1969

Reliable Furniture Company v. American Home Assurance Co., Western Genearal Agency, and General Adjujstment Bureau : Appellant's Brief

IN THE SUPREME COURT

OF THE

STATE OF UTAH

RELIABLE FURNITURE COMPANY,

Plaintiff and Appellant,

vs.

AMERICAN HOME ASSURANCE CO., WESTERN GENERAL AGENCY, and GENERAL ADJUSTMENT BUREAU,

Defendants and Respondents.

Case No. 11656

APPELLANT'S BRIEF
PETITION FOR REHEARING

RELIEF SOUGHT BY PETITION FOR REHEARING

Appellant seeks reversal of the decision and findings of the Supreme Court of Utah in the instant action by reason of the Judgment granted by the Court on March 10, 1970, wherein it affirmed the Judgment of the lower Court. Appellant seeks to have the Supreme Court remand the case back to the lower Court,

so that Appellant may have a jury weigh the facts and determine the issues set forth by the pleading of the Appellant and Respondents and do justice to the parties.

STATEMENT OF FACTS

Appellant refers the Honorable Court to both the Appellant's original Brief and Appellant's reply Brief in the matter herein as to the facts in this action, but would draw to the attention of the Court an error in the written decision of the Court, wherein in the third paragraph of the Court's March 10, 1970, statement of the case, it alleges that a fire occurred on March 30, 1961, "* * * and six weeks later on June 16, 1961." It is pointed out to this Honorable Court that March 30, 1961, to June 16, 1961, is a period of approximately 79 days.

ARGUMENT

POINT 1.

THE COURT ERRED IN AFFIRMING THE LOWER

COURT JUDGMENT RULING THERE WAS AN ACCORD AND SATISFACTION.

Accord and Satisfaction is an affirmative defense, but must be pleaded, as set forth in the reply Brief of the Appellant on Page 2. The Court in its March 10, 1970, decision in the instant action, referred to Bennet vs. Robinson's Medical Mart, Inc., Supreme Court of the State of Utah, 18 Ut.2d 186, 417 P.2d 761, August, 1966, as authority for its statement, "Where a person (the Plaintiff) has in writing accepted a settlement of a disputed claim, the effect is an Accord and Satisfaction." This is a case wherein the employee was the Plaintiff and sought recovery of commissions from the Defendant who was the employer. The Defendant-employer gave the Plaintiff-employee a check with a notation, payment in full thereon, and the Plaintiff cashed the check taking the proceeds and subsequently filed an action for additional monies coming to him and the Defendant sought to defend on the grounds of an Accord

and Satisfaction. In this case, the employee cashing the check with a notation that payment was in full was held by the Court as not constituting an Accord and Satisfaction as held by the Utah Supreme Court. This case is direct authority for the Reliable facts that there was no accord.

This Honorable Court held in the Scoville vs. Kellogg Sales Company case, 261 P.2d 933, October 16, 1953, which was a case wherein a salesman had funds coming and was paid by a check, which he endorsed and cashed without formal protest and subsequently filed an action against the employer for additional monies allegedly due and owing. The defense of the employer was an Accord and Satisfaction and the Utah Supreme Court stated that this defense was one for a jury to decide. See also Ralph A. Badger & Company vs. Fidelity Building & Loan Association, 94 Ut. 97, 75 P.2d 669; A. W. Sewell Company vs. Commercial Casualty & Insurance

Company, 80 Ut. 378, 15 P.2d 327.

Louis W. Trompeter vs. United Insurance Company, Supreme Court of Washington, October 17, 1957, 316 P.2d 455, held, that in a personal injury case where a sum was paid by an Insurer for loss of time and medical expense due under the terms of the policy and was a liquidated sum, that there was no consideration for the release of the Insurer's liability to the Insured. That under the facts, existing therein, there had not been payment for all of his injury and that, therefore, the consideration was insufficient and there could not be an Accord and Satisfaction or Release in the matter.

This Honorable Court held in Kelley vs. Salt Lake Transportation Company, August 15, 1941, 116 P.2d 383, that where consideration is grossly inadequate as to a Release, that the very inadequacy of the amount may clearly indicate fraud therein.

This Court in its last instant decision, stated, quoting from Jiminez vs. O'Brien,

117 Ut. 82, 213 P.2d 337, "The avoidance (of an Accordance and Satisfaction) requires clear and convincing evidence." However, this Court in a later statement, in Kirchgestner vs. Denver & Rio Grande Western Railroad Company, 233 P.2d 699, June 19, 1951, in defining "clear and convincing" stated that "we had occasion recently to examine the expression 'clear and convincing evidence' and the Court defined it as evidence that must at least have reached a point where there remains no serious doubt or substantial doubt as to the correctness of the conclusion." Assuming that the Court should ignore all of the other conditions which have been set forth as necessary, to have a pleading of Accord and Satisfaction in the action herein, and assuming that all of the other elements hereinabove set forth have been met, it must be obvious from the three day testimony of Plaintiff's witnesses, that the evidence being viewed, as this Court has said, "in the light

most favorable to the Plaintiff's contentions" that an Accord and Satisfaction cannot lie, and that there is sufficient evidence in the testimony in the record, in avoidance of such an Accord and Satisfaction.

This Court stated in Reliable Furniture Company vs. Fidelity at 16 Ut. 2d 211, 398 P.2d 685, February 3, 1965, "upon the basis of the record thus far, it appears that Defendants own figures showed that it owes the Plaintiff $12,609.39." As evidenced by the record in the instant case before this Court, this figure shows that the amount owing to the Plaintiff is in a sum of approximately $128,000.00.

Casper National Bank vs. Woodin, et al., Supreme Court of Wyoming, June 19, 1951, 232 P.2d 706, the Court stated, that where a debtor already does what it is already bound to do, that there is no consideration to support an Accord and Satisfaction. As this Court, the Utah Supreme Court, has said the $12,000.00

given to the Appellant, was a minimal consideration and in light of the testimony now on record and before this Court, was not even an approximation of the amount truly due.

It was stated in Siegal vs. A. L. Lechler, Supreme Court of Colorado, November 1, 1954, 275 P.2d 949, that a release given for a nominal consideration is not supported by any valid legal consideration and that it is void and does not bar a right of action by the Plaintiff for the full amount actually owing to the party.

Moore vs. Satir, Supreme Court of California, July 11, 1949, 207 P.2d 835, the Court set forth what the elements of an Accord are:

1. A proper subject matter.

2. Competent parties.

3. Consent or meeting of the minds of the parties.

4. Consideration.

As has been previously set forth for this Court, there is an entire lack of two of the

elements herein; which would be the consent or meeting of the minds of the parties, and the consideration herein; and further, the California Court held that whether or not there was an agreement, was a question of fact, the intention of the parties, and hence, a jury question and not one for the lower Court to have taken away from the jury in giving its decision.

POINT II.

THE COURT ERRED IN DENYING FRAUD AS A MATTER OF LAW.

The Court in its decision of March 10, 1970, precipitously dismissed fraud as a factor, stating some of the elements of fraud were missing herein. It is the contention of the Appellant that deceit is a basic element of fraud and can constitute fraud. As set forth in M. G. Chamberlain and Company vs. Kenneth R. Simpson, District Court of Appeal of California, August 25, 1959, at 343 P.2d 438, "deceit is

either the suggestion as a fact, of that which is not true, by one who does not believe it to be true, or the suppression of a fact by one who is bound to disclose it, or who gives information of other facts, which are likely to mislead for want of communication of that fact." The evidence before this Court is clear that William Ball as agent of the General Adjustment Bureau and Jack Day as agent for the other Defendants in this action, had a duty to disclose to the Plaintiff, that the $84,000.00 check for the inventory was deliverable to the Plaintiff without any strings whatsoever attached to it, and that his failure to so act and his insistence as the unimpeached testimony of the Plaintiff's witnesses, Sam Herscovitz and Wayne Dykstra, clearly evidences, that not only was there no revelation of an unincumbered delivery of the check for the inventory, but to the contrary, that conditions were attached to its delivery, namely, the acceptance of the $12,000.00

draft as settlement for American Home Assurance. The California Court in the Chamberlain case went further and stated "Where a release is procured through fraud and conspiracy, it is immaterial whether the fraud was practiced by an authorized or a self-constituted agent of the Releasee. In either event, the Releasee should not be allowed to take advantage of an unfair settlement obtained through the fraud of a third party, for his benefit. Even persons who are not parties to procuring of a release cannot defend its validity against procurement by fraud."

Dobinson vs. McDonald, 92 California 33, 27 P. 1098; Chung vs. Johnston, 128 California App. 2d 157, 274 P.2d 922, set forth the principle, that the failure to disclose material facts affecting the essence of a release agreement may constitute actual fraud vitiating the contract.

Winstanley vs. Ackerman, 110 Cal. App. 641,

294 P. 449, stated that where it is shown that deception has been practiced in obtaining a release, it may not be considered as a satisfaction of anything not consented to by the Claimant.

Jordan vs. Guerra, 23 Cal. 2d. 469, 144 P.2d 349, sets forth the principle that in any case, where fraud or release is alleged, it is for the Trier of Facts to determine whether one of the parties had an understanding of the effect of the writing, which was different from that expressed in the writing, and whether his different understanding was induced by the other party.

This Court in its Reliable decision of February 1965 stated that "upon consideration of the record as it has come to us, we cannot conclude with such certainty as to justify ruling as a matter of law, that there was no duress and/or fraud practiced upon the Plaintiff in obtaining the release in question."

It should be stated that the unimpeached testimony set forth in the record here, and stating the testimony of Wayne Dykstra and Sam Herscovitz, clearly being considered in the light most favorable to the Plaintiff and being unimpeached, is even a stronger record than was evidenced by the Depositions and Pleadings before the Court at the time it made this statement.

It was stated in Francis McKinley Samora vs. Lorenzo Bradford, January 2, 1970, the Court of Appeals of New Mexico, 465 P.2d 88, "uncontradicted evidence, which is not subject to reasonable doubts, may not be arbitrarily disregarded." This was also adopted in the cases of Aragon vs. Boyd, 80 N.M. 14, 450 P.2d 614, 1969; Medler vs. Henry, 44 N.M. 275, 101 P.2d 398, 1940. Testimony need not be accepted as true when not directly contradicted, if:

1. The witnesses are shown to be unworthy of belief, or

2. His testimony is equivocal or contains inherent improbabilities, or

3. Shows a transaction surrounded by suspicious circumstances, or

4. Is contradicted, subject to reasonable doubt as to truth and veracity, by legitimate inferences drawn from the facts and circumstances of the case.

This principle being set forth in Hales vs. VanCleave, 78 N.M. 181, 429 P.2d 379, stated, credibility is a matter for the Jury and not for the Court in a Summary Judgment or Dismissal.

POINT III.

THE COURT ERRED IN DENYING THE DOCTRINE OF STARE DECISIS.

The doctrine of stare decisis is described in Floyd vs. Department of Labor and Industries, Supreme Court of Washington, April 9, 1954, 69 P.2d 563, "The rule laid down in any particular case is applicable only to the facts in that particular case or to another case involving identical or substantially similar facts."

As defined in Black's Law Dictionary, fourth edition, Page 157, stare decisis is binding on the Court only "in subsequent cases where the very point is again in controversy" and where the "facts are substantially the same."

Chester Barnett vs. M. T. Brown and C. V. Hoke, Supreme Court of New Mexico, October 18, 1956, 302 P.2d 735, the Court stated "the issues are precisely as those raised and passed upon in our decision filed August 15, 1956* * * which decision controls disposition of this appeal." The Court here setting forth the rule that where an issue on appeal is the same as previously and has been passed upon by a decision of the Supreme Court that such decision controlled the disposition of the appeal.

In the Reliable case of February, 1965, the facts before the Court were the pleadings, Depositions, and Interrogatories of the parties and in the instant previous Reliable case, there is no controverting of any of the basic

facts therein, nor was there any impeachment of the facts then set forth before the Court. The doctrine of stare decisis would seem to apply and be effective in the action before the Court. Stocks vs. Stocks, Supreme Court of Nevada, July 24, 1947, 183 P.2d 617, the Court stated "while Courts will indeed depart from the doctrine of stare decisis, where such departure is necessary to avoid the 'perpetuation of error', the observance of the doctrine has long been considered indispensable to the due administration of justice, that a question once deliberately examined and decided should be considered as settled."

POINT IV.

THE COURT ERRED IN DENYING ECONOMIC DURESS AS A MATTER OF LAW.

This Honorable Court stated in its February 1965 Reliable decision "In determining whether the Plaintiff is entitled to redress, it is not essential that his contentions of fraud and duress be considered separately. They can and

should be considered on the basis that he contends, that they existed intermingled together; and based upon the proper presumption, the Court correctly assumed that the Plaintiff was in economic distress and that the Defendant knew and took advantage of this by falsely representing that money belonging to the Plaintiff could not be delivered to him, wrongfully refusing to deliver it unless the Plaintiff would also accept the proffered settlement on Defendant's policy resulting in the Plaintiff being compelled to accept a settlement against his will." The Court made these observations in 1965 having before it only the pleadings, Depositions, and Briefs of the parties. In the March 10, 1970, Reliable decision, the unimpeached and sworn to testimony of the Appellants witnesses was before the Court, fully setting forth every element pertaining to duress and fraud as appeared in the earlier decision, and in addition, a detailed statement of the fraud

and duress as testified to by the witnesses under oath.

This Honorable Court claimed all of these factors of fraud and duress were overcome by the fact that Sam Herscovitz was a Law School graduate and an intelligent man, with business experience, as against the fact that the Defendants' agents were Insurance Agents and Adjustors and schooled and trained in the experience of giving the least and getting the most, and most important, had in their possession property of the Plaintiff in the amount of over $84,000.00 which was desperately needed by the Plaintiff if it was to survive. The Defendants had all the advantages in the game that was played on the premises of the Reliable Furniture on June 19, 1961. Mr. Herscovitz never denied that he knew he was being cheated and being taken advantage of by the Defendants, and the fact that he was a Law School graduate and that he was intelligent, and that he had business experience, might

have been the basis for his having knowledge of the principles of the Law, and perhaps having the naivette of a student of the Law, in believing that principles of the Law are easily, accurately, and always applied to specific situations, such as the rule laid down by this Honorable Court in the Reliable case of February 1965 when it held "that where a release has been obtained by fraud, the return or tender of consideration is not a necessary condition precedent to disaffirmance of release and enforcement of one's claim."

Metropolitan State Bank, Inc., vs. Arthur Crox, et al., Supreme Court of Colorado, October 8, 1956, 302 P.2d 188, is authority for the statement " * * * or one induced by fraud, imposition, over-reaching, or misrepresentation, or by concealment of the material facts, such that if it had been known to the other party, he would not have entered into the Accord is voidable and ineffective, and as elsewhere appears, may be set aside at the instance of the injured

party." The Court further stated that an agreement and its performance cannot constitute an Accord and Satisfaction of a claim or demand, where it is the result of collusion or what is known as "business compulsion."

Wheelock Bros., Inc., vs. Bankers Warehouse Company, et al., Supreme Court of Colorado, July 1, 1946, 171 P.2d 405, is a case analogous to the Reliable situation in that the Defendant, Bailee, had in his possession merchandise which was the property of the Plaintiff, Bailor. The Bailee, by reason of its negligent conduct, delivered up some of the property of the Bailor to a third person and upon the Bailor demanding back the remaining inventory in order to prevent any further liquidation of the inventory wrongfully, the Bailee refused to release the inventory without a full release of any claim that the Plaintiff might have, in order to get the remaining goods, and upon being given the release by the Plaintiff-Bailor, did deliver

up the remaining inventory. The action herein was to invalidate the release and to recover from the Defendant, the value of the merchandise which it had in its possession and had delivered up without turning over adequate compensation to the Bailor for same. The Court quoted Moise Bros. Company vs. Jamison, 89 Colorado 278, 1 P.2d 925, for authority that "such release was without consideration and given under duress of goods." The Court further stated that the Defendant could not allege the release as a bar to recovery by the Plaintiff. This Honorable Court in its February 1965 decision on behalf of Reliable cited Manno vs. Mutual Ben., Health and Accident Association, 187 NYS 2d. 709, also Kelley vs. United Mutual Insurance Association, 112 S.W. 2d 929, as authority for the statement made by this Honorable Court when it stated "if found to be true, this false representation, coupled with the wrongful withholding of that which belonged to the Plaintiff,

may well justify a finding of duress which would afford him release from the settlement."

The Court stated in the Reliable March 10, 1970, decision that the signing of the $12,000.00 draft nine days later was done after all coercion had terminated by reason of the cashing of the $84,923.39 draft. The closure of Reliables business for 47 days, the non payment for its inventory of $84,923.39 until more than 80 days had elapsed, the inability to repair the premises and obtain replacement of inventory for six months all were coercive factors. The Court is overlooking the most important fact of all - the payment of $12,609.00 rather than $128,000.00 business interruption loss rightfully owing the Plaintiff to cover the actual expenditure it made for continuing costs of overhead must be considered in its proper relation to fraud and economic duress. This was a continuing economic factor that was not cured by the payment of the insurance proceeds.

POINT V.

THE COURT ERRED IN DENYING RIGHT OF TRIAL BY JURY.

The Appellant brought to the attention of this Honorable Court in its last instant Reliable Brief, that this Court has recognized in Fimlayson vs. Brady, 121 Ut. 204, 240 P.2d 491, that the right to trial by jury is an ancient and valued right, not to be denied without compelling reasons.

In Raymond vs. Union Pacific Railroad, 1948, the Supreme Court of Utah, 191 P.2d 137, referring to the constitutional right of trial by jury stated that "this Court is charged with a duty of protecting all of the rights of all litigants. This is especially true of those fundamental rights guaranteed by the State and Federal Constitutions." The Court further stated in this case "that the right to have a jury pass upon the issues of fact does not include the right to have a cause submitted to a jury

in the hope of a verdict, when the facts undisputably show that the Plaintiff is not entitled to release." In the instant case before this Honorable Court, we are seeking to determine whether there was duress, fraud, release and/or ratification. The determination of any one of these is a factual issue, and factual issues are for the Jury to determine. This was affirmed in the Fimlayson case supra and is set forth in 78-21-2 Utah Code Annotated as amended 1953; all questions of fact, where a trial is by jury, other then those mentioned in the next section, are to be decided by the jury, and all evidence thereon is to be addressed to them, except when otherwise provided.

Article 1, Section XI, of the Utah Constitution, was cited by this Court in the February 1965 Reliable decision and was alleged in Appellant's Brief on Page 13 and 14 of the instant action before this Court. The Supreme Court of the State of Utah is circumscribed in

its power and jurisdiction by the Constitution and by the Statutes of the State of Utah, and it was held in the case of State of Oregon vs. Frank B. Reid, June 20, 1956, Supreme Court of Oregon, 298 P.2d 990, "No Court is authorized to construe Law to fit each individual case as it arises. If it attempted such, the orderly administration of justice, according to the well established rules adopted to protect the public, would cease and chaos would reign."

53 Am. Jur., Page 292, Section 362, states "the trial Court should not assume to direct a verdict where its ruling would require it to pass upon the credibility of witnesses and weigh testimony, or would require it to resolve a conflict in the evidence; whenever there is credible evidence from which a reasonable conclusion can be drawn in support of the claim of the party against whom the Motion is made, the Motion must be denied and the case submitted to the jury." It is submitted to this Court

that three days testimony by the Plaintiff's advocates, can only be determined against the Plaintiff, by the Court presumptiously taking from the jury, the right to determine by credibility and demeanor, the value and weight of the testimony given. This particularly so when there has been no valid impeachment, either from direct or cross examination, of the Plaintiff's witnesses, or by direct testimony of Defendants' witnesses.

Article 1, Section VII, of the Constitution for the State of Utah provides: "No person shall be deprived of life, liberty, or property, without due process of law." It is submitted to this Honorable Court, that what this Court stated in its Reliable 1965 decision was in point at that time and is even more in point, now that more then nine years have elapsed from the time of the injury of the Plaintiff and his pursuit of his constitutional remedies when this Court stated "Even more fundamental

on this point is the reflection upon the fact the paramount object is always to do justice between the parties."

CONCLUSION

WE SUBMIT TO THIS HONORABLE COURT THAT THERE IS NO EVIDENCE SO CLEAR, THAT AS A MATTER OF LAW, IT CAN BE HELD THAT THERE WAS NO DURESS AND/OR FRAUD PRACTICED UPON THE PLAINTIFF, AND THAT THE DEFENDANT CANNOT WITH HINDSIGHT REMEDY THE CASE BY INJECTING AFFIRMATIVE DEFENSES, WHICH IT DID NOT PLEAD IN THIS ACTION ORIGINALLY. IT IS ASKED THAT THIS CASE BE REMANDED FOR TRIAL BY A JURY AS PRAYED FOR BY PLAINTIFF.

Respectfully submitted,

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