1965

Flinco, Inc., A Utah Corporation v. The Goodyear Tire & Rubber Comp Any, A Foreign Corporation : Appellant's Brief

Case No. 10321

IN THE SUPREME COURT
of the
STATE OF UTAH

FLINCO, INC., a Utah Corporation,
Plaintiff-Appellant

-vs-

THE GOODYEAR TIRE & RUBBER COMPANY, a Foreign Corporation,
Defendant - Respondent

APPELLANT'S BRIEF

APPEAL FROM JUDGMENT OF PLAINTIFF'S COMPLAINT
HON. RAY VAN COTT, JR.

DWIGHT L. KING
2121 South State
Salt Lake City, Utah
Attorney for Plaintiff

PETER W. BILLINGS and
G. KENNETH HANDLEY of
FABIAN & CLENDENIN
800 Continental Bank Building
Salt Lake City, Utah
Attorneys for Defendant - Respondent

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STATEMENT OF THE NATURE OF THE CASE

Plaintiff filed an action against defendant claiming a breach of a franchise agreement by wrongful termination thereof and the violation of the Anti-Monopoly Statute of the State of Utah. The plaintiff is seeking damage for violation of its rights as a result of said two basic kinds of conduct.

DISPOSITION IN LOWER COURT

Judge Ray Van Cott, Jr. granted the defendant's Motion for Dismissal of plaintiff's action at the close of plaintiff's case in chief on the grounds that plaintiff had shown no right to relief and refused to submit plaintiff's case to the jury for its consideration.

RELIEF SOUGHT ON APPEAL

Appellant seeks an order reversing the trial court and requiring submission of its case to the jury for determination.

STATEMENT OF FACTS

On June 21, 1962, plaintiff accepted a "Goodyear Franchise Agreement" which is set up on a Goodyear Tire Company printed form, a copy of said agreement is attached to plaintiff's Complaint and is Exhibit No. 1.

Under the "Goodyear Franchise Agreement", plaintiff was designated as a dealer in tires, batteries, and accessories for the Goodyear Tire & Rubber Company.

Plaintiff terminated a line of tires that it was handling, the Hood brand, and expended considerable amounts of its money to set up as a Goodyear Tire dealer. It operated under such franchise agreement until the summer of 1963, at which time defendant began to circulate rumors in the Salt Lake and Ogden territories that plain-

tiff had been cancelled as a Goodyear Tire dealer. On September 16, 1963, defendant notified plaintiff in writing that under the terms of the Goodyear contract, plaintiff was terminated as a dealer.

Plaintiff claims that the termination by the defendant, in addition to being wrongful in the sense that the terminaton occurred without notice and prior to the notice of said September 16, 1963, was without cause. Plaintiff claims that the termination was a part of an overall plan and design by Goodyear Tire & Rubber Company to restrict competition in rubber products, batteries, and accessories in the State of Utah and particularly in the area in which Flinco, Inc. operated. The termination is in violation of Title 50, Sec. 1, etc. U.C.A., 1953. Plaintiff claims the termination was because it had taken on an additional brand of tires for distribution through its area, namely the Miller line.

Plaintiff's evidence shows that the Goodyear Franchise Agreement contains several contradictory and inconsistent provisions; first, paragraph 6 provides that the Goodyear Tire Company may cancel the agreement for failure on the part of the dealer to make payments when due Goodyear. In paragraph 13 of the agreement, it provides that the agreement shall expire in five years from the date of execution and paragraph 14 provides that the agreement may be cancelled upon thirty days written notice by dealer to Goodyear or by Goodyear, through its local management, to dealer.

These provisions, the plaintiff claims are inconsistent one with another unless the thirty day cancellation clause is interpreted to be for cause either set forth in paragraph 6 or other good and sufficient cause. No part of the franchise agreement contains any statement or agreement that the agreement could be cancelled without cause. The contract is not exclusive and Goodyear specifically reserved the right to sell in plaintiff's territory through other dealers.

Plaintiff offered testimony concerning negotiations and preliminary discussions prior to the execution of the franchise agreement and the trial court refused to permit any testimony relating to said subject (R. 67-68).

During the period prior to September 16, 1963, the date of cancellation, plaintiff's evidence indicated that local representatives of Goodyear Tire & Rubber Company were stating that Flinco, Inc. was cancelled or was about to be cancelled because it had taken on the Miller Tire line. Evidence also revealed that complaints were made to the Flinco people about their handling the Miller Tire line although there was nothing in the franchise agreement which indicated any restriction on Flinco's handling other lines of Rubber Tire products or accessories competitive to Goodyear.

Flinco's position is that the real and basic reason for cancelling the dealership was the handling of the Miller Tire line and that this action on Goodyear Tire Company's part was a violation of the Anti-Monopoly Pro-

visions of the Laws of the State of Utah contained in Title 50-1, etc., U. C. A., 1953.

It is plaintiff's position that the evidence presented at the trial court presented a question of fact on each of the issues made by the pleadings and as set forth in this Statement of Fact and that the court violated the plaintiff's constitutional rights in refusing to submit the case to the jury on the evidence.

ARGUMENT

POINT 1

THE GOODYEAR FRANCHISE AGREEMENT IS AMBIGUOUS IN ITS TERMS.

POINT 2

THE TRIAL COURT ERRED IN REFUSING TO PERMIT EVIDENCE OF THE NEGOTIATION AND DISCUSSION PRIOR TO EXECUTION OF THE GOODYEAR FRANCHISE AGREEMENT.

POINT 3

THE EVIDENCE REVEALED A VIOLATION OF TITLE 50-1-1, UTAH CODE ANNOTATED BY DEFENDANT.

ARGUMENT

POINT 1

THE GOODYEAR FRANCHISE AGREEMENT IS AMBIGUOUS IN ITS TERMS.

The Goodyear Franchise Agreement in paragraph 6 provides:

> "Upon failure of dealer to make any payment when due, Goodyear may, at its option, cancel this agreement or defer additional shipments until overdo accounts have been paid."

This is the only reference in the agreement relating to cancellation of the agreement except that paragraph 14 states:

> "This agreement may be cancelled upon thirty days written notice by the dealer to Goodyear or by Goodyear, through its local manager, to the dealer."

At no place in the franchise agreement is there any other grounds set forth for cancellation of the franchise agreement.

The franchise agreement does not provide for an exclusive territory for plaintiff to sell in, nor does it restrict defendant's right to sell in the area which plaintiff operates. The contract does contain in paragraphs 7, 8, 10, and 11, restrictions on the plaintiff's activities. In no place does the defendant retain the right to cancel the agreement except for failure to pay overdue accounts.

The defendant claimed at the time of trial, and the Trial Court, in dismissing plaintiff's Complaint, ruled that defendant had an unrestricted right of cancellation

by giving thirty days written notice to plaintiff and that no cause need be present for such cancellation.

Plaintiff contends that the right to cancel, as contained in paragraph 14, must be read in conjunction with paragraph 6. If so interpreted, the agreement does not give defendant an unrestricted right of cancellation.

In paragraph 13 of the agreement, it provides that the agreement shall expire five years from the day of execution unless previously terminated as hereinafter provided. A fixed term of this kind would seem superfluous if the agreement is terminable at will.

The franchise agreement is a printed form supplied by the defendant. Blanks are filled in to designate the dealer, the types of products that he will handle, and fixing a date on which the agreement is to commence.

This court, on numerous occasions has ruled concerning such documents, that the interpretation of the document must be most strongly against the party furnishing the form and responsible for its contents.

In the case of *Barnard v. Hardy,* 77 Ut. 218, 293 P. 12, this court was concerned with a real estate broker's listing agreement. A part of the property listed had been sold through the efforts of the broker. The owner refused to pay the commision to the real estate broker. The court examined the listing agreement and discovered

that it did not provide for a commission in case a part of the property was sold. After discussing the plaintiff's claim and request that the Court should add, "Should I sell said property or any part thereof." A ruling was made in the following language, "The agreement was prepared by plaintiff, on a printed form furnished by him and therefore must be construed most strongly against him." The court then refused to add the language to make possible commission on a partial sale of the real estate.

In *Mifflin v. Shiki,* 77 Ut. 190, 293 P. 1, a printed listing agreement furnished by a real estate broker and filled in by the broker was before the court. The question was whether or not the broker was entitled to a commision on the trade of the listed real estate or only where there was a sale for cash either on an installment or full payment transaction. This court refused to permit parol evidence to explain the ambiguity created in the printed part which was attempted to be cured by insertion of the word, "trade" on an endorsement to the printed listing agreement. The court applied the rule that where a party furnishes a printed form, the language is interpreted most strongly against the party whose form is used.

A case closest to the facts before the court is *Cowley v. Anderson,* (10 Cir.) 159 F. 2d 1, this case involved a contract between a dealer and supplier of poisonous substances used for rodent control. The contract between the dealer and the supplier provided for exclusive territory, required the dealer to exercise a certain amount of

diligence in exploiting the territory, and provided that the agreement could be terminated for lack of diligence. The contract, as in the present case, was for a five-year period. The Circuit Court held that under such circumstance, the contract was a five-year contract and could not be terminated by the distributor at its will without cause. It pointed out that even though the dealer had a right to discontinue the contract, this does not create a lack of mutuality and grant to the distributor a right of termination without cause.

It would have been a simple matter had the defendant intended to reserve a right of termination, without cause, to have clearly set this out in its printed form. Since it did not, it is respectfully submitted that a proper construction of the contract would adopt the plaintiff's position that the right of cancellation was for cause only and that there was not an unreserved right of cancellation without cause, at the unrestricted will of defendant.

POINT 2

THE TRIAL COURT ERRED IN REFUSING TO PERMIT EVIDENCE OF THE NEGOTIATION AND DISCUSSION PRIOR TO EXECUTION OF THE GOODYEAR FRANCHISE AGREEMENT.

The negotiations preceding the execution of the Goodyear Franchise Agreement were carried on by one G. E. Ap Roberts, an employee of plaintiff. Plaintiff

propounded a question to Ap Roberts concerning his discusion with one Mr. Ferguson relating to the relationship between Flinco and Goodyear Tire and Rubber Company. The court refused to permit the answer of Ap Roberts (R. 67-68). Thereupon, counsel for plaintiff made an offer of proof that the witness, Ap Roberts would state that in all of the discussion with Ferguson, the contract was stated to be for a five-year term and was so intended by Ap Roberts and Flinco, Inc., that prior to the execution of the agreement it was understood that it was for a five-year term (R. 68-69). The court refused to permit this testimony and plaintiff claims this prejudiced its rights.

The rules relating to parol evidence in aid of interpretation of ambiguous agreements has been discussed on many occasions by this court. It is submitted that there is a clear rule that the evidence is admissible to aid in arriving at a proper and clear interpretation of a contract and to ascertain the intentions of the parties.

Penn Star Mining Company v. Lyman, et al., 64 Ut. 343, 231 P. 107, involved an appeal from a refusal by the trial court to permit parol evidence relating to certain documents and contracts on which the plaintiff sought recovery of damages. The defendant claimed the agreement and contract was obscure, uncertain, and ambiguous. The plaintiff claimed that it was perfectly clear and wholely free from ambiguity. The Trial Court refused to permit evidence from the defendant to show what the

language of the agreement actually meant. This Court reversed the Trial Court and stated that there was an extensive and well established rule that in cases where the language of a written instrument is obscure, uncertain, or ambiguous so that the intentions of the party were left in doubt by an inspection of the instrument alone, extrinsic evidence within recognized limits is always admissible to aid the court in arriving at the true intentions of the parties. This court in setting forth the principle and general rule, quoted at length the case of *Salt Lake City v. Smith,* 104 F. 457, 43 C.C.A. 642. In the recent case of *Continental Bank and Trust Company v. Stewart,* 4 Ut. 2d, 228, 291 P. 2d 890, cited again the *Salt Lake City v. Smith* case and quoted the rule for which that case stands in the following language:

> "It is true that the express terms of an agreement may not be abrogated, nullified or modified by parol testimony; but where, because of vagueness or uncertainty in the language used, the intent of the parties is in question, the court may consider the situation of the parties, the facts and circumstances surrounding the making of the contract, the purpose of its execution, and the respective claims thereunder, to ascertain what the parties intended."

The Penn Star case also stands for the proposition that where a party to a contract uses ambiguous language, the language will be interpreted most strongly against the party using it. It cites with approval the proposition that when there is doubt as to meaning of a

contract, a party responsible for the language will be held to that meaning which he knew the other party supposed the words to mean.

Plaintiff attempted through the witness Ap Roberts, to show the court and jury what it was that the plaintiff believed the franchise agreement meant prior to its execution, and at the time of its execution, how the plaintiff interpreted the language of the printed form furnished to it by defendant. In refusing to permit plaintiff to make such showing, it is respectfully submitted the court erred to the prejudice of the plaintiff.

Many Utah cases have applied the rule that extrinsic evidence may be admitted to show the meaning the parties gave to the agreement and the circumstances surrounding their negotiations so that an accurate ascertainment of the parties' intentions could be achieved.

In *Boley v. Butterfield,* 57 Ut. 262, 194 P. 128, this court permitted extrinsic evidence to show that a lease of grazing permits was to be non-exclusive rather than exclusive. It permitted the defendant to show that the plaintiff had been advised that other persons were sharing in the grazing area and that his permit was therefore not to be exclusive.

In *Read v. Forced Underfiring Corporation,* 82 Ut. 529, 26 P. 2d, 325, this court permitted extrinsic evidence to show what was meant by "net profits." The evidence

revealed that at the time of the agreement, the directors were not being paid and this expense was not taken into consideration by the parties in arriving at the company's "net profits."

In *Vincent v. Federal Land Bank,* 109 Ut. 191, 167 P. 2d, 279, this court permitted evidence to show that an agreement that the property line would be at the edge of a body of water was intended to mean the shore of the body of water at the time of the agreement and not the receded shore line which was claimed by the plaintiff at the time of the trial.

In *Udy v. Jensen,* 63 Ut. 94, 222 P. 597, this court approved evidence that a contract involving the sale of stock was a mere option and the buyer was not bound to purchase, permitting evidence of statements made by the buyer at a directors' meeting where he advised the seller that he did not intend to be bound or jeopardize any of his property but only purchase if he could do so. Parol evidence was allowed to show the buyer did not intend more than an option.

In *Continental Bank and Trust Company v. Stewart,* 4 Ut. 2d 228, 291 P. 2d 890, this court in a scholarly opinion permitted witnesses to testify to the meanings of obligations and debts and to show that the debts to be assumed by the buyer as a part of the purchase price of real estate, were secured debts.

In *Maw v. Noble,* 10 Ut. 2d 440, 354 P. 2d 121, the court permitted extrinsic evidence to show the meaning of an attorneys fee arrangement. It stated again the rule that party drawing an agreement which contains an uncertainty or ambiguity, should have the contract most strongly construed against him. The primary and more fundamental rule is that the contract must be looked at realisticly in the light of circumstances under which it was entered into and if the intent of the parties can be ascertained with a reasonable certainty, it must be given effect.

In the case of *Cornwall v. Willow Creek Country Club,* 13 Ut. 2d 160, 369 P. 2d 928, the court set forth as the cardinal and primary rule of interpretation which plaintiff seeks to have applied in the present litigation and stated:

> "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."

Applying the rules set down in the *Cornwall* case, it would appear that only by ignoring the content of paragraph 6 of the franchise agreement, could the court rule that the franchise agreement could be cancelled at the will of either party. It seems clear that if it is cancell-

able at the will of either party, no reasons such as is set forth in paragraph 6 would be necessary for cancellation.

It is plaintiff's position that the court in interpreting the franchise agreement, should have received evidence concerning the parties intentions, circumstances, and plans at the time the franchise agreement was entered into, to ascertain the true intent. This court has determined, on numerous occasions, that under such circumstances, parol evidence may be received to resolve disputes concerning the meaning of ambiguous portions of the contract.

In *Burt v. Stringfellow,* 45 Ut. 207, 143 P. 234, this court in an opinion written by Justice Frick examined the occasions when parol evidence may be received and set forth that it was proper to, (a) define the nature and quality of the subject matter, (b) situation and relation of the parties, (c) all the circumstances surrounding the making of the contract.

In a later case, *Mathis v. Madsen,* 1 Ut. 2d 46, 261 P. 2d 952, the court has enlarged on the rule and set forth the order in which the intent of the parties to a contract that is ambiguous, should be ascertained. *First,* the language of the contract should be examined, *second,* any contemporary writings may be examined, and *third,* if the meaning of the agreement is still uncertain, then parol evidence of the parties' intentions and plans may be received.

Under all of the cases cited, the refusal by the trial court to permit the witnesses Ap Roberts and Tate to testify concerning the negotiations and discussions of the Goodyear Franchise Agreement, was error.

POINT 3

THE EVIDENCE REVEALED A VIOLATION OF TITLE 50-1-1, UTAH CODE ANNOTATED BY DEFENDANT.

Plaintiff's evidence revealed that agents and representatives of defendant discussed with plaintiff's agents and representatives the fact that the plaintiff had taken on the distribution of an additional brand of tires since entering into the franchise agreement with Goodyear.

In one conversation, the agent, R. W. Morrow, stated to Tate, President of Flinco, Inc. that he was in Salt Lake for the purpose of terminating Flinco, Inc. since they took on the Miller Tire line (R. 152). Similar statements were made on other occasions to other representatives of Flinco, Inc. (R. 90).

This evidence is important on two separate facets of plaintiff's case; mainly on its claim for damages for monopolistic practices and second, it indicates that the defendant did not believe they could terminate the contract without good and sufficient cause.

The testimony of the plaintiff's witnesses to the effect that defendant in its distribution system required

its dealers to handle only Goodyear Tire and Rubber products and that the termination of Flinco, Inc. was related to its acceptance of an additional line of rubber products for distribution, is sufficient support for plaintiff's claim of a violation of Section 50-1-2 of Utah Code Annotated, 1953. From such testimony, the jury could find that the defendant was a party to an agreement to fix or limit the amount or quality of rubber products which could be sold in the Flinco territory.

If the jury believed Flinco's evidence, it could find a breach of the anti-monopoly laws of the State of Utah. Flinco would be entitled to triple damages for any damage resulting from this agreement if the termination of its franchise was an act in furtherance of the agreement. It is plaintiff's position that such an act would amount to a wrongful termination.

This court has on two separate occasions, considered the anti-monopoly laws of the State of Utah, and its decisions clearly recognize that any attempt to fix the price or the amount of merchandise to be distributed is against public policy. See *Gammon v. Federated Milk Producers,* 11 Ut. 2d 421, 360 P. 2d 1018, *Zion Service Corps v. Danielson,* 12 Ut. 2d 369, 366 P. 2d 982.

The court did not permit plaintiff to continue with its evidence relating to damages. It directed the verdict on liability without permitting plaintiff to present its evi-

dence on damages and losses by reason of the termination.

The United States Supreme Court in *Standard Oil v. U.S.*, 337 U.S. 293, 93 Law Ed. 1371, had before it a claimed violation of the Clayton Act by reason of Standard Oil's exclusive contracts with its independent oil dealers requiring them to handle only the Standard Oil line of products.

That Court, in its opinion, held that the contract tying an independent dealer to the Standard products was "a potential clog on competition" and "it would impede a substantial amount of competitive activity" and it upheld the Trial Court's decision that Standard's tying agreements violated the Clayton Act prohibiting monopolistic and price-fixing practices. The *Standard Oil* case is a conclusive holding that if contracts similar to Goodyear Franchise Agreements are used to restrict the dealers' rights to handle other brands of rubber products, they would be a violation of the principle of free competition and against the public policy.

The only purpose of the tying agreement is to suppress competition. Plaintiff submits defendant might be found to have terminated the franchise agreement because Flinco, Inc. took on the Miller Tire line, and if it is so found, triple damages would follow.

CONCLUSION

It is respectfully submitted that the plaintiff should be granted a new trial and determined by this court that the evidence is sufficient to justify plaintiff's case being submitted to the jury on both of its theories and causes of action.

RESPECTFULLY SUBMITTED this ..... day of May, 1965.

DWIGHT L. KING

Attorney for Plaintiff-Appellant
2121 South State Street
Salt Lake City, Utah