1964

Raymond Otteson v. M. K. Baird et al : Petition for Rehearing

Utah Supreme Court

William N. Henderson; Attorney for Defendant and Appellant;
Neil R. Jensen; Attorney for Plaintiff and Respondent;

IN THE SUPREME COURT
OF THE STATE OF UTAH

RAYMOND OTTESON,
Plaintiff and Respondent,
vs.
L. E. BAIRD, et al.,
Defendants,
ROBERT E. WILKEY,
Defendant and Appellant.

Case No.
10018

PETITION FOR REHEARING

Appeal From a Judgment of the District Court
of Juab County, Hon. C. Nelson Day,
District Judge.

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IN THE SUPREME COURT

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The appellant respectfully petitions for rehearing in the above matter for the following reasons:

1. THE DECISION OF THE SUPREME COURT IS FACTUALLY INCORRECT WHEREIN IT STATES THAT "THE TRIAL COURT HELD FOR THE APPELLANT ON CONTROVERTED EVIDENCE".

We have examined the 150 pages of records referred to; the Brief of the Ottesons, and we respectfully submit: The evidence of the employment of the Ottesons by defendant Milco Corporation (and not by appellant Wilkey) was not controverted. It was testified to, admitted, and conceded by the Ottesons.

What is the controverted evidence the court refers to?

2. THE DECISION OF THE SUPREME COURT IS ERRONEOUS WHEREIN IT STATES THAT "THE CASE STRICTLY IS FACTUAL".

We respectfully submit: The case is not strictly factual. There is no evidence supporting the facts found by the trial court. The testimony of the Ottesons flies in the face of the findings of the trial court. This presents a question of law for the Appellate Court:

> "Whether or not there is any evidence to support the verdict is a question of law, within the meaning of section 9 of article 8 of the constitution of this state. If there is no evidence from which to find a verdict for the plaintiff, this court has power to say it was found contrary to law, and was erroneous, and reverse the case for that reason. Harrington v. Mining Co. 17 Utah, 300, 53 Pac. 737; People v. Jones 31 Cal. 566."

(Marti v. American Smelting & Refining Co., 23 Utah 2, 63 Pac. 184):

> "Error of law, which will result in reversal, exists, however, if the fact findings or conclusions are manifestly or clearly wrong or erroneous, contrary to the evidence, obviously or clearly against the weight of the evidence as considered infra section 1658, or without support in the evidence . . . "
> (5 C.J.S. p 470 sec. 1556 (3)).

3. THE DECISION OF THE SUPREME COURT ERRONEOUSLY HOLDS AN AWARD OF ATTORNEYS FEES IN VIOLENCE OF THE PROVISIONS OF UTAH CODE 34-9-1 PROVIDING THAT ATTORNEYS FEES CANNOT BE ALLOWED WHEN THE DEMAND BEFORE SUIT EXCEEDS THE AMOUNT FOUND DUE.

Utah Code sec. 34-9-1 provides:

> "Limit of Amount - Taxed as costs. Whenever a mechanic, artisan, miner, laborer, servant or other employee shall have cause to bring suit for wages earned and due according to the terms of his employment, and shall establish by the decision of the court that the amount for which he has brought suit is justly due, and that demand has been made in writing at least fifteen days before suit was brought then it shall be the duty of the court before which the case shall be tried to allow to the plaintiff a reasonable attorney's fee in addition to the amount found due for wages, to be taxed as costs of suit."

In this case the lower court allowed a credit of $75.00 for payment "made by Eugene E. Wilkey", so that demand before suit exceeded the amount found due (See findings and judgment).

Despite this fact, the lower court still allowed the attorney's fees and the Supreme Court upholds this decision.

CONCLUSION.

Notwithstanding the fact that this case involves only $750.00; that five prominent lawyers took part; that there are about one hundred fifty pages of record; appellant respectfully requests consideration of the foregoing points on Petition for Rehearing.

Dated: July , 1964.

Respectfully submitted,

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