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Harold O. Bjork, Herman A. Bjork, Beatrice A.
Wilcox and Arthur Anderson v. April Industries :
Reply Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT
OF THE STATE OF UTAH

HAROLD O. BJORK, HERMAN A.
BJORK, BEATRICE A. WILCOX
and ARTHUR ANDERSON,

Plaintiffs-Respondents,

vs.

APRIL INDUSTRIES, INC.,
a Delaware corporation,

Defendant-Appellant.

Case No. 14620

REPLY BRIEF OF APPELLANT
APRIL INDUSTRIES, INC.

APPEAL FROM JUDGMENT
of the
DISTRICT COURT OF THE THIRD JUDICIAL
DISTRICT IN AND FOR SALT LAKE COUNTY,
STATE OF UTAH

Honorable Gordon R. Hall, Judge

FILED

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Clerk, Supreme Court, Utah

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HAROLD O. BJORK, HERMAN A.
BJORK, BEATRICE A. WILCOX
and ARTHUR ANDERSON,

vs.

Defendant-Appellant.

Case No. 14620

Defendant-appellant, April Industries, Inc., hereby
replies to certain matters raised in respondents' brief.

I. Prior Rulings In This Case Do Not Bar Defendant's
Claim That The Trial Court Awarded Plaintiffs Inconsistent
Remedies.

Respondents argue that this Court's prior ruling holding that plaintiffs are entitled to damages is res judicata of appellant's claim that the trial court awarded plaintiffs inconsistent remedies by granting them damages and by also ordering the removal of restrictive legends from plaintiffs'

stock certificates. This argument is, as the record reveals, incorrect.

The first award of inconsistent remedies was in the judgment entered by the district court in May of this year. (R. 11) The earlier judgment of the lower court only ordered defendant to remove the restrictive legends from plaintiffs' certificates. Thus, the issue of double recovery was not properly before this Court until the present appeal. The issue was neither ruled upon nor considered in this Court's prior opinion.

II. The Cases Cited By Respondents Show The Impropriety Of Awarding Inconsistent Remedies In This Case.

Plaintiffs' cited authorities hold that specific performance and damages may be awarded in those cases where both forms of relief are necessary to put the complaining party in as good a position as he would have been in had the breaching party properly performed. For example, in Johnson v. Jones, 109 Utah 92, 164 P.2d 893 (1946) this Court awarded both damages and specific performance for breach of a contract for the sale of a duplex. Both remedies were proper since, if the defendant had performed, the plaintiff would have been entitled to both

possession of the premises and also to the rentals earned during the time of such possession.

In the present case, plaintiffs are to receive more than they would have received if defendant had performed the contract. They claim a breach of an agreement to sell their shares. Had this agreement been performed, plaintiffs, by selling, would no longer own their stock. Yet, the lower court's judgment awards plaintiffs the equivalent of the proceeds from the sale of the shares and also permits them to keep their stock. This type of recovery would not be permitted by the authorities which plaintiffs cite.

III. There Was A Violation Of Due Process.

Plaintiffs argue that there is no violation of due process because the trial court did not award plaintiffs double recovery. The argument implicitly admits that, should appellant be able to show an improper double recovery, due process would be violated. Defendant submits that the trial court's judgment permits such double recovery.

Because defendant must, in reality, purchase plaintiffs' shares without receiving that stock, its property is being confiscated. It has been held that the 14th Amendment to the United States Constitution protects property interests

already acquired as a result of "existing rules or understandings that stem from an independent source such as state law - rules or understandings that secure certain benefits and that support claims or entitlement to those benefits." Board of Regions of State Colleges v. Roth, 408 U.S. 564, 577, 92 S.Ct. 2701, 2709, 33 L.Ed. 2d 548 (1972). Under the rules of decision of the State of Utah litigants, such as defendant, are entitled to protection from double recovery being awarded to plaintiffs. To permit such double recovery is to violate the constitutional proscription against depriving property without due process.

IV. Respondents Misstate Appellant's Argument On Prejudgment Interest.

Plaintiffs suggest that defendant is asking this Court to limit plaintiff's recovery of interest to post-judgment interest. This suggestion misstates defendant's argument.

Defendant argues in its brief that, because the amount of plaintiffs' damages was not ascertainable until the March, 1976 opinion of this Court, the earliest date from which prejudgment interest should be computed is the date of that opinion. Judgment for plaintiffs was not entered until May of 1976, and there is thus a period of several months when pre-

judgment interest could be permitted. However, the amount of any such interest should be computed only from the March, 1976 date and not, as in the lower court's judgment, from February, 1972, the date of the public offering.

Respectfully submitted,

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