1998

Robert Neldon Conder v. Royal K. Hunt, Kim C. Hansen, Bancroft Whitney Company, Eileen M. Salisbury, John Harr, SR., the U.S. Internal Revenue Service, the Utah State Tax Commission, and Jean Conder, and any other persons unknown claiming and right, title, estate, lien or interest in the real property described in the complaint by or through Royal K. Hunt and Larry R. Vonwald : Petition for Rehearing

Richard C. Terry; Corbridge, Baird, Christensen; attorney for appellant.
Randy M. Lish; McCullough, Jones, Ivins; Larry L. Whyte; attorneys for appellee.

IN THE UTAH COURT OF APPEALS

ROBERT NELDON CONDER, Plaintiff/Appellant,

V. Case # 980270-CA

ROYAL K. HUNT, KIM C. HANSON, BANCROFT WHITNEY, EILEEN SALISBURY, JOHN HARR, SR., THE U.S. INTERNAL REVENUE SERVICE, THE UTAH STATE TAX COMMISSION, and JEAN CONDER, and any and all other persons unknown claiming any right, title, estate, lien or interest in the real property described in the complaint by or through Royal K. Hunt,

Defendants/Royal K. Hunt, Appellee,

and

Larry R. VonWald, Intervenor/Appellee.

PETITION FOR REHEARING

On Plaintiff/Appellant's appeal from final order of the Third Judicial District Court, Salt Lake County State of Utah, Hon. Sandra Peuler, Presiding

Richard C. Terry - #3216
Corbridge Baird & Christensen
39 Exchange Place, Suite 100
Salt Lake City, Utah 84111
Attorneys for Appellant
Tele: 801 534 0909

Larry L. Whyte - #4942
60 East South Temple
Suite 670
Salt Lake City, Utah 84111
Attorney for Royal K. Hunt
Tele: 801 578 5892

Randy M. Lish - #3823
McCullough Jones & Ivins
853 W. Center St.
Orem, Utah 84058
Attorneys for Appellee,
John Harr, Sr.
Tele: 801 224 2119

Larry R. VonWald
Intervenor/Appellee
2535 Chalet Road
Tele: 801 942 1720

IN THE UTAH COURT OF APPEALS

ROBERT NELDON CONDER, Plaintiff/Appellant,

V. Case # 980270-CA

ROYAL K. HUNT, KIM C. HANSON, BANCROFT WHITNEY, EILEEN SALISBURY, JOHN HARR, SR., THE U.S. INTERNAL REVENUE SERVICE, THE UTAH STATE TAX COMMISSION, and JEAN CONDER, and any and all other persons unknown claiming any right, title, estate, lien or interest in the real property described in the complaint by or through Royal K. Hunt,

Defendants/Royal K. Hunt, Appellee,

and

Larry R. VonWald, Intervenor/Appellee.

PETITION FOR REHEARING

The undersigned attorney for Royal K. Hunt herewith petitions the Court for rehearing of the captioned appeal as it relates to the Opinion of the Court filed April 13, 2000.

The Court states in its Opinion, page 3., paragraph 5., that "Conder did not appeal the final denial of his request to intervene." And further states, final sentence, page 5., paragraph 11, that "[w]hile the denial of a motion to intervene is appealable, see Tracy v. University of Utah Hosp., 619 P.2d 340, 342 (Utah 1980), it does not finally determine the merits of the intervenor's claim." It should here be emphasized that instead of appealing the denial of his motion to intervene, appellant Conder instituted this action

and thereby sought to again raise the identical questions and issues that were presented and determined in the intervention proceedings.

Basing appellee Hunt's argument on the ruling in Cheyenne River Sioux Tribe of Indians v. Unites States, 338 F.2d 906, 911 (8th Cir. 1964), that "Appellant failed to avail itself of the right to appeal. Instead [Conder] instituted this action and thereby sought to again raise the identical questions and issues that were presented and determined in the intervention proceedings. This it may not permissibly do. The issue of [intervention] was decided against appellant and res judicata bars further litigation of that issue between the same parties. See Commissioner of Internal Revenue v. Sunnen, 333 U.S. 591, 597, 598, 68 S.C. 715, 92 L.Ed. 898 (1948)."

In its Opinion, the Court then turned to an application of the elements of res judicata [Op., paragraphs 10, 11, and 12, pp. 5-6]. Without going into those elements, because it should be apparent that in no case of a ruling on an application for intervention could there be a final judgment on the merits, identity of parties, or of causes, as the Court stresses in its opinion, and in the instant case equally apparent that appellee Hunt employed or coined the term "res judicata" [although perhaps by indirection or even mistake

based on his reading of Cheyenne River, supra.] to indicate the conclusive affects on future proceedings involving the same subject matter of the failure to appeal an appealable order or judgment. See, e.g., Commercial Investment Corp. v. Siggard, 936 P.2d 1105, 1111 (Utah.App. 1997) ("However, because Buyer did not appeal the jury's verdict the Buyer was not entitled to specific performance we decline to grant Buyer the relief sought.")'; In re Vorhees Estate, 366 P.2d 977 (Utah 1961) ("There was nothing more to be decided on that [issue]. That being so the decree entered thereon was final and therefore appealable. Since she took no appeal within the time allowed by law, that decree is conclusive.")

The Court is further urged to consider that the "failure to appeal an appealable order" is not a prerequisite for the application of res judicata; therefore, the reference to res judicata after the reference to "failure to appeal an appealable order" should be regarded as mere surplusage and not in a manner to define the affects of the failure to appeal but only to establish the nature of those affects. In the Cheyenne case, it was the Government's contention that the appellant Tribe (who was denied intervention; the 'of right' status dependent on whether or not the Tribe was an

"indispensable party") "is precluded, as the trial court held, for failing to appeal the denial of its motion to intervene. [the appellate court:] This contention has appealing logic."

It is appellee Hunt's contention, undeniably established, that appellant Conder is precluded for failing to appeal the denial of Conder's motion to intervene.

I certify that this petition is presented in good faith and not for delay.

CONCLUSION: Appellee therefore moves the Court for an order in all things withdrawing its said Opinion of April 13, 2000, and further ordering affirmance of the trial court's decision from which this appeal has been taken, upon a ground or for a reason appearing from the record and more particularly described in this petition which the Court may have overlooked or misapprehended, to-wit, that appellant is precluded for failing to appeal the denial of his motion to intervene as of right.

DATED April 26, 2000.

LARRY L. WHYTE
Attorney for Appellee Royal K. Hunt

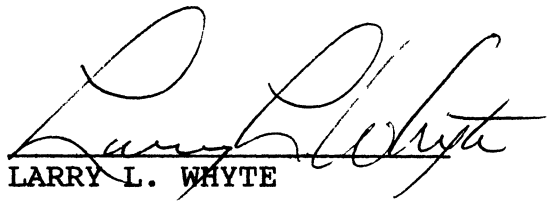
PROOF OF SERVICE

On April 27th, 2000, two true copies mailed as follows:

Richard C. Terry
Corbridge Baird & Christensen
39 Exchange Place, Suite 100
Salt Lake City, Utah 84111

Randy M. Lish
McCullough Jones & Ivins
853 W. Center Street
Orem, Utah 84058

Larry R. VonWald
2535 Chalet Road
Sandy, Utah 84093



LARRY L. WHYTE