

1960

George D'Ambrosio and Theresa D'Ambrosio v. Francis C. Lund : Petition for Rehearing and Brief in Support Thereof

Utah Supreme Court

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G. Hal Taylor; Attorney for Defendant;

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AUG 26 1960

LAW

IN THE SUPREME COURT
of the
STATE OF UTAH

GEORGE D'AMBROSIO and
THERESA D'AMBROSIO,
Plaintiffs and Respondents,

vs.

FRANCIS C. LUND,
Defendant and Appellant.

FILED

AUG 31 1960

Supreme Court, Utah

No.
9202

PETITION FOR REHEARING AND BRIEF IN
SUPPORT THEREOF

G. HAL TAYLOR
Attorney for Defendant

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IN THE SUPREME COURT of the STATE OF UTAH

GEORGE D'AMBROSIO and
THERESA D'AMBROSIO,

Plaintiffs and Respondents,

vs.

FRANCIS C. LUND,

Defendant and Appellant.

No.
9202

PETITION FOR REHEARING AND BRIEF IN SUPPORT THEREOF

Comes now the defendant and respectfully petitions the court for a rehearing of its decision and judgment in the above-entitled matter upon the following ground for the following reason.

I.

THAT THE COURT ERRED AS A MATTER OF LAW IN HOLDING THAT THE DEFENDANT HAD PLENTY OF OPPORTUNITY TO MEET ONE OF THE ISSUES

SET FORTH IN THE PRETRIAL ORDER, TO-WIT: THAT THERE WAS A DIFFERENCE IN VALUE OF THE STOCK BETWEEN THE TIME THE STOCK SHOULD HAVE BEEN DELIVERED AND THE TIME IT WAS DELIVERED WHEN THE DECISION OF THE TRIAL COURT AND THAT OF THIS COURT HOLD THAT THE MONEY OF THE PLAINTIFF WAS NEVER INVESTED IN A URANIUM COMPANY AND THAT THE DEFENDANT HAD NOT ACCOUNTED FOR THESE FUNDS BECAUSE THE DEFENDANT DID NOT HAVE AN OPPORTUNITY TO MEET THE ISSUE OF INVESTMENT AND ACCOUNTING FOR FUNDS.

G. HAL TAYLOR
Attorney for Defendant

I, G. Hal Taylor, attorney for defendant in the above-entitled cause, sincerely believe that error has been committed by this honorable court in the opinion rendered in this cause in the particular set forth in the Petition for rehearing.

G. HAL TAYLOR
Attorney for Defendant

ARGUMENT

I.

THAT THE COURT ERRED AS A MATTER OF LAW IN HOLDING THAT THE DEFENDANT HAD PLENTY OF OPPORTUNITY TO MEET ONE OF THE ISSUES SET FORTH IN THE PRETRIAL ORDER, TO-WIT: THAT THERE WAS A DIFFERENCE IN VALUE OF THE STOCK BETWEEN THE TIME THE STOCK SHOULD HAVE BEEN DELIVERED AND THE TIME IT WAS DELIV-

ERED WHEN THE DECISION OF THE TRIAL COURT AND THAT OF THIS COURT HOLD THAT THE MONEY OF THE PLAINTIFF WAS NEVER INVESTED IN A URANIUM COMPANY AND THAT THE DEFENDANT HAD NOT ACCOUNTED FOR THESE FUNDS BECAUSE THE DEFENDANT DID NOT HAVE AN OPPORTUNITY TO MEET THE ISSUE OF INVESTMENT AND ACCOUNTING FOR FUNDS.

The petition for rehearing in this matter is being filed with a particular plea to the court to correct a manifest injustice to a member of the Bar of the State of Utah, Francis C. Lund.

In Point III of defendant's original brief, the defendant urged that the trial court had erred in granting judgment on the theory that the money received by the defendant was never invested in a uranium company as agreed by the parties and that the defendant had not accounted for said funds. This error was urged because such theory is at variance from the pleadings and the defendant did not have opportunity to meet such issue.

It is submitted that a rehearing should be granted in this matter because the opinion fails to correctly state the law with regard to a litigant having an opportunity to meet an issue upon which the decision of the trial court is based. The last paragraph of this court's opinion indicates, although there was no finding by the trial court, that the stock was worth \$500.00 at the time it should have been delivered that such was the value of the stock and that there was no value in the stock of an inactive corporation at the time when the stock was issued and concluded that this was one of the issues

in the trial and that the defendant had he desired had plenty of opportunity to meet this issue. Had the trial court's opinion been based upon this issue, the defendant could have no complaint, assuming that the evidence was such to support a judgment upon this issue. However, as set forth in this court's opinion, at the top of Page 2 of the Green Sheet, the basis upon which the trial court rendered judgment was as follows:

"The court concluded that the money was never invested in the uranium company which had been contemplated and agreed to by the parties, that defendant had not accounted for these funds and that plaintiffs were entitled to a judgment for \$500.00 plus interest, which was granted. This appeal is from that judgment."

The balance of this opinion with the exception of the last paragraph, heretofore referred to, sustains the trial court's findings and conclusions that defendant had not accounted for these funds. This court states further, "the trier of the facts could reasonably *infer* that the stock when issued was not issued because of any payment made to this corporation by plaintiffs for this stock." (*Italics added.*)

It is this issue that defendant would like the opportunity to meet. Inasmuch as this issue was not set forth in the pre-trial order, no evidence was adduced at court in order to meet this issue. If a rehearing is granted, the evidence will conclusively show that the \$500.00 which was given to Mr. Kipp was in turn placed into the funds belonging to the corporation and that it was because of the investment of this particular \$500.00 that the stock was issued and not because of some undisclosed knowledge of the defendant which as the court points out was not revealed in the record.

The opinion of the court by implication casts a doubt upon the integrity and honesty of a member of the Bar and this is done on the basis of the trial court's holding that the defendant had not accounted for \$500.00 of funds belonging to the plaintiffs, an issue which he would like to have the opportunity to meet.

We would submit that there is nothing in the record before this court from which there could be implied a consent on the part of the defendant to try the issue of not having the money invested in the uranium company and not accounting for the funds. Certain it is that had I, as counsel for the defendant, known that this issue would have to be met, it would have been met. The problem of getting such evidence would have been relatively simple. The evidence which is in the record touching upon this matter was all adduced by examination by plaintiff's counsel. At no time has the defendant had the opportunity to show to the trial court the disposition made of these funds. There were only two issues tried. First, whether or not the corporation was formed. This issue was no doubt abandoned. The other issue, the difference in the value of the stock when it should have been delivered and when it was delivered, is not the basis upon which the trial court rendered the judgment against the defendant. Without some evidence of the value of the stock at the time it should have been issued—either market value or book value, or some other recognized method of determining value, such judgment could not be and was not rendered upon this issue. It is fundamental and all courts which counsel has been able to check, including the Supreme Court of the United States, have uniformly held that par value and actual value are not synonymous and

there is often a wide disparity between them. See New York vs. Latrove, 279 U.S. 242 and Stensgaarg vs. St. Paul Real Estate Title Insurance Co., 52 N.W. 910, 50 Minn. 429.

CONCLUSION

It is therefore submitted that this honorable court should grant a rehearing in the above-entitled cause and upon such rehearing should hold that the case should be remanded to the district court for the purpose of allowing the defendant to meet the issue of accounting for the funds belonging to the plaintiffs. We again call the court's attention to the authorities cited in Point III of defendant's original brief and urge that Mr. Lund's rights as to the issue of investment of the funds of plaintiffs should not be concluded without giving Mr. Lund notice and an opportunity to meet such issue.

Furthermore, to allow the decision of this court to stand will announce an erroneous opinion with regard to when the rule is satisfied that a litigant should have an opportunity to meet an issue upon which the decision of the trial court is based. In this instance the trial court based its decision on the fact that the funds were not invested in a uranium company and the defendant had not accounted for these funds, whereas, the opinion of the Supreme Court states that the defendant had the opportunity to meet the issue of the value of the stock.

Respectfully submitted,

G. HAL TAYLOR
Attorney for Defendant