

1991

Waterside Associates, a limited partnership;
Machan-Hampshire Properties, Inc., a Utah
corporation; and W.E.S./MHP Venture v. D.
Stoddard Judd and Valene A. Judd, husband and
wife : Brief of Appellee

Utah Supreme Court

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BRIEF

DOCKET NO.

91-0607-CA

IN THE SUPREME COURT OF UTAH

WATERSIDE ASSOCIATES, a limited
partnership; MACHAN-HAMPSHIRE
PROPERTIES, INC., a Utah corp-
oration; and W.E.S./MHP VENTURE,

Third-Party Plaintiffs and
Appellees,

v.

D. STODDARD JUDD and VALENE A.
JUDD, husband and wife,

Third-Party Defendants and
Appellants.

91-0607-CA

Case No. 910061

Priority No. 16

BRIEF OF APPELLEE

Appeal from Judgment of the Third Judicial District Court
in and for Salt Lake County, State of Utah
The Honorable Timothy R. Hanson, Judge, Presiding

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FILED

AUG 19 1991

CLERK SUPREME COURT,
UTAH

IN THE SUPREME COURT OF UTAH

| | | |
|----------------------------------|---|-----------------|
| WATERSIDE ASSOCIATES, a limited |) | |
| partnership; MACHAN-HAMPSHIRE |) | |
| PROPERTIES, INC., a Utah corp- |) | |
| oration; and W.E.S./MHP VENTURE, |) | |
| |) | |
| Third-Party Plaintiffs and |) | |
| Appellees, |) | Case No. 910061 |
| |) | |
| v. |) | |
| |) | |
| D. STODDARD JUDD and VALENE A. |) | Priority No. 16 |
| JUDD, husband and wife, |) | |
| |) | |
| Third-Party Defendants and |) | |
| Appellants. |) | |

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RULE 24(a)(1) LIST OF PARTIES

Case No. C85-5168
Plaintiff

CAHOON & MAXFIELD IRRIGATION COMPANY, a Utah corporation

Defendants and Third-Party Plaintiffs

WATERSIDE ASSOCIATES, a limited partnership; MACHAN-HAMPSHIRE PROPERTIES, INC., a Utah corporation; and W.E.S./MHP VENTURE

Third-Party Defendants

D. STODDARD JUDD and VALENE A. JUDD, husband and wife

Case No. C87-6497
Plaintiffs

D. STODDARD JUDD and VALENE A. JUDD, husband and wife

Defendants

BRUCE McMULLIN; WESTERN ENVIRO-SYSTEMS, INC., a Utah corporation; WATERSIDE ASSOCIATES, a limited partnership; MACHAN-HAMPSHIRE PROPERTIES, INC., general partner; MACHAN-HAMPSHIRE PROPERTIES, INC., a Utah corporation; and W.E.S./MHP VENTURE, as a partnership or unincorporated joint venture

The cases have been consolidated.

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JURISDICTION

This Court has jurisdiction of this appeal pursuant to Utah Code Ann. Section 78-2-2(3)(j) (Cum. Supp. 1991).

STATEMENT OF ISSUES AND STANDARD OF REVIEW

1. Did the trial court properly find that D. Stoddard Judd and Valene A. Judd (the "Judds") breached their duty to defend and warrant title? The Supreme Court may review the evidence in a case in equity. However, "due to the advantaged position of the trial court, [the Supreme Court] indulge[s] considerable deference to his findings and do[es] not interfere with them unless the evidence so clearly preponderates against them that [the Supreme Court] is convinced that a manifest injustice has been done." Hatch v. Bastian, 567 P.2d 1100, 1102 (Utah 1977).

2. Did the trial court properly find that appellees (hereinafter collectively referred to as "Waterside") did not waive the Judds' duty to defend? The standard of review is the same as that for issue #1 above.

STATEMENT OF DETERMINATIVE AUTHORITY

Utah Code Ann. Section 57-1-12 (1990) (emphasis added).

Form of warranty deed -- Effect.

Conveyance of land may be substantially in the following form:

WARRANTY DEED

_____ (here insert name), grantor, of
_____ (insert place of residence), hereby
conveys and warrants to _____ (insert
name), grantee, of _____ (insert place of
residence), for the sum of _____ dollars, the
following described tract _____ of land in
_____ County, Utah, to wit: (here describe the
premises).

Witness the hand of said grantor this _____ day of
_____, 19 _____.

Such deed when executed as required by law shall have the effect of a conveyance in fee simple to the grantee, his heirs and assigns, of the premises therein named, together with all the appurtenances, rights and privileges thereunto belonging, with covenants from the grantor, his heirs and personal representatives, that he is lawfully seised of the premises that he has good right to convey the same; that he guarantees the grantee, his heirs and assigns in the quiet possession thereof; that the premises are free from all encumbrances; and that the grantor, his heirs and personal representatives will forever warrant and defend the title thereof in the grantee, his heirs and assigns against all lawful claims whatsoever. Any exceptions to such covenants may be briefly inserted in such deed following the description of the land.

STATEMENT OF CASE

a) Nature of the Case. This case involves disputes between Cahoon & Maxfield Irrigation Company ("Cahoon"), Waterside and the Judds over title to a parcel of property (the "Property") conveyed by the Judds by warranty deed and eventually acquired by

Waterside. Waterside claimed that the Judds breached their duty to defend and warrant title.

b) Course of Proceedings. A bench trial was conducted before Judge Timothy R. Hanson on November 14, 1989. Cahoon was not present, its claims having been settled prior to trial. All other parties were represented by counsel at trial.

The matter proceeded by proffer of testimony by all parties through their respective attorneys, and exhibits were marked and received into evidence. After having received the pleadings on file, the evidence and exhibits of the parties, and the pre- and post-trial briefs submitted by the parties to the court, and having considered the arguments of counsel, the trial court entered Findings of Fact and Conclusions of Law and Judgment in favor of Waterside.

c) Disposition at Trial Court. The trial court found that the Judds breached their duty to defend and warrant title entitling Waterside to be indemnified for the costs they incurred in defending title and settling the fee title claims of Cahoon. The Judds have appealed the trial court's decision.

STATEMENT OF RELEVANT FACTS

Western Enviro-Systems, Inc. ("Western Enviro") purchased the Property from the Judds by Warranty Deed on August 17, 1983. Third-Party Plaintiffs' Exhibit 9. The Warranty Deed given to Western Enviro by the Judds contained the customary requirement to "defend and warrant" title to the buyer. The Warranty Deed contained the exceptions as stated below:

SUBJECT TO Easements, Restrictions and Rights of Way, currently of record and/or enforceable in law and equity, and general property taxes for the year 1983 and thereafter, in any and all water rights of record.

Third-Party Plaintiffs' Exhibit 9. (TR:00870, page 15, lines 11-16).

By Quit Claim Deeds, Western Enviro and R. Bruce McMullin conveyed their interest in the Property to W.E.S./MHP Joint Venture. Third-Party Plaintiffs' Exhibits 11 and 12. On June 28, 1985, W.E.S./MHP Joint Venture transferred the property to Waterside Associates by Warranty Deed. Third-Party Plaintiffs' Exhibit 15.

On September 27, 1985, Cahoon filed suit against third-party plaintiffs, Waterside, claiming, among other things, a fee simple interest to a ditch area that cut through Waterside's development. Third-Party Plaintiffs' Exhibits 29 and 30. When

sued by Cahoon, Waterside made demand upon the Judds to defend the title and filed and served their third-party complaint. (TR:00870, pages 8-9, 16-17) Third-Party Plaintiffs' Exhibit 34.

Rather than defend title, the Judds began a non-judicial foreclosure proceeding against Waterside in September of 1986. (TR:00870, pages 8, 16-17) Following a hearing on August 6, 1987, the court entered a preliminary injunction against the Judds enjoining them from proceeding with their foreclosure action. (TR:00870, pages 8-9) That order is not part of this appeal.

After consideration of Cahoon's claims and the potential effects of an adverse ruling on the entire project, Waterside determined that the risk of an adverse finding warranted some attempt at settlement and compromise with Cahoon. (TR:00870, pages 7-10)

Prior to trial, Waterside and Cahoon reached a stipulated resolution of their claims. (TR:00870, page 7, lines 11-16) The Judds refused offers to participate in the negotiations that led to the settlement between Waterside and Cahoon. (TR:00870, pages 10-11) The Judds' defense of title consisted of retaining various attorneys (TR:00870, pages 16-18), doing some minimal research (TR:00870, page 20, lines 16-18) and appearing at trial claiming that they were then ready to defend title.

SUMMARY OF ARGUMENTS

The trial court properly found that the Judds breached their duty to defend and warrant title. The evidence proffered at trial showed that (1) the Judds did not accept the defense of title, or relieve Waterside of the necessity of defending against the claims of Cahoon; (2) the Judds did not provide any real or effective assistance with regard to defending against Cahoon's title claim; and (3) the only action taken by the Judds was to hire counsel, obtain an attorneys opinion and research Cahoon's records. Actual eviction is not necessary for a claim of breach of warranty of title. The trial court properly applied Utah case law in ruling that the Judds breached their duty to warrant title.

Waterside did not waive the Judds' duty to defend. The evidence proffered at trial was conclusive that the Judds refused to participate in the defense of title despite requests from Waterside to do so.

ARGUMENT

The Judds' arguments on appeal can be separated into two general contentions: (1) The evidence is insufficient for a finding that the Judds breached their duty to defend and warrant title; and (2) Waterside waived their right to require Judds to defend title. As discussed below, the Judds' arguments are not supported by the

law or facts, and the decision of the trial court should be affirmed.

POINT I: THE TRIAL COURT PROPERLY FOUND THAT THE JUDDS BREACHED THEIR DUTY TO DEFEND AND WARRANT TITLE AND THE THAT FINDING IS SUPPORTED BY THE EVIDENCE IN THE RECORD.

A. The Judds have Failed to Marshal the Evidence Which Supports the Trial Court's Findings of Fact.

While the Judds claim that "the trial court's findings of fact related to the Judds duty to defend title are not supported by the record" (Appellants' Brief at page 6), in reality, the Judds' appeal is based upon their argument that there are facts in the record which might support their theory of the case. On appeal, however, the standard of review for findings of fact does not involve an analysis of whether the trial could have found for the Judds. The focus is on whether the trial court's findings of fact are supported by evidence in the record.

It is clear that a trial court's findings of fact will not be disturbed unless they are clearly erroneous. Hoth v. White, 799 P.2d 213, 216 (Utah Ct. App. 1990); Burrow v. Vrontikis, 788 P.2d 1046 (Utah Ct. App. 1990). As the Court of Appeals stated in Hoth:

When challenging findings of fact on appeal, the appellant must show that the factual findings are clearly erroneous. To show clear error, the appellant must

marshall all the evidence supporting the trial court's factual findings and then demonstrate that the evidence, including all reasonable inferences drawn therefrom, is insufficient to support the findings.

Hoth v. White, 799 P.2d at 216 (emphasis added).

Recently, this Court held:

An appellate court does not lightly disturb the verdict of a jury nor the findings of fact made by a trial court. If a challenge is made to the findings, an appellant must marshal all the evidence in favor of the facts as found by the trial court and then demonstrate that viewing the evidence in a light most favorable to the court below, the evidence is insufficient to support findings of fact.

Saunders v. Sharp, 154 Utah Adv. Rep. 5 (Feb. 12, 1991).

While the Judds challenge the trial court's findings of fact, they make no effort to support a reversal based on the "clearly erroneous" standard which governs this appeal. Rather than marshal the evidence as this Court requires, the Judds simply argue that there is testimony in the record which might support their theory of the case. In short, unhappy with the outcome below, the Judds attempt to reargue the facts of their case in this Court in hopes of a more favorable result.

Indeed, the Judds admit that there is evidence in the record to support the trial court's findings of fact when they state, "The only indication that the Judds may have failed to defend title are contained in the allegations of the Third-Party

Complaint (TR:00106) and the testimony proffered pursuant to stipulation of the parties (TR:00870, page 8, lines 17-19)." (Appellants' Brief at page 7). Of course, Waterside contends that the record contains more evidence to support the findings of fact than that referred to by the Judds (see Waterside's argument below), but the fact remains that the section of the record cited by the Judds does indeed support the trial court's findings of fact.

The Judds' efforts fall short of carrying their burden of proof to show that given the evidence as a whole the trial court clearly erred. The Judds have not marshalled all the evidence.

B. The Record Supports the Trial Court's Findings of Fact.

Even though the Judds failed to meet their burden of proof and the appeal must be dismissed on that ground alone, it is helpful to realize how strongly the record supports the trial court's findings. The evidence is overwhelming.

1. The Judds did no More than Appear at the Time of Trial Boldly Announcing that They were Ready to Defeat the Adverse Claim to Fee Simple Ownership.

The Judds argue that the record does not support the trial court's findings that the Judds refused to defend title and refused to participate in settlement negotiations. There is,

however, ample evidence to support the trial court's findings. This Court may overturn the trial court's findings only upon a determination that the evidence "so clearly preponderates against them that . . . a manifest injustice has been done." Hatch v. Bastian, 567 P.2d 1100, 1102 (Utah 1977).

Waterside proffered testimony that the Judds failed and refused "to accept the defense of the title, or to relieve Waterside Associates, or Machan-Hampshire, or the joint venture of any necessity of defending against the claims of [Cahoon], and that indeed the response from the Judds was to bring a foreclosure action which required Waterside Associates to obtain first a temporary restraining order, and later a preliminary injunction to avoid the foreclosure of the property." (TR:00870, pages 8-9) Waterside "received no real, or effective assistance from any counsel hired by Doctor Judd with regard to defending against the title claim." (TR:00870, page 10, lines 14-17) Early on in the litigation, Waterside had two meetings with counsel for the Judds regarding settlement of Cahoon's claims but nothing ever came of them. (TR:00870, pages 10-11)

The Judds' proffer also evidenced their lack of involvement in defending the title. The Judds had no communications from their attorney concerning "any discussions that he held of a settlement nature or of assisting in defense of this matter whatsoever." (TR:00870, page 21, lines 20-23)

The only evidence of anything done by the Judds, other than appearing at trial, to defend title consists of the Judds hiring three attorneys (TR:00870, pages 16-18); obtaining an attorney's opinion in a letter dated November 15, 1986 (TR:00870, page 17, lines 10-19), third-party defendants' Exhibit 39; and requesting that substituted counsel examine the records of Cahoon. (TR:00870, page 20, lines 16-18) There is no evidence that the Judds did anything else. They did not even fully answer Waterside's Third-Party Complaint against them. (TR:00870, page 10, lines 8-14)

The testimony and evidence of Waterside was that the Judds did little more than appear at the time of trial, with knowledge that Waterside had settled, and boldly announce that they were ready to defeat Cahoon's claims to fee simple ownership. The Judds failed to introduce evidence that they performed their duty to defend title. The trial court's finding is not "clearly erroneous," but is supported by the evidence.

2. The Trial Court's Finding that the Judds Breached their Warranty of Title was Correct, Because Constructive Eviction Under Paramount Title Constitutes a Breach of the Covenant of Warranty of Title.

The Judds misstate the general rule of law concerning a breach of covenant of warranty of title. Breach of the covenant occurs when it is shown that the grantor did not own the land that he purported to convey by the warranty deed description. Creason

v. Peterson, 24 Utah 2d 305, 470 P.2d 403, 404 (1970). However, "it is not necessary to show an actual eviction or threat thereof." Creason, supra (emphasis added). A grantee is entitled to compensation for the damage he suffers "as a result of the breach [of warranty of title, including] taking measures as are reasonable and necessary to clear up any difficulty which would represent a substantial flaw in his title." Creason, supra. The Creason case cited by the Judds in their brief is particularly enlightening on this point.

In Creason, the grantee had purchased certain property by warranty deed in which the meets and bounds description caused a shift of the boundaries. Upon discovering the apparent error in the description, the grantee solicited adjoining property owners for deeds to correct the error. The solicitation and correction of the error cost the grantee at least \$50 plus attorneys fees of \$720. No one evicted the grantee, or even threatened eviction. There was no determination by a court that an error existed or that the grantor did not own the property he conveyed by warranty deed. The court, however, noting the general rule of law stated that the "[grantee] would be justified in doing whatever was reasonable and prudent to clear [the defect]; and if this involved the necessity of employing an attorney, the reasonable expense therefor would be compensable." Creason, 470 P.2d at 405-06 (citing Van Cott v. Jacklin, 63 Utah 412, 226 P. 460 (1924)).

Waterside discussed the fee claims of Cahoon with Cahoon's counsel and, based upon a Supreme Court of Utah case entitled State v. Cox, 29 Utah 2d 127, 506 P.2d 54 (1973), concluded that there were factual and legal questions which could be found adverse to them, and if the court made those findings, reversal on appeal was unlikely. (TR:00870, page 7, lines 1-10) Waterside determined that it was prudent to settle the dispute with Cahoon if reasonably possible without presenting the fee ownership issue for judicial determination. (TR:00870, pages 5-7) That is exactly what was done in Creason. The trial court's finding that the Judds' breached their warranty of title is supported by law and should be affirmed.

POINT II: THE TRIAL COURT PROPERLY FOUND THAT THE JUDDS OWED WATERSIDE A DUTY TO DEFEND TITLE WHICH WATERSIDE DID NOT WAIVE AND THE JUDDS FAILED TO PERFORM.

The Judds attempt to shift responsibility to Waterside for their failure to defend by claiming that Waterside waived the Judds' duty to defend prior to trial by settling with Cahoon. Appellants' Brief, pages 10-11. Their contention is nonsensical and unsupported by law.

Waterside faced an enormous loss in the event Cahoon were granted fee title to the Property. Waterside had developed the Property prior to Cahoon's fee claims at a cost in excess of a million dollars. (TR:00870, page 9, lines 16-17) An adverse ruling

would have been disastrous and irreparable. Waterside took the prudent and reasonable action in settling the fee claims of Cahoon.

The Judds contend that the settlement reached by Waterside with Cahoon precluded a hearing of the fee claim on its merits, thereby preventing the Judds from consummating their defense of the title. The Judds were notified of the fee claim of Cahoon and were invited to participate in settlement discussions. The Judds refused.

At the outset of the litigation, Waterside made demand upon the Judds to defend title and gave the Judds every opportunity to participate and defend title to the Property. The Judds refused the demands of Waterside and waited instead until trial to proclaim their readiness to defend title. Waterside did not at any time waive the Judds' duty to defend title to the Property, but called on the Judds to fulfill their obligations under Utah Code Ann. §57-1-12 (1990). Waterside was forced, by the Judds' failure to respond to their duty to defend, to take the only prudent action and on the eve of trial, settle with Cahoon to avoid imminent and irreparable harm.

Waterside did not waive the Judds' duty to defend title when it settled with Cahoon. An analogy can be made to the law of insurance to illustrate the non-waiver of the Judds' duty to defend title, as well as the Judds' breach of that duty and resulting

liability. An insurer is bound to defend an insured against lawsuits alleging facts and circumstances covered by the policy, regardless of the merit of the allegations. Carter v. Aetna Casualty and Surety Co., 473 F. 2d 1071, 1075 (8th Cir. 1973). The insurer's liability for refusing to defend may be for the full amount of the insured's detriment, including the risk that the insured will settle:

Once an insurer breaches its contract by refusing to defend an action against its insured, it takes the risk that the insured will have a judgment entered against him, or will accept a settlement with the injured party. The insurer is liable on its refusal to defend, and must pay the amount of the judgment or settlement

Carter, 473 F.2d at 1078. If the insurer elects not to defend, it does so at its peril. Carter, supra.

By refusing to defend title to the Property, the Judds breached their contract with Waterside contained in the Warranty Deed and took the risk that Waterside would receive an adverse judgment or settle with Cahoon. The Judds became liable at the time of their failure to defend for any judgment against Waterside or any settlement entered into. The settlement ultimately agreed to by Waterside and Cahoon did not effect a waiver of the Judds' duty to defend, which the Judds had already breached. Instead, as under similar circumstances governed by insurance law outlined above, the Judds became liable to Waterside to the full extent of the settlement together with defense costs. See Carter, supra.

The trial court was correct in granting judgment in favor of Waterside and against the Judds based on the evidence showing their failure to defend title.

CONCLUSION

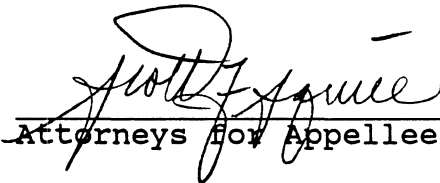
This Court should affirm the judgment of the trial court in favor of Waterside. There has been no showing that the trial court clearly erred in its findings of fact or conclusions of law, or that a manifest injustice has been done.

DATED this 19th day of August, 1991.

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By


Attorneys for Appellees

CERTIFICATE OF SERVICE

I hereby certify, that on the 19th day of August, 1991,
I caused four true and correct copies of the Brief of Appellee to
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