

1965

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

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Supreme Court, Utah

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

UNIVERSITY OF UTAH

OCT 15 1965

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WERNER KIEPE,
*Plaintiff and Appellant
and Cross Respondent,*

vs.

Case No.
10310

ELI D. LECHEMINANT,
*Defendant and Respondent
Cross Appellant.*

CROSS APPELLANT'S REPLY BRIEF

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IN THE SUPREME COURT OF THE STATE OF UTAH

WERNER KIEPE,
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and Cross Respondent,*

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CROSS APPELLANT'S REPLY BRIEF

Counsel for Appellant has devoted much of Appellant's Reply Brief to charging Respondent with numerous false statements in Respondent's Brief. If the charges were true then we most certainly would owe an apology to this Honorable Court, but the statements contained in Respondent's Brief are not false as we will herein prove.

While we are mindful of the fact that there are a few statements contained in Respondent's Brief which might not be borne out by the record still that does not make the statements false as counsel charges. The reason these statements are not borne out by the record is because the Trial Court repeatedly, during the trial of the case, called both counsel into his chambers where much discussion and argument took place and where not once but on several occasions the Court stated among other things, that it intended to allow Respondent some compensation for his having preserved the assets of the partnership during the winding up period. We shall treat the Points in the order set out in Appellant's Reply Brief.

POINT I.

RESPONDENT PARTICIPATED IN APPELLANT'S INCOME FROM APPRAISAL BUSINESS.

Counsel states under this Point at page 2 of Appellant's Reply Brief as follows:

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).

The Court in its judgment ordered the division as stated but the record on which Respondent relies

in his statement is the testimony of Appellant as follows, taken from R. 212:

MR. KIEPE: Your Honor, for the year 1963 my total appraisal fees were \$28,825, but there was outstanding unpaid at the end of the year \$8,520, so I had some accounts receivable which would not all be collected. I also had \$3,295 in real estate commissions. The actual amount that I collected is just under \$24,000. The total amount of fees and commissions received for the year 1963 were \$23,600.30.

THE COURT: Now, is that the gross fees you earned from the partnership, or is that your half?

MR. KIEPE: These are the gross which I have received.

THE COURT: And which you have retained fifty per cent?

MR. KIEPE: I have retained them all for 1963, but I have against that some \$10,000 of personal expense which I have paid.

It is clearly evident from this testimony that not only did Appellant not intend that his income should go into the partnership but Appellant kept the whole of his income for 1963 and he would have kept it unless ordered by the Court to make the division.

When the Court ordered the putting into the partnership account the income of each partner, Appellant retained 60% of the total income (R. 291) instead of the scale as ordered by the Court. This

in part brought about the disagreement between the parties.

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.

It comes as a great surprise that counsel for Appellant contends that the court did not retain jurisdiction of the case to settle the matter of distribution of income and expenses during the period of January 1, 1963 to February 1, 1964 when the whole record made at both the hearing had on June 13, 1964 and on June 24, 1964 is as a result of the parties' inability to agree on this matter.

The statement made by counsel for Appellant at page 4 of their reply brief that the only ruling 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" is not supported by the evidence. The evidence shows that the Court also awarded each of the parties a bonus of \$535; adjudged that the Respondent is entitled to total credits of \$20,101.93, less refunds of \$3,668.71; adjudged

that Respondent is entitled to net credits of \$16,443.-22; adjudged that compensation paid to Ruth Barlow and R. L. Christensen should be allowed as partnership expense and be borne equally by the partners, and adjudged that the fee charged by Lawrence S. Pinnock, Certified Public Accountant should be a partnership expense and borne equally by the partners, from all of which Respondent takes his Cross Appeal. Contrary to the statement of counsel for Appellant that the Court did not consider the matter of accounting for the thirteen month period it is clearly evident that the Court did consider same.

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.

Counsel for Appellant's argument under this Point appears to be most inconsistent and we consider it fully answered in Respondent's original brief.

POINT IV.

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

Here counsel for Appellant again recklessly charges Respondent and his counsel with false state-

ment, this even in the face of the record (R. 60), being the original judgment reading in part as follows:

... the court having heard the evidence both oral and documentary, and being fully advised in the premises, and the parties hereto having waived Findings of Fact and Conclusions of Law.

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 BY ITS DECISION AFTER THE JUDGMENT OF MARCH 12, 1964 WAS ENTERED THEREON.

The record of the case may not support the argument of Respondent as to this Point. Contrary to the statement of counsel at page 8, the Court did on numerous occasions during the trial request that counsel meet in chambers with the trial judge where much discussion and arguments took place, which were not recorded and during which sessions the Court not only once but several times advised counsel that the Court intended to award compensation to Respondent for his having preserved the assets of the partnership during the winding up period. The record shows that Respondent had testified to the time devoted to such preservation.

We submit that the record does not support the statement of counsel for Appellant that counsel for

Appellant never requested the Court to retain jurisdiction of the case, but on the contrary it is evident that the Court did retain jurisdiction and counsel for both parties recognized this fact.

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.

As stated in Respondent's original brief, Respondent urged that if the partnership agreement was to be invoked during the thirteen month period of winding up the business of the partnership it should be invoked in all respects, not only as to those provisions favorable to Appellant but also to those provisions favorable to Respondent, which would have required the consent of Respondent to the hiring of additional employees during this period. The Court and counsel were considering all matters which might affect the division of earnings of the parties during the winding up period and not only that of the insurance premiums as counsel for Appellant contends.

POINT VII.

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

Under this point Counsel for Appellant states at page 13 of the reply brief as follows:

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.

Counsel overlooks the fact that not \$8,091.81 of Respondent's earnings would go into the partnership account but one-half of that figure. (R. 213-214.) This is the basis on which Respondent made the recommendation which was adopted by the Court. However the evidence shows that after Appellant made such statement and representation on which Respondent relied, there was not the sum of \$13,695.00 of earnings of Appellant which went into the partnership account but only the sum of \$5,415.17 after Appellant charged the salary payments made to Ruth Barlow and R. L. Christensen as partnership expense. (R. Exhibit 2nd P-2.)

POINT VIII.

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

It is evident from the record in this case that the statement of counsel in support of this point is not in accordance with the testimony of Appellant (R. 212) wherein Appellant admits having retained

all of his income for the year 1963, and Appellant would have retained the whole of his 1963 income had not the Court ordered the division which it did do.

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.

This statement under this Point is not supported by the evidence but on the contrary the record shows that both parties offered evidence both documentary and oral at each of the hearings subsequent to March 12th, on the question of income and proper charges as against income.

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.

In this contention we do not agree. If the partnership agreement is adhered to in all respects, then the computation contended for by Respondent in his Cross Appeal is correct.

POINT XI.

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

In this statement we agree but it is Respondent's contention that Appellant had received this sum in his accounting and this amount should be allowed to Respondent to offset that received by Appellant.

CONCLUSION

The Respondent and Cross Appellant submits that the law and the evidence requires:

That the Order appealed from by Appellant be affirmed except as to those Points on which Cross Appellant assigns as errors in his original brief.

Respectfully submitted,

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