

1977

Don S. Smith And Brigham H. Smith v. R.L. War v.  
J.H. Ehlers, Evelyn P. Boyce. Lois P. Connell :  
Response Brief To The Petition For Rehearing

Utah Supreme Court

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#### Recommended Citation

Legal Brief, *Smith v. Warr*, No. 14565 (Utah Supreme Court, 1977).  
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DON S. SMITH and BRIGHAM H. )  
SMITH, )

Plaintiffs, )

vs. )

R. L. WARR, )

Defendant and )  
Cross-complainant )  
and Appellant, )

Civil No. 14565

vs. )

J. H. EHLERS, EVELYN P. )  
BOYCE, and LOIS P. CONNELL, )

Defendants and )  
Cross-defendants )  
and Respondents. )

RESPONSE BRIEF TO THE PETITION FOR REHEARING

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FILED

JUN 21 1977

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IN THE SUPREME COURT OF THE STATE OF UTAH

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RESPONSE BRIEF TO THE PETITION FOR REHEARING

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ARGUMENT

Respondents BOYCE and CONNELL have sought a re-hearing of this case on two points which are discussed below. It is submitted by appellant WARR that both of these points were fully considered by this Court in the original hearing before this Court and that the opinion rendered by this Court requires no further rehearing or reconsideration.

POINT ONE

BENEFIT OF THE BARGAIN MEASURE OF DAMAGES WAS  
APPROPRIATELY APPLIED IN THIS CASE.

It would be pointless to repeat and reiterate all of the arguments in favor of the benefit of the bargain rule as it applies to this case. Needless to say, this Court exhaustively reviewed the matter and concluded correctly that in Utah under the circumstances of this case the bargain rule is properly applied.

#### POINT TWO

THE SPECIAL WARRANTY PROVISION OF THE CONTRACT IN QUESTION DOES NOT CHANGE THE MEASURE OF DAMAGE RULE.

Respondents BOYCE and CONNELL argue because they were required by the real estate contract which they signed with appellant WARR to provide a special warranty deed as opposed to a full warranty deed at the conclusion of the purchase, the damage rule applied by this Court does not apply to them. That argument was fully explored in said respondents' brief on the original appeal and was fully and completely responded to in Points Seven and Eight of appellant's reply brief. (Appellant's Reply Brief pages 13-16.) It should also be noted that in respondent BOYCE and CONNELL'S petition for rehearing no case law or authorities are cited anywhere in support of their proposition.

A brief summary of the arguments against respondents' position are as follows:

1. Respondents BOYCE and CONNELL were divested of any title to the property because of the adverse possession and therefore are in no position to give a special warranty deed, much less any greater title. Hence, they must respond

in damages.

2. Said respondents have not appealed from the decision of the lower court which held them liable for damages because of their inability to pass title. They are therefore precluded from raising any objection on that point in this appeal.

3. A special warranty deed does not in itself put a vendee on notice or upon inquiry as to any defects in title. Paul v. Houston Oil Co., 211 S.W.2d 345 (Texas Civil App. 1948).

4. The problems which arose and which divested said respondents of title came directly because of acts or failures to act of said respondents. Therefore the defects in title arose "by, through, or under" the said respondents, making respondents liable for subsequent damages. For a discussion of those acts or failures to act see pages 15 and 16 of appellants reply brief.

#### SUMMARY

The matters raised in respondents' petition for rehearing were specifically raised before this Court and answered by this Court in its opinion. There is nothing in respondents' petition which raises any new point or makes any new argument that was not previously aired before this Court both in the briefs and in the oral argument. The petition for rehearing of respondents BOYCE and CONNELL should therefore be denied.

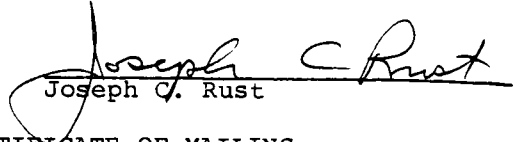
\* \* \*

\* \* \*

DATED this 20 day of June, 1977.

Respectfully submitted,

KIRTON, McCONKIE, BOYER & BOYLE

  
Joseph C. Rust

CERTIFICATE OF MAILING

I herewith and hereby certify that a true and correct copy of the foregoing Response Brief to the Petition for Rehearing was placed in the United States mail at Salt Lake City, Utah, with postage thereon fully prepaid, this 21st day of June, 1977, addressed as follows:

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