

1971

Jerry Skousen v. Alvin I. Smith : Brief of Respondent

Follow this and additional works at: https://digitalcommons.law.byu.edu/uofu_sc2

Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errors. Leon M. Frazier and J. Brent Wood

Recommended Citation

Brief of Respondent, *Skousen v. Smith*, No. 11598 (1971).
https://digitalcommons.law.byu.edu/uofu_sc2/4767

This Brief of Respondent is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs (1965 –) by an authorized administrator of BYU Law Digital Commons. For more information, please contact hunterlawlibrary@byu.edu.

IN THE SUPREME COURT OF THE STATE OF UTAH

JERRY SKOUSEN,

Plaintiff and Respondent,

vs.

ALVIN I. SMITH,

Defendant and Appellant.

Case No.
11598

BRIEF OF RESPONDENT

Appeal from the Judgment of the District Court
of Salt Lake County, Honorable Stewart M. Hanson

FRAZIER & WOOD
Leon M. Frazier
J. Brent Wood

Attorneys for Plaintiff
and Respondent

1005 West Center Street
Provo, Utah 84601

IRWIN ARNOVITZ

Attorney for Defendant
and Appellant

1309 Deseret Building
Salt Lake City, Utah 84111

FILED

JUL 28 1971

TABLE OF CONTENTS

	Page
STATEMENT OF THE NATURE OF THE CASE	1
DISPOSITION IN LOWER COURT	2
RELIEF SOUGHT ON APPEAL	2
ARGUMENT	4
POINT I. THE TRIAL COURT CORRECT- LY CONSTRUED THE PROMISSORY NOTE TO MAKE DEFENDANT LIABLE FOR PAYMENT TO PLAINTIFF WHEN DEFENDANT RECEIVED PAYMENT FROM CLIFFORD WALKER ON NOTES EXECUTED BY WALKER.	4
POINT II. THE TRIAL COURT WAS COR- RECT IN NOT EXERCISING ITS EQUIT- ABLE POWERS TO VARY THE MEAN- ING OF THE PROMISSORY NOTE.	10

CASES CITED

Bennett v. Robinson's Medical Mart, Inc., 18 Utah 2d 186, 415 P.2d 928 (1962)	6
Continental Bank and Trust Comany v. Bybee, 6 Utah 2d 98, 306 P.2d 773 (1957)	6, 10

	Page
Cornwall v. Willow Creek Country Club, 13 Utah 2d 160, 369 P.2d 928, 929 (1962, emphasis added)	8
Ephraim Theater Company v. Hawk, 7 Utah 2d 163, 321 P.2d 221 (1958)	6
Jensen Used Cars v. Rice, 7 Utah 2d 276, 323 P.2d 259 (1958)	7, 9
Mathis v. Madsen, 261 P.2d 952 (1953)	6
Maw v. Noble, 10 Utah 2d 440, 354 P.2d 121 (1960)	6, 8
Naisbitt v. Hodges, 6 Utah 2d 116, 307 P.2d 620 (1957)	12
Pacific States Cast Iron Pipe Co. v. Harsh Utah Corp., 5 Utah 2d 244, 300 P.2d 610	5
Peterson v. Paulson, 24 Wash. 2d 166, 163 P.2d 830	12
Sine v. Harper, 118 Utah 415, 222 P.2d 571 (1950)	12

IN THE SUPREME COURT OF THE STATE OF UTAH

JERRY SKOUSEN,

Plaintiff and Respondent,

vs.

ALVIN I. SMITH,

Defendant and Appellant.

Case No.
11598

BRIEF OF RESPONDENT

STATEMENT OF THE NATURE OF THE CASE

Plaintiff in the above entitled case sought to enforce payment of a promissory note drafted and executed by Defendant and payable according to its terms to Plaintiff.

DISPOSITION IN LOWER COURT

The case was tried to the Court sitting without a jury, The Honorable Stewart M. Hansen, Judge. The Court found the promissory note payable and granted judgment to Plaintiff for \$6,988.85 together with interest, attorney's fees, and costs, all totalling \$11,417.77.

RELIEF SOUGHT ON APPEAL

Plaintiff and Respondent, Jerry Skousen, seeks to sustain the Judgment in favor of Plaintiff granted by the Lower Court.

STATEMENT OF FACTS

Plaintiff, Jerry Skousen, is a resident of Mesa, Arizona and the Defendant, Alvin I. Smith is a member of the Utah Bar and a practicing Utah Attorney.

On or about February 1, 1962, Alvin I. Smith, drafted and executed a promissory note in favor of Jerry Skousen (R. 6) which read as follows:

PROMISSORY NOTE

\$6,988.85

February 1, 1962

Two years after date, without grace, I promise to pay to the order of Jerry Skousen, Six Thousand, Nine Hundred Eighty-Eight, and 85/100 (\$6,988.85) Dollars, for value received, with in-

terest from date at the rate of 6% per annum until paid. Principal and interest payable in Lawful Money of the United States at Phoenix, Arizona, and in case suit is instituted to collect this note or any portion thereof, I promise to pay such additional sum as the Court may adjudge reasonable as Attorney's fees in said suit.

It is understood and agreed that the drawer of this note shall not be liable hereunder until and unless payment is received from Clifford R. Walker on notes executed by him in the total sum of \$13,977.70.

/s/ Alvin I. Smith

Mr. Smith admitted at trial that in April of 1964, he received a payment of \$2,500.00 from Clifford R. Walker on the sum of \$13,000.00 referred to in the subject note (R. 8-9).

Although the Walker notes to Smith were due and owing early in 1964, when the \$2,500.00 payment was received, suit was not instituted by Smith against Walker for payment until September 12, 1967, three months *after the Complaint in the instant case was filed* (May 23, 1967), and more than *three years* after the Walker notes became due.

On May 23, 1967, Plaintiff, Jerry Skousen, filed suit in the District Court for payment of the subject note. This was more than five years after the date on the note; and, Smith had received payment from Walker of \$2,500.00 "on notes executed by him in the total sum of \$13,977.70."

ARGUMENT

POINT I

THE TRIAL COURT CORRECTLY CONSTRUED THE PROMISSORY NOTE TO MAKE DEFENDANT LIABLE FOR PAYMENT TO PLAINTIFF WHEN DEFENDANT RECEIVED PAYMENT FROM CLIFFORD WALKER ON NOTES EXECUTED BY WALKER.

A.

The subject matter of this litigation is a promissory note signed by Alvin Smith, (Defendant) in favor of Jerry Skousen, (Plaintiff), and payable according to its terms. Mr. Smith is an experienced attorney and a member of the Utah Bar; he drafted the note and executed it. Mr. Skousen is a businessman. Both parties had experience in business transactions.

The subject note is relatively simple and provides in pertinent part that “the drawer of this note [Alvin Smith] shall not be liable hereunder until and *unless payment is received from Clifford R. Walker on notes executed by him.*” (Emphasis added.) It was uncontroverted at trial that Clifford Walker had paid to Alvin Smith \$2,500.00 on notes executed by him, and that Alvin Smith had credited the money to those notes. Therefore, the only issue before the District Court Judge was to construe the note and determine the intent of the parties thereto. The proper construction of the

note was a question of law for the Trial Court. *Pacific States Cast Iron Pipe Co. v. Harsh Utah Corp.*, 5 Utah 2d 244, 300 P.2d 610.

The issue before the Trial Court was to determine the intent of the parties to the note as to how much Clifford R. Walker must pay to Alvin Smith before Smith became liable to Skousen on the note. That is, does the note require Clifford Walker to make payment “on” his notes, or “of” them. The Court construed the note to require the following:

That under the terms of said Promissory Note, said Promissory Note was payable within two years after date, *provided the drawer of the note had received payments on Promissory Notes, which the Defendant held on Clifford R. Walker.*

(Findings of Fact No. 2, emphasis added.)

There are three basic methods by which the Trial Court could determine the intent of the parties to the promissory note:

1. Hold the parties to their intent as expressed in the writing itself unless bona fide ambiguities make that impossible.
2. If there are ambiguities, resolve the issue of intent by reference to other contemporary writings of the parties.
3. If there are no such writings, admit oral testimony to demonstrate intent.

This Court has clearly and definitely taken the first position stating that the intent of the parties to a writing will be determined from the language within its four corners where the writing is reasonably free of ambiguity. *Bennett v. Robinson's Medical Mart, Inc.*, 18 Utah 2d 186, 415 P.2d 928 (1962); *Maw v. Noble*, 10 Utah 2d 440, 354 P.2d 121 (1960); *Continental Bank and Trust Company v. Bybee*, 6 Utah 2d 98, 306 P.2d 773 (1957); *Ephraim Theater Company v. Hawk*, 7 Utah 2d 163, 321 P.2d 221 (1958); and *Mathis v. Madsen*, 261 P.2d 952 (1953).

The rule above is particularly applicable to this case in a business transaction between experienced parties where the complaining party is an experienced attorney. The Trial Court may fairly have inferred that Mr. Smith knew by virtue of his legal training and as a matter of general knowledge, the difference between the phrases "payment of a note" and "payment on a note," and that he knew the former refers to a complete payment of a note and the latter refers to a partial payment.

The note could not have been more simply or concisely stated: it suggests no other direction except that Alvin Smith would become liable when Clifford R. Walker made a payment on notes which he executed.

This rule represents a conscious policy decision on the part of the Court. Parties should be held to their clearly expressed intention or the orderly conduct of affairs would quickly stop. If parties were allowed to amend contracts to cover failure to think, or changes of

mind, there would be no reliable and dependable contracts. Thus, Justice Henroid in *Jensen Used Cars v. Rice* (1958) :

Elementary it is that in construing contracts we seek to determine the intentions of the parties. But it is also elementary and of extreme practical importance that we hold contracting parties to their clear and understandable language deliberately committed to writing and endorsed by them as signatories thereto. Were this not so business, one with another among our citizens, would be relegated to the chaotic, and the basic purpose of the law to supply enforceable rules of conduct for the maintenance and improvement of an orderly society's welfare and progress would find itself impotent. It is not unreasonable to hold one responsible for language which he himself espouses. Such language is the only implement he gives us to fashion a determination as to the intentions of the parties. Under such circumstances we should not be required to embosom any request that we ignore that very language. This is as it should be. The rule excluding matters outside the four corners of a clear, understandable document, is a fair one, and one's contentions concerning his intent should extend no further than his own clear expressions.

Jensen Used Cars v. Rice, 7 Utah 2d 276, 323 P.2d 259 (1958).

In addition, Utah law allows a finding of uncertainty or ambiguity by the Trial Court "only where there is some *genuine lack of certainty*," it does not refer to "strained or merely fanciful or wishful interpretations

that may be indulged in.” *Maw v. Noble, supra*, 354 P.2d at 123. In the latter category surely belong Appellant’s demonstrations of the charges in the meaning of the note which can be accomplished by changing words, substituting words, or playing with syntax (App. Brief 13-14, 18).

In interpreting a contract, *the primary rule is to determine what the parties intended by what they said*. The Court may not add, ignore or discard words in the process, but attempts to render certain the meaning of the provision in dispute by an objective and reasonable construction of the whole contract.

Cornwall v. Willow Creek County Club, 13 Utah 2d 160, 369 P.2d 928, 929 (1962, emphasis added).

In considering the controversy here it is well to keep in mind the fundamental concepts in regard to contracts: that their purpose is to reduce to writing the conditions upon which the minds of the parties have met and to fix their rights and duties in respect thereto. *The intent so expressed is to be found, if possible within the four corners of the instrument itself in accordance with the ordinary accepted meaning of the words used*. Unless there is ambiguity or uncertainty in the language so that the meaning is confused, or is susceptible or more than one meaning, there is no justification for interpretation or explanation from extraneous sources. *It would defeat the very purpose of formal contracts to permit a party to invoke the use of words or conduct inconsistent with its terms to prove that the parties did not mean what they said, or to use such inconsistent words to conduct to demonstrate uncertainty or ambiguity where none would otherwise exist*.

Ephriam Theater Company v. Hawk, *supra* at 22. Cf. *Jensen Used Cars v. Rice*, 7 Utah 2d 276, 323 P.2d 259 (1958).

Thus, by reference to the language of the note above, it is clearly provided that payment by Clifford Walker on his notes to Alvin Smith make the latter liable to Jerry Skousen for the face amount of the subject note. The Trial Court so held.

B.

Even had the District Court initially viewed the promissory note as ambiguous, it would have properly construed the same in favor of Plaintiff and strictly against the Defendant as its draftsman and an attorney.

Even assuming the note to be ambiguous, the Court would have still referred to it *first* in determining the intent of the parties thereto. *Continental Bank and Trust Company v. Bybee*, *supra*; *Mathis v. Madsen*, *supra*. In so doing it is elementary that a writing be construed against its draftman, and strictly so when the draftsman is an attorney as in the case with Mr. Smith. In *Continental Bank and Trust v. Bybee*, *supra*, the Plaintiff, an attorney, and draftsman of the subject writing, had a dispute with a carpet company regarding a faulty carpet installed in his home. The Plaintiff Attorney therein drafted a "release" which provided in part that the carpet company pay the Attorney \$100.00 and release him from any indebtedness to the carpet company. The issue was

whether the parties intended that Plaintiff be released from his promissory note earlier negotiated to a holder in due course. There as in the instant case, the Attorney draftsman argued that his writing be construed to cover a circumstance which he had failed to foresee; or, which he foresaw, but failed to provide for when he drafted his writing. The Court there said that since Bybee was both the Attorney-draftsman of and a party to the instrument, the proper construction of the instrument should be strictly against him. *Continental Bank and Trust v. Bybee, supra*, 306 P.2d at 775.

It therefore follows that the District Court in strictly construing the promissory note against Defendant as draftsman and attorney reasonably construed it to impose liability upon him two years after date thereof, Clifford Walker having made payments on notes executed by him.

POINT II

THE TRIAL COURT WAS CORRECT IN NOT EXERCISING ITS EQUITABLE POWERS TO VARY THE MEANING OF THE PROMISSORY NOTE.

Even had the Trial Court initially felt that the promissory note was a proper subject for the exercise of its equitable powers, it is clear from the Findings of Fact (No. 4) and the evidence at trial that Defendant was not standing before the Court with "clean hands."

First, Defendant wrote the language of which he complained to the Court.

Second, Defendant made no effort to alleviate the problem he created by his writing, but rather—as the Trial Court specifically found (Finding of Fact No. 4 quoted *infra*)—sought to take advantage of the condition: thus, with reference to the language of the note (“unless payment is received from Clifford R. Walker on notes executed by him”), and the fact that Clifford Walker had made a \$2,500.00 payment, *Defendant could claim—as he did in this case—that the note really should have required full payment, and refuse to pay Plaintiff as the note required.* If, however, Mr. Skousen agreed with the theory above and did not sue on the note, *Mr. Smith could simply wait more than six years before proceeding against Walker and then allege—as Plaintiff did here—that the note became due and owing upon the first payment by Walker and that the statute of limitations had expired thereby nullifying an action by Skousen on the note.*

The Trial Court in its Findings of Fact No. 4, found:

The Court finds that the Defendant failed and neglected or refused to take action against Clifford R. Walker on the Promissory Note which the Plaintiff held until after the Plaintiff commenced an action against the Defendant; and, because of the statute of limitations and the possibility of the Plaintiff losing his cause of action on the Promissory Note, his action would appear to have been appropriately taken.

The Trial Court's fact findings reasonably supported by evidence should be affirmed on Appeal *Sine v. Harper*, 118 Utah 415, 222 P.2d 571, 581 (1950).

In addition, the oral evidence introduced by Defendant was contrary to that necessary under Utah Law for its reformation on the basis of mutual mistake of fact:

1. "Mutual mistake of fact may be defined as error in reducing the concurring intentions of the parties to writing." *Peterson v. Paulson*, 24 Wash. 2d 166, 163 P.2d 830, quoted in *Naisbitt v. Hodges*, 6 Utah 2d 116, 307 P.2d 620 (1957).

2. "Evidence necessary to substantiate the mutual mistake of fact must be clear, definite, and convincing . . ." *Naisbitt v. Hodges*, *supra*, at 623.

3. "The party seeking reformation should not be guilty of negligence in the execution of the contract or deed or latches in making timely application for its reformation." *Id.* at 623. See generally, *Sine v. Harper*, *supra*.

The burden of proving mutual mistake was on Defendant, and the burden required was evidence "sufficiently clear and convincing" to satisfy the Court "*beyond a reasonable doubt*" of the existence of a mutual mistake of fact. *Sine v. Harper*, *supra*, at 581.

With regard to requirements one and two, there was no evidence before the Trial Court to demonstrate *an intention concurred in by both parties* which Mr. Smith failed to properly record. Certainly there was no

evidence sufficient to have convinced the District Court *beyond a reasonable doubt*. The most reasonable inference from the evidence is that Mr. Smith simply drafted without thinking. The Courts have refused to protect *laymen* under these circumstances and the District Court therefore correctly refused an Attorney. Cf. *Jensen Used Cars v. Rice, supra*.

With reference to the third requirement, the Plaintiff, in his Complaint, specifically alleged failure, neglect, or refusal on the part of Defendant to take action in collecting the monies owed to him by Clifford Walker. The evidence showed three years had lapsed during which Defendant did not take action against Clifford Walker, yet the evidence also showed Mr. Smith was aware of Walker's relatives, some of his movements, and the fact that he regularly came to Salt Lake every six months for L. D. S. conference. Nevertheless, notwithstanding his earlier failure, Defendant was able to promptly sue Walker once he was sued by Mr. Skousen. The Trial Court's Findings of Fact reasonably supported by the evidence should be supported on appeal. *Sine v. Harper, supra*.

Respectfully submitted,

FRAZIER & WOOD
J. Brent Wood

Attorney for Plaintiff-Respondent