

1988

George Ronald Wright v. Westside Nursery and Darrel Humphries : Reply Brief

Utah Court of Appeals

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UTAH COURT OF APPEALS
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DOCKET NO. 88-0544

IN THE UTAH COURT OF APPEALS

GEORGE RONALD WRIGHT,)

Plaintiff and Appellant,)

vs.)

Case No. 880544-CA

WESTSIDE NURSERY, a Utah)
limited partnership, and)
DARREL HUMPHRIES, an)
individual,)

Priority No. 14b

Defendants and Respondents.)

RESPONDENT'S REPLY BRIEF RE: CROSS-APPEAL

APPEAL FROM THE FIFTH JUDICIAL DISTRICT COURT IN
AND FOR WASHINGTON COUNTY, STATE OF UTAH,
THE HONORABLE J. PHILIP EVES, JUDGE PRESIDING

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MAY 12 1989

COURT OF APPEALS

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RESPONDENT'S REPLY BRIEF RE: CROSS-APPEAL

STATEMENT OF THE CASE

Because Wright appealed and Defendant cross-appealed, a statement concerning the briefing process is in order, and of some significance. When Humphries filed his brief as Respondent, he addressed matters raised in Appellant's brief and included arguments concerning his cross-appeal. Wright thereafter filed what is captioned as a Reply Brief but Wright did not reply to matters raised by Humphries (as the Respondent) that challenged the substance of the issues raised by Wright on his appeal. Rather, Wright's reply brief only addresses matters raised by Humphries' cross-appeal. Therefore, this brief addresses only matters addressed in Wright's reply brief concerning the cross-appeal.

SUMMARY OF ARGUMENT

Even though the jury found that Humphries breached the agreements between the parties, the jury still found that Wright was obligated to pay Humphries \$15,000 due under the Management Agreement, calculated at \$2,500 per month for 6 months. The evidence supports such a finding by the jury and it was therefore improper for the Trial Court to take away the jury's verdict.

Humphries does not contend he is entitled to additional pre-judgment interest on the \$30,000 promissory note, but rather to have this Court direct the Trial Court to award Humphries interest post-judgment in accordance with the rate of interest stated in the \$30,000 promissory note, and likewise award him indemnification against Wright in the event Humphries is forced to pay additional amounts as attorneys fees if collection of the note is pursued by Zions First National Bank.

Humphries is clearly entitled to pre-judgment interest on the amount awarded him for fraud. The parties bargained and agreed to exchange assets having equal value, with the value fixed on October 4th, 1985. Even though the Purchase Agreement is silent as to the value of the respective properties to be exchanged, the jury found that both Wright and Humphries expected to receive an asset having \$90,000 in value at the time of the exchange, to-wit, October 4th, 1985.

Any difference in value should therefore bear interest from the date of the exchange.

POINT I

ASSUMING WRIGHT WAS JUSTIFIED IN TERMINATING HUMPHRIES, HE HAS ALREADY RECEIVED FULL CREDIT FOR DAMAGES HE SUFFERED BY HUMPHRIES' MISCONDUCT.

Assuming for argument purposes that because Humphries acted inconsistent with the terms of the agreement, Wright was entitled to fire him, what the Trial Court failed to acknowledge and likewise what Wright fails to address in his reply brief is that Wright has been fully compensated for the sums the jury found Humphries had spent from his employer's account without authorization. All of the sums the jury found Humphries wrongfully spent have been deducted from the ultimate verdict in favor of Humphries. Wright has therefore been made "whole" for any wrongful conduct on the part of Humphries, and it was clearly the jury's intent to likewise make Humphries "whole" because he was wrongfully terminated by Wright. To arrive at the net judgment in favor of Humphries, the Trial Court adopted the findings of the trier of fact as to who owed how much and made those adjustments in the Judgment on the Verdict.

At the conclusion of the trial, the Court ordered the jury verdict entered, and only pursuant to Wright's Motion for a New Trial or in the Alternative, Judgment Notwithstanding the Verdict, did the Court take away the verdict in favor of

Humphries for \$15,000. The record clearly supports that a Judgment NOV was granted by the Trial Court as compared to some other ruling by the Court concerning the \$15,000 awarded to Humphries. Therefore, the Trial Court committed error in ruling that Wright was justified when he fired Humphries as manager when in fact, the jury rejected Wright's argument of justification and found in favor of Humphries.

POINT II

HUMPHRIES DOES NOT SEEK ADDITIONAL PRE-JUDGMENT INTEREST ON THE \$30,000 PROMISSORY NOTE

Humphries admits that he was in fact awarded pre-judgment interest on the \$30,000 promissory note at the rate specified in the note. Counsel for Wright correctly states that Humphries was awarded unpaid interest on the \$30,000 note in the sum of \$7,305.21, which was the amount that had accrued at the time of trial and was based on the testimony of an officer for Zions First National Bank.

Humphries only seeks to have this Court direct the Trial Court to award him indemnification post-judgment for any interest he has to pay on the note that Wright was ordered to pay. If it was proper to award Humphries pre-judgment interest in accordance with the terms of the note, it only follows that Humphries should be indemnified at the same interest rate post-judgment.

Contrary to Wright's statement on page 6 of his Reply Brief, Humphries does not ask this Court to award him pre-

judgment interest on top of the \$37,305.21 awarded him at the time of trial. Humphries only seeks to be totally indemnified by Wright for the note he signed on behalf of Wright, and nothing more.

Likewise, Humphries only seeks to have this Court direct the Trial Court to indemnify him in the event he has to pay attorney's fees that the holder of the note, Zions First National Bank, incurs if it is required to seek collection of the note. Admittedly, this may occur at a future time. Humphries is entitled to be made whole for attorney's fees he may have to pay because even though Wright has been ordered to pay the note, he may not do so. To hold otherwise, will not totally indemnify Humphries on all sums he may have to pay on a note he signed on behalf of his employer and pursuant to the Management Agreement.

POINT III

UNLESS HUMPHRIES IS AWARDED PRE-JUDGMENT INTEREST ON HIS FRAUD CLAIM, WRIGHT WILL BE UNJUSTLY ENRICHED

The Purchase Agreement does not establish the value of the assets the parties agreed to exchange. Humphries' testimony, which the jury adopted, was that since Humphries believed and represented to Wright that the nursery had a value of at least \$90,000, that he (Humphries) was likewise entitled to receive an asset having an equal value when he sold the nursery.

For purposes of assessing damages, the jury used \$90,000 as what Wright represented the Ogden property to be worth. To determine fair market value of the Ogden property, the jury chose to adopt what the property actually sold for a few months prior to trial and awarded damages for the difference in those two values, therefore finding that on October 4th, 1985, Humphries should have received an asset having a value of \$90,000. Since Humphries did not receive that value, but rather property having a value of \$51,418, he will not be awarded what he bargained for unless he receives pre-judgment interest on the damages arising from the fraud. In other words, Humphries did not have the use of the difference in the values of the assets exchanged, to-wit, interest on the sum of \$38,582. That amount should bear interest from the date of the exchange, not the date of the judgment as the Trial Court ruled.

Wright quotes on page 7 of his reply brief the Trial Court's statement that there was considerable dispute in the evidence about what the value was at any given time and that it would be difficult to go back and award interest based on some unspecified figure from the past. The Trial Court simply missed the point in forming that conclusion. The date on which the parties exchanged assets is a date certain with absolutely no speculative nature. If the date of the exchange is not used as the date when interest starts, a party is

penalized who has been defrauded, who cannot sell the property, and who cannot get his day in court for two or three years.

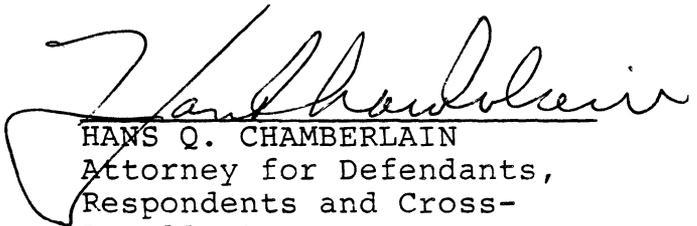
Finally, contrary to the Court's statement, Les Froerer, the appraiser called by Humphries, testified that on October 4th, 1985, the Ogden property had a certain value to-wit: \$35,000. However, the jury elected to use as the value of the Ogden property its recent sales price, essentially rejecting the values given by Froerer and the values given by the appraiser called by Wright, Wib Cook. For the Trial Court to hold that interest does not accrue on the amount of damages arising from the fraud because the jury elects to use the sales price of the property for purposes of computing damages serves to penalize a litigant who tries to mitigate his damages by getting the best price for the property, a decision which may require him to wait for the best time to sell the property as Humphries did in this case.

CONCLUSION

This Court should reinstate the \$15,000 awarded Humphries for wrongful termination, award him pre-judgment interest on the damages he suffered by Wright's fraudulent misrepresentations, and also direct the Trial Court to totally indemnify Humphries on the \$30,000 promissory note. This Court should therefore direct the Trial Court to recognize that in the event Humphries has to pay Zions First National Bank interest

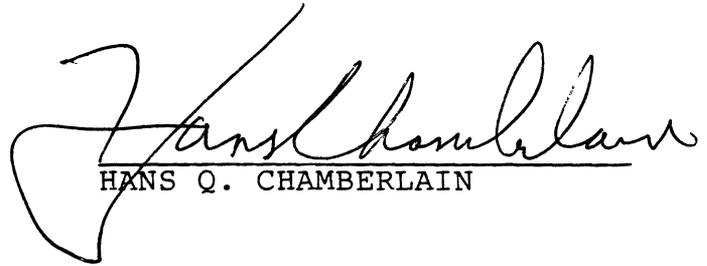
at the contract rate and attorney's fees Zions will incur when it files suit, that Humphries should be awarded judgment against Wright for all of those amounts. To hold otherwise will not totally indemnify Humphries.

DATED this 11th day of May, 1989.


HANS Q. CHAMBERLAIN
Attorney for Defendants,
Respondents and Cross-
Appellants

CERTIFICATE OF MAILING

I do hereby certify that on this 11th day of May, 1989, I did personally mail four (4) true and correct copies of the above and foregoing RESPONDENT'S REPLY BRIEF RE: CROSS-APPEAL to Mr. Gary W. Pendleton, Attorney at Law, 150 North 200 East, Suite 202, St. George, Utah 84770, first-class postage prepaid.


HANS Q. CHAMBERLAIN