

1992

Smith Marketing Group Inc., and Hugh B. Smith v. Larae Kunz : Reply Brief

Utah Court of Appeals

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UTAH COURT OF APPEALS
BRIEF

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IN THE COURT OF APPEALS IN AND FOR
THE STATE OF UTAH

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SMITH MARKETING GROUP, INC.,)	
and HUGH B. SMITH,)	
)	
Appellants,)	Appellate Court No. 92-0814-CA
)	
vs.)	Priority No. 15
)	
LARAE KUNZ,)	
)	
Appellee.)	

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APPELLANT'S REPLY BRIEF

This Appeal is from a Judgment
of the Third Judicial Circuit Court, Salt Lake County,
the Honorable Judge Philip K. Palmer

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Utah Court of Appeals

MAR 23 1993


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I. APPELLEE HAS MISAPPLIED ITS STANDARD OF REVIEW

Appellee, in its "Standard of Review" as set forth in its Brief, has misapplied Rule 52(a) of the Utah Rules of Civil Procedure, and attempts to use this procedural rule as the standard by which this Honorable Appeals Court should rule.

Case law is the standard which this Honorable Court should use to determine the issue presented for review which is:

"Was there sufficient evidence to support the lower Court's finding that the Plaintiffs/Appellants breached the Buyer-Broker Agreement, thereby resulting in a reduced judgment for commissions due, including the omission of attorney fees and costs?" (See Appellants' Brief page 1)

Although the element of "clearly erroneous", when determining the grounds for appeal on the lower Court's findings, is contained in Rule 52(a), case law dealing with the effects and measure of the "clearly erroneous" factor are better suited for use by this Court when considering this case on appeal.

In the recent case of Hardy v. Hardy, 776 P.2d 917 (Utah App. 1989), this Honorable Court set forth the following:

"Trial court's findings of fact must: include enough facts to disclose process through which ultimate conclusion is reached; indicate that process is logical and properly supported; and not be clearly erroneous."

To be "clearly erroneous" the Trial Court's findings must be contrary to the weight of evidence presented at trial. The Appellants' Brief exhaustively set forth the testimony provided the Trial Court and included even the testimony of the Appellee as evidence of the erroneous findings. Consistent with the Court's requirements in Doelle v. Bradley, 784 P.2d 1176 (Utah 1989), the Appellants also marshalled all the evidence in support of the Trial Court's findings and then demonstrated in its Brief that even when viewed in the most "favorable light" the Trial Court's findings are insufficient and were clearly against the weight of the evidence provided and do not support the reduced judgment and complete omission of the award of attorney fees and costs.

The finding in question under this appeal is the Trial Court's finding number 7 which states:

"The Court finds that Plaintiffs, knowing of Defendant's strong desire to purchase the property in question, knowing of the seller's statement concerning commissions and Defendant's ignorance of such statement, and preparing of an offer wherein the seller would pay a 3% commission in light thereof, did not fully comply with their obligations under paragraph 3 of the Buyer-Broker Agreement."
(emphasis added)

Although the Appellee's Brief makes a "broad brush" attempt to defend the Trial Court's findings, there is only one real issue to

be considered by this Honorable Court in this case and that is: Did the Appellee know about the seller's statement concerning commissions before the offer was presented? (see emphasis in finding number 7 as set forth above)

Again, the evidence provided in the Appellants' Brief in relation to the fact that all parties involved in the sale of the property in question, the Appellee, the Appellants and even the Seller himself, is exhaustive. The only evidence to the contrary was already established in Appellants' Brief when Appellants marshalled evidence in favor of the Court's findings. It should be noted that the Appellee failed to dispute the sole facts marshalled by the Appellants in favor of the Court's findings.

II. APPELLEE HAS MISCONSTRUED THE FACTS OF THE CASE

The Appellee sets forth 28 points of fact in its Brief of which only points numbered 8, 9 and 14 have anything to do with the issues surrounding this appeal, and fail to support any reason why this Honorable Court should not find in favor of the Appellants.

In paragraph 8, Appellee sets forth testimony that she was ignorant of the Seller's position regarding commissions (R 264, 313-313-314). However, her testimony is exhaustively contradicted by not only the Appellants and the Seller, but also the Appellee herself (See Appellants' Brief and summary paragraphs hereafter).

In the Appellants' Brief, page 9-10, R 271-273, it becomes clear that the Appellee did in fact have knowledge of the Seller's position regarding commissions, and that was based on her own testimony.

The Seller also testified that he warned the Appellee about his position in relation to paying commissions and his testimony in relation to this is set forth in R 325, Appellants' Brief page 5.

And finally, the Appellants testified that the Appellee had a sure knowledge of the Seller's position prior to the tendering of an offer and even as early as February 28, 1991 (R 200) and Appellants' Brief page 14.

In paragraph 9, the Appellee interjects a false characterization as to the feelings of Dr. Pease in relation to the Appellants not supported in the record.

In paragraph 14, the Appellee sets forth an interesting fact. As set forth in the record and the Appellants' Brief the Appellee had a sure knowledge of the Seller's position in relation to paying a commission, but she still assisted the Appellants in the preparation of the Ernest Money Sales Agreement including the commission provision.

III. REPLY ARGUMENT

Appellants incorporate their Brief herein and reiterate the argument presented therein. The Trial Court entered findings that resulted in a reduced judgment and omission of attorney fees and costs based on one important issue that stands alone as the issue to this appeal and that being that the Appellee herein was ignorant of the Seller's position in relation to paying a commission (Finding #7, R 151). No other finding supported a reduced judgment.

The Trial Court did commit a clearly erroneous finding that the Appellee was "ignorant" about the Seller's statement concerning commissions. The testimony of the Appellants, the Seller and even that of the Appellee support the Appellants argument and position that the Trial Court's finding was clearly erroneous as the weight of the evidence is clearly in favor of the Appellants' position.

IV. CONCLUSION

This Honorable Court should determine that the Finding of Fact from which this appeal was consummated was clearly erroneous and that based on the overwhelming testimony all parties involved to the contrary of the finding that a reversible mistake has been made. Cummings v. Cummings, 821 P.2d 472, 476 (Utah App. 1991).

(State v. Bobo, 803 P.2d 1268, 1272 (Utah App. 1990). See Doelle v. Bradley, 784 P.2d 1176, 1178 (Utah 1989).

Dated this 18th day of March, 1993.

Tom D. Branch
TOM D. BRANCH
Attorney for Appellants

V. CERTIFICATE OF MAILING

I, Tom D. Branch, certify that on the 28th day of March, 1993, I served two copies of the Appellants' Reply Brief upon the Appellees Counsel, by mailing them to him by first class mail with sufficient postage prepaid to the following address:

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