

1980

# Wilford Leslie Neves and Gloria Gay Neves, His Wife v. Bruce Earl Wright and Shonnie C. Wright, His Wife : Brief of Plaintiff-Respondents

Utah Supreme Court

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KEITH E. SOHM; Attorney for Plaintiffs and Respondents  
M. DAYLE JEFFS; Attorneys for Defendants and Appellants

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IN THE SUPREME COURT OF THE  
STATE OF UTAH

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WILFORD LESLIE NEVES and  
GLORIA GAY NEVES, his wife,

Plaintiffs and  
Respondents,

-vs-

Case No. 16910

BRUCE EARL WRIGHT and  
SHONNIE C. WRIGHT, his wife,

Defendants and  
Appellants.

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BRIEF OF PLAINTIFF-RESPONDENTS

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Appeal from Judgment of the Fourth  
Judicial District Court of Utah  
County, Honorable George E. Ballif,  
Judge

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Clerk, Supreme Court, Utah

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IN THE SUPREME COURT OF THE  
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-vs-

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SHONNIE C. WRIGHT, his wife

Defendants and  
Appellants .

---

BRIEF OF RESPONDENTS

NATURE OF THE CASE

The nature of the case was stated accurately by the appellants and need not be restated here.

DISPOSITION IN THE LOWER COURT

The case was tried without a jury before the Honorable George E. Ballif, who entered judgment in favor of the plaintiff -respondents buyers and against the defendant -appellants sellers. The Court in entering a Memorandum decision stated as follows:

"The Court finds that the failure of the defendants to disclose the fact that they did not have title to the property at the time the contract was a breach of contract by defendants entitling plaintiffs to rescind the contract of sale. (Leavitt v. Blohm, 11 U.2d 220. The instant case is stronger on the facts because here defendant had no title at the time of the sale.)"

The Court found at the Motion for Summary Judgment stage "that the defendants were out-of-title" (Rec. 112:15-18)

The Court then awarded to the Plaintiffs \$3,000.00 plus the cash paid under the contract less \$200.00 per month rental for the period of occupancy. Based upon such decision, the plaintiffs-respondents submitted a judgment which included \$1,918.00 attorney's fees and \$604.50 interest. Defendants-appellants made a motion to strike the attorney's fees. The motion was granted and after the ruling on attorney's fees, defendants-appellants filed their Notice of Appeal.

#### RELIEF SOUGHT ON APPEAL

The relief sought on appeal has been correctly stated and need not be restated here.

#### STATEMENT OF FACTS

The Statement of Facts given by the appellants is, in the most part, completely irrelevant and immaterial. Skipping page three and most of page four brings us to the first full paragraph where the relevant facts begin.

The plaintiff-respondents purchased a home from the defendant-appellant on a Uniform Real Estate Contract, the first copy of which was dated April 19, 1977 (Ex. 9, R. 106:15-18)

The defendants, Bruce E. Wright and Shonnie C. Wright, executed a Quit Claim Deed (Ex. 4) on April 11, 1977, conveying all of their interest in the property involved herein to a third party.

On April 19, 1977, the plaintiff-respondents and



defendant-appellants entered into a Uniform Real Estate Contract (Ex. 9, Rec. 106:15-18). No disclosure was made to the plaintiff-respondents by the defendant-appellants that the sellers, in fact, had no legal title to the property they were selling. (Rec. 143:4-6). Plaintiffs took possession and began making payments upon the purchase contract to appellants and to First Security Bank, the first mortgage holder.

On May 31, 1977, the parties, with a proper legal description, re-signed the Uniform Real Estate Contract (Ex. Rec. 105:21-29) and executed an escrow agreement, (Ex. 5). The appellants even signed a Warranty Deed on May 31, 1977 to the property they did not own (Ex.2) falsely and fraudulently warranting that they owned the property.

During all of this time and through all of these contracts sellers failed to reveal to buyers that they had deeded the property to a third party. In February of 1978, plaintiff-respondents became aware through an examination of the County Recorder's Office that the defendant-appellants had conveyed the property to a third party. By this time respondents had paid appellants \$7,555.44 for property respondents did not own. Through counsel, plaintiff-respondents sent notices that they were vacating the property, tendering the property back to the appellant-sellers and refusing to make further

payments. Plaintiff-respondents' letters were received in evidence as Exhibits 6, 7 and 8. Mr. Neves, the plaintiff-respondent, stated clearly that he would not have purchased the property if he had known that the title had been transferred.

A. ... "Had I known the facts of the case, that he didn't have a deed to the property, that only a week before he had deeded it to his parents, I would not have entered into the contract." (Re. 118:4-8)

The plaintiff-respondent then commenced an action to rescind the contract and for damages. The lower Court found for the plaintiff-respondent and granted damages.

### ARGUMENT

#### POINT I

DEFENDANTS-APPELLANTS REPRESENTED AND WARRANTED THAT THEY OWNED THE PROPERTY WHICH REPRESENTATION WAS FALSE AND FRAUDULENT. SUCH A MATERIAL AND FRAUDULENT REPRESENTATION IS A BASIS FOR RECISSION OF THE CONTRACT BY THE BUYER.

The defendants told plaintiffs they owned the property in question, represented that they owned the property in the two real estate contracts (Ex. 1 and 9) and warranted that they owned it in the Warranty Deed dated May 31, 1977 (Ex. 2).

By conveying the property to a third party by Quit Claim Deed without any written reservation the defendant-appellant transferred all of their interest in the property, Ruthrauff v. Silver King Western, 95 Ut. 279, 80 P.2d 338 also 112 Ut. 52, 185 P.2d 264. Clearly after defendant-respondent conveyed the property to a third



party by Quit Claim Deed they had no interest to sell and any attempt to sell something they didn't own was fraud.

In the BYU Summary of Utah Real Property Law, Vol. 1 Section 59 under the title of "Quality of Title the Vendee is to receive" we read:

"Where mutual assent does not occur due to the presence of mistake, fraud, or undue influence, in establishing the contractual relationship, then the contract is never formed."

Section 57-1-3 Utah Code Annotated states the respondents had a right to rely on the document given them as evidence of clear title.

"A fee simple title is presumed to be intended to pass by a conveyance of real estate, unless it appears from the conveyance that a lesser estate was intended."

The case of Elder v. Clawson, 14 Ut. 2d. 379, 384 P. 2d 802 (1963) held purchasers could rescind for fraud when sellers failed to mention a quarantine for a noxious weed and held "silence may become actionable fraud where it relates to a material matter known to the party... ." Certainly nothing could be more material then representations as to who actually owns the land being transferred. The plaintiff-respondent could rescind the contract and did. Section 8.60 states:

"A party may claim the right to rescind a contract but to do so he must evidence intent to rescind by some unequivocal act, either by explicit notice or some act from which notice may be implied."

In our case the plaintiff-respondents gave immediate notice of rescission and vacated the premises as soon as

they discovered the fraud. In Frailey v. McGarry, 116 Ut. 504, 211 P.2d 840, the Court acknowledged the right to rescind for false representations but held when the plaintiff delayed a year he, in effect, ratified the contract.

## POINT II

THE PLAINTIFF-RESPONDENTS HAD A RIGHT TO PRESUME THEY WERE PAYING FOR AND RECEIVING PROPERTY OWNED BY THE DEFENDANT-APPELLANTS AND THE FAILURE OF DEFENDANT-APPELLANTS TO DISCLOSE THE FACT THAT THEY DID NOT HAVE TITLE TO THE PROPERTY AT THE TIME THE CONTRACT WAS ENTERED INTO WAS A BREACH OF CONTRACT BY DEFENDANT-APPELLANTS ENTITLING PLAINTIFF-RESPONDENTS TO RESCIND THE CONTRACT OF SALE.

The signing of a Uniform Real Estate Contract by the parties was a conveyance of the property. Section 57-1-1 defines conveyance as follows:

"The term 'conveyance' as used in this title shall be construed to embrace every instrument in writing by which any real estate, or interest in real estate, is created, aliened, mortgaged, encumbered or assigned, except wills, and leases for a term not exceeding one year."

The buyers in this case had the right to presume the defendant-appellant sellers had title to the property conveyed. Section 57-1-3 states:

"A fee simple title is presumed to be intended to pass by a conveyance of real estate, unless it appears from the conveyance that a lesser estate was intended."

Any desire of the defendant-appellant sellers to give the property to someone else for whatever reason should be included in the conveyance document. The summary of Utah Real Property Law, Vol. I, Section 8.14 states:

"(1) A fee simple absolute is presumed absent other terms. (2) Any desire of the vendor to retain a portion of the estate or joint title, or give another portion, remainder or other joint title, to someone else should be included." (underlining added)

A contract may be rescinded if the seller cannot convey his title free from all but agreed upon encumbrances.

Section 8.15 states in part, as follows:

"Generally, a contract may be rescinded if the vendor cannot convey his title free from all but mutually agreed upon encumbrances." (Thackery v. Knight, 57 Ut.21, 192 P.263 (1920).

The cases cited by the defendant-appellants to the effect that seller need not have a marketable title do not apply in our case.

In all of the cases cited by the defendant-appellant only nominal defects were involved. Case Woodward v. Allen, 1 Ut. 2d 220, 265 P.2d 398 (1953), for instance, the purchaser signed an agreement in the evening then stopped payment on his check the next morning. The Court found the purchaser's complaint about a marketable title was an after thought being merely an attempt to get out of the contract. The seller had title but merely had some clouds on it to be cleared. There were no material defects nor were there any material representations involved.

In the case Leavitt v. Blohm, 11 Ut. 2d 220, 357 P. 2d 190, both the trial court and the Supreme Court agreed on the same principal we (plaintiff-respondents) are contending here that purchaser has the right to rescind when seller, by conveying title, had clouded the title. The

trial court gave damages to purchaser but the upper court, though agreeing that there was a right to rescind, equivocated on damages because purchaser had not offered to return the property but merely moved out and abandoned the premises and did not even ask for return of money until the time for a counterclaim. The Court struck out the counterclaim Judgment to purchaser but affirmed the rescission.

Even in cases where seller lost or gave up his title the cases uniformly hold the purchaser could rescind. In the case Marlowe v. Radmall, 26 Ut. 2d 124, 485 P. 2d 1402, the Court held purchaser could rescind:

It is true that ordinarily such a vender does not necessarily have to have marketable title until the purchaser has made his payments. Nevertheless, if it plainly appears that he has so lost or encumbered his ownership or his title that he will not be able to fulfill his contract he cannot insist that the Purchaser continue to make payments when it is obvious that his own performance will not be forthcoming."

This case refers back to Leavitt case and cites Tremonton Investment v. Home, 59 Ut. 156, 202 P. 547; 55 Am Jur. 624, Vender and Purchaser, Sec. 154.

In Beckstrom v. Beckstrom, 578 P. 2nd 520, (1978) the Court held that the seller breached the contract in not being able to convey the other half of the 80 acres contracted for by the purchaser.

### POINT III

THE DEFENDANT-APPELLANTS LOST ALL INTEREST IN THE REAL PROPERTY WHEN THEY CONVEYED IT BY A QUIT CLAIM

DEED AND NO SUCH THING AS AN ORAL TRUST OR ANY OTHER KIND OF SO-CALLED RESERVATION OF INTEREST IS VALID UNLESS THE ORAL TRUST OR RESERVATION OF INTEREST IS IN WRITING.

A deed is a written instrument which, when properly executed, conveys any interest in real property, 23 Am. Jur. 2d Deeds Sec. 1. A Quit Claim Deed "will pass all rights, title, interest and estate of the grantor at the date of the conveyance" Summary of Utah Real Property Law, Vol. 1 Chapter II Deeds Sec. 2.2; Ninx v. Tooele County, 101 Ut. 84, 118 P.2d 376 (1941) Ruthrauff v. Silver King Western (Supra). Such instruments are construed in favor of the grantee, Meagher v. Uintah Gas Co., 123 Ut. 123, 255 P. 2d 989, 993 (1953).

A DELIVERED RECORDED DEED TO 3rd PARTY FURTHER PRE-CLUDED ALL CLAIM OF TITLE BY PLAINTIFFRESPONDENTS.

The law says there must be a delivery of the deed to the grantee. In our case the deed was not only delivered by the Defendants to a 3rd party but the deed was recorded. The very purpose of recording is to give:

"All subsequent purchasers and mortgagees constructive notice of the existence and contents of the recorded instruments." "A major premise of the law of real property is the rule that "first in time is first in right" "the first-created of two competing interest has priority". Sec. 2.38 S.U.R.P.L. Also see Powell, The Law of Real Property, Sec. 912.

"Constructive notice deals with title to land. Proper recordation gives all prospective subsequent grantees constructive notice of the existence and contents of the recorded instruments. In essence, there can be no subsequent bonafide purchasers because anyone wishing to be a grantee will be said to be an constructive notice of the deed since he has a duty to search the chain of title. A proper search will uncover a proper-



ly recorded deed", S.U.R.P.L. Sec. 2.40.

Section 57-3-2 of the Utah Code provides:

"Every conveyance, or instrument in writing affecting real estate, executed, or acknowledged or proved, and certified, in the manner prescribed by this title, and every patent to lands within this state duly executed and verified according to law, and every judgment, order or decree of any court or record in this state, or a copy thereof, required by law to be recorded in the office of the county recorder, and every financing statement which complies with the provisions of section 70A-9-402 shall, from the time of filing the same with the recorder for record, impart notice to all persons of the contents thereof; and subsequent purchaser, mortgagees and lienholders shall be deemed to purchase and take with notice."  
(underlining added)

"To illustrate the above statute assume that O conveys to B. B records. O then conveys to C, who had no actual notice of the prior conveyance. B prevails over C because C was given constructive notice by proper recordation. "S.U.R.P.L. Sec. 2.40.

This illustration is identical to our case, O being the appellants and C being the respondents. The appellants might just as well have sold the respondents the Brooklyn Bridge. In the end the respondents, C, would get nothing. Unfortunately respondents did not check the recorder's office before signing the contracts but, fortunately, respondents did check the recorder's office before they had paid out more money to appellants who had no recorded title or interest in the property they were selling.

ALL TERMS AFFECTING AN INTEREST IN REAL PROPERTY  
MUST BE IN WRITING. AN ORAL TRUST IN A REAL  
PROPERTY TRANSACTION IS VOID.

There was nothing on the appellant's Quit Claim Deed to the 3rd party indicating the 3rd party was to hold the



property in trust. -All agreements connected with real estate transactions must be in writing. Counsel for appellants has repeatedly referred to the agreement between appellants and the 3rd party was an "Oral Trust". Section 25-5-1, Utah Code Annotated, dealing with the Statute of Frauds, states as follows:

"No estate or interest in real property, other than leases for a term not exceeding one year, nor any trust or power over or concerning real property or in any manner relating thereto, shall be created, granted, assigned, surrendered or declared otherwise than by act or operation of law, or by deed or conveyance in writing subscribed by the party creating granting, assigning, surrendering or declaring the same, or by his lawful agent thereunto authorized by writing." (underlining added)

In fact the law says an oral agreement or oral trust not a part of the deed or a written contract is VOID. Section 25-5-3 reads as follows:

"Every contract for the leasing for a longer period than one year, or for the sale, of any lands, or any interest in lands, shall be void unless the contract or some note or memorandum thereof, is in writing subscribed by the party by whom the lease or sale is to be made, or by his lawful agent thereunto authorized in writing." (underlining added)

Section 57-1-6 discussing trusts and trustees states that recording real estate transactions is necessary to impart notice and states in part as follows:

"Neither the fact that an instrument, recorded as herein provided, recites only a nominal consideration, nor the fact that the grantee in such instrument is designated as trustee, or that the conveyance otherwise purports to be in trust without naming the beneficiaries or stating the terms of the trust, shall operate to charge any third person with notice of the interest of any person or persons not named in

such instrument or of the grantor or grantors; but the grantee may convey the fee or such lesser interest as was conveyed to him by such instrument free and clear of all claims not disclosed by the instrument or by an instrument recorded as herein provided setting forth the names of the beneficiaries, specifying the interest claimed and describing the property charged with such interest." (underlining added)"

In other words the appellants could have conveyed to the 3rd party by writing in the trust relationship but since no trust relationship was established by the deed itself the grantee-third party could convey the property "free and clear of all claims not disclosed by the instrument". Sections 57-1-19 through 36 provide detailed instructions on trust sales. Having some 16 sections of law referring to trust arrangements shows how concerned Utah is about sales of real property connected with trust agreements. The appellants should have done two things which they did not do, that is:

1. The appellants should have had such an agreement acknowledgment from 3rd Party before executing the Quit Claim Deed and preferably the agreement should have been part of the deed.
2. The appellants should have advised the respondents of the Quit Claim Deed and trust arrangements before the contract signing so respondents would have "actual notice" of the document and arrangement.

The respondents can only take a recorded document for its face value and had full right to avoid or rescind an agreement when the appellants sold them property which they represented they owned especially when the respondents had to find out, by their own investigation, that the appellants, in fact, had no title whatsoever to the property

sold.

The dangers of such a transfer, no matter what the intent is obvious. If the appellants died the knowledge of an oral agreement dies with them and 3rd party owns the property free and clear. If the 3rd party died the property belongs to their estate clear and simply. The dead man statute precludes testimony concerning the intent of oral agreements of the dead man. Even if the 3rd party decided to deny the oral agreement there would be serious problems. If creditors attached the property of the 3rd party, the oral agreement would be invalid.

#### POINT IV

ADMITTEDLY DEFENDANT -APPELLANTS TRANSFERRED THE PROPERTY TO A THIRD PARTY TO THWART CREDITORS. THE COURT SHOULD NOT REWARD THIS ATTEMPT TO DEFRAUD CREDITORS.

By Defendants own admission the transfer to a 3rd party was to thwart creditors. Transfers to defraud creditors are Fraud and against Public policy. Section 25-1-11 Utah Code Annotated states:

"All deeds, gifts, conveyances, transfers or assignments, verbal or written, of goods, chattels, or things in action made in trust for the use of the person making the same shall be void as against the existing or subsequent creditors of such person."

Obviously appellants should not seek equity in this Court because of their acts calculated to defraud creditors. Certainly this court should not give credence to reasons behind the scenes for a transfer of property

when reasons were fraudulent and unlawful.

#### POINT V

#### DAMAGES WERE PROPERLY CALCULATED

For damages the respondents should recover the \$3,000.00 agreed value of the down payment for land given, plus the \$2,000.00 additional down payment and the amount of \$2,555.44 paid out in monthly payments for a total of \$7,555.44 less reasonable rental value which the evidence shows was \$200.00 per month for nine months or \$1,800.00 for a final total of \$5,755.44 plus costs and interest.

#### CONCLUSION

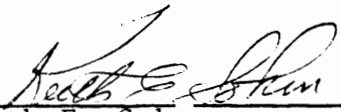
Respondents urge the Court to find that the facts which are not in dispute and the law support the decision of the trial court and pray the court deny the appeal and uphold the award of the lower court.

Respectfully submitted:

  
\_\_\_\_\_  
Keith E. Sohm

#### CERTIFICATE OF MAILING

I hereby certify that two true and correct copies of the foregoing Brief of Respondents were mailed first class to M. Dayle Jeffs, 90 North 100 East, P.O. Box 683, Provo, Utah 84601, postage prepaid, this 4th day of September, 1980.

  
\_\_\_\_\_  
Keith E. Sohm