1955

# Wallace R. Smith dba Smith Realty Company v. C. Taylor Burton : Petition for Rehearing and Brief in Support Thereof

Utah Supreme Court


Rawlings, Wallace, Roberts & Black; Dwight L. King; Counsel for Appellant;

Case No. 8302

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

WALLACE R. SMITH, dba SMITH REALTY COMPANY,
*Plaintiff and Appellant,*

— vs. —

C. TAYLOR BURTON,
*Defendant and Respondent.*

## PETITION FOR REHEARING
## AND
## BRIEF IN SUPPORT THEREOF

RAWLINGS, WALLACE, ROBERTS & BLACK and DWIGHT L. KING
*Counsel for Appellant*

530 Judge Building
Salt Lake City, Utah

## INDEX


*Page*

PETITION FOR REHEARING ..... 1

BRIEF IN SUPPORT OF PLAINTIFF'S PETITION FOR REHEARING ..... 2

PRELIMINARY STATEMENT ..... 2

STATEMENT OF FACTS ..... 3

POINTS RELIED UPON ..... 3

POINT I. THIS COURT HAS MISAPPLIED AND MISCONSTRUED THE SO-CALLED PAROL EVIDENCE RULE. ..... 3

CONCLUSION ..... 11


## TABLE OF CASES


Farr v. Wasatch Chemical Co., 105 Utah 272, 143 P. 2d 281 ..... 4


## TEXT


Wigmore on Evidence, Vol. IX, 3rd Ed., Sec. 2430-2431, pp. 97-104 ..... 6

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

WALLACE R. SMITH, dba SMITH REALTY COMPANY,
*Plaintiff and Appellant,*

— vs. —

C. TAYLOR BURTON,
*Defendant and Respondent.*

Case No. 8302

## PETITION FOR REHEARING AND BRIEF IN SUPPORT THEREOF

### PETITION

Plaintiff petitions this Honorable Court for a rehearing in the above-entitled matter and in support thereof states as follows:

I. That the decision filed on the 1st day of August, 1955, in the above entitled matter contains a basic misapplication and misconstruction of the so-called Parol Evidence Rule as concerns the commission agreement dated the 1st of May, 1953.

II. That the decision deprives plaintiff without any justification of commissions which in equity and good conscience were due him and in effect creates a penalty and forfeiture.

WHEREFORE, appellant prays that a rehearing be granted and as to the May 1st agreement, the Court affirm the lower court's decision.

DATED this 19th day of August, 1955.

RAWLINGS, WALLACE,
ROBERT & BLACK AND
DWIGHT L. KING

By.....
Dwight L. King
Counsel for Appellant

530 Judge Building
Salt Lake City, Utah

---

## BRIEF IN SUPPORT OF PLAINTIFF'S PETITION FOR REHEARING

---

### PRELIMINARY STATEMENT

Parties will be referred to throughout this brief as they were in the trial court.

All italics are ours.

## STATEMENT OF FACTS

In the decision of this court, it held that the trial court could not consider parol evidence in interpreting and construing the following agreement:

> "As my commission for services in connection with that Exchange Agreement dated May 1, 1953 (with Toone) I will take ½ of rental fee for pastures for the 1953 season until a total of $2,000 is paid, together with sorrel horse, saddle and bridle. *Smith to rent pastures.*"

The facts concerning the drawing and signing of the quoted agreement were generally undisputed. It is in longhand, was written by the defendant on a scratch pad and was drawn without either party consulting or being advised by an attorney.

The agreement was intended by both parties to provide for a means of payment for commission on the exchange of certain real property which was fully consummated as a result of the efforts of plaintiff.

There was no discussion nor claim that the parties intended to work a forfeiture or penalty on plaintiff by the hastily drawn and unconsidered memorandum.

## POINTS RELIED UPON

### POINT I. THIS COURT HAS MISAPPLIED AND MISCONSTRUED THE SO-CALLED PAROL EVIDENCE RULE.

In the decision of the court, it is stated:

> "It is impossible to determine how such finding could be reached, except by considering parol evidence, since such finding is the antithesis of the plain terms of the memoradum."

The quoted language indicates that the court has fallen into the error of considering the Parol Evidence Rule as a rule of evidence. It has long been conceded that the Parol Evidence Rule is a rule of substantive law and does not concern the receipt or rejection of evidence.

The rule actually concerns whether or not the terms of an integrated written instrument may be varied by parol evidence. It does not prohibit the receipt by the finder of fact of evidence concerning the oral transactions. How the information which remained in an oral form can be used by the finder of fact in his interpretation of the written instrument is the subject of the Parol Evidence Rule. The rule has been the subject of a very careful and considered opinion by this court.

In *Farr v. Wasatch Chemical Co.,* 105 Utah 272, 143 P. 2d 281, this court, after a careful analysis of the Parol Evidence Rule, sets down the principles which are applicable and which are not seriously controverted by any authority. It stated as follows:

> "* * * The rule is, of course well established, but it has no application here. The problem of ascertaining when the rule applies to a given fact situation is discussed by Wigmore, Sec. 2430 of his work on Evidence. It is there stated: 'The

> inquiry is whether the writing was intended to cover a certain subject of negotiation; for if it was not, then the writing does not embody the transaction on that subject * * *. Whether a particular subject of negotiation is embodied by the writing depends wholly upon the intent of the parties thereto * * *. This intent must be sought * * * in the conduct and language of the parties and the surrounding circumstances * * *. The question being whether certain subjects of negotiation were intended to be covered, we must compare the writing and the negotiations before we can determine whether they were in fact covered. * * * In deciding upon this intent, the chief and most satisfactory index for the judge is found in the circumstances whether or not the particular element of the alleged extrinsic negotiation is dealt with at all in the writing. If it is mentioned, covered, or dealt with in the writing, then presumably the writing was meant to represent all of the transaction on that element; if it is not, then probably the writing was not intended to embody that element of the negotiation."

It is plaintiff's position that this court has failed to consider or apply the rules which it enunciated in the Farr case to the uncontradicted facts of this case.

This court in its present decision did not compare the subject of negotiations and the final written instrument as Judge Jeppson did in arriving at his decision. This court completely rejects all of the oral evidence which outlines the nogotiations. It looked only at the writing. As Wigmore explains in his treatise on evi-

dence, such action does not place the written instrument on its proper base nor give an outline of the subject matter to be covered by the written instrument, Wigmore on Evidence, Vol. IX, 3rd Ed., Sec. 2430 - 2431, pp 97 - 104.

This court in its decision states that "It is impossible to determine how such finding could be reached, except by considering parol evidence, since such finding is the antethesis of the plain terms of the memorandum." It, in effect, is saying that parol evidence cannot be received because it is varying the terms of the writing. Wigmore, supra, p. 102 points out the error of this kind of reasoning in the following language:

> "(a) It is not uncommon to speak of the present rule as a rule against 'varying the terms of the writing.' No doubt that is precisely the result of applying the rule. But it can never serve as a test to determine in the first instance whether the rule is applicable. The applicability and the effect of the rule are distinct things. To employ this phrase as a test is to reason in a circle; for it is to attempt to decide whether something conceded to be different from the writing ought to be excluded, by showing that it *is* different. All the phrases about transactions that 'vary,' or 'contradict,' or are 'inconsistent,' involve the same futility. The fundamental question is as to the intent of the parties to restrict the writing to specific elements or subjects of negotiation (ante, § 2430, par. 3); and if that intent existed, then

the other subjects of negotiation can be established, even though they be (as they usually are) different from the writing:"

* * * * * * *

"(b) It has occasionally been laid down that, in ascertaining, in the first instance, the parties' intent to embody or not in the writing certain subjects of negotiation, 'the writing is the sole criterion,' i.e. no search for data of intent can be made outside the four corners of the document:"

* * * * * * *

"Such a proposition, however, is untenable, both on principle and in practice. In practice, it is not enforced by its theoretical advocates. In theory, its fallacy is indicated by what has been already notice (*ante,* §2430). The problem being to ascertain whether the parties intended a certain writing to cover certain subjects, the relation between the writing and those subjects and their conduct is necessarily involved; and all these matters must be considered. * * *"

The Wigmore reasoning which is obviously sound, was adopted in this court by the Farr decision but has been ignored by the court in its present decision.

This court did not examine the writing to see whether or not the elements were all dealt with which were covered by the oral negotiations between the parties. A mere restatement of the matters which the court must pass upon demonstrates that they are not covered by the written instrument. For instance, nothing in the written instrument covers in any way the contingency

which arose, namely, that a total of $2,000.00 was not received from the rental of the pastures during the 1953 season. This contingency, the plaintiff stated, was discussed orally and it was agreed that if the rental did not amount of $2,000.00, he was to be paid that sum on October 1st.

Can it possibly be claimed that the memorandum covered the contingency and as to said matter was an integrated written instrument? That particular element is not dealt with any place in the writing and the only evidence upon it must be of an oral nature.

The court underlines the words, "Smith to rent pastures" and seems to feel that this language can be interpreted to mean that Smith assumed all responsibilities for the rental of the pastures and would forfeit the $2,000.00 which he had earned if the pastures proved to be unrentable. This language the trial court interpreted in the light of the negotiations between the parties. To arrive at its true meaning necessitated the receipt and consideration of statements made by both parties and the selection from among the contradictory testimonies of what should be believed. Apparently, the court assumed that without considering any oral negotiations that "Smith to rent pastures" meant that if Smith did not rent the pastures he forfeited all claim to the $2,000.00 fee which he has earned and further that he was to rent the pastures regardless of their condition or the obstacles which could be placed in his path by de-

fendant. It is impossible for plaintiff to understand how the court can conclude that the phrase, "Smith to rent pastures" could be interpreted without considering the negotiations between the parties which were oral in form. Without considering the oral transaction the only logical meaning we submit is to conclude that Smith was to have the right to negotiate rental contracts and would undertake to discharge that duty. Certainly, it could not be claimed that the forfeiture which this court has decreed was a particular element dealt with at all in writing.

The court suggests that plaintiff amend his complaint since nothing was pleaded about defendant fixing the fence. This suggestion reveals a failure to understand not only the Parol Evidence Rule but our new rules of civil procedure. It is no longer necessary to plead facts in order to prove them at the trial. It is sufficient to merely plead that defendant owes plaintiff and all evidence bearing on the subject may be received. See Forms of Complaints, pp. 837 to 844, Vol. 9, U.C.A. 1953. There was never any objections by any party during the trial to receipt of evidence on the fence being down and the pasture not rentable. The evidence is without contradictions and is found throughout the whole transcript both from plaintiff and defendant that defendant actually undertook fencing to enclose the pasture.

This pasture enclosure agreement is another illustration of a part of the agreement between the parties

which cannot be found mentioned at all in the May 1st writing. Its proof must be made by showing oral transactions which under the Farr decision and Wigmore's principles is proper.

The Farr case, plaintiff submits, sets forth the applicable principles concerning the use and application of the parol evidence rule. The court in the present case has overlooked the Farr decision. It has failed completely to consider the principles which are set forth in Wigmore on Evidence, 3rd Ed., Vol 9, p. 97, Sec. 2430 - 2431.

It is respectfully submitted that the quoted agreement of May 1st cannot be classified as a fully integrated agreement between plaintiff and defendant concerning the arrangements for the commission on the Toone transaction. It is obviously a partial integration and as a partial integration the trial court and this court must consider oral transactions which explain and complete the particular elements which are not dealt with at all in the written instrument. The only evidence of what the parties intended on the matters not contained or dealt with at all in the writing can only be resolved by resort to their negotiations which were oral in nature and which were not embodied in the written instrument.

It is respectfully submitted that this court in its decision on the May 1st agreement has deprived plaintiff of a commission which was fully earned; that it has

done this without considering the legal principles applicable to the interpretation of said agreement; that it has adopted a strained interpretation of the agreement which results in an inequitable and unjust result. Plaintiff could understand the resort to a strained interpretation to effect an equitable result but where the result is inequitable and deprives a party of a commission which has been completely earned, it is impossible for plaintiff to understand the court's decision.

## CONCLUSION

It is respectfully submitted that the court has misapplied the parol evidence rule and has misconstrued and misinterpreted the agreement of May 1, 1953; that as a result its decision works an inequitable and unjust result, and the court should reconsider and reverse its ruling as concerns the $2,000.00 commission earned by plaintiff on the Toone transaction.

Respectfully submitted,

RAWLINGS, WALLACE, ROBERTS & BLACK and DWIGHT L. KING

*Counsel for Appellant*

530 Judge Building
Salt Lake City, Utah

Received .....copies of the within Brief of Plaintiff this ..... day of ....., A. D. 1955.

_____

Counsel for Defendant & Respondent