

1979

# Terry Lynne Jones v. William K. Hinkle and Kathryn P. Hinkle : Plaintiff's Brief in Answer to Petition for Rehearing

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

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TERRY LYNNE JONES, :  
 :  
Plaintiff-Appellant, : Case No. 16525  
 :  
vs. :  
 :  
WILLIAM K. HINKLE and :  
KATHRYN P. HINKLE, :  
 :  
Defendants-Respondents. :

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PLAINTIFF'S BRIEF IN ANSWER  
TO PETITION FOR REHEARING

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Appeal from the Third Judicial District  
Court of Salt Lake County, Utah  
Honorable Christine M. Durham, Judge

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IN THE SUPREME COURT OF THE STATE OF UTAH

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TERRY LYNNE JONES, :  
Plaintiff-Appellant, :  
vs. : Case No. 16525  
WILLIAM K. HINKLE and :  
KATHRYN P. HINKLE, :  
Defendants-Respondents. :

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PLAINTIFF'S BRIEF IN ANSWER  
TO PETITION FOR REHEARING

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PRELIMINARY STATEMENT

Defendants-Respondents (hereinafter Defendants) have petitioned the Court for rehearing after having the lower court's ruling of summary judgment in favor of Defendants on Defendants' motion for summary judgment and the lower court's ruling in favor of Defendants on Plaintiff's motion for summary judgment reversed and remanded for entry of summary judgment in favor of Plaintiff and for award of attorney fees to Plaintiff. The matter was submitted to the lower court for decision upon all matters at issue between the parties upon motions for summary judgment by Plaintiff and by Defendant. Defendants' motion for summary judgment and the affidavits of Dean L. Gray and Kathryn P. Hinkle were filed and delivered on May 2nd, and

the affidavit of Howard Swapp was filed and delivered on May 16th, the motion of Plaintiff and the affidavit of Plaintiff in support of her motion were filed and delivered upon May 15th. Pursuant to stipulation between counsel for both parties the motions were consolidated for argument and heard by the Court as scheduled by Defendants on May 17th, 1979. Defendants neither objected to Plaintiff's affidavit nor did Defendants file any affidavits in response to Plaintiff's affidavit. No issue with respect to the sufficiency of Plaintiff's affidavit or the timing of Plaintiff's motion for summary judgment or affidavit in support of said motion was raised by Defendants on appeal. The entire record before the lower court was designated by Plaintiff for purposes of Plaintiff's appeal, including the affidavits of all parties and the filing dates of the motions and affidavits were set forth in detail by Plaintiff at page 7 of Appellant's brief in the Statement of Facts for the court.

The Supreme Court in accordance with the provisions of Rule 76(a) reversed the judgment appealed from and ordered the lower court to enter judgment in accordance with the Supreme Court opinion. Plaintiff respectfully submits that Defendants' petition for rehearing should be denied on the grounds that the Supreme Court correctly reviewed and decided the issues raised in the record before the lower court and Defendants' arguments in support of the petition for rehearing are based upon issues

not presented to the lower court and not presented to the Supreme Court in Defendants-Respondents' brief, which arguments cannot be considered when raised for the first time upon petition for rehearing.

I. THE COURT CORRECTLY RULED ON ALL ISSUES  
PROPERLY PRESENTED BY THE PARTIES AT  
THE LOWER COURT AND ON APPEAL

The relief sought on appeal by Plaintiff as stated in Appellant's brief was as follows:

"Plaintiff-Appellant seeks to have the decision of the lower court reversed, vacating the summary judgment and award of attorney fees granted to Defendants and to have the case remanded for entry of judgment and award of attorney fees on behalf of Plaintiff-Appellant."

The issues as set forth in Appellant's brief are as follows:

"1. The district court erred in interpreting the contract to state that Plaintiff had no right to assume the obligation set forth in paragraph 6 of the contract pursuant to the terms of paragraph 8.

2. The district court should have held that according to the terms of the contract Plaintiff has an absolute right to assume the obligation set forth in paragraph 6 of the contract when the terms of paragraph 8 are fulfilled.

3. Defendants are liable for any damages to Plaintiff caused by their refusal to transfer title according to the terms of the contract.

4. The district court erred in awarding Defendants an attorney fee based upon paragraph 21 of the contract because as a condition precedent to the award of attorney fees a finding must be made that a party is in default in a covenant or agreement contained in the contract.

5. The district court should have awarded Plaintiff an attorney fee based upon paragraph 21 of the contract."



Plaintiff in her appeal brief relied extensively upon the statements set forth in Plaintiff's affidavit. References to the transcript found in the Statement of Facts and Argument in Appellant's brief referring to transcript pages 51 and 52 refer directly to said affidavit.

In the lower court Defendants neither objected nor moved for any relief concerning a desire to file a counter-affidavit to Plaintiff's affidavit or concerning the fact that Plaintiff's motion and affidavit were not filed with the Court ten days prior to the date of hearing. In the order prepared by counsel for Defendants it is stated that the motions were consolidated for hearing before the Court. The motions were consolidated upon stipulation of counsel for Plaintiff and counsel for Defendants and therefore the motions, affidavits and other matters raised to the Court upon Plaintiff's motion for summary judgment and Defendants' motion for summary judgment were properly considered pursuant to Rule 56 of the Utah Rules of Civil Procedure and Rule 2.7(e) of the Rules of Practice in the District and Circuit Courts of the State of Utah.

The Supreme Court correctly reviewed and decided the issues which were presented to it by Appellant and Respondents at the time of appeal. The appeal was submitted to the Court upon the briefs and oral argument was not requested by either party.

The Arizona Supreme Court in the case of Birchfield v. Tiercof, 429 P.2d 512 (Arizona 1967) in considering a case similar to the instant case where the lower court decided the matter upon submission of motions for summary judgment and affidavits in support thereof found that the sufficiency of the affidavits became an issue as relied upon in the lower court and where there was no contention made in the answering brief that the issues concerning the affidavits were not raised in the lower court, that the matter could not be raised first upon a motion for rehearing. The Arizona Supreme Court denied that motion for rehearing. The Idaho Supreme Court in the case of Minidoka County v. Krieger, 399 P.2d 962 (Idaho 1964) denied a motion for rehearing concerning a motion for summary judgment and affidavits in support thereof holding that it was improper upon motion for rehearing for a party to complain that it had not been able to file counter affidavits when that allegation was raised for the first time upon motion for rehearing. The Idaho court applied its Rule 56(e) which is substantially similar to Utah Rule of Civil Procedure Rule 56(e), in holding that such questions of fact could not be raised by such a method.

II. DEFENDANTS' PETITION IS BASED UPON FACTS  
AND ARGUMENTS NOT PRESENTED TO THE LOWER  
COURT OR UPON APPEAL AND THEY CANNOT BE  
BROUGHT BEFORE THE COURT UPON A  
PETITION FOR REHEARING

The rule is universal and well supported by case law that new issues cannot be raised for the first time in a petition for rehearing. Defendants attempt to raise factual issues which if valid, should have been raised for the consideration of the lower court and which could have been raised in response to Plaintiff's reliance upon her affidavit on appeal. Defendants took neither of these opportunities to raise any factual issue with respect to the sufficiency of Plaintiff's affidavit and now raises these issues for the first time on appeal. The Utah Supreme Court in the case of Wellsville East Field Irrigation Company v. Lindsay Land and Livestock Company, 104 Utah 498 143 P.2d 278 (1943) held that it was improper for the plaintiffs in that case to change positions after asserting the same posture throughout trial and on appeal to a new position upon petition for rehearing and denied said petition. The Utah Court in the case of Spanish Fork West Field Irrigation Company v. District Court of Salt Lake County, 99 Utah 558 110 P.2d 344 (1941) denied a petition for rehearing holding that the petitioner could not raise an issue in requesting rehearing that had not been raised before the lower court on appeal. The California Supreme Court in the case of Sanders v. Howard Park

Company, 195 P.2d 898 (Cal. 1948) held:

"An argument based upon a point not mentioned in the original brief of the petitioner will be of no avail on its demand for rehearing. The judgments of appellate courts will not be upset in order to grant a rehearing unless the basis of the petitioner's demand was presented in his opening brief."

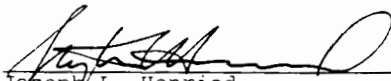
Plaintiff submits that this is the position which the Supreme Court should take on Defendants' petition for rehearing, that said petition is not well founded and that granting said petition would not be in the best interests of justice or in furtherance of the arguments as propounded by Plaintiff and Defendants at the lower court and on appeal. Cases from other jurisdictions in support of Plaintiff's position that such new contentions are not to be considered first upon petition for rehearing are as follows: State v. McCracken, 520 P.2d 787 (Alaska 1974); Watts v. Seward School Board, 423 P.2d 678, (Alaska 1967), vac. 88 S.Ct. 1753, 391 U.S. 592, 20 L.Ed.2d 842, on rehearing 454 P.2d 732, cert. denied 90 S.Ct. 899, 397 U.S. 921, 25 L.Ed.2d 101, rehearing denied 90 S.Ct. 1495, 397 U.S. 1071, 25 L.Ed.2d 695; Blackman v. MacCoy, 339 P.2d 169 (Cal. 1959); Wilhorn Builders Inc. v. Cortaro Management Company, 308 P.2d 251 (Arizona 1957); Smith v. Crocker First National Bank of San Francisco, 314 P.2d 237 (Cal. 1957); Deponte v. Ulupalakua Ranch, Ltd., 396 P.2d 826 (Hawaii 1964); Denver National Bank of Denver, Colorado v. State Commissioner of Revenue and Taxation, 279 P.2d 257 (Kan. 1955); Cannon v. Taylor, 493 P.2d 1313 (Nev. 1972); Barnes Agency v. Chino,

291 P.2d 328 (N.M. 1956); Brown v. State Election Board, 369 P.2d 140 (Okla. 1962); Rohner v. Neville, 368 P.2d 391 (Ore. 1962).

CONCLUSION

Plaintiff submits that the Supreme Court properly reviewed, considered and decided the issues which were presented to the Court upon appeal by Appellant and Respondents, and it is improper for Defendants to attempt to raise issues not presented before the lower court in Respondents' brief on appeal first upon petition for rehearing and that the court therefore should deny Defendants' petition for rehearing.

RESPECTFULLY SUBMITTED this 25 day of June, 1980.

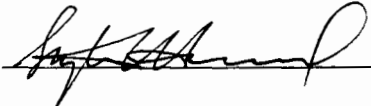


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CERTIFICATE OF MAILING

I certify that I mailed two true and accurate copies of the foregoing Plaintiff's Brief in Answer to Petition for Rehearing to Mr. Dean L. Gray and Mr. Gary L. Atkin of the firm of Gustin, Adams, Kasting & Liapis, 1000 Boston Building, Salt Lake City, Utah 84111 postage prepaid this 25 day of June, 1980.



A handwritten signature in black ink is written over a horizontal line. The signature is cursive and appears to be "Gary L. Atkin".