

1965

Werner Kiepe v. Eli D. Lecheminant : Appellant's Reply Brief

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In the Supreme Court of the State of Utah

UNIVERSITY OF UTAH

WERNER KIEPE,

*Plaintiff-Appellant
and Cross Respondent,*

vs.

ELI D. LeCHEMINANT,

*Defendant-Respondent
and Cross Appellant.*

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Case No. 10310

APPELLANT'S REPLY BRIEF

Appeal from the judgment of the Third District Court
For Salt Lake County
Hon. Marcellus K. Snow, *Judge*

MOFFAT, IVERSON AND ELGGER

1311 Walker Bank Building
Salt Lake City, Utah

*Attorneys for Plaintiff-Appellant
and Cross Respondent*

BACKMAN, BACKMAN AND CLARK

1111 Deseret Building
Salt Lake City, Utah

*Attorneys for Defendant-Respondent
and Cross Appellant*

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Supreme Court, Utah

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Defendant's Brief contains several statements which are not only not supported by the record but are untrue, and if not denied may be confusing to the Court in considering the matters at issue in this appeal.

POINT I

RESPONDENT PARTICIPATED IN APPELLANT'S INCOME FROM APPRAISAL BUSINESS.

At Page 8 of his brief, Respondent states:

"The fact, as shown by the record, is that while the partners continued on in the same office, Appellant took into his possession and under his control the appraisal business and records, claiming those assets as his own and not partnership assets, and Appellant conducted his own inde-

pendent appraisal business. He did not intend that Respondent participate in the income therefrom while Respondent carried on the mortgage loan and insurance business of the partnership from which Appellant expected to and did at all times participate in the income just as he did prior to the dissolution of the partnership."

Respondent does not cite any page of the record to support this statement.

There is nothing in the record to show that "Appellant took into his possession and under his control the appraisal business and records, claiming those assets as his own."

The fact is that Respondent participated in the income from the appraisals made by Appellant just the same as he had done at all times prior to January 1, 1963 (R. 63, first four lines of Paragraph 9 of the Judgment).

POINT II

THE COURT DID NOT RETAIN JURISDICTION OF THE CASE AT THE REQUEST OF COUNSEL TO SETTLE THE MATTER OF DISTRIBUTION OF INCOME AND EXPENSES DURING THE PERIOD OF JANUARY 1, 1963 TO FEBRUARY 1, 1964.

At the last two lines of Page 2 and at Page 3 of his brief, Respondent states :

"The only question before the Court is what is an equitable basis upon which the parties operated for the period of thirteen months from the date of dissolution until the final breaking off date. The attention of the Court is directed to the fact that this phase of the case was not made an issue by the pleadings. The trial court retained

jurisdiction after having entered its judgment on the case, at the request of counsel, to settle the controversy which had arisen between the parties as to this thirteen-month period of time when the parties could not resolve their differences. The order from which the appeal is taken was initiated not by any pleadings, but upon application of Respondent for an order to show cause why Appellant should not be found in contempt of court for having failed to comply with the judgment of the Court which was made and entered on March 12, 1964. At this hearing on Respondent's application both parties initiated the matter of accountings for the thirteen-month period subsequent to the date of dissolution."

Respondent cites no page or pages of the record to support any of the misstatements above made.

The question of the "equitable basis under which the parties operated for the period of thirteen months from the date of dissolution to the final breaking off date" was tried by the Court and was decided on February 13, 1964 (R. 153 to R. 245). Judgment was entered March 12, 1964, (R. 60-64). The judgment became final thirty days thereafter.

The statement that "the trial court retained jurisdiction after having entered its judgment on the case at the request of counsel to settle the controversy which had arisen between the parties as to the thirteen-month period of time when the parties could not resolve their differences" is wholly false, and no page of the record is cited in support thereof. Counsel did not request the Court to retain jurisdiction "to settle the controversy

which had arisen between the parties as to the thirteen-month period." As above stated, the judgment of March 12, 1964 (R. 60-64) decided all questions concerning income and disbursements during the thirteen-month period. (R. 245 and R. 60-64). Nearly 100 pages of record were made in presenting this matter. (R. 153-245).

The statement that at the hearing of June 13, 1964 and June 24, 1964, which were held upon orders to show cause directed to both Appellant and Respondent, that "both parties initiated the matter of accounting for the thirteen-month period subsequent to the date of dissolution" is not true, nor is any page of the record cited in support thereof. It is true that at said hearing Respondent questioned some items contained in settlement statements furnished by Appellant, and in rebuttal Appellant adduced some evidence relative to services performed by Ruth Barlow and Richard Christensen and some evidence on bonuses, but both parties did not initiate the matter of accountings. The only ruling that the Court made upon said hearings which was different from the judgment of March 12, 1964, was that "Defendant LeCheminant will receive the sum of \$2,500.00 for his efforts and services during the last thirteen months in preserving the mortgage loan asset of the partnership." Not a word of pleading was filed in this matter, nor was it at issue, nor was it mentioned, nor was a word of evidence adduced thereon at said hearings. (R. 246-308). The Court did not consider that matter.

Respondent in his memorandum for the Court after

said hearings and before the Court entered its Order for Judgment, started out his memorandum as follows:

"The Court having designated four points to be covered by this memorandum, Defendant will treat these points in the following order: (1) Compensation paid to Ruth Barlow; (2) Compensation paid to R. L. Christensen; (3) Percentage of commission to be paid producer; (4) Contempt. (R. 84)"

As stated in Appellant's brief at Pages 19 to 22, this issue of whether Respondent was entitled to any compensation for "preserving the mortgage loan asset" was decided by the judgment of March 12, 1964, and was res adjudicata before the hearings of June 13 and 24 were held.

POINT III

RESPONDENT GAINS NO BENEFIT FROM THE FACT THAT THE COURT FAILED TO MAKE FINDINGS TO SUPPORT THE JUDGMENT ON THE MATTER OF SALARIES AWARDED TO RUTH BARLOW AND R. L. CHRISTENSEN.

At Pages 3 and 4 of Respondent's brief, he states:

"As is heretofore stated, not only are there no pleadings or findings to support this award under the order appealed from as contended by Appellant, but there are no pleadings, findings and conclusions to support that part of the order which Appellant is willing to have stand and to have enforced against Respondent, which benefits Appellant, from which Respondent takes his cross appeal, that part of the judgment pertaining to salaries awarded Ruth Barlow and R. L. Christensen and charged against partnership operations."

Appellant cannot understand how Respondent is helped because he filed no pleadings and the Court entered no findings or conclusions to support the Court's judgment pertaining to salaries awarded to Ruth Barlow and R. L. Christensen and charged against the partnership operations. It was Respondent who asked that said salaries not be charged against partnership operations but failed to make any pleadings, findings or conclusions.

The Appellant promptly moved for a new trial and for amendments of the "Judgment Designated Order" of November 9, 1964, not only on the ground that the Court failed to make and enter findings and conclusions in support of the judgment, but that the evidence was insufficient to support the part of the judgment for Respondent on the matter of awarding him compensation for "preserving the mortgage loan asset of the partnership," and the issue had before been decided against Respondent by a judgment that became final and was res adjudicata. Respondent has never made a motion for a new trial or to amend judgment because the judgment was entered against Respondent on the matter of salaries awarded to Ruth Barlow and R. L. Christensen.

POINT IV

THE PARTIES DID NOT WAIVE FINDINGS AND CONCLUSIONS IN THE CASE PROPER.

At Page 4 of his brief, Respondent states:

"It is to be noted that the parties waived findings and conclusions in the case proper."

No page of the record is cited in support of this

statement, and it is untrue. The Judgment Designated Order was signed November 9, 1964 (R. 110). Appellant on the same day, November 9, 1964, served motion for new trial on the grounds of failure to file findings and conclusions (R. 112).

POINT V

THE PARTIES DID NOT AGREE TO SUBMIT THE MATTER OF "COMPENSATION TO THE RESPONDENT FOR HIS HAVING PRESERVED THE MORTGAGE LOAN ASSET OF THE PARTNERSHIP" AND TO ABIDE ITS DECISION AFTER THE JUDGMENT OF MARCH 12, 1964 WAS ENTERED THEREON.

At Pages 4 and 5 of his brief, Respondent stated:

"The action is an equitable action and contrary to the arguments of Appellant that the Court heard no evidence to support its order, the Court did hear evidence and had theretofore indicated to counsel that it intended to award some compensation to Respondent for his having preserved the mortgage loan asset of the partnership and having retained jurisdiction of the case at the request of both counsel, the case having been tried piece-meal, exercised its equitable powers in entering its order allowing compensation to Respondent for his services rendered. The parties agreed to submit this phase of the case to the Court and abide its decision. Therefore, an appeal from the ruling is not in order nor is the order appealed from an appealable order."

No page of the record is cited in support of any of these statements.

The statement that "(1) the Court did hear evidence and (2) had theretofore indicated to counsel that it intended to award some compensation to Respondent

for his having preserved the mortgage loan asset of the partnership, and (3) having retained jurisdiction of the case at the request of both counsel * * * exercising its equitable powers entered its order allowing compensation for his services rendered, and (4) the parties agreed to submit this phase of the case to the Court and to abide its decision" is in each of the four subdivisions false.

After the judgment of March 12, 1964, (R. 60-64) in which the Court adjudged that "the judgment herein entered constitutes an accord and satisfaction of all claims each of the parties has against the other," not one word of evidence was introduced nor one word of argument made on the matter of allowing Respondent any compensations for "preserving the mortgage loan asset of the business." (R. 245-R. 308).

The Court's equitable powers are to enter judgment upon proper findings and conclusions supported by proper evidence. After the Court has entered a judgment which has become final and *res adjudicata*, the Court has no power to enter a different judgment, particularly without a motion to amend the judgment and without any new evidence, findings or conclusions.

The Court at no time indicated to counsel for the Appellant that he intended to award some compensation to Respondent for his having "preserved the mortgage loan asset." At the beginning of the hearing held on February 13, 1964, Respondent stated:

"We further intend to show * * * while he

(Respondent) has been devoting his time for the preservation of the asset (mortgage loan asset), the Plaintiff has been doing his appraisal business (R. 1954)."

From R. 154 to R. 245, the Court took evidence on the matter and ruled against the Respondent. (R. 245) (R. 60-64). Counsel for Appellant never requested the Court to retain jurisdiction of the case.

Certainly the Appellant never agreed to submit the matter of compensation for the Respondent for "preserving the mortgage loan asset." There would be no reason to do so after the Court had ruled that "Neither party will receive any special compensation for services during this interim period." (R. 245).

POINT VI

THE RULING WHICH THE COURT MADE IN ITS ORDER FOR JUDGMENT (Page 245) DID NOT REQUIRE RESPONDENT'S CONSENT TO THE EMPLOYMENT OF MRS. BARLOW AND MR. CHRISTENSEN.

At Page 6 of his brief, Respondent states:

"Appellant points out the fact that the Court adopted the recommendation of Respondent in ordering that all income received by either party from January 1, 1963, to February 1, 1964, should be distributed in the same manner and as is provided by the partnership agreement and has heretofore been received and distributed, and that neither partner will receive any compensation for services during this interim period. It is evident, however, that when such recommendation was made by Respondent's counsel, it was assumed that the partnership agreement, if invoked, be

invoked in all aspects. This would require the consent of Respondent to the employment of those not employed by the partnership. Thus, Respondent would be protected and would not be compelled to pay one-half of the salaries of such employees. See R. 83."

Respondent cites R. 83 when he no doubt intended to cite R. 233.

A reading of the discussion which took place between the Court and both counsel (R. 222-245) and particularly the comment of Mr. Backman at R. 244, will answer this statement of Respondent. It is apparent that the last eight lines of the statement are not true.

The matters which the Court and counsel were considering were solely whether the earnings allowed to each party should be allowed in accordance with the partnership agreement and the prior practice of the partnership, and particularly whether Respondent should be given fifty per cent of the premiums received on insurance policies which had been written with the mortgage loans, and the balance placed in the profit and loss account from which he would receive fifty per cent thereof, or whether the income from the insurance policies should be divided equally between the partners. In this matter the Court ruled in favor of the Respondent. There was no discussion as to whether the consent of the Respondent to the employment of Mrs. Barlow and Mr. Christensen need be obtained.

POINT VII

THE STATEMENT OF APPELLANT WHICH RESPONDENT CONTENDS MISLED RESPONDENT COULD NOT HAVE SO MISLED RESPONDENT.

At the bottom of Page 6 and at Page 7 of his brief, Respondent states:

“Appellant bases his argument on the ground that the award made by the Court to Respondent was at issue. It was not made an issue by any pleadings but was simply an announcement by a court of equity in its arriving at a settlement of the dispute arising after the Court had rendered judgment and after counsel for the parties had requested that the Court retain jurisdiction of the case to settle the dispute. It is evident that Appellant would take advantage of his having led Respondent into believing that Appellant's net income was considerably more than Appellant later showed his net income to be, and in counsel's in reliance of such representation and recommending to the Court that which he considered a fair division of income and expenses, which recommendation the Court adopted. Respondent later found when the true facts were made known, which facts were much different from those represented by Appellant, that not only would Respondent sustain a substantial loss from participating in any income of Appellant, but Respondent would expose his income to ridiculously high operating costs resulting in a much different award than had been anticipated.”

It will be noted that the Respondent cites no page or pages of the record in support of the misstatements set forth above.

Going on, at Page 8 the Respondent quotes the prior

testimony of Appellant that his income for 1963 and January, 1964, would be approximately \$28,000.00, with expenditures of about \$10,000.00 against that, and he goes on to state:

"In reliance on this representation and assuming there would be approximately \$20,000.00 go into the partnership account through Appellant's earnings, the above referred to recommendation was made by Respondent's counsel. It is evident that the Court considered there would be sufficient income realized by Respondent from Appellant's earnings to offset any additional award which the Court had theretofore indicated it would make to Respondent for his services in preserving the assets of the partnership represented by the mortgage loan business. The Court, realizing the inequity resulting and to correct this inequitable situation, stated that it had retained jurisdiction of the case and made the award of \$2500.00.

Again, there is nothing in the record to support the assumption which Respondent has made without foundation. The Court at no time stated that it had retained jurisdiction of the case.

The Respondent could not rightly assume that there would be approximately \$20,000.00 go into the partnership account through Appellant's earnings. He quotes Mr. Kiepe as stating that his income for 1963 would be approximately \$28,000.00, with expenditures of about \$10,000.00. Under the partnership agreement and the practice of the partnership (which the Court ruled would be the basis of any award made for the business of 1963

and January, 1964), Appellant was entitled to the first fifty per cent of the income for himself, with a graduated bonus thereon which amounted to \$2,365.00 (R. 120). Thus, without any expenses of operation, the most that Respondent could expect would go into the partnership account through Appellant's earnings of \$28,000.00 would be \$14,000.00, less bonus of \$2,365.96, or \$11,634.04. There could be no possible basis for expecting \$20,000.00 to go into the partnership account through Appellant's earnings of \$28,000.00. Actually, Appellant's earnings were \$32,120.00 (R. 242) instead of \$28,000.00, and the amount going into the partnership account through his earnings would be \$13,695.00 instead of \$11,634.00. The amount which would go into the partnership account for the same period from Respondent's earnings would be \$8,091.81.

The Court did not state "that he had retained jurisdiction of the case and made the award of \$2500.00." The Respondent cites no reference to the record and there is nothing in the record to support this statement.

At the bottom of Page 8, the Respondent states:

"The evidence shows the difficulty Respondent faced in compelling Appellant to render an accounting of his earnings as ordered by the Court and in having the Appellant each time the matter was brought before the Court furnish a different account, finally forcing the Respondent to obtain an order to show cause."

Again, Respondent fails to cite any page of the record in support of this misstatement. The matter was

only brought before the Court once. The Appellant explained that some of the accounting rendered by him varied because collections had been made in the interim between statements, which necessitated a revision of the figures in the accounting (R. 248). Respondent was not forced to obtain an order to show cause any more than the Appellant was forced to obtain an order to show cause against the Respondent.

POINT VIII

RESPONDENT PARTICIPATED IN APPELLANT'S APPRAISAL INCOME DURING 1963 THE SAME AS HE DID PRIOR THERETO.

Respondent at Page 9 of his brief states:

“Appellant argues at Page 20 of his brief that Respondent took care of the mortgage loan asset for many years before 1963 but received no special compensation therefor in addition to his fees for making loans and commissions on insurance written with the loans. We point out, however, that Respondent was, during that period of time, participating in income from the appraisal business of Appellant of which approximately 50 per cent went into the partnership income which was divided equally between the parties after the proportionate share of expenses has been charged against this income.”

It now appears that Respondent admits that no special compensation was ever given to the Respondent for “taking care of the mortgage loan asset for many years before 1963” but states that the Respondent during that period of time “participated in income from the appraisal business of Appellant of which approximately

fifty per cent went into partnership income, which was divided equally between the parties after the proportionate share of expenses had been charged against this income." During 1963 the same was true. Fifty per cent of Appellant's income from the appraisal business went into partnership income, except for the bonus paid to him. The same was true of the Respondent's income. However, instead of earning a bonus of only \$908.19 as in 1963, Mr. LeCheminant in prior years earned sufficient income that there was paid to him bonuses thereon as follows:

1959	\$4,046.34
1960	1,676.39
1961	1,862.62
1962	1,848.58 (R. 294)

POINT IX

THE PARTIES DID NOT SEEK THE AID OF THE COURT TO MAKE A DIVISION OF INCOME AND EXPENSES DURING THE PERIOD JANUARY 1, 1963 to FEBRUARY 1, 1964 AFTER THE COURT'S JUDGMENT OF MARCH 12 WAS ENTERED.

At page 16 Respondent states:

"Neither party to the action had by any pleadings asked for a determination of the rights of the parties during the thirteen-month period subsequent to the cutting off date of the partnership as of February 1, 1963. When the parties were unable to agree on an equitable division of income and expenses during this thirteen-month period, the parties sought the aid of the Court to settle this controversy which the Court did and it resulted in the order herein appealed from."

Again, Appellant states this statement is wholly false. As stated at R. 154, before any evidence was introduced into the hearing of February 13, 1964, counsel for Respondent stated:

"We further intend to show that during the past years prior to the date of the dissolution of the partnership, February 1, 1963, the Defendant has carried on the mortgage loan and insurance business which Plaintiff is now receiving, and he has preserved that asset for the partners * * * and I can appreciate that it may develop into a most difficult situation for the Court to have to determine what would be fair and just in this matter."

As before stated, the Court then proceeded to hear 91 pages of evidence and argument on this matter (R. 152-245) and rendered its decision against the Respondent, and never thereafter heard one word of evidence nor one word of argument on the matter of consideration for "preserving the mortgage loan asset." Again, Respondent fails to cite a page of the record in support of his statement.

POINT X

THE AMOUNT THAT BOTH PARTIES WILL BE ENTITLED TO CANNOT BE DETERMINED UNTIL THE COURT HAS PASSED UPON THE ITEMS OF THIS APPEAL.

At Page 22 of his brief, Respondent states:

"The Court erred in its finding that Cross-Appellant is entitled to receive the sum of \$16,433.22 out of the cash on hand of \$28,723.98. This item results in the assumption that the cross appeal will be favorable to Cross-Appellant on all

points relied upon, in which case the award to Cross-Appellant should be \$20,093.22 and not the sum of \$16,433.22 awarded to Cross-Appellant by the order appealed from."

It is true that the calculations of the final amounts to be awarded to the parties must await the decision of the Court on the other matters argued in Appellant's brief and Respondent's brief.

POINT XI

AN AWARD OF A BONUS OF \$535.00 TO EACH OF THE PARTIES WILL BE OF NO VALUE TO EITHER PARTY.

At Page 10 of Respondent's brief, referring to the award of a bonus of \$535.00 to each of the parties in the judgment of November 9, 1964, Respondent states:

"This point is predicated entirely upon an accounting principal which the Court considered. Appellant had, according to the accounting submitted, received his revised bonus over and above the fifty per cent awarded in the original judgment and the Court, in order to place both parties on the same bonus basis, awarded this item to Respondent."

Appellant asks what accounting principle is Respondent talking about?

The bonus for the Appellant and the Respondent was calculated by the certified public accountant in accordance with the judgment of the Court and resulted in the following bonuses: To Appellant, \$2,365.96; to Respondent, \$908.19. (R. 120). Neither party will benefit a dollar by awarding each a bonus of \$535.00 as pro-

vided in the judgment (R. 110). The Court did not order a bonus of \$535.00, or any other amount, paid to the partners (R. 107-R. 108).

CONCLUSION

The Appellant again submits that the law and evidence require that:

1. The award of \$2500.00 to Respondent for "preserving the mortgage loan asset of the partnership" be set aside.

2. That the bonus of \$535.00 to each partner ^{be} ~~to~~ set aside.

3. That the portion of the judgment which fixes the amount of credits to which Respondent is entitled and which fixes the amount of refunds due Appellant and the balance credit due Respondent be set aside, and that this matter be returned to the trial court for further consideration.

4. Appellant's motion to amend the judgment of March 12, 1964, nunc pro tunc be granted.

Respectfully submitted,

MOFFAT, IVERSON AND
ELGGREN

By

J. Grant Iverson
J. Grant Iverson

Attorneys for Appellant