

1997

Glen D. Wardle and Thora Wardle v. Lester Romero : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

GLEN D. WARDLE and THORA
WARDLE,

Plaintiffs-Appellees,

v.

LESTER ROMERO,

Defendant-Appellant.

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)

Case No. 970139-CA

Priority No. 15

Priority No. 15

LESTER ROMERO,

Defendant-Appellant.

BRIEF OF PLAINTIFFS-APPELLEES

APPEAL FROM A DECISION OF THE
SECOND DISTRICT COURT, DAVIS COUNTY, STATE OF UTAH
HONORABLE RODNEY S. PAGE

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**UTAH COURT OF APPEALS
BRIEF**

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DOCKET NO. 970139-CA

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IN THE UTAH COURT OF APPEALS

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| GLEN D. WARDLE and THORA |) | |
| WARDLE, |) | Case No. 970139-CA |
| Plaintiffs-Appellees, |) | |
| v. |) | Priority No. 15 |
| LESTER ROMERO, |) | |
| Defendant-Appellant. |) | |

BRIEF OF PLAINTIFFS-APPELLEES

JURISDICTION OF THE COURT

The Court of Appeals has appellate jurisdiction in this matter pursuant to Utah Code Annotated as amended section 78-2a-3(2)j and section 78-2-2(4).

STATEMENT OF THE ISSUES FOR REVIEW

1. Whether the defendant has marshalled all the evidence in support of the trial court's findings, as he must, and then has demonstrated that despite this evidence, the trial court's findings are so lacking in support as to be against the clear weight of the evidence, thus making them clearly erroneous on the issues that there was no tolling of the running of the statute of limitations by any payment after June 1965.

2. Whether the trial court erred in its conclusion of law that the defendant's counterclaim is barred by the statute of

limitations contained in Utah Code Annotated sections 78-12-1, 78-12-23, 70A-3-118, and 70A-3-122.

Appellees agree with the appellant's statement of the standard of review of conclusions of law for correctness, and add the case of Scharf v. BMC Corp., 100 P.2d 1068, 1070 (Utah 1985).

DETERMINATIVE CONSTITUTIONAL PROVISIONS
STATUTES, ORDINANCES, AND RULES

The appellant has listed most of the determinative statutes and rules, however, the cited Utah Code Annotated section 70A-3-122 was repealed and the substance thereof is contained in the 1993 amendment designated as section 70A-3-118, Statute of Limitations, which provides as follows:

(1) Except as provided in Subsection (5), an action to enforce the obligation of a party to pay a note payable at a definite time must be commenced within six years after the due date of dates stated in the note or, if a due date is accelerated, within six years after the accelerated due date.

(2) Except as provided in Subsection (4) or (5), if demand for payment is made to the maker of a note payable on demand, an action to enforce the obligation of a party to pay the note must be commenced within six years after the demand. If no demand for payment is made to the maker, an action to enforce the note is barred if neither principal nor interest on the note has been paid for a continuous period of 10 years.

(3) Except as provided in Subsection (4), an action to enforce the obligation of a party to an unaccepted draft to pay the draft must be commenced within three years after dishonor of the draft or 10 years after the date of the draft, whichever period expires first.

(4) An action to enforce the obligation of the acceptor of a certified check or the issuer of a teller's check, cashier's check, or traveler's check must be commenced within three years after demand for payment is made

to the acceptor or issuer, as the case may be.

(5) An action to enforce the obligation of a party to a certificate of deposit to pay the instrument must be commenced within six years after demand for payment is made to the maker, but if the instrument states a due date and the maker is not required to pay before that date, the six-year period begins when the demand for the payment is in effect and the due date has passed.

(6) An action to enforce the obligation of a party to pay an accepted draft, other than a certified check, must be commenced within six years after the due date or dates stated in the draft or acceptance if the obligation of the acceptor is payable at a definite time, or within six years after the date of the acceptance if the obligation of the acceptor is payable on demand.

(7) Unless governed by other law regarding claims for indemnity or contribution, an action for conversion of an instrument, for money had and received, or like action based on conversion, for breach of warranty, or to enforce an obligation, duty, or right arising under this chapter and not governed by this section must be commenced within three years after the cause of action accrues.

STATEMENT OF THE CASE

Appellees agree with the appellant's statement as to the nature of the case and course of proceedings. However, the trial court recited his findings of fact in great detail from the bench in support of his ruling and the formal Findings of Fact substantially incorporate the oral findings of fact.

STATEMENT OF FACTS

The Findings of Fact attached to Appellant's brief (5 pages) are the facts adopted by the Appellees as the appropriate statement of facts rather than the Appellant's capsule statements which include facts not found by the trial court.

We reference the record (R) and transcript (TR) for evidence supporting the trial court's findings as a supplemental statement of facts.

There were three witnesses called to testify: Thora Wardle and Maxine Romero for the plaintiff and Lester Romero for the defendant. Counsel for Lester Romero in opening statement told the court that "The statute of limitations is the primary issue in this case." (TR 8).

Thora Wardle testified that she and her husband received a warranty deed to the house on the lot described in Exhibit 1, dated March 15, 1960, and that she has resided in that house since that time. (TR 11). She identified a conformed copy of a mortgage plaintiffs signed to Lester and Maxine Romero for \$5,400 (TR 14) which is dated March 14, 1960 (Exhibit 3). She was shown Exhibit 14, a promissory note dated March 1, 1960, in the sum of \$6,000, which she said she never signed and she said the obligation to Romeros was \$5,400 not \$6,000. (TR 23-24) She also denied signing a Trust Deed, Exhibit 16, for \$6,000. (TR 24). Appellees had supplied statutory references which indicated that the statute from which the Trust Deed form was taken had not been passed in 1960. (See plaintiff's memorandum in support of motion for partial summary judgment). (R 147-157). She also denied signing the quitclaim deed, Exhibit 16, which Romero claimed he was given as security.

Mrs. Wardle was shown Exhibit 19, consisting of copies of three pages on account-lined paper captioned in handwriting

"Wardle Payments," which she had not seen before the pending litigations. Romero testified that Exhibit 19 is a copy taken from his columnar pad which was marked as Defendant's Exhibit 4. A copy of Exhibit 19 is attached in the addendum to this brief and is the same as Exhibit 4 except for the headings on the first page. A copy of the first page of Exhibit 4 is included in the addendum for a comparison which shows that the Exhibit 19 supplied to plaintiffs' counsel included headings not appearing on the original Exhibit 4. Romero testified that Exhibit 19 is a photo copy of Exhibit 4. (TR 82). The entries on Exhibit 4 begin in 1960 and the last entry is 1992. Although Romero testified that he made the entries of payments in the months in which payments were made, he only noted the month, not the day of payment. The payment in 1985 does not even show a month. It only shows: "1985 Horsey Knowlton sent me 100." Romero explained that Knowlton retained the \$100 for a fee. (TR 87).

Although Exhibit 19 and Exhibit 4 both show the last payment as being made in 1992, Romero said he found out he was probably a year off when his attorney told him to check the records, but in absence of records, Romero said his memory was that the payment was in 1991 not 1992. (TR 90-91). Assuming a payment in 1985, if no other payment were made until 1992, the six-year statute of limitations would have run, which is likely the reason he abandoned the 1992 entry in favor of his memory.

Mrs. Wardle testified that the last payment made by her or her husband was in 1965. (TR 29 and 122) She testified on cross

examination that neither she nor her husband knew Horace Knowlton and never made any payment to him. (TR 117-118).

SUMMARY OF ARGUMENT

The appellant's sole argument on appeal is a challenge to the trial court's finding no payments after 1965 tolling the statute of limitations. The court, on appeal, does not weigh the evidence, de novo, and great deference is given to the trial court's findings, especially when they are based upon an evaluation of conflicting live testimony. Appellant has not marshalled the evidence in support of the trial court's findings and has essentially reargued the factual case in a light most favorable to appellant's case, ignoring the evidence supportive of the trial court's findings.

ARGUMENT

POINT I

RULE 52(a) UTAH RULES OF CIVIL PROCEDURE PROVIDES
THAT FINDINGS OF FACT, WHETHER BASED ON ORAL OR
DOCUMENTARY EVIDENCE, SHALL NOT BE SET ASIDE
UNLESS CLEARLY ERRONEOUS

Rule 52(a) Utah Rules of Civil Procedure and the cases construing the "clearly erroneous" rule, place a great burden upon the party who challenges the trial court's findings to marshal all the evidence in support of those findings and then demonstrate that despite this evidence, the trial court's findings are so lacking in support as to be against the clear weight of the evidence, thus making them clearly erroneous.

Matter of Estate of Bartell, 776 P.2d 885, 886 (Utah 1989);

Butler Crockett v. Pinecrest Pipeline, 909 P.2d 225, 228 (Utah

1985).

Appellant acknowledges the clearly erroneous rule and instead of marshalling the evidence supportive of the findings, substitutes his opinion of the weight of the evidence and credibility of witnesses. Application of the clearly erroneous rule does not eliminate the traditional deference afforded a fact-finder to determine the credibility of witnesses. See State v. Wright, 744 P.2d 315, 317 (Utah App. 1987). The supreme court has stated: "It is not our function to determine the credibility of conflicting evidence or the reasonable inferences to be drawn therefrom." State v. Bagley, 681 P.2d 1242, 1244 (Utah 1984).

Rule 52 (a) also provides that "due regard shall be given to the opportunity of the trial court to judge the credibility of witnesses." The clearly erroneous standard is applicable in equity cases. Bellon v. Malnar, 808 P.2d 1089, 1092 (Utah 1991).

POINT II

APPELLANT HAS NOT ARGUED THAT THERE IS AN ABSENCE OF EVIDENCE SUPPORTING THE COURT'S FINDINGS AND THERE IS SUFFICIENT EVIDENCE TO SUPPORT THE FINDINGS

Appellant concedes that there was evidence supporting the trial court's findings that no payments were made after 1965, but argues that the finding is against the "great weight of the evidence." In Reid v. Mutual of Omaha Ins. Co., 776 P.2d 896, 900 (Utah 1989), the court held that:

Here, the evidence provides adequate support for the findings. We certainly cannot say that they are against the clear weight of the evidence, especially when we give "due regard" to the trial court's opportunity to assess the credibility of the numerous

witnesses called by each party.

The "documentary evidence," plaintiff's Exhibit 19 and defendant's Exhibit 4, are the record which Romero testified he kept of payments made by Wardles. (See appendix for Exhibits). The trial court analyzed this record, cited discrepancies and found "that this payment record is not worthy of any credibility" (See Findings of Fact, pp 3-4).

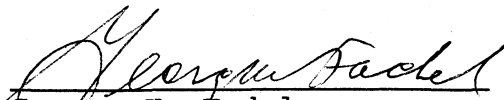
A major discrepancy in Exhibits 4 and 19, affecting credibility was in the payment shown as "1992 Glen Wardle payed me 100" on Exhibit 4 and the addition of the word "cash" after 100 on Exhibit 19. Exhibit 19 was the copy provided to plaintiffs' counsel whereas Exhibit 4 is the original. At trial, Romero testified that the "1992" notation should have been "1991" which he determined by recollection after his attorney asked for verification of this 1992 year. The strong inference to be drawn is that he changed to the year "1991" because the record of the previous payment was "1985" and if the next payment were "1992," it would be a seven-year lapse creating another legal basis for ruling that the statute of limitations of six years barred the claim.

The trial court properly relied upon the testimony of Mrs. Wardle and her daughter, Maxine Romero, that no payments were made after 1965. Once the statute bars the claim, the Statute of Limitations cannot be revived or extended by partial payment. See State Bank of Southern Utah v. Troy Hygro Systems, 894 P.2d 1270, 1276 (Utah App. 1995).

CONCLUSION

The decision of the trial court should be affirmed.

Dated this 4th day of June, 1997.


George K. Fadel
Attorney for Appellees

CERTIFICATE OF MAILING

I certify I mailed two copies of the Appellees' brief to Mr. James R. Wilson, Attorney for the Appellant, 9 Exchange Place, 1100 Boston Building, Salt Lake City, Utah 84111 on this 4th day of June, 1997.


George K. Fadel

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CASE NO. 94-17-2
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1985

Honey Kroulter
sent me

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Ken Word
forgot me
(spdy)

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REPRODUCIBLE BY ALL OFFICE COPYING MACHINES



WILSON JONES

COLUMN WRITE®
COLUMNAR PAD

make entries easier... read entries faster...
avoid "decimal slip"



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