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Thomas E. Mower v. Neil Jorgensen : Reply Brief

Utah Court of Appeals

Douglas B. Thayer; J. Bryan Quesenberry; Hill, Johnson and Schmutz; attorney for appellee.
Douglas L. Neeley; attorney for appellant.

IN THE UTAH COURT OF APPEALS

THOMAS E. MOWER, Plaintiff and Appellee, vs. NEIL JORGENSEN dba Skyline Sheep Company, Defendant and Appellant	Trial Court No. 980600364 Appellate Court No. 20050235-CA

REPLY BRIEF OF APPELLANT

APPEAL FROM THE RULING OF THE HONORABLE DAVID L. MOWER, ENTERED FEBRUARY 4TH, 2005 DENYING DEFENDANT'S MOTION TO ALTER OR AMEND RULING, IN THE SIXTH JUDICIAL DISTRICT COURT

Douglas B. Thayer-(6942)
J. Bryan Quesenberry (9156)
HILL JOHNSON & SCHMUTZ
3319 North University Ave
Provo, UT 84604
Attorney for Thomas Mower

Douglas L. Neeley (6290)
1st South Main, Suite 205
P.O. Box 7
Manti, UT 84642

Attorney for Neil Jorgenson

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ARGUMENT

I. APPELLANT IS PROPERLY APPEALING

Appellee Mower states that Jorgensen has not timely appealed; which is ironic considering Appellee's own brief was a month past the deadline and should itself be stricken. Mower overlooks the fact that Appellee has admitted that the December 12th, 2001 order is a change in the law in this case. The trespasses complained of in this case took place before that date. How could Appellant Jorgensen have appealed the application of a new order to events that occurred prior to the order being issued, yet not at issue?

II. APPELLANT JORGENSEN NEVER STIPULATED TO A "PER SHEEP PER DAY" CLAUSE

Appellee Mower's entire argument, and the trial courts rationale, hinges on one thing and one thing alone: Counsel for Jorgensen's single word answer to the trial court's question in October 2001, and that such answer be a stipulation. Without both of those being satisfied, Mower's argument fails.

A. Counsel for Appellant never stipulated

A stipulation is an agreement between parties. First Of Denver Mortgage Investors v. C. N. Zundel & Assocs., 600 P.2d 521 (Utah 1975). There is no evidence that there was ever an agreement between the parties. Indeed, all evidence shows that Jorgensen never agreed to a $25 dollar per day per sheep damage amount. Mower can only point to one single, solitary event: an answer to a question by the trial court; and said answer is open to interpretation.

The statement in question is this. "Is there an order in the file, Mr. Harmon[Jorgensen's prior counsel], that says pay $25.00 per sheep per day?" To which Mr. Harmon answered, "Yes." R. 269. This exchange is the sole evidence that Mower points to as a stipulation. There is no other evidence of an agreement, or even negotiations between the parties to interpret the previous order as providing a $25 per day per sheep damage amount. Thus, all Mower can do is attempt to make the answer to the trial courts question imply that Jorgensen stipulated to accepting the vastly higher damage amount.

This exchange between the trial court and counsel for Jorgensen, however, does not establish a stipulation. The lower court did not ask if there had been any agreement between the parties. If the lower court had

asked something like "Is there an agreement, Mr. Harmon, that says pay $25.00 per sheep per day", with an answer of "yes," then that would be something Mower could point to as an agreement.

In fact, though, the statement at issue was not a stipulation; it was a mistake on the part of Jorgensen's former counsel. The court asked counsel a question: "Is there an order in the file that says pay $25 per sheep per day." At the time, of the hearing, there was the November 22, 2000 order in the file that did mention a fine of $25 dollars per day for trespassing sheep. The question, therefore, is whether Jorgensen's counsel was referring to the November 22, 2000 order, or whether there really was an agreement between Mower and Jorgenson to pay $25 per sheep per day for trespass.

In reality, it's clear that there is no stipulation of fact. Counsel was answering a question from the court, not informing the court of any agreement to adjust the order on file. Appellee Mower has not introduced any other evidence at any stage of the proceedings that Appellant Jorgensen ever agreed to this change in the damages. Indeed, there is no earthly reason why Jorgenson would agree to change the damages in such a way (who voluntarily changes their damages to massively higher amounts for no equivalent concession?).

The question the lower court asked was equivalent to asking about the status of a law. For example: "Is there a law which states that murder is a crime, a misdemeanor?" If counsel answers "yes" to that question, was a stipulation made making murder a misdemeanor only? That, in essence, is what Mower's position is. The question of what an order on file states is not a fact that can be stipulated. An order can be modified by stipulation, it is true, but not what the actual content of the order means, which is a question of law for the court. Stipulations on questions of law are not binding on the court. First Of Denver Mortgage Investors v. C. N. Zundel & Assocs., 600 P.2d 521, 527 (Utah 1975).

In addition, Appellant Jorgensen notes that the December 2001 order only mentions the "per sheep per day" clause as pursuant to the November 22, 2000 order. It did not state that the "per sheep per day" was a result of a stipulation. While that order does mention stipulations, it is clear that it is the facts of the trespass that were stipulated (number of sheep, etc.).

Appellee Mower argues that Jorgensen nor his attorney objected at the October 17th, 2001 hearing, and thus should be bound. Instead of demonstrating acquiescence, it is more likely that no one recognized the alleged stipulation. After all, the trial court was asking about the existence

of a specific order; not whether there were any changes or agreements modifying orders.

Appellee Mower also argues that if this Court overturns the trial court, that stipulations will no longer be reliable, leading to all sorts of theoretical horrors. This is simply incorrect. Jorgensen is not attacking the validity of factual stipulations, such as Jorgensen's own stipulation of a trespass. What Appellant Jorgensen is arguing that the trial court should do its own work; not ask the parties to do its work for it. The trial court asked about the existence of an order in the court file. Surely, it is the duty of the trial court to actually verify the existence of that order and its contents, especially when, like now, the decision is the heart of the case. Parties cannot just misrepresent the contents of an order in the case file to the court and expect it to be the law of the case.

Under the Appellee's view, if the trial judge and counsel make a mistake in terms of the exact language of an order while discussing it in court, they are bound forevermore, never again able to correct their mistake. This is simply an absurd result. The trial court asked about the existence of an order saying 1)$25 dollars, 2) per trespassing sheep, and 3) per day. In fact, there was an order on file that contained two of those three elements;

leaving out the "per sheep" bit. It is not surprising that counsel agreed there was an order on file talking about such things.

B. The per sheep per day fine became effective in December 2001.

Assuming Appellee Mower is correct, however, and there was indeed an agreement wherein Jorgensen voluntarily agreed to astronomical damage sums (setting aside the patent absurdity of such an agreement), when was such a stipulation made? The trial court asked if such an agreement imposing a "per sheep per day" fine was in the file. There was no such agreement in the file. Not until the December 12th, 2001 order is there anything anywhere in the court file that states "per sheep per day." Thus, counsel's "yes" is wrong. **No such order existed** at the time he said there was.

Counsel for Jorgensen cannot, by saying there was such an order, create one. If a childless man is asked if he has a child and he says yes, a child does not mystically spring into being. The same is true here. Counsel for Jorgensen was asked if there was an "order in the file that says pay $25.00 per sheep per day." Even though Counsel agreed, there was no such

order—and such an order cannot suddenly spring into being on demand. Only a court can issue an order, not an attorney.

If there really had been an intent to actually enter into a stipulation, counsel for Jorgensen would have said something like "no, there is not an order stating that in the file, but we would like to stipulate to such a damages clause."

This did not happen. Nowhere did Appellant Jorgensen or his counsel ever positively stipulate to any such clause or damages or rewriting of the orders. All counsel did was incorrectly answer a question. Without any other evidence of agreement or intention than an incorrect answer to a question, Appellee now maintains that such an incorrect answer is absolute incontrovertible proof that Appellant Jorgensen agreed to assume a huge measure of damages, merely for the fun of it since he received nothing in return for such a stipulation.

C. The alleged stipulation is vague.

It is also in doubt as to exactly what Appellant Jorgensen allegedly stipulated to. The question the trial court asked was if there was an order in the file stating to pay $25.00 per head per day, to which the answer was yes. What did Appellant Jorgensen stipulate to, except at the most the existence of such an order? He certainly cannot be held to agree with this order.

Nowhere did he agree to be bound by such an order. Jorgensen nowhere signed any statement demonstrating an intent to be bound by such a restriction. He did not agree to never appeal, to waive his rights to fight such an order. Acknowledgment of the existence of something does not demonstrate acceptance. Acknowledging the existence of murderers does not mean society must be forced to accept murder. Simply put, what was stipulated to must be examined. Higley v. Mcdonald, 685 P.2d 496 (Utah 1984).

Nowhere has Appellee Mower ever demonstrated that there was even discussions or negotiations, let alone agreement, involving changing the penalty from per day to per head per day. There is simply not the agreement necessary for a stipulation to be enforced.

III. LAW OF THE CASE

Apellee Mower provides much authority on the fact that oral stipulations are valid. This, of course, is not in dispute. However, what is in dispute is whether there was any stipulation made at all. As demonstrated *supra*, there was no stipulation made, and even if one was made, Appellant Jorgensen only stipulated to the existence of an order, not to being bound by the contents of said order. Quite simply, on December 12, 2001 the trial court

changed the remedy in this case to provide for a "per sheep per day" trespass.

The trespasses complained of by Mower in the instant case took place before that day. Mower has, by not addressing it, admitted that the law of the case changed from the November 2000 order. Thus, it is clear that there was no "per sheep per day" fine in effect on the day of the trespasses complained of. Thus, it is clear error for the trial court to retroactively impose a change in the law of the case on prior events.

Under the clearly erroneous standard set forth by Thurston v. Box Elder County, 892 P.2d 1034 (UT 1995), Appellant is also entitled to relief. Even under the abuse of discretion standard Appellee Mower is advocating, it is clear the trial court abused its discretion in failing to overturn its application of its order.

Appellee Mower presents his own doomsday scenario of disastrous litigation, untrustworthy attorney's, and massive increases in time and money to litigate cases if stipulations are thrown out. But Appellant Jorgenson does not argue that stipulations are invalid. Rather, Jorgenson is arguing that trial courts have a duty to examine their case files. Counsel for Jorgensen said an order existed, incorrectly. The trial court controls the case file: it can check for itself. Mower's argument is a novel one, where trial

This, of course, is nonsense. How could Jorgensen possibly have known in December 2001 that in 2004 he would be waiving his rights to fight the December 2001 order when it was being applied to events occurring in October 2001? As Mower points out, waiver requires intentional relinquishment of a known right. How did Jorgensen intentionally waive his right to appeal for a trespass not even complained of? Clearly, Jorgensen has not waived his rights to appeal in this case.

It is also of interest to note that the trespass Mower is complaining of took place before the December 2001 order, and not afterwards, when the new damage scheme went into effect.

Mower also claims without the "per sheep per day" fine, that there is no deterrent value. This is not true, as seizure and selling procedures are still in place under the November 2000 order.

CONCLUSION

For the foregoing reasons, it is clear that Appellant Jorgensen never made a stipulation at all, that such stipulation if made was vague, and that the "per sheep per day" fine was first instituted in December of 2001. Since the trespasses complained of took place before that date, no "per sheep per day" fine is applicable. Nor has Appellant Jorgensen waived his rights to

appeal. The trial courts refusal to reexamine the case and apply the prior damages clause from the November 20th, 2000 order should be reversed.

DATED this 13th day of March, 2006.

Douglas Neeley
Attorney for Plaintiff Appellant