

1991

# In the Matter of the Estate of Clarence I. Justheim : Reply Brief

Utah Supreme Court

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IN THE SUPREME COURT  
OF THE STATE OF UTAH

IN THE MATTER OF THE ESTATE OF )

CLARENCE I. JUSTHEIM, )

Deceased. )

Case No. ~~91-0244~~

) 91-0244-CA  
)

APPELLANTS' REPLY BRIEF

This Reply Brief responds to the Appellee's Brief relative to the Appeal from the DECREE AND JUDGMENT ON VERDICT DENYING APPELLANTS' PETITION on behalf of the Estate to recover 120,431 shares of Wyoming Petroleum Company stock from the Respondent, In The Third Judicial District Court of Salt Lake County, State of Utah. This case was heard before the Honorable Michael R. Murphy, District Judge.

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**FILED**

JAN 15 1991

Clerk, Supreme Court, Utah

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IN THE SUPREME COURT  
OF THE STATE OF UTAH

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IN THE MATTER OF THE ESTATE OF     )  
CLARENCE I. JUSTHEIM,                     )     Case No. 890419  
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OPENING STATEMENT OF ISSUES IN REPLY BRIEF

This Brief is in reply to the Appellee's Brief, sometimes hereinafter called Ebert's Brief, and is limited basically in its response to the three points of argument advanced by Ebert in his brief.

ARGUMENT

POINT I

THE TRIAL COURT DID ABUSE ITS DISCRETION IN  
DENYING BENEFICIARIES A NEW TRIAL BASED ON THE ALLEGED  
IMPROPER ADMISSION OF PAROL EVIDENCE.

The parol evidence rule is a substantive rule of law. It is not a rule of evidence. The cases which hold evidence violative of the parol evidence rule must be excluded, even though admitted without objection, and these cases emphasize the substantiveness of the rule. Because it is a rule of substantive law, the time at which the rule may be invoked differs markedly from the time at which a rule of evidence must be invoked. In fact, the time element of invoking the rule is the hallmark and is the only difference between the two rules. If there is no time difference in which the rules must be invoked, then it is difficult to perceive that any effect has been given to the words that the parol evidence rule is a "substantive rule of law".

The Utah cases provided in Ebert's Brief appear to set the same time standard for invoking the two rules, requiring that each must be invoked timely during trial. But, it does not appear from the cases that the substantiveness of the parol evidence rule has ever been addressed by the Court. Ebert's

brief does not meet the issue raised by the beneficiaries that the parol evidence rule is one of substantive law. The beneficiaries lay before the Court the question of whether the substantiveness of the rule enlarges the time in which it may be invoked, and requires that evidence violative of the parol evidence rule, even though admitted without objection, must be excluded when the rule is invoked in a post-trial motion, at least under the facts of this case. The cases cited by the beneficiaries are from those jurisdictions which have acknowledged the substantiveness of the rule and given affect to it with the result being it is not necessary to object to the admission of the evidence which is in violation of the parol evidence rule during the trial. The objection may be first raised following the trial and some cases permit the raising of the objection even at a later date. The beneficiaries invoked the parol evidence rule following trial in a connection with several motions including the motion for a new trial.

The beneficiaries have no argument with Rule 103 of the Utah Rules of Evidence. Those rules are just what the title states--rules of evidence. Parol evidence rule is not the rule of evidence but a substantive rule of law, and therefore distinguishable from and not subject to the Rules of Evidence.

The appellees cite the case of Edmonds v. Galey, 458 P.2d 650 (Wyo. 1969) in which the Court said:

[T]he parol evidence rule, like most things, has its exceptions. It does not apply where the writing is collateral to the issue involved, and the action is not based on such writing. To state it another way, the parol evidence rule applies only where the enforcement of an obligation created by the writing is substantially the cause of action. . . .

Justheim's Codicil is the "writing" and is substantially the cause of action in this case. It is the Codicil which Respondent Ebert's attorney states "would be submitted to the Probate Court for final determination"; and further informed Ebert "that the Codicil was written evidence of Clarence's intent to give Ray the stock" (Ebert's brief, Page 12). It was the Codicil upon which Ebert relied to transfer Justheim's stock as his letter to the transfer agent, in which Ebert enclosed a copy of the Codicil, states "the Codicil bequeathed to me all of Clarence I. Justheim's interest in Wyoming Petroleum Corp." (emphasis added, Exhibit I, Beneficiaries' Brief). In May 1984, Ebert wrote to the accountant, John Dinero, who was working on the Inventory for the Estate:

"In May, 1981, C.I.J. signed a Codicil to his Will giving me all of his holdings in Wyo. Pet. He also handed me certificates (120,431 shares) stating "don't let Bud (J. H. Morgan, Jr.) know anything about these" (Exhibit 1, Appellant's Brief) (emphasis added).

Ebert relied on the Codicil as a valid testamentary instrument in which he was "bequeathed" all of Justheim's stock in Wyoming Petroleum, in his dealings with John Morgan resulting in Ebert's control and becoming President of Wyoming Petroleum three months after Justheim's death. Trial Exhibits A, B, C and D which are subject matter of POINT III hereof and which are letters of Morgan to Ebert and show the assertion by Ebert of the validity of the Codicil and his reliance thereon as well as the acceptance of that representation by Morgan.

Without the Codicil, Ebert's claim to the stock is reduced to a naked oral claim or statement that the stock is his

by virtue of two inter vivos gifts from the deceased. Ebert needs and must have the Codicil in order to support his claim, particularly as he is the Trustee for the beneficiaries and Executor of the estate, and his claim as an individual is diametrically opposed to the interests of the estate and the beneficiaries of the Trust. The Codicil is the very heart of Ebert's position as well as the basis of the claims of the beneficiaries. This is a proper case in which to give effect to the substantiveness of the parol evidence rule and apply it to the evidence of this case particularly as a result of Ebert's close and unique relationship with Justheim, combined with his duty and loyalty as Trustee and Executor. Pepper v. Zions First National Bank, 147 Utah Adv. Rep. 5, 9 (Utah 1990) imposed upon Ebert the highest duty of care and loyalty:

Executors and trustees are charged as fiduciaries with one of the highest duties of care and loyalty known in the law. . . .

#### POINT II

#### THE TRIAL COURT DID ABUSE ITS DISCRETION WHEN IT DENIED BENEFICIARIES A NEW TRIAL BASED ON ESTOPPEL

All of the cases cited by Ebert are cases in which the parties are alive and before the Court, but the main party and actor involved in this case, Clarence Justheim, is deceased and on that basis alone, those cases are distinguishable from the present case. As noted in Ebert's brief, he had a long relationship with Justheim. However, it wasn't until Justheim was elderly and became incapacitated as a result of an automobile accident that the uniqueness of the relationship ripened into an unusual one where Ebert was

almost his sole contact with the outside world as stated in

Appellant's Brief:

. . .For some five years, Ray spent six days a week, twenty minutes to five hours a day helping Clarence and Chickie. Ray visited Clarence, typed his personal correspondence, delivered his personal and corporate mail for him, assisted him in his personal affairs, shopped for him, helped him care for his invalid wife, and generally provided him the kind of comfort and companionship a confined person craves. . . . (Appellant's Brief, Page 7) (reference to transcript omitted)

Further, as noted, Justheim amended his Trust on five occasions, the last being January 1981, two months prior to preparation of the Codicil. In the last Amendment, Justheim added Ebert as a .005% residuary beneficiary of the trust. Amendments were made with the assistance of an attorney. There are frequent contacts with Justheim's attorney. Obviously, there was availability of an attorney to assist in the estate planning at every stage. The Will and the Amendments to the Trust are evidence of the particularity and thoroughness with which Justheim acted in matters of his estate. Ebert, as Trustee, had signed the Trust and the Amendments thereto and was aware of Justheim's estate planning. Notwithstanding Ebert's knowledge of the foregoing, his duty and loyalty to the beneficiaries as Trustee, his appointment as Executor of the estate, he prepared a Codicil which conflicted with his claim of inter vivos gifts asserted after the death of Justheim. He prepared a Codicil in which Ebert has Justheim's say that Justheim owns 50% of the stock of Wyoming Petroleum, but if the 120,000 shares of the first gift are taken into account, Justheim owned less than 5% of the stock at the time Ebert prepared

the Codicil. Ebert had the control and power to disclose the ownership to be 5% and not 50% as to the amount of stock ownership by Justheim. He drafted and typed the Codicil. He authored or co-authored and created the Codicil. He, as any individual in society, owed the duty not to knowingly misrepresent a fact and certainly not to misrepresent the fact when the fact is designed to come to life or be published only when the other co-author is deceased. Ebert had an active hand in the misrepresentation set forth in the Codicil. Even if it be assumed that Ebert's role is only one of silence, the Pepper case (P. 7) holds the silence as equivalent to fraudulent misrepresentation when there is a duty to speak. Ebert had such a duty to speak. He should have told or reminded Justheim something to the effect "you just recently made me a beneficiary of your Trust and the Wyoming stock is a substantial asset of your estate and I suggest we get your attorney to draw up some papers so that this matter can be handled by him as I am the Trustee and I do not want to have to explain to the beneficiaries. I would prefer the attorney do that." Ebert chose silence and that silence should be continued by the application of estoppel.

### POINT III

#### THE TRIAL COURT DID ABUSE ITS DISCRETION BY EXCLUDING EXHIBIT A, B, C AND D (EBERT'S BRIEF E, F, G AND H)

Exhibits A, B, C and D flush out the relationship between the parties and give background as to how Justheim ran his affairs. They explain why Justheim said: "...Be damn sure to don't let Bud" Morgan know about the Wyoming stock, and why

Ebert never responded to the letters. Exhibits 1 and 3, Beneficiaries Brief. As already noted, they show the representation and reliance of Ebert on the Codicil. Exhibit A (Exhibit E of Ebert's brief) dated October 10, 1983, three months after Justheim's death, discloses that "you have indicated to me that Clarence, by his Will, had given you all of his stock in Wyoming Petroleum Corporation. You mentioned that this was contained in one of the Amendments or Codicil to Clarence's Will." (emphasis added) Although Morgan is not pleased with the estimentary disposition, he accepts the representation without qualification as Morgan states further "you are obviously in control of Wyoming Petroleum Corporation."

Exhibit B shows the receipt by Morgan of a copy of the Will but no Codicil is furnished. It points out that the Will does not deal with the stock and reiterates that the Codicil is the basis of Ebert's claim to the stock. It throws light on how the control stock was obtained in a few short sentences and shows how the Will and the Trust operate. It does, particularly in retrospect, attack the credibility of Ebert in his statements.

Exhibit C, dated December 4, 1983, does cover some of the same territory and points out that the change in the Will deprives beneficiaries of the stock. More importantly, Morgan is still not informed at this time of the claim of gifts and has not been furnished a copy of the Codicil. Although Ebert is not under duty to furnish Morgan with a copy, Ebert's claim of having received the stock under the Codicil had had great impact on their relationship and the management of Wyoming Petroleum and

vividly demonstrates the silence and unwillingness of Ebert to disclose the circumstances surrounding the stock.

Exhibit D, dated January 21, 1983, acknowledges receipt of a copy of the Codicil and discloses the defectiveness of it and then goes on to ask a series of questions which anyone knowing the thoroughness of Justheim would raise and want answers to including the beneficiaries.

These letters further show the strength and the assurance with which Ebert informed and convinced Morgan that he received the stock by virtue of the Codicil. It is demonstrative of an attitude and course of conduct which again affects his credibility and shows the relationship of the parties. They bear on the issues of loyalty to the beneficiaries and the credibility of Ebert and impeachment of Ebert.

#### CONCLUSION

It is respectfully submitted that the Lower Court did commit error and the beneficiaries should be awarded a new trial and such other relief as the Court may deem proper.

Dated this 14th day of January, 1991.

BELL & BELL by

  
\_\_\_\_\_  
J. Richard Bell

MAILING CERTIFICATE

Mailed three true and correct copies of the foregoing Briefs of Appellants, postage prepaid, this 14th day of January, 1991, to the following:

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