

1983

Henry Thomas Adams And Henry Thomas Adams, III v. Stephen L. Gubler, Ted Gubler, Venla Gubler, Steamboat Vista, Inc., The Leslie Wilcox Family Trust, Laprele G. Orton, Glen L. Gubler And Jean G. Cox, Trustees of The Leslie Wilcox Family Trust : Reply Brief

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IN THE SUPREME COURT OF THE STATE OF UTAH

HENRY THOMAS ADAMS and HENRY)
THOMAS ADAMS, III,)

Plaintiffs and Appellants,)

-vs-)

CLARENCE L. GUBLER, TED)
GUBLER, VENLA GUBLER,)
SHERBOAT VIST, INC.,)
THE LESLIE WILCOX FAMILY)
TRUST, LAFFELE G. ORTON,)
CLARENCE L. GUBLER and JEAN G.)
COX, Trustees of the)
LESLIE WILCOX FAMILY TRUST,)

Defendants and Respondents.)

Case No. 19342

REPLY BRIEF

A Reply Brief of Appellants on an Appeal from a
Judgment of the Fifth District Court of Washington County,
the Honorable J. Harlan Burns, District Court Judge

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IN THE SUPREME COURT OF THE STATE OF UTAH

THOMAS ADAMS and HENRY)

ADAMS, III,)

Plaintiffs and Appellants,)

-vs-

STEVEN R. CARTER, TRD)

GUBLER, DONNA GUBLER,)

STEPHEN G. WEST, INC.,)

THE WILCOX FAMILY)

TRUST, MARCELE G. ORION,)

GENE L. GUBLER and JEAN G.)

COX, Trustees of the)

LESLIE WILCOX FAMILY TRUST,)

Defendants and Respondents.)

Case No. 19342

REPLY BRIEF

STATEMENT OF FACTS

Appellants deposited \$7,500 with Steven R. Carter, the broker. Mr. Carter subsequently issued a check for \$7,500 out of his brokerage account to Stephen Gubler. These funds were used as part of the downpayment in purchase of the subject real property. Mr. Carter's testimony indicates that the \$7,500 was the Appellants' money. Stephen Gubler's testimony indicates that the \$7,500 was a commission due and owing to him. The trial court found and held that the \$7,500 was in fact the Appellants and that the Respondents should return that money to the Appellants. The Respondents argue on Appeal that said Finding of the court should be reversed.

ARGUMENT

The court's finding that the \$7,500 paid by Carter to Gubler was the Appellants' money is supported in the record and should be upheld. Mr. Carter, the Appellant himself was best able to enlighten the court regarding the disposition of funds from his brokerage trust account. Since it was he who wrote the check and it was his account, Mr. Carter indicated that he released the \$7,500 of Mr. Adams' money upon the Adams' consent and that he gave it to Stephen L. Gubler. (See Trial Transcript (hereafter "T") Page 111, Line 25 through Page 113, Line 1 and Page 113, Lines 12 and 13; TT Page 114, Lines 4 through 7; TT Page 122, Lines 22-25; TT Page 133, Lines 11-20). Mr. Carter's testimony was direct and to the point that the \$7,500 came out of his brokerage trust account and went to Mr. Gubler and that it was indeed the Adams' money which was transferred. Said money had not been transferred until Mr. Carter had contacted Mr. Adams and had received his authorization to release the funds. It is acknowledged that Mr. Stephen Gubler testified that he thought the funds were part of his commission. However, it is noted that Mr. Carter testified that to have paid Mr. Gubler a commission out of his brokerage trust account would have been illegal. (TT Page 114, Line 19, through Page 115, Line 2).

In regards to this Court's standard of review for factual issues determined by the trial court, it is undeniably held that the trial court's Findings of Fact will not be disturbed on appeal unless they are clearly erroneous and that as a matter of law no one could reasonably find as did the fact finder. Carnesecca v. Carnesecca, 572 P.2d 708 (Utah, 1977). This Court has consistently followed the standard of appellate review which precludes substitution of the Supreme Courts judgment for

that of the trial court on issues of fact, where the trial court's Findings and Judgment are based on substantial, competent and admissible evidence. Fisher v. Taylor, 572 P.2d 393 (Utah, 1977). See also Mal Taylor Associates v. Mal America, Inc., 657 P.2d 743 (Utah, 1982). The trial court in the instant matter was presented with substantial evidence which clearly and convincingly showed that the money which Respondent Stephen Gubler received was indeed the very money which the Appellants had tendered to Steven Carter.

The testimony regarding the origin of the subject \$7,500 was presented by two individuals, namely the Respondent Stephen Gubler and by the broker in this transaction, Steven M. Carter. The trial court Judge was in a position to observe firsthand, the demeanor of these two witnesses and to assess their credibility in regards to the truthfulness of the matters testified to. This Court cannot substitute its Judgment for that of the trial court regarding the facts testified to by these individuals. In DeBella v. Eugh, 660 P.2d 233 (Utah, 1983), the Utah Supreme Court stated:

The trial court heard the witnesses of both parties firsthand, evaluated detailed written audits by both sides, and concluded that plaintiff's evidence was not as convincing as defendant's evidence. On appeal we do not retry the facts and will not overturn the trial court's findings of fact if they are supported by substantial evidence.

See also Page v. Clark, 197 Colo. 306, 592 P.2d 101 (1979) in which the Colorado court addresses the fact that the trial court had the opportunity to observe the witnesses and determine their credibility first hand. Steven Carter undeniably testified that the \$7,500 given to Stephen Gubler was the Adams' original deposit. The Respondent Stephen Gubler

testified that Mr. Carter had told him that the \$7,500 was part of his commission. However, Mr. Carter testified that the \$7,500 was not for Mr. Gubler's commission nor was the check issued a commission check. (TT Page 234, Lines 14-16)

Respondents' counsel would have this Court find that Appellants and Steve Carter had an ongoing business relationship as partners and thus his testimony is unreliable. It is pointed out, that in the instant case all of the parties contemplated some sort of business relationship with each other. The relationship between Adams and Steve Carter was client to broker - the same as between the Gublers and Steve Carter. Actually, Stephen Gubler had further business relationships with Mr. Carter. Stephen Gubler was one of his salesmen and he also owned property with him. (TT Pages 138-139). Mr. Carter's testimony is not inherently unreliable because of his business associations with Mr. Adams. Mr. Adams' testimony hardly indicates that his business relationship with Mr. Carter was as his broker, and that he went to other brokers in the Washington County area to see what business investment opportunities existed. (TT Page 27, Lines 3-8). Mr. Carter testified, that on one other occasion he did own a joint interest in some property with Mr. Adams. (TT Page 119, Lines 10-13).

The evidence presented at trial does not prove any facts which would show that Mr. Carter was biased in any way for or against the Appellants or the Respondents. The trial court's assessment of these facts and these witnesses should not be disturbed.

CONCLUSION

The issue before the trial court regarding the \$7,500 which was tendered by Steven R. Carter to the Respondent Stephen L. Gubler was purely an issue of fact. The trial court determined from the testimony presented that that \$7,500 had come from Steven R. Carter's brokerage trust account and that it was in fact the original \$7,500 that appellants had tendered initially as a stock subscription in Greaseboat Vista, Inc., and overall as a deposit for their partial interest in the subject real property. These facts are well substantiated in the record. It is not in this Court's prerogative to set aside the trial court's findings regarding these facts in order to reach a different conclusion.

The trial court's findings and conclusion in regards to the \$7,500 which was tendered by Mr. Carter to the Respondent Stephen Gubler should be affirmed.

RESPECTFULLY SUBMITTED this 27th day of January, 1984.

Snow & Nuffer
A Professional Corporation

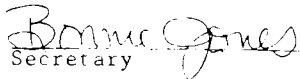
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MAILING CERTIFICATE

I hereby certify that on the 27th day of January, 1984, I served two copies of the foregoing REPLY BRIEF, on J. MacArthur Wright, by depositing a copy in the U.S. Mail, postage prepaid, addressed to:

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