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UNIVERSITY OF UTAH

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IN THE SUPREME COURT OF THE STATE OF UTAH

FILED

JAN 15 1964

Clerk, Supreme Court, Utah

DON CORDNER and SYLVIA CORDNER, his wife,
Plaintiffs and Respondents,

vs.

CLINGER'S INCORPORATED, a Utah corporation, and HOWARD R. CLINGER, et al,
Defendants and Appellants.

Case No. 9866

PETITION FOR REHEARING AND BRIEF IN SUPPORT THEREOF

Appeal from the Judgment entered against defendants by the District Court of Salt Lake County on the verdict of the jury, Hon. Ray Van Cott, Jr., Judge, Presiding.

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IN THE SUPREME COURT OF THE STATE OF UTAH

DON CORDNER and SYLVIA CORDNER, his wife,
Plaintiffs and Respondents,

vs.

CLINGER'S INCORPORATED, a Utah corporation, and HOWARD R. CLINGER, et al,
Defendants and Appellants.

Case No. 9866

PETITION FOR REHEARING AND BRIEF IN SUPPORT THEREOF

Defendants- appellants submit their petition importuning the Supreme Court in justice and equity to grant them a re-hearing in the above case because of errors made by the Court in misconstruing and wrongly interpreting admitted and undisputed facts in what the Court itself has designated as a "highly complicated" case.

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It is respectfully submitted that this misconstruction and wrong interpretation by the Court of admitted and undisputed facts is particularly germane to the issue and basic to the decision of the Court because it goes to the very heart of the question of damages. A correct interpretation of these particular facts would have dictated a different decision by the Court.

The facts and points relied on to justify a re-hearing and re-examination of the case are set forth and argued in the brief annexed hereto and by reference made a part hereof.

QUENTIN L. R. ALSTON
Attorney for Defendants-Appellants

STATEMENT OF FACTS

This is a petition for re-hearing on the decision rendered in the above case by the Supreme Court and filed with the Clerk on December 19, 1963. The opinion by Justice McDonough was concurred in by all members of the Court.

The dispute between the parties arose out of a series of real estate transactions which are detailed in the original appeal brief of Clingers (defendants-appellants), and, which also, are summarized briefly in the opinion by Justice McDonough. The summary by Justice McDonough is substantially correct, but, in two most important particulars, recited in the opinion,

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is exactly opposite and contrary to the admitted and undisptued facts in the record. This misinterpretation of admitted and undisputed facts is vital since it goes to the very heart of the question of damages and a reversal of those facts should have dictated a different decision by the Supreme Court.

Cordners (plaintiffs-respondents) originally owned an equity in the Green Gables Apartments. They traded this equity plus their note for $4,500 to Bunkers (defendants, who were also sued by Cordners but who were not parties to the trial in the District Court from which an appeal was taken) for an equity in the Villa Apartments. Cordners then traded their acquired equity in the Villa Apartments for what was to have been $16,500 in net inventory at cost in the Picabo Store in Picabo, Idaho, to Griffiths (defendants who were sued by Cordners for fraudulent misrepresentation but who are not appellants herein) who owned that inventory. Cordners were then to give title to this $16,500 in net inventory at cost to Clingers (defendants- appellants) for the following considerations from Clingers: Clinger's equity in a home in Salt Lake City valued at $7,500, cancellation of the $4,500 note Cordners had given Bunkers and which Clingers had acquired from Bunkers, relinquishment of Clinger's commission of $2,940 derived from selling the Green Gables Apartments originally owned by Cordners, and, execution by Clinger of a personal note to plaintiffs for $1,560.

The creditors of Griffiths from whom Cordners

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were acquiring the inventory to give to Clingers foreclosed on and repossessed the inventory, however, because they had not been paid and Cordners consequently never did give title to this inventory to Clingers and never were in a position to give title to the said inventory to Clingers.

Cordners did, however, get the Villa Apartments for which they had given their equity in the Green Gables Apartments. Justice McDonough though, in the opinion, said: "Plaintiffs, however, did not take possession of the Villa Apartments." This is exactly opposite and contrary to the admitted and undisputed facts in the record, and, as indicated above, is vital since it goes to the very heart of the questoin of damages, if any, sustained by Cordners.

Cordners' "Reply to Counterclaim of Defendants, S. Bartell Bunker and Wilma B. Bunker, his wife" (R. 34) in paragraph 3 contains Cordners' own admissions, through their attorney, that they did in fact get the Villa Apartments. The exact language is as follows:

> " * * * admit that Plaintiffs entered into possession of the Villa Apartments and commenced to operate and manager the same and collect the rentals therefrom."

This is also admitted by Mr. Cordner himself, one of the plaintiffs-respondents and the one most conversant with the entire transaction. The transcript of his testimony given at the trial (R. 116) shows the following admission by him:

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"* * * about the 1st of August why Mr. Griffiths moved out of the Villa Apartments and surrendered possession of them to us."

He testified further (R. 116) as follows:

Q. "And this was August of what year, Mr. Cordner?"

A. "Nineteen sixty-one."

Q. "And how long did you retain possession of the Villa Apartments in Afton, Wyoming?"

A. "Until the 14th of May, 1962."

Mr. Cordner later testified (R. 119) as follows:

Q. "And then you actually had physical possession of the Villa Apartments in Afton, Wyoming from about August of '61 through what period of time, Mr. Cordner?"

A. "May of '62."

Q. "And did you collect the rents?"

A. "Yes."

The fact that Cordners (plaintiffs-respondents) did get the Villa Apartments, contrary to the statement in the opinion that they did not, is undisputed. Furthermore, Mr. Cordner himself, in a letter to Mr. and Mrs. Griffiths dated June 23, 1961 (Exhibit 8), in which he is taking the Griffiths to task for their (the Griffiths) not complying with the terms of the agreement between Cordners and Griffiths, admits that his (Mr. Cordner's) equity in the Villa Apartments is worth $19,500. His own wording is as follows:

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> " * * * there is now due two months interest on my equity of $19,500 * * * ."

The other particular in which the admitted and undisputed facts in the record have apparently been misconstrued by the Supreme Court concerns the instructions. In the opinion Justice McDonough says:

> "The assignments of error concerning the instructions have been examined in the light of our rules, a) requiring the submission of correct instructions, b) that proper and timely objections be made to those claimed to be in error, and c) that objections to them cannot be raised for the first time on appeal."

It is rather difficult to interpret exactly what the Court meant but in any event the record shows that Cordners (plaintiffs-respondents) made no requests, and, took no exceptions. (R. 317). On the other hand, contrary to the inference suggested by the above language of the Court, Clingers (defendants-appellants) did make requests. (R. 59-60). And, in view of the fact that Cordners' claim for damages against Clingers was limited both by the Pre-Trial Order (R. 52-54) and the Instructions to Jury (R. 61-68) to one for purported breach of an oral contract and not for negligence, it is respectfully submitted that the requested instructions were correct instructions.

Furthermore, Clingers (defendants- appellants), did take exceptions to and make proper and timely objections thereto. (R. 317). The objections were not raised for the first time on appeal. They were made

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when the exceptions were taken as asked for by the Trial Court (R. 317), and, were again called to the attention of the Trial Court in the "Affidavit In Support of Defendants' Motion For New Trial" (R. 73) and in the "Motion For New Trial" (R. 72) submitted and argued to the Trial Court but denied. (R. 73-a).

STATEMENT OF POINTS

POINT I

THE SUPREME COURT'S MISCONSTRUCTION OF ADMITTED AND UNDISPUTED FACTS WARRANTS AND JUSTIFIES A RE-HEARING, RECONSIDERATION AND REVERSAL OF DECISION BY THE SUPREME COURT.

POINT II

A PROPER EVALUATION OF THE ASSIGNMENTS OF ERROR MADE BY DEFENDANTS-APPELLANTS IN THEIR ORIGINAL APPEAL BRIEF IN LIGHT OF THE FACTS IN THE RECORD AND THE LAW APPLICABLE THERETO WARRANTS AND JUSTIFIES A RE-HEARING, RECONSIDERATION AND REVERSAL OF DECISION BY THE SUPREME COURT.

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ARGUMENT

POINT I

THE SUPREME COURT'S MISCONSTRUCTION OF ADMITTED AND UNDISPUTED FACTS WARRANTS AND JUSTIFIES A REHEARING, RECONSIDERATION AND REVERSAL OF DECISION BY THE SUPREME COURT.

As set forth in the statement of facts, the opinion by the Supreme Court recites facts, basic to the decision, exactly opposite and contrary to the admitted and undisputed facts in the record.

First, the Court says that Cordners (plaintiffs-respondents) did not take possession of the Villa Apartments. This is not so. Cordners did take possession of the Villa Apartments. This was called to the attention of the Court and not disputed, when, in the original appeal brief of Clingers (defendants- appellants) it was said in reiterating what the record showed: (Appellants' Brief Page 21).

> " * * * It is undisputed first that the creditors of Griffiths moved in and foreclosed on the inventory and second that plaintiffs themselves (Cordners) re-took possession of the Villa Apartments in Afton, Wyoming, and, operated the same from approximately August of 1961 through May of 1962. * * * "

Second, the Court infers that Clingers (defendants-appellants) did not: a) submit correct requests for

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instructions, b) did not make proper and timely objections to those claimed to be in error, and c) raised objections to them for the first time on appeal.

Here, again, the Court has apparently confused the parties in an admittedly complicated case. Cordners (plaintiffs-defendants) made no requests. Cordners took no exceptions. On the other hand Clingers (defendants-appellants) did submit requests. And, it is respectfully submitted that these were correct requests. Clingers did take exceptions to the erroneous instructions actually given. Clingers did raise their objections to the instructions given, not, as intimated by the Supreme Court, for the first time on appeal, but, when they were first given and again when they argued their "Motion For New Trial."

Recognizing that, contrary to what the Supreme Court said in the opinion, the Cordners (plaintiffs-respondents) did take over the Villa Apartments, it is most important to consider further, that Mr. Cordner himself valued his equity in the Villa Apartments at $19,500. (See Exhibit 8) . In other words, Cordners got the equity in the Villa Apartments valued at $19,-500, they did not and could not give Clinger title to $16,500 in net inventory at cost, they did not pay the $2,940 commission obligation which they admittedly owed Clingers, they did not pay the $4,500 note which they gave Bunkers as part payments on the Villa Apartments which Bunkers endorsed to Clingers. Nevertheless, they got an instruction by the District

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Court, duly excepted to, first, that they "sustained damage in a sum of money" (Instruction No. 2 subparagraph 4, R. 63), and, second, that "plaintiffs' measure of damages would be the sum of $16,500". (Instruction No. 5, R. 67).

Even Cordners (plaintiffs-respondents) recognize that the above instruction is erroneous and misleading. They say in their original appeal brief at page 19:

> " * * * It is acknowledged that the Defendant will receive credit against the judgment in the amount of this promissory note upon its cancellation. The same applies to the commission."

Justice and equity require that consideration be given also to the value of the equity which Cordners, contrary to what the Supreme Court said, got in the Villa Apartments. This equity, Mr. Cordner himself valued at $19,500. (See Exhibit 8). If consideration was given to this equity, it would necessarily wipe out any claim for damages.

POINT II

A PROPER EVALUATION OF THE ASSIGNMENTS OF ERROR MADE BY DEFENDANTS-APPELLANTS IN THEIR ORIGINAL APPEAL BRIEF IN LIGHT OF THE FACTS IN THE RECORD AND THE LAW APPLICABLE THERETO WARRANTS AND JUSTIFIES A RE-HEARING, RECONSIDER-

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ATION AND REVERSAL OF DECISION BY THE SUPREME COURT.

It is respectfully submitted that the five points set forth and argued in the original appeal brief of defendants-appellants adequately set forth the facts and law applicable thereto so as to have justified a reversal by the Supreme Court. For that reason they are not set forth and re-argued here but are referred to and by reference made a part hereof. Since the Supreme Court did apparently misconstrue certain basic admitted and undisputed facts, it is respectfully urged that the points and arguments therein set forth be reviewed and re-examined in the consideration of this petition for re-hearing.

It should be noted that in affirming the judgment of the District Court, the Supreme Court made no reference whatsoever to the claimed error of the District Court in refusing to allow Clingers (defendants-appellants) to adduce evidence concerning the Idaho Bulk Sales Law. During the oral argument before the Supreme Court several of the Justices wondered about it and asked certain questions of counsel but the opinion makes no reference to this claimed error. It is respectfully submitted that this too is basic and that the District Court erred in this respect to the prejudice of Clingers in the following respects: The trial itself was limited to the claim for damages by Cordners against Clingers for the purported breach by Clingers of an oral contract and not for any claimed negligence on

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the part of Clingers. By that contract Clingers were to give Cordners various considerations totalling $16,500 for $16,500 in net inventory. Cordners did not own this inventory but they were to get it from Griffiths for their (Cordners') equity in the Villa Apartments. They (Cordners) never did get the $16,500 in net inventory at cost, and, never could give title to it to Clingers, however, because the Idaho Bulk Sales Law had not been complied with, and, Griffiths' creditors, who had not been paid, repossessed and foreclosed on said inventory. In other words, Cordners (plaintiffs-respondents) did not and could not deliver to Clingers so they (Cordners) re-took from Griffiths the very equity which they were giving Griffiths for the inventory, namely, the Villa Apartments which Mr. Cordner himself valued at $19,500. Clingers on the other hand got nothing. Since Cordners could not perform by delivering title to $16,500 in net inventory at cost to Clingers he could not get damages from Clingers for the purported non-performance by Clingers. Cordners got back the very equity which they were trading for the inventory which they were to give to Clingers. The applicability of the Idaho Bulk Sales Law is to the effect that it proves conclusively that Cordners could not perform on their contract and consequently they could not seek damages from Clingers.

The attention of the Court is invited particularly to Point V set forth and argued in the original brief of Clingers (defendants-appellants). With reference

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to this Cordners (plaintiffs-respondents) say in their original appeal brief at page 19:

> " * * * The authorities cited upon damages by the appellants are not disputed by respondents. * * * "

CONCLUSION

Based on the undisputed and admitted facts in the record, misconstrued by the Supreme Court, and, in light of the law applicable thereto, it is respectfully submitted that Clingers (defendants-appellants) were not afforded a fair trial and the Supreme Court should accordingly grant a re-hearing. This, so that justice and equity can be done in the matter, rather than the rights of Clingers foreclosed by a sweeping statement that "there is substantial proof to support" the decision when that decision is based on admitted facts which have been misconstrued.

Respectfully submitted,

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