1963

# Carl W. Thorstensen v. Sid Weese : Brief of Appellant

Utah Supreme Court


Ira A. Huggins; Attorney for Appellant;
Alan D. Frandsen; Attorney for Respondent;

IN THE

# Supreme Court of the State of Utah



CARL W. THORSTENSEN,
*Plaintiff and Respondent,*

vs.

SID WEESE,
*Defendant and Appellant.*

Case No.
9899

# APPELLANT'S BRIEF

Appeal from Judgment of the Second
District Court for Weber County,
Honorable Charles G. Cowley, Judge.



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Case No. 9899

## BRIEF OF DEFENDANT AND APPELLANT

### STATEMENT OF THE KIND OF CASE

This is an action by respondent upon a Memorandum of Contract for the sale by respondent to the appellant of sixty-four share of stock in Ogden Utah Knitting Company for $3,200.00. The appellant paid $2,200.00, and refused to pay the balance for the reason that the stock when the contract was entered into was worthless, and that the contract was entered into under mutual mistake of fact, both parties in good faith believing that the stock had substantial value.

### DISPOSITION IN LOWER COURT

This matter was tried to the Court without a jury. Judgment was rendered in favor of the respondent for the unpaid balance of the contract, i. e., $1,000.00 and dismissing appellant's Counterclaim to rescind and for restsitution of the $2,200.00 paid (R. 7, 10).

Ogden Utah Knitting Company for over sixty years was engaged at Ogden, Utah in the manufacture and sale of certain articles of wearing apparel.

The agreement (R. 2) was entered into in good faith by both parties on December 28, 1961. Several months later, July, 1962, after the taking of a physical inventory, and upon preparation of a operating statement, it was determined that the company sustained an operating loss for the year 1961 of $159,289.00 (Tr. 52). The company had previously lost, without its fault, the right to use the trade-mark for LDS garments, the use of which, prior to the loss, accounted for more than fifty per cent of its total business. In 1961 it was attempting to convert its operations from manufacture of LDS garments to other lines of merchandise, and to establish a market for the new lines. Losses sustained by being deprived of the use of the LDS trade-mark, and inability to promote and establish itself in new lines resulted in the insolvency of the company. This was not, and could not be determined until after the taking of physical inventory early in 1962, and the audit of its financial affairs and the preparation by the company accountant of an operating and financial statement for 1961. See testimony of Herbert J. Corkey, Sr., CPA (Tr. 50-66 incl.). The company was bankrupt, (Tr. 19, 34, 44, 45, 54, 55, 56, 59).

Both respondent and appellant, at the time of entering into the purchase and sale agreement, were officers and employees of the company, and each thought the stock worth the agreed upon purchase price, i. e., $50.00 per share, whereas the operating and financial statements later prepared are conclusive that the stock had no value. Both parties made inquiry from Charles C. Thorstensen, President-General Manager, and principal stockholder of the company who had dur-

ing 1961 paid $70.00 per share for some of the company stock, who advised them that in his opinion the stock was worth about $50.00 per share. Both relied on that (Tr. 23, 33).

Appellant claims that since the stock actually had no value at the time of the agreement; that there was a mutual mistake of fact as to the stock having any value; that he is entitled to rescind the purchase agreement, and to recover that part of the purchase price already paid to the respondent, and that the respondent should retain the stock. The Trial Court found that the stock on December 28, 1961 had value, that both parties were assuming a risk in entering into the agreement, and that there was not a mutual mistake of fact as to the value of said stock (R. 8).

Appellant claims that the finding that the stock had value on December 28, 1961, and that there was not a mutual mistake of fact with respect to it having any value is contrary to all of the evidence, and that the Court then in effect disbelieved all of the evidence adduced with respect to value, and that its findings, conclusions, and decree are based upon no evidence at all, and are contrary to all of the evidence.

## RELIEF SOUGHT ON APPEAL

Appellant seeks to have the findings, conclusions and judgment reversed, and the Trial Court instructed to enter contrary findings and conclusions, and enter judgment in favor of the appellant permitting him to rescind and to recover from respondent that part of the purchase price already paid.

## STATEMENT OF FACTS

This is an action brought by respondent against the ap-

pellant for judgment in the sum of $1,000.00 with interest, representing the unpaid balance of an agreement dated December 28, 1961 between the parties wherein appellant agreed to purchase sixty-four shares of stock in Ogden Utah Knitting Company, a Utah corporation, doing business at Ogden, Utah. Appellant paid $2,000.00 on the agreement at the time of its execution, and agreed to pay the balance of $1,200.00 at $100.00 per month beginning with January 31, 1962. He paid two monthly installments, and then upon discovering that the stock had no value at the time of execution of the agreement refused to pay more, and demanded the return of that part of the price already paid.

Respondent was a stockholder and had been since 1940, and was vice president of the corporation. Appellant was appointed manager of the corporation October 8, 1961, at which time he was given twenty-five shares of stock in the corporation by the president of the company, (Tr. 20).

While there was some reason to believe the company was having some financial troubles, the extent and effect thereof were not known until after the closing of its books, preparation of inventory, operating statement and financial statement, and a determination made therefrom in July, 1962, (Tr. 54). At that time it was determinied by the company auditor, Herbert J. Corkey, Sr., CPA, that the company was insolvent, its assets so depleted that any value theretofore had by the stock was completely wiped out, and it was unable to meet its obligations to other creditors, and that that condition existed back and prior to the date of the purchase agreement, and that neither of the contracting parties knew, or could have known these facts until the CPA had made his determination and report.

## ARGUMENT

### POINT I

THE EVIDENCE IS INSUFFICIENT TO SUPPORT THE FINDING OF THE COURT THAT "THE STOCK ON OR ABOUT DECEMBER 28th HAD VALUE, AND BOTH PARTIES WERE ASSUMING A RISK IN ENTERING INTO THE STOCK SALE, AND THERE WAS NOT A MUTUAL MISTAKE AS TO THE VALUE OF SAID STOCK."

### POINT II

THAT THE EVIDENCE IS INSUFFICIENT TO SUPPORT THE CONCLUSION THAT "PLAINTIFF SHOULD BE AWARDED THE SUM OF ONE THOUSAND ($1,000.00) DOLLARS AS DAMAGES FOR BREACH OF CONTRACT, AND THE DEFENDANT SHOULD BE AWARDED THE SIXTY-FOUR (64) SHARES OF STOCK, AND DEFENDANT'S COUNTERCLAIM SHOULD BE DISMISSED WITH NO CAUSE OF ACTION." AND SAID CONCLUSION IS AGAINST LAW.

### POINT III

THAT THE EVIDENCE IS INSUFFICIENT TO SUPPORT THE CONCLUSION THAT "JUDGMENT SHOULD BE ENTERED IN FAVOR OF PLAINTIFF, AND AGAINST DEFENDANT FOR THE SUM OF ONE THOUSAND ($1,000.00) DOLLARS, AND FOR INTEREST AND COURT COSTS INCURRED HEREIN, AND DEFENDANT SHOULD BE AWARDED THE SIXTY-FOUR (64) SHARES OF STOCK IN SAID CORPORATION AND DEFENDANT'S COUNTERCLAIM DIS-

MISSED WITH NO CAUSE FOR ACTION." AND SAID CONCLUSION IS AGAINST LAW.

## POINT IV

THAT THE EVIDENCE IS INSUFFICIENT TO SUPPORT THE JUDGMENT AWARDING PLAINTIFF THE SUM OF ONE THOUSAND ($1,000.00) DOLLARS, TOGETHER WITH INTEREST AT SIX (6%) PER CENT, AND COSTS, OR ANY SUM AT ALL, AND SAID JUDGMENT IS AGAINST LAW.

Since all of the points stated, and relied upon by the appellant, tie into and relate to the salient claim of the appellant, i. e., that the agreement was entered into through a mutual mistake of fact, in the interest of time and space, it would appear proper to argue all of said points concurrently.

The following facts are not controverted by any evidence:

1. There was no quoted market value for the stock described in the agreement to purchase.
2. That both appellant and respondent believed as a fact that the stock had substantial value.
3. That at the time the agreement was executed, the stock had no value.
4. That fact number "3" was not established, and could not be established by them, or either of them at or prior to the execution of the agreement.
5. That the stock has never been delivered to the appellant.
6. That appellant and respondent relied upon the same source of information in fixing value.
7. That there was no consideration for appellant's

promise to pay, and for the payments actually made.

8. There is no evidence of changed conditions in respondent's position. Lawson vs. Woodmen of the World, 88 Utah, 267, 53, Pac. 2d. 432.

Appellant claims, in view of the foregoing, that he is in no different position than one who buys spurious stock from another, neither of whom knowing the stock was spurious, but believing it to be genuine. The issue here is not "market value" of the stock, but that the stock had no value at all:

> "It is a firmly established general rule that money paid to another under the influence of a mistake of fact, that is, on the mistaken supposition of the existence of a specific fact which would entitle the other to the money, which would not have been paid, if it had been known to the payor that the fact was otherwise, may be recovered provided the payment has not caused such a change in the position of the payee that it would be unjust to require a refund." 40 Am. Jur., Payment, Sec. 187. (See also Williston on Contracts, Sec. 1556-1573); Restatement Restitution, Sec. 26, 39, 49; American National Bank of Chicago vs. McKay 102 F. 662; Great Northern Ry. Co. vs. Reid, 245 F. 86. There is no evidence of changed conditions, Utley vs. Donaldson 94 U.S. 29. "To recover money paid under mistake, the payment must have been made under a mistaken belief that the money was due the payee, when in truth it was neither legally nor morally due. An error of fact is ordinarily said to take place either when some fact which really exists is unknown, or some fact is supposed to exist, which really does not exist." 40 Am. Jur., Payment, Sec. 189, 193; Smith vs. Rubel, 140 Ore. 422, 13 Pac. 2d 1078; 87 A.L.R. 647; Grand Lodge A. O. U. W. vs. Towne, 136 Minn. 72, 161 N.W. 403; Sutton vs. Peterson (Wash.) 1938, 74 Pac. 2d 885.

The only evidence as to the value of this stock, or whether it actually had any value at all is found in the testimony of the expert witness, Herbert J. Corkey, Sr., CPA. His testimony contains an analysis of the facts and conditions upon which value must be based. His testimony is fairly short, (Tr. 50-60). The writer is of the opinion that a reading of this witness' testimony in full by the Court would be far more enlightening on the issue involved than by quoting select portions of it.

It is said in Am. Jur. 40, Payment, Section 216, "Money Paid for Worthless Articles,"

> "It is firmly established that an action lies to recover back money paid for an article which is entirely worthless. Thus, a purchaser and holder of counterfeit United States bonds, redeemed by the United States after his purchase, may recover the purchase money without returning the bonds, and before repaying the United States, and money paid for a bill which turns out to be counterfeit may be recovered, for a payment for such a bill must be regarded as a payment by mistake for a thing of no value, but which was, at the time it was received, believed to be and imported on its face to be of instrinsic worth."

This Court said in Board of Education of Sevier School District vs. Board of Education of Piute School District, 85 Ut. 276, 39 Pac. 2d. 340, apparently quoting with approval from 13 C. J. Page 377,

> "That where certain facts assumed by both parties are the basis of a contract, and subsequently it appears that such facts did not exist THERE IS NO AGREEMENT, and thus where parties agree in regard to a thing which unknown to both parties does not exist at the time THERE IS NO CON-

TRACT. THERE IS NO SUBJECT MATTER." (Emphasis ours).

It is said in 13 C.J., Page 369,

"A mistake of fact takes place when some material fact which really exists is unknown or when some essential fact, which is supposed to exist really does not exist" and on Page 375, "a mutual mistake as to material facts will void the agreement." (Citing cases).

Applying this rule to the instant case, the Ogden Utah Knitting Company was insolvent, and its stock had no value, but on the contrary a negative value, (Tr. 55). There is no evidence in this record to the contrary. Hence, a material fact (insolvency hence no value) existed at the time the agreement was executed and this fact was unkown. Put conversely, the contracting parties assumed the fact to be that the company was solvent, and that its stock had value, which fact did not exist. In the school board case (supra), the contracting parties entered into an agreement with respect to the location of the precinct of Koosharem. This contract between the two districts was based upon the assumption or belief that it was uncertain in which of the two contracting districts the said precinct was located, and the agreement concerned itself with a payment of costs, and expenses of the school located in Koosharem by the two contracting parties, since the fact assumed was that the location of the Koosharem precinct, whether in plaintiff or defendant district, was uncertain, they agreed to share the costs. It subsequently developed and the true facts were that by a previous court decision it had been definitely established that Koosharem was located in the plaintiff district. Hence, this Court found and decided that since both the contracting parties were mistaken with respect to a material fact (location), that there was no basis for the con-

tract. This Court said; "THE SURVEY WAS ACKNOWLEDGED, AND EVER SINCE ACQUIESCED IN, AND SO FAR AS MADE TO APPEAR WAS NOT QUESTIONED UNTIL 1923 WHEN THE THEN MEMBERS OF THE SCHOOL BOARDS ASSUMED THERE WAS SOME UNCERTAINTY WHICH DID NOT EXIST AS TO THE TRUE BOUNDARY LINE. THE MEMBERS OF THE TWO BOARDS WHO ENTERED INTO THE AGREEMENT MAY HAVE BEEN IGNORANT OF SUCH SURVEY, AND OF THE ESTABLISHMENT OF SUCH BOUNDARY LINE. WHETHER THEY WERE OR NOT, THEIR ASSUMPTION OF UNCERTAINTY HAD NO EXISTENCE IN FACT." (Emphasis ours). "Notwithstanding that, it now, because of an unfounded and nonexisting uncertainty, and mutual mistake of fact, not of law, seeks to enforce the contract or agreement against the Piute School District, which is still executory on behalf of the latter."

The Trial Court refused to enforce the agreement on the grounds of want of power, and of legal authority of the Boards to enter into such an agreement. With respect to that theory this Court said; "Much may be said in support of that, but in examining the ruling we need not go that far. We prefer to put the affirmance on rules and principle of equity as shown by authorities referred to, and under which relief should be granted against the enforcement of the agreement as alleged in the Complaint, and not as found by the Court." Numerous other authorities could be cited. (See Bowles vs. Miller, Colo. 1935, 40 Pac. 2d 243). However, in the opinion of the writer the above and foregoing authorities cited state the general rule, and the great weight of authority. Further citations would be more or less cumulative and time and space consuming.

It is inconsistent, in view of the facts and evidence in this case, that appellant would have agreed to purchase this stock had he not believed that it had substantial value. The evidence is conclusive that he did believe it had substantial value; that respondent believed it had substantial value, and that both parties relied upon these assumed facts which did not exist, and hence were mutually mistaken; not that one party believed it had one value and the other party believing it had a different value, but uniting on a mistaken belief that the facts were that it did have substantial value, and that a reliance upon that fact was a material element relied upon in the consummation of the agreement. The uncontroverted facts are that contrary to the judgment of the Trial Court the parties were actually contracting to buy and to sell nothing. If appellant rescinds and is granted restitution, the respondent loses nothing. He still has his stock which is worth nothing. If, on the other hand, the judgment of the Trial Court is permitted to stand, then appellant will be required to pay $3,200.00, and get nothing in return. In other words, it sums up to the fact that there was no consideration for the transaction from its inception, and equity proposes and undertakes to avoid such a result. Assuming for the sake of the argument that the stock in question actually belonged to a third party, but that both of the contracting parties believed it belonged to the respondent who was not acting by or in behalf of, or under circumstances in which he could bind the true owner, so far as the parties in that case are concerned, the stock would have no value to either of the contracting parties, and hence there would be no consideration for the contract. It would seem to the writer that the ultimate facts in that hypothetical case, and the instant case would be identical, and that the rule of law which would permit, under the

assumed circumstances, rescission and restitution, applies with equal force and to the same effect in the instant case.

Notice of Rescission of Contract was not necessary to maintenance of action for moneys had and received on the ground that there has been a total failure of consideration, Westbrook vs. Reneau, 278 Pac. 2d 32, 129 C.A. 2d 715. Cherry vs. Hayden, 223 Pac. 2d 878-100 C.A. 2d 416.

## CONCLUSION

In conclusion it would seem on the record in this case that equity compels the reversal of the judgment of the Trial Court, because it is based upon findings of fact and conclusions of law which are diametrically opposed to not only the weight of, but all of the evidence in the case.

We respectfully submit that the judgment should be reversed, findings should be made contrary to those found by the Trial Court, the conclusions and judgment reversed.

Respectfully submitted,

HUGGINS & HUGGINS
IRA A. HUGGINS.