

1977

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

Utah Supreme Court

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MILTON V. BACKMAN & DAVID B. BOYCE; Attorneys for Respondent Ehlers
RICHARD S. JOHNSON; Attorney for Respondents Boyce and Connell
ROBERT C. CUMMINGS; Attorney for Respondents Boyce and Connell
JOSEPH C. RUST; Attorneys for Appellant

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IN THE SUPREME COURT OF THE STATE OF UTAH

DON S. SMITH and BRIGHAM H. SMITH,)

Plaintiffs,)

vs.)

R. L. WARR,)

Defendant, Cross-complainant,
and Appellant.)

vs.)

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

Defendants and Cross-defendants,
and Respondents.)

BRIEF ON PETITION FOR REHEAR
OPION OF SUPREME COURT

ON APPEAL FROM JUDGMENT
BY OPINION OF THE SUPREME COURT

JOSEPH C. RUST
DAVID A. WESTERBY
Kirton, McConkie, Boyce & West
336 So. 3rd East Street
Salt Lake City, Utah 84143

Attorneys for Appellant

FILE

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IN THE SUPREME COURT OF THE STATE OF UTAH.

* * * *

DON S. SMITH and BRIGHAM H. SMITH,)
Plaintiffs, ()
vs.)
R. L. WARR,)
Defendant, Cross-plaintiff,)
and Appellant,)
vs.)
J. H. EHLERS, Evelyn P. BOYCE, and)
LOIS P. CONNELL,)
Defendants, cross-defendants,)
and Respondents)

Case No. 14,565.

* * * *

STATEMENT OF KIND OF CASE:

Action on real estate sales contract, wherein title failed, and district court judgment was for return of purchase money paid. Purchaser filed cross complaint seeking damages, and, on appeal his contention that he should have benefit of bargain damages was upheld by Supreme Court. Respondents, Boyce and Connell, seek rehearing, or modification of judgment.

RELIEF SOUGHT ON REHEARING OR MODIFICATION

Respondents, Boyce and Connell, seek a rehearing, or modification of judgment, based on matters of law, and exoneration from benefit of bargain damages by reason of: special warranty provisions in contract of sale of real estate.

STATEMENT OF FACTS:

See respondents' brief, previously filed herein, at page 2 thereof.

ARGUMENT:

POINT I: BENEFIT OF BARGAIN RULE AS APPLIED HEREIN IS ERRONEOUS

The opinion of this Honorable Court, holds the cross-defendants and respondents, Boyce and Connell, liable for breach of contract of sale of certain real estate and applies the rule of benefit of the bargain as the rule of damages to be applied in such situation.

The attention of this Honorable Court is directed to the proposition, long established, that the rule above mentioned is herein inapplicable.

The real estate contract:- signed by the respondents, Boyce and Connell, if carried out, would have resulted in a deed to the defendant cross-plaintiff and appellant, Warr. The deed would under ordinary circumstances not existing here, however, and as hereinafter set out would have had covenants of possession, title, and warranty, and on any breach thereof, the measure of damages would have been the return of the consideration paid, plus interest thereon. See Section 142 (d) Covenants, Corpus Juris Secundum, page 1010, Volume 21, wherein it is stated:

"As a general rule, the measure of damages for a breach of the usual covenants of title, results in a total loss of the estate conveyed, and is the purchase money paid or the value of the consideration with interest thereon. . . from the date of conveyance, or as otherwise stated in some cases, the value of the land at the time of the conveyance estimated by the purchase price."

It is submitted that this measure of damages for breach of the covenants in the deed contracted for is the controlling factor, and applicable herein, rather than the benefit of the bargain measure set out in the Court's opinion heretofore rendered herein.

POINT II: THE SPECIAL WARRANTY PROVISION OF THE CONTRACT PRECLUDES THE BENEFIT OF THE BARGAIN DAMAGES.

There is a further cogent reason for limiting the liability of the cross defendants and respondents, to-wit: The limitations contained in the special warranty deed contracted for.

The wording of the warranty to be given, upon payment, is a warranty

case, the respondents, the cross-defendants, Boyce and Connell.)

The claim of the Smiths was not a claim, by, through, or under, or emanating from these respondent-defendants, or either of them, but something arising totally outside of their contractual commitments. To hold this limiting feature of the contractual arrangement is to be nullified, enlarged, or ignored, is unfair and inequitable. The cross-plaintiff and Appellant's recovery under the benefit of the bargain theory for which sort of liability the respondent-cross-defendants never agreed to be or become liable is most unjust.

It is to be noted that the trial Court found that the defendants, cross-defendants and respondents, acted in good faith, and were not cognizant of any defects in title or possession, while the cross-plaintiff and appellant had opportunity to inspect the premises, check the title, generally know the situation before entering into any contract.

It is submitted that the limiting features of the coveants contracte for, should not be enlarged because the contract was an executory rather than an executed one, and consequently the limiting effects of the agreed covenants should not be enlarged or ignored. It is submitted that the liability of respondents, cross-defendants Boyce and Connell should not be based on any benefit of the bargain rule, as announced in the Court's decision and opinion, for the limiting covenant was a very basis of the transaction. Furthermore, the district court only awarded damages based on the amount of the consideration paid, and which was to be returned to the appellant, cross-complainant and defendant. The award in the lower court was for an amount which did not exceed the consideration, and no cross appeal from that determination was needed or warranted.

CONCLUSION:

The opinion rendered by this Honorable court should be reheard, or modified, or amended in accordance with the foregoing.

Respectfully submitted,

(Richard S. Johnson-)
207 Atlas Building
Salt Lake City, Utah 84101

(Robert C. Cummings-)
320 So. 3rd East Street
Salt Lake City, Utah 84111

SERVICE:

Receipt of two copies each, of the foregoing "Brief on and Petition for rehearing, is hereby acknowledged; on this 2nd day of June, 1977.

(Joseph C. Rust)

(David A. Westerby)

Attorneys for defendant, cross-complainant, and appellant.

Backman, Clark & Marsh,
David B. Boyce,
Milton V. Backman

By _____

Attorneys for defendant, cross-defendant, and respondent, J. H. Ehlers.