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Vera S. King v. F. F. Hintze : Brief of Respondent

Utah Supreme Court

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STATE SUPREME COURT
BRIEF

ET NO. 8071 P1



In the Supreme Court
of the State of Utah

VERA S. KING,
Plaintiff and Respondent,

vs.

F. F. HINTZE,
Defendant and Appellant.

No. 8071

Brief of Plaintiff and Respondent

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VERA S. KING,

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vs.

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Defendant and Appellant.

No. 8071

Brief of Plaintiff and Respondent

Introduction

This case was tried before a jury in the court of the Hon. Ray Van Cott. After the completion of the evidence, Judge Van Cott instructed the jury that the evidence established a breach of contract on the part of the defendant and that the defendant had failed to introduce evidence sufficient to constitute a defense to said breach. The jury was therefore instructed that they should return a verdict of nominal damages for the plaintiff and that they should take under consideration

the matter of compensatory damages. The jury returned a verdict of 6c nominal damages and \$4500.00 compensatory damages. From that verdict this appeal was taken by the defendant. As the plaintiff does not agree in its entirety with the Statement of Fact contained in the Brief of the appellant, we will here set forth at some detail the facts as we feel the record shows them to be.

STATEMENT OF FACTS

Sometime prior to the year 1950, Mrs. Vera S. King and Edwin G. Kidder had jointly acquired a mining lease and option on four patented mining claims and one unpatented mining claim located in the White Pine Mining District, White Pine County, State of Nevada. These claims were known as the Ora, West Onetha, the Onetha, the Milwaukee, and the Cedar Ridge No. 1. Mining operations had been in progress for some time on the Ora and Onetha claims (T. 15). The evidence contains the settlement sheets on the ore which had been removed from these claims previous to the 24th day of June, 1950 (Ex. 4). In the late fall of 1949 one P. C. Reynolds, acting on behalf of Mrs. King and Mr. Kidder, employed a Mr. Casselli, a mining engineer residing in the state of Nevada, to locate some mining claims surrounding the claims covered by the mining lease and option above mentioned (T. 16-19). Casselli proceeded to file location notices on 17 claims surrounding the claims covered by the mining lease and option. As winter closed in shortly after the location notices were filed, the location work on these claims was not

done in the winter of 1949 and 1950, and had not been done on the 24th day of June, 1950, when the agreement, which is the subject of this law suit, was entered into between Mr. Kidder and Mrs. King, on the one hand, and F. F. Hintze, on the other (T. 20). However, no intervening rights had been filed.

Mr. F. F. Hintze is a mining engineer who has long been connected with the mining department of the University of Utah. He was associated in business with Kidder. In the spring of 1950, Hintze went to New York City where he talked to some people interested in putting money in a mining venture in the West (T. 202). Hintze evidently knew about the Kidder-King properties from his association with Kidder. Upon his return to Salt Lake City, Hintze contacted Kidder regarding acquiring the mining lease and option above mentioned and the unpatented claims which are above discussed. Kidder expressed his willingness (T. 193-195). Thereupon Hintze contacted Mrs. King to determine whether or not she was willing to sell her interest in these claims (T-170-173). Mrs. King considered the matter for a day or two and then advised Hintze that she was willing. Accordingly, Hintze drew up the agreement and the assignment which is the subject of this law suit (T. 22). Mrs. King went to Hintze's office and there signed the agreement. Kidder signed at the same time.

As is stated in the statement of facts in appellant's brief, this agreement constituted an assignment to Hintze of the mining lease and option which Mrs. King and Mr. Kidder owned. In exchange for this, Hintze agreed to form a corporation and to convey to Kidder and Mrs. King, in exchange

for the mining lease and option, 1,250,000 shares of stock of a par value of 10c per share in said corporation to be formed. The agreement also provided that Mrs. King and Mr. Kidder would execute and deliver to Hintze or to the company to be organized by him a Quit Claim Deed to the unpatented mining claims mentioned above and also to the Charter Oak, a patented claim, and one-third interest in the Monitor Reindeer Survey, also a patented claim. The evidence indicates that Hintze never did follow through on the location and development work on the unpatented mining claims. However, he did proceed to re-locate them, not in the name of Kidder and King, but in his own name (T. 132, 160). The evidence is undisputed that Hintze never formed the corporation.

I. THERE WAS NO BREACH OF THE TERMS OF THE AGREEMENT BY KIDDER AND KING.

(a) THE MINING LEASE AND OPTION WERE IN GOOD STANDING.

In his appeal to this court the defendant, Hintze, has based his entire case on an alleged deficiency in the location work on the unpatented mining claims. He has raised no question on appeal as to the status of the case and option, although in the court below and in all the correspondence which appears in evidence, his original assigned reason for failing to go through with the contract was that the lease and option were in default. Evidently the evidence was so overwhelming on this point that it has been abandoned by Hintze. The respondent brings the point up here only because

of the danger that in concentrating only on the unpatented mining claims, their importance in this transaction will be exaggerated.

As is stated above Mrs. King and Mr. Kidder held a lease and option on the Ora, the Onetha and the Milwaukee claims. These were patented claims on which there was an operating mine. The unpatented mining claims in question had no mine workings on them at all. They surrounded the claims which were subject of the lease and option and were considered of value in the matter only for the purpose of protecting the working claims. Mr. E. W. Newman, a mining engineer employed by American Smelting and Refining Company, was called as a witness by the plaintiff to place a value on the properties conveyed by Kidder and King to Hintze. Mr. Newman stated that in his opinion the total properties, i. e. the lease and option on the working claims and the unpatented claims surrounding them, were worth a minimum of \$25,000.00 on a cash deal or a maximum of \$50,000.00 on an option deal. On cross-examination the defendant asked Mr. Newman to break this figure of \$25,000.00 down as between the lease and option, which was purchased, and the unpatented claims surrounding them. Mr. Newman stated that he was unable to break the figure down. However, he did state that in arriving at his minimum figure of \$25,000.00 he had given major consideration to the lease and option (T. 78). He stated that the showings from the Ora mine were very favorable. He stated that he had not even inspected the grounds on which the unpatented mining claims were located and had assigned value to them only because they surrounded and

protected the claims subject to the lease and option which were actually being worked. Therefore, the court should keep in mind that even if it were true, as we deny, that the plaintiff had no property interest in the unpatented mining claims, still there was no failure of consideration under the contract because of the fact that the major element of value in the conveyance from Kidder and King to Hintze was the mining lease and option on the operating mine, which the defendant evidently now admits was in good standing as he has raised in this court no question as to its validity.

(b) THE PLAINTIFF HAD A PROPERTY RIGHT IN THE UNPATENTED MINING CLAIMS WHICH COULD BE CONVEYED BY QUIT CLAIM DEED.

The appellant's entire appeal is based upon his contention that Mrs. King and Mr. Kidder had no right at all in the unpatented mining claims and that there was therefore a breach in the contract on their part which excused performance on his part. His entire brief is devoted to this point. Even if Hintze's position that Kidder and King had no property right in the unpatented mining claims were true, that would still not constitute a defense to the action by Hintze for reasons that will be discussed in the next succeeding section. However, because respondent does not wish the court to feel that we acknowledge this point to be well taken, we wish to discuss the matter here.

Evidently the contention of the appellant in regard to the unpatented claims was raised by him in the case as an after thought. The evidence shows that he was approached

a number of times regarding the formation of the corporation, and always excused his non-performance on the ground that he was busy, that he did not have sufficient money, and later on the ground that the lease and option was in default. Never, at any time up to the time this action was brought did he raise the point that there was anything wrong with the unpatented mining claims. There is in evidence correspondence between Mrs. King and Hintze and between counsel in this case. Hintze attempts to justify his failure to form a corporation, but nowhere in this correspondence does there appear any reference to any invalidity of the unpatented mining claims. Furthermore, in his answer, which was filed on the 18th day of August, 1952, Hintze does not raise any question as to the unpatented mining claims. The sole defense set forth in the Answer and Counterclaim is that the mining lease and option was in default, which position he has now abandoned. It was not until 8 months later, on the 28th day of April, 1953, just 20 days before this case came to trial, that the defendant filed an Amended Answer and Counterclaim in which he raised for the first time the question as to the questionable character of the unpatented mining claims.

Hintze certainly was never misled by Mrs. King as to the condition of these unpatented mining claims. The testimony is undisputed that Mrs. King did not approach Mr. Hintze on the matter but that he approached her. Furthermore, Hintze admits that no representation as to these claims was made by Mrs. King. Reynolds testified, without contradiction, that prior to the time that Hintze prepared the contract here in question, he, Reynolds had told Hintze just what had been

done in regard to the unpatented claims. Certainly, therefore, Hintze, an experienced mining man, could not have been misled. Furthermore, the evidence is undisputed that immediately after the contract was signed, Hintze rather than carrying through on the locations filed in the name of Kidder and King the previous fall, elected to make new filings on the property in his own name, which he did proceed to do. Therefore, even if we were to take the position that the location notices filed by King and Kidder were invalid because of the length of time that had run without the location work being done, still that would not be available to Hintze as a reason for not going ahead with the formation of the corporation as there had been no intervening claims filed and Hintze immediately after the signing of the contract, posted location notices on the land in his own name and could have followed through with the location work had he elected to do so.

The appellant has quoted at length from statutes of the United States and statutes of the state of Nevada relative to the location of lode mining claims. We see no purpose in restating the statutes here, but will refer to them by number as they appear in the brief of the appellant. The United States laws require (30 U.S.C.A. 28) that the location of a lode mining claim must be distinctly marked on the ground so that its boundaries can be readily traced. With this requirement, Mr. Casselli complied in filing the location for Mrs. King and Mr. Kidder. He did erect monuments on the ground and on each monument placed a can and in this can placed the description by metes and bounds of the claim in question.

There is no requirement in the federal law that the four corners of the claim must be actually marked on the ground, nor is this requirement found in the laws of many states. The laws of the state of Nevada, Sec. 4121, do require that the corners be marked. However, in this regard, it may be well to review the steps necessary to locate and patent a lode mining claim. The first step which is taken is the filing of a location, which is done by the erecting of a monument and by the placing on the monument a description of the claim the name of the claimant and other pertinent information. Under the laws of the state of Nevada within 20 days after the posting of the notice of location, monuments are to be erected at each corner and in the center of the claim. Within 90 days after the posting of the notice of location, a discovery shaft should be driven. After the discovery shaft is driven, the claimant may then file his claim for record in the office of the County Recorder. Then after doing the necessary development work and complying with the other requirements under the law, the filing may ripen into a patent. In this case, the monuments were placed and the location notices were properly placed on the monuments. However, it is not disputed that the four corners were not marked out within 20 days, nor is it disputed that the discovery shaft was not sunk within 90 days. Attention of the court, however, is called to the testimony of the witness Reynolds that winter set in immediately after the filing of the location notices. He testified that the claims were at an elevation of some 8,000 feet and that it was impossible to even get to the claims during the time that the snow was on the ground. Obviously, therefore, regardless of what the statutes provide, it would have been a physical

impossibility to follow through with the marking of the corners or with the sinking of the discovery shaft within the time required by the statute. This is the situation that was intended to be taken care of by Section 1563 from the Compiled Laws of Nevada, which reads as follows:

"The location and transfers of mining claims heretofore made shall be established and proved in contestation before the courts, by the local rules, regulations, or customs of the miners in the several mining districts of the territory in which such location and transfers were made."

Reynolds was qualified as an expert and testified that he had filed claims in the same mining district and was acquainted with the customs in the area (Tr. 20). He testified that it was the custom in this area, due to the severe winters, that the time in which to place the corner markings and which to sink a discovery shaft was waived during the period that weather prevented access to the mining property. Such appears to have been a logical rule, and in fact is the rule that has been adopted by the Supreme Court of the state of Utah for this state.

In the case of *Brockbank v. Albion Mining Company*, 29 Utah 367, the court in discussing this very question stated:

"While the boundaries were not fully marked on the day the location notice was posted because the snow then being from 10 to 15 feet deep, it was impractical to do so, still the notice having contained a full description of the claim by courses and distance from the discovery monument where it was posted and the claim being a re-location of one covering the

same ground, the corners of which were yet substantially in place, the location was at least sufficient to entitle a locator to perfect it within a reasonable time or before other parties had acquired rights in the ground."

This case is directly in point with the Brockbank case, except that in this case it was not a reposting on an earlier location where the corners had been marked, however, the full description of the property was contained in the location notice. Anyone desiring to discover the description could have done so. In this case, as in the Brockbank case, it was impossible to locate the corners within the time required because of deep snow. Furthermore, it does not appear that a reasonable time had elapsed after the snow had melted in the spring and before this contract was signed. It should further be pointed out that in this case there had been no rights acquired by other parties. No other claims had been filed on this property. In fact the witness Hintze, himself, after having signed the contract with Kidder and Mrs. King, went out and refiled on the property himself in his own name.

In regard to the effect of mining laws and customs on filing of claims, the following language is found in 36 Am. Jur. 331:

"Sec. 76. Miners' Rules and Customs. The recognition accorded by the Act of 1866 to the rules and customs developed by the miners of the West was not withdrawn when that enactment was superseded, for the present statute expressly declares that subject to certain stated requirements, 'the miners of each mining district may make regulations not in conflict with the laws of the United States, or with the laws of the state

or territory in which the district is situated, governing the location, manner or recording, (and) amount of work necessary to hold possession of a mining claim.' Since these rules and customs have been adopted in most of the mining regions of the United States, it is evident that they constitute a large body of unwritten law which must be given effect in all cases wherein they do not conflict with the statutes.

"It is not necessary that a custom be defined in writing, for it may be binding whether written or unwritten. Moreover, customs of this type are to be distinguished from ancient customs of the common law, which, to have force, must be immemorial and continuous."

The authors of *Corpus Juris* treat the same subject at 58 *Corpus Juris Sec.*, 65, in the following language:

"Sec. 8. At an early day there grew up in the western and southwestern part of the United States certain customs and usages with respect to mining, and the customs and usages and rules and regulations whereby rights to mine were initiated and protected and all rights of liberty and property recognized were generally so fair and equitable that they were ultimately respected and recognized by the courts and regarded as the common law of mining. Under the federal statutes, 30 U.S.C.A. Sec. 28, the miners of each mining district are still authorized to make rules and regulations, not in conflict with the laws of the United States or with the laws of the state or territory in which the district is situated, governing the location of claims, the manner of recording, etc.

"The applicability and effect of particular rules, regulations, and customs are considered *infra* Sections 12-96."

According to Reynolds' testimony, the custom in the White Pine Mining District, due to the geographical location, was that the time requirement as to location of corners and the driving of the discovery shaft was tolled during the period when the land was inaccessible. This provision is not contrary to the laws of the United States nor to the laws of the state of Nevada. Therefore, it clearly appears from the evidence that the time in which to comply with these requirements had not expired.

The courts of Nevada very early recognized the effect of mining customs. Two early cases on this point are *Golden Fleece Gold & Silver Mining Co. v. Cable Consolidated Gold & Silver Mining Co.*, 12 Nev. 312, and *Smith v. North American Mining Co.*, 1 Nev. 423.

(c) FAILURE TO COMPLY WITH TIME REQUIREMENTS IN THE LOCATION LAWS DOES NOT WORK A FORFEITURE IN THE ABSENCE OF AN INTERVENING VALID CLAIM.

The appellant has based his argument on the grounds that Mrs. King and Mr. Kidder failed to comply with the requirement of marking the corners of the claim and driving a discovery shaft within the time required by law and has, without citation of authority or without logical reason, jumped to the conclusion that such alleged failure worked a forfeiture of any rights of Mrs. King and Mr. Kidder to the unpatented mining claims. Even if this court were to hold, contrary to the argument of this respondent in the preceding section, that the corners had to be marked within 20 days and the dis-

covery shaft driven within 90 days, and that the local customs could not be allowed to toll this custom, still there would be no forfeiture of the rights of King and Kidder. There was no intervening filing or location between the date that Casselli placed the location monument and notices and the date of the contract here in question. The first work done on relocation of the claims after Casselli located them in the names of Mrs. King and Mr. Kidder was when the defendant Hintze following the execution of the contract caused them to be located in his own name.

The following language is found in 58 C.J.S., 143:

"A locator or owner of a mining claim may forfeit his claim by not complying with the statute requiring annual labor or improvements to be placed on it, but the forfeiture becomes complete and effectual only when another enters on the ground after the expiration of the time within which the labor may be done, and completes a relocation before resumption of work by the original locator, * * * ."

A similar statement is found in 36 Am. Jur. 357, as follows:

"While it is clear that a failure to do the work is in itself insufficient to affect the locator's title, the courts concur in holding that a valid relocation after such failure will completely extinguish his rights."

There are numerous cases holding that a failure to comply with statutory requirements for the location work within the time limit does not work a forfeiture in the absence of an intervening claim. If no claim intervenes, the locator can pick

up where he left off and proceed with his location and assessment work and need not start again from the beginning.

In the case of *Oliver v. Burg*, 58 Pac. (2d), 245, the Oregon Supreme Court stated:

"A forfeiture does not ensue from the failure to comply with the law. It requires the intervention of a third party and a relocation of the ground before any forfeiture can arise."

The following language is in *Whitwell v. Goodsell*, 295 Pac. 318:

"While the failure to do the assessment work during the previous years 1922, 1923, 1924 and 1925 left the ground open to relocation at any time before the owner resumed work thereon, it did not have the effect of a forfeiture of the claim. The owner, no right of third parties having intervened, had a perfect right to do the assessment work in 1926 and if he did do the assessment work for that year his title is good, not only against all others but against the government itself."

In *Law v. Fowler*, 261 Pac. 667, the Supreme Court of Idaho stated:

"The last ground for nonsuit is not tenable. If plaintiff had shown herself entitled to the possession of the Montezuma Claim by reason of a valid location or by adverse possession for the statutory period, the mere failure to perform the annual assessment work, in the absence of a valid subsequent location of part or all of the same ground, will not work a forfeiture."

See also in this regard:

Rush v. French (Ariz.), 25 Pac. 816.

Emerson v. McWhitter (Calif.) 65 Pac. 1036.

Snowy Peak Mining Co. v. Tamarack & Chesapeake Mining Co. (Idaho) 107 Pac. 60.

Knutson v. Fredlund (Washington), 106 Pac. 200.

Most of the above cases deal with failure to do assessment work. However, it appears that the same rule applies to any stage of the location work. For example, in the California case of *Dripps v. Allison Mines Co.*, 187 Pac. 448, the claimant failed to record the notice of filing in the time required by law and the court held that such failure, in the absence of an adverse filing, did not work a forfeiture of the claim. It appears clear, therefore, that based upon the work which they had done, Mrs. King and Mr. Kidder retained a property right in the unpatented mining claims until such right was cut off by an adverse filing, even if the laws be so construed as to place Mrs. King and Mr. Kidder in default on their location work.

II. MRS. KING AND MR. KIDDER MADE NO WARRANTY AS TO THE UNPATENTED MINING CLAIMS.

Although we have spent considerable time in this brief on the proposition that Mrs. King and Mr. Kidder did have a property interest in the unpatented mining claims, the determination of that question is not necessary to the disposition of this appeal. They conveyed and were required to convey the unpatented mining claims only by Quit Claim Deed and made no warranty whatsoever as to such. It is well established that a Quit Claim Deed implies no warranty of title and conveys only such title as the grantor has, be that a fee title or be it nothing at all.

The following language is found at 16 Am. Jur. 625:

"The decisions are in accord in holding that a quit-claim deed passes all the right, title and interest which the grantor has at the time of making the deed which is capable of being transferred by deed, unless a contrary intent appears, and nothing more. * * * Where the grantor has no interest to convey, his quit-claim will be regarded as merely a release or formal disclaimer, notwithstanding the use of additional words of grant."

The authors of Corpus Juris state at 27 C.J.S. page 181:

"A quit-claim deed is one which purports to convey, and is understood to convey nothing more than the interest or estate in the property described of which the grantor is seized or possessed, if any, at the time, rather than the property itself."

This matter has likewise been passed upon by the Supreme Court of the State of Utah in the case of Nix, et al v. Tooele County, 118 Pac. (2d) 376. The court stated:

"Plaintiffs' title is founded upon quit-claim deeds. Such deeds do not imply the conveyance of any particular interest in property. See section 78-1-12, R.S.U. 1933, as compared with section 78-1-11, R.S.U. 1933. Plaintiffs acquired only the interest of their grantors, be that interest what it may."

In regard to what is conveyed by a Quit Claim deed, the appellant has quoted from American Jurisprudence, but has neglected to state to the court that the sections which he quotes are under the heading "Provisions for conveyance without warranty or with special warranty." 55 Am. Jur. 630.

The appellant has attempted to expand the conveyance of the unpatented mining claims into something more than a quit claim deed first, by attempting to apply other provisions of the contract, and secondly, by attempting to show an intent to give more than a quit claim deed by parol evidence of the circumstances surrounding the signing of the agreement. Let us examine these arguments in the order stated. Paragraph 9 of the contract warrants that there are no outstanding debts, liens or claims against the property. A reading of the section in its context will indicate quite clearly that this provision refers only to the mining lease and option which was the major element of value being conveyed. Hintze first asserted, but then abandoned the assertion that there was some default in the mining lease and option. Had there been, such might have constituted a defense. However, as stated this provision of the statute does not apply to the unpatented mining claims. However, even if it should be construed to apply to the unpatented mining claims, there is no showing of any debts, liens or claims against these unpatented claims. Certainly there were no liens against it. The evidence is also clear that there were no intervening claims filed on these properties. It could not certainly be the contention of the appellant that the government's revisionary claim to any located property not yet patented was warranted against. The very use of the term unpatented mining claims which appears throughout the contract would negative any such construction as this.

Nor does there appear to be anything in the negotiations surrounding the execution of the contract which would indicate that the quit claim deeds were actually intended to war-

rant title. It is true that there was some element of value in the unpatented mining claims. A discovery of open ore showings had been made thereon, although no development work had been done. Their principal value, however, was as protection to the more valuable working claims which were subject to the lease and to the option.

Immediately upon signing the contract two courses of action were open to Hintze in regard to the unpatented mining claims. Either he could proceed with the location and development work based upon the monuments and notices of the location previously filed by Mrs. King and Mr. Kidder, or he could elect to start over with new location notices. This latter he elected to do and proceeded to do. It is evident, therefore, that he considered the quit claim deeds from Mrs. Kidder to these unpatented mining claims as disclaimers so that Hintze himself could start over with location and development work which would eventually ripen into a patent. Although Hintze filed the relocation of the claims in his own name, we must assume, in all fairness to Mr. Hintze, that at the time he later intended to convey them to the corporation to be formed.

III. THERE WAS NO BREACH OF THE CONTRACT ON THE PART OF MRS. KING AND MR. KIDDER.

The assertion of Hintze that he could not form the corporation because of some asserted defect in the unpatented mining claims has a very hollow ring. As pointed out above, he first asserted this reason for not performing in his Amended Answer and Counterclaim filed on the 28th day of April,

1953, almost three years after the execution of the contract. In the meantime he had asserted and abandoned various other alleged reasons for failure to form the corporation. Furthermore, it is obvious that even if Mrs. King and Mr. Kidder had no interest in the unpatented mining claims, the ability of Mr. Hintze to form the corporation was not impaired. By the very fact that the claims were unpatented, Mr. Hintze must have known that in order for the corporation to realize the value of such claims it would have to follow through on location and development work and eventually secure a patent on these claims. As stated above, rather than to follow through on the location notices posted the previous fall, Hintze chose to post new locations in his own name. He was then in the same position, so far as his ability to follow through and secure a patent on the land, as he would have been had the defects in the unpatented claim filings which he alleges to exist not been present.

CONCLUSION

The points assigned to this court for consideration in this appeal are entirely without foundation. Hintze was faced with the fact that he had breached his contract. He found himself forced to abandon his earlier claim that the mining lease and option was in default. He then grasped at the straw of the condition of the unpatented mining claims. As pointed out above, this is not a defense—

First: because the time requirements were waived because of the inclement weather and the work was not in default;

Second: even if the work were construed as being in default, no forfeiture resulted because there were no intervening claims; Third: even if there were no rights in the unpatented claims in Mrs. King and Mr. Kidder, they made no warranty of title and so would not be in default; and

Fourth: whatever the defects in the unpatented mining claims might have been, it did not interfere with the formation of the corporation for the reason that Hintze immediately proceeded to relocate said claims in his own name.

The instruction of the trial court that the plaintiffs should be awarded nominal damages and such compensatory damages as the jury should find they are entitled to was, therefore, well-founded.

Respectfully submitted,

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