1983

Hansen's Farm Supply, Inc v. Paul Fjeldsted dba Fjeldsted Oil Company : Brief of Respondent

IN THE SUPREME COURT OF THE STATE OF UTAH

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HANSEN'S FARM SUPPLY, INC.,	:	
Plaintiff and Respondent	:	Case No. 18989
vs	:	
PAUL FJELDSTED dba Fjeldsted Oil Co.,	:	
Defendant and Appellant	:	

BRIEF OF RESPONDENT

- - -

AN APPEAL FROM A JUDGMENT OF THE
SIXTH JUDICIAL DISTRICT COURT OF SANPETE COUNTY
STATE OF UTAH

The Honorable Don V. Tibbs, Judge

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BRIEF OF RESPONDENT

STATEMENT OF THE NATURE OF THE CASE

Plaintiff-Respondent brought this action to recover amounts owed by Defendant-Appellant on an open account with Plaintiff-Respondent, alleging fuel had been delivered to Defendant-Appellant's place of business.

DISPOSITION OF LOWER COURT

The case was tried to the bench on January 5, 1983, and the Honorable Judge Don V. Tibbs ruled in favor of Respondent. Appellant has appealed to the Utah Supreme Court.

RELIEF SOUGHT ON APPEAL

Respondent seeks to have the ruling of the Trial Court affirmed.

STATEMENT OF THE FACTS

Defendant-Appellant is an owner/operator of a retail outlet for petroleum products who has had a long standing open account with Plaintiff-Respondent,

a corporation which distributes petroleum products on a wholesale basis to retailers. Appellant has historically made numerous purchases of petroleum products from Respondent on credit. Respondent billed Appellant on a monthly basis based on invoices, many of which were unsigned, that itemized the individual deliveries.

It was stipulated by the parties that of the hundreds of separate transactions occurring in the period of time set forth in the Complaint, four specific invoices comprised the unpaid and disputed balance of the account. One of these was found to be an improper charge and was disallowed. The issue at trial was limited to whether the fuel represented by the remaining three invoices was delivered to the Appellant.

Respondent's president testified that because of the fuel shortage during the time period in question (T-17:14-16) Appellant had placed a standing order for all the fuel that Respondent could deliver (T-24:3-13; 25:16-17). This was not denied by Appellant. Appellant also admitted that it was not unusual for direct deliveries to be made to his business establishment (T-39:11-22) and that frequently he ordered, received and paid for many items based on unsigned invoices (T-40:22-41:20).

Respondent's president also testified, and substantiated by offering into evidence its own invoices, that he was present when the disputed deliveries were actually made (T18:12-17; 31:1-8) pursuant to the standing order Appellant had with Respondent. Respondent also offered into evidence a delivery ticket prepared by a third party, Metro Oil Products, which Respondent's president testified he initialled to acknowledge delivery at the

time the delivery was made. This document was admitted into evidence by the Trial Judge under the business records exception to the hearsay rule.

ARGUMENT

POINT I

THE BUSINESS RECORDS EXCEPTION TO THE HEARSAY RULE DOES NOT SPECIFY THAT RECORDS PREPARED BY A THIRD PARTY WHO IS NEITHER AN EMPLOYEE NOR AGENT OF THE PROFFERING PARTY ARE INADMISSIBLE SOLELY BECAUSE OF THAT FACT.

Rule 63(13), Rules of Evidence (Utah 1971) makes no distinction between records which were prepared by the proffering party or its employees or agents and records which were prepared by some other third party. It merely lays out criteria, which if met by any business record, allow that record to be admitted into evidence as an exception to the hearsay rule. All that is required of a writing is (1) that it be offered as a memorandum or record of an act or event in order to prove the facts stated therein, and (2) that the judge make a determination that it meets certain standards of reliability and objectivity such as being "made in the regular course of business at or about the time of the act", etc.

The judge is to be given considerable discretion in admitting or rejecting such evidence. Bambrough v. Bethers, 552 P.2d 1286, 1290 (Utah 1976). See also, Shoreline Prop. Inc. v. Deer-O-Paints & Chem. Ltd., 24 Ariz. App. 331, 538 P.2d 760, 766 (1975). If the judge finds a document meets the criteria of the business records exception, it should be admitted regardless of whether it was prepared by the proffering party or a third party and the trial court's ruling should only be overturned after a clear showing that the trial judge has abused his discretion.

POINT II

THERE ARE NUMEROUS EXAMPLES OF COURTS ADMITTING RECORDS PREPARED BY A THIRD PARTY UNDER THE BUSINESS RECORDS EXCEPTION TO THE HEARSAY RULE, AND THIS COURT SHOULD DO LIKEWISE IN THIS CASE.

Appellant is correct in his assertion that Utah cases to date have only dealt with fact situations wherein the record sought to be admitted under the business records exception to the hearsay rule had been prepared by an agent or employee within the business entity proffering it. Other courts, however, have allowed records created by disinterested third parties to be admitted under this exception if they met the criteria laid out in the rule. See DeHart v. Allen, 26 C.2d 829, 161 P.2d 453 (Cal. 1945), (document prepared by a process server was admitted in a suit between a lessor and a lessee); In re Doyle's Estate, 152 Kan. 23, 103 P.2d 52 (1940), (records prepared by priests of the Catholic Church were admitted to show certain facts about intestate's alleged father). Hospital records have also been admitted under this exception by many surrounding jurisdictions in cases were the hospital was a disinterested third party. See Zerbinos v. Lewis, 394 P.2d 886 (Alaska 1964); Good v. A. B. Chance Co., 565 P.2d 217 (Colo.App. 1976); Boulden v. Britton, 86 N.M. 775, 527 P.2d 1087 (1974); Swyden v. Killam, 531 P.2d 1031 (Okla. 1975); Mayor v. Dowsett, 240 Or. 196, 400 P.2d 234 (1965); Wolff v. Coast Engine Products, Inc., 72 Wash.2d 226, 432 P.2d 562 (1967); In re Morton's Estate, 428 P.2d 725 (Wyo. 1967).

In a case similar to the case at bar involving a dispute over [illegible] of an open account, the Kansas Supreme Court allowed in a document prepared by a disinterested third party under the business records exception to the

hearsay rule. Phillip Van Heusen, Inc. v. Korn, 204 Kan. 172, 460 P.2d 544 (1969). In that case, the report of a credit reporting agency was allowed in to show the defendant had made representations as to his willingness to assume responsibility for the debts of his son's clothing store.

Several of the cases cited above relied on the Uniform Business Records as Evidence Act. Paragraph 2 thereof states:

> "A record of an act, condition or event, shall, in so far as relevant, be competent evidence if the custodian or other qualified witness testifies as to its identity and the mode of its preparation, and if it was made in the regular course of business, at or near the time of the act, condition or event, and if, in the opinion of the court, the sources of information, method and time of preparation were such as to justify its admission."

Although the language is not identical to that found in Rule 63 (13), Rules of Evidence (Utah 1971), the criteria to be met is basically the same, i.e., writings which were made in the regular course of a business, at or about the time of the occurrence, and testimony as to their reliability and trustworthiness. Neither the Uniform Act nor the Utah Rule specifies that the party proffering the document must be the creator, but only that if the criteria are met, the document is to be admitted. In this case, the criteria were met and the document was properly admitted.

In the case at bar, the exhibit in question was admittedly prepared by a third party (T-27:8-10). However, it was also established that Erval Hansen acting on behalf of Respondent was present when the delivery was made (T18:12-14), acknowledged the receipt of the fuel at the time of delivery by initialling the exhibit in question (T18:12-17; 20:8-14), and that this was done in the ordinary course of Respondent's business (T27:15-17).

Respondent's witness testified that he was physically present when the delivery was made to Appellant and recorded his witness of the delivery by

initialling the delivery ticket at the time of the act. By initialling the delivery ticket prepared by Metro Oil Products, Respondent's witness was in effect incorporating that delivery ticket into Respondent's regular course of business and by actually witnessing the delivery, Respondent's witness was also able to determine the trustworthiness of the document.

There is adequate evidence to support the trial judge's findings that the evidence which Appellant sought to exclude met the criteria of Rule 63 (13), Rules of Evidence (Utah 1971) and was therefore properly admitted. Giving the deference due the trial judge's discretion as discussed in Point I above, it is clear that the admission of the evidence in question should be upheld. There has been insufficient showing that the trial judge so abused his discretion as to justify overturning his ruling.

In this case, the Utah Supreme Court should follow the precedent set in other jurisdictions and affirm the admission of a qualified business record prepared by a disinterested third party under the business records exception to the hearsay rule. This is particularly so where Respondent made an entry of its own to the document by initialling it and thereby acknowledging receipt of the product for its own records.

POINT III

EVEN IF THE EVIDENCE IN QUESTION WAS IMPROPERLY ADMITTED, THE ERROR WAS HARMLESS AND THE TRIAL COURT'S RULING SHOULD BE UPHELD

Rule 61, Rules of Civil Procedure (Utah 1953) states:

> "No error in either the admission or the exclusion of evidence, and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties, is ground for granting a new trial or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the

proceeding which does not affect the substantial rights of the parties."

In a jury trial, the Utah Supreme Court recently elaborated on this rule:

> "Assuming arguendo that the trial court erred in admitting Dr. Lee's testimony, such error does not rise to the level of prejudicial error unless there is a reasonable likelihood that the jury would have reached a different result if the error had not occurred." Dowland v. Lyman Products for Shooters, 642 P.2d 380, 381 (Utah 1982)

The principle that an even more substantial error must occur before a ruling in a non-jury trial will be reversed has been well established for many years. In Spratt v. Paulson, 49 Ut. 9, 161 P. 1120, 1122 (Utah 1916), the Court said:

> "...if the case had been tried by a jury instead of by the court, there would be no doubt respecting our duty to reverse the case upon the ground that improper evidence was admitted against the defendant over his objections and exceptions which were prejudicial to his substantial rights. In view, however, that the case was tried by the court, it is insisted by plaintiff that although it were conceded the court erred in the particulars just stated, yet that there is at least some substantial evidence in support of the material findings, and hence we may not interfere. Counsel cite and rely upon the case of Victoria, etc. Co. v. Haws, 7 Utah 515, 27 Pac. 695, where the court lays down the doctrine contended for in the following words:
>
> "When the judge tries a case without a jury, it is not a reversible error to admit incompetent, irrelevant, or immaterial evidence; for he decides the case on the proper testimony only, and disregards entirely that which is incompetent, irrelevant, and immaterial. When the clear preponderance of competent, relevant, and material evidence supports the findings, this court will not reverse because of errors of the court below in admitting incompetent, irrelevant, or immaterial evidence, for the presumption in such case is that it was wholly disregarded.'"

It is unlikely that Appellant can meet even the standard required in a jury trial to compel an overturning of the trial court's ruling let alone the higher standard required for non-jury trials. The only attempt Appellant

made to refute Respondent's allegations was his own testimony that the deliveries was never made (T-38:2-3). Even this was qualified because he was claiming only that he didn't know they were delivered, not that he was sure they weren't (T-39:9-10). Appellant did not deny that he had a standing order with Respondent for fuel. He admitted that it was a common practice for him to purchase products on credit from Respondent without signing for them (T-41:12-20), and that other direct deliveries had been made to his establishment (T-39:11-17).

On the other hand, Respondent presented testimony by its president that the deliveries were made (T-18:15-17), that he was present when the deliveries were made (T-18:12-14; 31:1-8), that he initialed the exhibit which is at issue in this appeal at the time of delivery to acknowledge that the delivery had actually been made (T-20:8-14). Respondent substantiated this testimony by offering into evidence its own invoices for the same deliveries (T-15:7-19; 15:24-16:10; 21:12-22:6; 22:14-15). Respondent also established that it was a common practice to make deliveries to Appellant without having Appellant sign the invoice by its president's testimony (T-7:15-23; 28:10-16; 29:20-30:4) and by Appellant's own admission (T-40:22-41:20).

It is clear that even if Exhibit #5 was admitted into evidence in error, the error is not prejudicial applying either the standard for juries or the standard for trial before a judge. Because the presumption is that improperly admitted evidence is wholly disregarded by a judge in a trial to the court, the question becomes whether a preponderance of competent, relevant and material evidence supports the finding. If so, the trial court's ruling is to be upheld.

In this case, a single testimony denying knowledge of the disputed deliveries must be weighed against an eye-witness's testimony of delivery, substantiated by invoices which were made in the regular course of Respondent's business and whose trustworthiness was established by extensive testimony (T-7:15-8:25; 10:5-23; 28:10-16; 29:20-30:4; 40:22-41:20). It is clear that the preponderance of the evidence supports the trial judge's findings, and they should be upheld.

Rule 61, Rules of Civil Procedure (Utah 1953) is controlling in this case. Since any error which may have occurred does not affect the substantial rights of the parties (according to the criteria given in case law as discussed above) this court must disregard the error and refuse to disturb the trial court's judgment and order.

CONCLUSION

The business records exception to the hearsay rule makes no distinction between records prepared by the proffering party and those prepared by disinterested third parties. It simply lays out criteria, which if met, allow any business document to be admitted into evidence as an exception to the hearsay rule. Although the Utah Supreme Court has not yet addressed the issue of business documents prepared by disinterested third parties, other courts have recognized this principle, and justice dictates that it should be recognized in this case.

Even if the court finds that Exhibit #5 was erroneously admitted, the trial court's ruling should still be affirmed because the error would not affect the substantial rights of the parties. There was ample other evidence given

to support the trial court's ruling and according to established precedent, they should not be disturbed on appeal.

For these and other reasons discussed above, Plaintiff-Respondent respectfully requests that the ruling of the Trial Court be affirmed.

Dated this 6th day of June, 1983.

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CERTIFICATE OF MAILING

Mailed this 13th day of June, 1983, postage prepaid, a true and correct copy of the foregoing Brief of Respondent to Dale M. Dorius, Attorney for Appellant, 29 South Main Street, P.O. Box "U", Brigham City, Utah 84302.

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