

1959

# Joseph H. Dupler et al v. Maurice Yates : Petition for Rehearing and Brief in Support Thereof

Utah Supreme Court

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**IN THE SUPREME COURT  
of the  
STATE OF UTAH**

**FILED**

JUN 14 1967

JOSEPH H. DUPLER, I. HOWARD  
MARCUS, B. M. ROE and DAVID  
I. ZINIK,

Clerk, Supreme Court, Utah

*Appellants,*

vs.

MAURICE YATES,

*Respondent.*

UNIVERSITY OF UTAH

JUL 10 1967

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**PETITION FOR REHEARING AND BRIEF  
IN SUPPORT THEREOF**

**RAWLINGS, WALLACE, ROBERTS  
& BLACK  
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Salt Lake City, Utah**

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# IN THE SUPREME COURT of the STATE OF UTAH

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JOSEPH H. DUPLER, L. HOWARD  
MARCUS, B. M. ROE and DAVID  
I. ZINIK,

*Appellants,*

vs.

MAURICE YATES,

*Respondent.*

Case No. 9048

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## PETITION FOR REHEARING AND BRIEF IN SUPPORT THEREOF

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### PETITION FOR REHEARING

Come now Appellants and respectfully petition this honorable Court to vacate the Order of the Court affirming the judgment and to reverse said judgment or to grant a rehearing. This petition is based on the following grounds:

#### POINT I.

This court erred in holding that a summary judgment was properly entered in favor of defendant.

## POINT II.

This court erred in holding reliance by plaintiffs on others precluded reliance on defendant.

## POINT III.

This court erred in holding that from the termination of the Wyoming actions it must be inferred that plaintiffs were fully compensated and their claims satisfied thereby.

RAWLINGS, WALLACE, ROBERTS & BLACK  
SAMUEL BERNSTEIN

Counsel for Appellants

530 Judge Building  
Salt Lake City, Utah

I hereby certify that I am one of the attorneys for the appellants, petitioners herein, and that in my opinion there is good cause to believe the judgment objected to is erroneous and that the case ought to be re-examined as prayed for in said petition.

Dated this 9th day of June, 1960.

BRIGHAM E. ROBERTS

BRIEF IN SUPPORT OF APPELLANTS'  
PETITION FOR REHEARING

ARGUMENT

POINT I.

THIS COURT ERRED IN HOLDING THAT A SUMMARY JUDGMENT WAS PROPERLY ENTERED IN FAVOR OF DEFENDANT.

We submit that the holding in this case is absolutely contrary to law and if this opinion is persisted in we will have in Utah a hybrid and anomolous summary judgment proceeding.

The one fundamental and controlling principle applied in all cases until the present one is that all inferences must be drawn in favor of the party or parties against whom a summary judgment is sought. *Morris v. Farnsworth Motel*, 123 Utah 289, 59 P. 2d 298; 6 Moore's Federal Practice 2123, § 56.15 (3).

In cases of fraud the rule is stated in 6 *Moore's Federal Practice* 2215 § 56.17 (27) as follows:

"In ruling on the motion the court should remember that the movant has the burden of demonstrating clearly the absence of any genuine issue of material fact, that the court should not draw factual inferences in favor of the moving party."

Under the next two points we will demonstrate plaintiffs were denied the benefits of this rule and judgment entered against them in violation thereof and

in violation of plaintiffs' right to a plenary trial. Consternation follows a realization that all that stands between plaintiffs and a plenary trial is an affidavit by plaintiffs that they did too rely on the false statements made by defendant concerning the amounts which were to be paid for the various interests purchased. These allegations were made in the pleadings and there is no place in the record where defendant under oath, or otherwise, categorically denied that allegation or alleged that there was no reliance by plaintiffs upon defendant.

In refusing to follow the above fundamental principle this Court has made it necessary for counsel to file affidavits in support of pleadings even though the pleadings themselves are not denied or challenged.

Let us here and now assure this Court that had counsel felt the necessity, an affidavit would have been filed alleging reliance. The result is reached in this case because of the failure to file an affidavit to facts already in the record both by pleading and inference. Plaintiffs are denied a trial on the merits because of a technicality and this Court applies a drastic remedy thereby thwarting such a trial.

As we read the majority opinion in this case, if this Court erred in holding that reliance on others precludes reliance on defendant and that termination of the Wyoming actions requires a finding that plaintiffs were fully compensated and their claims satisfied, then the judgment of the trial court should be reversed and plaintiffs

granted a trial of the action which they have never had under the rulings of the trial court and the majority of this Court.

## POINT II.

THIS COURT ERRED IN HOLDING RELIANCE BY PLAINTIFFS ON OTHERS PRECLUDED RELIANCE ON DEFENDANT.

It stands uncontradicted in the record defendant made the representations as alleged in the complaint and they were false. It stands uncontradicted plaintiffs made the payments alleged. These payments were more than the cost represented, more than was actually paid for the interests purchased.

This Court takes the position that admitting this, nevertheless, there was no reliance on these misrepresentations because plaintiffs relied on representations of others. Of course, this is simply a non sequitur. If both A and B make misrepresentations and I testify I relied on statements made by A it just does not follow that I thereby declare I did not rely upon the representations of B, nor may it be inferred that I did not rely on B. Yet this Court makes that inference even in the face of the rule that all inferences are to be drawn in favor of plaintiffs here. That plaintiffs did rely on defendant's representations is proved by the fact they paid what defendant represented the cost to be.

Another situation is here presented which obviously has escaped the attention of this Court. The representation made by the Aimonettos and Simmons had to do



with the productivity of the wells involved. Defendant's misrepresentations consisted of statements relating to how much the particular interest to be obtained by plaintiffs and defendant cost or what defendant had paid for plaintiffs. This type of representation was not one of value or productivity of the well but a misrepresentation as to selling price. For instance B tells A that a well is worth \$10,000. C tells A that the cost of the well is \$7,500 and as a matter of fact its cost is \$5,000. A pays \$7500. It would certainly be reasonable to find that A relied upon both representations. That he relied on one would not preclude reliance on the other. But this Court holds no reliance upon the representation as to cost.

Take the other situation presented. B tells A he has paid \$7,000 for an interest for him. As a matter of fact he has not. A pays the \$7,000 to B. No reliance! No trial on the merits may be had.

In the First Cause of Action it is alleged that defendant represented that an undivided one-fourth interest would cost \$60,000.00 and that this was false. Defendant represented that he had paid \$30,000.00 for a one-fourth undivided interest and that this was false.

Here is a situation where defendant falsely represented the amount an undivided one-fourth interest cost and falsely represented what he had paid for one-half of an undivided interest and defendant then paid \$30,000 for one-half of said undivided one-fourth interest.

These representations had nothing to do with the representations made by the Aimonettos. These had to do with what this interest cost plaintiffs and defendant. By falsely representing the cost defendant was able to get plaintiffs to pay more than what the interest obtained actually cost plaintiffs and defendant.

It is just inconceivable that there would be no reliance upon a representation that an undivided one-fourth interest cost \$60,000.00 when in fact it did not cost that much yet plaintiff paid \$30,000.00 for a one-half of the one-fourth interest. Certainly there would be reliance on this even if there was reliance upon a representation that the well had a value greater than it actually had. (Paragraph 3 (b), Second Cause of Action, Exhibit D).

Take the fact here. Defendant said the cost of the one-fourth interest was \$60,000.00, it in fact cost \$40,000.00 and plaintiffs paid \$30,000.00 for one-half thereof. How can anyone say or infer that plaintiffs did not rely upon that misrepresentation? If he didn't rely upon it why is he paying the \$30,000.00 for one-half of an interest which cost only \$40,000.00?

The Second Cause presents much the same situation. Plaintiff Dupler and defendant bought a one-fourth interest which defendant represented to cost \$35,000.00 and he represented he paid \$17,500.00 for his one-half which he had not paid. Plaintiff Dupler pays the \$17,500.00 and defendant gets a one-half interest without paying. Would plaintiff have paid the \$17,500.00 for one-half of a one-fourth when that was the cost of the whole

one-fourth? How can this Court conscientiously say that there was no reliance on this representation in making this payment even though someone else made a misrepresentation as to productivity which was also relied upon?

In the Third Cause defendant represented to plaintiff that he had paid \$7,000.00 to purchase a 5% interest for plaintiff. This was false. Plaintiff paid defendant \$7,000.00. Why did he pay the money if he didn't rely upon defendant's representation that he had paid this amount? Can anyone fairly say that plaintiff did not rely upon this representation in making the payment? Can anyone say that if plaintiff had known this money had not been paid he would still have paid the \$7,000.00 to defendant? Is not this reliance? Suppose testimony was introduced that this representation was made, that plaintiff paid defendant the \$7,000.00 and that the representation was false. These allegations are not contradicted. Certainly this would support, if not require, a finding of reliance without any direct testimony that there was reliance. Also that someone else had misrepresented the value of productivity would not preclude or eliminate reliance on the representation that the money had been paid by defendant for plaintiff.

In the Fourth Cause defendant represented that the 50% interest cost \$77,500.00, that he had paid his \$15,500.00 for his 10% interest. As a matter of fact the 50% cost \$62,000.00 and defendant had not paid anything for his 10% interest. Why would plaintiffs have paid

the \$62,000.00 for 40% if that was the cost of 50%? How can this Court or anyone else say plaintiffs did not rely upon this misrepresentation as to cost regardless of other misrepresentations? And mind you, non reliance is found as matter of law on a summary judgment before issue is joined by answer. Nothing would have been added by an affidavit that plaintiffs did too rely.

The Fifth Cause is a consolidation of the other causes and hence reliance is established there.

In all of these causes of action one fact absolutely requires a finding of reliance. That is, in every instance plaintiffs paid the exact amount defendant represented the purchase price to be.

We submit the finding as matter of law or the inference that there was no reliance is just simply not justified.

### POINT III.

THIS COURT ERRED IN HOLDING THAT FROM THE TERMINATION OF THE WYOMING ACTIONS IT MUST BE INFERRED THAT PLAINTIFFS WERE FULLY COMPENSATED AND THEIR CLAIMS SATISFIED THEREBY.

This Court asserts:

“Thus, from anything that appears in this record, it must be assumed that the claims for damages which they now assert against Yates were satisfied in those Wyoming actions.”

We submit this is a violent assumption and is made in face of the rule that all inferences must be drawn in favor of the parties opposing a motion for summary

judgment. Also, in face of the fact that Yates was not a party to those Wyoming actions.

How come such an assumption can be made when the very bringing of these actions against Yates is an assertion to the contrary.

Also, as clearly appears, the basis of the Wyoming actions and of this case are entirely different. The Wyoming cases were based on a Federal statute and misrepresentation as to value, productivity, etc. Here defendant misrepresented the actual cost paid for interest in wells.

Under the principles applied to summary judgments it is incumbent upon defendant to show that there was satisfaction or compensation paid to plaintiffs. There is no such evidence in the record. This Court has inferred plaintiffs out of court.

In the cases involving the Aimonettos the order of dismissal was not binding upon plaintiffs so far as defendant Yates is concerned. He was not a party. We can imagine what would be said if a favorable judgment against the Aimonettos had been obtained and we sought to bind defendant Yates therewith.

The record here only discloses that an action was pending against Simmons. There is no proof of any disposition of the case and no evidence of a judgment in favor of plaintiff. Defendant admits this in his brief (page 43). Disposition or termination of this case was not even before the trial court. This Court assumes that

there has been satisfaction. The Federal Reporter shows a dismissal of an appeal by Simmons. Was it incumbent upon plaintiffs to make affidavits concerning matters not in the record? We do not believe any rule of law foists such a burden on plaintiffs here.

One of the most astounding things in this case is the reliance by this Court, in defeating plaintiffs, upon the dismissal of the Simmons appeal. As appears in 268 F. 2d 217 the dismissal was entered February 26, 1959. The Summary Judgment herein appealed from was signed and entered five months before this, to-wit: September 10, 1958 (88, 89). How can there be any justification for this? How could plaintiffs make a counter affidavit concerning termination of a case not yet terminated? How can this Court say that an inference may be made of satisfaction of a claim from termination where the cause thereon is still pending?

If defendant claimed the termination of these cases compensated plaintiffs for their losses should they not assert it by affidavit or otherwise? How could counsel for plaintiffs anticipate that this or any other court would draw an unfavorable inference against plaintiffs in this summary judgment proceeding and require an affidavit against such inference?

We submit there is no justification either in fact, law or justice to infer from the dismissal of a case, the pendency of a case or the obtaining of a favorable judgment, that satisfaction of all claims has been accomplished. Such evidence in the trial of this case would

not have supported a finding to that effect. Defendant, in such affirmative defense, would be required to establish the ultimate fact of satisfaction or payment.

We submit that this Court cannot infer satisfaction from termination particularly when one case had not been terminated. To require counter affidavits in such a situation would impose an impossible burden on plaintiffs.

## CONCLUSION

We submit that this Court in the particulars above set forth has drawn unfavorable inferences against plaintiffs contrary to established law. We submit the majority opinion revolutionizes summary judgment proceedings. Without direct denial of reliance plaintiffs would have to file an affidavit that they did too rely even though they so state in their Amended Complaint (which should be taken into consideration under Rule 56(c)) and defendant does not allege they did not rely either by affidavit or pleading. We submit an affirmative defense of satisfaction or payment was improperly inferred without benefit of evidence, affidavit or pleading to that effect.

We submit the judgment should be reversed or a rehearing granted.

Respectfully submitted,

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