

1959

William F. Smith and Patsy Smith v. Carroll Realty Company and Nathaniel A. Smith : Petition of Nathaniel A. Smith for Rehearing

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

WILLIAM F. SMITH and
PATSY SMITH, his wife,

FILED

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Plaintiffs and Respondents,)
vs.) Case No.
: 8892
)

CARROLL REALTY COMPANY,
a Corporation, and
NATHANIEL A. SMITH,

Defendants and Appellants, :

NATHANIEL A. SMITH,

Petitioner for Rehearing. :

PETITION OF NATHANIEL
A. SMITH FOR REHEARING

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IN THE SUPREME COURT OF THE STATE OF UTAH

WILLIAM F. SMITH and)
PATSY SMITH, his wife,)
)
Plaintiffs and Respondents,:)
)
vs. : **Case No.**
) **8892**
CARROLL REALTY COMPANY, a :
Corporation, and)
NATHANIEL A. SMITH, :
)
Defendants and Appellants, :
)
and NATHANIEL A. SMITH, :
)
Petitioner for Rehearing. :

**PETITION OF NATHANIEL
A. SMITH FOR REHEARING**

Appellant Nathaniel A. Smith respectfully

petitions the Court for a rehearing and reconsider-
ation of this matter. The decision of February 9,
1959 misconceives some facts, ignores some
important facts, and fails to recognize at all vital

questions raised by the appeal. If the names were deleted, the opinion of the Court would seem to involve a different law-suit from the one presented to the jury. Appellant Carroll Realty Company is defunct and might as well be treated as such and is, therefore, not included as a petitioner for rehearing.

QUESTIONS NOT PASSED ON

1. The Exchange Agreement signed by the parties (Exhibit 1) contains this clause:

"It is also presumed and understood that all principals to this agreement have investigated the respective properties and the agent or broker is hereby released from all responsibility regarding valuation of same."

This was accepted by the plaintiff, W. F. Smith, and no agent other than petitioner dealt with him with reference to the Lava Hot Springs property. There was no conflict in the testimony

concerning the signing of this agreement with reference to that paragraph. Petitioner testified that the agreement was read over and discussed, a paragraph at a time (R. 229-230) and that as to this paragraph petitioner read it and asked if plaintiff Smith understood it and was advised that he did.

Such clauses are in common use in Utah in real estate and other documents and have been upheld in Utah in the absence of fraud, as shown by the cases cited at page 45 of the Appellants' Brief. The cause of action for fraud in this case was dismissed on plaintiffs' Motion (R. 272), and this paragraph therefore appears to bar plaintiff from a negligence action against petitioner based upon values of properties in the exchange. The trial judge found that the action for negligence could not be waived by

contract (R. 75). No reason of public policy and no citation of law was given by counsel at the trial, by the trial court, by the respondent in its brief before the Supreme Court, and it remained for appellants to speculate as to the possible basis of invalidity because of public policy.

Appellants' Brief (page 45) suggests that this clause does not involve an advance waiver of a tort to be committed, which is against public policy under some circumstances, but waiver of an existing cause of action for negligence which is valid under all authorities examined. This Honorable Court says nothing to the contrary, but has completely ignored the question. To avoid this clause was the reason for framing the original complaint in fraud. It was the basis upon which the action was tried, in large part, and not until the evidence was in was the action

for fraud dismissed as not tenable. The Exchange Agreement was signed by W. F. Smith after a conversation about its contents and petitioner submits that plaintiff waived any cause of action he might have had for negligence or representation of value.

2. The opinion of the Court does not consider the question of whether Mrs. Smith has a cause of action, and we now urge the Court to consider that question. As a joint tenant (R. 123-125) she should be considered as a half owner of the property (Appellants' Brief , p. 48), but since she was not a participant in any of the conversations concerning an agreement as to valuation or recital of the conversation with Bishop Teeples or a party to the listing agreement (Ex. 3), the basis of her participation in the action and the

judgment is not shown. Petitioner urges that a plaintiff to share in a favorable judgment must have support beyond inclusion in the complaint as a party. This error was pointed out to the trial court (R. 61 par. 1) and presented to this Court (Appellants' Brief, pages 46 to 48), but is not recognized in the Court's opinion.

3. The Court's opinion refers to an agreement to determine value. At the bottom of page 2 of the mimeographed opinion it is stated:

"The trial court submitted to the jury the question as to whether or not the defendant Smith was obligated under the scope of the Employment Agreement to determine and report the reasonable value of the Kladis property. The jury answered that defendant was so obligated."

And in the preceding paragraph the Court observed:

"But he told plaintiff that he would ascertain the value of the Idaho property."

agreement and this Court observed that there was such an agreement. The jury was allowed to give plaintiff judgment for breach of a void oral agreement. It was prejudicial error because so much was made of the point in the evidence and in the instructions. The statute of frauds makes such a modification void and unenforceable, as argued in Appellants' Brief pages 33 to 37. Is not petitioner, who makes his living in real estate, entitled to the ruling of this Court on so vital a question as oral modification of an agreement within the statute of frauds? The Court's opinion ignores the question.

IGNORING OF SIGNIFICANT FACTS

Defendants requested instructions on contributory negligence and assumption of risk (R. 25

to 30). In the similar case of *Lewis vs. White*,
2 Utah 2d 101, 269 P. 2d 865, this Court said:

"No matter how naive or inexperienced the defendants were, they could not close their eyes and accept unquestioningly any representations made to them. It was their duty to make such investigation and inquiry as reasonable care under the circumstances would dictate; whether this required them to make further inquiry concerning the income, and if so, the extent thereof was for the jury to determine."

Petitioner submits that the Court is
ignoring these facts:

Plaintiff traded for the Eighth East property on superficial inspection without going inside, and this petitioner handled the deal (R. 123 and 122).

Plaintiff William F. Smith said he wouldn't trade for the Lava Hot Springs property without seeing it (R. 102).

William Smith spent two or three hours in Lava Hot Springs inspecting the property and the town (R. 103), and if opinions on value were desired, that was the time to get them. Petitioner

knew nothing about Lava Hot Springs, as plaintiff knew (R. 143).

Plaintiff asked petitioner to call someone like the LDS bishop (R. 139), not a real estate man or appraiser.

When the conversation was reported to plaintiff, he was not interested in the quality of the opinion which was reported as coming from an LDS bishop (R. 139).

Plaintiff did not buy blindly. He looked at the property, he bargained for the price, and for a loan of cash by Mr. Kladis, and got both (Exhibits 4 and 1).

There is further doubt whether plaintiff relied on petitioner's report from the fact that plaintiff charged Kladis with fraudulent representations of value in the action brought by Kladis in Idaho (R. 151, 154). The case at bar was an afterthought and much delayed in the bringing.

And if the Court would consider it,

William Smith did not rely on the petitioner at all with his report from Bishop Teeple, but signed a counter-offer the very night they

returned from Lava Hot Springs, as testified to by the petitioner, denied by the plaintiff, and established by the exhibits attached to the Motion for New Trial. There was a sharp conflict on this evidence.

William Smith, in suggesting that inquiry be made of a bishop, assumed the risk of an uninformed opinion, and the question of contributory negligence should have been submitted to this jury, as was plainly requested. Plaintiff had made a visit to Lava Hot Springs to inspect the property and knew that petitioner was not informed as to Lava Hot Springs properties (R. 143), and could not help but know that petitioner had not made any further investigation than a phone call to a stranger.

There were many circumstances questioning reliance of the plaintiff on the defendant

and showing that plaintiff was himself adequately informed and that defendant was only reflecting a statement or opinion from an unidentified and unqualified person. In the language of this Court, we repeat:

"No matter how naive or inexperienced the defendants were, they could not close their eyes and accept unquestioningly any representations made to them. It was their duty to make such investigation and inquiry as reasonable care under the circumstances would dictate: whether this required them to make further inquiry concerning the income, and if so, the extent thereof was for the jury to determine." *Lewis v. White, supra*.

The Court's opinion castigates petitioner.

The jury struggled with this case, requesting advice twice, and returning a verdict with small recovery for the plaintiff on its first abortive verdict.

The question of fraud and reprehensible conduct was the theory of the first cause of

action, which was abandoned, obviously because there was insufficient proof to give a reasonable chance before the jury. Without opportunity to defend himself, petitioner now sees every inference and insinuation interpreted against him as though he had been accused and found guilty of fraudulent misrepresentations. This issue was taken from the jury. It was submitted on the theory of negligence and not fraud.

There were no instructions on fraud and the burden of proof which that entails. The court's opinion uses the following language in describing the conduct of petitioner as it finds him to be:

"It is strange that defendant made no inquiry when he and plaintiff Smith went to look at the property, unless he didn't want to make any investigation with plaintiff present. He testified that he was in Lava Hot Springs for three or four hours, yet he didn't even talk to a neighbor or a businessman. The next

day when he talked with Mr. Teeple he knew that his client would be getting a raw deal. He knew the price was too high and that the house was poorly constructed and was without heat. Yet defendant Smith kept from plaintiff facts which he had a duty to disclose and represented that it was a fine deal and that the property in Idaho was worth what they were asking. If defendant had merely neglected to ascertain the reasonable market value of the Kladis property his conduct would not be justified, but to obtain the information and to withhold the same was reprehensible, particularly so when the withholding of the information probably was the cause of plaintiffs' loss. It is most unlikely that plaintiffs would have executed the Exchange Agreement had they been given the information which defendant obtained for plaintiffs but failed to disclose. "

Petitioner invites the Court to reconsider that language in view of the several requests for an instruction on contributory negligence, and the holding of this Court in *Lewis v. White*, *supra*, and in view of the Court's statement that there was no occasion in this case for

giving an instruction on either contributory negligence or assumption of risk. Let us consider the quoted passage a sentence at a time:

"It is strange that defendant made no inquiry when he and plaintiff Smith went to look at the property, unless he did not want to make any investigation with plaintiff present."

The evidence is that plaintiff said he would not exchange for the Lava property without looking at it. So the defendant took the plaintiff to Lava and spent two or three hours on the property giving him opportunity to ask and have answered every question in his mind. They then drove around Lava Hot Springs permitting the plaintiff to satisfy himself completely. It was not until the return trip from Lava Hot Springs that there was any question about inquiries concerning value. And the defendant did exactly what the plaintiff suggested.

"He testified that he was in Lava Hot Springs for three or four hours, yet he did not even talk to a neighbor or a businessman. "

The plaintiff knew that as well as the defendant and had made no request to do other than was done. He also knew that defendant was a stranger in Lava Hot Springs and was unfamiliar with property values there.

"The next day when he talked with Mr. Teeple he knew that his client would be getting a raw deal. "

The Court does not consider the fact that Teeple was not an expert in real estate and did not pretend to be. And when petitioner suggested to Teeple that the property was to be involved in an exchange for property in Salt Lake City, Teeple said that value was a relative thing.

"But I did mention, after he mentioned that it was a trade to be made on some

Utah property, then I told him that would be different because maybe the property here would be high enough to off-set that. " (Teeples' deposition, page 5).

The Court's opinion continues:

"He knew the price was too high and that the house was poorly constructed and was without heat. "

The value of the property was a relative thing to be compared with the property being exchanged in Salt Lake, which was also priced high. The ultimate exchange was at a price which reduced the Lava property by \$3,000.00 and involved the making of a loan by Kladis to the plaintiff, which was a further concession as to comparative values. That the house was poorly constructed and was without heat was as well known to plaintiff as it was to petitioner and was better known to both of them than to Teeples because they had spent two or three

hours in the house and had gone clear through it, whereas Teeple had only been a casual visitor (Teeple's Deposition, page 3).

"Yet defendant Smith kept from plaintiff facts which he had a duty to disclose and represented that it was a fine deal and that the property in Idaho was worth what they were asking."

There was never any suggestion that the Lava property was worth what they were asking, as a counteroffer at a reduced price was apparently made and the deal was closed with \$3,000.00 off of the asking price, in addition to the loan that Kladis made to plaintiff. The statement is appropriate to a charge of fraud and deliberately withholding, but when the issue is negligence, the Court should consider the source of the related information and whether plaintiff should have relied on it. Plaintiff did not ask the

experience or qualifications of the source of the information, and petitioner simply stated that he had contacted a person in Lava Hot Springs who said the deal was O.K. (R. 130). This agrees favorably with the statement made by Teeple upon learning that the transaction was to be an exchange. And as to the reference to insulation and heating, there was no occasion to tell plaintiff that which he had already observed by going through the house. Plaintiff himself had suggested calling the bishop in Lava Hot Springs and had no right assuming that any other person had been contacted. While in Lava he had not asked for the opinion of a real estate man or appraiser or banker and could only assume that the defendant had called the bishop as the plaintiff himself had suggested.

"If defendant had merely neglected to ascertain the reasonable market value of the Kladis

property, his conduct would not be justified, but to obtain the information and to withhold the same was reprehensible, particularly so when the withholding of the information probably was the cause of plaintiffs' loss. "

Petitioner had done what plaintiff suggested, namely, make a call to someone like the LDS bishop and ask about the house and had not withheld anything that was significant according to Teeple's desposition. The fact that the price of \$15,500.00 sounded high was perfectly consistent with the inflated price of the Salt Lake house and the subsequent negotiations of the parties in insisting on an advance of cash by Kladis to the plaintiff to supply the cash needed by plaintiff in the transaction. Six weeks elapsed from then until the time the transaction was consummated and plaintiff did not bother to make any further inquiry or have defendant

make any further inquiry; and after the exchange was completed plaintiff did nothing to realize the value from the property.

"It is most unlikely that plaintiffs would have executed the exchange agreement had they been given the information which defendant obtained for plaintiff but failed to disclose. "

Disproving that very statement is of course the significance of the evidence submitted on the motion for new trial; but if plaintiff had been relying on petitioner's inquiry to fix the value of the property, he surely would have been interested to know what type of person had given the opinion of value, what the basis of his acquaintance with the property was, and what value had been placed on the property by such person. He was obviously interested in the exchange after inspecting the property himself in Lava Hot Springs and no determination of

value, beyond a phone call to a person not shown to be skilled in real estate, was ever suggested.

This case was not presented to the jury on the issue of fraud and misrepresentation but on the issue of negligence. Had the evidence supported reprehensible conduct, the plaintiffs undoubtedly would have wanted the case to go to the jury on the theory of fraud and misrepresentation; but that was withdrawn from the jury. In view of the holding of this Court in *Lewis v. White*, *supra*, it is difficult to see why the issue of contributory negligence was not submitted to the jury under the instructions requested by the defendants, and why this Court will not look at the evidence as permitting the jury to find that the plaintiff directed the entire operation and expressed satisfaction in the exchange, knowing that there was no appraisal and that petitioner had not returned to

Lava Hot Springs and that a casual telephone call was being relayed to plaintiff to corroborate plaintiff's already formed opinion. This was contributory negligence and the jury would undoubtedly have so found.

MISCONCEPTION OF FACTS

This Court upholds the district court in denying reduction of the verdict or granting a new trial for punitive damages, confusing the situation where a transaction is consummated and commission is incident to the transaction and that where there is no sale or exchange and the real estate broker is suing for a commission. The Court says:

"We know of no rule which would hold defendants liable for damages in the deal and at the same time entitle them to compensation for their breach of duty."

The question is, what is the rule of damages? In this case an exchange was

consummated on a misconception of values, and the plaintiff is entitled to be placed in the position he would have held had the values been as he believed them to be. This is not a case of rescission and of restoration of consideration received on both sides, but a case of making the plaintiff whole. The appraisers gave the values as opinion evidence which was supposed to establish the element of damages. If the Salt Lake house were worth \$19,000.00 and the Lava house \$8,000.00 and there was a mortgage on the Salt Lake house of \$7,500.00, the difference would be \$3,500.00, and the payment of that difference would make the plaintiff whole.

If petitioner now pays plaintiff \$1,150.00, the plaintiff will be better off than if the values had been accurately known and the exchange had been

made on that basis; since in that case the commission would rightfully have been paid, but on a lesser amount.

The Court says "compensation for their breach of duty" as though an element of punitive damages were included in this case and there is no suggestion of that in any of the instructions or in the Court's decision, except such as accidentally results from the error of the Court in requiring return of the \$1, 150. 00. If that is a matter of punitive damages or fraudulent conduct, petitioner had a right to have that submitted to the jury.

Furthermore, petitioner did not receive \$1, 150. 00. The Eighth East house was listed at \$23, 000. 00 on which the commission was \$1, 150. 00. The Eighth East house was sold by Fletcher Lucas to Kladis. Pursuant to the Sales Agency Agreement,

Exhibit 3, Fletcher Lucas earned that commission and received it (R. 238).

The Lava Hot Springs property was listed with Fletcher Lucas in behalf of itself and other board members (Ex. 5) and that commission was payable to Carroll Realty, which is therefore assumed to have received \$775.00. There is no evidence whatever of the money petitioner received and there was no issue on it at the trial. The third cause of action for return of commission was added after the evidence was in (R. 272).

Petitioner objected to this peremptory instruction of the trial court for the reason that defendants had not received the \$1,150.00 commission (R. 278); and made this a basis of their Motion for New Trial (R. 62). There is no evidence before the Court to show how the commissions were divided and what portion

of it was received by petitioner who is made a joint and several judgment debtor without any reference to taking from him the amount of commission actually received. It is definite that Fletcher Lucas and not the defendants received the commission on plaintiffs' house (R. 238).

The case of Reich v. Christopoulos, 123 Utah 137, 256 P. 2d 238, upon which the Court relies, is a case where the transaction was not consummated and the broker was attempting to obtain his commission from a seller who had listed his property but which had not been sold. In that case there was a simple failure to find a buyer ready, able and willing to buy and the owner of the property was left whole.

In the case before the Court, the owner of the property is already whole by reason of

the jury's verdict for damages; and awarding the plaintiff the additional \$1, 150. 00 put the plaintiff in a better position than if the sale had been properly consummated.

The case of *Isaacs v. Frank Maline Co.*, 37 P. 2d 1045 cited at Appellants' Brief, page 51, is precisely in point and is based on a statute which established as a general rule of damages putting the damaged party in the position he would have enjoyed had there been no breach. That is the rule in Utah in the absence of fraud. *Stewart v. Hansen*, 62 Utah 281, 218 P. 959; *Stimson Co. v. Porter* (C. A. 10th, Utah) 195 F 2d 410; Am. Jur. Damages, secs. 43, 65. In this case, no breach means the exchange would have been made at proper values and the difference between assumed values and sound values must be paid by the defendants to the

plaintiff. By its decision the Court penalizes the defendant without an issue on penalty and without the support of the jury as to punitive damages. And, furthermore, making petitioner pay \$1,150.00 penalty is taking from him a commission paid to Fletcher-Lucas and not to him.

FACT IMPROPERLY ASSUMED

This Court finds lack of diligence by appellants in producing evidence made the basis of the Motion for New Trial. The Court states:

"The showing made is not persuasive of the fact that defendants had used the due diligence required to satisfy the granting of a new trial."

The trial court had this question before it and resolved it in favor of finding diligence when it said:

"On this point the Court is of the opinion that the plaintiffs would be very much weaker, and is of the opinion that the

plaintiffs testified they did not sign any documents on the evening of the return from Lava Hot Springs.

"This point may justify the granting of the motion for a new trial."

This Court had no occasion to go into the matter of diligence, as to which the trial court was satisfied. The authorities cited by appellants in their brief (pages 57-59) amply support the motion for new trial on the merits.

CONCLUSION

This Honorable Court should grant a rehearing or reconsider the case as to the following matters:

1. The clause in the Exchange Agreement stating that the plaintiffs rely on their own investigation of values is binding in the absence of fraud.

2. The oral agreement to determine value is within the statute of frauds. sec. 35-6-4 (5)

UCA 1953.

3. No cause of action in favor of Patsy Smith, a joint tenant, was established.

4. The question of contributory negligence should have been submitted to the jury.

5. Directing judgment for \$1,150.00 return of commission was error because:

- (a) it was punitive without any support ;**
- (b) it was double damages ;**
- (c) petitioner did not receive the commission.**

Respectfully submitted,

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