

1986

Mel Trimble Real Estate v. Monte Vista Ranch, Inc.,  
Wallace Ohran, Ray E. Nelson, Howard D.  
Sherwood : Petition for Rehearing

Utah Court of Appeals

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UTAH COURT OF APPEALS  
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DOCKET NO. 860135-CA

IN THE UTAH COURT OF APPEALS

MEL TRIMBLE REAL ESTATE,	)	
	)	
Plaintiff,	)	PETITION FOR
	)	REHEARING
vs.	)	
	)	
MONTE VISTA RANCH, INC. and	)	Civil No. 860135-CA
WALLACE OHRAN, RAY E. NELSON	)	
HOWARD D. SHERWOOD, ET AL.,	)	
	)	
Defendants.	)	

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Mary T. Norman  
Clerk of the Court

MEL TRIMBLE REAL ESTATE,	)	
	)	
Plaintiff,	)	PETITION FOR
	)	REHEARING
vs.	)	
	)	
MONTE VISTA RANCH, INC. and	)	Civil No. 860135-CA
WALLACE OHRAN, RAY E. NELSON	)	
HOWARD D. SHERWOOD, ET AL.,	)	
	)	
Defendants.	)	
	)	

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## PETITION

Pursuant to Rule 35, Rules of the Utah Court of Appeals, appellant (Trimble) respectfully petitions for a rehearing. The grounds for this motion are as stated below.

## FACTS AND PROCEDURAL HISTORY

Trimble is a broker. Ohran is a seller. Fitzgerald is a buyer. In an earlier action, Trimble (Broker) sued Fitzgerald (Buyer) for a real estate commission. Trimble lost. Mel Trimble Real Estate v. Fitzgerald, 626 P.2d 453 (Utah 1981).

Thereafter, Trimble (Broker) sued Ohran (Seller) for a real estate commission growing out of the same transaction. This second suit was dismissed on the basis of collateral estoppel. Thus, the trial court judge ruled that:

The issue at the first trial and the present issue are essentially the same, that is, whether a real estate commission was due Florence from the sale of Monte Vista Ranch, Inc. . . .and if so, who should pay the commission. (R.252.)

This court's opinion turned what documents were available to the trial court. This court reasoned that:

From all that appears in the Supreme Court opinion, the jury's judgment that Fitzgerald did not owe a commission means that Trimble was not entitled to a commission at all [from either Buyer or Seller.]

Slip Opinion, at p. 5.

On the other hand, the court conceded that the opinion standing alone might be misleading:

Close examination of the record in a proceeding may well lead to a conclusion somewhat at odds with the apparent "plain meaning" of a reported decision.

Slip Opinion, at p. 6.

Thus, this court's opinion turned exclusively on whether the trial court should have taken judicial notice of certain records from the earlier trial.

. . .[T]he trial court did not err in failing to review the record of the prior proceedings on its own motion. It is not mandatory that we take notice of the record in that proceeding for the first time on appeal. . .

Slip Opinion, at p. 9.

### ARGUMENT

It is certainly true that Trimble attempted to inject documents from the first trial at a fairly late stage of the proceedings. It is also true that such documents (if received) would have been useful in clarifying the collateral estoppel issue. However, Trimble has never contended that such documents were indispensable. Indeed, Trimble has consistently argued that the trial court's ruling was incorrect on the basis of the existing record! It is respectfully submitted that this Court's opinion wholly fails to analyze the collateral estoppel issue on the basis of the existing record.

The language at issue was a jury instruction which states:

. . .The agreement of December 7, 1977 imposed upon defendant the liability for the real estate commission, if any, owed plaintiffs upon this transaction.

Mel Trimble Real Estate v. Fitzgerald, 626 P.2d 453, 455 (Utah 1981). (Emphasis added.)

The trial court believed the words if any means that no one in the world owed Trimble (Broker) a commission. The fallacy is that the trial court didn't bother to look at



the caption. This was a lawsuit between Trimble (Broker) and Fitzgerald (Buyer). The only thing which could possibly have been adjudicated in that earlier trial was whether Fitzgerald (Buyer) owed a commission to Trimble (Broker). If we want to know whether anyone in the world owes a commission to Trimble (Broker), everyone in the world would have to be added as party defendants. The point is so elementary that no citation is required.

It is true that the Ohran (Seller) was involved in the prior suit. However, he was involved in a cross-claim with Fitzgerald (Buyer). However, that cross-claim had nothing to do with Trimble (Broker). Or stated in other words, the original lawsuit did not involve any claim by Trimble (Broker) against Ohran (Seller) for a real estate commission.

The trial court was fully aware of the nature of the original lawsuit. Indeed, the matter was frequently argued. Early in the litigation, Ohran (Seller) made a motion to dismiss on the basis that Ohran (Seller) was an indispensable party in the original action. (R.17, R.20.) Actually, that argument was simply a res judicata argument under a different name. (R.49, at Point III.)

In any case (whatever the name), the relationships in the earlier case were explained to the trial judge in great detail. (R.39, R.90.) Indeed, plaintiff's entire trial brief from the earlier trial was presented to the trial court. (R.49.) That document describes the relationships in graphic form.

Later, Ohran (Seller) made a motion for summary judgment based upon collateral estoppel. Trimble (Seller) made an appropriate response. (R.165-166.) Although Trimble's response on collateral estoppel was a bit brief, it must be remembered that Trimble (Broker) had earlier in the case explained those same relationships to the Court in great detail. (R.39, 49, 90.)

On appeal, this Court concluded that the trial court had no duty to take judicial notice of files and records from another trial in another county. (Slip Opinion, at p. 6 and 7.) However, shouldn't the trial court have taken judicial notice of its own file? Indeed, shouldn't the trial court have taken judicial notice of the caption in Mel Trimble Real Estate v. Fitzgerald, supra?

In the briefing before this Court, Trimble (Broker) showed that the relationships from the earlier trial were available in the Court's own file--without resort to judicial notice. (Appellant's Brief, at p. 15; Appellant's Reply Brief, at p. 1-6.)

DATED this 21 day of July, 1988.

ROBERT J. DEBRY & ASSOCIATES  
Attorneys for Plaintiff/  
Appellant

By: Robert J. Debry

MAILING CERTIFICATE

I certify that on the 22 day of July,  
1988, a true and correct copy of the foregoing APPELLANT'S  
BRIEF (Trimble v. Monte Vista Ranch, Inc.), was mailed,  
postage prepaid, by depositing a copy of the same in the U.S.  
mail, to the following:

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