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# Marion W. Beckstrom v. Vere Beckstrom and Norman Laub : Reply Brief of Cross Defendants and Respondents

Utah Supreme Court


J. MacArthur Wright; Attorney for Appellant;
J. MacArthur Wright; Attorney for Appellant;
Morris & Bishop; Attorneys for Appellant;
Allen, Thompson, Hughes & Behle; Attorneys for Respondent;

IN THE SUPREME COURT
OF THE STATE OF UTAH

MARION W. BECKSTROM,

Plaintiff and Respondant,

vs.

VERE BECKSTROM and NORMAN LAUB,

Defendants and Appellant.

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NORMAND D. LAUB and BARBARA R. LAUB,

Cross Plaintiffs and Appellants,

vs.

VERE BECKSTROM and ELIZABETH S. BECKSTROM,

Cross Defendants and Respondants.

Case No. 15273

# REPLY BRIEF OF CROSS DEFENDANTS AND RESPONDANTS

Appeal from the Judgment of the 5th
District Court for Washington County,
Hon. Don V. Tibbs, Judge

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Cross Defendants and Respondants, VERE BECKSTROM and ELIZABETH S. BECKSTROM, hereinafter referred to as "VERE BECKSTROM", reply to the points of Cross Plaintiffs and Appellants, hereinafter referred to as "LAUB" as follows:

## POINT I

THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN RULING THAT DEFENDANT, CROSS PLAINTIFF AND APPELLANT NORMAND D. LAUB HAD A DUTY TO INVESTIGATE THE STATUS OF TITLE TO THE PROPERTY, AND THAT HE BREACHED A DUTY IN NOT SO DOING.

Though the Cross Plaintiffs and Appellants believe they had no obligation to investigate the status of the title of the property purchased from VERE BECKSTROM, the Court below ruled that they were sufficiently negligent in failing to do so to justify a mitigation of the damages awarded to them.

In claiming that the trial court erred, LAUB cites Marlowe Investment Corporation vs. Radmall, Leavitt vs. Blohm, Woodard vs. Allen and Naylor vs. Jolley, all of which address themselves to the proposition that a vendor need not necessarily have a good and clear title at the time the contract of sale is made but rather, it is only necessary at the time provided for conveyance under the contract.

VERE BECKSTROM does not argue the validity of that principal of law. However, VERE BECKSTROM does submit that LAUB has confused the issue that is actually involved. The Court below did not address itself to the time that

VERE BECKSTROM is obligated to deliver clear title, but rather to the negligence of LAUB in failing to determine under the facts of this case, that, at the very least, there was another claimant of an interest in the property, one other than VERE BECKSTROM.

Section 57-1-6 of the Utah Code Annotated provides for the recordation of instruments of conveyance in the County Recorder's office of the county in which the property is situated.

Crompton vs. Jenson, 78 U 55, 1 P2d 242, provides that one who deals with real property is charged with notice of what is shown by the records of the County Recorder of the county in which the property is situated.

Hayes vs. Gibbs, 110 U 54, 169 P2d 781, in discussi restrictive covenants appearing of record in the Recorder's office, quotes 66 C.J. P 1128 §962, which states:

> "A purchaser of land is chargeable with notice of all conditions, restrictions, exceptions, or reservations appearing in his claim of title, or concerning which he is put on inquiry.***"

In Davis vs. Kleindienst, 169 P2d 78, an Arizona case, the Court, on page 83, says:

> "The law seems to be settled that a person who fails to exercise due diligence which is within his reach is not a bona fide purchaser."

In the Davis case, Supra, after noting that the record showed numerous acts of obvious ownership, then added

"...were all matters which at least were sufficient to put the Defendant upon notice to make an inquiry. Any reasonable inquiry would have resulted in the disclosure that Plaintiff claimed the tract in question. (Emphasis Added)

LAUB may argue that the recording statutes are only to protect the purchaser against third parties and not from the error or mistake, or even dishonesty of a vendor. However, the cases all indicate that a recorded interest is notice to all people of, at least a claim and under the circumstances of the instant case, it appears that it would be carelessness, at least, and probably outright negligence for LAUB, being charged with notice of MARION BECKSTROM's claims, (by virtue of his being shown in the Recorder's office as a joint owner of the property with VERE BECKSTROM [Tr. 7, LL8-12] ) not to have made inquiry of MARION BECKSTROM as to whether he in fact claimed an interest in the property. LAUB was well aware that MARION had occupied and farmed the property for an extended period of time (Tr. 80, LL25-28) and that knowledge together with the imputed knowledge that MARION BECKSTROM was shown as a tenant in common with VERE BECKSTROM, by virtue of the record, should have caused him to make an inquiry.

LAUB may no doubt insist that, as mentioned before, such imputed knowledge only protects MARION BECKSTROM from losing his interest by VERE BECKSTROM's purported sale to LAUB. As indicated in Appellant's Brief, VERE BECKSTROM

felt MARION BECKSTROM had abandoned his interest and by his acts would be estopped from asserting any claim to the property so that he, VERE BECKSTROM, was perfectly free to sell the property to LAUB. However, assuming the Court rules against VERE BECKSTROM on that issue, then VERE BECKSTROM was wrong and he could not convey at least one-half of the property to LAUB.

It would appear only logical, reasonable and equitable that LAUB had some responsibility to determine, when the record showed MARION a tenant in common with VERE, that that may well be the case; and make any inquiry of both MARION and VERE. If, after that inquiry he determined to gamble upon VERE being correct in his assumption that MARION no longer had a legal or equitable interest in the property, he would have done so with full understanding of the risk he was taking.

The cases say LAUB is charged with knowledge of the status of the recorded title and if he did not inquire of the record, or make an investigation of the circumstance surrounding the information found in the record, he must suffer the consequences.

In the situation of the instant case, Cross Defendan and Appellants, VERE and ELIZABETH BECKSTROM, submit that eve though they believed the trial court to have been in error in not finding that the factor of an equitable estoppel existed

against MARION BECKSTROM's claim, they do sincerely submit that the trial court did not err in finding, under the circumstances, that LAUB had a duty to make an inquiry into the status of the title (especially in view of the status of the record title and LAUB's own personal knowledge of the circumstances of the property in question) and that having failed to do so is prohibitive to him from entitlement to the unreasonable and almost confiscatory claim against VERE BECKSTROM which he makes in demanding that, not only should VERE BECKSTROM forfeit any interest in the property, but pay LAUB damages in an amount in excess of $19,000.00.

## POINT II

THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN IT FAILED TO APPLY THE PROPER MEASURE OF DAMAGES AND FAILED TO AWARD TO APPELLANTS LAUB, DAMAGES IN THE AMOUNT OF $19,767.13.

LAUB argues in his Brief that because the property in question has had an amazing record of appreciation in value from $20,000.00 in December, 1972 (Tr. 96, LL23-26) to $70,000.00 in March, 1977 (Tr. 97, LL20-28) he should be entitled to one-half of the current market value of the property in damages against VERE BECKSTROM if VERE BECKSTROM cannot deliver title to the entire parcel. That amounts to total damages to VERE BECKSTROM of loss of one-half of the property to MARION BECKSTROM, and loss of the other half to LAUB plus the sum of $35,100.00, or over $15,000.00 more than LAUB contracted to pay VERE BECKSTROM just 5 years ago

for all of the property.

LAUB cites Bunnell vs. Bills, 368 P2d 597, 13 Utah 2d 83, and Andreason vs. Hansen, 335 P2d 404, 8 Utah 2d 370, as the law in Utah--the point being that the purchaser is entitled to the "benefit of his bargain".

Certainly the Bunnell case Supra and the Andreason case Supra would seem to suggest that to be the law in Utah.

77 Am Jur 2d 648, Vendor and Purchaser §519, as cite by LAUB states the principal as follows:

> "...these statements are substantially the same in effect and resultes in giving the purchaser as damages the benefit of his bargain, in case the land is worth more than the price agreed upon."

However, Am Jur qualifies that somewhat by continuin

> "This is very generally recognized where the vendor cannot be said to have acted in good faith, as where, after the making of the contract disables himself by his own act or neglect from being able to convey, or where, having the ability to do so, he refuses to convey because of an advance in the value of the land or otherwise, or where he had knowledge of his want of or the defects in his title. When, however, the vendor has acted in good faith but is unable to carry out the contract because of some defect in the title, recovery by the purchaser for loss of his bargain is denied by the weight of authority." (Emphasis Added)

Section 522 of the same treatise expounds upon that theme as follows:

> "in many jurisdiction, when the vendor is unable to convey, a distinction is made regarding the general damages

> recoverable by the purchaser under a land contract, between cases where the vendor acts in good faith in entering into the contract, and those in which good faith is wanting. While it is generally recognized that the purchaser is entitled to recover the difference between the value of the land and the agreed price, to recover for the loss of his bargain, where the vendor cannot be said to have acted in good faith, it is held by many courts, in cases where the vendor does act in good faith, that the measure of damages is the amount of the purchase money paid, with interest, thereby denying to the purchaser any recovery for the loss of his bargain." (Emphasis Added)

The Bunnell case, Supra says, pertaining to the issue of damages, merely,

> "The measure of damages where the vendor has breached a land sale contract is the market value of the property at the time of the breach less the contract price to the vendee."

Nothing more is said concerning the theory of that pronouncement. No analysis of the rationale of that determination is made. Nothing is said in the case about whether that pricipal is hard and fast or whether it applies only where the vendor did not act in good faith. However, the facts, in that case, were such that would certainly have justified the Court in finding that the vendor did not act in good faith and the Court's decision might well be assumed to have been predicated upon that circumstance even though it did not enunciate a distinction based upon bad faith of the vendor in the body of its opinion.

The Bunnell case merely cited for authority the

Andreason case, Supra. However, even though the Andreason case did say,

> The proper measure of damages would be the difference between the Defendant's offer and the actual market value of the property..."

it was done without citation of authority or analysis of any kind. Nevertheless, the Court, in that case, did spend much of its written opinion discussing improprieties on the part of the vendor and finally decided the case, actually, upon the narrow issue of liquidated damages.

VERE BECKSTROM respectfully submits that neither the Bunnell nor the Andreason cases, Supra stand solidly for the principal that regardless of the circumstances the purchaser is entitled to the "benefit of his bargain" in Utah. Rather, it is respectfully submitted that the precise issue of whether the principle applies only when the vendor acts in bad faith is still open in Utah.

Assuming that issue is open, the instant case would seem to provide an excellent example why the law should make a distinction between the situation where a vendor acts in bad faith and where he acts in good faith.

An early Washington State case, Morgan vs. Bell, 3 Wash. 554, 28 P 925, provides an excellent analysis, commencing on page 932, of the arguments pro and con and concludes the better rule is that one who acts in good faith is entitled to a mitigation of damages as opposed to a vendor

who does not act in good faith.

On page 933, the Court notes, after referring to several cases:

> "In these cases the line has been repeatedly drawn between parties acting in good faith, and failing to perform because they could not make a title, and parties whose conduct is tainted with fraud or bad faith."

After a fairly lengthy discussion of the cases, the Court illustrated why it adopted the rule that it did:

> "The case at bar aptly illustrates the injustice which the eminent Justice sought to prevent. If Plaintiff's allegations are true, the contract was for sale of lands which in December were worth $20,000.00 and in April following were worth $150,000.00; and the result is that for the pitiful sum of $500.00 the Defendant, who was acting in perfect good faith, is called upon to yield up $134,500.00 in response to Plaintiff's investment of $500.00 for four months. If such a rule were adopted in this western country, where what is cheap agricultural or farming land one year is valuable city property the next and where the laws by reason of the formative condition of the state, are unsettled and unadjudicated, a conveyance of land would be a perilous transaction, which a prudent man might well hesitate to engage in."

The same might be said about a time when inflation causes rapid appreciation in land values or in which ever increasing scarcity of water creates enormous increases in value of otherwise valueless land which is lucky enough to have a water right appurtenant to it, as is the situation in the instant case.

Though the situation is not quite as extreme in

this case as the example provided in the Morgan case Supra, nevertheless, it does point up a severe hardship that may be imposed upon a vendor who cannot provide title at the time provided for conveyance, if the Bunnell and Andreason cases are interpreted to establish the law in Utah as disregarding good faith on the part of the vendor in mitigation of damages.

The final point is, of course, necessarily that the vendors, in this case, VERE BECKSTROM and ELIZABETH BECKSTROM, must be found to have acted in good faith in selling to LAUB.

It is respectfully urged that regardless of the outcome of the appeal in this case by VERE BECKSTROM from the judgment below awarded against him and to MARION BECKSTROM, VERE BECKSTROM certainly did not act fraudulently or in such patent bad faith as to justify the penalty that awaits him if LAUB were to be successful in his appeal.

To illustrate the good faith of VERE BECKSTROM, one would have to reiterate the entire appeal brief previously submitted by him dealing with the doctrine of equitable estoppel and he does respectfully refer the Court to that entire Brief.

Suffice it to say that VERE BECKSTROM, not being educated in the niceties of the law, added up the many factors before him: his having paid almost the entire cost of the land; his brother having abandoned it many years before; VERE, himself, having paid all the taxes on it, both before and after MARION's abandonment of it; his having provided

improvements (digging a new well, among others); VERE having operated it for several years until his stroke prevented him from doing so any longer after MARION abandoned it; his having thereafter taken the responsibility of leasing it; MARION having earlier tried to get him to sell it, simply to avoid losing it by foreclosure as was done with companion property obtained under similar circumstances; and finally, MARION having refused to pay additional taxes when due with knowledge of what the possible consequences of failure to pay them would be (Tr. 30, LL10-13) and at least, according to VERE, saying "Let the state take it for taxes". All of these factors led VERE to believe, rightly or wrongly, that he was at that time the sole owner of the property and had every right to sell the property and convey good title to it to LAUB.

If VERE BECKSTROM was wrong, he will be advised by this Court he was wrong, depending upon the results of his appeal against the judgment awarded below to MARION BECKSTROM, but even if that be the result, it hardly seems a case where one might say his act of selling the property in question to LAUB was not done in good faith and that consequently not only must he lose his investment in money, time and hard effort which he has made in the property over many years, but must also pay out of his pocket to LAUB an additional $19,767.13 in what can only be characterized as punitive damages against him.

This seems particularly true when, as the Court below found, LAUB had a duty of inquiring and investigating and thereby determining the status of the title.

It would be the best of two worlds if he could say to himself, "I know there is another claimant of an interest in the property, but I won't do anything about it to protect myself. If that claimant's interest turns out to be valid, I'll at least get my money back plus interest out of the seller, but if the price should appreciate in the meantime, I'll get damages from him as well. So I can't lose!"

One should not be able to stand idly by, in the face of notice of a possible problem and make an exhorbitant profit out of that inaction.

## POINT III

THE COURT ABUSED ITS DISCRETION AND COMMITTED REVERSIBLE ERROR BY AWARDING APPELLANTS LAUB ONLY $500.00 FOR THE SERVICES OF THEIR ATTORNEY.

LAUB argues that the Court below abused its discretion in awarding the sum of $500.00 rather than $800.00 as requested by him.

20 Am. Jur. 65, Costs §78 states that:

> "In the absence of an abuse of discretion, the amount awarded by the trial court as an attorney's fee will not be disturbed,---"

The Court below had the advantage of knowledge of the length of the trial, of observing counsel, reviewing th pleadings and having an intimate understanding of the servi

accordingly.

VERE BECKSTROM, in good faith, believed his brother would not claim the property - even that his brother, MARION, in fact, had no legal right to an interest in the property even if he did later claim an interest. But in spite of VERE BECKSTROM's judgment, LAUB certainly had some obligation to determine whether or not that judgment was reliable. He should not simply sit back and benefit from VERE BECKSTROM's mistake, if, indeed, it was a mistake, when he himself had an opportunity and a duty to make his own inquiry and judgment.

The Cross Defendants submit that there was, at least, sufficient obligation on LAUB's part to mitigate the amount of damages if not sufficient to exonerate them entirely.

Furthermore, the Cross Defendants and Respondants submit that the apparent holding of the Bunnell and Andreason cases, Supra, should be clarified and refined to establish the law in Utah to be that the vendor is entitled to "the benefit of his bargain" only when the vendor acts in bad faith, as has been expounded by many cases throughout the nation on the subject.

Should the judgment against VERE BECKSTROM in favor of MARION BECKSTROM be upheld by the Court, VERE BECKSTROM then urges that this honorable court either reverse and award LAUB only the refund of his money paid, plus interest or in the alternative sustain the award handed down by the lower court

rendered. It could hardly be deemed, as a matter of law, that the Court abused its discretion in awarding $500.00 rather than $800.00 under all the circumstances.

## POINT IV

APPELLANTS LAUB ARE ENTITLED TO AN ORDER OF THIS COURT AWARDING APPELLANTS ATTORNEY FEES ON APPEAL.

As LAUB states, an award of an attorney's fee on appeal is discretionary.

Under the circumstances of this case, the multiple appeals and the issues involved, it is respectfully submitted that it would not be in the interest of justice to award an attorney's fee on appeal to LAUB against the Cross Defendants, VERE and ELIZABETH BECKSTROM.

## CONCLUSION

Cross Defendants, VERE BECKSTROM and ELIZABETH BECKSTROM respectfully submit that--in view of his personal knowledge and acquaintance with both MARION BECKSTROM and VERE BECKSTROM and in view of the constructive knowledge of the fact that the record title in the County Recorder's office showed MARION BECKSTROM to have a tenancy in common interest in the property, and in view of the fact that it is almost inconceivable that one in this day would obligate himself under a contract to purchase real property without making some nominal and traditional investigation into the status of the title--that LAUB had a responsibility to determ what the record clearly showed and to conduct his affairs

against VERE BECKSTROM in favor of LAUB.

DATED this 12th day of September, 1977.

RESPECTFULLY SUBMITTED:

J. MacARTHUR WRIGHT,
Attorney for Cross Defendants
and Respondants