

1980

# Elva Romrell v. Zions First National Bank et al : Brief of Appellants in Opposition to Petition for Rehearing

Utah Supreme Court

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Arthur H. Nielsen; G. Richard Hill; Attorneys for Respondent;

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IN THE SUPREME COURT OF THE STATE OF UTAH

\*\*\*\*\*

ELVA ROMRELL,

Plaintiff and  
Respondent,

vs.

Case No. 16211

ZIONS FIRST NATIONAL BANK,  
N.A., and ZIONS FIRST  
NATIONAL BANK OF OGDEN,

Defendants and  
Appellants.

\*\*\*\*\*

APPELLANTS' BRIEF IN OPPOSITION TO  
PETITION FOR REHEARING

\*\*\*\*\*

Appeal from the Judgment of the Second Judicial  
District Court of Weber County, Utah  
Honorable Ronald O. Hyde, Judge

\*\*\*\*\*

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Attorneys for Respondent

FILED

JUN 20 1980

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<b>Plaintiff and</b>	:	
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	:	
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	:	
ZIONS FIRST NATIONAL BANK,	:	
N.A., and ZIONS FIRST	:	
NATIONAL BANK OF OGDEN,	:	
	:	
<b>Defendants and</b>	:	
<b>Appellants.</b>	:	

\*\*\*\*\*

APPELLANTS' BRIEF IN OPPOSITION TO  
PETITION FOR REHEARING

\*\*\*\*\*

STATEMENT OF THE CASE

Plaintiff Elva Romrell sought specific performance of an oral contract to sell 160 acres of real property located in Weber County, Utah, general damages for breach of contract and damages for fraud.

DISPOSITION IN THE LOWER COURT

Plaintiff dismissed her claim for damages for breach of contract at the time of trial. The trial court denied plaintiff's motion for directed verdict. The jury returned a general verdict directing specific performance. The trial court entered judgment in favor of plaintiff and against defendants, directing specific performance, and thereafter denied defendants' motion for judgment not-

## DISPOSITION IN THE SUPREME COURT

The Supreme Court set aside the judgment and remanded the cause to the District Court for the purpose of making necessary findings of fact and conclusions of law with respect to all issues presented to the court and for the entry of judgment in conformity therewith.

## RELIEF SOUGHT ON PETITION FOR REHEARING

Appellants ask that the petition for rehearing be denied.

## STATEMENT OF FACTS

Appellants rely on the statements of fact contained in their Brief on Appeal and Reply Brief. In addition to those facts, the Court's attention is called to the following:

1. The pretrial was held pursuant to a motion of defendants which recited ". . . the pleadings raise some issues on which plaintiff is entitled to a jury and some issues on which plaintiff is not entitled to a jury" (R.55).

2. The Pretrial Order (R.74-82) did not set forth whether the jury was or was not advisory, and did not recite whether both parties had consented to accept the jury verdict.

3. Defendants' request for instructions and special interrogatories to the jury, delivered to the Court and counsel for the plaintiff before the commencement of the trial, contained proposed interrogatories to the jury on each issue of fact set forth in the Pretrial Order (R.112,114). They also contained requested instruction stating "This case is not submitted to you for the rendi-

of a general verdict as is sometimes done, but it is your function herein to make findings of fact to special interrogatories or questions which are herewith submitted to you . . ." (R.113).

4. Defendants excepted to the Court's failure to give their proposed instructions which dealt with the submission of the case on special interrogatories rather than a general verdict, on the basis that the first element of plaintiff's claim is an action for specific performance, and the jury should be a finder of fact only and cannot render a general verdict (R.704).

5. In their Memorandum in Support of Motion for Judgment Notwithstanding the Verdict defendants stated "In addition, since specific performance is an equitable action, the Court makes the final decision, and the jury is a fact finder to assist the court. The only way to use a jury as a fact finder for the purpose is to submit special interrogatories" (R.184).

## ARGUMENT

### POINT I

THIS COURT DID NOT ERR IN HOLDING THAT THE JURY WAS AN ADVISORY JURY AND THAT THE FAILURE OF THE TRIAL COURT TO MAKE FINDINGS OF FACT WAS REVERSIBLE ERROR

In a unanimous opinion this Court, consistent with Rule 39(c), Utah Rules of Civil Procedure, and Kesler vs. Rogers, 542 P.2d 354 (Utah 1975), held that when there is a demand for a jury trial in an equity case, the jury will serve only in an advisory capacity unless both parties have clearly consented to accept a jury verdict. Not only is the holding a correct principle of law, it is consistent

with the position taken by defendants in this case. Virtually at the outset of the case, in the motion for a pretrial, defendants suggested to the trial court that there were some jury issues and some nonjury issues raised by the pleadings. There was nothing in the Pretrial Order which evidenced any consent by either party to accept a jury verdict. In defendants' request for instructions and special interrogatories, it was clearly set forth that defendants considered the jury an advisory jury only, and in their argument in their memorandum to the trial court they clearly set forth that they considered the jury as a fact finder to assist the court. Therefore, contrary to the assertions of respondent the record does contain numerous instances wherein defendants asserted that position.

This Court's holding clearly set forth that the failure of a trial court to make findings of fact is reversible error. Defendants gave the trial court the opportunity to rely on findings of fact to be made by the jury, by submitting proposed special interrogatories on the issues of fact, but the trial court denied that opportunity. This circumstance was acknowledged by this court in its opinion in stating "in the present case defendants requested the submission of special interrogatories to the jury for findings on the questions of fact set out in the Pretrial Order. Had the jury answered those questions, its findings could have been adopted by the Court as the basis for the Court's findings of fact and conclusions of law upon which the judgment was based." This is the position urged on the trial court by defendants and urged by defendants on its appeal to this court. This Court, therefore, did not err in holding, consistent with Rule



to make findings of fact and conclusions of law , notwithstanding the advisory verdict of the jury , and that such requirement is mandatory and may not be waived .

**CONCLUSION**

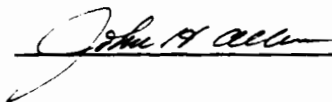
It is respectfully urged that this Court's opinion was correct , both on the principles of law announced , and based upon the facts of the instant case . The petition for rehearing should , therefore , be denied .

**Respectfully submitted ,**

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**MAILING CERTIFICATE**

**I certify that two copies of the foregoing Appellants' Brief in Opposition to Petition for Rehearing were mailed to Arthur H. Nielsen, 410 Newhouse Building, Salt Lake City, Utah 84111, and G. Richard Hill, 1000 Kennecott Building, Salt Lake City, Utah 84133, attorneys for plaintiff, and respondent, this 20 day of June, 1980.**

  
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