1984

Floyd Webster v. Mary Lehmer And Charles Lehmer : Reply Brief of Appellants

IN THE SUPREME COURT OF THE STATE OF UTAH

FLOYD WEBSTER,	:	
Plaintiff-Respondent,	:	
vs.	:	Appeal No. 19339
MARY LEHMER and CHARLES LEHMER,	:	
Defendants-Appellants.	:	

REPLY BRIEF OF APPELLANTS

On Appeal from the District Court
of Summit County
HONORABLE J. DENNIS FREDERICK, District Judge

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MARY and CHARLES LEHMER, Appeal No. 19339

Defendant-Appellants.

REPLY BRIEF OF APPELLANTS

STATEMENT OF THE FACTS

1. Lehmers Reaffirm Their Statement of The Facts.

Appellants Mary and Charles Lehmer ("Lehmers") reject Respondent Floyd Webster's ("Webster") statement of the facts and reaffirm their reliance on the statement of the facts as set forth in their opening brief. The Lehmers will not specifically rebut each purported fact presented by Webster. However, there are three misstatements of fact which must be clarified. Responses to those misstatements of fact are set out below.

2. Webster Did Not Own the Property.

Webster admits at page 3 of his answering brief that the record title to the property on which Webster had lived was in Royal Street Land Company. Webster goes beyond that fact and attempts to convert the fact of his claim of ownership into the the fact of ownership. The issue of the fact of ownership by

Webster was not before the trial court. That issue was never adjudicated. At best, Webster had a contingent expectancy or the basis for a good faith legal claim to title.

Mr. Huseth, the former president of Royal Street, testified that the informal policy to sell land to squatters was not based upon the squatter's legal rights but "on an emotional thing." (T 45-46). Webster's claim to a legal title is not a marketable title of any value until there has been a judicial determination that the legal standard for an adverse possession claim has been satisfied. Anderson v. Osguthorpe, 504 P.2d 1000, 1002 (Utah 1972); Babo v. Bookbinders Financial Corp., 551 P.2d 63, 64, 27 Ariz. App. 73 (1976).

When the Lehmers purchased Webster's interest in the property, subject to Webster's right to live on the property so long as he desired, they only purchased Webster's contingent expectancy or the right to stand in his place to assert a claim to legal title. Webster admitted that the Royal Street policy would probably not apply to a third party purchaser from a squatter (T.164) and Webster's compliance with the adverse possession statute was at best speculative. The Lehmers purchased an interest in property from Webster which could have and may yet turn out to be illusory and of no value. Lehmers in effect purchased the opportunity to spend the time and money to find out.

3. Webster Was Indifferent to the Ownership of His Property.

Webster's trial testimony clearly established that he was indifferent to whether his land was owned by the BLM or Royal Street. Webster's attempt to obfuscate that fact at pages 5 and 6 of his answering brief is to no avail. Webster's trial testimony was merely a replay of his deposition testimony.

> Q. (By Mr. Gesas): But why didn't you go and see if the BLM really owned the land, or if the mining company owned it? Why didn't you do that before you signed up with them [the Lehmers]?
>
> A. I don't know. I never had no desire to find out. I wasn't concerned.
>
> (Webster 1/7/83 depo. p. 95)

4. Webster Mistates His Relationship with the Lehmers.

Webster's statement of the facts and Webster's argument are replete with attempts to turn a casual social relationship between Webster and the Lehmers into a confidential relationship in which Webster was the dependent party. The facts as established at trial and in Mr. Webster's deposition are all to the contrary.

> Q. (By Mr. Campbell): Now, at that time, Mr. Webster, Mary Lehmer was not acting as your lawyer, was she?
>
> A. No.
>
> Q. She hadn't acted as your lawyer, had she?
>
> A. No.
>
> Q. She wasn't acting as your business advisor, was she?

A. No.

Q. Or your financial consultant, was she?

A. No.

Q. She wasn't acting as your real estate advisor, was she?

A. No.

Q. She hadn't in the past, had she?

A. No.

Q. You weren't relying at that time on Mrs. Lehmer for some confidential relationship, were you?

A. Not that I recall, no.

(T. 168).

Q. (By Mr. Gesas): Have you ever talked to her [Mary Lehmer] in confidence, told her your deepest secrets or feelings?

A. No.

Q. And you didn't go to her after the death of your wife, or go to Charles Lehmer and seek advice from them about your daily affairs with things you were doing in your life, did you?

A. No.

Q. You didn't go ask Mary or Charles how to buy or sell property or get groceries or how to run your life, did you?

A. No.

Q. And you weren't relying on them for advice in your everyday affairs, were you?

A. No.

Q. You were old enough and capable of taking care of yourself, weren't you, before October of 1980?

A. Yes.

Q. And after?

A. Still am.

Q. Thank you. Were Charles or Mary Lehmer your advisors before October 7, 1980 and after the death of your wife? Were you looking to them for any kind of advice?

A. No.

(Webster 1/7/83 depo. p. 106-107)

5. Lehmers' References to the Published Depositions Are Proper.

Webster concedes at page 17 of his answering brief that all depositions were published yet claims that they are "nonevidentiary matters". Webster cites no rule or case law in support of his claim that depositions ordered by the Court to be published are not evidence in that proceeding. In the case at bar, the depositions were ordered published at a pretrial conference and the trial court noted during trial that in fact the depositions had been published. (T. 238, 419; R. 301).

Rule 32 of the Utah Rules of Civil Procedure sets out certain specific circumstances under which depositions may be used at trial or upon a hearing of a motion. A party's right to use depositions for those purposes is founded upon the rules and a party need not secure special permission from the trial court for the use of the depositions for the purposes outlined in Rule 32. A party also need not request that the depositions be "published" to avail itself of that rule.

The publication of a deposition is a different matter. Upon an order of publication, the sealed copy of the deposition filed with the Court pursuant to Rule 30(f) of the Utah Rules of Civil Procedure is opened and the deposition becomes a part of the record of the proceeding. It is clear from this Court's reference to the use of published depositions in cases such as Farrow v. Health Services Corp., 604 P.2d 474, 477-478 (Utah 1979) that once a deposition is ordered published in a particular proceeding, in Farrow it was a motion for summary judgment, the deposition is "before the court". The published deposition is an evidentiary matter on which the trial court may rely in entering its findings and on which the Supreme Court may rely in reviewing the proceeding below.

ARGUMENT

POINT I

ADMISSION OF TESTIMONY ON FAIR MARKET VALUE WAS IMPROPER.

Webster's answering brief fails to separately address the appellants' two points of error concerning the trial court's admission of testimony on fair market value. Webster presents only a generalized discussion of some of the prerogatives of a trial court in an equitable proceeding in an apparent attempt to establish the relevance of the challenged testimony. Webster totally ignores Lehmers' claim of error with respect to the admission of the testimony of fair market value of the subject

"squatter's rights" without proper foundation. That issue presents a question of competency and foundation, not relevancy.

An expert's testimony cannot be based on facts which are contrary to the evidence. See, Great Western Sugar v. Northern Natural Gas, 661 P.2d 684, 694 (Colo. App. 1982); Liber v. Flor, 415 P.2d 332, 337 (Colo. 1966). In Liber, the Colorado Supreme Court concluded that certain expert testimony was incompetent and "should not have been admitted into evidence" because "the opinion in question was based on at least two purported facts that Summers [the expert] assumed to be true but which were not substantiated by the testimony of other witnesses or other evidence." Id. In Chicago and North Western Railway v. Hillard, 502 P.2d 189, 192 (Wyo. 1972), the Wyoming Supreme Court held that "the record must show sufficient facts upon which the judgment and opinion of an expert were based. A witness who asserts an opinion on the value of property not supported by facts is not competent;. . . ."

The Utah Supreme Court has stated that the admissability of expert testimony "depends in large measure upon the foundation laid. The expertise of the witness, his degree of familiarity with the necessary facts, and the logical nexus between his opinion and the facts adduced must be established." Edwards v. Didericksen, 597 P.2d 1328, 1331 (Utah 1979); Highland Construction Co. v. Union Pacific RR. No. 17990, filed February 3, 1984, P.11.

Webster only tangentially addresses the question of relevancy and ignores completely the question of competency and foundation. The expert testimony of Mr. Pia was incompetent and without proper foundation because it lacked the necessary "logical nexus" between any facts either asserted by Webster or proved at trial. Mr. Pia's opinion as to the fair market value of Webster's squatter's rights on October 7, 1980 was based on the erroneous assumption that Webster owned a fee simple interest on that date. Questions of competency and foundation are fundamental to the rules of evidence and the reliable, fair and efficient operation of the judicial system. Webster's generalizations about the rules of equity provide no basis whatsoever for abandoning the well established rules of evidence.

POINT II

WEBSTER'S UNILATERAL MISTAKES DID NOT JUSTIFY RECISSION OF THE CONTRACT.

Webster, in his answering brief, focuses on a single incident in the course of the transaction between Webster and the Lehmers and attempts to justify Webster's lack of due diligence. Even if the Court were to give credence to Webster's recitation of the facts surrounding the October 7, 1980 agreement, Webster still fails to take into account the subsequent events. Webster on three separate occasions after that date reaffirmed and ratified the agreement by seeking payments pursuant to it. In addition, Webster entered into a modified agreement on December

21, 1980 which reaffirmed the original agreement and relinquished his life estate.

During the entire period of time between October 7, 1980 and December 21, 1980, Webster was free from any influence of the Lehmers, assuming there had been any to begin with, and could have investigated the status of his land prior to the various reaffirmations of the agreement. The evidence is also clear that when it finally did occur to him to attempt to rescind the agreement, Webster was quick to travel to the courthouse in Summit County to determine the status of his land. (Webster 1/7/83 depo. p. 49-50). It is also clear, even under the version of the facts stated by Webster, that during this period he was living with Mary Dudley in Heber City and was not the lonely, desolate figure Webster makes himself out to be. (T. 181, 283-284; Webster 1/7/83 depo. p. 103-104).

Webster attempts to dismiss his 33 years of lack of diligence in determining the status of his property as somehow irrelevant. It is clearly relevant to demonstrate the fact of Webster's lack of diligence and it is also relevant to demonstrate that any lack of due diligence by Webster at the time of the original October 7, 1980 transaction and subsequent to it was simply part of the continuing pattern of indifference on his part and not the result of any pernicious influence exerted by the Lehmers.

Webster has no response at all to Lehmers' claim that Webster's ignorance of the status of his property is irrelevant

because there is simply no evidence of reliance upon this alleged misinformation. The evidence is clear from Webster's own testimony that even if he had known his property was not on BLM land it would not have made any difference. In his own words, he just "didn't care" whether or not his property was on BLM land. (T. 146-148).

POINT III

THE ALLEGED MUTUAL MISTAKE DOES NOT WARRANT RESCISSION OF THE CONTRACT.

Webster's argument concerning the alleged mutual mistake requires only a brief response as all the relevant issues are fully explicated in Point III of Lehmers' opening brief.

Webster claims that rescission is appropriate because the contract created a "hostile marriage" between Lehmers' and Webster's children. This is a wholly new argument raised for the first time on appeal and not properly cognizable by this Court. Nelson v. Newman, 583 P.2d 601, 603 (Utah 1978); Simpson v. General Motors Corp., 470 P.2d 399, 401 (Utah 1970); Hamilton et al. v. Salt Lake County Sewerage Imp. Dist., 390 P.2d 235, 236 (Utah 1964). In addition, there is simply no evidence in the record to support this claim. The reasons for the lack of any evidence are clear. The issue was never raised before the trial court and it is simply not relevant to this lawsuit.

Webster further claims that this alleged mutual mistake justifies rescission because "severance of the joint tenancy was

a condition precedent" to Webster receiving the purchase price for his money. It is clear from the testimony from Mary Lehmer that she is prepared to proceed with the transaction whether Webster has the rights of a joint tenant or a tenant-in-common. (T. 303-304). Even if the Court were to assume this was a condition precedent, it is subject to waiver by the Lehmers, and clearly the Lehmers have waived the condition. Therefore, even if there was a condition precedent, it makes no difference to the question of whether rescission is appropriate based upon this alleged mutual mistake.

POINT IV

WEBSTER FAILED TO ESTABLISH THE EXISTENCE OF A FIDUCIARY OR CONFIDENTIAL RELATIONSHIP.

Utah has well developed case law on the standards for determining the existence of a confidential relationship. That case law is discussed and analyzed in light of the facts of this case in Lehmers' opening brief. Webster's ignores this Utah law. Rather, Webster simply cites a string of legal authorities on various theories not applicable to this appeal.

Among the citations set out by Webster are references to unconscionable contracts and constructive fraud. The issues of unconscionability and constructive fraud were not presented at trial and they are not a proper subject for appeal. Wilson, supra; Simpson, supra. Further, Webster does not advance these references as separate legal theories on which he bases his claims for relief.

In summary, Point IV of Webster's answering brief is an eclectic presentation of general legal principles which are not related to the facts of this case. Webster provides no useful argument in response to the arguments and analysis presented in Lehmers' opening brief on the issue of the existence of a confidential relationship.

POINT V

THIS COURT NEED NOT GIVE ANY SPECIAL DEFERENCE TO THE CONCLUSIONS OF THE TRIAL COURT.

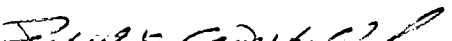
The Trial Court's findings on contractual capacity, confidential relationship and the appropriateness of rescission as a remedy for the alleged unilateral and mutual mistakes are contrary to well established Utah law. The questions at issue in this appeal essentially involve the application of the facts in this case to the law, which are legal questions. The Utah Supreme Court does not accord the trial court's conclusions on questions of law the same deference as accorded findings of fact. This Court must make its own independent determination of the relevant legal issues. Betenson v. Call Automobile and Equipment Sales, 645 P.2d 684, 686 (Utah 1982); Provo City Corp. v. Nielsen Scott Co., 603 P.2d 803, 805 (Utah 1982).

C O N C L U S I O N

Webster has attempted to piece together isolated, unrelated and undocumented pieces of evidence to demand that a valid

contract be voided. His demand is not supported by the facts or the law. The common thread in all of Webster's claims and legal theories is that after voluntarily entering into a valid contract he decided that he could have made a better deal. Webster has failed to prove that the agreement was unfair or that any legal or equitable basis exists for rescinding the contract. The law of contracts would be a shambles of every contracting party could back out of an agreement by the simple telling of a story of imagined woe. Webster is a capable adult member of society who is bound to his word and his contracts, as are we all.

Respectfully submitted,



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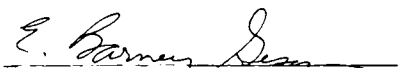

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