Douglass, James R. vs. Judy, J. V. 1856 Cooper Co. 1st Cir. 212/5

Old 73/19

Dismissed - incorrect appeal procedure

Action of damage on contract - Douglass claimed $50

D purchased mare from J that was older than J claimed & died a few wks later of old age

D claimed he was too drunk to know what he was doing

In the Circuit Court of
Cooper County-

James R Douglass
Plff
against
J V Judy Deft.

Boonville Decr 11th/56
Wm E Dunscomb Esq
Dear Sir
You will please send me a writ of error in the above entitled cause. I wish to get the case before the Supreme Court at the Jany Term next,

Very Respectfully Yours &c
J. W. Draffen Atty for Douglass

Jas R Douglass

v T Principe

I to Ruddy

filed Dec. 16 1856

Wm E Dunscomb

Clerk

Cooper

1st.

THE STATE OF MISSOURI, ss.

The State of Missouri, To the Judge of the first Judicial Circuit in said State, GREETING:

WHEREAS, In the Record and Proceedings in a certain cause lately pending in the Circuit Court of Cooper County, in the Judicial Circuit aforesaid wherein James R. Douglass was plaintiff, and I. B. Judy was defendant

in an action of Trespass on the case manifest error hath intervened, to the great damage of the said Douglass as by his complaint, we are informed.

NOW, we being willing that the error, if any there be, should be corrected, and full and speedy justice done to the parties aforesaid, in that behalf, COMMAND YOU, that you send to us, certified under your seal, the record and proceedings in the cause aforesaid, as fully as the same remain of record before you in said Court, so that we may have them before us at our Supreme Court, to be begun and held at the City of Jefferson, in the county of Cole, in said State, on the second Monday in January next, so that our Judges of our Supreme Court, on inspecting the record and proceedings aforesaid, may cause to be further done therein, for correcting the error, what of right and according to law ought to be done.

Witness, WILLIAM E. DUNSCOMB, Clerk of our said Supreme Court, at office, in the City of Jefferson, the sixteenth day of December in the year of our Lord one thousand eight hundred and fifty six

Wm E Dunscomb

Mr Craffin will please fill blanks

W E D

$1.00 paid for writ

W E D

State of Illinois } ss
County of Cook }

The execution of this writ will appear by the Shedule annexed marked (A)

In witness whereof I Amy Tompkins clerk of circuit court of Cook county aforesaid hereto set my hand & affix the seal of said court at office this December 19th 1856

Amy Tompkins clerk

1

(a)

Be it remembered that on the 28th day of July 1856. the following transcript was filed in the office of the clerk of the circuit court for Cooper County Missouri, which reads in the words and figures following to wit.

Justice's transcript

James R. Douglas vs. J. V. Judy

action of damage on contract
James R. Douglas against
J. V. Judy
said Douglas claimed fifty dollars
damage said action commenced

on the 3rd day of May 1856 summons issued on the same day directed to the constable of Clarkfork Township Cooper County Mo summons returned having been served on the defendant parties met on the 17th day of May 1856 went into trial case been tried by a Jury and found for the plaintiff to the amount of damage Forty dollars J. V. Judy defendant took an appeal to Circuit Court on the 23r day of May 1856

Andrew J. McKee J.P.

(Justices fees omitted)

State of Missouri
County of Cooper
Clarkfork Township } ss I Andrew J. McKee J.P. in & for Clarkfork Township aforesaid, do certify that the above and foregoing is a true and correct transcript of all the proceedings had before me, in the case of Jas R. Douglas vs. J. V. Judy of Record on my docket.
Given under my hand this 28th day July 1856.

Andrew J. McKee J.P.

This day personally appeared J. V. Judy before me an acting Justice of the peace and made application for an

appeal from the decision of trial between James R. Douglass plaintiff and J. V. Judy defendant said Judy made oath that the application for an apeal is not made for vexation or delay but because he believes the appellant is injured by the Judgment of the Justice

J. V. Judy

Sworn and subscrid to before me this 23rd day of May 1856 A. P. McKee J.P.

(Appeal bond omitted)

Acct sued on (Account sued on before A. P. McKee J.P.)

J. V. Judy

To James R. Douglass Dr

1854

To this amount of damage sustained by the said Douglass in a purchase of a mare from said Judy

$50.00

Record And afterwards at the September Term 1856 of the Cooper Circuit Court on the 11th day of September and while said Court was in session the following entry was made of Record

Record James R. Douglass plaintiff

vs 3 Appeal

J. V. Judy defendant

Now at this day come the said parties and this cause coming on to be heard thereupon come a Jury of six towit: Gab Jaquis Wm Henshaw, Moses Martin E. P. Elliott J. R. Payne John Bull, who are elected tried and sworn to try this cause, and the jurors aforesaid on their oaths find for the defendant therefore it is considered by the Court that said ~~defendant~~ plaintiff take nothing by his suit, and that said ~~defendant~~ plaintiff go hence without day, and that said defendant recover of said plaintiff, his costs

and charges in this behalf laid out and expended as well in the justice court & this court and that he have execution therefor

And afterwards on the 13th of September at the same term of said court the following entry was made of Record.

Record

James R. Douglass
vs
J. V. Judy

Plaintiff files his motion to set aside the verdict in this cause and grant him a new trial, which being heard, is now by the court overruled.

Which said Motion for new trial reads in words and figures following:

Motion for New trial

James R. Douglass — In the Circuit Court of
Plaintiff — Cooper County Missouri.
Against,
J. V. Judy — Defendant.

Now at this day comes the plaintiff and moves the court, to set aside the verdict, rendered by the Jury in the above entitled cause, and grant a new trial in the same, for the following reasons

1st
Because the verdict of the Jury was contrary to the law and evidence,
2nd. Because the verdict of the Jury was contrary to the weight of evidence
3rd. Because the court misinstructed the Jury in regard to the law governing the case
4th. Because the court gave each and every instruction asked for by defendant, and refused to give the first instruction asked by plaintiff. Draffen for pltff.

And afterwards on September 16th 1856 at the same term of said Court the following entry was made of Record:

Record. James R. Douglass

vs

J. V. Judy

Plaintiff files bill of exceptions, which is signed sealed & made part of record:

Which bill of exceptions reads in words & figures following

Bill of exceptions James R. Douglass Plff. } In the Circuit Court of Cooper County Missouri.

against

J. V. Judy - Deft -

Be it remembered that on the trial of the above entitled cause, the plaintiff introduced evidence conducing to show, that in the Month of May A.D. 1854 plaintiff purchased of defendant a certain man for $65. that at the time of the sale or in a few moments after defendant told plaintiff that the said man was 10 or 11 years old and that defendant stated some time afterwards that he had told plaintiff at the time of the trade that the man was 10 or 11 years old perhaps more. Plaintiff also introduced evidence conducing to show that said man was at the time of the trade 18 or 20 years old, and that in a few weeks after she was purchased by plaintiff, and came into his possession that she had died from old age. Plaintiff also introduced evidence conducing to show that at the time defendant made the statements above related in regard to the age of the man on the day of trade he (plaintiff) was more intoxicated than witnesses had ever seen him. Defendant introduced evidence conducing to show, that on the day of the trade Plaintiff approached defendant and other

and stated that he wished to purchase some mare for the purpose of raising mules, and that immediately afterwards defendant offered to trade plaintiff his mare, and asked him $60. for her. that plaintiff offered him $55. and that they finally traded at this price. Defendant also introduced evidence conducing to show that plaintiff was sufficiently sober to know what he was doing, and here the evidence was concluded for both parties.

Plaintiff then moved the Court to instruct the Jury as follows,

For Plff.

Plaintiff's instructions

1st

If the Jury believe from the evidence, that the defendant made representations to plaintiff, that the mare was ten or eleven years old, thereby inducing plaintiff to purchase her, when in reality she was much older, and less valuable, then they must find for the plaintiff, whether defendant knew her real age or not.

Refused

2. The criterion of damages in this case is the difference between the price at which the mare was sold by defendant to plaintiff, and her actual value at the time of the sale.

Given

The first of which instructions was refused by the Court, and the following instruction given by the Court in its stead. Court.

Instructions by the Court

No express words are necessary to constitute a warranty it is sufficient if the jury believe from the evidence that the words and representations of the of the defendant were understood by the plaintiff as a warranty & that the defendant intended him to so understand.

Given

To which opinion of the Court plaintiff excepted. Defendant then moves the Court to instruct the Jury as follows,

Deft's instructions

1st Unless the defendant expressly warranted the age of the mare, or committed a fraud in the sale, the Jury must find for him. To fix fraud upon him it rested upon the plaintiff, to prove that he made a false representation as to the age of the mare, knowing it to be false; and even this will not avail the plaintiff, if the age of the mare was equally open to the observation of both parties.

Given.

2d The law affords reasonable protection against fraud in dealing; but it does not go to the romantic length of giving indemnity against the consequence of indolence and fally, or a careless indifference to the ordinary and accessible means of information. If the plaintiff was wanting in attention to the age of the mare when attention would have been sufficient to protect him from surprise or imposition, he has, in the absence of an express warranty, no legal ground of complaint.

3rd Given. If the jury believe from the evidence that the assertions of defendant as to the age of the mare in controversy was a mere expression of opinion by him they are bound to find for the defendant even though they may find that such opinion was falsely made or given.

Given.

Which instructions were all given, to which the plaintiff (see opposite margin) at the time excepted, and the Jury then found their verdict for the defendant.

Plaintiff then filed his motion to set aside said verdict and for a new trial, which said motion is in the words and figures following, (for which see page of this Record) which motion being overruled by the Court, plaintiff excepts to the opinion of the Court, and herewith files his bill of exceptions, and prays that the same be duly signed, sealed, and made part of the record.

G. W. Miller (Seal)

Judge.

Certificate

State of Missouri } ss
County of Cooper } I Roy Tompkins clerk of the circuit Court for said County do certify that the foregoing pages contain a full & complete transcript of the Record in the Case of

James D Douglass vs J V Judy as the same remains in my office

Given under my hand & Seal of Said Court at office this December 15th 1856

Benj S Tompkins Clerk

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Fees paid by Douglass.

Writing 2100 words & figures	$ 2.10
Two Certificates & seals	1.00
	$ 3.10

17. ~~10.~~

P.E.

Douglass James R

vs Appeal

J. V. Indy

filed Dec. 25 1856

Wm E Dunscomb

Clerk

Cooper

1st

In the Supreme Court
January Term 1857—

James R. Douglass — Appellant
vs } Error to Cooper Circuit Court.
J. V. Judy — Respondent.

This suit was brought by the Appellant against the respondent before a Justice of the Peace of Cooper County, to recover damages alleged to have been sustained by him, by reason of false and fraudulent representations made by the respondent on the sale of a certain "Mare" to Appellant as to the age of said Mare. The amount of damages claimed, Fifty Dollars. On the trial before the Justice a verdict was found for the Appellant, and Judgment rendered against the respondent for that sum.

The respondent appealed from this Judgment to the Cooper Circuit Court; And at the September term thereof AD 1856, the case came on for Trial. A jury was sworn to try the issues &c And upon the trial the evidence offered by the parties conduced to show "that "in the month of May AD 1854. the appellant "purchased a mare from the respondent at the "price of fifty ~~five~~ dollars. That at the

time of sale, or a few moments afterwards, the Respondent told the Appellant that said Mare was ten or eleven years old; And also that after the sale the respondent admitted that at the time of the sale he told the appellant that the mare was ten or eleven years old, may be more.

After the close of the evidence the following instructions were asked by the appellant, to wit; "1st If the jury believe from the "evidence that the defendant made representa-"tions to plaintiff that the Mare was ten or "eleven years old, thereby inducing plaintiff "to purchase her, when in reality she was much "older, and less valuable, then they must find "for the plaintiff, whether the defendant knew "her real age or not."

"2? The criterion of damages in "this case is the difference between the price "at which the mare was sold by defendant to "plaintiff, and her actual value at the time of "the sale." The first of which instructions was refused by the Court, and the following instruction given in its stead by the Court on its own motion, to wit; "No express "words are necessary to constitute a warranty, "it is sufficient if the jury believe from "the evidence, that the words and representations

" of the defendant were understood by the plain-
" tiff as a warranty, and that the defendant
" intended him to so understand."

To which opinion of the Court in refusing the first instruction asked, and offering one in its stead, the appellant excepted. And the Court gave the second instruction.

The respondent moved the Court to instruct the jury, as follows:

"1st Unless the
" defendant expressly warranted the age of
" the mare, or committed a fraud in the
" sale, the jury must find for him. To fix
" fraud upon him, it rests upon the plain-
" tiff to prove that he made a false repres-
" entation as to the age of the mare, knowing
" it to be false; And even this will not avail
" the plaintiff, if the age of the mare was
" equally open to the observation of both
" parties."

"2nd The law affords reasonable
" protection against fraud in dealing;
" but it does not go to the romantic length
" of giving indemnity against the conseq-
" uence of indolence, or a careless indifference
" to the ordinary and accessible means of
" information. If the plaintiff was

"wanting in attention to the age of the
"mare when attention would have been
"sufficient to protect him from surprise
"or imposition, he has in the absence of
"an express warranty, no legal grounds
"of complaint."

"3d If the jury believe from
"the evidence that the assertions of defendant,
"as to the age of the mare in controversy,
"were mere expressions of opinion by him,
"they are bound to find for the defendant
"even though they may find that such
"opinion was falsely made or given.

Which instructions were all given, and to the giving of which the plaintiff excepted. On the evidence, and instructions given the jury found a verdict for the respondent. The appellant then filed his motion to set aside said verdict, and for a new trial - which motion was overruled by the court, and to this action in overruling said motion the appellant excepted, and brings his case here by writ of error.

Emmett R Hayden for respondent.

Points & Authorities;

1st The first instruction asked for by the Appellant is not law; And the Court properly refused to give it. It assumes the law to be, that a mere representation, untrue in point of fact, made on the sale of a Chattel, gives a cause of action against the party making it, though such representation is honestly made and believed to be true.

The gist of action in all cases of this description is moral or actual, and not legal or constructive fraud. Deceit must be practised upon the party complaining. The representation made, must be false to the knowledge of the party making it, otherwise no action "for deceit" will lie. The evidence in this case does not show fraud of any description. See, Smith on Contr; pages 137 to 150 inclusive. Chandelor vs Lopus 1 Smith's Leading Cases, 177. 182-188 et sequ: 2 Kent 482 et sequ. Jolliffe vs. Collins 21 Mo Rep 342.

2nd The instruction given by the Court for

the appellant in lieu of the first instruction, declared the law as favorably for appellant, as the evidence in the case would warrant, and the judgment of the Court below will not be reversed on that ground.

3d The instructions given by the Court for the respondent, declare the law of this case correctly, they were fully warranted by the evidence. See authorities cited under first point

4th The verdict of the jury is for the right party, they could not have found otherwise on the evidence before them; and the judgment of the Court below ought to be affirmed.

Douglass – Appellant

vs.

Judy – Respondent

E. R. Hayden's Brief

filed Jan. 12 1857
Wm E Duncomb
Clerk

In the Supreme Court
January Term 1857 –

James R. Douglas – Appellant.
vs } Error to Cooper Circuit Court.
J. V. Cady – Respondent.

The respondent now here comes and joins in error, and says that in the record & proceedings and in giving of this judgment there is no error. Whereon he prays the Court to examine said record & proceedings, and to affirm the judgment in said cause

Emmett R. Hayden for
Respondent.

Douglas Appellant

vs

Indy a Respondent

Joinder in Error

filed day 13. 1857
Wm E. Dunscomb
Clk

In the Supreme Court of
the State of Missouri

James R Douglass Appellant
Against
J W Judy Respondent

Now at this day comes the said Appellant here into Court by his Attorney, and moves the Court, to set aside the judgment rendered by the Circuit Court in this Case, and also to dismiss the appeal in said Cause, for the following reasons.

1st The Circuit Court of Cooper County had no Jurisdiction to hear, try, and determine said Cause.

2nd All Appeals from judgments rendered by Justices of the peace within and for Cooper County are required by Law, to be certified to the Cooper Court of Common Pleas, and were required, so to be certified at the time of the appeal in this Case. See 28th Sec. of an Act entitled, "An act establishing a Court of Common Pleas in Cooper County. Approved December 7th 1855

J W Draffen for Appelt

James R Douglass
vs
J V Judy

Motion

filed Jany 13. 1857
Wm E. Dowscomb
Clk