

1958

Rex Holland v. Arthur E. Moreton et al : Appellants' Reply Brief

Utah Supreme Court

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Case No. 8740

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IN THE SUPREME COURT
of the **FILED**
STATE OF UTAH 3 - 1958

Clerk, Supreme Court, Utah

REX HOLLAND; REX HOLLAND, Administrator with
the Will Annexed of the Estate of JOHN G. HOLLAND,
Deceased,

Plaintiffs and Appellants,

vs.

ARTHUR E. MORETON, ETHEL T. MORETON, also
known as E. T. MORETON, JOHN R. MORETON, also
known as J. R. MORETON, ROSE ANN P. MORETON,
SUSAN MORETON TEVIS,

Defendants and Respondents.

APPELLANTS' REPLY BRIEF

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Salt Lake City, Utah

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OF THE

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MORETON, JOHN R. MORETON,
also known as J. R. MORETON,
ROSE ANN P. MORETON, SUSAN
MORETON TEVIS,

Defendants and Respondents.

APPELLANTS' SUPPLEMENTAL REPLY BRIEF

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2. Rex F. POINT I.

RELIEF ASKED HERE

Upon re-examination of our original brief we find that there is confusion in the prayers for relief we are seeking from this Court. We, therefore, ask the Court to disregard the statements on pages 4 and 5, pages 61 and 62 and page 70 with respect thereto. In the interest of clarity we herewith set forth the precise relief which we desire at the hands of this Court:

1. The plaintiff Rex Holland, in his individual capacity, requests this Court to reinstate the Judgment in his favor against Arthur E. Moreton in the sum of \$95,833.00 actual damages, plus \$25,000.00 punitive damages, and to correct said Judgment so as to include therein interest at the rate of 6% per annum from December 20, 1948 on the said \$95,833.00 to the date of judgment, July 10, 1957.

2. Rex Holland in his individual capacity further requests this Court to enter Judgment in his favor against all defendants other than Arthur E. Moreton in the sum of \$95,833.00 plus interest thereon at 6% per annum from December 20, 1948 to the date of judgment, or in the alternative to grant a new trial as to the individual defendants other than Arthur E. Moreton.

3. Rex Holland in his capacity as Administrator of the Estate of John Holland, requests this Court to enter Judgment in favor of the estate against all defendants in the sum of \$95,833.00 with interest thereon at 6% per annum from December 20, 1948 to the date of judgment, or in the alternative to grant a new trial against all defendants.

POINT II

CLAIMED ERRORS DURING TRIAL

Under Point X of their brief, defendants raised questions concerning claimed errors

during the trial of the case.

It should be observed that defendants' position on these errors is not the one ordinarily taken. They are not asking a new trial from this Court because of these errors, but are merely seeking to use the asserted errors in the trial court as a pretext to prevent the reinstatement of plaintiff's judgment. These alleged errors cannot be used for such purpose. Plaintiff's judgment must be reinstated if there is evidence to support it and the fact that there were errors in instructions, or errors in the admissibility of evidence will not prevent this result. Only when plaintiff's judgment is reinstated may the alleged errors be given effect for the purpose of obtaining a new trial provided, of course, the defendants have properly reserved their right to so use them. However, the fact of the matter is that defendants have not preserved their rights to ask for a new trial from this Court. An examination of defen-

dants' brief discloses that they are not even now asking for a new trial.

We do not question the right of a respondent to raise questions concerning errors committed during the trial where a Judgment Notwithstanding the Verdict has been granted in his favor and from which an appeal has been taken. The right to raise such questions is expressly given in Rules 74(b) and 75(d) Utah Rules of Civil Procedure. However, those rules require that the questions which a respondent seeks to raise in such a situation be raised in a certain manner. Thus, Rule 74(b) requires that a respondent desiring to raise such questions must perfect a Cross-Appeal by filing a Statement of Points on which he intends to rely within ²⁷⁰ the time and as required by Rule 75(d). This latter rule requires that said statement be filed within 10 days after the filing of the Designation of the Record. In the case at bar defendants have failed to comply with these rules and hence, cannot

now raise the question.

Since the defendants have failed to meet the jurisdictional requirements of the Utah Rules of Civil Procedure they have no standing at this time to raise any question as to any claimed errors occurring during the trial.

If defendants desire to obtain a new trial because of these errors it was incumbent upon them to cross-appeal and ask affirmative relief from this Court. The law is clear that where a respondent asks the court to affirmatively aid him as distinguished from merely affirming a judgment appealed from, then cross-appeal is necessary. See Fowers v. Lawson, 56 Utah 420, 191 Pac. 227; Jensen v. Utah Railway Co., 72 Utah 366, 270 Pac. 349; DeCorso v. Thomas, 89 Utah 160, 50 Pac. 2d 951; Hartford Accident & Indemnity Co. v. Clegg, 103 Utah 414, 135 Pac. 2d 919. In the Fowers case, the Court stated:

"True, as pointed out in the case referred to, the cross-appellant may avail himself of the bill of exceptions and of the whole record, if the same is brought to this court, which is prepared and filed by the principal appellant. It, however, is not true, as there intimated, that he may also reverse or modify the judgment in his favor upon his cross-assignment of errors without a cross-appeal. If he desires to reverse or modify the judgment in his favor, he must serve notice of his cross-appeal and assign his errors in support thereof. As a matter of course, if he does not desire to reverse or modify the judgment, but merely intends to point out errors which neutralize, modify, or meet the assignment of errors of the principal appellant, he may assign such cross-errors for that purpose without serving a notice of cross-appeal. The taking of a cross-appeal in this jurisdiction is so simple, and withal so free from labor, trouble, or expense that it is always safer and more prudent to serve notice of a cross-appeal than merely to rely on cross-assignments of error."

In the Jensen case the court stated:

"This court, in a number of cases, considering the purpose and function of cross-assignments, has held that cross-assignments cannot avail the respondent to have the record reviewed, to afford him a modification of the judgment or any affirmative relief, and that to review a record for such purpose, and to grant such relief, a cross-appeal is essential, and assignments made thereon in

"the same manner as on the appeal by the appellant, and that cross-assignments perform the office and function of only defending and upholding the judgment."

In the DeCorso case this Court stated:

"Cross-assignments of error without a cross-appeal may serve the purpose of upholding a judgment which otherwise would be vulnerable to attack, but cross-assignments of error, even if well taken, do not authorize this court to grant relief other than or in addition to that granted in the judgment appealed from. *Fowers v. Lawson*, 56 Utah 420, 191 P. 227. Respondent should have cross-appealed if he desired to obtain a different judgment from that rendered in the court below."

In the Hartford case this Court stated:

"No affirmative relief can be granted to respondent, even if he were entitled to such, because no cross-appeal has been filed."

In any event we submit that the instructions and evidence complained of under point X of defendants' brief were proper in every instance.

When considering the instructions it must be noted that the defendants took an extraordinary stand in the trial court. They failed to request any instructions whatsoever

They made no effort in any way to aid the trial court in the preparation of the instructions which were given.

Defendants attack instruction No. 6, but this instruction is correct for the reason that the law imposes the duty upon a fiduciary to make the necessary disclosures. Even if the instruction were incorrect, nevertheless it constituted at most harmless error because the defendants had a burden not only to show they had made full disclosure, but beyond that, to show additionally that the transaction itself was fair, which, of course, defendants wholly failed to do. Omega Investment Co. v. Wooley, 72 Utah 474, 271 Pac. 797.

Defendants make complaint regarding the scope of instructions 2, 4 and 6 on the ground that they should have informed the jury of additional issues. Defendants are in no position to raise this question. In order to do so it was necessary that they submit requested instructions embracing

such additional issues as they claimed, should have been included in the instruction to the jury. Not having done so, they cannot complain of the trial court's failure to instruct on these issues. Under Point IV of the brief of appellants we have set forth the evidence which supports the submission of instruction No. 6(a). The evidence, the admissibility of which is now improperly questioned, was limited by the trial court to the state of mind of Rex Holland and fell within the well-recognized rule permitting its admission.

We respectfully submit that the Court should not consider these alleged errors because not properly raised and, in any event, the instructions and evidence were proper.

POINT III

nothi BUREAU OF MINES REPORT

Rep Counsel for defendants, in the argument, in his brief and in the appendix, have

1. ~~held~~ ~~great~~ ~~at~~ ~~less~~ ~~upon~~ ~~a~~ ~~Bureau~~ ~~of~~ ~~Mines~~

received by plaintiff Rex Holland in June or July of 1947.

In his deposition given in 1953 plaintiff Holland stated that he did not remember sending a report to the Kaiser people (532). At the trial he stated that he did send such a report. At the deposition he was not shown a copy of the report. However, when he later obtained a copy of the report he then recognized it as a report that he had had and had sent to the Kaiser people (Respondents' Appendix a 11). We cannot understand what significance can be placed upon this. Apparently since the deposition the witness' recollection had been refreshed as to the existence and type of report and he was then able to say that it was this report he had mailed.

It is to be noted that this report has nothing to do with value. It merely is a report of drilling on the M & H claims and so far as Rex is concerned it would not indicate the size of the ore body. (Res-

pondents' Appendix a 4). It gave him but one dimension - that was depth, and from this he could not figure the size of the ore body.* The witness Young from the Bureau of Mines testified that it would be a difficult task to interpret a report of this kind and it would take engineering ability. He also testified: "If I tried real hard I think I could come up with an answer (as to tonnage) in about 3 days" (740-742).

Moreton could not figure the tonnage from the report and conceded it would take an engineer (590-591).

Everyone, including Moreton, agreed that no price quotations were set forth or mentioned in this report (592)

POINT IV.

DEFENDANT AGREED TO PATENT AND SELL CLAIMS

During oral argument a question was raised by a member of the Court as to whether Moreton was to get a 1/4 interest for patenting the mining claims.

The evidence reveals that the patenting

was only a part of what was to be accomplished by Moreton. The ultimate aim of all concerned was to sell the claims and patenting them was a necessary step in reaching that result.

The inception of the transaction between the parties, was a meeting of April, 1946. A document was written at that time but it was never produced by defendant Moreton who was the only one who had a copy of it. The parties were thus relegated to oral testimony concerning the original contract between them.

Defendant told the co-owners that he would be their attorney in getting the patent and also in selling the property (337, Brief of Appellants, 21). Moreton himself testified concerning this first conversation (R. 621 Transcript 306):

(2) "The conversation was this: They said, 'Will you be willing to undertake the sale and patent of these claims?'

Patton "And I said I would."

Defendant then took over both the patent-

ting and the selling. Application for patent was made August 25, 1947 and the patent was finally issued October, 1948. During all this time defendant was advising the co-owners not to talk with anyone about prices and to let him handle the sale.

The Agreement of Ownership (Ex. P-6)) provides that the $1/4$ interest is to be given to defendant Moreton for and in consideration of the patenting of the "claims and also for "other good and valuable considerations". This latter could only refer to the efforts defendant Moreton made in selling the claims. Hence, the contract between the co-owners and defendant Moreton cannot be divided and defendant was to get $1/4$ for all of his work. This brings the case directly under the authorities cited under Point IV of Appellants' original Brief (31). Under these authorities he was not entitled to compensation for even properly performed services for which no compensation

Defendant Moreton is obligated to respond to each of the co-owners and he is entitled as a matter of law, to nothing. However, in the present case even after he disgorges to the two co-owners he will still end up with \$95,833.00 for his efforts in this transaction.

POINT V.

THE LAW OF THE CASE

This rule contended for by defendants is inapplicable here. They contend that the prior case between plaintiffs and the corporate defendants determined that plaintiff Rex Holland was informed of the total price paid and that this is now in some way binding upon plaintiffs here and in favor of the present defendants.

First, the prior case did not so hold. It held that the corporate defendants had not participated in the fraud perpetrated upon the co-owners by defendant Moreton.

Second, the rule could not apply here because the same parties are not before the

Court and the rule only applies in cases where that is true.

POINT VI.

PAROLE EVIDENCE RULE

This rule in no way affects the result here.

The initial conversation was in April 1946. While the understanding between the parties was reduced to writing, still it was not produced. Therefore, we must rely on oral testimony. From this it appears that defendant originally agreed to act as the co-owners' attorney both in accomplishing the patenting and selling of the mining claims.

POINT VII.

OPTIONS AND AGENCY

Defendants again bring up in their type-written brief the options and contend that they eliminate any confidential relationship.

When the transaction was closed the options were not exercised. It was a direct

sale by defendant Moreton of an undivided 1/4 interest and a direct sale by the co-owners of an undivided 3/4 interest. Options were prepared by Moreton and executed by the co-owners. Eventually, however, an Agreement of Ownership was entered into. Moreton acknowledged that this had replaced the option when he stated in his letter of September 25, 1948 (Ex. D-33, Respondents' Appendix a 25): "However, we considered the enclosed Agreement of Ownership as a better way to handle the matter as you will recall."

When the transaction was finally closed none of the previous documents were followed or used.

POINT VIII.

NO REPUDIATION OF TRUST RELATIONSHIP

Defendants assert that any trust relationship was repudiated prior to the eventual consummation of the sale and transfer of these mining claims. Any such contention flies in the face of the uncontested

evidence. The defendant Moreton continued to act for and represent, the co-owners in the sale of this property. The final stages of the negotiations began October 8, 1948. Even by the very letter which they claim is a repudiation defendant Moreton is still advising the co-owners not to quote a purchase price to anyone (Ex. D-33).

Defendant Moreton continued up until the execution of the deeds and receipt of the money, to act as the attorney for the co-owners. He was the one that prepared all of the documents for their signatures and he was the one who was present at the final meeting and giving them advice concerning the documents. It is just impossible, in view of the record, to claim that there was any repudiation of the fiduciary relationship prior to December 20, 1948. Nothing occurred after that time which would constitute a repudiation until plaintiff Rex Holland learned of the fraud in October of 1951.

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Respectfully submitted,

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