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Utah Court of Appeals

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DOCKET NO. 920533-CA

IN THE UTAH COURT OF APPEALS

WEST ONE TRUST COMPANY, Personal Representative for the Estate of Merlin R. Morrison, Sr.,	:	
Petitioner/Appellant,	:	Case No. 920533-CA
v.	:	Priority No. 16
MERLIN R. MORRISON, JR., and EDNA R. MORRISON,	:	
Respondent/Appellee.	:	

REPLY BRIEF

On Appeal From The Judgment of the
Third Judicial District Court,
Civil No. 8809093555
in and for Salt County, State of Utah
Honorable Frank G. Noel

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FILED

SEP 25 1992

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TABLE OF CONTENTS

	Page
SUMMARY OF ARGUMENT	1
ARGUMENT	3
I. GENUINE ISSUES OF MATERIAL FACT PRECLUDE SUMMARY JUDGMENT.	3
II. THE ISSUES ON APPEAL WERE SUFFICIENTLY RAISED IN THE TRIAL COURT.	7
CONCLUSION	13

TABLE OF AUTHORITIES

Page

CASES

Chicago & Calument Dist. Transit Co., Inc. v. Stravatzakes, 156 N.E.2d 902 (Ind. Ct. App. 1959) 9

Danes v. Automobile Underwriters, Inc., 307 N.E.2d 902 (Ind. Ct. App. 1974) 8, 9

Hartwell Corp. v. Smith, 686 P.2d 79 (Idaho Ct. App. 1984) . 10

Independent Nat'l Bank v. Westmoor Elec. Inc., 795 P.2d 210 (Ariz. Ct. App. 1990) 10

James v. Preston, 746 P.2d 799 (Utah Ct. App. 1987) 7

Wojt v. Chimacum School Dist. No. 49, 516 P.2d 1099 (Wash. Ct. App. 1973) 9

STATUTES

Utah Code Ann. § 48-1-3 (1992) 5

Utah Code Ann. § 48-1-5 (1992) 10

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REPLY BRIEF

SUMMARY OF ARGUMENT

Appellees assert that the trial court was correct in refusing to look beyond the four corners of the deeds to determine the intent of partners Merlin R. Morrison, Jr. ("Morrison, Jr.") and Merlin R. Morrison, Sr. ("Morrison, Sr.") Appellees reach that conclusion by virtually ignoring the Utah Partnership Act and by relying on cases which are inapposite. Under the clear language of the Act, properties purchased with partnership funds belong to the partnership, unless a contrary intention appears. This is true regardless of the record title. The facts are uncontroverted in this case that the properties in question were purchased by Morrison Sr. and Morrison Jr. with partnership funds.

Appellees may dispute that the facts are uncontroverted on this issue, but at the very least, there exists a genuine issue of material fact as to whether the properties were purchased with partnership funds.

The next issue of whether there is sufficient evidence to rebut the presumption that the properties belonged to the partnership also raises genuine issues of material fact. Appellees are saddled with the burden of showing a contrary intent. Appellees never met this burden because the trial court, refusing to look beyond the four corners of the deeds, never reached the issue of intent. Courts uniformly hold that record title alone does not establish intent, a point appellees do not dispute. Because there are genuine issues of material fact in this case, the trial court clearly erred in granting summary judgment for appellees.

Appellees suggest that West One is precluded from making arguments concerning the use of partnership funds to purchase the real properties. Appellees are dead wrong. West One persistently argued to the trial court the legal principles, theory and policy that embody the Utah Partnership Act -- that partnership property belongs to the partnership unless a contrary intention is shown. Courts uniformly hold that omitting a specific citation to a statute does not preclude a party from raising the statute on appeal. In this case, omission of a specific citation

to the Act is inconsequential. Appellant properly cites on appeal the statute and its underlying principles.[1]

ARGUMENT

I.

GENUINE ISSUES OF MATERIAL FACT PRECLUDE SUMMARY JUDGMENT.

Appellees argue that West One's reliance on the legal principles underlying the Partnership Act is misplaced because there is no evidence that partnership funds were used to purchase the three properties in question. The record shows otherwise.

As cited in appellant's brief, there are numerous references to Morrison, Jr.'s testimony that he and his father, Morrison, Sr., financed and operated the properties like they did their other business enterprises -- as a "partnership." (Depo. of Morrison, Jr. at 25, 68-69 & 76; R. 125.) The partners had a 30-year partnership where they would contribute capital and

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[1]In their description of the course of proceedings, appellees state that the Morrisons' motion to restrain West One's prosecution of this appeal was based on the fact that West One had failed to consult the heirs with regard to the appeal. (Appellees' Brief, p. 3.) This statement is inaccurate and unsupported by the record. Contrary to appellees' statement, the supporting memorandum to the Morrisons' motion (attached to Appellees' Brief, addendum No. 2) does not even mention, let alone assert, that West One had failed to fully consult the heirs. In fact, Gilbert Bean, personal Trust Officer of West One Bank, in the fall of 1991, notified by letter the heirs regarding the appeal.

Appellees also attempt to create the impression that this appeal is contrary to the wishes of the majority of the heirs and only serves to waste the estate's assets. Appellees' portrayal is disingenuous. Even if only one heir requested West One to appeal the trial court's order, West One would be obligated to do so because the trial court was wrong. If West One declined to appeal the trial court's order, it may well be in breach of its fiduciary duties to the heir(s).

services to finance and operate numerous business enterprises. In Morrison, Jr.'s own words, they "were always partners . . . ." (Depo. of Morrison, Jr. at 25, Addendum No. 2, Appellant's Brief.) Their partnership activities included the purchase of the three subject real properties. In his affidavit, Morrison, Jr. testifies that he and Morrison, Sr. "jointly purchased" the three real properties and that "various tax returns were filed indicating a partnership" between them. (R. at 125) (emphasis added). Morrison, Jr.'s testimony is unequivocal that he regarded the purchase of the three real properties as another business enterprise of the partners and that the subject properties belonged to the partnership.

Appellees' description of Morrison, Jr.'s and Morrison, Sr.'s partnership relationship is confusing. Appellees assert that because Morrison, Jr. and Morrison Sr. contributed half of the funds to purchase the real properties they were "co-owners," not partners. Appellees state that "Mr. Morrison, Jr.'s testimony make [sic] it clear that he uses the term [partnership] as synonymous with "co-owners." (Appellees' Brief, p. 9) (footnote omitted). Appellees also state that "West One concedes that Mr. Morrison, Jr. contributed half of the funds to purchase the properties and in doing so must concede that the properties were not purchased with partnership funds." (Appellees' Brief, p. 13.)

Appellees' logic is specious, and reflects a misunderstanding of what a partnership is under the Utah Partnership Act. As stated in Utah Code Ann. § 48-1-3, "[a] partnership is an association of two or more persons to carry on as co-owners, a business for profit." Utah Code Ann. § 48-1-3 (1992) (emphasis added). Appellees' own description of Morrison, Jr.'s and Morrison, Sr.'s association contains a critical partnership element.

Appellees needlessly point out that Morrison, Jr.'s testimony did not accurately explain the full implications of a "partnership." Morrison, Jr. testified that he thought he owned a 50% interest in the properties. (R. at 125.) Appellees recite general principles of partnership law that the partnership actually holds a 100% interest in partnership property and two partners each hold a 50% interest in the partnership. (Appellees' Brief, p. 9-10.) Appellees glean to this error in Morrison, Jr.'s testimony to show that Morrison, Jr. could not have intended that the properties belonged to the partnership. Appellees overstate the significance of this testimony. Morrison, Jr.'s description of partner ownership is understandable in light of what appellees characterize as his "layman's" understanding of partnership law. Morrison, Jr.'s testimony, however, in no way evidences that he did not intend a partnership in the legal sense. His testimony is clear that the indicia of a partnership existed between he and Morrison, Sr.: the two men had a long association as co-owners to finance and operate

businesses for profit, including the purchase of the real properties.

Because the partners purchased the properties with partnership funds, the trial court should have, as urged by West One, looked beyond the four corners of the deeds to determine the partners' intent. Appellees respond that "West One also attempts to have the Court speculate as to the intent of Mr. Morrison, Jr. . . ." (Brief of Appellees, p. 9.) Appellees misunderstand West One's point. West One is not attempting to have this Court speculate as to Morrison, Jr.'s intent. That obviously is not this Court's role. West One is simply marshaling facts to show that the partners regarded the property as partnership property, or, at the very least, that a genuine issue of material fact exists as to whether the properties were purchased with partnership funds. It is the trial court's responsibility to weigh the evidence and determine the partners' intent. The trial court, however, refused to look beyond the record title to reach the issue of intent. This refusal was an error of law. Accordingly, the trial court's order of summary judgment should be reversed and this case should be remanded for a trial on the factual issues that are germane to the disposition of the subject real properties.

II.

THE ISSUES ON APPEAL WERE SUFFICIENTLY RAISED IN THE TRIAL COURT

Appellees argue that West One failed to argue to the trial court the theory that the three properties at issue belonged to the partnership because the properties were purchased with partnership funds. Appellees either ignore or overlook numerous references to this theory in the record below. The issue of the existence of a partnership and the use of partnership funds to purchase the properties was briefed by West One in its Memorandum in Opposition to appellee's Motion for Partial Summary Judgment. The issue also permeated the discussion at oral argument and is central to the decision at hand.[2]

In James v. Preston, 746 P.2d 799 (Utah Ct. App. 1987), this Court held that

> [a] matter is sufficiently raised if it has been submitted to the trial court and the trial court has had the opportunity to make findings of fact or law.

Id. at 801. In the present case, West One sufficiently raised the issue that property purchased with partnership funds belongs to the partnership although it did not cite to a specific statutory provision.

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[2]Appellees state that West One has made "several arguments" which were not made to the trial court. (Appellees' Brief, pp. 10-12.) The only such argument identified by appellees was that concerning the use of partnership funds to purchase the subject real properties. The other argument(s) to which appellees refer are a mystery.

The lack of a specific statutory citation to the trial court does not, however, preclude West One from citing to that statute on appeal. General reference to the legal principle(s) underlying the statute sufficiently preserves the relevant issues. Appellate courts uniformly adhere to this principle. In Danes v. Automobile Underwriters, Inc., 307 N.E.2d 902 (Ind. Ct. App. 1974), the Indiana court was faced with a situation very similar to the one at hand. In Danes, the plaintiff, who was acting as guardian for her minor child, sought a declaration that a previous release of her daughter's claims against an uninsured motorist pursuant to a settlement entered into by the plaintiff be declared void. Although the plaintiff argued that the release was "'void ab initio' as against public policy," the plaintiff failed to cite to an Indiana statute which specifically required that a compromise or settlement of a minor's claim is valid only when approved by the court. Id. at 903. The plaintiff first referred to the statute itself in the plaintiff's appellate brief. Although the defendant insurer asserted that the citation of the statute gave rise to a new issue on appeal which was not before the trial court, the appellate court disagreed stating that the plaintiff

> persistently argued that a minor's claim may not be compromised or settled without court approval . . . . Questions within the issues and before the trial court are before the appellee (sic) court, and new arguments and

> authorities may with strict priority be brought forward.

Id. at 905 (emphasis added). The court further mentioned that

> [i]t is clear that: ". . . the courts of a state will take judicial notice of its own public statutes and that it is accordingly unnecessary to plead them or to set out the contents or substance thereof."

Id. at 905 (quoting Chicago & Calument Dist. Transit Co., Inc. v. Stravatzakes, 156 N.E.2d 902, 905 (Ind. Ct. App. 1959)).[3]

In Wojt v. Chimacum School Dist. No. 49, 516 P.2d 1099 (Wash. Ct. App. 1973), the Washington court similarly held that a failure specifically to cite to the statute did not preclude the appellant from bringing the statute to the court's attention during the appeal. Id. at 1103 n.4. In Wojt, the plaintiff challenged the legal sufficiency of the stated causes for his discharge from one of the defendant's schools, but failed to cite to the court a statute that required the promulgation of evaluative guidelines concerning teaching and other classroom-related performance. In holding that the plaintiff could cite to the court the statute for the first time on appeal, the court stated that the primary issue before the trial court was the legal sufficiency of the stated causes for discharge and, accordingly, "[a]ll statutes and authorities which bear upon the issue of the

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[3] In addition, although the court noted that had plaintiff's counsel specifically called the trial court's attention to the statute the trial court might well have resolved the matter differently, the court put no weight on the counsel's oversight. Danes, 307 N.E.2d at 905.

sufficiency of the causes are therefore properly before this court." Id. (emphasis in original).

Other courts have also held that the failure to specifically cite the statute at trial did not preclude its citation during appeal. See, e.g., Independent Nat'l Bank v. Westmoor Elec. Inc., 795 P.2d 210 (Ariz. Ct. App. 1990) (where defendant failed to cite Arizona statute providing for set-off, court found that defendant's general argument concerning set-off sufficiently preserved argument for appeal); Hartwell Corp. v. Smith, 686 P.2d 79 (Idaho Ct. App. 1984) (general reference to statute of limitations, but failure specifically to cite statute, did not preclude its use during appeal).

In the present case, although West One did not cite Utah Code Ann. § 48-1-5 to the trial court, West One did persistently argue the theory of section 48-1-5. West One's primary argument was that the trial court should look at the intent of the partners because the properties belonged to the partnership. The theory of section 48-1-5, was thereby preserved for argument on appeal. During the oral argument of defendants' motion for summary judgment, the following discourse took place:

> Mr. Sessions: We're saying: No, wait a minute. We're entitled to look behind the four corners of the documents; number one, because Mr. Morrison was in a partnership with his son, the partnership that they had covered five separate business transactions . . .

. . .

The Court: So if you prove there's a partnership--I'm just trying to follow along, suppose you are able to prove there was a partnership and these properties belonged in this partnership; why couldn't they still be in joint tenancy and then be back to where we are now, and that is interpreting the language of the deed?

Mr. Sessions: The reason why is if in fact it is a 50/50 partnership, just for purposes of argument, in fact 50 percent of the property that is owned in the partnership would belong to the estate.

The Court: Why would it if--I agree with you on a general basis, 50/50 partnership, they each owned 50 percent. But if they agreed to hold some of the real property in joint tenancy, why can't they do that so that upon the death of one of them it just passes along?

Mr. Sessions: I think this is the key and the answer, as least as I view the answer. The easy and quick answer is yes, you can hold property in joint tenancy, no question about that. But if the parties really intended that it wasn't to be joint property at all in the sense that it passed to the survivor upon the death of the first to die, but it was intended by the parties to be something else in this case, partnership property. Then if it is the intention of the parties that ought to be enforced.

. . .

The Court: All you've shown here is they intended this be part of the partnership--

Mr. Sessions: Exactly.

(Trans., pp. 28-32, Addendum No. 1.)

The above discussion between the trial court and West One's counsel shows counsel's emphasis on the fact that the properties were partnership properties. Accordingly, the court was compelled to ascertain the intent of the partners in order to determine the disposition of the properties. There is no question that the trial court understood that West One was arguing that the property was purchased with partnership funds and is presumed to be partnership property, absent a contrary intent. As noted above, the court asked:

> [S]uppose that you are able to prove that it was a partnership and these properties belonged in this partnership; why couldn't they still be in joint tenancy and then be back to where we are now, and that is interpreting the language of the deed?
>
> . . .
>
> All you've shown here is that they intended that this be part of the partnership . . . .

(Trans. at 29-31, Addendum No. 1.) The court further stated that

> . . . just because someone intended that to say something different, if it's clear, I'm not sure the law allows me to go behind and change it. But Mr. Sessions is saying, yes, that's true. Citing the case, the fact these were partnership assets injects a new element in this.

(Trans. at 39, Addendum No. 1.)

The trial court was well aware of West One's argument that because the property was partnership property, the property belonged to the partnership absent a contrary intent. The court's discussion with counsel during argument demonstrates this

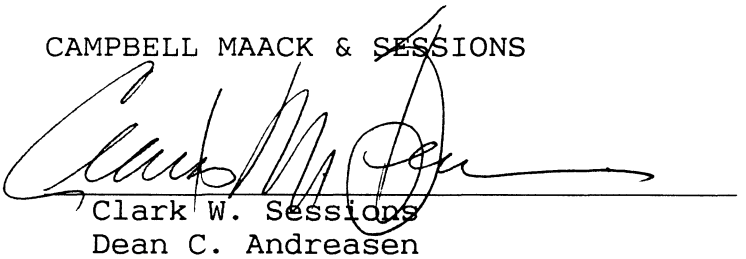
awareness. Appellees' argument to the contrary wholly lacks merit.

CONCLUSION

For the reasons set forth in West One's briefs, West One respectfully submits that the trial court's summary judgment be reversed and the case be remanded for a factual determination whether the appellees can rebut the presumption that the three subject real properties were and are properties of the partnership.

DATED this 25th day of September, 1992.

CAMPBELL MAACK & SESSIONS



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CERTIFICATE OF SERVICE

I herewith certify that I am a member of and/or employed in the law firm of Campbell, Maack & Sessions, One Utah Center, Thirteenth Floor, 201 South Main Street, Salt Lake City, Utah and in said capacity and pursuant to Rule 26, Utah Rules of Appellate Procedure, four (4) true and correct copies of the foregoing REPLY BRIEF were mailed, postage prepaid, on this 25th day of September, 1992, to the following:

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