

1990

Lochhead v. Jordan : Reply Brief

Utah Court of Appeals

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Recommended Citation

Reply Brief, *Lochhead v. Jordan*, No. 900140 (Utah Court of Appeals, 1990).

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UTAH COURT OF APPEALS
BRIEF

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DOCKET NO.

900140-CA

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UTAH COURT OF APPEALS

PAUL R. LOCHHEAD and)
PENNY LOCHHEAD,)
)
) Case No. 900140-CA
Plaintiffs/Appellants,)
)
vs.)
)
STEPHEN C. JORDAN,)
)
Defendant/Respondent.)

REPLY BRIEF

ON APPEAL FROM THE THIRD DISTRICT COURT

Honorable Pat B. Brian, District Court Judge, presiding

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REPLY BRIEF

ARGUMENT

MISREPRESENTATION WAS RAISED AT THE HEARING
BELOW AND ADDRESSED BY THE COURT AND
RESPONDENT'S COUNSEL.

In Point II of his brief, the Respondent suggests
that the issue of misrepresentation was not raised below.
A brief review of the record shows that this argument is
baseless. The transcript of the hearing shows no less
than six occasions on which counsel for the Lochheads

raised this issue with the court, see the record 154 page 4, line 13; page 8, line 8; page 9, line 12; page 9, line 21; page 18, line 2; page 18, line 17.

At page 18, line 7 of the transcript of the proceeding the court specifically addressed the issue of misrepresentation and then ignored it. At page 23, line 12 counsel for Jordan addressed the issue with the court. Notably he did not allege that this was the first he had heard of this argument, since it was not. Jordan's counsel made no objection to the matter being heard by the court and allowed the matter to be presented, R. 154, page 24, line 2.

The crux of the issue of whether or not a matter is presented to the trial court is whether the trial court reached or ruled on the issue, Cunningham vs. Cunningham, 690 P.2d 549, 552 (Utah 1984), see also Franklin Financial vs. New Empire Development Co., 659 P.2d 1040 (Utah 1983).

The "raised below" issue was discussed by this Court in some detail in James vs. Preston, 746 P.2d 779, 801 (Utah App. 1987). "A matter is sufficiently raised if it has been submitted to the trial court and the trial court has had the opportunity to make Findings of Fact or law."

The transcript in this matter shows that the court did reach and rule on the issue. In the record at 154, page 9 commencing at line 4, counsel discussed the matter with the court.

"MR. WILDE: May I respond?

THE COURT: The Court would be very interested in your response.

MR. WILDE: First of all, the reason that we have provided the Court with the order from the bankruptcy court is because that order indicates that the information we had was not the correct information.

THE COURT: Counsel, whose responsibility is that?

MR. WILDE: If they are going to mislead us, it is their responsibility.

THE COURT: Isn't your responsibility to exercise due diligence when you negotiate in behalf of a client, and say, You tell us we are only going to get \$8,000 out of this case. The truth of the matter is we might get \$80,000. Whose responsibility is that? In the negotiation process doesn't that occur every day in this city and in every city in the United States?

A. I think that misses the point. The point is Mr. Jordan had stated under oath, in the bankruptcy court in Arizona, what his assets were. The bankruptcy court in Arizona finds in its order that the schedules reflect substantial additional assets.

THE COURT: What date is that order?

MR. WILDE: September 1 of 1989.

THE COURT: Are you saying that you now would not have sent your letter of August 1, had you known that information?

MR. WILDE: That's exactly what I am saying.

THE COURT: What was available to you, through the bankruptcy court, prior to August 1, in terms of verifying or disaffirming representations of opposing counsel and his client?"

The issue raised and discussed with the court is the Defendant's misrepresentation. The matter was again approached page 18, commencing at line 2.

"MR. WILDE: Your Honor, again, the other point here is that the acceptable agreement was made before we were aware that the representations we had received from Mr. Jordan, based on the findings of the bankruptcy court, were apparently inadequate or in error or misrepresented or whatever.

THE COURT: Counsel, the Court understands that. The Court understands precisely what you are saying. Whose responsibility is it to check out that kind of information? You certainly believed that opposing counsel is going to advance his client's causes in his client's best interest. He is going to tell you, whether it is factual or actual, that he believes if you go through a proceeding you are not going to get \$8,000 out of the bankruptcy court, anyway. That's his opinion. If you have a differing opinion on that, then you ought to check it out.

MR. WILDE: We perceived this rather to be a matter of factual misrepresentation by Mr. Jordan. Anyway, suffice it to say, I believe we have presented the Court with our arguments, and we will submit the matter.

THE COURT: Anything further?"

The Court's response to the presentation of counsel for Lochhead's on the issue of misrepresentation was, "The court understands precisely what you are saying." In other words the Court addressed the issue.

Finally, at page 23 commencing at line 10 counsel for Jordan discussed the matter with the Court,

"The other point I would make is the business about the misrepresentation."

THE COURT: Is that really necessary to argue, based on what the Court has indicated its assessment of the case?

MR. GREEN: I don't believe so, and I don't believe it is before the Court. I would submit it on that basis.

THE COURT: Both parties submit?

MR. WILDE: We will submit it, your Honor.

THE COURT: What is the motion before the Court?

MR. WILDE: The motion before the Court is to vacate the dismissal which was previously entered.

THE COURT: Any other motions?

MR. GREEN: None, your Honor.

THE COURT: Both counsel submit on all motions before the Court?

MR. GREEN: Correct, your Honor."

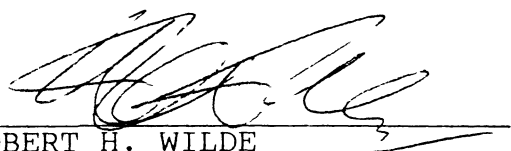
Counsel for Jordan was aware that the issue of misrepresentation was before the court, did not object to

the discussion between opposing counsel and the court on that matter and did not raise any objection to indicate he was not prepared to argue the matter.

CONCLUSION

In this matter the Cunningham of reached or ruled on was met. The matter was before the court below and should be considered here.

DATED this 6th day of April, 1990.


ROBERT H. WILDE
Attorney for Appellants

CERTIFICATE OF SERVICE

I hereby certify that I caused four true and correct copies of the foregoing APPELLANT'S BRIEF to be deposited in the United States Mail, postage prepaid, to:

Frederick N. Green
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Attorneys for Respondent
10 Exchange Place, Suite 528
Salt Lake City, Utah 84111

on this 6th day of April, 1990.


ROBERT H. WILDE