

1979

Robert P. Morris et al v. John Price Associates, Inc. : Petition for Rehearing

Utah Supreme Court

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Prince, Yeates and Geldzahler; Attorneys for Respondents;

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IN THE SUPREME COURT
OF THE STATE OF UTAH

- - - - -

ROBERT P. MORRIS and GUMP
& AYERS REAL ESTATE, INC.,

Plaintiffs and
Respondents,

Case No. ¹⁵⁶⁶⁰15560

vs.

JOHN PRICE ASSOCIATES, INC.,

Defendant and
Appellant.

- - - - -

BRIEF OF APPELLANT
IN SUPPORT OF
PETITION FOR RE-HEARING

PETITION FOR RE-HEARING

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FILED

JAN 26 1979

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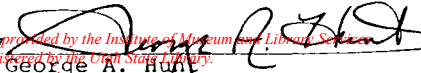
Pursuant to Rule 76(e), Utah Rules of Civil Procedure,
appellant above-named hereby petitions this Court for a
re-hearing of the appeal in this cause.

This petition is made on the grounds and for the reason
that the majority opinion of this Court filed January 11,
1979, places this case in a procedural posture which renders
the case and the result reached by the majority herein, in
direct conflict with the Court's prior decision in A. J. Limb
v. Federated Milk Producers Assn., 23 Utah 2d 222, 461 P.2d
290 (1969).

This petition is supported by the Brief of Appellant
filed herewith.

96
DATED this 25 day of January, 1979.

SNOW, CHRISTENSEN & MARTINEAU


George A. Hunt
Attorneys for Appellant

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STATUS OF THE CASE

The appeal in this action was filed February 1, 1978. The issues were briefed and the matter was argued before this Court on December 12, 1978. The opinion of this Court was filed January 11, 1979. The decision was split, with Justice Ellett writing a vigorous dissent. The Petition for Re-hearing was timely filed on January 26, 1979.

ARGUMENT

THE COURT'S OPINION CREATES A DIRECT CONFLICT
WITH PRIOR DECISIONS OF THIS COURT.

In the opinion which has been filed in this case, the Justices of this Court unanimously agreed that as to plaintiff Robert P. Morris, the action should have been dismissed at the trial level. The Court then reversed the lower court with respect to plaintiff Morris and dismissed the action as to him, but affirmed the lower court's judgment as to plaintiff Gump & Ayers, Justice Ellett dissenting. With the dismissal of Morris, the case then falls directly within the rule previously enunciated by this Court in A. J. Limb v. Federated Milk Producers Assn., 23 Utah 2d 222, 461 P.2d 290 (1969). However, the result reached by the Court in the instant case is directly contrary to the result

reached in Limb. The cases have virtually identical facts.

In Limb, the defendant had entered into a letter commission agreement with one John Williamson who was employed by the plaintiff as a real estate salesman. The plaintiff was a licensed real estate broker. The operative language of the commission agreement letter which is set forth in the opinion is almost identical to the language contained in the controversial letter in the instant case. Essentially, the letter guaranteed Mr. Williamson a 5% commission if the Cloverleaf Dairy on South State Street was sold to any one of the six listed purchasers. The letter did not require Mr. Williamson to make the sale. Two years after the letter had issued, the subject property was sold to one of the listed purchasers by another realtor. Limb then made claim for a commission.

At the trial level, both Limb and Williamson were listed as plaintiffs in the case. However, the case was dismissed as to Williamson on the trial level for the same reasons that Morris was dismissed out in this action. The trial court, per Wilkins, J., then granted Summary Judgment to the defendant. On appeal, this court affirmed, noting that the contract was with the salesman and since the salesman was not a party, the broker could not substitute himself as a party to the contract. The court stated:

It is, therefore, evident that Mr. Williamson being only a real estate salesman could not collect a fee from the defendant and that the promise to pay him would be unenforceable. Mr. Limb attempts to substitute himself as a party and collect on a joint contract. 461 P.2d at 292.

The court further stated that:

Even if the contract were not void, Mr. Limb could not recover in this case. Mr. Williamson was not a broker but was attempting to act as one when he secured the letter from the defendant. A broker employed by an owner to purchase or sell real property bears a fiduciary relationship to his employer, and the applicable law is stated . . . to be:

If the contract made by an agent acting for an undisclosed principal involves elements of personal trust and confidence as a consideration moving from the agent, contracting in his own name, to the other party to the contract, the principal, while the contract remains executory, cannot, against the resistance of the other party, enforce it, either to compel performance by the other party or to recover damages for breach. Id. at 292, 293.

It may be argued that the instant case is distinguishable from Limb on the facts because the letter in the present case was addressed to Mr. Rob Morris at Gump & Ayers and therefore Gump & Ayers was a party to the contract. However, as noted in the dissent of Justice Ellett the grammar of the letter here clearly indicates that the letter was directed to Mr. Morris individually and not to him and his affiliated broker. Furthermore, the evidence is clear and undisputed

that such negotiations as there were took place with Morris alone and that the only reason Morris was involved at all was because of his long-time personal association with John Price. The record reflects and the evidence is that if a contract existed at all, it was with Rob Morris--not his corporate broker.

The instant case is thus not unlike Limb. The evidence in Limb clearly showed that the parties knew Williamson worked for Limb as a salesman and was Limb's agent. Nevertheless, the court found that because the contract was negotiated with and directed to Williamson (Dear Sir:), it was a contract with him and not with his broker. The "Dear Rob:" letter at issue here is no different in its material aspects than the "Dear Sir:" letter in the Limb case. And yet, the court here has reached an opposite result. CF. Young v. Buchanan, 123 Utah 369, 259 P.2d 876 (1953).

Had the trial court dismissed Morris from this case when defendant's summary judgment motion was made, the trial of the case would have taken a different tack. Even further and more explicit testimony respecting the intentions of the parties vis a vis who the contracting parties were would have been elicited. As it was, such testimony was of little immediate importance because at trial, the law of the case was that Morris was a proper party. Thus, the lower

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court's error in failing to dismiss Morris as a party had a prejudicial effect upon defendant and the claims it could make and argue to the jury. Had Morris been dismissed it could have been effectively argued to the jury that based upon the evidence it was apparent that no contract existed with Gump & Ayers. This is very crucial because by the time negotiations commenced between defendant and IBM in late September of 1975, Morris had terminated his employment with Gump & Ayers. (Tr. p. 42). The broker-salesman relationship was thus terminated between plaintiffs and anything Morris did after August of 1975 was for his own account and not for Gump & Ayers. Because the evidence showed that at no time did anyone from Gump & Ayers do anything on this property other than Rob Morris, it could have been very effectively argued and defendant was entitled to argue that all Morris' alleged activity after his employment terminated with Gump & Ayers proved that he considered the contract to be with him rather than them.

As it turned out, the lower court's ruling effectively precluded defendant from making this argument because the court had effectively ruled that defendant's liability to plaintiffs was joint and several so at that juncture and with Morris still in the suit, the argument was inapplicable.

RELIEF REQUESTED

Appellant respectfully requests this court to vacate its majority opinion of January 11, 1979 and enter an order reversing the decision of the court below, or, in the alternative, for its order granting a new trial sans plaintiff Morris.

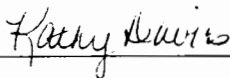
SNOW, CHRISTENSEN & MARTINEAU

By


George A. Hunt
Attorneys for Appellant
John Price Associates, Inc.

CERTIFICATE OF MAILING

I hereby certify that I mailed two copies of the foregoing Petition and Brief to John P. Ashton, of Prince, Yeates & Geldzahler, 455 South Third East, Salt Lake City, Utah 84111, this 26th day of January, 1979.


Kathy Davis