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Dairy Distributors, Inc. v. Locan Union 976 et al : Appellants' Reply Brief

Utah Supreme Court

Clarence M. Beck; Elias Hansen; Attorneys for Petitioners;
Arthur A. Allen, Jr.; Rex Hansen; Attorneys for Respondents;

IN THE SUPREME COURT OF THE STATE OF UTAH

DAIRY DISTRIBUTORS, INC.,
Plaintiff and Respondent,

vs.

LOCAL UNION 976, JOINT COUNCIL 67, WESTERN CONFERENCE OF TEAMSTERS, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, AFL-CIO, MILO V. RASH, CLARENCE LOTT and JOSEPH W. BALLEW,
Defendants and Appellants.

Case No. 10160

APPELLANTS' REPLY BRIEF

Appeal from the Judgment of the Third District Court of Salt Lake County
Honorable Aldon J. Anderson, Judge

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APPELLANTS' REPLY BRIEF

STATEMENT

The record in this case is correct as to the facts. The theory upon which respondent claims the trial court had the right to make the order dated March 23,

1964, amending the judgment rendered on October 30, 1957, is shrouded in uncertainty. At the time of the hearing of the motion to dismiss the appeal, it was argued on behalf of the respondent that interest on the judgment was a part of the judgment and added to the judgment even though not mentioned therein. In respondent's brief now filed, it is contended that the amendment of adding interest to the judgment is authorized by the provision of Utah Rule 60 (a).

On Page 2 of the respondents' brief counsel seems to derive comfort because appellants have lost in their contention heretofore made at every point. We are at a loss to understand what bearing such evidence has upon the claim had on behalf of the respondent that it is entitled to have the judgment rendered on October 30, 1957, amended to include interest. Surely it is not claimed that respondent has acquired a vested right to whatever money judgment it may ask. We have no doubt that under the Constitution and Law of California, interest is included in a money judgment provided it is timely raised. We contend as conceded by respondent at the time of the hearing of the motion to dismiss, that there are no Utah cases except the order of the trial court in this case that clearly, or at all, supports respondent's claim that interest is included in the judgment here involved. In this reply brief we shall discuss the points urged by respondent under the same numbered points as those used by respondent in its brief, and shall attempt to avoid repeating what we have said in our original brief.

POINT I

THE JUDGMENT WAS AMENDED CONTRARY TO LAW AND WAS NOT INCLUDED IN THE JUDGMENT AS A MATTER OF LAW, OR AT ALL.

The order appealed from provides that the judgment on the verdict dated October 30, 1957, be, and the same is hereby, amended to include interest at the rate of 8% nunc pro tunc, as of October 30, 1957. The motion to set aside the amendment is dated May 5, 1964. (Record 18). That order was made without any evidence showing or tending to show that it was not deliberaitely made. Indeed, it will be observed from the judgment that markings were placed in the blank spaces on the form of the judgment left for filling in the amount of interest and the date when interest should begin to run. Obviously, it requires an uncommon degree of credulity to believe that a clerk whose duty it is to enter judgments on verdicts did not in good faith and wilfully fill in the blank spaces in the manner that they were filled in. Moreover, the order granting the amendment was made without notice to the defendants, or any of them. It is so admitted by counsel for respondent. The provisions of 6 and 7 of Article I of the Constitution of Utah provides that:

> "No person shall be deprived of life, liberty or property without due process of law." UCA Vol. I, Page 14.

A number of cases are there recited, among which is

Christiansen vs. Harris, 109 Utah 1, 116 Pac. 2nd 314, where it is held that due process of law requires that parties to litigations shall have an opportunity to examine and cross examine witnesses. Other state and federal cases so holding are collected in 16 A, CJS, Page 824, Note 54.18. To the same effect is the Constitution of the United States.

In our original brief, Page 19, we have cited Freeman on Judgment, Fifth Edition, Vol. 1, Page 301, Section 153, where it is held that errors with respect to interest on judgments must be merely clerical or inadvertent mistakes. Judicial errors awarding or withholding interest in not stating it renders the judgment like other judicial errors was properly amendable. A number of cases are there cited in support of the text. We have been unable to find a case or other authority to the contrary except the manner in which the present case was disposed of by the trial court. Defendants were entitled to notice and an opportunity to ascertain who, of anyone, was guilty of any unintentional error.

POINT II

THE MATTER OF WHETHER INTEREST ATTACHED AT THE STATED RATE TO JUDGMENT UPON THE VERDICT IS CONTROLLED BY UTAH LAW AS FIXED BY THE JUDGMENT AND NOT OTHERWISE.

Under Point II of respondent's brief, attention is called to Rule 54 (e), which contains among its provisions this language:

> "The clerk must include in any judgment signed by him any interest on the verdict or decision from the time it was rendered if the same has been fixed or ascertained."

In this case neither the costs or interest was ascertained by the clerk at the time and not by the court until the nunc pro tunc order was made over six years after the judgment was rendered. Rule 54 (e) provides that the clerk, not the judge, shall enter the judgment fixing the interest in the class of the case here involved. On page 5 of respondent's brief, it is stated that appellant contends in its brief that the Utah Rules of Civil Procedure is an unnecessary exercise in futility and repetition. We deny having made any such statement.

On the contrary, on Page 18 of appellants' brief, we contend that the meaning of Rule 54 (e) is clear and not subject to construction. If additional clarity is needed to make appellants' position clear, we direct the attention of the court to such cases as Utah Rapid Transit Company vs. Ogden City et al, 84 Utah 546, 58 Pac. 2nd, Tribune Reporters Printing Company vs. Homer, 51 Utah 153, 167; 169 Pac. 170, and the text and the cases cited in footnotes to the text in 82 CJS, page 66, Sec. 333 (a), where it is held that if an act fixes a right and the manner in which it must be exercised, the right must be exercised in the manner

provided and not otherwise. There is no rule or legislative act that authorizes a court to interfere with or amend the judgment entered by the clerk without an opportunity for the person affected to be heard. Appellants in their original brief, page 20 to 22, have quoted Rule 60 (a) and (b) and cites cases from this and other jurisdictions which are at variance with respondent's contention especially in that the facts in this case place it within the provisions of 60 (b) and not (a).

POINT III

THE TRIAL COURT WAS WITHOUT POWER TO AMEND THE JUDGMENT OF THE CLERK ESPECIALLY AFTER THE TIME ALLOWED BY LAW FOR CORRECTING THE JUDGMENT HAD LONG SINCE EXPIRED AND WITHOUT THE PARTIES ADVERSELY AFFECTED BEING GIVEN AN OPPORTUNITY TO BE HEARD.

Under respondent's Point III, the Utah cases of Kittmer vs. Snow, 13 Utah 2nd 382, and Cook vs. Gardner, 14 Utah 2nd 193, are cited in support of its claim that the trial court had the power to make the amendment here involved. As we read those cases, they do not support or tend to support the claim made by respondents. In the case of Kittmer vs. Snow, Supra, it is observed that the trial judge did not have the authority to change the rules and to permit the filing

of an order of nunc pro tunc to increase the time which the rule had limited. There is also stated on Page 7 of respondent's brief the statement of the court that nunc pro tunc orders may be made to correct clerical errors so that the record will actually reflect that change in fact took place. The difficulty with the application of such statement is that the record in this case fails to show that the granting of interest in the judgment ever in fact took place. The evidence is to the contrary. Respondent cites at page 9 of its brief the case of Howard vs. Howard. In that case the court applied the provisions and law of California which provides that interest is a part of the judgment and shall be allowed. We have discussed this phase of the case and cited authorities on pages 14 to 19 of our original brief. No useful purpose will be served by repeating what is there said.

POINT IV

UCA 1953 15-1-4 REQUIRES THAT INTEREST, IF ANY, MUST BE PROVIDED FOR IN A JUDGMENT AND RULE 54(e) REQUIRES THAT THE CLERK SHALL INCLUDE ENTERING ANY INTEREST ALLOWABLE ON A VERDICT.

The law and the rule mentioned upon this point is discussed on page 18 of appellants' original brief. Under Point IV of respondent's brief, attention is di-

rected to the cases which hold that the provisions of 28 UCA, Sec. 1961, was sought to bring uniformity with respect to interest on judgments. The cases cited hold that the only uniformity sought by the quoted provision was that an action brought in a given state should be in conformity with the substantive and procedural law of such state. That is the effect or holding of the U. S. cases cited on pages 12 and 13 of respondent's brief. The case of Blaine vs. Durham cited on page 13 of respondent's brief falls within the same doctrine as the California cases in that the law of Tennessee is construed by the Supreme Court that interest is a part of the judgment, notwithstanding it is not mentioned in the judgment, Knights of Pythias vs. Allen, 104 Tenn. 628, 58 SW 240.

POINT V

THE UNITED STATES COURT OF APPEALS DID IN EFFECT AFFIRM THE DECISION OF THE SUPREME COURT OF UTAH. UNDER POINT V OF RESPONDENT'S BRIEF, IT IS CONTENDED THAT THE TENTH CIRCUIT COURT OF APPEALS WAS POWERLESS TO AFFIRM OR MODIFY THE DECISION OF THE SUPREME COURT OF UTAH.

The United States District Court enjoined the enforcement of the judgment of the United States District Court, which had been affirmed by the State Su-

preme Court. See Exhibit B of the Record. On Page 28 of appellants' brief, we have quoted some of the language used by the Tenth Circuit Court in its opinion. If, by such language, the federal appellate court did not in effect decide that the doctrine of res judicata was rendered by the decision of the Supreme Court of Utah, it is difficult to see the purpose of such language, but even though the United State Court of Appeals did not affirm the judgment of the Supreme Court of Utah, the record in this case which we have set out in our original brief clearly shows that the doctrine of res judicata precludes the Third District Court from amending the judgment which was rendered by it more than six years prior to the time such amendment was made.

We submit that the judgment making the amendment by adding interest to the judgment should be reversed.

Respectfully submitted,

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