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Scott Anderson et al v. W. Adrian Wright et al : Brief of Appellants

Utah Supreme Court

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Case No. 8140

**IN THE SUPREME COURT
of the
STATE OF UTAH**

SCOTT ANDERSON, FRED H.
SHEPHERD, EARL M. BAKER,
RICHARD W. TIPPETTS and
EARL J. KNUDSON,

Plaintiffs and Appellants,

— vs. —

W. ADRIAN WRIGHT and W.
MEEKS WIRTHLIN, partners, do-
ing business under the name and
style of WRIGHT - WIRTHLIN
REALTORS,

Defendants and Respondents.

BRIEF OF APPELLANTS

RAWLINGS, WALLACE,
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BRIEF OF APPELLANTS

PRELIMINARY STATEMENT

Throughout this brief, plaintiffs and appellants will be referred to as plaintiffs, and defendants and respondents will be referred to as defendants. All italics are ours.

STATEMENT OF FACTS

This appeal arises out of an action commenced by four salesmen against a real estate broker for payment of compensation for the sale of houses located in the Morning Side Heights Subdivision.

The case was tried to a jury and on November 25, 1953 it returned a verdict as follows (R. 230) :

On behalf of Scott Anderson.....	\$987.50
On behalf of Earl M. Baker.....	225.00
On behalf of Earl J. Knudson.....	718.75
On behalf of Fred R. Shepherd.....	831.25

Judgment was entered on the verdict. On the 15th day of December, 1953, the Honorable Ray Van Cott, Jr., granted a motion vacating and setting aside the judgment and ordered that judgment be entered for defendants against plaintiffs "no cause of action" (R. 237).

This appeal is prosecuted so that this Court can determine from the record whether or not there was evidence to support the verdict of the jury.

The complaint originally set forth a cause of action based on a 55% of 5% of the sales price of the homes sold by plaintiffs while employed by defendants. After the first day of trial, it appeared from the evidence presented by plaintiffs that there had been a modification of the usual standard employment agreement between the real estate salesmen and broker. It was plaintiffs' posi-

tion that their assent to this modified arrangement was obtained by fraud and concealment and overreaching by the defendants. However, the court ruled that he would not permit plaintiffs to recover on the theory of fraudulent concealment and ruled, which rule became the law of the case, that plaintiffs could only recover on the basis of the modification even though the modification was obtained through fraud and overreaching. This ruling was made known to the jury on the morning of the second day of trial at approximately 11:15 and is contained in a statement made by the court (R. 109).

At the same time, the court ruled that the plaintiffs could file an amended complaint to conform to the proof which they were presenting and had presented. The amended complaint was prepared and filed during the trial and upon the amended complaint the trial proceeded (R. 5).

The amended complaint was based on the theory that plaintiffs had agreed to sell the homes in the Morning Side Heights Subdivision at \$100.00 per house. Wright-Wirthlin had failed, neglected and refused to pay the \$100.00 per house but had paid only a portion of the \$100.00 per house.

The evidence shows that all of the plaintiffs were salesmen for the defendant brokerage; that in the early part of May, 1950, the brokerage negotiated an agreement with Felt Syndicate, Inc., which document is entitled Sales Agency Agreement and is Exhibit 4. The agree-

ment is dated the 11th day of May, 1950. The terms of this agreement were not made known to the plaintiffs. Defendants did not divulge to plaintiffs the amounts the brokerage was receiving as commission. Throughout the sales campaign, defendants did not reveal to or in any way make known to plaintiffs the contents of the Sales Agency Agreement. Even at the time of trial, defendants did everything in their power to prevent the contents of the Sales Agency Agreement, Exhibit 4, from being revealed to the court and jury. It will be noted that in the examination of defendant Wirthlin, counsel for defendants refused to put into evidence a copy of the Sales Agency Agreement even though counsel for plaintiffs repeatedly objected to examination concerning the contents of the written instrument (R. 146, 147, 148). Plaintiffs were only able to get into evidence the Sales Agency Agreement after the direct examination of Mr. Wirthlin was finished (R. 164). This refusal by defendants to reveal to plaintiffs the exact working arrangement with Felt Syndicate, Inc., was one of the bases for plaintiffs' original claim that there had been a fraudulent concealment and overreaching. However, it being the law of the case that plaintiffs could not recover more than \$100.00 per house, the plaintiffs proceeded on the theory imposed upon them by the court's ruling.

It was undisputed by all of the parties that Wright-Wirthlin agreed to pay each of the plaintiffs \$100.00 per house which plaintiffs sold. It was further undisputed that a large number of houses were sold. Exhibit

No. 3, prepared by defendants, shows the exact number accredited to each of the plaintiffs. Mr. Wirthlin and all of the salesmen testified that not one of the sales accomplished by the plaintiffs back-fired (R. 177). Every buyer performed under the agreement which the plaintiffs obtained. The purchasers were required to sign Earnest Money Receipts and Agreements, a copy of the form used is Exhibit 1. The Sales Agency Agreement provided as follows:

“3. A sale is to be considered made and the commission earned when a purchaser has been obtained who has signed a contract for the purchase of the lot and home to be built upon the lot, and such purchaser’s application for a loan to either the Prudential Federal Savings & Loan Association or the Prudential Insurance Company has been approved, and the mortgage recorded. In the event a purchaser fails and refuses to go forward and forfeits the earnest money payment, such sum so forfeited will be applied first to payment of loan costs, and the remainder shall be divided equally between the First Party and Second Party, and in such event no additional commission shall be charged.”

Exhibit 1, the Earnest Money Receipt and Agreement, contains a provision that the loaning institution, Prudential Federal Savings and Loan Association, would pay out the down payment made by the purchaser and the proceeds of the loan at certain percentages as the housing construction progressed.

The Sales Agency Agreement, Exhibit 4, provided for payment to Wright-Wirthlin of the \$300.00 commission. The brokerage was to receive this commission at certain stages of construction. Paragraph 2 of said agreement contains the following language: "This sales commission is to be paid on the same percentage draw basis as other items are paid through the disbursal during the progress of the construction program."

The houses which were sold by plaintiffs were constructed. During the construction, the contractor became unable to proceed with the construction project. Felt Syndicate, Inc. likewise failed. When Felt failed, it transferred and assigned to Wright-Wirthlin twelve options to purchase lots and received for the transfer a credit of \$150.00 per lot on the amounts due and owing from Felt to Wright-Wirthlin. This transfer of lots in partial satisfaction of the Wright-Wirthlin claim was done without the knowledge of or the consent of plaintiffs. Felt also assigned to the defendants all of the funds which they had coming from Prudential Federal under the contracts covering the construction of Morning Side Heights (R. 192, 194). This assignment placed in the hands of the broker all of the rights of Felt to funds payable under its contract. Defendants received in cash and credit on the options for the twelve lots a total of \$14,590.74 (Exhibit 2). They paid out of said sum to all salesmen, including plaintiffs, approximately \$5400.00, or approximately 54% of the amount which the salesmen earned. In the amount thus credited, Wright-Wirthlin

refused to give credit for the profits which they made from the options received from Felt. Nor, have defendants taken into account the value of the lawsuit which they have against the bonds on the construction job and the assignment which they received from Felt for its share of the miscellaneous fund account.

Defendants informed the salesmen, including these plaintiffs, that payments of their commission would be at the same rate as the construction draws were made as the house construction project progressed. The salesmen testified that they looked to defendants for the payment of their \$100.00 (R. 66, 69, 113 and 115). At no time were the plaintiffs informed of the negotiations between Wright-Wirthlin and Felt nor were the salesmen offered any part of the consideration which was in the form of lots and assignment of funds. No accounting was ever given to the salesmen during the time that they worked for defendants. Not until after this suit was filed against defendants for their compensation was any accounting made.

It was freely admitted that defendants did not keep track of the various stages of construction of the houses sold by the individual salesmen. Nor did Wright-Wirthlin attempt to pay to each salesman his share of the draws which were made on the houses which he sold (R. 213 to 215). Plaintiffs repeatedly demanded payment from defendants and were always given the story that the monies had not been collected.

The houses were all occupied by the buyers. The money for the construction of the homes were paid in full by Prudential Federal. These funds, as was indicated by the Sales Agency Agreement, were to be paid out at the various stages of construction. The funds were paid out to the last dollar (R. 169, 170). However, G.I. approval was not obtained on the homes and as a consequence the Prudential Federal mortgages have not been given a Veterans' Administration guarantee (R. 167). The failure of the V.A. to guarantee the mortgages was based upon its refusal to approve the homes (R. 172).

At the close of all the evidence, the court instructed the jury orally (R. 223). Neither plaintiffs nor defendants are here complaining about the instructions. The instructions fairly and fully submitted the factual propositions covered by the evidence which the jury was required to pass upon.

Instruction No. 4 sets forth the crucial proposition upon which the jury was required to pass. It reads as follows, (R. 225) :

“Instruction No. 4. Before you can find these defendants are liable you must find by a preponderance of the evidence that there was a contract entered into by them with these plaintiffs whereby they rendered themselves personally liable as defendants to the plaintiffs for the payment of these commissions.”

Upon the quoted instruction the jury necessarily found in favor of the plaintiffs. The evidence fully justified such a finding.

STATEMENT OF POINTS RELIED ON

POINT I.

THE EVIDENCE SUPPORTS THE JURY'S FINDING THAT DEFENDANTS WERE PERSONALLY LIABLE TO PLAINTIFFS FOR THE \$100.00 PER HOUSE COMMISSION.

ARGUMENT

POINT I.

THE EVIDENCE SUPPORTS THE JURY'S FINDING THAT DEFENDANTS WERE PERSONALLY LIABLE TO PLAINTIFFS FOR THE \$100.00 PER HOUSE COMMISSION.

There was no dispute in the evidence concerning the basic facts and dealings between plaintiffs and defendants. The exhibits and the testimony did not conflict in very many particulars. Where there were conflicts, they were of a minor nature.

The fundamental problem presented by the evidence was one of interpretation. The interpretation and significance of conduct on the part of plaintiffs and defendants and the meaning of the written instruments were presented for the jury's consideration. Plaintiffs submit that such interpretation is the prerogative of the jury and is a part of the function which the Constitution of the State of Utah requires that they be permitted to perform.

There is no dispute between plaintiffs and defendants concerning the fact that the proposition was submitted to the jury by the court's instruction. A re-examination of those instructions by this court will indicate, plaintiffs feel sure, that the proposition was fairly, concisely and clearly submitted to the jury by the court's instructions.

The verdict was in plaintiffs' behalf. The ruling by the trial court which entirely disregarded and set aside the jury's verdict could only be justified if there was no evidence which supported the verdict found by the jury. This rule of law is so clear and undisputed that no more than a few cases will be cited to support it.

Until the new rules of civil procedure were adopted, under Utah law, a trial court could not entertain a motion for judgment notwithstanding the verdict. *Buhler v. Maddison*, 105 Utah 39, 140 P. 2d 933; *Kirk v. Salt Lake City*, 32 Utah 143, 89 P. 458, 12 *A.L.R.*, N.S. 1021. Rule 50(b) of the Rules of Civil Procedure provides for consideration of a motion to set aside the judgment entered on a verdict. In *Morby v. Rogers*, Utah..... (1953), 252 P. 2d 231, p. 232, this Court stated the rule for Utah as follows:

“It is well settled that in order for a court to grant a request for a directed verdict or for a judgment notwithstanding the verdict grounded on non-negligence of defendant, the record must disclose no evidence against the party so requesting upon which reasonable minds could find him

guilty of the negligence charged. The issue here, then, was whether the record disclosed any evidence upon which the jury could have found the appellant guilty of negligence."

The Federal cases have interpreted Rule 50(b) and the guide set up there would apply in Utah. In *Binder v. Commercial Travelers Mut. Acc. Ass'n.*, 165 F. 2d 896, p. 901, the Second Circuit Court stated the rule as follows:

"In setting aside the verdict as against the 'weight' of the evidence, we think the district judge resorted to a formula which is no longer (if it ever was) appropriate. The discussions in the opinions in *Galloway v. United States*, 319 U.S. 372, 63 S.Ct. 1077, 87 L.Ed. 1458, show that it is the jury's, not the court's, function to weigh the evidence, and it is only where there is lacking any evidence of substance upon which reasonable men could reach the result represented by the verdict that a judge may interfere."

A more complete statement of the rule with authorities is found in *Frabutt v. New York, C. & St. L. R. Co.*, 88 F. Supp. 821, p. 825, where Judge Gourley says:

"In passing upon a motion to set aside a verdict for plaintiff and to enter judgment for the defendant, evidence including all reasonable inferences to be drawn therefrom must be taken in the light most favorable to the plaintiff and all conflicts must be resolved in his favor. *Wagman v. General Finance Co. of Philadelphia, Pa., Inc.*, 3 Cir., 116 F.2d 254; *Schad et al v. Twentieth Century-Fox Film Corp. et al.*, 3 Cir., 136 F.2d

991; Lukon v. Pennsylvania R. Co., 3 Cir., 131 F.2d 327; Meyonberg v. Pennsylvania R. Co., 3 Cir., 165 F.2d 50; Kraus v. Reading Co., 3 Cir., 167 F.2d 313; O'Brien v. Public Service Taxi Co., 3 Cir., 178 F.2d 211.

The court cannot concern itself with the credibility of the witnesses or the weight of the evidence. Roth V. Swanson, 8 Cir., 145 F.2d 262.

The court is not free to reweigh the evidence and set aside the jury's verdict merely because the jury could have drawn different inferences or conclusions, or because the court regards another result as more reasonable. Tennant v. Peoria & P. U. Ry. Co., 321 U.S. 29, 64 S.Ct. 409, 88 L.Ed. 520.

Where uncertainty as to the existence of negligence arises from a conflict in the testimony, or because, the facts being undisputed, fair-minded men will honestly draw different conclusions from them, the question is not one of law but of fact to be settled by the jury. Gunning v. Cooley, 281 U.S. 90, 94, 50 S.Ct. 231, 74 L.Ed. 720."

The Sales Agency Agreement, Exhibit 4, required the payment of \$300.00 commission. Defendants were entitled to be paid the commission as the houses were constructed. It contains unequivocal language as follows: "* * * this sales commission is to be paid on the same percentage draw basis as other items are paid through the disbursal during the progress of construction program." It is undisputed that the percentages were paid in their entirety and that all of the funds provided for

the construction of the Morning Side Heights' homes have been disbursed. Defendants are entitled to their \$300.00 per house commission since all of the funds available for the construction of the houses have been paid and that is the condition upon which the sales commission is to be paid. Plaintiffs therefore submit that they are entitled to their \$100.00 per house from defendants.

The evidence in its light most favorable to the plaintiffs requires that regardless of any agreements defendants may have had with Felt, they were entitled to their \$100.00 per house as an absolute proposition.

The basic and fundamental proposition which defendants are attempting to have this Court sustain is that plaintiffs must be required to assume the risk that the defendants do not collect the funds due them under the Sales Agency Agreement. Plaintiffs submit, to require them to do so would be grossly inequitable, unfair and not in accordance with plaintiffs' understanding nor even as contemplated by defendants.

To illustrate the unfairness of defendants' proposition, consider the following which are shown by the evidence:

1. None of the plaintiffs were parties to the Sales Agency Agreement.
2. None of the plaintiffs knew of the terms of the Sales Agency Agreement.

3. None of the plaintiffs knew of the amount of commissions which defendants were receiving and had, therefore, no basis for passing on the fairness of the contract.
4. Plaintiffs were not informed of the parties to the Sales Agency Agreement nor to whom defendants were looking for the payment of the commissions which were earned.
5. All of the negotiations, collections and procedures by defendants were taken without consultation between defendants and plaintiffs.
6. Defendants received and accepted property and agreed to delay the payments under the Sales Agency Agreement terms without consulting with plaintiffs.
7. Defendants own and will have all the benefits of any causes of action or claims which it is successful in pursuing against Felt Syndicate, Prudential Federal or the bonds of Cassidy, the construction contractor.
8. Defendants will be permitted to retain approximately \$9,190.74 out of the \$14,590.74 which they have collected, plus all of the profits which they have received from the sale of the twelve lots, options to which they received from Felt Syndicate and thus profit tremendously without paying to the plaintiffs the amount which all agreed would be paid as consideration for the selling of the Morning Side Heights' homes.

The proposition which defendants are attempting to foist on to the Court, and have to the present time successfully foisted off on Judge Van Cott, would require that employees assume the risk that their employer col-

lect all of his accounts receivable before they are entitled to be paid their salaries. Such a proposition is unknown in the annals of business relations, it is a risk the employer assumes and is paid for in the amount of his gross profit on sales.

There is no dispute that plaintiffs rendered the services required of them and that binding and subsisting sales contracts were entered into. Every duty required of the salesmen was performed in full. The only thing which was left undone in the complete performance was the collection from Felt Syndicate of the agreed and earned sales commission.

Who should be saddled with the loss suffered by reason of the failure to collect from Felt Syndicate—the salesmen who had no contract with that group, or the broker who negotiated the contract and dealt with, negotiated with, and compromised with the Syndicate? The answer seems to be clear and unequivocal and plaintiffs submit that no judgment other than a reversal of Judge Van Cott's granting of judgment notwithstanding the verdict can achieve a fair and equitable result in this case.

The rules of interpretation and construction of contracts has been repeatedly set forth in our Utah cases. It has always been our law that if there is ambiguous language or language which is susceptible of more than one meaning, the meaning adopted is the one most favor-

able to the person not using the language. The circumstances and positions of the parties and the subject matter and all other surrounding facts are to be considered in finding the true intention of the parties. This job of finding the language of the contract and then interpreting it is to be left to the jury. *Penn Star Mining Co. v. Lyman*, 64 Utah 343, 231 P. 107; *Jordan v. Madsen, et al*, 69 Utah 112, 252 P. 570; *Fox Film Corporation v. Ogden Theatre Co.*, 832 Utah 279, 17 P. 2d 294; *Mifflin v. Shiki*, 77 Utah 190, 293 P. 1. The most recent reiteration of the rules for interpretation and construction is *Read v. Forced Underfiring Corp.*, 82 Utah 529, 26 P. 2d 325, p. 327. There this Court stated as follows:

“In construing the term ‘net profits’ as used in the contract, it is the duty of the court to consider the language in connection with the conditions and circumstances under which the parties were contracting and the relation which they sustained to each other. 2 Elliott on Contracts, 774.

Where the language is mixed and susceptible of more than one construction, the court should attempt to place itself as nearly as possible in the situation of the parties to the contract at the time the agreement was entered into, so that it may view the circumstances as viewed by the parties themselves to be enabled to understand the language used in the sense with which the parties used it. In order to accomplish this purpose it is generally proper for the court to take notice of the surroundings and attendant circumstances and consider the language used in the light of such circumstances. *Id.*, p. 791.

* * *

It is a familiar rule of construction that the language used must be construed most strongly against the person using it. In this case, the contract is in the form of a letter written by the defendant corporation to the plaintiff in which they set out the terms of the employment. It is their language used at a time when no salaries were being paid and were apparently not in contemplation of being paid. At that time, under the conditions surrounding the plaintiff, he could not be expected to anticipate the creation of the new expenses which, if allowed, would make meaningless that part of the contract referring to net proceeds. The contract should be so construed as to require the payment of commissions due the plaintiff upon the net proceeds of the Salt Lake division without deducting salaries voted to the directors as managers after the contract had been entered into."

From the authorities cited, it would appear that the function of the jury where the existence of an agreement is denied is to first find whether or not there was an agreement and second, it must find the meaning of the agreement. The jury in this case under instructions satisfactory to both parties, found that there was an agreement, and further found that under that agreement there were certain sums due plaintiffs. The trial court in entering judgment against plaintiffs ignored this verdict and usurped the function which the Constitution requires he permit the jury to perform.

Plaintiffs submit that the trial court's ruling should be set aside and the verdict of the jury should be ordered reinstated.

CONCLUSION

Plaintiffs submit that the trial court has usurped the function of the jury and has unconstitutionally denied them the right to a jury trial and the result thereof. This Court should order the restoration of the judgment in favor of plaintiffs and against defendants in accordance with the jury's verdict.

Respectfully submitted,

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Received copies of the within Brief
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