

1967

Double "D" Amusement Company v. William B. Hawkins : Respondent's Brief

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In the Supreme Court of the State of Utah

DOUBLE "D" AMUSEMENT
COMPANY, a Corporation,
Plaintiff and Respondent,

vs.

WILLIAM B. HAWKINS,
Defendant and Appellant.

**CASE
NO. 10938**

RESPONDENT'S BRIEF

NATURE OF CASE

This is an action for breach of a contract by the terms of which appellant was to have permitted respondent to place an automatic music vending machine on appellant's business premises, in consideration for which appellant was to receive a percentage of the gross receipts of the machine.

DISPOSITION OF CASE IN LOWER COURT

The respondent agrees with the appellant's statement of the disposition of the case in the lower court.

RELIEF SOUGHT ON APPEAL

, The respondent seeks to have the judgment of the trial court sustained contending that there was adequate evidence to support the finding of the court with respect to damages.

STATEMENT OF FACTS

Respondent corporation, plaintiff below, is engaged in the business of operating amusement machines (record players, pinball machines, etc.) on locations in various restaurants and taverns. In exchange for the right to place its machines upon the premises respondent pays over a fixed percentage of the gross receipts of each machine to the owner or operator of the premises.

On October 16, 1963, respondent entered into such a contract with appellant as owner and operator of the L-Roy Tavern and Lounge in Orem, Utah. Pursuant to the contract respondent placed an automatic record player on appellant's premises. For a period of approximately eight months the parties shared the gross revenues of the machine, dividing them equally.

On or about July 1, 1964, appellant wrongfully breached the contract by removing the machine from his business premises. The fact of appellant's liability for such breach is not an issue in this appeal.

After the initial trial, at which appellant's liability was established, a new trial was granted by the court primarily on the issue of damages. At the new trial the testimony and exhibits received at the first trial were treated as again being before the court, pursuant to stipulation of counsel and ruling of the court (R. 135-136).

At the first trial evidence had been received of the

exclusively to the operation of the machine in question.

A case directly in point which commends itself by the clarity and brevity of its analysis is *King Features Syndicate v. Courier*, 241 Iowa 870, 43 N.W. 2d 718, 41 ALR2d 467. (1950). The case involved a contract similar to that in the instant case by which plaintiff was to install its printer telegraph machines in defendant's premises and defendant was to pay \$10.00 a week for news reports received over the machines. Defendant breached the agreement before the machines were installed. Holding that the measure of plaintiff's damages was the gross receipts which plaintiff would have received, less the "cost of obtaining them" the court further held that:

" . . . the cost of performance figure, used to diminish the gross payments due, did not need to include what might be termed the overhead or fixed expenses as argued by defendants. The record shows such items of expense would be constant whether this contract was performed or not. This being true, they were of no interest on the question of damages for nonperformance.

In answering a similar argument to that presented by the defendants here, the court in *Oakland California Towel Co. v. Sivils*, supra, said: ". . . the true rule seems to be that the prospective profits should be diminished by charges composing an essential element in the cost of manufacture, or, as in this case, of service. Essential elements in such cost do not include remote costs, overhead or otherwise, but are confined to expenditures that would necessarily have been made in the performance of the contract. The only matter of concern is the detriment suffered or benefit lost as the result of the breach. If the fixed expenses nei-

ther increased or decreased as a consequence of the nonperformance of the contract, there would be no loss or benefit arising from that factor." (52 Cal App2d 517, 126 P2d 652.) 41 ALR 2d 476.

Respondent's witness Arvid Dodge, a certified public accountant, after stating that he would exclude fixed costs of the business as a whole in determining loss of profits resulting from the breach testified as follows:

"Q. (By Mr. Howard) Can you tell us why you think that would be the more acceptable calculation, based upon accounting practice?

A. Yes. The expenses incurred by the Corporation during this period would go on whether or not his machine was actually in use, with one or two exceptions: repairs and maintenance, automobile expense, which undoubtedly would have been greater had this machine been in operation.

But we have a machine here, that through obsolescence, if nothing else, depreciation would continue, advertising would continue, wages would continue. All of these expenses incurred and spent by the Corporation would continue whether or not this machine brought in revenue. Therefore, in this computation I have tried to take the overall net income deficiency and deduct just those additional expenses that would ordinarily—which would have occurred had this machine been in operation for this period of time." (R. 113).

The testimony of Dodge in this particular was uncontradicted. This case is thus clearly within the reasoning of the **King Features** case, and the court correctly measured respondent's loss of profits by deducting from gross

gross receipts of the machine in question for the eight months' period it was in operation on appellant's premises (R. 135). From this evidence the court was able to determine by simple arithmetical calculation the average monthly gross receipts of the machine (R. 122) and the projected gross receipts for the life of the contract (Memorandum Decision, March 17, 1967).

At the second trial evidence was received as to respondent's costs of doing business (R. 106-111, 127-131; Exhibits A-3, A-4). These costs fall into two categories: (a) Those general costs which enter into the calculation of net income of the corporation and (b) that part of the general costs in category (a) which relate exclusively to the particular machine which is part of the subject matter of this litigation, e.g., depreciation of the machine, maintenance costs, etc. These latter costs in category (b) were necessarily estimated costs over the life of the contract since the contract was terminated by defendant's breach after eight months of operation. The phrase, "sheer guess work", applied by counsel for appellant to these calculations (R. 108) is therefore inaccurate. The calculations were the work of a skilled certified public accountant and based largely upon accepted depreciation schedules (R. p. 106).

On the basis of this evidence the court calculated respondent's share (\$4,050.00) of the projected gross revenue for the life of the contract and determined the damage to respondent by subtracting therefrom the projected costs in category (b) above for the life of the contract (\$2,-150.00) and respondent's receipts for the first eight months (\$567.25). The calculation of the court as found in its Memorandum Decision is as follows:

"In this case the court finds the issues in favor of the plaintiff and against the defendant and finds that the gross revenue from the music machine in defendant's place of business amounted to \$67.50 per month; that for a five-year period this would indicate total gross revenue of \$4050.00, to which the plaintiff would be entitled; that the sum of \$567.00 was paid from the machine in cash to the plaintiff leaving a balance to recover of \$3,482.75; that the cost of operation for the five-year period would amount to \$2,150.00, resulting in a loss of net revenue to the plaintiff of \$1,332.75, for which it is entitled to judgment."

Respondent believes that the figure of \$2,150.00 for cost of operation is over-stated. (Compare Exhibit A-3.) In the interest of terminating this litigation, however, respondent is willing to accept the trial court's figure.

ARGUMENT

POINT I

THE TRUE MEASURE OF RESPONDENT'S DAMAGE FOR LOSS OF PROFITS FROM THE MACHINE IN QUESTION IS ARRIVED AT BY DEDUCTING PROJECTED COSTS ATTRIBUTABLE TO THAT MACHINE ONLY FROM RESPONDENT'S SHARE OF THE MACHINE'S PROJECTED GROSS REVENUE FOR THE CONTRACT PERIOD.

The principal question raised on appeal is whether in determining damages for loss of profits from operation of the machine the trial court must subtract a pro rata share of the costs attributable to all 83 machines, the operation of which constitutes respondent's business, or rather if the court need only subtract those direct costs attributable

receipts only those costs exclusively attributable to the machine in question.

POINT II

THERE WAS COMPETENT EVIDENCE FROM WHICH THE TRIAL COURT COULD DETERMINE RESPONDENT'S LOSS OF PROFITS, RESULTING FROM APPELLANT'S BREACH.

That "damages cannot be found from mere speculative and conjectural evidence" (Bunnell v. Bills, 13 Utah 2d 83, 368 P2d 597, 602 (1962)) is a sound and well established principle of law which respondent does not here dispute. A corollary principle, equally well established, is stated by this Court as follows:

Where the plaintiff has shown actual loss of business during the period as a result of defendant's breach of contract, he will not be denied recovery because the exact amount of damage cannot readily be ascertained. Gould v. Mountain States Tel. & Tel. Co., 6 Utah 2d 187, 309 P2d 802, 805 (1957); and see numerous cases cited at footnote 3.

The rule against speculative and conjectural evidence of damages is directed to evidence of the fact rather than evidence of the extent of damage:

Courts indicate that there is a distinction between the quality of proof necessary to establish the fact that the plaintiff has sustained some damage and the measure of proof necessary to enable the jury to fix the amount. Although formerly the tendency was to restrict the recovery to such matters as were susceptible of having attached to them an exact pecuniary value, it is now generally held that the uncertainty

which prevents a recovery is uncertainty as to the fact of the damage and not as to its amount and that where it is reasonably certain that damage has resulted, mere uncertainty as to the amount will not preclude the right of recovery or prevent a jury decision awarding damages. This view has been sustained where, from the nature of the case, the extent of the injury and the amount of damage are not capable of exact and accurate proof. Under such circumstances, all that can be required is that the evidence—with such certainty as the nature of the particular case may permit—lay a foundation which will enable the trier of facts to make a fair and reasonable estimate of the amount of damage. The plaintiff will not be denied a substantial recovery if he has produced the best evidence available and it is sufficient to afford a reasonable basis for estimating his loss. 22 Am Jur 2d 44, Damages Sec. 25; Gould case, *supra*, 309 P2d at 805-6.

In the case at bar there was clear and precise evidence before the trial court of the exact amount of gross receipts from the machine for the eight months' period prior to appellant's breach. On the entirely reasonable assumption that average monthly revenue from the machine would remain constant for the remaining life of the contract, the trial court was able to determine the projected gross profits of respondent for the life of the contract. It is not understood that appellant disputes this assumption.

Further, there was clear evidence as to the estimated costs of operation attributable to the machine in question for the life of the contract. These costs are by their very nature estimates. Appellant cannot breach his contract and then be heard to say that because the contract was not performed respondent's costs and therefore its damages are uncertain and unrecoverable. Respondent's Exhibit

A-3 constituted adequate evidence of costs related to operation of the machine. The figures as to depreciation were arrived at in conformity with accepted accounting practice (Record, page 6) and those relating to maintenance and service costs were developed by dividing the actual costs for the business as a whole by the number of machines operated by the business (R. 109-111).

It is, therefore, apparent that while the evidentiary data from which respondent's loss of profits was calculated were estimated data, they were in no sense speculative, conjectural or "mere guess work". Rather, they represent rational extrapolations from known facts in accordance with sound accounting practice.

CONCLUSION

Respondent is confident that this Honorable Court will act with wise restraint according to its settled rule that in the absence of abuse of his discretion "the question of excessive verdict must rest within the sound discretion of the trial judge . . ." Gould Case, supra, 309 P2d at 807.

Respondent urges that the verdict be affirmed.

Respectfully submitted,

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