1978

Ara Otteson and Nellie A. Otteson, Husband and Wife v. Richard D. Malone and Hila Sue Malone, Husband and Wife : Petition For Rehearing and Brief In Support of Petition For Rehearing By Plaintiffs-Respondents

Utah Supreme Court

IN THE SUPREME COURT OF THE

STATE OF UTAH

ARA OTTESON and NELLIE A. OTTESON, husband and wife,	)	
Plaintiffs-Respondents,	)	Case No. 15478
vs.	)	
RICHARD D. MALONE and HILA SUE MALONE, husband and wife,	)	
Defendants-Appellants.	)	

PETITION FOR REHEARING AND BRIEF IN SUPPORT OF PETITION FOR REHEARING BY PLAINTIFFS-RESPONDENTS

APPEAL AND PETITION FOR REHEARING FROM JUDGMENT OF SEVENTH DISTRICT COURT FOR CARBON COUNTY, HONORABLE EDWARD SHEYA, JUDGE

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IN THE SUPREME COURT OF THE

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PETITION FOR REHEARING

The Supreme Court of the State of Utah erred in its opinion filed September 13, 1978, in the above-captioned matter when it held that the Ottesons failed to prove "by clearly convincing evidence that they had not understood and agreed to the contract as they signed it." (Page 3, paragraph 1, Sup. Ct. decision)

Plaintiff-Respondent asserts such holding is error in that:

1. The findings of fact of the trial court was sufficiently based in the facts to not be clearly erroneous. The Supreme Court, by its ruling, has merely second-guessed the trial judge and has not taken into account the trial court's advantaged position.

WHEREFORE, Plaintiffs-Respondents petition the Utah Supreme Court to reconsider their opinion in the above-entitled case and rule in favor of the Ottesons by affirming the findings of fact and conclusions of law of the court below and by denying specific performance to the Defendant-Appellants.

RESPECTFULLY submitted this 29th day of September, 197[illegible].

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IN THE SUPREME COURT OF THE

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BRIEF IN SUPPORT OF PETITION FOR REHEARING BY DEFENDANTS-RESPONDENTS

POINTS WHEREIN IT IS ALLEGED THE SUPREME COURT ERRED:

The Court below, after taking evidence and viewing the witnesses at trial, made the following ruling in its Memorandum Decision:

> "By reason of the circumstances by which the option was exercised, the Court is doubtful that the significance or effect thereof was understood by the plaintiffs, and especially the plaintiff Ara Otteson. The evidence indicates that plaintiff Ara Otteson thought that the option meant he

still had a right to determine later whether or not the property should be sold, and only in the event that he thereafter decided to sell the property would the defendants have the right of first refusal. Plaintiff Ara Otteson stated that he and his wife told Malones they wouldn't sell the land and did not discuss the option in the form it appeared in the lease." (Pg. 2, trial court's memorandum decision, paragraph 2.)

Justice Maughan writing for the Supreme Court held as follows:

"In view of the situation here, where there were prior negotiations, and furnishing of the preliminary copy, as well as amended one, with ample opportunity to read (the defective hearing of Mr. Otteson thus becoming unpersuasive) coupled with the later signing, and other circumstances shown, I cannot see where a fair and reasonable conclusion could be drawn that the Ottesons proved by clear and convincing evidence that they had not understood and agreed to the contract as they signed it."

Plaintiffs-Respondents respectfully submit that the Court erred in its reasoning as follows:

POINT I.

THE TRIAL COURT'S FINDINGS OF FACT WERE NOT CLEARLY ERRONEOUS CONSIDERING THE EVIDENCE ON THE RECORD AND TO OVERTURN THE TRIAL COURT'S FINDINGS OF FACT ON THE RECORD PRESENTED DOES NOT TAKE INTO ACCOUNT THE ADVANTAGE POSITION OF THE TRIAL JUDGE.

The record on appeal shows the following:

(1) The Ottesons were old, crippled and/or handicapped. (Trial transcript, page 43, 222).

(2) Ara Otteson had lived on, and farmed, the 28 acres most of his life. (Trial transcript, page 41, 56)

(3) The Malones approached the Ottesons about leasing 28.2 acres (Trial transcript pg. 41)

(4) Mrs. Malone and Mr. Otteson went to an attorneys office to draft the lease, but at the time, Mr. Otteson's hearing aid wasn't working and he heard very little of the conversation. (Trial transcript pg. 43 and 44)

(5) The Malones and the Ottesons never discussed an option to purchase the property and Mr. Otteson didn't hear any mention of option at the attorneys office. (Trial transcript, pg. 45)

(6) The attorney, Mr. Bunnell, testified that at no time did he explain to the Ottesons what the option meant. (Trial transcript pg. 116)

(7) The Ottesons thought the option gave them the right to sell the property to the Malones, if, they wanted to. (Trial transcript pg. 46)

(8) The Ottesons had specifically told the Malones that they would not sell this property to them. (Trial transcript pg. 225, 227)

In the case of Nunley v. Walker, 13 Utah 2d 105, 369 P. 2d 117 (1962), the Utah Court made the following statement regarding the reversal of a trial court's findings of fact:

> "Although the question of a boundary line by acquiescence is a matter of equity, we will reverse the trial court's findings of fact only if we conclude that they are clearly erroneous." (Emphasis added)

Again, in Stone v. Stone, 19 Utah 2d. 378, 431 P. 2d 802, (1967), the Court made the following clear statement demonstrating the appropriate deference given the trial judge by the court, in making a determination of fact:

> "In reviewing the trial court's order in divorce proceedings, there are certain well-established principles to be born in mind. The findings and order are endowed with a presumption of validity, and the burden is upon the appellant to show they are in error. Even though our constitution provision, Section 9 of Article VIII, states that in equity cases this Court may review the facts, we, nevertheless, take into account the advantaged position of the trial judge. Accordingly, we recognize that it is his prerogative to judge the credibility of the witnesses, and in a case of conflict, we assume that the trial court believed the evidence which supports the findings. We review the whole evidence in the light more favorable to them; and we will not disturb them merely because this court might have viewed the matter differently, but only if the evidence clearly preponderates against the findings."

The evidence as presented to the trial court was conflicting, but the evidence viewed in the light more favorable to the trial court's ruling shows the lack of sophistication and position of ignorance of the infirm and aged farmer family, the Ottesons, which adequately justifies the conclusion of the trial court that the Ottesons did not understand the legal meaning of the document which they signed. The trial court was in an excellent position to recognize the infirmaties and vulnerabilities of the Ottesons. These subtle nuances cannot be transmitted to the appellate court via a lifeless transcript. The trial court should be given the preference promised in decisions of this court.

The Supreme Court cites the fact that there were prior negotiations, and a written document, which was read, and signed by the Ottesons, and that these facts make the trial court's conclusion unreasonable. The plaintiff submits that any case involving a signed contract will contain the same elements. If the mere presence of those elements is sufficient to prevent a party from showing mistake, then there is little hope of anyone ever showing mistake in a contract situation.

The court below did not relieve the Ottesons of their obligation under the contract, but but only denied specific performance of a portion of that contract. The lower court ruling should be upheld, and affirmed, if meaning to appropriate prior words of this court is to exist.

RESPECTFULLY submitted this 29th day of September, 1978.

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CERTIFICATE OF MAILING

On this 29th day of September, 1978, I mailed three copies of the foregoing Petition for Rehearing and Brief in Support of Petition for Rehearing, by first class mail, postage prepaid thereon, to attorneys for appellants Michael R. Jensen, Frandsen, Keller & Jensen, Professional Building, 90 West, First North, Price, Utah 84501.