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IN THE SUPREME COURT OF THE STATE OF UTAH

RUSSELL ACTON, ANDREW ACTON and CAROL E. ACTON,	
Plaintiffs-Appellants,	Case No. 19300 Case No. 19327 Case No. 19367
vs.	
J. B. DELIRAN, a Utah corporation; GERALD HOUSE; ERA REALTY CENTER; DARYL YATES and MARYDON YATES, husband and wife,	
Defendants-Respondents, ad Cross-Appellants.	

BRIEF OF RESPONDENTS AND CROSS-APPELLANTS J. B. DELIRAN AND JERALD HOUSE TO THE BRIEF OF ERA REALTY CENTER, TO PLAINTIFFS' BRIEF, AND REPLY BRIEF TO PLAINTIFFS' RESPONSE BRIEF

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STATEMENT OF THE NATURE OF THE CASE

In all of the briefs that have been filed, a great deal has been said about the nature of this particular case. Factually, it is a result of a jury trial that as far as the jury, the plaintiff was not happy with, as far as the actions of the trial judge after the jury decision, neither defendant is happy with. As far as respondents House and Deliran are concerned, how far can a trial judge go in mutilating a jury verdict? What is the condition concerning attorney fees bearing in mind that the trial judge told the jury that he would determine the attorney fees? As a matter of law, he refused to allow the attorney fee question to go to the jury.

NATURE OF THE RELIEF SOUGHT

Defendants, appellants, and respondents Deliran and House desire the jury verdict to be reimposed and the attorney fee provisions of the contract enforced.

STATEMENT OF FACTS

At this point, the undersigned doubts if anyone clearly understands the facts in this case. They have been mutilated and turned to the point that no one knows what happened.

It is the position of the defendants, appellants and respondents Deliran and House that Deliran sold a piece of property and wants the contract enforced. All items that have been discussed were disclosed to the purchasers Acton before the closing. They bought, knowing there were questions of access, knowing that there was no water, and as happens with many little boys, after they find out that these things still are not in existence, go crying to their mother and this action has been brought. They made a contract acknowleding complete disclosure; they signed a contract that said this is the entire contract, and now they and the trial judge want to change it. They have asked for recision and are still asking for recision and apparently expect to keep, a long with the recision, the judgment of the trial judge for failure to provide access which was disclosed before closing, and which is a matter of practical expediency. Bearing in mind that the questionable access is under a surfaced county road, it can never be taken away from the

respects to parallel [illegible] the trial judge's predictions and fears and desires to do what the jury would not do.

ARGUMENT

POINT I

THE JURY VERDICT IS CORRECT AND SHOULD BE ENFORCED

The primary case is an action brought by Actons to set aside and rescind a purchase contract. At no time have they asked for any other relief; at not time have they made an attempt to amend their pleadings or have they made a request to amend their pleadings. The Money Receipt and Offer to Purchase has been set forth in detail and is a part of Actons' responding brief and included therein as Exhibit "1". Actons' pleadings pertain to a water question, as to whether or not there was water and whether or not there was a disclosure of the fact that there was not water by anybody, and whether or not at the time of closing and paying the money in August, the plaintiffs knew they had no water. The question of access was not made into any pleadings and did not come to light until the time of trial. There has been no request to amend the pleadings. In many ways this is a most interesting case because after a three-day jury trial, the jury in substance and effect said that the contract is fine, enforce it. From the standpoint of Deliran and House, the trouble arises thereafter. It has been reported and the trial judge has privately admitted it, there is no record to the effect that immediately after the jury verdict and after the discharge of the jury, in the lavatory of the

courthouse, in front of a witness, the trial judge made a statement that he thought the jury was wrong and that they should not have found as they did. In addition, privately, the trial judge has affirmed this statement in other places. This brings us to the question of what we do about setting aside a jury verdict that the trial judge believe is wrong. The transcript reveals that immediately after the trial, the plaintiffs' attorney asked for authority to file a motion for judgment notwithstanding the verdict and was granted 10 days and did file such a motion. This was denied by the trial judge. Apparently, the trial judge did not have courage enough, even though he thought the jury was wrong, to set aside their verdict and squarely face up to the question but has attempted to do the same by supplementary judgments not justified under the pleadings and the facts. This brings us to the question: Can the Supreme Court of the State of Utah at this time rescind the contract that has been affirmed by a jury and affirmed by the trial judge as a matter of record and the refusal of the trial judge to grant a motion to set aside a jury verdict and to give a judgment notwithstanding the verdict? In this instance, the jury was the finder of facts. The trial judge affirmed as a matter of record the findings of facts although he has many times made statements that he did not agree with the jury which are not of record. Any item of record simply shows the trial judge affirming the jury verdict. What is the authority of the Supreme Court to rescind and set aside the jury verdict under these conditions?

Many cases that have been decided by the Supreme Court of the State of Utah, are to the effect that when the finder of fact has found something and there is evidence to justify it, the court will not set it aside. In this particular instance, not only is the finder of fact the jury but it has been affirmed as a matter of record by the trial judge. Can the Supreme Court set it aside and rescind? If the Supreme Court does so, they will be going against all the pronoucements they have made over many years.

This brings us to the question: Is there evidence to justify it? Two places where the evidence to justify the trial court decision and the jury decision not to set aside because Actons had actual knowledge of the water and access situation are found in the record, with the testimony of three different witnesses or more. Mrs. Acton was aware of the no access problem and so were her sons; these are found in the written disclosure, Exhibit "6" dated the 1st day of August, 1981; this is the report of the surveyor hired by the Actons. They had knowledge that Wayne Smith had told her son and her son had told her of no access; this is found in the transcript of Mrs. Acton's testimony on page 332, line 3 through line 24; this talks about arrangements and if people are going to do this and this and this and this at the same time the contract, which is Exhibit "1" to Actons second filing in the Supreme Court contains a statement that it is the entire contract and that there is nothing that is not set forth therein. The testimony of Wayne Smith, page 472,

says that he cut off the water before the [illegible] as well as making the disclosure. This is shown in the transcript on page 472, beginning with line 1 and continuing to line 7. On page 474, line 3 to line 17, on the 1st day of August, Mr. Wayne Smith stated that he told Russell Acton that they had no water and that he owned the land out in front, under the road, and that he was not going to let them cross it. This is reiterated in Wayne Smith's testimony on page 476, beginning with line 4 through line 9 under cross-examination by Actons' attorney. This was confirmed by Mr. Grimshaw, Actons' surveyor, in his testimony on page 487, from line 15 through line 20, where it is stated that Mr. Grimshaw heard Mr. Smith tell Actons that they had neither water nor access. These items were acknowledged by Russell Acton to Mrs. Nacy Hale, page 440 of the transcript, beginning line 1, specifically line 16 to 18, at which time Mr. Russell Acton acknowledged that he knew there was no water but that he did not know how much he was going to cost to get it there.

Under these conditions, there can be no question but that there was satisfactory evidence for the jury to make a finding that these items were known and that Actons accepted them when they closed the matter. This brings us to the question if the Supreme Court wants to set this aside, do they have any authority to do so? The Supreme Court of the State of Utah, while it may endorse the action of Judge Bonnow, cannot, from a standpoint of practicality, continue to do this.

Pacific Reporter many times taken the attitude that the finders of fact, a jury or the court, if evidence on which they may make a decision should be enforced whether it is the jury or a judge. Under these conditions, where it is both, what can we do about it?

One of the more recent decisions of the Supreme Court of Utah on this point is not found in the Pacific Reporter inasmuch as it has not been published there yet but probably will be in the future. It is Supreme Court Number 17984, a decision filed the 23rd day of January, 1984, and while it should have been remanded, it has not, in the case of Auto West, Inc., et al. v. Richard Baggs. There in a question where a trial judge refused to grant a judgment either for or against either party and said that it was not res judicata, and in court refused to change this decision on the basis that it had been made by the finders of fact. Under these conditions, applying this to the case at bar, there is no way in the world that we can come up with any decision except that the jury and the trial judge should have their decision enforced and the contract should be enforced.

POINT II

ATTORNEY FEES SHOULD BE GRANTED TO J. B. DELIRAN AND JERALD HOUSE

Again we are doing nothing but reading the contract. In addition to the statement previously referred to, "it is understood and agreed that the terms written in this receipt

constitute the entire preliminary contract between the purchaser and the seller, and that no verbal statement by anyone relative to this transaction shall be conceived to be a part of this transaction unless it is incorporated in writing herein," and we apply that to this particular transaction, there was nothing else done as far as closing was concerned; all there was was a deed and payment. Under these conditions, this Earnest Money Receipt and Offer to Purchase is still standing and this provision applies. This is followed by another statement:

> "We do hereby agree to carry out and fulfill the terms and conditions specified above, and seller agrees to furnish good and marketable title with abstract brought up to date or at Seller's option a policy of title insurance in the name of the purchaser and to make final conveyance by warrant deed or warranty deed in the event of other than real property, seller will provide evidence of title or right to sell or lease. If either party fails so to do, he agrees to pay all expenses of enforcing this agreement, or of any right arising out of the breach thereof, including a reasonable attorney's fee."

Bearing in mind that we have a court action for rescision and ruled by a trial judge, regardless of whether he likes it or not, is not the defense of a rescision action a cost of enforcing the agreement when the jury says no rescision? There can only be one answer to this particular question, and all of the cases that are cited pertaining to people who do not get attorney's fees because they are not enforcing an agreement but are attempting to rescind it. It can only come to the conclusion that as far as Deliran and House are concerned, they were enforcing the agreement

so the are entitled to attorney fees. The trial court should have granted this based upon the exhibit that was put before the trial court, and at this time, the Supreme Court of the State of Utah should send it back to the trial court for a finding for attorney fees in favor of J. B. Deliran and Jerald House to include several thousand dollars in front of the Supreme Court of the State of Utah.

POINT III

THE ACTION OF THE TRIAL JUDGE IN FINDING THE COSTS FOR LACK OF ACCESS SHOULD BE SET ASIDE

There is no question that these items were known, that the jury determined this as one of the factors that they considered in whether or not the matter should be rescinded, and that there was a disclosure of this item and that whatever was done in closing the matter by Actons was with the specific information as to the question of access which frankly means nothing due to the fact that the easement is under a public road and certainly no one is going to take that public road out of existence based upon over ten years of use, and that under these conditions, this is a monstrosity that should be avoided.

CONCLUSION

The jury verdict and the trial judge's decision as far as the record is concerned should be enforced, and attorney fees to the contractor on the Earnest Money Receipt and Offer to Purchase should be granted, and the judgment

against House for failure to furnish [illegible] should be set aside.

DATED this 5 day of March, 1984.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I mailed two copies of the foregoing Brief to the following, postage prepaid:

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