

1976

# Helen Ingram v. Henry H. Forrer : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT  
OF THE  
STATE OF UTAH

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HELEN INGRAM, formerly :  
known as Helen Woolworth,

Plaintiff- :  
Appellant, :  
:

v. : Case No. 14608

HENRY H. FORRER and :  
CHLORA FORRER, his wife, :  
:

Defendants- :  
Appellees. :

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APPELLANT'S BRIEF

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### STATEMENT OF THE NATURE OF THE CASE

Appellant seeks to overturn the Lower Court's decision and have judgment entered in her favor.

### DISPOSITION OF THE LOWER COURT

After a trial on the merits the Court granted reformation of the contract between Appellant and Appellees and denied relief to Appellant.

### RELIEF SOUGHT ON APPEAL

Appellant seeks to have the Lower Court's decision vacated, a decision entered in her favor and a remand to the Lower Court on the issue of damages.

### STATEMENT OF FACTS

On November 10, 1968, Appellees sold to Appellant under a Uniform Real Estate Contract certain real property in Duchesne County, Utah. Title to the property passed to Appellant by Warranty Deed dated October 30, 1969, and the deed was placed in escrow until the sum specified in the contract should have been paid to Appellees. On or about February 26, 1973, Appellant paid to Appellees the entire amount

due on the contract and the Warranty Deed was delivered and placed of record.

On July 10, 1970, after the Warranty Deed was in escrow and before Appellant placed the Warranty Deed as of record, Appellees sold to Howell Spear the mineral rights of said property which Appellees allege to have owned. The Warranty Deed between Appellant and Appellees on its face was an unrestricted sale, no mention of any exceptions as to the mineral rights appearing in the document.

THERE WAS NOT SUFFICIENT EVIDENCE  
TO JUSTIFY REFORMING THE CONTRACT  
OF SALE USED IN THIS CASE.

Two clauses of the Uniform Real Estate Contract are here in issue.

"Clause 19. The Seller on receiving the payments herein reserved to be paid at the time and in the manner above mentioned agrees to execute and deliver to Buyer or assigns, a good and sufficient warranty deed conveying the title to the above described premises free and clear of all encumbrances except as herein mentioned..."

"Clause 20. It is hereby expressly understood and agreed by the parties hereto that the Buyer accepts the said property in its present condition and that there are no representations, covenants, or agreements between the parties hereto with reference to said property except as herein specifically set forth or attached hereto."

(Emphasis added.)

It will be readily seen from an examination of the sales contract that no addition or exception was taken to the Warranty Deed except notification that a mobile home located on the property would be included in the purchase price.

No issue of ambiguity with respect to these clauses appears in Appellees' pleadings and the issue of ambiguity was not raised at trial. In fact, Appellees' Answer would seem to concede that on its face the contract is clear as to its meaning and import. Consequently, the only issue involved in this case is the reformability of this contract.

Long ago the Supreme Court of the United States indicated what the rule of law was with respect to reformation of land contracts:

"The jurisdiction of equity to reform written instruments, where there is a mutual mistake, or mistake on one side and fraud or inequitable conduct on the other, is undoubted; but to justify such reformation the evidence must be sufficiently cogent to thoroughly satisfy the mind of the court. (Cites omitted, Simons Creek Coal Co. v. Doran, 142 U.S. 417, 435, 12 S. Ct. 239, 245, 35 L. Ed. 1063, 1892)"

No allegation of fraud or inequitable conduct has been raised by Appellees in pleadings or at trial except in so far as Appellant seeks to enforce this contract as clearly written. Furthermore, the record shows that no evidence of any

kind was produced to indicate that Appellant knew anything she should have revealed, and did not reveal, or that she hid anything from Appellees, or that she tricked, fooled, lied, cajoled or intimidated Appellees or that Appellant affirmatively acted in any way with conscious intent to deny any right to Appellees. The record further shows that both parties at all times negotiated at arms length and had ample opportunity to correct any errors contained in the agreement or object to the absence of any clause that ought to have been in the document.

In light of this record Appellees' contention must be that there was a mutual mistake. The term mutual mistake has been defined in 66 AmJur 2d 549, Reformation of Instrument: Section 22. At page 550 that section reads:

"Indeed, when no question of fraud, bad faith, or inequitable conduct is involved and the right to reform an instrument is based solely on a mistake, it is necessary that the mistake be mutual, and that both parties understood the contract as the complaint or petition alleges it ought to have been, and as in fact it was except for the mistake, and this is so whether the mistake is one of fact or one of law.

It follows from the above that in the absence of fraud or inequitable conduct by the other party, or of a voluntary instrument which a donor seeks to have reformed, unilateral mistake is not a ground for reformation..."  
(Emphasis added.)

AmJur 2d lists a great number of cases, from a large number of jurisdictions, substantiating the requirement that the mistake be mutual in the absence of fraud or inequitable conduct which have not been alleged or proved in the case at bar.

Section 123 of the same topic in AmJur 2d states the law to be that a mere preponderance of the evidence is not sufficient to prove a mutual mistake and again cites numerous authorities at p. 647 to support that proposition. At page 648, AmJur 2d lists the various jurisdictions and their requirements that the evidence be clear, unequivocal, decisive, strong, cogent, precise, exact or convincing, and lists a great many authorities for each at page 648. AmJur 2d further points out at page 651: "an honest difference of understanding as to what the contract was is fatal to reformation, for in such case there is no meeting of the minds of the parties and no pre-existing agreement to which the written instrument can be conformed." Again, AmJur lists supporting authorities. Finally, AmJur 2d points out that "it has been doubted whether, as a general rule, a writing should be reformed on the unsupported testimony of the party asking its reformation." P. 651.

It is clear then that the general trend discovered by AmJur is that:

1. In the absence of fraud or inequitable conduct, neither of which have been urged here, there must be a mutual mistake by both parties.
2. If there is a mistake by only one party, then the motion for reformation must be denied.
3. That the evidence to support the reformation must be such that it establishes the mistake by more than a preponderance of the evidence.
4. That an honest difference of opinion as to the terms of the contract is not enough to support reformation.
5. That the unsupported testimony of an interested party seeking reformation should not warrant the reformation of a document.

Utah case law is not apposite to these rules and, in fact, supports them. Naisbitt v. Hodges, 6 Ut. 2d 116, 307 P. 2d 620, (1957); Bench v. Pace, Utah, 538, P. 2d 180 (1975); Ellison v. Johnson, 18 Ut. 2d 374, 423 P. 2d 657 (1967); Intermountain Farmers Ass'n. v. Peart, 30 Ut. 2d 201, 515 P. 2d 614 (1973).

In Bench v. Pace, supra, the Court quoted from Williston on Contracts, Vol 13, 3d Ed. Sec. 1552 favorably.

"It is understood that to warrant reformation or rescission, the court must be persuaded by the clearest kind of evidence



that a mistake has been made by both parties, or in some cases by one, or that some other basis exists upon which relief should be granted." (538 P. 2d at 182, emphasis added.)

Williston clarifies when a reformation may occur if a mistake occurs as to one party only and essentially relates the same case law discussed in AmJur 2d, to-wit: in the absence of fraud, etc., there must be a mutual mistake by both parties. As Bench, supra, indicates, the mistake of both parties must be proved by "the clearest kind of evidence". In Naisbitt v. Hodges, supra, the Utah Supreme Court had occasion to expand and more clearly define its requirement of evidence to support a motion for reformation.

"All that is required is that evidence exists whereby this court can say that the trial judge acted as a reasonable man in finding that the proof of the fact asserted is greater than a mere preponderance." (6 Ut. 2d at 122, emphasis added.)

In determining what a preponderance of the evidence is, Black's Law Dictionary provides useful case law and reasoning.

"Preponderance. Greater weight of evidence, or evidence which is more credible and convincing to the mind. Button v. Metcalf, 80 Wis. 193, 49 N.W. 809. That which best accords with reason and probability. U.S. v. McCaskill, D.C.

Fla., 200 F. 332. The word "preponderance" means something more than "weight"; it denotes a superiority of weight, or outweighing. The words are not synonymous, but substantially different. There is generally a "weight" of evidence on each side in case of contested facts. But juries cannot properly act upon the weight of evidence, in favor of the one having the onus, unless it overbear, in some degree, the weight upon the other side. Mathes v. Aggler & Musser Seed Co., 178 P. 713, 715, 179 Cal. 697; Barnes v. Phillips, 184 Ind. 415, 111 N.E. 419. See, also, Weight of Evidence.

It rests with that evidence which, when fairly considered, produces the stronger impression, and has the greater weight, and is more convincing as to its truth when weighed against the evidence in opposition thereto. S. Yamamoto v. Puget Sound Lumber Co., 84 Wash. 411, 146 P. 861, 863; but it does not mean greater number of witnesses. Heerdink v. Kohmescher, 94 Ind. App. 296, 180 N.E. 683, 684.

Preponderance of evidence may not be determined by the number of witnesses, but by the greater weight of all evidence, which does not necessarily mean the greater number of witnesses, but opportunity for knowledge, information possessed, and manner of testifying determines the weight of testimony. Garver v. Garver, 52 Colo. 227, 121 P. 165, 166, Ann. Cas. 1913 D, 674.

It should be remembered that the quotation defines preponderance and that Utah law and the general trend of the country's case law require more than a preponderance. As Am... points out, the evidence need not lead to a conviction of "beyond a reasonable doubt," but it must be more than a preponderance, i.e., clear and convincing.

Those cases in which the Court has previously granted a reformation will be useful in that they indicate the quantum of evidence necessary. In Bench, supra, the defendants claimed that they had retained the oil and mineral rights and asked the Court to reform the contract of sale between themselves and plaintiff to show the reservation of oil and mineral rights. The Court granted the motion. At trial the evidence was conflicting as between the parties. But in addition to his own testimony, defendant (1) had an independent witness who testified and verified defendant's position; (2) three years after the contract, in 1968 and in 1969, plaintiffs approached defendants to buy oil and mineral rights on the property which they wouldn't have done had they owned the rights; (3) the defendant had leased the mineral estate to third parties, which fact was well known to the plaintiffs, and the leasing arrangement was ratified by the plaintiff without objection; and (4) the defendant's ownership of the mineral estate was not threatened until the proceedings were initiated.

In Intermountain Farmers Association, supra, the reformation was granted. Testimony of the parties conflicted. The plaintiff alleged that of the five acres of ground he owned he intended to only convey two acres to defendant but a mistake

by the scrivener gave defendant the entire five acres. In addition to plaintiff's testimony, the Court found (1) that there was an outstanding real estate contract for three acres of the land with a third party at the time plaintiff sold the two adjoining acres to defendant; (2) that the third party was in possession of the three acres at the time of the sale; (3) that defendants, prior to the consummation of the sale, had inspected the property at least three times; and (4) that plaintiff asked defendants to reconvey the property when he discovered the mistake.

In Naisbitt v. Hodges, supra, the Court found that defendant failed to object to numerous activities adverse to his claims of which he had knowledge. Independent witnesses verified that defendant believed he owned nothing and the Court refused to reform the contract.

Finally, in Ellison v. Johnson, supra, the Court refused to grant reformation. The significant finding of the Court was "Plaintiffs deny any mistake and the agreement is unambiguous." (18 Ut. 2d at 376) Defendant did no more than allege the mistake without any further evidence. Furthermore, the Court found that defendant received everything he had bargained for.

These cases, therefore, substantiate the rule that in order to reform a contract the evidence must be more than a preponderance. Simple allegation by one side and subsequent denial by the other is insufficient grounds without more concrete evidence. The unsupported, self-serving comment of an interested party cannot be sufficient basis for reformation, as Ellison, supra, shows, in the face of a clear unambiguous agreement.

Applying the foregoing rules of law to the case at bar we arrive at the following:

1. The testimony of Appellees and Appellant is in conflict. Appellees testified that they told Appellant that she would receive no mineral rights. (Trial Transcript, pp. 62, 63, 66, 67, 74) To the contrary, Appellant testified that Appellees said nothing about the minerals at first but that later, when attempting to clear a cloud on the title to the property, Appellant testified that Appellees brought a copy of an escrow agreement which spoke about mineral rights. At that point Appellant testified that Appellee indicated he had no interest in the minerals. (Trial Transcript, pp. 11, 12.)
2. Appellees had no corroborating witnesses or evidence. On the other hand, in addition to Appellant's testimony, Appellant produced an escrow document which established that mineral rights existed when the contract was consummated. (Exhibit P-1).
3. Appellees denied having knowledge as to whether or not mineral rights existed on

the property. (T.T., p. 62) Appellant rebutted that testimony with the December, 1951 escrow agreement which showed that Appellees had knowledge of the existing rights from as early as December, 1951.

4. Appellant testified that Appellees gave her a copy of the escrow agreement (T.T., p. 11). Appellees denied having done so. (T.T., pp. 66, 67).
5. Appellee testified that he signed over his share, though he is not clear as to just what he signed over, to his brother. (T.T., p. 67). Appellant's expert witness, Mr. Garner, testified that the only documents recorded (see Exhibit P-8) were the original grant of title to the Ostlers, the transfer from the Ostlers to the Forrers, the transfer of mineral rights from Mr. and Mrs. Forrer to Mr. Spear, and the transfer from Mr. and Mrs. Forrer to Mrs. Ingram of title to the land.

The most that can be said for this evidence is that it is in conflict. Neither party seems to be able to clearly indicate what the actual oral contract was though Appellant submits that a fair evaluation of the evidence would indicate that Mrs. Ingram has the more substantiated testimony.

It is submitted that at all times Mrs. Ingram acted in accordance with her interpretation of the contract. She testified that she sought help from others to investigate her mineral property as early as 1973 when the property was finally paid off. (T.T. at p. 18) Furthermore, when asked why she had not investigated earlier, she testified that the property was

involved in a separate lawsuit and she was not sure what the status was. (T.T. at p. 22) The property had been foreclosed on by Mr. and Mrs. Forrer resulting in Ingram paying off Forrers and obtaining her deed.

The December, 1951 escrow agreement is clear on its face. Mr. Forrer signed the document and so testified. (T.T., p. 67) That testimony is not ambiguous. On the other hand he testified that he signed the document in 1964 in order to transfer the title to his brother so that his brother could get on welfare. But he testified that his brother died in 1963! (Ibid.) Perhaps at Mr. Forrer's age one can be allowed the mistake of reversing these years, nevertheless, the escrow agreement bears the date of December 10, 1951 and the agreement indicates in its first sentence that the sale was to both brothers. The notary public indicates that both brothers signed on that date. The document reserves 1/4 of the mineral rights to the Forrer brothers, consequently, Mr. Forrer was aware of the mineral rights reserved to him since at least 1951. Obviously, this testimony leaves something to be desired in terms of clarity.

Furthermore, at p. 66 of the Trial Transcript, Mr. Forrer testified as follows:

"And I figured if there was any mineral right it should be stated on the deed, the same as the water shares should be stated on the deed."

On the other hand at p. 29, Mrs. Ingram testified:

"Q. Mrs. Ingram, with respect to the one-fourth mineral interest that you testified that you knew or thought that you were getting when you purchased this property, is there any reason why you didn't make reference to that on the documents that it was a one-fourth interest that you were getting?

A. No, because at that time I also had another deed. It just wasn't, I don't believe, customary to put them on deeds, and I was just unaware that it was put on like that. I knew that if you wished to keep something off that you put it on, you know. If we would have wished to put it on there, it would have been on there. I'm not sure."

Obviously, both parties had honest differences of opinion as to what belonged on the contract which only serves to emphasize the conflicts in the testimony. At the very most all the evidence, as a whole, serves to indicate that there have been an honest difference of opinion as to the terms of the contract and such a circumstance does not warrant a reformation.

In summary, Appellant contends that Appellee has not come forward with that "clearest kind of evidence" required by Utah case law and therefore this Court should vacate the Lower Court's judgment and enter a verdict in favor of Mrs. Ingram and remand the case to the Lower Court on the issue of damages.



APPELLEE WAS NEGLIGENT IN HIS ACTIONS  
AND SHOULD NOT BE GRANTED REFORMATION  
ON THAT BASIS ALONE.

In Ellison v. Johnson, supra, the pertinent rule  
was stated:

"Evidence to sustain a mutual mistake of  
fact must be clear, definite and convincing,  
and the party asserting it should not be  
guilty of negligence in the execution of the  
contract." (18 Ut. 2d at 377)

In Ellison, supra, the defendant was seeking to have  
the contract reformed. He testified that he relied on plaintiff  
in the computation of complex figures. Such reliance the Court  
referred to as "carelessness." (18 Ut. 2d at 377) In the  
case at bar the same facts exist. Appellee relied on Appellant  
(T.T. at 71) and never examined the document for its legal sig-  
nificance even though he knew that the oil and mineral rights  
were not mentioned. Furthermore, he testified that he relied on  
his own understanding of the legal significance of the document,  
(T.T. at p. 66) rather than have an attorney render a legal opin-  
ion. Appellant submits that this carelessness falls within the  
rule of Ellison, supra, and for that reason the Lower Court's  
decision should be vacated and judgment entered for Appellant.

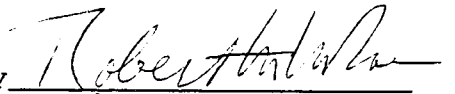
#### CONCLUSION

Pursuant to 57-1-12, Utah Code Annotated, 1953, which  
demands that any exceptions to a Warranty Deed appear in the

document of transfer of title and because insufficient evidence exists to warrant a reformation of the land contract involved in this case and because Appellees were careless in their execution of the land contract and title deed, Appellant submits that the Lower Court's decision should be vacated, judgment in this Court entered for Appellant and the case remanded to the Lower Court on the issue of damages.

Respectfully submitted,

HATCH, McRAE & RICHARDSON

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CERTIFICATE OF MAILING

This is to certify that I mailed two (2) copies of the foregoing brief to James S. Smedley, Attorney for Defendant Appellees, 30 North Main Street, Heber City, Utah 84032, this 8th day of September, 1976.

  
Robert M. McRae