

1991

Reed v. Forrer : Response to Petition for Rehearing

Utah Supreme Court

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UTAH SUPREME COURT

COURT OF THE STATE OF UTAH

DOCKET NO.

BRIEF
14572 RB

HENRY H. FORRER,
Plaintiff-Appellant,

vs.

STUART REED, RUSSELL REED,
DONALD REED, FRANKLIN REED,
MARGARET REED, CORDIE MAE
REED and LAWANNA KAY REED,

Defendants-Counter-
Plaintiffs and Res-
pondents,

vs.

HENRY H. FORRER, ROBERT
SATHER, EZILDA HENDRICKS,
CHARLES HENDRICKS, ROGER
L. ROBERSON and ETHEL
LaVERNIA ROBERSON,

Counter-Defendants
and Appellants.

Case No. 14572

RESPONDENTS' BRIEF IN OPPOSITION TO
APPELLANTS' PETITION FOR REHEARING

Appeal from Judgment of the Fourth District Court
Uintah County, State of Utah
The Honorable George E. Ballif, Judge

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FILED

MAR - 1 1977

Clerk, Supreme Court, Utah

IN THE SUPREME COURT OF THE STATE OF UTAH

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Case No. 14572

RESPONDENTS' BRIEF IN OPPOSITION TO
APPELLANTS' PETITION FOR REHEARING

STATEMENT OF THE NATURE OF THE CASE
STATEMENT OF FACTS

The statement of the nature of the case and the statement of facts as contained in Respondents' brief filed in this court are incorporated into this instant brief.

DISPOSITION OF CASE

The trial court granted Appellants' judgment quieting title to them of the land in question. The trial court granted the Respondents' judgment on their complaint for foreclosure of their mortgage and ordered sale of the property. The Appellants appealed

the trial court's ordering foreclosure of the mortgage and the Respondents appealed the trial court's failure to award attorney fees. In a unanimous decision written by Justice Hall, this court affirmed in all respects the trial court's decision, thus denying the appeal by Appellants and the cross-appeal by Respondents. Appellants failed to reply to Respondents' brief and waived their right to make oral argument to the court. They now seek the court to rehear the case. The Appellant in the initial appeal, Robert Sather, has not joined in this petition for rehearing.

RELIEF SOUGHT

Respondents respectfully request this court to deny the Appellants' petition for rehearing and to award Respondents their costs, attorney fees and damages incurred by reason of this petition for rehearing, in the amount of \$1,500.00.

ARGUMENT

POINT I

THE DECISION HERETOFORE RENDERED BY THIS COURT IS IN ALL RESPECTS CORRECT AND APPELLANTS OFFER NO NEW EVIDENCE AND CITE NO AUTHORITY IN SUPPORT OF THEIR PETITION.

1. Appellants offer no authority in support of their contentions that this court erred in its decision. Appellants apparently felt that they had adequately brief their position to this court when they failed to submit a reply brief to Respondents' brief. Their confidence is further evidenced by their failure to exercise their right to present oral argument in support of their positions. Now they seek to present to the court the argument which they previously waived. Again, however, they fail to present any brief in support of their position, despite the provision

of Rule 76(e)(1), Utah Rules of Civil Procedure which provides, *inter alia*:

"...The petition *shall* be supported by a brief of the authorities relied upon to sustain the points listed in such petition..."[emphasis added]

2. This court should grant rehearing only if a strong showing is made that the court failed to consider a material point, erred in its conclusion or that new matter has been discovered. *In re McKnight*, 4 U. 237, 9 P.299; *Brown v. Pickard*, 4 U. 292, 9 P. 573. Certainly the failure to submit a reply brief, the failure to exercise the right to oral argument, the failure to submit a brief in support of the petition and the failure to submit new evidence falls far short of the showing necessary to grant rehearing.

POINT II

APPELLANTS' PETITION IS FRIVOLOUS AND FOR THE PURPOSE OF DELAY AND SHOULD BE DENIED AND RESPONDENTS AWARDED THEIR COSTS, ATTORNEY FEES AND DAMAGES INCURRED BY REASON OF SUCH PETITION.

Had Appellants strongly briefed their position on the initial appeal, exercised their right to oral argument and presented a brief in support of their petition for rehearing, a finding that the petition was not for delay might be appropriate. However, in light of their failure to do so and in light of the affidavit of Respondents' attorney, Appendix A hereto, it is clear that the only purpose of the petition for rehearing is to delay satisfaction of the judgment. Interestingly, the individual who probably will have to bear a substantial portion of the judgment if ultimately sustained, Robert Sather (the predecessor in interest to the Appellants in this petition), has failed to join in the request for rehearing.

Pursuant to Rule 76(b), Utah Rules of Civil Procedure, "... [Where] the court finds that an appeal was taken for delay, it may add to the costs such damages as may be just." Of course, such a determination should be carefully made in order to not prejudice a party who legitimately believes the court has made a mistake. However, the burden which the petition for rehearing places upon the responding party, not to mention the court, should not have to be shouldered by the responding party when the petition is frivolous. Failure to apply that sanction could well lead to the automatic petition for rehearing in every case. In the instant case, since no attorney fees were awarded by the trial court to Respondents and they were required to assume the costs and attorney fees in both the trial court and the appeal to this court, this petition for rehearing, totally unsupported by evidence and/or authority, and the Respondents' required response, should not have to be further born by respondents out of the judgment as affirmed. Where an appeal is frivolous and without merit, damages are appropriately assessed. *See, e.g., Heller v. Osburnsen*, 548 P.2d 607 (Montana, 1976).

CONCLUSION


From the above, it is clear that the decision of this court must be sustained. Further, while Respondents may be required to bear the costs of the initial appeal (even though Appellants did not submit a reply brief and did not want oral argument) they should not be required to bear the costs of this petition for rehearing. Considering the costs, attorney fees and delay in obtaining satisfaction of their judgment, a reasonable sum to be as-

sessed is \$1,500.00.

Respectfully submitted this 1 day of March, 1977.

REYNOLDS & ARNOLD
Attorneys for Respondents
922 Kearns Building
Salt Lake City, Utah 84101

By:



APPENDIX "A"

AFFIDAVIT

STATE OF UTAH)
)
) : ss.
COUNTY OF SALT LAKE)

R. CLARK ARNOLD, being duly sworn upon his oath deposes and says as follows:

1. He is the attorney for the Respondents herein;


2. Subsequent to the decision by the Utah Supreme Court affirming the Trial Court's decision in Case No. 14572, he contacted George Mangan, attorney for Appellants Forrer and Robersons and James R. Hall, attorney for Appellant Sather. He was informed by Mr. Hall that Mr. ~~Forrer~~^{Sather} did not believe that he should have to pay all of the judgment as affirmed. He was informed by Mr. Mangan that neither the Robersons or Mr. Forrer had sufficient funds with which to satisfy the judgment. Mr. Mangan indicated that perhaps he would have to litigate the responsibility for satisfying the judgment.

3. After being informed of the above, the affiant advised both Mr. Mangan and Mr. Hall that the Respondents could not delay foreclosure while Appellants litigated who was to satisfy the judgment and suggested that a pooling arrangement be effected to satisfy the judgment. Affiant received no further word until the petition for rehearing was received on the last date for filing, March 1, 1977.

DATED this 1 day of March, 1977.


R. CLARK ARNOLD

Subscribed and sworn to before me this 1st day of March, 1977


NOTARY PUBLIC
Residing at Salt Lake City, Utah

My Commission expires:

Mar. 24, 1980 -6-

MAILING CERTIFICATE

The undersigned hereby certifies that on the 1 day of March, 1977, he properly mailed two copies each to each of the following attorneys at the addresses as indicated next to their names, postage prepaid.

GEORGE E. MANGAN, ESQ.
P.O. Box 246
Roosevelt, Utah 84066

JAMES R. HALL, ESQ.
P.O. Box 395
Roosevelt, Utah 84066

DATED this 1 day of March, 1977.


R. CLARK ARNOLD