

1982

# Nick Kiahtipes, Dino Kiahtipes, and Angelo Kiahtipes v. Marius Henry Mills and Maxine Mills : Petition For Rehearing

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

NICK KIAHTIPES, DINO  
KIAHTIPES and ANGELO  
KIAHTIPES,

Plaintiffs-  
Appellants,

vs.

MARIUS HENRY MILLS and  
MAXINE MILLS,

Defendants-  
Respondents.

Supreme Court No. 17528

PETITION FOR REHEARING

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## STATUTES CITED

Rule 76 (e), Utah Rules of Civil Procedure . . . . . 1

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Supreme Court No. 17528

PETITION FOR REHEARING

INTRODUCTION

DEFENDANTS-RESPONDENTS petition the above-entitled Court, pursuant to Rule 76 (e), Utah Rules of Civil Procedure, for a rehearing of this case upon the grounds hereinafter set forth.

POINT I

THE COURT MISCONSTRUED PARAGRAPH 3 OF THE  
AGREEMENT AS IT RELATES TO APPROVAL BY CREDITORS

The opinion over-simplifies the issues in the case by stating that because the agreement does not expressly mention the Helper State Bank (HSB), the effect of its junior mortgage can be ignored and that only the Federal Land Bank (FLB) and Production Credit Association (PCA) mortgages must be considered in determining whether the agreement is valid.

There is no indication in the opinion that the true significance of the Helper State Bank mortgage is recognized by the Court.

Paragraph 3 of the agreement quoted in the opinion, when construed in the light of surrounding circumstances, clearly shows that it was the intent of both the sellers and the buyers to terminate the agreement before the closing date IF the creditors holding liens on the property refused to permit all of the proceeds of the sale to go to Utah Production Credit Association. The Mills' financial condition was bad. (See Exhibit 15A.) PCA had a second mortgage on the "Old Mills Farm" and a second mortgage on the "Angelo Peparakis Farm". PCA was threatening foreclosure. (Tr. 220) Helper State Bank was also threatening foreclosure. (Tr. 220) We quote from the testimony of M. Henry Mills:

"Q. In your meetings with Mr. Holdaway and Mr. Litizette were you able to work out an agreement by which they would release their mortgages in favor of PCA and Federal Land Bank?

"A. No.

"Q. Did they threaten foreclosure?

"A. Yes.

"Q. Did PCA threaten foreclosure?

"A. Yes.

"Q. Did PCA give you ultimatums?

"A. Yes.

"Q. During the summer of 1977 did they give you ultimatums?

"A. Yes.

"Q. As a result of the ultimatums given to you by Helper State Bank, Federal Land Bank, and PCA, did you have any source or funds or abilities to pay them off?

"A. No." (Tr. 220)

The only reason paragraph 3 was included in the sales agreement was to protect both the buyers and the sellers against involvement in imminent foreclosure suits. All parties to the agreement were aware of the indebtedness. (Tr. 213)

Paragraph 3 accomplished nothing unless all lienholders agreed that all the proceeds would go to PCA. The trial court properly found that under the circumstances mentioned above the purpose of seeking to obtain a release of the Helper State Bank mortgage was to meet the conditions of paragraph 3, construed as stated above. The opinion of this Court, under Heading I, page 4, points out that the defendants agreed to deliver clear title to the property upon receipt of the required documents from PCA and Federal Land Bank. This, of course, was impossible with the third mortgage of HSB outstanding and not within the control of the sellers, who were in serious financial trouble.

This Court has failed to consider the obvious intent of the parties. The Court made the following statement on page 4:

"Defendants accordingly assumed full responsibility for clearing the property of the HSB mortgage prior to sale and cannot now claim their own failure to do so as an excuse for nonperformance of the contract."

The statement of the law is correct, but it has no application to this case, where the closing of the sale was necessarily dependent on the approval of all creditors who had liens on the property to be sold.

If this opinion stands, the buyer will be acquiring property subject to a debt to PCA in the amount of \$220,000.00, plus accrued interest (Tr. 189); to Federal Land Bank of \$26,000.00 plus accrued interest (H. Mills Depo. 8); and Helper State Bank in the amount of \$90,000.00, plus accrued interest (Tr. 157). All debts are listed in Exhibit 15A. A personal claim against the sellers for their failure to clear the title may have little value. They are in bankruptcy under Chapter 11 of the Bankruptcy Act and have been for several years.

## POINT II

### THE OPINION INACCURATELY STATES THAT CREDITORS' LETTERS "APPROVED" THE AGREEMENT

It is stated in several places the FLB approved the agreement. Under II in the opinion it says:

"Although FLB issued promptly following the agreement, a letter approving the agreement..."

and further down,

"....it expressly reaffirmed its willingness to do so...."

The letter, dated May 11, 1977, referred to, appears in full in defendants-respondents' brief, page 6. We quote:



"Federal Land Bank Association of Provo  
P. O. Box 198, 172 South 100 East  
Provo, Utah  
Telephone: 373-8640

"May 11, 1977

"Mr. M. Henry Mills  
RFD #1, Box 148  
Price, Utah 84501

"Dear Sir

"This letter is written confirmation of our mutual agreement made yesterday, May 10th, in our office, that we would be willing to release from our mortgage that portion of the property which is known as the "Old Mills Farm".

"This agreement, to make the release at some future time, will have to comply with the then existing partial release policy of the Bank. The release is contingent upon our loan being kept current and that all of the monies, approximately \$192,000.00, from the sale of this and the Peperakis farm are applied to your now existing debts to the Utah Farm Production Credit Association.

"Sincerely,

"Wayne W. Probst, Manager  
FLBA of Provo"

Plaintiffs' Exhibit 2

It will be noted that the agreement to release is contingent upon (1) the loan being kept current and (2) that all monies, approximately \$192,000.00, are applied to the debt to Utah Farm Production Credit Association. The second contingency could not be met because of the Helper State Bank mortgage which encumbered the property.

A similar letter from the PCA bearing the same date  
(Respondents' Brief, page 6A), states:

"UTAH FARM PRODUCTION CREDIT ASSOCIATION  
215 West First South  
Salt Lake City, Utah 84101  
Telephone: (801) 355-6259

"May 11, 1977

"M. Henry Mills  
Price, Utah 84501

"Dear Henry:

"Reference is made to that certain AGREEMENT entered into on the 10th day of May, 1977, by and between M. Henry Mills and Maxine Mills, his wife, Sellers, and Nick Kiahtipes, Dino Kiahtipes, and Angelo Kiahtipes, Buyers.

"The Utah Farm Production Credit Association has been informed of the above AGREEMENT by a copy thereof and the Association hereby agrees with, and approves of the terms of the Agreement, with full proceeds of the sale (\$192,225.00 + interest accrued) paid directly to the Utah Farm Production Credit Association as outlined in Paragraphs 3, 4, and 6 of said Agreement.

"Henry, this approval of the sales agreement with the Kiahtipes in no way alters the mortgage we hold on the cattle. As a matter of fact, we are going to insist that a sufficient number of your cattle be sold within the next 60 days to bring your balance down below the \$192,225.00 covered by this Farm sales agreement.

"You should want to do this anyway, as there is no way you can adequately summer all your cattle in view of the severe drought conditions in the area. Mr. Johnson will call on you in the next few days to see as many of these cattle as possible.

"Very truly yours,

"Loile J. Bailey  
Senior Loan Consultant"

Plaintiffs' Exhibit 8

Neither letter is an unconditional approval, as implied in the opinion, but each is conditional upon all of the proceeds of the sale going to PCA, which was impossible because of the Helper State Bank mortgage.

### POINT III

THE COURT ERRED IN HOLDING THAT JENSEN  
KNEW OF THE HELPER STATE BANK MORTGAGE  
AND EASILY COULD HAVE MADE THE AGREEMENT  
CONTINGENT ON ITS RELEASE

Although Therald Jensen, who drafted the agreement in May 1977, attended a Henry Mills creditors meeting in September, 1976, in Mr. Mills behalf, he testified that he had not been aware of Mills' financial situation between the dates indicated and prepared the agreement on the facts furnished to him by his clients.

"Q. Now, I take it that you did receive a title report?

"A. I don't think I did.

"Q. Did there come a time when you discovered that the Helper State Bank claimed an interest in the property that they wouldn't release.

"A. Yes.

"Q. When was that?

"A. Oh, within a relatively short period of time after the contract was signed, as I remember." (Tr. 122)

"Q. So, when they came to you and said, "Please prepare this contract," they gave you the basic details and that's what you worked from, I take it, from one day to the next, from one day to the next week; is that right?

"A. That is correct.

"Q. And the ones you were told about or informed about were these here, these two - Federal Land Bank's and Production Credit Association's?

"A. This was in May; wasn't it?

"Q. Yes, May 10th of 1977?

"A. You're not confusing this with '76?

"Q. I'm talking about '77?

"A. Right, May of '77.

"Q. When they came into you to draw up the contract?

"A. Right.

"Q. And those are the ones you refer to in the contract; is that right?

"A. Correct.

"Q. And you didn't concern yourself with any other lenders at that time?

"A. No.

"Q. And did they tell you that these were the only lenders that had liens on the property that were being purchased by Mr. Kiahtipes?

"A. No. I don't suppose they told me they were the only ones.

"Q. They told you these were the only ones you needed to worry about?

"A. They didn't say they were the only ones we needed to worry about. All I can conclude from me drawing the contract is that those were the ones they must have told me about because I put them in the contract." (Tr. 137, 138)

"Q. No. What I'm saying -- let's go back to 1976;

"A. Alright.

"Q. September of 1976?

"A. Yes.

"Q. Wasn't it your purpose at that time to try to help with his problems with his creditors?

"A. He apparently asked me to meet with them, which I did.

"Q. Yes.

"A. In fact I'd forgotten all about the meeting until you fellows met in my office this morning. I thought that meeting was after the contract.

"Q. Okeh.

"A. And I don't think I met with Henry or with his creditors or talked with any of them any time after that.

"Q. Well --

"A. Wait a minute - from September, from the time of that meeting until they walked into my office, somebody walked in, in May, and I don't think anybody asked me about Henry Mills' problems." (Tr. 140)

"Q. Okeh, well, then after the contract was signed in May of '77, you had another meeting with all those creditors?

"A. That's the second meeting.

"Q. And at that time you were concerned about Mr. Mills' overall picture?

"A. Well, at that time I was trying to get this contract on stream and that's what I was trying to do then.

"Q. Weren't you trying to refinance the whole thing for Mr. Mills?

"A. Yes, at the suggestion of Production Credit, and, in fact, they made the suggestion. It wasn't even my suggestion; that suggestion came from the lending institutions because they said, "Why don't you go and see if you can't get some loan and pay us all off?"

That's how they arose, a second meeting with the -- but to answer your question, I didn't have an ongoing assignment from September of 1976 to try to work out Henry Mills' problems, no.

"Q. Did you after the meeting you had with them following the May 10th '77 contract?

"A. Yes, then I was trying to do everything I could to get the problem solved so that we could go through with this deal. That's what I was doing.

"Q. Well, you were trying to get his problems solved so that he could go ahead with his business too; weren't you?

"A. Well, that wasn't my immediate problem. My immediate problem was working out this contract.

"Q. Well, at that time when you met with these people after the contract was signed ---

"A. Yes.

"Q. You became quite familiar with his business structure and the liens that were on his property?

"A. Yes, in fact, I had found out about it after the contract.

"Q. Yes, after the contract, but that was around June 1st, I believe you said?

"A. Yes, or maybe prior to that, I don't know. It was shortly after because I figured I was going to help them, make them, get Henry to get this thing wound up as well as draw up the escrow agreement, I began to get ready to draft the papers. That's what I done."  
(Tr. 140, 141, 142.)

"Q. Okeh. You knew he had debts with PCA, Federal Land Bank; is that right?

"A. Now, you're talking about that I learned this, that it came to my knowledge after the contract?

"Q. Yes.

"A. Yes.

"Q. And you knew that he had debt at the Helper State Bank and Walker Bank?

"A. True.

"Q. And you knew he had other obligations, other creditors that were after him?

"A. I knew at least one.

"Q. That was the gas company in Wellington?

"A. Pardon?

"Q. A gas company in Wellington?

"A. Yes.

"Q. Is that the one you're referring to?

"A. Yes.

"Q. And you knew that the liens from the different banks affected different properties; isn't that true?

"A. Well, my recollection is that a lot of them overlapped. Each lending institution, at least some of them, took blanket mortgages on everything he had, as I remember.

"Q. Some were second mortgages; isn't that right?

"A. Well, obviously.

"Q. And Walker Bank had, as it turned out, had a lien on the machinery, isn't that right?

"A. I don't know what they had.

"Q. Did you ever sort out what liens were attached to what property?

"A. On the land set up, I'm sure I did. I got in my mind as to what mortgages he had.

"Q. This was after the contract was signed?

"A. Sir, I'd never seen them before that.  
(Tr. 143, 144.)

As indicated above, Mr. Jensen undoubtedly knew about the HSB mortgage in September, 1976, but did not have anything to do with the Henry Mills problems between that date and May, 1977. He prepared the agreement based on information furnished to him and did not discover the HSB mortgage until after the agreement was executed. (Tr. 122)

#### POINT IV

THE MISTAKE WHICH THE DEFENDANTS CLAIM INVALIDATED  
THE AGREEMENT WAS A MISTAKE OF FACT  
AND WAS NOT "...A MISPERCEPTION OF THE EFFECT  
OF THE HSB MORTGAGE"

It is stated in the opinion of this Court:

"The trial court judged the sales agreement of the parties to be unenforceable not only because of a perceived failure of conditions precedent but because of the existence of a "mutual mistake of fact." The "mistake of fact" referred to by the court appears to consist of defendants' alleged misperception of the effect of the HSB mortgage upon their sales agreement...."

The mistake of fact referred to by the trial court is specifically set out in Conclusion of Law No. 2 as follows:

"2. There was a mutual mistake of fact as to the existence of the Helper State Bank mortgage and the clearing of the transaction with creditors who had liens upon the land and water stock described in the preliminary agreement."

As plainly stated in the conclusion, the mistake of fact was as to the existence of the HSB mortgage. The attorney who drafted the agreement did not discover the fact that such a mortgage existed until after the agreement was signed and the fact that it existed and the Mills had no way of paying it and preventing



imminent foreclosure made the agreement to sell impossible to perform.

The extensive quotations in the opinion from the testimony of Therald Jensen and Stanley Litizzette to the effect that Helper State Bank had not been asked to release its mortgage has nothing whatever to do with the issue of mistake of fact. Of course, it would be an idle act for the Mills or their attorney to ask the HSB to release its mortgage without substituting security or making arrangements to pay from a source other than the Kiahtipes agreement. This is exactly what Therald Jensen was seeking to accomplish by meeting with creditors after the agreement was executed. All efforts failed.

#### CONCLUSION


All of the circumstances show that, (1) it was the intent of the parties to clear the land of debt so that it could be sold free and clear of encumbrances, and (2) that the attorney did not, by mistake, include a reference to the HSB mortgage in paragraph 3 with the result that the agreement would provide for the sale of land upon which foreclosure was threatened by three major creditors. This Court, in reversing the judgment of the trial court, apparently failed to realize that the parties intended to get the property in a saleable condition by obtaining advance approval from creditors having liens thereon. The obvious practical result is that if this petition is denied, and the contract is

enforced, the buyer will be purchasing property he cannot get title to without paying several hundred thousands of dollars of existing liens which the sellers cannot discharge.

DATED this 21<sup>st</sup> day of June, 1982.

VAN COTT, BAGLEY, CORNWALL & McCARTHY

By:

  
E. J. SKEEN

Attorneys for Defendants-Respondent

#### CERTIFICATE OF MAILING

I hereby certify that two copies of the foregoing Petition for Rehearing were mailed to Plaintiffs-Appellants' attorneys, postage prepaid, addressed as follows:

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on this 21<sup>st</sup> day of June, 1982.

  
Craig A. Chadwick