1977

Carna L. Peterson v. David H. Carter and Janet S. Carter et al : Reply Brief of Plaintiffs-Appellants

Utah Supreme Court

IN THE SUPREME COURT

OF THE STATE OF UTAH

CARNA L. PETERSON, by LARRY BROADHEAD, guardian,	:	
Plaintiffs-Appellants,	:	
vs.	:	
DAVID H. CARTER and JANET S. CARTER,	:	Case No. 15,310
Defendants-Respondents,	:	
STATE OF UTAH, by and through UTAH STATE DEPARTMENT OF SOCIAL SERVICE,	:	
Intervenor.	:	

REPLY BRIEF OF PLAINTIFFS-APPELLANTS

APPEAL FROM JUDGMENT OF THE FOURTH JUDICIAL
DISTRICT COURT, STATE OF UTAH
JUDGE J. ROBERT BULLOCK

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ARGUMENT ON APPEAL

This appeal contests the findings of the Trial Court that Carna Peterson understood the transaction with the respondents. The respondents allege in their brief that the Trial Court correctly decided the issue of Carna Peterson's competency, and further argue that the appellant lacks standing to bring this appeal. This brief is necessary to outline those additional factors which should be considered by this Court showing the great weight of evidence against the Court's finding, and to answer the allegations raised by the respondents' attack on appellant's standing to bring this appeal.

POINT I

THE WEIGHT OF THE EVIDENCE IS CLEARLY AGAINST THE TRIAL COURT'S FINDING THAT CARNA PETERSON UNDERSTOOD THE TRANSACTION WITH THE RESPONDENTS.

The respondents argue in their brief that Carna Peterson coherently expressed her purpose in selling the subject property. They would have the Court believe that the transaction proceeded smoothly without incident and that Carna Peterson and "her" attorney, Milton Harmon consummated the sale of her home over a period of two days.

A close reading of the record on appeal, however, would indicate that the respondents had "their" attorney, Milton Harmon, present to oversee the transaction. (R.76). The attorney was paid by the respondents. (R.173). It is readily conceded by the appellants that Carna Peterson trusted the attorney, (R.84), but when the later actions of the only other independent witness Don Gowers are examined, it is clearly shown that something was indeed wrong with the transaction.

Don Gowers testified under oath that he was induced to come to the rest home by the respondents to merely talk with Mrs. Peterson about the lien. (R.132). He further testified that he had no knowledge that any deed was going to be signed. (R.132). Finally, due to the fact that Don Gowers felt that Carna Peterson was incapable of handling her own business affairs he then left the room wanting no part of the transaction. (R.132). Immediately after leaving the

room, the respondent, David Carter, cornered Don Gowers and told him that he should not contact the family of Mrs. Peterson about the purchase because, as Mr. Gowers put it: "he didn't want me to mess this purchase up like I did the previous one." (R.136). If indeed the transaction were done in a truly arms length fashion with a competent person, there would have been no need for the respondent, David Carter, to approach Don Gowers with that type of veiled threat, nor would there be any need for him to leave the room of the transaction, wanting no further part of it.

Respondents would further have the Court believe that when Milt Harmon was questioning Carna Peterson regarding her intent to sell the property, that the conversation proceeded in a smooth manner with Mrs. Peterson immediately responding to the questions being put to her. There is nothing in the evidence, however, that supports that contention. (R.77-78). Further, the respondents argue that the day of the execution of the deed, Carna Peterson must have had one of her lucid intervals. The testimony of independent witnesses, however, is contrary to that implication. For example, all of the witnesess testified that there had been very little, if any, deterioration of her mental state from the time of the transaction to the time of her testimony in Court. (R.57, 119, 129). Mrs. Garfield testified that Carna Peterson could carry on a conversation during her bright periods but she was never really alert. (R.57). Kathleen Broadhead testified that she could carry on a conversation

at times but that if she wrote you a letter at that same time, it didn't make any sense. (R.66). Juanita Crawford testified that on her bright days she could eat breakfast and could care for her personal hygiene, (R.118), but was not competent in September of 1975 to handle a real estate transaction. (R.117). Elsie Johnson further testified that she could carry on a conversation on her bright days, (R.130) but was incapable of handling financial matters in September of 1975. (R.128). These witnesses testimony have forceful impact when it is considered that Carna L. Peterson was declared incompetent on the 13th of November, 1975 by order of the Fifth Judicial District Court. That hearing, with Judge Harlin Burns sitting as Judge in Probate No. 1,896 was a mere two months after the execution of the deed and the Trial Court was requested to take judicial notice of that finding. (R.256).

The inconsistencies of Milt Harmon's testimony show the misplaced reliance of the Court upon this witness. For example, Milt Harmon testified that the deed was executed on September 3. (R.85). The deed, however, clearly reflects that it was signed on September 2, 1975 and recorded the next morning. (E P-3). When the witness was confronted with this inconsistency, he testified that he was hazy on the date because of the intervening Labor Day holiday. (R.83). On cross-examination, however, this inconsistency became even more obscure when he testified that, "I do recall that

there was a day intervening and that I put a date on this deed that it says the 2nd, and I'm sure that it's now my recollection as it wasn't until the 3rd." (R.90). This was in response to being questioned about the fact that Labor Day was on Monday, September 1, and thus of necessity there would have to have been a three day intervening holiday if this testimony were to be believed.

When asked whether he knew what the respondents were paying for the house, Milt Harmon categorically answered that he did not know what the respondents were paying for the house only that $1,000.00 was going to the family and the balance of the money would go to the welfare department to satisfy their lien. (R.88-89). However, when cross-examined about plaintiffs' Exhibit P-4, which clearly indicated that he had received notice of the purchase price sometime shortly after August 29, 1975, the witness admitted that he had recalled getting the letter and discussed the matter with the respondents. (R.99-100. Compare R.245).

Mr. Harmon further testified that he called Anna Broadhead to tell her of the transaction on September 2, 1975. (R.79). He claims that Mrs. Broadhead called him back either that evening or the next morning. Linda Garfield, however, testified that Milt Harmon called Anna Broadhead on the 3rd of September and she was present when that phone call took place. (R.50. Compare R.137). This is critical since that phone call would have been after the deed was

signed and recorded.

Milt Harmon testified that LeRoy Jackson and he had a phone conversation demanding return of the property and he conveyed that message on to the respondents. (R.91-92). The respondent David Carter testified, however, that he had never had that conversation with Mr. Harmon and was unaware of any problem until he received the demand letter from the plaintiff's attorney, marked as plaintiff's Exhibit 7. (R.177, R.241, R.239). This testimony was further weakened by his admission that he felt: "That before the deed had been signed and the transaction completed that the family should be contacted." (R.90). In addition, instead of having Mrs. Peterson executing the affidavit of survivorship which became part of plaintiffs' Exhibit 6, Milt Harmon had the respondents execute the same. (R.252. Compare Exhibit P-6).

The respondents argue that Larry Broadhead, as spokesman for the family, clearly authorized and gave his blessing to the completion of the transaction. However, Mr. Broadhead clearly stated that:

Q And you said you had no objections, is that correct?

A I said I had no objections, that my mother was handling it. At this time I had no interest in it, and at that time I was not guardian of Carna Peterson.

Q Yes. But at that time you didn't have any objection and you told him that?

A I told him that I had no say on the matter and that he would have to go through my mother.

Q Well, did you object to it at that time?

A At that time I didn't. I didn't object to him talking to my mother, no. (R.15).

In fact, the respondents testified that Larry Broadhead was the only member of the family that they contacted regarding the property and left it up to Milt Harmon to contact Anna Broadhead. (R.172).

Respondents place a great deal of reliance upon the Oklahoma Supreme Court case of Tate v. Murphy, 202 Okl. 671, 217 P.2d. 177 (1950). Although not controlling in the State of Utah, that case does show the type of things that the Court may look at to determine capacity. In Tate, for example, the purported incompetent person continued to transact her business affairs contrary to the situation presently before the Court. The Court found she was competent because she:

> ". . . paid her doctor and hospital bills, her grocery bills, gas bills, insurance premiums and taxes, all by check. She collected her rents and deposited them in the bank and placed over $1,000.00 on time deposit. She had several Wills prepared . . . " 217 P.2d. at 181.

This is in direct contradiction to the fact situation presently before the Court where the evidence clearly shows that this 91 year old woman could not pay her own bills since approximately 1970. The Court in Tate further emphasized that:

> "While evidence of her mental condition prior to and after the time she made the transfers, releasing herself of her property, is important and deserves careful consid-

> eration, her mental condition at or near the time she acted is most important in determining the validity or invalidity of her acts upon that particular date. It was generally admitted by witnesses that her mental condition varied from time to time, depending largely upon whether or not she was suffering from her physical afflictions, or was under the influence of seditives given to relieve her." 217 P.2d. at 182.

This is contrary to the case presently before this Court. Don Gowers got up in the middle of the transaction and left because he did not feel that she was competent to execute the deed. Furthermore, independent witnesses testified that Carna Peterson was in the same approximate mental state of awareness and capacity at the time she was in Court as she was in September of 1975. Finally, in the Tate decision, there was not a single witness who saw the incompetent person within ten days of the tranfer which is contrary to the facts herein since Don Gowers, Juanita Crawford and Elsie Johnson and other members of the family saw Mrs. Peterson at or near the time of the signing of the deed.

It is respectfully submitted that the Trial Court errored in failing to find that this 91 year old woman living in a rest home had the necessary capacity to execute a deed and sale for her acre lot and home for $3,200.00.

POINT II

THE APPELLANT DOES HAVE STANDING TO BRING THIS ACTION, AND IS PROPERLY BEFORE THIS COURT.

The respondents argue that this suit is merely a vexatious claim in which the appellants will receive no benefit. They admit, however, that the State of Utah which is a party to this action, has standing and a valid interest in the proceedings. This Court has consistently held, however, that:

> "The reason the defendant has the right to have a cause of action prosecuted by the real party in interest is so that the judgment will preclude any action on the same demand by another and permit the defendants to assert all defenses or counter-claims available against the real owner of the cause. Shaw v. Jeppson, 239 P.2d. 745 (1952).

The Court does have before it, the real parties in interest and this claim of the respondents is without merit.

The respondents further argue that this claim should not be before this Court since the consideration given for the property was adequate. They cite in support of this proposition, 23 Am.Jur. 2d. Sec. 66 on Deeds. A complete reading of that Section, however, clearly shows the misapplication of that proposition to the case at hand:

> "Any valuable consideration, even a nominal sum of money, is sufficient, as between the parties and their privieas, to render a deed operative to pass title to property. Although adequacy of consideration is an element is a case where the instrument is alleged to have been secured by fraud or in a suit to set aside the transfer of an expectancy of to reform the deed, it is immaterial where the sole question is whether a deed of bargain and sale is operative to pass the property." (Emphasis Added).

It is clear from a complete reading of that citation that the case before this Court is of a nature that the argument of lack of consideration is without merit.

CONCLUSION

Upon a complete review of the record in this matter, the Court should reverse the Trial Judge's finding that Carna Peterson knew and understood the transaction she entered into with respondents. The great weight of the evidence is against any other such finding.

RESPECTFULLY SUBMITTED this 5th day of April, 1978.

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MAILING AFFIDAVIT

I hereby certify that on the 5th day of April, 1978, I personally mailed two (2) copies of the foregoing Reply Brief of Appellants to Mr. Dave McMullin, Attorney for Defendants-Respondents, City Office Building, P. O. Box 176, Payson, Utah, 84651 and to Mr. Steven Schwendiman, Attorney for Intervenor, 231 East 400 South, Salt Lake City, Utah, 84111.

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Secretary