1986

R. R. Sather and R. R. Sather v. William E. Pitcher : Brief of Respondent

Utah Court of Appeals

Gayle McKeachnie; Clark B. Allred; Attorneys for Respondent.
Craig S. Cook; Attorney for Appellants.

IN THE SUPREME COURT OF THE STATE OF UTAH

R. R. SATHER AND R. R. SATHER dba SATHERS COMMUNICATIONS ELECTRONICS AND COMMUNICATION ELECTRONICS, Plaintiffs/Appellants, vs. WILLIAM E. PITCHER, JR., PITCHER COMMUNICATIONS ELECTRONICS, A CORPORATION, DWIGHT PITCHER, VERNA PITCHER, AND JOHN DOES ONE AND TWO, Defendant/Respondent.	860312CA Case No. 20949 (Category No. 13)

BRIEF OF RESPONDENT - WILLIAM E. PITCHER, JR.

Appeal from the Seventh Judicial District
Court of Uintah County,
The Honorable Richard C. Davidson, Judge.

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STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

Defendant, William E. Pitcher, Jr., submits the following as issues to be reviewed by the Court:

1) May the Plaintiff properly rely on his version of the facts rather than considering all the facts in a light most favorable to the verdict, when claiming the trial court committed error?

2) Did the trial court abuse its discretion in not allowing Plaintiff to raise the defense of laches in his closing argument, when the defense had not been raised prior to closing arguments and no facts were in evidence to support the defense?

STATEMENT OF THE CASE

Plaintiff, R.R. Sather, filed his Complaint seeking an accounting and a Writ of Replevin. The Complaint was dated August 10, 1981. (R. 5) After Plaintiff had filed his Second Amended Complaint and venue had been transferred to Uintah County, Utah, Defendant filed his Answer and Counterclaim. (R. 44) The Counterclaim sought damages for breach of contract and for Plaintiff's abuse of process for having two pre-judgment Writs of Replevin issued contrary to the law. The trial date was continued several times because of Plaintiff's failure to comply with discovery requests. (R. 71, 80, 89, 91, 100) Trial was finally held on

September 16, 1985. The Court found in favor of Defendant, William E. Pitcher on his Counterclaim, and awarded him judgment in the amount of $10,696.88, plus costs.

Plaintiff, R.R. Sather, and Defendant, William E. Pitcher, Jr., entered into a partnership as of January 1, 1972, to conduct a television and electronic repair service. Their agreement was set forth in a typewritten document with handwritten additions. (Addendum - Exhibit 2) The agreement required the Plaintiff to furnish a shop, necessary equipment to operate the business, inventory and a service truck. (Par. 1 and 4, Exhibit 2) Mr. Pitcher was to devote his full time and effort to the business and to operate the business in a good and workmanlike manner. (Par. 2, Exhibit 2) The parties agreed that after certain business expenses were paid, that the profits or losses would be divided equally. Mr. Sather also agreed to pay for repair and service work and for parts and materials furnished to Sather's Jewelry, another business owned by the Plaintiff. (Exhibit 2, par. 5)

The partnership lasted from January 1, 1972, through December 31, 1978. During that time period, Mr. Pitcher devoted his full time and effort to the business. (T. 128) He received so little income from the business that he was not required to file personal income tax returns for that

time period. (T. 59, 188) Plaintiff failed to live up to his obligations under the Contract. Originally he provided some test equipment for the business, having a value of approximately $1,250.00, (T. 19) and some shop space in a basement in which to conduct the business. The basement was not adequate and Mr. Sather refused to provide a suitable shop. (T. 31) Mr. Pitcher moved the business in December, 1972, to a building which he owned. (T. 31, 110, 124) Mr. Sather also refused to provide any more equipment, inventory or even a service truck for the business. (T. 48, 58, 125) Mr. Pitcher, therefore, was required to obtain all of those items using funds generated by the partnership. (T. 58)

During the time period the partnership operated, it incurred a total loss of $9,888.08. (T. 56, Exhibit 5) Most of that loss occurred in 1977 and 1978. The Plaintiff refused to pay for his share of the loss even though he deducted the entire losses from his taxes on his personal income tax returns. (T. 56, 144 Exhibit 28) When Plaintiff refused to pay his share of the losses, Defendant was required to pay the entire sum.

In 1978, Mr. Pitcher came to the realization that he was being taken advantage of and that the Plaintiff had no intention of complying with the terms of their agreement. (T. 189) He contacted the Plaintiff and offered to buy out Plaintiff's interest in accordance with the provisions of

paragraph 8 of their agreement. Mr. Sather refused. Mr. Pitcher then, on December 31, 1978, terminated the partnership. (T. 55) The partnership at that time had inventory of approximately $13,000.00 and some equipment that was so old that it had no value. (T. 190)

In 1978, the last year which the partnership operated, it incurred a loss of $7,450.02. Because of the large loss, the business was unable to pay certain of its taxes. In 1979, the Internal Revenue Service assessed those taxes and levied on both the Plaintiff's and Mr. Pitcher's personal accounts. Plaintiff was required to pay $1,993.18 and Mr. Pitcher was required to pay $2,506.89. (T. 183) Mr. Pitcher also paid to the State Tax Commission the sum of $446.17. (P. 182, Exhibit 34)

At the conclusion of the evidence, the Court concluded that little credibility could be given to the Plaintiff's conflicting testimony. Based on the evidence presented, the Court found that the assets of the partnership on the date it terminated had a value of $13,000.00. The Court also found that during the term of the partnership, it had sustained losses totaling $12,000.00, and that Mr. Pitcher was entitled to $14,000.00 for the rental of his building for the six years it was used by the partnership. The Court further found that the Plaintiff owed to the partnership $6,600.79 for rental fees and $832.98 for repairs to the

base stations used by Sather Jewelry, which amounts Plaintiff had failed to pay in violation of the parties agreement.

SUMMARY OF ARGUMENTS

1) The rules for Appellate review require that the evidence be viewed in a light most favorable to the finding of the trial court, that considerable deference be given to the finding of the Court and that the decision should only be reversed to prevent manifest injustice. The Plaintiff acknowledges this standard for review, but then ignores it in his argument. The Plaintiff's claims of error relate to the Court's findings of fact and its calculations. In his argument, Plaintiff relies only on the portions of the record that add support to his argument. When the entire record is considered, the evidence fully supports the decision of the trial court.

2) Rule 8(c) of the Utah Rules of Civil Procedure requires that laches, an affirmative defense, be raised in the pleadings or it is waived. A party who is relying on an affirmative defense also has the burden to prove his defense. The Plaintiff never raised the defense of laches until his closing argument and produced no facts to support such a defense. The trial court did not abuse its discretion in refusing to allow Plaintiff to raise the defense in his closing argument.

ARGUMENTS

POINT I

THE EVIDENCE WHEN CONSIDERED IN FULL, SUPPORTS THE TRIAL COURT'S FINDINGS.

The burden of proof at trial was on the Plaintiff to prove facts in support of his Complaint. When the Plaintiff failed to produce any facts to support his claims, he cannot now be heard to complain about the trial court's findings adverse to him. A reviewing court will only consider the evidence presented to the trial court. Turtle Management, Inc. vs. Haggis Management, Inc. 645 P.2d 667 (Utah 1982). In reviewing this decision this Court should review the facts in a light most favorable to the findings of the trial court and should give considerable deference to the trial court's findings. West vs. West, 403 P.2d 22 (Utah 1965), Jeppsen vs. Jeppsen, 684 P.2d 69 (Utah 1984) The trial court's decision should only be reversed so as to prevent manifest injustice. Penrose vs. Penrose 656 P.2d 1017 (Utah 1982) In evaluating the trial court's findings, the reviewing court should consider the written findings together with any oral statements made by the Court. Bill Nays & Sons Excavating vs. Neeley Construction Company, 677 P.2d 1120 (Utah 1984).

The Plaintiff in his Brief has agreed with the above described standard of review. Yet the Plaintiff in his argument cites only a portion of the evidence, those that

support his argument, while completely disregarding the evidence that supports the Court's findings. In this particular case, the Court made a specific finding that the testimony of the Plaintiff and certain of his witnesses was not believable. On appeal Plaintiff challenges the facts that support the findings. In this case, there are substantial facts that support all the Court's findings, which Plaintiff attempts to ignore. When the facts that support the findings of the trial court are considered, those facts fully support the decision of the trial court, which decision should be affirmed.

POINT II

THE TRIAL COURT BASED ITS DECISION AS TO THE VALUE OF THE ASSETS OF THE PARTNERSHIP ON THE UNCONTRADICTED EVIDENCE IN THE CASE.

The Plaintiff in his first argument claims that the Court failed to value the partnership assets at their market value as of the time the partnership dissolved. Plaintiff, in making that argument, totally ignores the fact that he had the burden to prove the value of the assets and that he failed to produce any evidence on that point. The only evidence received on that issue was evidence from the Defendant who testified as to the fair market value of the assets as of the time the partnership dissolved. The court properly based its findings on the evidence received at trial.

Since Plaintiff had no evidence on the issue, the reviewing court should not consider it an issue on appeal. Turtle Management Inc., vs. Haggis Management Inc., 645 P.2d 667 (Utah 1982) If the Court does review the matter, it reviews the facts in a light most favorable to the prevailing party and the decision reached by the Court. Scharf vs. BMG Corporation, 700 P.2d 1068 (Utah 1985)

The only evidence regarding the value of the partnership assets at the time of dissolution, was presented by the Defendant. The only asset in the partnership was inventory, upon which the Defendant placed a fair market

value of $13,000.00, and some very old equipment, which Defendant said had no value. (T. 190) Neither party made a claim for good will and no evidence was presented regarding whether the company had good will or its value.

The Court's findings on the value of the partnership as of the date of termination, are fully supported by the only evidence that was presented on that issue. The Plaintiff presented no evidence on either the value of the equipment and inventory, nor of his belated claim of good will. Since the evidence is fully supported, the decision should be affirmed.

POINT III

THE TRIAL COURT DID NOT ERR IN CALCULATING THE AMOUNT OF RENT OWED DEFENDANT FOR THE USE OF HIS BUILDING.

Plaintiff argues that the Court improperly calculated the amount of rent due Defendant, arguing that the partnership occupied Plaintiff's building from January 1, 1973, through December 31, 1978. Those dates are based on a statement of the Defendant's. (T. 31 line 10) That statement was either a misstatement by the Defendant, or an error in transcription. All the other evidence shows that the Plaintiff's building was occupied by the partnership from December of 1972 through December of 1978. At trial, those dates were undisputed and were relied on by Plaintiff and his counsel. At no time did Plaintiff or his counsel claim that the dates were incorrect or the amount owed for rent was incorrect. (T. 30 lines 19-25; T. 110 lines 1-5, T. 124 lines 6-13)

The preponderance of the testimony was that the partnership moved into Plaintiff's building in December of 1972. It remained there until the partnership terminated in December of 1978. The testimony further showed that a reasonable rental for that time period was $200.00 per month. The partnership occupied the building for approximately 72 months, which at $200.00 per month fully supports the $14,000.00 awarded by the trial court. (T. 195)

POINT IV

THE TRIAL COURT'S CONCLUSION AS TO THE PROPER AMOUNT OF DAMAGES TO COMPENSATE DEFENDANT FOR HIS LOSS IS FULLY SUPPORTED BY THE EVIDENCE AND IS PROPERLY CALCULATED.

The trial court found that the Plaintiff was to be responsible for one-half of the losses and debts of the partnership, which included operating expenses, tax liabilities and interest. (Finding of Fact No. 9) The Court found the total loss to be $12,000.00, and entered Judgment for one-half of that amount as reimbursement to the Defendant. The Plaintiff argues that the Court miscalculated the amount of the loss. In making that argument, Plaintiff again overlooks the facts that support the Court's verdict and leaves out of his calculations many of the elements relied on by the Court in reaching its verdict. If the Court made a miscalculation, that miscalculation was in favor of the Plaintiff.

The evidence at trial showed that the partnership had incurred an operating loss of $9,888.08, and it had unpaid taxes upon dissolution of $4,946.24, for a total of $14,834.32. Mr. Pitcher had paid the entire operating loss and paid, pursuant to a levy, $2,506.89 in federal taxes and $446.17 in state taxes. (T. 182-183) The Plaintiff, pursuant to a levy, had paid $1,993.18 in taxes. If the entire loss and debts of the partnership of $14,834.32 is divided in half, then each partner's share was $7,417.16.

Plaintiff had only paid $1,993.18, pursuant to a levy, of his share of the debts and losses. That left a balance owing from the Plaintiff to the Defendant of $5,423.98.

The Court's finding further provided that the $6,000.00 award included interest. The amount owed by Plaintiff to Defendant had been owing in excess of five years. If we consider the $5,423.98 for only five years at the statutory rate of interest of 10%, the total interest owing is $2,712.00. That amount added to the $5,423.98, brings a total of $8,135.98, which should be paid by Plaintiff to the Defendant. Therefore, the ruling of the Court that Plaintiff was to pay to Defendant $6,000.00 was in favor of the Plaintiff and he should not complain at this time.

POINT V

THE DEFENSE OF LACHES WAS PROPERLY REJECTED BY THE COURT BECAUSE IT WAS NOT PLED, NOR WAS THERE EVIDENCE TO SUPPORT IT.

The defense of laches is an affirmative defense, which must be raised in the pleadings. Rule 8(c) Utah Rules of Civil Procedure. Failure to raise the defense in the pleadings generally results in its exclusion as an issue in the case. FMA Financial Corporation vs. Build, Inc., 404 P.2d 670 (Utah 1965) If a person has properly pled the defense of laches, he still has the burden to prove the defense. The defense of laches is contingent upon two elements, the first being lack of diligence on the opposing party in raising the claim, and the second being injury to the other party due to the lack of diligence. Leaver vs. Grose, 610 P.2d 1262 (Utah 1980) Mere delay is not sufficient, but it must be shown to work to the disadvantage of another. Papaniklos Brothers Enterprises vs. Sugarhouse Shopping Center Association, 535 P.2d 1256 (Utah 1975) The defense of laches is related to the statute of limitations and strong circumstances must exist to sustain a defense of laches when the statute of limitations has not run. Laniger vs Arden, 409 P.2d 891 (Nev. 1966)

Plaintiff filed his Complaint in August of 1981. The

claims generally arose out of a partnership, dissolution of which occurred December 31, 1978. When Mr. Pitcher filed his Answer and Counterclaim, one of the defenses raised by Mr. Pitcher was the defense of laches. Plaintiff filed a response to the Counterclaim. Plaintiff, however, did not raise any affirmative defenses, including the defense of laches. The Plaintiff at no time raised the defense of laches until closing argument by his counsel. The trial court refused to allow him to raise that affirmative defense at that late date. (T. 212). This holding by the trial court was in accordance with the Rules of Civil Procedure and within the discretion given to the trial court.

In addition to not raising the defense as is required by the Rules of Civil Procedure, the Plaintiff also failed to produce any facts to support his belated claim of laches. The facts at trial showed that if there was any lack of diligence, that lack of diligence was by the Plaintiff. Plaintiff knew of the termination of the partnership in January of 1979, but did not seek an accounting until August of 1981. Once the lawsuit was filed, the Plaintiff failed to take any action to move the case along, but rather by his actions delayed it for several years. The Plaintiff failed to respond to discovery despite orders of the Court, and requested several continuances because of problems with his

accountant. The Plaintiff also failed to produce any facts showing that he incurred any injury as a result of the delays. The Plaintiff failed to produce any facts at the trial that would support his claim of laches. Therefore, the Court's refusal to allow him to raise the affirmative defense at the closing arguments was proper and should be affirmed.

CONCLUSION

The facts presented at trial fully support the findings and verdict of the trial court. Defendant respectfully requests that the Court uphold the finding of the trial court.

RESPECTFULLY submitted this 27 day of May, 1986.

NIELSEN & SENIOR
Attorneys for Respondent

By: _____
Clark B. Allred

By: _____
Gayle F. McKeachnie

ADDENDUM

EXHIBIT #2

AGREEMENT

This Agreement, made and entered into this 7th day of January 1972 by and between R. R. SATHER, hereinafter called "Sather", and WILLIAM E. PITCHER, Jr., hereinafter called "Pitcher",

W I T N E S S E TH:

1. That the parties hereto agree to enter into the business of Television and Electronic repairs and service, and Sather agrees as follows:

a. To furnish shop from which the business is to be conducted.

b. To furnish necessary equipment, to operate the business, including test equipment, and other equipment reasonably necessary to conduct the same, and to provide for and furnish an inventory of tubes, parts and other materials that may be required in the business.

2. That Pitcher agrees to spend his full time and effort in the said business and to whatever he can to secure business and to operate the business in a good and workmanlike manner.

3. That it is agreed that the business shall be owned by Sather, that Pitcher is to be compensated for his services as follows:

a. To receive 60% of all of the labor and 20% of all of the parts and materials used in connection with radio and television repairs and service.

b. To receive 60% of the labor and 10% of all parts and materials used in the service and operation of the Communications part of the business.

4. That Sather shall furnish a suitable service truck for use in the said business, it is agreed that time for the service truck, while on business purposes shall be billed to customers at the rate of .35¢ per mile, with Pitcher to receive the sum of .15¢ per mile, and the sum of .20 cents per mile to go for truck expenses and maintenance.

5. That in the event that Pitcher does repair and service work for Sather in connection with Sather Jewely Company, then such work shall be billed to Sather at the regular shop and service call rates.

6. That it is agreed that at least monthly, an accounting shall be had, both as to labor and for parts.

7. That it is hereby agreed that Pitcher will pay his own social security, income tax, and workmans compensation, and that Sather shall not be responsible for the same.

8. That it is agreed that thisagreement may be terminated by either of the parties at any time, that upon termination it is agreed that an accounting in full shall be had between the parties within three (3) days after such termination.

9. That all of the bills, invoicing and "paper work" in connection with the business shall be the responsibility of Pitcher.

WITNESS the hands of the parties hereto this _____day of _____, 1972.

Okt 1109

_____
R. R. Sather

_____
William E. Pitcher, Jr.

8. That the said Pitcher shall have the option during the term of this agreement to purchase the entire business, the purchase price shall be determined on the basis of the cost of equipment, less depreciation, plus all of the inventory of parts, tubes, supplies, etc.

9. That it is agreed that all of the expenses of the business, rent, utilities, taxes and other necessary business expenses shall be deducted before a division is made of the proceeds as set forth in paragraph 3, hereof.

10. That work done for Sather Jewelry, set forth in paragraph 5, hereof, all parts and materials used shall be at wholesale cost of the same.

11. That it is agreed that this agreement may be terminated by either of the parties at any time, that upon termination it is agreed that an accounting in full shall be had between the parties within three (3) days after such termination.

12. That all of the bills, invoicing and "paper work" in connection with the busines shall be the responsibility of Pitcher.

WITNESS the hands of the parties hereto this _____day of _____, 1972.

_____
R. R. Sather

_____
William E. Pitcher, Jr.

WITNESS:

_____.

TYPED REPRODUCTION OF HANDWRITTEN NOTES APPEARING ON BACK OF PAGE 3 OF EXHIBIT 2.

"Purchase option" buy (blue ink)

Business expenses to be taken off the top at 50-50, rent and utilities and taxes of profits before draw (blue ink)

Change 3 to partnership (black ink)

Store services charge parts only at wholesale cost (blue ink)

Okay on agreement as listed above and front two pages
ss/ R. R. Sather (blue ink)
William Pitcher 7-1-72 (black ink)

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IN THE SEVENTH JUDICIAL DISTRICT COURT OF UINTAH COUNTY

STATE OF UTAH

R.R. SATHER and R.R. SATHER dba SATHERS COMMUNICATIONS ELECTRONICS and COMMUNICATIONS ELECTRONICS, Plaintiffs, vs. WILLIAM E. PITCHER, JR., PITCHER COMMUNICATION ELECTRONICS, a corporation, DWIGHT PITCHER, VERNA PITCHER and JOHN DOES ONE and TWO, Defendants.	FINDINGS OF FACT AND CONCLUSIONS OF LAW Civil No. 11,156

The above captioned matter came before the Court for trial on September 16, 1985, at 9:30 a.m. Plaintiff, R.R. Sather, was present and represented by his attorney, Anthony Famulary. Defendant, William E. Pitcher, Jr., was present and represented by his attorney, Clark B. Allred. The other Defendants have filed bankruptcy and notice of the bankruptcy filing is contained within the file. Testimony from various witnesses, together with documentary evidence was received by the Court and the Court being fully advised and having heard the testimony and examined the evidence produced and after argument by counsel hereby enters

the following Findings of Fact.

FINDINGS OF FACT

1. Plaintiff, R.R. Sather, and Defendant, William E. Pitcher, Jr., entered into an agreement dated January 1, 1972. The agreement is Exhibit No. 2.

2. One of the major issues before the Court is whether the agreement created a partnership as claimed by the Defendant or was a sole proprietorship arrangement as claimed by the Plaintiff.

3. A determination of the issues in this case is primarily dependent upon the creditability of the Plaintiff and the Defendant. Based on the demeanor of the Plaintiff, the inconsistent statements, the responses given on the witness stand and the positions taken by the Plaintiff, the Court finds that little creditability should be given to the Plaintiff's testimony.

4. The agreement of the parties, together with the actions of the parties, are more consistent with the arrangement being a partnership rather than a sole proprietorship. The Court finds that the facts are more consistent with the arrangement being a partnership. Those facts include the preparing and signing of a written agreement which is unusual in an employer/employee relationship, a requirement that the Defendant provide an accounting, the provision for a buy-out by the Defendant, Plaintiff's response to Defendant's proposed buy-out, the

discussion regarding survivorship insurance, the fact that Defendant was responsible for the work and the inconsistent statements of the Plaintiff regarding what the arrangement was together with express language contained on the back of Exhibit 2.

5. The Court received testimony regarding an accounting provided by the Plaintiff and an accounting provided by the Defendant. The Court finds that the accounting provided by the Plaintiff can be given very little weight in that it was undisputed that not all documents had been examined by the accountant, cash disbursements for expenses were not included and the records relied on by Plaintiff's accountant had not been in the possession of the accountant, but for three years had been in the possession of an accounting firm in California with no explanation given as to whether any documents had been removed, lost, changed or altered.

6. The Plaintiff breached the terms of the parties agreement dated January 1, 1972, by his failure to provide a shop, to pay for personal repair and service work or to provide a truck or other equipment. In general the Plaintiff basically ignored the terms of the parties agreement.

7. Defendant generally complied with the terms of the agreement until December 31, 1978, at which time he terminated the agreement by starting a new business entity.

8. When Defendant terminated the business on December 31,

1978, Plaintiff was entitled to receive one-half of the value of the assets at that time. The assets of the partnership on December 31, 1978, included equipment which was fully depreciated and had no value and inventory of approximately $13,000.00.

9. At the time the partnership was terminated on December 31, 1978, Plaintiff was also responsible for one-half of the losses and debts of the partnership which losses included operating expenses during the term of the partnership, tax liabilities, tax benefits received by the Plaintiff and not by the Defendant and interest for a total loss of at least $12,000.00.

10. Plaintiff, pursuant to the parties agreement, was responsible to provide a building for use of the partnership. The Plaintiff failed to provide that building and so the Defendant was required to provide the building. A reasonable rent for the building was $200.00 per month for a total rental of $14,000.00.

11. Plaintiff used, during the term of the partnership and even after the partnership was terminated, two base stations which belong to the partnership. Plaintiff had agreed to pay a reasonable rental for those base stations, but failed to do so. A reasonable rental for those base stations during the time period they were in the Plaintiff's possession was $6,600.79.

12. Plaintiff had agreed to pay the partnership for any repairs made to equipment owned by the Plaintiff. Plaintiff

incurred repair expenses of $832.98 which he has failed to pay.

13. The Plaintiff treated the arrangement between the parties as a means whereby he could claim substantial tax benefits without incurring any work or expense and requiring the Defendant to do all the work and incur the expense which is contrary to the terms of the party's agreement.

14. In August, 1981, Plaintiff signed an Affidavit and Judge Bullock, relying on the Affidavit, issued a Pre-judgment Writ of Replevin and an Order to Show Cause requiring the Defendant to appear before the Court on August 24, 1981. The Plaintiff, when signing the Affidavit under oath, had no facts which showed immediate and irreparable injury, loss or damage and there was no basis for the issuance of the Pre-judgment Writ without notice to the Defendant.

15. Defendant, on being served with the Pre-judgment Writ of Replevin and the Order to Show Cause, appeared before the Court on August 24, 1981. Neither Plaintiff nor his counsel appeared at that time and therefore the Writ was dismissed.

16. In September, 1981, the Plaintiff signed an identical Affidavit and presented the same to a different Judge, Judge Sam, to obtain another Pre-judgment Writ of Replevin. No notice was given to the Defendant or his counsel of the Writ. The Plaintiff had no facts to support his claim of immediate and irreparable injury.

17. Pursuant to the Order to Show Cause which accompanied

the second Writ of Replevin, the Defendant again appeared before the Court and the Court found at that time that venue was improper and ordered the case transferred to Uintah County, Utah.

18. Defendant, to avoid other continued legal hassels, agreed to file a bond guaranteeing that the two base stations would be available in the event the Court ruled that Plaintiff was entitled to the same.

19. Defendant incurred legal fees in the amount of $480.00 contesting the two Writs of Replevin.

CONCLUSIONS OF LAW

Based on the preceding Findings of Fact, the Court makes the following Conclusions of Laws.

1. Plaintiff, R.R. Sather, and Defendant, William E. Pitcher, Jr., entered into a partnership whereby they were to split expenses, profits and losses 50-50. That partnership had a term beginning January 1, 1972 and terminated on December 31, 1978.

2. The testimony of Plaintiff, Sather, is to be given little credence.

3. The accounting provided by Plaintiff, Sather, is to be given little credence.

4. The accounting of the partnership shows that the Plaintiff owes to Defendant the sum of $6000.00 as his 50% share of the loss of the business and $10,716.88 for Plaintiff's 50% share for the rent of the building, the base stations and repairs

which Plaintiff had failed to pay to the partnership.

5. Defendant owes to Plaintiff the sum of $6,500.00 for Plaintiff's 50% share of the assets of the partnership.

6. The obtaining of the two Pre-judgment Writs of Replevin by the Plaintiff was in violation of Rule 64A of the Utah Rules of Civil Procedure, was done intentionally without notice and with malice and Defendant incurred damages of $480.00 in legal fees as a result of the wrongful actions of the Plaintiff.

7. When amounts owed by the Defendant to Plaintiff is deducted from the amount owed by Plaintiff to Defendant, the resulting balance that Plaintiff owes to Defendant is the sum of $10,696.88 for which Defendant is entitled to judgment.

DATED this 4 day of ~~September~~ October, 1985.

Richard C. Davidson
District Judge

CLARK B. ALLRED
GAYLE F. McKEACHNIE
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IN THE SEVENTH JUDICIAL DISTRICT COURT OF UINTAH COUNTY

STATE OF UTAH

R.R. SATHER and R.R. SATHER dba SATHERS COMMUNICATIONS ELECTRONICS and COMMUNICATIONS ELECTRONICS, Plaintiffs, vs. WILLIAM E. PITCHER, JR., PITCHER COMMUNICATION ELECTRONICS, a corporation, DWIGHT PITCHER, VERNA PITCHER and JOHN DOES ONE and TWO, Defendants.	JUDGMENT Civil No. 11,156

The above captioned matter having come before the Court on September 16, 1985, for trial and the Court having entered its Findings of Fact and Conclusions of Law and being fully advised, hereby;

ORDERS, ADJUDGES AND DECREES that:

1. Defendant, William E. Pitcher, Jr., have judgment against Plaintiff, R.R. Sather, in the amount of $10,696.88, together with costs.

2. The undertaking previously filed herein on behalf of the

Defendant regarding the base stations is hereby discharged.

DATED this 4 day of ~~September~~ October, 1985.

Richard C. Davidson
District Judge

MAILING CERTIFICATE

I hereby certify that I mailed four (4) true and correct copies of the foregoing Brief of Respondent - William E. Pitcher, Jr., to Craig S. Cook, 3645 East 3100 South, Salt Lake City, Utah 84109, on this 27 day of May, 1986.

Clark B. Allred