

1988

Leon H. Saunders; Robert Felton; Saunders Land Investment Corp.; White Pine Ranches; White Pine Enterprises; Kenneth R. Norton v. John C. Sharp and Geraldine Y. Sharp : Petition for Rehearing

Utah Court of Appeals

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DOCKET NO. 88-0710 IN THE UTAH COURT OF APPEALS

LEON H. SAUNDERS; ROBERT FELTON;
SAUNDERS LAND INVESTMENT CORP.,
a Utah corporation; WHITE PINE
RANCHES, a Utah general
partnership; WHITE PINE
ENTERPRISES, a Utah general
partnership; and KENNETH R. NORTON,
dba Interstate Rentals, Inc., a
Nevada corporation,

Plaintiffs and Appellants,

vs.

JOHN C. SHARP and GERALDINE Y.
SHARP,

Defendants and Respondents.

Case No. 880710-CA

Category 14b

PETITION FOR REHEARING

APPEAL FROM THE THIRD JUDICIAL DISTRICT COURT
OF SALT LAKE COUNTY, STATE OF UTAH
THE HONORABLE J. DENNIS FREDERICK,
DISTRICT JUDGE PRESIDING

DEPOSITED BY THE
STATE OF UTAH

AUG 17 1990

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In its May 25, 1990 Opinion, this Court overlooked or misapprehended numerous Utah Supreme Court decisions -- especially those governing the marshaling doctrine, the legal principle on which the Court so heavily relied in the Opinion. In this extremely significant case, involving hundreds of thousands of dollars, this Court reached a tremendously inequitable result by failing to consider at all scores of legal authorities which compel a reversal of the trial court's judgment as a matter of law, irrespective of the correctness of the trial court's findings. This Court abdicated its duty -- imposed by numerous Utah Supreme Court decisions -- to address the legal arguments White Pine raised. If a rehearing is not granted, the Court -- without ever considering Appellants' legal arguments -- will have affirmed a judgment that is erroneous as a matter of law, and economically disastrous for the Appellants. In the face of contrary Utah Supreme Court decisions, this Court will also have announced a new and incorrect standard of appellate review.

I. PRELIMINARY STATEMENT.

This Court failed to recognize the extensive legal issues before it, and addressed Appellants' (collectively "White Pine") arguments as if they presented only issues of fact. Without addressing a single legal argument raised by the parties, this Court, without any discussion, affirmed the following legal conclusions of the trial court:

- Appellees (the "Sharps") did not breach the parties' contract by failing to reconvey property under a trust

deed, even though White Pine had paid for it and the parties' contract required the reconveyances as payments were made.

- The Sharps' legally reconveyed the Property by signing a document consenting to the recording of a plat of the Property even though it contains no conveyance, release, or granting language.
- The Sharps' breach of contract was legally excused by their reliance upon advice of counsel.
- The Sharps were excused from their contractual obligation to reconvey because White Pine, after paying for the property, failed to request the reconveyance of specific property prior to White Pine's default under the contract.
- White Pine was not entitled to the legal remedy of receiving specific reconveyances of property for which White Pine had expressly contracted with, and paid, the Sharps; instead, the Sharps were entitled to retain the substantial sums paid for the reconveyances and to foreclose their lien on the property they were obligated to reconvey.
- White Pine first breached the contract by failing to pay approximately \$3,200.00 in real estate taxes even though White Pine had paid more than \$1,500,000.00 to the Sharps under the Contract.
- The Sharps -- as trust deed beneficiaries -- legally granted an easement to themselves over a roadway owned by White Pine.

Despite the parties' extensive briefing of controlling authority -- and relevant authority from other jurisdictions -- this Court failed to address any of the legal arguments because it concluded those issues

strike at the trial court's determination of whether there was a material breach of contract, and if so, when, and by whom. Such questions constitute issues of fact for the fact finder.

Opinion, p. 5. These are not issues of fact. Rather, they are issues of law which this Court is required to address.

II. Issues Of Breach And Performance Are Not, Under These Circumstances, Questions of Fact.

The Opinion suggests this Court affirmed the trial court because questions of breach "constitute issues of fact for the fact finder." This proposition, however, is directly contrary to controlling Utah law.

In Avgikos v. Lowry, 54 Utah 217, 179 P. 988 (Utah 1919), plaintiff/seller sued defendant/buyer for unpaid amounts allegedly owing under two contracts for the delivery of wool. Defendant admitted the contracts and that he had only paid a specified amount thereunder, but asserted a counterclaim alleging the plaintiff failed to deliver the total amount specified.

All claims went to trial before a jury, which returned a verdict in favor of the plaintiff for the full amount. Defendant appealed on three bases, including: (1) that the trial court erred in submitting to the jury the question of whether the amount of wool delivered substantially complied with the contract; and (2) that the trial court erred in instructing the jury that substantial compliance was a question of fact. Id. at 989-90.

In reversing the jury award, the Supreme Court held that where, as here, the facts are undisputed, "the question of whether or not they constitute a performance or a breach of the contract is one of law for the Court." Id. at 90 (quoting 13 C.J. 790 para. 1011). Since the sufficiency of the amount of wool delivered

presented a question of law, the Supreme Court concluded that it was error to submit that issue to the jury. Id.

Avgikos, then, represents the only controlling Utah authority, and it is directly contrary to this Court's statement that issues of breach and substantial performance are questions of fact. Those issues are issues of law, when, as here, the facts are undisputed or presumed to be correct.

III. EVEN IF FACTS ARE CHALLENGED ON APPEAL, THIS COURT HAS A DUTY TO CONSIDER THE PARTIES' LEGAL ARGUMENTS.

In its analysis, this Court mistakenly overlooked, and failed to apply correctly, two separate lines of controlling Utah authority which conclusively establish either that (1) none of the foregoing issues presents a question of fact; or (2) even if White Pine did fail to marshal evidence -- a ruling White Pine respectfully submits is erroneous -- this court nevertheless has a duty to determine if the trial court correctly applied the law.

A. The Interpretation Of An Unambiguous Document Is A Question Of Law; The Construction Of A Document Is Always A Question Of Law.

The briefs in this case make abundantly clear that the rights and obligations of the parties were governed by a July 16, 1981 Memorandum of Closing Terms ("Closing Memorandum") (Ex. D-15); a Trust Deed Note (Ex. D-3); a Trust Deed (Ex. D-2); and a Warranty Deed (Ex. D-17) (collectively, the "Contract").

Of all the Contract documents, the trial court found only the phrase "pro rata cost to the purchaser", contained in paragraph 7

of the Closing Memorandum, to be ambiguous. (C. 16). The trial court accordingly permitted extrinsic evidence to interpret that phrase, but made no finding that extrinsic evidence was necessary to interpret any other portion of the Contract.¹ None of the trial court's legal conclusions, which this Court affirmed without analysis in its Opinion, involves that phrase.

Accordingly, the various breach issues on appeal involve unambiguous contractual language. The trial court's interpretation of such unambiguous language is to be accorded no deference on appeal, but reviewed de novo. See, e.g., Buehner Block Co. v. UWC Assoc., 752 P.2d 892, 895 (Utah 1988); Faulkner v. Farnsworth, 714 P.2d 1149, 1150 (Utah 1986); Kimball v. Campbell, 699 P.2d 714, 716 (Utah 1985); Bradshaw v. Burningham, 671 P.2d 196, 198 (Utah 1983); Jones v. Hinkle, 611 P.2d 733, 735 (Utah 1980); Crowther v. Carter, 767 P.2d 129, 131 (Utah App. 1989); Big Cottonwood Tanner Ditch Co. v. Salt Lake City, 740 P.2d 1357, 1358-59 (Utah App. 1987).

Moreover, regardless of why the trial court admitted extrinsic evidence, such extrinsic evidence is admitted solely for the

¹ In a rambling footnote at page xii of their Brief, the Sharps claim the Closing Memorandum "ambiguous". The transcript page cited by the Sharps (Tr. 733) indicates only that "based upon para. 7 at least and potentially more" the trial court would continue to hear testimony regarding the Closing Memorandum's terms. In its conclusions, however, the trial court concluded in the last analysis that only para. 7 was ambiguous; and the trial court considered extrinsic evidence only to interpret para. 7. (C. 16). Every other citation in the Sharps' footnote goes to the easement question, not to the breach issues central to this appeal.

purpose of interpreting the terms of an ambiguous contract. Once a contract has been interpreted, however, the construction of that contract "is always reviewed as a law issue." Fashion Fabrics of Iowa, Inc. v. Retail Investors Corp., 266 N.W.2d 22, 25 (Ia. 1978) (emphasis added).

Consequently, to the extent Contract provisions must be construed at all, questions involving (1) the Sharps' duty to reconvey; (2) the legal effectiveness of their purported reconveyances; (3) the effect of White Pine's failure to make specific requests; (4) White Pine's entitlement to the legal remedy of receiving specific reconveyances for which White Pine had already paid the Sharps; and (5) whether the Sharps -- who owned no fee interest -- were able to grant an easement to themselves, are all questions of law to be resolved de novo by this Court.

B. To the Extent White Pine Challenges Findings, Those Findings are Irrelevant to the Breach Issues Central to This Appeal; Failure to Marshal Does not Relieve this Court of its Duty to Determine (1) If the Findings Support the Conclusions, or (2) Whether Those Conclusions Can Be Sustained Under Any Set of Facts.

1. White Pine Challenged Only Findings Unrelated to the Breach and Reconveyance Issues.

White Pine did challenge some of the trial court's findings.²

² White Pine challenges (1) Finding No. 91 that the Sharps relied on the advice of counsel (Appellants' Brief ("AB") 22-24; Reply Brief ("RB") 23-24); (2) the findings pertaining to attorneys' fees (AB 47-48); and (3) the trial court's finding of market value (RB 12-13). Similarly, White Pine argues there is not evidence in the record to support certain legal conclusions made by the trial court (RB 20-21, 24). Obviously, it is impossible to marshal evidence when none exists. The only possible marshaling would be a citation to the entire trial transcript. An

None of these challenged findings, however, has any bearing on the breach and reconveyance issues central to this appeal. No matter how much evidence may or may not support the trial court's findings, this Court must nevertheless determine if the findings support the legal conclusions challenged in this appeal.

2. The Court Misapplied the Marshaling Doctrine and Overlooked Its Duty to Determine Whether the Trial Court's Findings of Fact Support Its Conclusions of Law and Judgment, or If The Trial Court Applied Erroneous Principles of Law.

The marshaling doctrine provides:

To mount a successful attack on the trial court's findings of fact, an appellant must marshal all the evidence in support of the trial court's findings and then demonstrate that even viewing it in the light most favorable to the court below, the evidence is insufficient to support the findings.

Scharf v. BMG Corp., 700 P.2d 1068, 1070 (Utah 1985). Unless the facts are marshaled, a trial court's findings of fact will not be disturbed. Id. Accordingly, in Scharf, where the appellant failed to marshal the evidence, the Supreme Court accepted the lower court's findings of fact. See, Id.

Of critical importance, however, the Scharf court did not merely affirm the judgment at that point; instead, it proceeded to consider and address appellant's specific challenges to the trial court's conclusions of law. Id. Thus, even where an appellant fails to marshal the evidence below, an appellate court still has

appellant simply cannot marshal the negative.

a duty to examine "whether the trial court's findings of fact support its conclusions of law and judgment." Sampson v. Richins, 770 P.2d 998, 1002 (Utah App. 1988) (emphasis added).

The Utah Supreme Court has explicitly recognized this duty, implicit in all the marshaling cases, to examine legal argument irrespective of the failure to marshal. For example, in Ashton v. Ashton, 733 P.2d 147 (Utah 1987), the appellant failed to marshal all evidence supporting the trial court's findings of fact and thus accepted those findings. Id. at 150. The court, however, immediately thereafter acknowledged its "duty . . . to determine whether those findings [justified] the trial court's conclusion of law," and then independently reviewed that conclusion for correctness. Id.³

The following cases demonstrate the two-step nature of the required analysis: When an appellant fails to marshal evidence, the trial court's findings are presumed correct. See, State of Utah v. Harrison, 122 U.A.R. 32, 34 (Utah App. 1989). The presumption is that the findings are supported by competent and sufficient evidence. See, e.g., Bennion v. LeGrand Johnson Const.

³ The Utah Supreme Court has applied this principle even where an appellant failed to provide the Supreme Court with any trial transcript. See, e.g., Powell v. Bastian, 541 P.2d 1127, 1128 (Utah 1975); Walker Bank & Trust Co. v. Neilson, 26 Utah 2d 383, 490 P.2d 328, 329 (Utah 1971). In both of those cases, the Supreme Court presumed that the trial court's findings were based upon competent and substantial evidence, and then automatically proceeded to determine whether those findings supported the trial court's conclusions of law. Id.

Co., 701 P.2d 1078, 1085, n. 2 (Utah 1985). When "findings are supported by competent evidence, they will not be disturbed by the reviewing court, but if erroneous principles of law are applied to the facts, as they were in this case, judgment on such facts will not be upheld on review." Survey Eng'rs Inc. v. Zoline Foundation, 532 P.2d 748, 751 (Colo. App. 1975) (emphasis added), rev'd on other grounds, 546 P.2d 1257 (Colo. 1976).

The Indiana Court of Appeals succinctly described the appropriate two-step analytical process on appeal:

[T]his Court will employ a two-tier standard of review. First, it must be determined the evidence supports the findings. Then the Court must conclude the findings support the judgment.

Keystone Square Shopping Center Co. v. Marsh Supermarkets, Inc., 459 N.E.2d 420, 422 (Ind. App. 1984) (emphasis added).

This is the analytical process White Pine followed in its briefs.⁴ Moreover, it is precisely the approach this Court used

⁴ For example, in its treatment of finding no. 47, White Pine argued the trial court's conclusion that White Pine had established a "practice" could not be sustained, as a matter of law, in light of the trial court's unchallenged finding no. 28 that White Pine had only made a single request for reconveyance. (AB 25, RB 4-5). In making this argument to the Court, White Pine wrote that "the court's own findings (and omitted findings) concerning requests preclude a determination that there was a 'practice' of making 'timely' requests for the release of property." This is a direct challenge to a legal conclusion, not to a finding, and this Court has a duty to address that legal argument. In this regard, to the extent Finding No. 47 found a "practice" to exist, it is in reality a question of law. An appellate court is free to disregard the trial court's designation of "findings" and "conclusions", and is free to recharacterize the trial court's statements in a proper manner. See, Smith v. Maldonado, 103 N.M. 570, 711 P.2d 15, 17 (1985); Maloha Village v. Kanar Elec. Co, Ltd., 593 P.2d 375, 384 (Hawaii 1979) ("A conclusion of law is not rendered immune from

in addressing the issue of attorneys' fees. Opinion at 6-7. White Pine directly challenged the evidence regarding their reasonableness. This Court, however, did not refuse to reach the underlying legal issues. Rather, it engaged in detailed legal analysis notwithstanding White Pine's failure to marshal all evidence supporting the finding of reasonableness. This Court should have used this same approach on all legal issues, not merely on the isolated attorneys' fee issue.

By failing to use this two-tiered analytical process, this Court precluded the appellate review of purely legal issues. For example, White Pine argued that, as a matter of law, White Pine is still entitled to a reconveyance of the property for which it paid. (AB 14-19; RB 8-14, citing e.g., Columbia Dev., Inc. v. Watchie, 448 P.2d 360 (Ore. 1968); Burroughs v. Garner, 405 A.2d 301 (Md. App. 1979); Eldridge v. Burns, 76 Cal. App.3d 396, 142 Cal Rptr. 845 (1978); Leisure Campground & Country Club Ltd. Pship. v. Leisure Estates, 372 A.2d 595 (Md. App. 1977)). White Pine argued that it was entitled to this remedy notwithstanding any of the trial court's findings, including its finding that White Pine first breached the parties' contract. This Court, however, never considered the issue of White Pine's legal entitlement to this remedy. Thus, in effect, the Opinion transformed the marshaling

review because labeled a finding of fact.").

doctrine into a doctrine of waiver by its requirement that legal argument will not be addressed if the facts are not marshaled, even if those facts are fundamentally irrelevant to legal issues on appeal. White Pine respectfully submits this Court did not intend that result.⁵

IV. CONCLUSION

A Petition for Rehearing is appropriate when the appellate court has overlooked or misapprehended particular points of law. This Court's Opinion overlooks or misapplies three fundamental legal principles: (1) questions of breach and substantial performance are questions of law for the court when, as here, the

⁵ The "advice of counsel" issue also illustrates this unjust and inappropriate foreclosure of legal argument. White Pine argued, as a matter of law, that reliance on a counsel's advice is no defense to a breach of contract action. (AB 22, citing, Mann v. Glens Falls Inc. Co., 418 F.Supp. 237, 251 (D. Nev. 1974)). White Pine argued that no matter what the facts are, advice of counsel provides no defense to a breach of contract action. Because of its one-step analysis, however, the court will never reach such legal issues.

Consider further, for example, a situation where (1) the trial court made 15 findings in an action where the sole defense was the statute of frauds; (2) none of those findings found a writing sufficient to take the alleged transaction out of the statute of frauds; and (3) the appellant never ordered a transcript because his sole issue on appeal was that the trial court erred as a matter of law in finding the contract to be enforceable despite the absence of a required writing. Obviously, the appellant would not have to marshal any evidence supporting challenged findings in order to argue on appeal that, in their totality, the findings could not support the legal conclusion. Nevertheless, under the Opinion, an appellant now must marshal all evidence regarding irrelevant findings as a condition precedent to having its legal arguments considered.

facts are undisputed or presumed correct; (2) the interpretation of an unambiguous document presents only questions of law, and the construction of a document is always a legal issue; and (3) the marshaling doctrine applies only when findings are challenged, and in any event does not eliminate an appellate court's duty to review for correctness the trial court's application of the law to the findings made.

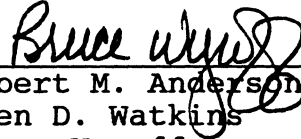
If a rehearing is not granted, this Court will have affirmed the trial court's judgment without ever addressing whether the trial court properly applied principles of law. That result, contrary to controlling authority, is economically disastrous to White Pine, which, according to the trial court's judgment, must suffer a forfeiture in a project costing more than 2.7 million dollars, because White Pine was late in paying \$3,200.00 in property taxes. Such consequences, among serious ones obvious from the arguments made on appeal, underscore the responsibility of this Court to address the legal arguments made in this case.

Moreover, if a rehearing is not granted, and White Pine's legal issues are not addressed, the Court's Opinion will establish a new and inappropriate condition for appellate review: all appellants will have to marshal all evidence to support all findings the appellants anticipate the appellate court may feel are disputed in order to avoid waiving their right to have their purely legal arguments considered. This Court should not turn the marshaling requirement into a waiver doctrine.

DATED: June 15, 1990

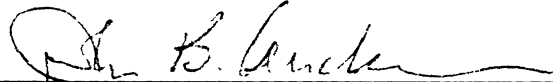
Respectfully submitted,

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CERTIFICATE OF SERVICE AND GOOD FAITH

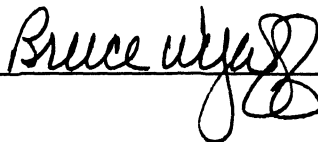
On this 15 day of June, 1990, I hereby certify that I caused to be mailed, via first-class United States mail, postage prepaid, a true and accurate copy of the foregoing Petition for Rehearing to the following:

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and further certify that this Petition is presented in good faith and not for delay.



(E:U:BRUCE:WPR401)

AMENDED CERTIFICATE OF SERVICE AND GOOD FAITH

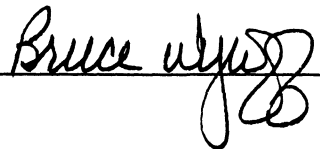
On this 18th day of June, 1990, I hereby certify that I caused to be mailed, via first-class United States mail, postage prepaid, four true and accurate copies of the Petition for Rehearing, a copy of which was lodged with the Court on June 15, 1990, to each of the following:

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and further certify that this Petition is presented in good faith and not for delay.



(E:U:BRUCE:WPR401)