are related to basic and fundamental concepts in the law and are not dependent upon the evidence of certain facts as found in the evidence.

Under these circumstances, the appellant respectfully submits that this Court may properly review the alleged errors in instructions, and that in doing so the Court is fully justified by the provisions in Rule 51. Furthermore, appellant did make objections to many of the instructions.

Respectfully submitted,

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