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Utah Supreme Court

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Recommended Citation

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IN THE SUPREME COURT

OF THE

STATE OF UTAH

* * * * * * * * * * * * * * * * * * *

CLARENCE WOODARD and INA WOODARD, *

Plaintiffs and Appellants, *

vs *

JESSE R. ALLEN, *

Defendant and Respondent.

* * * * * * * * * * * * * * * * * * *

CASE NO. 8031 8031

BRIEF IN OPPOSITION TO PETITION FOR REHEARING

J. VERNON ERICKSON, TEX R. OLSEN and H.R. WALDO, JR., Attorneys for Plaintiffs and Appellants.

J. GRANT IVERSON, Attorney for Defendant and Respondent.

FILED
FEB 27 1954
Clerk, Supreme Court, Utah

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IN THE SUPREME COURT

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CLARENCE WOODARD and INA WOODARD, *

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* * * * * * * * * * * * * * * * * *

CASE NO. 8031

BRIEF IN OPPOSITION TO PETITION FOR REHEARING

TO THE HONORABLE THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF UTAH:

Plaintiffs--appellants, Clarence Woodard and Ina Woodard, oppose the petition of defendant-respondent for a rehearing of the appeal in this matter for the reasons set forth below.

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PETITIONER'S FIRST POINT PRESENTS NO VALID REASON FOR A REHEARING.

Petitioner contends for the first time that it was error for the trial court to fail to make findings of fact on the issues of misrepresentation and recision. This objection is not tenable for three reasons.

First, the failure of the trial court to make findings on the issues of misrepresentation and recision was waived by petitioner by failing to include such issues in the findings prepared by him and by failing to claim error on appeal. Counsel states (Petition, p. 3) that he asked the trial Judge to include findings on misrepresentation and recision but that the Judge "indicated" the finding of non-marketability would be conclusive. This is

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not a matter of record and should be ignored by the Court. But even if cognizance is taken of such a colloquy, it demonstrates that counsel was aware of the possible error if such findings were omitted yet failed to include them in his proposed findings or otherwise indicate as a matter of record his present contention that findings on the omitted issues were necessary . Teavis v. Miller (N. Mex.) 208 P. 2d 156; Garcia V. Chovez, (N. Mex.) 212 P. 2d 1052.

But assuming there was no waiver of findings at the trial stage of this case, there was certainly a waiver by failing to raise such a question and argue it on appeal. It is settled in this state as in the great majority of other states that error not argued is waived.

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Reid v. Anderson, 116 Utah 455, 211 P. 2d. 306.

Floor v. Johnson, 114 Utah 313, 199 P. 2d. 547.

Hales v. Comm'l Bk. of Spanish Fork, 114 Utah-186, 197 P. 2d 910.

State v. Prettyman, 113 Utah 36, 191 P. 2d 142.

Duncan v. Hummelwright, 112 Utah 262, 186 P. 2d 965.

3 _Am. Jr_. 336, Appeal and Error, Sec. 776.

True, petitioner did argue that as a matter of fact the evidence supported finding of misrepresentation, a contention this Court found untenable. But petitioner nowhere argued that the failure to make such a finding was error under Rule 52, U.R.C.P. Furthermore, petitioner nowhere argued that the failure to make a finding on the issue of

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recision was either error on the facts or error as a matter of procedure under Rule 52.

Second, petitioner cannot on rehearing raise a question not presented to the Court at the original hearing. Wellsville East Field Irr. Co. v. Lindsay Land and Livestock Co., 104 Utah 498, 143 P. 2d 278. This is a necessary rule for if new questions could be raised on rehearing "there would be no end to a case on appeal or error." 3 Am. Jur. 351, Appeal and Error, sec. 806.

Third, the omission of findings on the issues of misrepresentation and recision was not error. Both issues are matters of affirmative defense on which defendant had the burden of proof. It is established that a failure to make a finding on a particular

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issue is deemed a finding against the party having the burden of proof on that issue.

<u>Drumm v. Simer</u> (Ariz.), 205 P. 2d 592.

<u>Fouts v. Largent</u>, (Ind.) 94 N.E. 2d 448.

<u>Esch v. Leithauser</u>, (Ind. App.) 69 N.E. 2d 760.

<u>McClellan v. Tobin</u>, (Ind.) , 39 N.E. 2d 772.

<u>McCoy v. Kentucky & West Va. Gas Co.</u>, (Ky.) 226 S.W. 2d 515.

<u>Const. Co. v. Goldsmith</u>, (Mo.) 201 S.W. 354.

<u>Burlington Transp. Co. v. Wilson</u>, (Nev.) 114 P 2d 1094.

<u>Mosley v. Magnolia Petroleum Co.</u>, (N. Mex.) 114 P. 2d 740 at 759.

<u>Culligan v. Wooten</u>, (Tex. Civ. App.) 254 S.W. 2d 155.

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Ingle v. Ingle, (Wash.) 48 P. 2d 576.

PETITIONER'S SECOND POINT PRESENTS NO VALID REASON FOR A REHEARING.

Petitioner contends he is entitled to a new trial so that he can be relieved from payment of the interest the plaintiff is entitled to under the contract. By their contract (Plaintiff's Exhibit B) the parties agreed that defendant could take possession of the property sold and that interest on the unpaid balance at the rate of 5% per annum was required. Petitioner admits (Petition p. 7) that he refused to take possession of the property sold but that plaintiff has always been willing to give him possession. Surely it is not the law that a defaulting vendee can avoid the interest payments he agreed upon by contract by

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merely refusing to take advantage of the benefits he is entitled to under that contract!

But if such be the law, it can have no application to this case for petitioner has made no claim by answer or counterclaim for a set-off for the rents and profits received by the vendor. No evidence was introduced on the question whatsoever. From all that appears, there were no rents and profits received. It would be rough justice indeed to first say that the vendor must account to the guilty vendee and then to assume as a matter of law that the amount of interest chargeable under the contract is equivalent to the rents and profits received from the land. Although this case involves equitable considerations, such a re-

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sult is not equitable nor is it equitable to force an innocent vendor in a new trial to meet issues not heretofore raised by the pleadings or argument.

PETITIONER'S THIRD POINT PRESENTS NO VALID REASON FOR A REHEARING.

The question of whether the facts establish misrepresentation was fully argued and briefed by counsel at the original hearing and competently discussed and determined by the Court in its opinion. Nothing can be gained by further argument now.

It is respectfully submitted that the opinion of the Court was correct and determinative of all issues in this case and that the petiti rehearing should therefore be de

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