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Appeal: Right to Appeal After Satisfaction of Judgment

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CASE COMMENTS

APPEAL: RIGHT TO APPEAL AFTER SATISFACTION OF JUDGMENT

Kuharske v. Lake County Citrus Sales, Inc., 44 So.2d 641 (Fla. 1950)

Defendant, a fruit packer, contracted with plaintiff to purchase certain merchantable grapefruit. He advanced $4,000, which sum, by the terms of the contract, was considered a guarantee fund to be retained as liquidated damages by the plaintiff growers in the event defendant failed to perform. Were the contract carried out as planned, the fund was to be deducted from the defendant's final remittance to the grower. Following a heavy freeze, defendant spot-picked grapefruit valued at $4,189.50 but refused to take more. Deducting the guarantee fund from the value of the fruit picked, plaintiff tendered $189.50 in final settlement, which defendant refused. Plaintiff then sold additional fruit to another shipper and sued defendant for breach of contract. After instructions that the maximum damages that could be awarded were those set out in the contract as liquidated damages, the jury returned a verdict for the remaining unpaid value of the fruit, that is, $189.50 in addition to the $4,000 already held on deposit by plaintiff, plus $4,000 as liquidated damages. After accepting this sum and giving a satisfaction of judgment, plaintiff appealed for review of that portion of the judgment relative to damages. HELD, plaintiff is not estopped from appealing by acceptance of the benefits of the verdict. Reversed and remanded to allow the jury to find actual damages, Justices Terrell, Thomas and Sebring dissenting.

The Supreme Court discharged the defendant's contention of estoppel in a terse, one-sentence treatment, citing "the exception" to the general rule as recognized in *McMullen v. Ft. Pierce Financing and Construction Co.*[1] This general rule is that one accepting voluntarily the fruits of a judgment is thereafter estopped to appeal.[2] From the standpoint of a defendant, a plaintiff may not accept the fruits of a verdict while at the same time denying its validity.[3] From the standpoint of a plaintiff, to allow such an appeal incurs the hazard of

[1]108 Fla. 492, 146 So. 567 (1933).

[2]Capital Finance Corp. v. Oliver, 116 Fla. 790, 156 So. 736 (1934); McMullen v. Ft. Pierce Financing & Constr'n Co., 108 Fla. 492, 146 So. 567 (1933).

[3]See, *e.g.*, Paine v. Woolley, 80 Ky. 568 (1882).

eventually recovering less than the amount already collected and enjoyed.[4]

There are two well-recognized exceptions to this rule: (1) when the sum accepted by the appellant is an amount to which he was entitled in any event and about which there has been no controversy;[5] (2) when the contract or controversy is severable and the appellant accepts satisfaction of one portion.[6] Unfortunately the Court failed to designate into which of the two enumerated exceptions the principal case falls. On the basis of the facts contained in the opinion, either exception would have to be considerably enlarged to include this case, according to all analogous Florida holdings[7] and cases from other jurisdictions cited therein.[8]

As regards the first exception, severable issues have been defined as separate, distinct, or unrelated parts.[9] The instant case quite obviously did not present severable issues,[10] inasmuch as it involved no more than the plaintiff's claim of actual damages for breach of a single purchase contract. Indeed, on appeal this action was little more than an accounting, and the Florida Supreme Court has until this case held that accounting actions are generally single and not severable controversies as respects the right to appeal from one portion of the settlement while accepting the benefits of another.[11]

As to the second exception, the instant case cannot possibly be considered one in which the appellant accepted only an amount to which he was entitled in any event. Defendant-appellee admitted

[4]See, *e.g.*, Bechtel v. Evans, 10 Idaho 147, 77 Pac. 212 (1904).

[5]Mudd v. Perry, 25 F.2d 85 (8th Cir. 1928); Dore v. Lejeune, 11 La. App. 266, 123 So. 403 (1929); Giordano v. Height, 188 N.Y. Supp. 837 (Sup. Ct. 1921); Brawand v. Home Installment Co., 75 Ore. 478, 147 Pac. 391 (1915); *see* McMullen v. Ft. Pierce Financing & Constr'n Co., 108 Fla. 492, 496, 146 So. 567, 569 (1933).

[6]*See* McMullen v. Ft. Pierce Financing & Constr'n Co., 108 Fla. 492, 495, 146 So. 567, 568 (1933).

[7]Capital Finance Corp. v. Oliver, 116 Fla. 790, 156 So. 736 (1934); McMullen v. Ft. Pierce Financing & Constr'n Co., 108 Fla. 492, 146 So. 567 (1933).

[8]Adams v. Carter, 92 Miss. 579, 47 So. 409 (1908); McKain v. Mullen, 65 W. Va. 558, 64 S.E. 829 (1909).

[9]See Worthington v. Beeman, 91 Fed. 232 (7th Cir. 1899).

[10]*Cf.* Gilfillan v. McKee, 159 U.S. 303 (1895); Kelley v. Laconia Levee Dist., 74 Ark. 202, 85 S.W. 249 (1905); *In re* Black's Estate, 32 Mont. 51, 79 Pac. 554 (1905); Genet v. Davenport, 60 N.Y. 195 (1875); Woeltz v. Woeltz, 93 Tex. 548, 57 S.W. 35 (1900); Milam v. Hill, 29 Tex. Civ. App. 573, 69 S.W. 447 (1902).

[11]*See* McMullen v. Ft. Pierce Financing & Constr'n Co., 108 Fla. 492, 496, 146 So. 567, 569 (1933).

liability for merely the agreed price of the fruit picked, and denied all liability for damages, either liquidated or actual. He conceded that he owed the $4,000 deposit, plus the $189.50, as the contract price of the fruit picked; but at no time did he acknowledge liability for more. Regardless of whether the $4,000 deposit was treated as an advance or, following the verdict, as liquidated damages awarded in addition to the $4,189.50 price of fruit picked, the defendant admitted liability for a total of $4,189.50 only. Other jurisdictions have used such terminology as "an amount conceded by all parties to be due,"[12] or "an amount not in dispute,"[13] to characterize the type of sum that may be accepted without creating an estoppel to appeal.

Some jurisdictions, while attempting to stay within one of the recognized exceptions, have created the equivalent of a third exception. An Iowa case held that one was not estopped to appeal by accepting the minimum amount due under alternative theories of recovery of the same claim.[14] The Florida Court might have been influenced by a New York holding to the effect that when a claim is for both the value of goods sold and loss of profits the two theories of damages are severable.[15] The New York case, however, although cited ten times, has always been offered merely as authority for the general rule stated therein and never for the severable-damages exception it created.[16] At least one state has passed a statute allowing appeal after acceptance of benefits.[17] Because of such statutory provisions limiting appeal to the question of increasing the damages, some jurisdictions, in the limited field of condemnation, have read into their statutes a legislative intent to abolish the general principle of waiver.[18] The question then arises as to whether the Florida Court intended to stretch Section 59.35 of *Florida Statutes 1949* so as to permit remand for new trial on the sole issue of damages to remove

[12]Merriam v. Victory Placer Min. Co., 37 Ore. 321, 56 Pac. 75 (1899).

[13]Ballinger v. Connecticut Mut. Life Ins. Co., 118 Iowa 23, 91 N.W. 767 (1902).

[14]*In re* Youngerman's Estate, 136 Iowa 488, 114 N.W. 7 (1907).

[15]Goepel v. Kurtz Action Co., 216 N.Y. 343, 110 N.E. 769 (1915).

[16]*E.g.*, Clair Marcelle, Inc. v. Agfa Ansco Corp., 250 App. Div. 508, 294 N.Y. Supp. 929 (1st Dep't 1937); Harris v. Rogers, 190 App. Div. 208, 179 N.Y. 799 (4th Dep't 1919); *In re* Friedman, 123 Misc. 809, 206 N.Y. Supp. 410 (Sup. Ct. 1924).

[17]*E.g.*, Combs v. Bates, 147 Ky. 849, 145 S.W. 759 (1912), citing KY. CODE CIV. PRAC. §757.

[18]St. Louis, O.H. & C. Ry. v. Fowler, 113 Mo. 458, 20 S.W. 1069 (1892); Low v. Concord R.R., 63 N.H. 557, 3 Atl. 739 (1886); *In re* City of New York, 216 N.Y. 489, 111 N.E. 65 (1916).

from jeopardy the sum gained in the first trial. In the absence of a statutory provision to the contrary, such as obtains in Kentucky,[19] the right to appeal is waived by acceptance of a sum placed in jeopardy by remand for new trial on the sole issue of damages.[20]

Perhaps it is possible by going outside the opinion to explain what the Florida Supreme Court had in mind. The record may contain testimony as to the market value of the fruit and the amount that was merchantable, as well as certain other factors lending support to the argument that in no event could damages of less than $4,000 be found. Thereupon the Court may have reasoned that, once the jury found a breach of contract, the $4,000 automatically became a sum to which the plaintiff was entitled in any event. Yet the instant opinion treats the $4,000 as an advance rather than as liquidated damages.[21] The $4,000 guarantee fund that the trial court awarded as damages was contested every step of the way by the defendant. While it is not illogical to argue that a showing of evidence might be such as to place certain damages beyond controversy, a decided majority of the cases substantiate the interpretation that the amount must be uncontested by both parties at the trial. After trial, of course, any verdict and judgment are "uncontested" unless appeal is taken. The instant case makes new law in Florida.

On the face of the opinion it is difficult to determine the position taken by the Florida Court. Three justices dissented, but inasmuch as they filed no opinions there is no way of determining whether they dissented from the majority on the estoppel question or on the substantive problem of breach of contract. An opinion should be an intelligible signpost by which the legal profession and the trial courts may interpret existing law. The only authorities cited by the majority, to the extent that they are relevant at all, support the dissent. It is most unfortunate that pressure of work[22] necessitates 4-3 decisions abrogating established rules of law without the citation of at least some pertinent authority or an explanation of the reasons for change.[23]

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[19]See note 17 *supra.*

[20]Guho v. San Diego, 124 Cal. App. 680, 13 P.2d 387 (1932).

[21]At p. 643.

[22]See Sebring, *The Appellate System of Florida,* 25 FLA. L.J. 141, 142-143 (1951).

[23]McCullough v. Forbes, 47 So.2d 780 (Fla. 1950), a similar example of such appellate process, will be discussed later in this volume.