1969

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

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

BRIEF OF APPELLANT

Appeal from a Judgment of the Third Judicial District
Salt Lake County,
Honorable D. Frank Wilkins Presiding

REX J. HANSON
702 Kearns Building
Salt Lake City, Utah

PETE N. VLA[illegible]
Eccles Building
Ogden, Utah [illegible]

PAUL A. RENNE
1 Maritime Plaza
Golden Gateway Center
San Francisco, California
Attorneys for Respondents

RICHARD W. CAMPBELL
Olmstead, Stine and Campbell
2324 Adams Avenue
Ogden, Utah [illegible]
Attorneys for Appellant

TABLE OF CONTENTS

Texts Cited

Cases Cited

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

BRIEF OF APPELLANT

NATURE OF THE CASE

This is an action filed in the District Court of Salt Lake County by plaintiff, Reliable Furniture Company, against defedants American Home Assurance Co., Western General Agency and General Adjustment Bureau. At time of trial, Security Development Company, a corporation, and American Carpet Company, a corporation, were joined as involuntary plaintiffs. The action seeks to set aside an insurance settlement under a business interruption policy, and to recover the actual loss sustained under the policy terms as well as accompanying damages.

DISPOSITION IN LOWER COURT

The motion of each defendant for an involuntary dismis-

sal at the close of plaintiff's case was granted by District Judge D. Frank Wilkins from the bench on March 20, 1969, after three days of trial before a jury. A formal judgment of dismissal was entered April 28, 1969, R-34.

RELIEF SOUGHT ON APPEAL

Appellant seeks reversal of the judgment of involuntary dismissal as to each defendant, and remand to the District Court for determination of all the issues by jury verdict.

STATEMENT OF FACTS

Presentation of appellant's case at trial entailed three days of testimony and twenty-three exhibits. Appellant will not set out in detail all the evidence, but will outline the basic facts relied upon to establish a jury question.

Appellant will be referred to as "Reliable"; defendant American Home Assurance Co. as "American"; defendant Western General Agency as "Western"; and defendant General Adjustment Bureau as "GAB".

Reliable is a Utah corporation, having conducted a furniture operation at Ogden, Utah, from 1945 through May of 1962 at a location at 23rd and Washington. R 55, 110. It was a substantial operation, with some thirty-four full-time employees, and sales of just under one million dollars in 1959. R 62, 67. Sam Herscovitz, principal officer of Reliable, has been in the retail furniture business since 1934. R 55.

In the morning hours of March 30, 1961, a fire of unknown origin swept the Reliable store, causing extensive damage to both the premises and the merchandise therein. R 81.

Reliable at that time had a policy of insurance with Fidelity and Guaranty Insurance, (not a party to this suit) covering the stock, or inventory, and Reliable also was insured by defendant American under a "U & O", or business in-

terruption policy. P-2, R 83. Defendant Western was the general agent in Utah for both Fidelity and American, and defendant GAB was assigned to adjust both the stock loss and the business interruption loss. R 245, 246, 83, 87.

The inventory of damaged merchandise was completed and the amount of the stock loss ($84,000) under the Fidelity policy agreed upon by Reliable and GAB within one week after the fire. R 83, 84. The damage to the store was so extensive the premises were not restored until July 20, 1961. R 91. In an attempt to reduce losses, Reliable opened its doors to dispose of some of the merchandise on May 15, forty-seven days after the fire. R 90. The store operation, due to the fire, repairs, disposing of merchandise and replacement of inventory, did not return to a substantially normal position until October, six months after the fire. R 94.

During the weeks after the fire, Reliable was engulfed by an increasingly serious need for money. R 85. This critical subject was discussed by Mr. Herscovitz at many times prior to June 19 with both GAB and Western. R 85, 86, 247, 248.

Despite this, Western did not receive authority from Fidelity to pay the stock loss until June 16, 1961, some ten weeks after Reliable and GAB had agreed on the $84,000 figure. On that date, Jack Day, vice-president of Western, telephoned Herscovitz he had authority to pay the claim if he would come down to Salt Lake. R 249. Herscovitz did go to Western's office that day, a Friday, but was then informed by Jack Day he wanted to settle the business interruption loss (American) at the same time. R 97. The adjuster on the American claim was not then available and despite the request of Herscovitz that Reliable be paid then for the stock loss, Day arranged for a meeting in Ogden the following Monday, the 19th, to conclude the stock loss and the business in-

terruption loss. R 98.

The meeting was held in Herscovitz' office in the store on June 19, 1961, beginning at about 2:00 P.M. and lasting until about 6:30 P.M. Present were Herscovitz, William Ball, (adjuster for GAB), Day, and for a part of the time, Wayne Dykstra, Reliable's bookkeeper. Day had with him the completed and signed $84,000 draft drawn on Fidelity and a blank draft drawn upon American.

The adjuster, Ball, obtained figures from Dykstra and spent perhaps two hours on calculations pertaining to the business interruption loss. R 99. Eventually Ball arrived at a figure of $12,900 and proposed this to Herscovitz. Both Herscovitz and Dykstra expressed surprise and concern at the small figure (R 210) and Herscovitz then asked for payment of the stock loss only and for postponement of the business interruption settlement. R 100. At this point Jack Day, vice-president of Western, told Herscovitz he would not be paid the stock loss payment ($84,000) unless he agreed to and signed the interruption loss settlement of $12,900. R 100, 211. Herscovitz then turned to Ball, GAB adjuster, and asked, "Is that the way it has to be?" Ball replied, "Yes, that's the way it has to be." R 101. Day further told Herscovitz at that time he was under instructions not to deliver the $84,000 draft unless the $12,900 release was signed. R 101.

Herscovitz relied on these statements of Day and Ball (R 138) and in order to obtain the desperately needed monies, signed the release agreement and received both drafts at approximately 6:30 or 6:45. R 205. The $84,000 draft remained in Day's pocket from his arrival at 2:00 P.M. until 6:30 P.M., when it was produced and delivered following execution of the $12,900 release. R 251.

Reliable deposited the $84,000 draft the next morning, but held the $12,900 draft some eight or nine days until the

$84,000 draft had in fact been paid. R 106. During this period, Herscovitz consulted with counsel and after doing so, endorsed and deposited the $12,900 draft. D 12, R 106.

The American policy (P-2) provides, in general terms, indemnity for the reduction of gross earnings during the period of business interruption. Reliable presented testimony of gross earnings during a four-month period and a six-month period following March 30, 1961, and compared such periods to the same periods of 1960, and also compared them to the same periods of time for the average of 1958, 1959 and 1960. This testimony established the reduction of gross earnings to be:

Four months 1960 basis	$59,467.93
Four months 3-year average	61,739.96
Six months 1960 basis	94,004.72
Six months, 3-year average	121,159.96

R 115, 116, 179. Additional expenses attributable to the interruption in excess of $17,000 were established. R 107, 108. Herscovitz testified the loss to be at a minimum under the American policy of $128,000. R 152.

Although Reliable kept its doors open until May of 1962, it could not survive after the disastrous fire and the action of defendants in withholding settlement of either claim for 2½ months and forcing Reliable to accept perhaps ten percent of its actual interruption loss experience. R 110.

Suit was filed August 11, 1961, shortly after the acts complained of. R 1. By leave of Court, two amendments to the complaint were filed, R 22, R 31. The relief sought is (1) setting aside the settlement of $12,900; (2) recovery of actual loss under the American policy; (3) attendant damages; (4) damages for fraud and misrepresentation.

ARGUMENT

1. THE TRIAL COURT ERRED IN GRANTING THE

MOTION FOR INVOLUNTARY DISMISSAL OF DEFENDANT AMERICAN HOME ASSURANCE CO.

The trial court ruled as a matter of law the draft, D-12, constituted a complete release of any and all claims under the business interruption policy. R 35.

It is interesting to note release is an affirmative defense that must be pleaded to be effective. U.R.C.P. 8(c). Defendants have never pleaded the defense of release. R-7. No amendment to the answer was asked for or granted during trial.

This Court, in an earlier appeal of this case, Reliable vs. American, et al, 16 Ut. 211, 398 P2 685, overturned a non-suit visited upon Reliable at pre-trial by the Honorable A. H. Ellett. In reversing, this Court set out the facts as claimed by plaintiff and ruled these facts sufficient to have a jury pass upon the questions of duress and fraud:

> "If we accept the facts as plaintiff contends them to be, as we are obliged to do on this review, we must assume not only that the plaintiff was in economic distress, but that the defendant knew this and took advantage of him by falsely representing that money belonging to the plaintiff could not be delivered to him, and wrongfully refusing to deliver it unless plaintiff would also accept the proffered settlement on defendant's policy, which resulted in compelling plaintiff to accept the latter settlement against his will. If found to be true, this false representation, coupled with the wrongful withholding of that which belonged to plaintiff, may well justify a finding of duress which would afford him relief from the settlement."

A quick perusal of the facts set out in that opinion with the Statement of Facts supra shows they are parallel and substantially identical. How, then, did the trial court here differentiate the evidence at trial from the opinion, with the end

result of Reliable being ejected from court a second time without benefit of jury? Apparently the difference exists solely in D-12, the $12,900 draft referred to in the Judgment. The document was not before this Court on the previous appeal.

Clearly, this is a distinction without a difference. This Court, on the previous appeal, had all of the facts surrounding the draft, its retention, consultation with counsel and eventual negotiation.

To quote from Respondent's Brief on the last appeal, at Page Four they set out:

> "Herscovitz allegedly objected but then accepted a settlement in the sum of $12,609.39 which was made out at that time along with a proof of loss release which Herscovitz executed. He also accepted the $84,-923.39 from Fidelity (D-68). Subsequently, Mr. Herscovitz consulted with counsel and presented both drafts for payment and accepted the proceeds (R 35)." (Underlining Added.)

This point was developed and relied upon by Justice Henroid in his dissent in the earlier case, commenting,

> "In waiting nine days, cashing it and using the proceeds, does not bespeak a lack of mutuality in measuring the length of the Chancellor's foot."

D-12 contains printed language standard to such drafts. Under normal circumstances the paid draft would evidence a release. But the case Reliable presents to this Court is not a normal case. It is a case of fraud and duress compelling Reliable to accept a token settlement or face certain destruction from lack of funds.

Admittedly, Herscovitz knew on June 19 that defendants were unfairly attempting to force a settlement on him. R 137. Knowledge of the fact of fraud or duress does not prevent

the injured party from asserting his rights thereafter. Buford vs. Lonergen, 6 U 301, 22 P 164.

At what point in time or in activity does the conduct of the victim reach the stature it was here accorded, constituting release as a matter of law? According to 76 C.J.S. Release, Sec. 32,

> "It has been said that an extreme case is required before the application of the rule of ratification will be inferred from conduct, and that one should not be held to have adopted a release procured by fraud in the absence of an unequivocal act giving rise to the inference of an intent to ratify or unless reasonable minds would say that he was guilty of conduct tending to show an intention so to do."

In the present action, Herscovitz testified he consulted counsel to determine his legal rights and thereafter deposited the check with no intention to accept or approve the settlement. R 140. The Trial Court apparently took the view there were two transactions, related but separate and independent. These were (a) the June 19 agreement resulting in signing of the Proof of Loss, P-14, and (b) the endorsement and deposit, eight or nine days later, of the $12,900 draft, D-2. This is an arbitrary and unrealistic approach that completely emasculates the earlier Reliable opinion of this Court.

A case very much in point is Purvis vs. Pennsylvania R. Co., 198 F2d 631, 3rd C.C.A. In this case Purvis, an injured workman, signed a release to obtain his paycheck. In return he was given a check that contained a printed release paragraph above the space for endorsement, just as the American draft in this case did. Purvis took the check elsewhere, endorsed and cashed it. The trial judge held there was sufficient evidence to go to the jury on the issue of setting aside the release, but he also reversed a judgment for Purvis on

a basis identical with the ruling of our Trial Court: The endorsed check as a matter of law was a complete release. In reversing the District Court, the Third Circuit held there is no basis to separate the transactions, stating:

> "We agree with the district judge that the validity of the release, under the testimony, was properly a jury question but we are forced to disagree with the interpretation of the endorsement of the check as an independent act. It seems to us that the attempted disposal of the claim must be viewed as a whole — a single business transaction. Admittedly the sole subject of the talk between Purvis and the claim agent was the payment of money by the railroad to Purvis. The latter says the money simply represented six days' pay. The railroad man asserts that the payment was primarily to obtain a release of all claims of Purvis stemming from his accident. Whatever be the fact as to that, unquestionably the railroad check was given in exchange for the release. It is that check which had the release language on it above where Purvis endorsed it. Whether there was fraud in the obtainment of the release was held to be a jury question and rightly so. But as a practical matter this ruling was rendered completely ineffectual by the trial court, deciding that the necessary signature to the instrument received in exchange for the release constituted a new, unrelated proceeding."

This presents the crux of appellant's complaint. The endorsed draft, D-2, cannot and should not be taken out of context, isolated and evaluated solely on its content and the time of negotiation. To do so renders immaterial all evidence surrounding the transaction that produced the draft, the meeting of June 19. Stated differently, appellant seeks to avoid the (singular) settlement of the American policy. Appellant has presented evidence sufficient, according to this court, to have a jury pass upon the question.

2. THE TRIAL COURT ERRED IN GRANTING THE

MOTION FOR INVOLUNTARY DISMISSAL OF DEFENDANT WESTERN GENERAL AGENCY.

The trial court entered Judgment (R 34) in favor of Western upon alternative grounds,

(a) insufficient evidence to support a finding that plaintiff executed the release as a result of duress or coercion by Western; or

(b) insufficient evidence to support a finding that Reliable relied to its detriment on any representation of Western.

The argument previously made as to defendant American is involved here, so this discussion will be limited to the narrow issues found by the trial court as to Western. The first finding by the Court relates to the economic duress allegations of Reliable's complaint. The second, or alternative finding is pertinent to the fraud and misrepresentation allegations of the complaint.

As to (a) it is indeed difficult to reconcile this finding with the evidence. The sworn testimony of Herscovitz reveals he agreed to the settlement solely because it was the only way he could get the $84,000 stock loss payment. Again, these are not two seperate, isolated transactions, but one settlement resulting from the duress of defendants. Day, vice-president of Western, is the person who made the actionable statements to Herscovitz.

(b) Deals with the fraud alleged in the amendment to the complaint of Reliable (R 31). The evidence is undisputed (R 138) that Herscovitz did indeed rely upon and believe the statements made by Day. As a result of such reliance and belief, and the economic position it was in, Reliable was forced to accept the unfair settlement. That Herscovitz knew Western was acting wrongfully, and consulted counsel with refer-

ence to his rights, does not alter the fact of belief and reliance upon Day's statements.

3. THE TRIAL COURT ERRED IN GRANTING THE MOTION FOR INVOLUNTARY DISMISSAL OF DEFENDANT GENERAL ADJUSTMENT BUREAU.

The questions of law here are identical to the Western argument; the only difference occurring in the identity of the malefactor. Ball, adjuster for GAB in charge of this interruption loss, was asked at the June 19 meeting by Herscovitz if what Day had said was correct. He replied, "That's the way it has to be." R 101. Additionally, it should be noted that Ball was the person who calculated the settlement figure this entire lawsuit is about. By adopting and confirming the statement of Day, Ball made GAB a principal in the wrongful acts complained of. It is not necessary to prove a person actually made the statement, if the proof shows he joined in or approved the statement of another. See 37 C.J.S. Fraud, Sec. 96.

4. THE TRIAL COURT ERRED IN REFUSING TO SUBMIT THE ISSUES OF FRAUD CONTAINED IN THE AMENDMENT TO PLAINTIFF'S COMPLAINT TO THE JURY AS TO EACH DEFENDANT.

At pre-trial held June 5, 1968, plaintiff obtained leave of Court, Honorable Bryant H. Croft, to amend its complaint with particularity as to the fraud alleged. This was done by Amendment filed September 26, 1968, R 31, 33. The Amendment alleged a cause of action bottomed in fraud, and resting upon the statements of Day and Ball previously set out in the Statement of Facts.

The cause of action sounding in fraud is not determined by the validity of the release, it stands or falls on the proof by Reliable of the elements of Fraud as set out by this Court in Pace vs. Parrish, 122 U 141, 247 P2 273:

"(1) That a representation was made;

(2) Concerning a presently existing material fact;
(3) Which was false;
(4) Which the representor either
    (a) knew to be false, or
    (b) made recklessly, knowing that he had insufficient knowledge upon which to base such representation;
(5) For the purpose of inducing the other party to act upon it;
(6) That the other party, acting reasonably and in ignorance of its falsity;
(7) Did in fact rely upon it;
(8) And was thereby induced to act;
(9) To his injury and damage."

The ultimate question in review of this point is not the release, but the showing of the above elements by admissable evidence of Reliable. The distinction is noted in 37 C.J.S. Fraud, Sec. 63, as

> "An action of deceit to recover damages for fraud inducing the making of a contract is not based on the contract but on the tort, and the consummation of the contract does not shield the wrongdoer or preclude recovery of damages for the fraud. Even in the case of an executory contract the action for fraud is not on the contract, but is collateral thereto."

Again, at 37 C.J.S. Fraud, Sec. 67, the rule is outlined:

> "Since an action for deceit, as noted supra Sec. 63, is based on the theory of an affirmance of the contract or other transaction, a rescission is not a condition precedent to maintaining an action to recover damages occasioned by the fraud, nor need plaintiff, as a condition precedent, return or offer to return what he received."

Accordingly, this portion of the complaint of Reliable must be examined independent of the claimed release. If, as Reliable alleges, the settlement was induced by the fraud and misrepresentation of defendants, the plaintiff is entitled to recover from the tort feasors the damages it suffered thereby:

The sums it would have recovered under the policy but for the fraud practiced upon it, less the actual amount received and plus any attendant damages it may prove.

To review the elements set out supra,

(1) Herscovitz testified the representations relied upon were made by Day, vice-president of Western, (Western being general agent for American) and affirmed by Ball, agent of GAB.

(2) Such statements obviously concerned a presently existing material fact, i.e., whether Reliable could obtain the $84,000 draft without settlement of the interruption policy.

(3) & (4) Day testified at trial he had no such instructions, establishing the falsity of the statements made. R 257.

(5) If the statements were made, it could have been solely for the purpose of inducing Reliable to settle for the $12,900 figure.

(6), (7) & (8) Herscovitz testified he did believe Day's statements and relied upon them in accepting the settlement.

(9) As set out in the Statement of Facts, the actual loss under the American policy was in the area of $128,000.

Reliable does not contend the evidence produced entitles it to judgment as a matter of law. It does assert that at the close of its case, the trial court and this court must review the evidence in the light most favorable to Reliable. Wells vs. Denver & R. G. Ry. Co., 19 U. 2nd 89; 426 P2 229. In this light, the canvass of the transcript establishes the elements of fraud pleaded and proved and Reliable had the right to a jury verdict on these disputed issues.

CONCLUSION

As this Court has recognized in Finlaysen vs. Brady, 121

U. 204, 240 P2 491, the right to trial by jury is an ancient and valued right, not to be denied without compelling reasons. In determining the question, every controverted fact must be resolved in favor of the party against whom the motion is directed. Boskovitch vs. Utah Const. Co., 123 U. 387, 259 P2 885.

We think appellant has kept faith with the allegations of its complaint, and the representations made to this Court at the last hearing concerning the nature and quality of the evidence it relies upon. The mandate of Reliable (if the decision ordering a new trial can be termed a mandate) has not been kept and appellant must again seek the aid of this Court. The relief sought is not extensive, simply the opportunity to have a jury pass upon the merits of the lawsuit.

Respectfully submitted,

PETE N. VLAHOS
Eccles Building
Ogden, Utah

RICHARD W. CAMPBELL of
Olmstead, Stine and Campbell
2324 Adams Avenue
Ogden, Utah

Attorneys for Appellant