

1982

# Richard A. Christenson v. Commonwealth Land Title Insurance Company : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

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RICHARD A. CHRISTENSON  
Trustee for CAPE TRUST,

Plaintiff and  
Respondent,

vs.

Case No. 18330

COMMONWEALTH LAND TITLE  
INSURANCE COMPANY,

Defendant and  
Appellant.

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APPEAL FROM THE JUDGMENT OF THE  
DISTRICT COURT OF THE THIRD  
JUDICIAL DISTRICT, SALT LAKE COUNTY,  
STATE OF UTAH

THE HONORABLE KENNETH RIGTRUP, JUDGE

---

Reply Brief of Appellant

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Reply Brief of Appellant

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Reply Brief of Appellant

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STATEMENT OF FACTS

There is apparently considerable disagreement between the parties concerning the existence and materiality of facts pertinent to the resolution of this action.

The alleged negligent misrepresentation is contained in the Assignment dated October 4, 1978 ("Assignment"), executed by Agla Development Co. ("Agla") and acknowledged by appellant Commonwealth Land Title Insurance Co. ("Common-

wealth"). Agla and Commonwealth are the sole signatory parties to the Assignment. The Assignment assigns a portion of the proceeds of two escrow agreements dated March 1, 1977 and April 22, 1977 to respondent Richard A. Christenson, Trustee for Cape Trust ("Respondent").

Agla executed the Assignment as a means of satisfying an antecedent debt which it owed Respondent, although Respondent never established the existence of the antecedent debt at trial. (Trans. at 14-15.) The pre-existing debt between Respondent and Agla arose out of an unrelated real estate development joint venture. (Trans. at 29-30, 40-41 & 45-46.) The amount of this pre-existing debt was not established in the trial of the instant case. (Trans. at 16-19, 20-21, 23 & 30-31.) The notes which evidenced the antecedent debt were never introduced into evidence. Counsel for Commonwealth objected to evidence relating to the amount owing on the notes in the absence of their introduction on the grounds of the best evidence rule. (Trans. at 19.) The \$21,680 figure for which judgment was entered is not the amount which Agla received credit for on the Cape Trust obligation. (Trans. at 27.)

Commonwealth disagrees with the characterization of the facts set forth in Respondent's Brief and, in certain instances, in the trial court's Findings of Fact.

Commonwealth was not compensated for signing the Acknowledgment to the Assignment. (Trans. at 34.) The Assignment was completely tangential to Commonwealth's role as an escrow agent. Commonwealth, therefore, was not "hired in this transaction," as is suggested in Respondent's Brief at 2, but rather executed the Acknowledgment as an accommodation to Agla.

Point No. 5 in Respondent's Brief at 3 and Finding of Fact No. 9 indicate that Respondent accepted the Assignment in satisfaction of the antecedent debt between Respondent and Agla. At trial, Respondent failed to introduce into evidence the agreement between Respondent and Agla concerning the legal effect of the Assignment upon the pre-existing debt. The meaning of the phrase "in satisfaction" was not established, and when counsel for Commonwealth on cross-examination attempted to determine the meaning of that phrase and whether Respondent had attempted to collect the outstanding balance of the antecedent debt from Agla, the Court sustained Respondent's objection to the line of questioning on the basis that it was immaterial. (Trans. at 46-47.) On recross-examination by Agla's counsel, Mr. Hanks (a trustee for Cape Trust) testified that the Assignment was accepted in satisfaction of the pre-existing debt (Trans. at 47), but neither the meaning of that term nor the value of the satisfaction was ever established. (Trans. at 11 & 14.) Furthermore, there is



nothing in the record or the Assignment which indicates that Commonwealth had knowledge of the reason for the Assignment or what impact the Assignment had upon the pre-existing debt generated from Respondent's joint venture with Agla.

Mr. Hank's testimony as to misrepresentations made by Commonwealth, other than the Acknowledgement, concerns a telephone call between Mr. Hanks (of Cape Trust) and Mr. Ribas (of Commonwealth). The contents of that conversation, however, based on the trial transcript citation provided by Respondent are ambiguous, at best. (See Trans. at 31-32, 35 & 71.) Perhaps Commonwealth knew that an Assignment was being drafted, in general terms, and what the Assignment purported to do. There is nothing in the record, however, which indicates that Commonwealth had any knowledge of any agreement concerning the antecedent debt owed to Respondent from Agla or how, pursuant to any such agreement, the Assignment impacted that pre-existing debt. Consequently, the characterization of the Acknowledgment or the vague and very general telephone conversation between Respondent and Commonwealth as "assurances" to Respondent is unwarranted. (Respondent's Brief at 5-6.) Respondent has failed to demonstrate that Commonwealth needed to "assure" Respondent of anything. Respondent was not signatory to the Assignment. Nothing in the record reflects Commonwealth's under-

standing of the underlying impact of the Assignment upon the antecedent debt or that anything concerning the impact thereof was or should have been known.

### ARGUMENT

#### POINT I

RESPONDENT FAILED TO ESTABLISH EITHER THE EXISTENCE OR AMOUNT OF THE ANTECEDENT DEBT BETWEEN AGLA AND RESPONDENT.

Respondent needed to prove the antecedent debt which Agla owed to Respondent and the amount thereof, in order to establish that a partial failure of consideration for the Assignment affected the antecedent debt and in turn damaged Respondent. Respondent's recovery, theory and pleadings are based upon negligent misrepresentation.

Respondent did not sue for breach of the Assignment. It could not do so. Agla could not assign to Respondent more than it had, and it did not have any interest in the five lots which Commonwealth has already paid off.

The assignee (Respondent) steps into the shoes of the assignor (Agla); the assignee takes nothing more than the assignor had to assign. Wiscombe v. Lockhart Co., 608 P.2d 236, 238 (Utah 1980); Tanner v. Lawler, 6 Utah 2d 84, 88, 305 P.2d 882, 885 (1957); See, Arizona Title Insurance & Trust Co. v. Realty Investment Co., 6 Ariz. App. 180, 430 P.2d 934 (1967). Consequently, Commonwealth paid Respondent every-

thing it was entitled to receive pursuant to the Assignment. Respondent, however, claims more than that and seeks to recover damages for a negligent misrepresentation contained in Commonwealth's Acknowledgment of the Assignment. Those damages must flow from Respondent's failure or inability to collect the antecedent debt from Agla.

If Respondent is still entitled to payment from Agla on the antecedent debt, it has suffered no damage and is not entitled to recover from Commonwealth. The existence and amount of the antecedent debt, therefore, is critical. If Agla had paid the entire amount of the antecedent debt to Respondent, Respondent suffered no damages and is not entitled to recover from Commonwealth.

Respondent, however, contends that both the existence and amount of the antecedent debt are immaterial. See Respondent's Brief at 6 (first full paragraph). The record establishes neither the existence nor the amount of the antecedent debt. The existence and the amount of this debt are threshold issues for this Court's resolution. See St. Paul Fire & Marine Insurance Co. v. James I. Barnes Construction Co., 31 Cal. Rptr. 52, 381 P.2d 932 (1963). In the absence of proof of the existence or amount of the antecedent debt, Commonwealth is entitled to reversal of the judgment below with a direction to enter judgment in its favor. No damage has been proved.

POINT II

RESPONDENT FAILED TO ESTABLISH ANY AGREEMENT BETWEEN AGLA AND RESPONDENT CONCERNING THE EFFECT OF THE ASSIGNMENT ON THE ANTECEDENT DEBT.

Agla executed the Assignment as a means of paying an antecedent debt to Respondent. The Assignment did not convert Respondent's interest in the antecedent debt from an unsecured to a secured status.<sup>1</sup> Also, this is not a situation where the Assignment was made in a contemporaneous exchange for value, such as the sale or delivery of a product by Respondent to Agla in exchange for the Assignment. The Assignment obligated Commonwealth, as escrow agent, to pay money to Respondent which it was under a duty to and otherwise would have paid to Agla.

Whether the Assignment discharged Agla from the payment of the antecedent debt is critical to the resolution of the instant case. If the Assignment did not discharge the antecedent debt (assuming arguendo that it existed), Respondent's creditor status was not affected by (1) the Assignment or (2) any alleged representations made by Commonwealth.

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1 If the Assignment is construed as giving Respondent a security interest in the proceeds, Respondent would have to show a breach of the underlying obligation (the antecedent debt) before it could recover. Aird Insurance Agency v. Zions First National Bank, 612 P.2d 341, 344 (Utah 1980).

For example, if Commonwealth had refused to execute the Acknowledgment to the Assignment, pointing out that the proceeds from the five lots were not available to be assigned, Respondent would still have an undischarged portion of the antecedent debt even if it accepted the assignment of the proceeds from the remaining lots. Any negligent misrepresentation (again assuming arguendo that there was one), therefore, which Commonwealth made concerning the status of the proceeds of the five lots did not proximately or actually cause any damage to Respondent. Regardless of any representation made by Commonwealth, unless the Assignment completely discharged the antecedent debt, Respondent would retain the same creditor status as was held prior to any representations by Commonwealth. (See Trans. at 46.)

The agreement between Agla and Respondent as to whether the Assignment completely and without recourse discharged the antecedent debt was never established at trial. It is unclear as to whether the negotiations between Agla and Respondent which culminated in the Assignment ever addressed this point. The reference in Respondent's Brief at 16 to the "full satisfaction" of the antecedent debt is unwarranted.

Mr. Hanks testimony on this point is confused. (Trans. at 11, 14-15 & 46.) Further, Commonwealth's cross-examination of Mr. Hanks on this point was objected to by Respondent and sustained by the trial court as immaterial. (Trans. at 46-47.) Respondent's Brief at 6 apparently maintains this position. Commonwealth, therefore, was precluded from developing evidence on this point. In the absence of such clarification, Respondent has failed to prove an essential element in its case and cannot recover. Indeed, from the record, it appears that Agla and Respondent made a mutual mistake as to the availability of the proceeds of the five lots and that Respondent, therefore, could proceed and obtain a judgment against Agla on the Assignment. Commonwealth, therefore, is entitled to a reversal of the trial court's judgment and an order directing the entry of judgment in Commonwealth's favor.

### POINT III

#### COMMONWEALTH WAS NOT SERVING IN A FIDUCIARY CAPACITY WHEN IT ACKNOWLEDGED THE ASSIGNMENT.

Commonwealth was serving as a fiduciary in its capacity as escrow agent under the March 1, 1977 and April 22, 1977 Escrow Agreements. These Escrow Agreements, however, do not require Commonwealth to acknowledge assignments or make rep-


resentations relating thereto. Commonwealth was never in privity of contract with Respondent; Respondent was not signatory to the Assignment or to the Escrow Agreements. (Trans at 12 & 51.) Also, Commonwealth was not paid for executing the Acknowledgment. (Trans. at 34.)

Further, the dispute in this case arose due to an accounting error, not because of any error relating to an area of expertise of Commonwealth. Respondent had the same information available to it as did Commonwealth and presumably had the same accounting ability. If Respondent wished to rely on Commonwealth's expertise, it should have purchased title insurance in connection with obtaining the Assignment, something for which Commonwealth would have been paid. (See Trans. at 24 and 34.)

In short, no fiduciary duty was owed to Respondent and none was breached. Any finding or assertion to the contrary is completely without support in the record before this court.

Dated this 30<sup>th</sup> day of July, 1982.

SNOW, CHRISTENSEN & MARTINEAU

By   
George A. Hunt  
Attorneys for Defendant/  
Appellant Commonwealth Land  
Title Insurance Company

CERTIFICATE OF MAILING

I hereby certify that I caused to be mailed, first class, postage prepaid, two copies of the foregoing Reply Brief of Appellant to the following counsel of record:

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Dated this 30<sup>th</sup> day of July, 1982.

  
George A. Hunt