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Harlan Ashby v. Board of Education, South Sanpete School District : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

HARLAN ASHBY, Appellant, v. BOARD OF EDUCATION, SOUTH SANPETE SCHOOL DISTRICT, Appellee.	Case No. 20050658-CA

REPLY BRIEF OF APPELLANT

Appeal from the Judgment and Order on Directed Verdict of the Sixth District Court in and for Sanpete County, State of Utah, Hon. David Mower, Sixth District Court Case No. 010600224, in which the Court granted a directed verdict and dismissed the case with prejudice.

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I.

Appellee's Advocacy for a Mixed Standard of Review is Contrary to Clear Utah Case Law Which Mandates that Decisions on Motions to Dismiss are Reviewed for Correctness.

"As with a directed verdict, whether dismissal was appropriate for failure to make a prima facie case is a question of law reviewed for correctness." *Grossen v. DeWitt*, 982 P.2d 581 (Utah App. 1999).

II.

Appellee Erroneously Argues for Application of the *Federal* Rule of Civil Procedure 41(b), which is critically distinct from *Utah's* Rule of Civil Proceure 41(b).

The Appellee points out that the Fed. R. Civ. P. 41(b) has been amended to delete the phrase limiting a motion to dismiss to after a plaintiff concluded his case in chief, and that therefore in the federal system, courts have approved of dismissals under 41(b) prior to the completion of the plaintiff's case. *See* Appellee's Brief p. 14.

Appellee's argument support's the Appellant's position.

The fact that the phrase in question *has not* been deleted from Utah's Rule 41(b) means that in Utah state courts, a motion to dismiss is to be considered "[a]fter the plaintiff . . .has *completed* the presentation of his evidence." *See* Utah R. Civ. P. If Utah follows the federal rules' lead and deletes that clause, then motions to dismiss would thereafter be appropriately considered earlier than the plaintiff's completion of the presentation of his evidence. Until and unless that happens, however, the rule should be followed as written.

III.

The Court's Weighing of Evidence and Deciding of Issues of Fact vis-a-vis the Motion to Dismiss, Without Deference to the Non-Moving Party, *Prior to* the Close of the Plaintiff's Case, Was Error. While it Would Have Been Appropriate to Make the Decision in Such a Manner, at the *Close* of the Plaintiff's Case, it was Inappropriate to do so in the Middle of the Plaintiff's Case.

Appellee erroneously dismisses the standards presented in Appellant's brief as inapplicable because this was tried to a judge and not a jury, and was thus a motion to dismiss rather than a motion for directed verdict; therefore, the Appellee argues that the Court can weigh the evidence without resolving inferences in favor of the non-moving party and without considering whether there remain any doubt as to the facts or any conflicting inferences which may be clarified with additional testimony and evidence. *See* Appellee's Brief p. 10-12.

The problem with the Appellee's argument is that the Court did not wait until the close of the Plaintiff's case, but rather cut that case short and ruled prior to hearing all of the Plaintiff's evidence. As such, the Court should have employed a more deferential standard (i.e., inferences in favor of non-moving party; if doubts exist, continue with the trial; etc.. *See* cases cited on pp. 11-12 of Appellant's Opening Brief.) rather than weighing the evidence as presented up to that point and making final findings and conclusions prematurely. In the case of *Grossen v. DeWitt*, 982 P.2d 581 (Utah App. 1999), the Utah Court of Appeals explains that motions styled as "motions for directed verdict," when brought in bench trials, are really motions to dismiss, and that courts are allowed to weigh evidence – after the manner suggested by the Appellee – ***but*** the critical distinction, ignored by the Appellee, between *Grossen* and the instant case, is that the district court in *Grossen* waited until the close of the Plaintiff's case. *See id.* at 583. The appellate decision repeatedly recites the

fact that the weighing of evidence standard is appropriate for motions to dismiss brought in bench trial *at the close of the plaintiff's case. See id.* at 583, 584.

The *Gossen* court thus states:

> In the context of a bench trial . . .where there is no jury verdict, the directed verdict's procedural counterpart is a motion to dismiss. See 75A Am.Jur.2d Trial §§ 855 (1991) ("When a case is tried by the court without a jury, and a defendant moves for a judgment ***at the close of the plaintiff's case***, the defendant is seeking an involuntary dismissal, not a directed verdict."). Rule 41(b) provides in relevant part:
>
> > ***After the plaintiff***, in an action tried by the court without a jury, has completed the presentation of his evidence the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in Rule 52(a).
>
> Utah R. Civ. P. 41(b).

(emphasis added).

Because the motion was made and ruled upon prior to the closing of the plaintiff's case, it was more akin to a motion to dismiss brought under Utah R. Civ. P. 12 or a motion for summary judgment brought under Utah R. Civ. P. 56 , and should be governed by a standard more akin to such motions – the common characteristic being the court deciding the case without hearing all the plaintiff's evidence. As such, in those motions as well as in the instant case, the Court should have, contrary to the standard advocated by the Appellee, given deference to , and drawn inferences and resolved doubts in favor of, the non-moving party. *See, e.g., Young v. Texas Co.*, 331 P.2d 1099 (1958) (deference to non-moving party in 12(b)(6) motions); *see also* Utah R. Civ. P. 56 (deferential standard stated in text of rule itself). This makes sense because the Court, in each of these scenarios, is deciding whether to find against the non-moving party, without considering all the evidence the

non-moving party has to offer. If the court is going to do so, then it needs to utilize a standard deferential to the non-moving party, regardless of whether the trial is to the bench or not (the deferential standard under Rule 12 or Rule 56 applies regardless of whether trial will be to bench or jury). In this case, had the Court waited until the close of the Plaintiff's evidence, as Rule 41 envisions, then this deferential standard would not apply, because no final decision would have been made without the hearing the plaintiff's evidence by the finder of fact. However, that was not what happened. The Court ruled without hearing all the plaintiff's evidence.[1]

IV.

Actually Receiving Into Evidence the Testimony and Evidence Which Plaintiff was Forced to Merely Proffer, Could Have Changed the Outcome, and Thus Should have Been Received and Weighed Prior to Any Ruling on the Motion to Dismiss

Actually hearing and receiving the proffered testimony and evidence could have altered the outcome of this case.

The proffer bears repeating:

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[1]Appellee interestingly argues that the proffered testimony should not be considered because, Appellee contends, Appellant did not marshall the evidence.

First, Appellant did marshall the evidence – the facts, including those negative to Appellant, as were found by the Court (the findings were written by the Appellees themselves -- it was their proposed order) were recited basically verbatim in Appellant's brief.

Second, Appellee's argument regarding marshalling is off base because the whole point of Appellant's argument is that a weighing of evidence prior to all that evidence's submission, and the entry of findings of fact and conclusions of law, was *not* in order at the point in time of the trial that they were entered, per Rule 41; Appellant is not arguing that the findings of fact were clearly erroneous and that this court should enter contrary findings. Rather, Appellant is arguing that the timing and standard under which those findings, and the attendant conclusion to dismiss the case, were in error – as matters of law. Thus the marshaling argument is inapposite.

A. That the superintendent would admit that he terminated Mr. Ashby because he was upset with him and dissatisfied with his services stemming from the Chapter I incident and because Mr. Ashby was sick, rather than because of the master's degree/falsehood issue; that he made an agreement with Mr. Ashby to resolve the master's degree issue by moving him down a step, but that the superintendent abandoned this agreement and fired Mr. Ashby instead; and that other employees of SSSD have been found to be on the wrong salary track/lane and that SSSD has not fired them; and that sometimes SSSD does put people on the salary track/lane that does not correspond with their educational record and that that is OK and sometimes happens, and that if it causes problems it can be corrected without firing. Tr. at 278-279.

B. That an SSSD employee would testify that she was in fact in charge of the Chapter I program during the year the audit was performed, and that she would corroborate Mr. Ashby's testimony regarding what happened with respect to the audit. Tr. at 279.

C. That Mr. Ashby's principal would testify that Mr. Ashby did a great job teaching after he was retained as an employee for the district after the audit debacle, and that SSSD was surprised by this and was hoping he would fail, as SSSD was looking for a way to get rid of Mr. Ashby. Tr. at 279.

D. That Mr. Ashby's principal at the time of the Chapter I audit would corroborate Mr. Ashby's testimony surrounding the Chapter I issues, and specifically the superintendant's statement to the principal that he would put Mr. Ashby on probation and find a way to terminate him." Tr. at 279.

E. That two other SSSD would corroborate Mr. Ashby's testimony regarding the

Chapter I related incidents. *Id.*

F. That the principal at the time Mr. Ashby was hired would corroborate Mr. Ashby's testimony regarding how he was hired and ***how he was truthful***, and how ***it was known that Mr. Ashby did not have a master's degree***, and that ***Mr. Ashby was told not to tell others about how he was put on the master's track***. *Id.*

G. That Mr. Ashby's principal during the Chapter I audit would corroborate Mr. Ashby's testimony that school officials asked him to mislead the auditors, and that the superintendent berated Mr. Ashby for the audit failure and indicated he would be put on probation and that they would find a way to terminate him. Tr. at 280.

H. That the superintendent's secretary and other SSSD employees would admit that ***Mr. Ashby never said he had a master's degree and that he directed them to inspect his employment file***, and that while he may have been equivocal about the issue, ***he never directly represented that he had a master's degree, but instead directed them to his file***. *Id.*

I. That an SSSD employee involved in Mr. Ashby's hiring would testify it was a practice of small school districts to offer people to be on higher salary tracks to get them to come to small districts, and that ***he was not deceived and that Mr. Ashby told him correctly of his actual credentials***. *Id.*

Basically, this proffered testimony and evidence raises doubts, and if those doubts, and all inferences, are drawn in favor of Mr. Ashby, it must be said that the Court could have concluded in the end that while Mr. Ashby may have in some senses of the word, and in some contexts, been "deceptive," as Mr. Ashby forthrightly admitted, the Court could also have concluded that the district

knew of his true credentials and thus was not deceived, and thus did not have legitimate reason to fire Mr. Ashby, but rather fired him because of the fallout from the audit. In such a scenario, Plaintiff could have made out a prima facie case for breach of contract.

It should be noted that litigants cannot be forced to proffer testimony and evidence, as the weight and impact of the live and actual testimony and evidence may prove persuasive in favor of its proponent. *See State v. Starnes*, 841 P.2d 712 (Utah App. 1992). Contrary to this clear legal standard, this was what occurred in this case. Plaintiff was forced to proffer his evidence, and in such form it was not convincing to the Court in his weighing of the evidence from the Plaintiff's own testimony, which admittedly contained damaging admission, but which also would have been contradicted by the proffered testimony. Without the opportunity to present that proffered testimony live, the Court was unconvinced by it in its proffered form and. without applying any deference to the non-moving party, the Court granted the motion to dismiss. As such, we are left to guess whether the proffered testimony could have mitigated, explained, and ultimately surmounted the challenges admittedly posed to the plaintiff's case by his own admission vis-a-vis deceptiveness. The court took away that opportunity by making its premature decision to dismiss the case. That was error.

CONCLUSION

The Judgement and Order on Directed Verdict should be reversed and the case should be remanded for trial.

Dated this 30th day of May, 2006,

Randall C. Allen
Counsel for Appellant

CERTIFICATE OF SERVICE

I certified that on the 25 day of May, 2006 I caused a true and correct copy of the foregoing to be served via mailing by US Mail first class postage prepaid to:

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