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Grant Shaw and Ila Shaw, Husband and Wife v. Rue Abraham and Gloria Abraham, Husband and Wife, Mary J. Abraham, Ben Noyce and Gaddis Investment Company, A Utah Corporation and Mary J. Abraham v. Rue Abraham and Gloria Abraham, Husband and Wife, and Grant Shaw and Ila Shaw, Husband and Wife : Brief In Support of Plaintiffs and Respondents Petition For Rehearing

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In the Supreme Court of the State of Utah

GRANT SHAW and ILA SHAW,
husband and wife,

Plaintiffs and Respondents,

—vs.—

RUE ABRAHAM and GLORIA ABRAHAM, husband and wife, and
MARY J. ABRAHAM, BEN BOYCE
and GADDIS INVESTMENT COMPANY, a Utah corporation,

Defendants and Appellants,

AND

MARY J. ABRAHAM,

Plaintiff and Appellant,

—vs.—

RUE ABRAHAM and GLORIA ABRAHAM,

Defendants and Appellants,

AND

GRANT SHAW and ILA SHAW,

Defendants and Respondents.

No. 9421

BRIEF IN SUPPORT OF PLAINTIFFS AND
RESPONDENTS PETITION FOR REHEARING

BRIEF OF RESPONDENTS

The Opinion of the Court recites simply that there was a Judgment against Abraham based on fraud and against Gaddis for negligence in connection with the Real Estate deal, and then states "Reversed with costs to Defendant."

It is impossible for the plaintiffs to determine from the Court's Opinion, and from the discussion of the facts therein contained whether or not the Trial Court's Findings, Conclusions of Law and Decree, setting aside the Deed given by plaintiffs to Rue and Gloria Abraham to the home which plaintiffs owned in Sigurd, has been set aside and reversed, or just where the title to the plaintiffs' home is intended to remain.

The Court's Decision recites that there was placed on the home a \$5,850.00 mortgage in favor of Mary Abraham, the mother of Rue Abraham. No part of this money was used in the completion of the transaction between Abraham and Shaw, except \$100.00 Earnest Money advanced prior to December 22nd, the date of the Contract. It is clear and admitted by all parties that the \$5,850.00 mortgage given by Rue Abraham to Mary Abraham was given by him to secure Mary Abraham in the payment of an antecedent obligation owed to her by Rue Abraham.

The \$10,000.00 obtained from the sale of Shaw's water stock was paid to Shaw and was the only payment made by Abraham. He made no payments on the con-

tract, did not pay on the mortgage given his mother. She started foreclosure proceedings to foreclose the mortgage before plaintiffs filed their suit.

A recapitulation of the figures shows Abraham received title to the home and placed thereon the mortgage of \$5,850.00 in favor of Mary J. Abraham, without consideration.

Abraham received 65 shares of water stock which was sold for \$10,075.00 to the Vermillion Irrigation Company.

Shaw received \$10,000.00, part of the proceeds from the sale of his water stock, Title to a vacant property worth \$700.00 as security, and an Assignment to a Real Estate Contract worth \$700.00.

The total received by Shaw in cash and security is \$11,400.00.

If the Trial Court's judgment which returned Shaw's home property to him, and set aside the mortgage given by Rue and Gloria Abraham to Mary Abraham to secure an antecedent debt is reversed and declared to be null and void, Shaws would have transferred property of an agreed value of \$22,000.00 and receive for it the \$11,400.00 and land which on return has a value of \$1440.00.

LOSS SUSTAINED

Contract price	\$22,000.00
Less Cash and Land.....	\$12,840.00
	<hr/>
Loss to Shaws.....	\$ 9,160.00

The mortgage was given to secure the payment of an antecedent indebtedness to Mary Abraham. The law is clear on this matter that this is not a valid good consideration for the creation of an obligation. See *American Law Institute, Restatement of Law of Contracts*, Vol. 1, Sec. 76(c), Page 84.

It seems clear that this Court's decision fails to take into account the deed of plaintiff's home to Abraham, and the mortgage to his mother. It does not indicate whether or not this Court intends the title to the home to remain in Abraham.

The Court's failure to take into consideration the Mary Abraham mortgage to discuss it and to appreciate the significance of the existence of such mortgage on the equities of the parties, plaintiffs submit, demonstrates

that the Court has overlooked a most important aspect of the plaintiffs' case. The fact that a mortgage for \$5,850.00 was given by Rue and Gloria Abraham to Mary Abraham without any consideration is enough, plaintiffs submits, to support the trial Court's finding of fraud.

The loss suffered by plaintiffs would amount to the following — using Nielsen's Appraisal:

Farm and home	\$21,140.00
Less payment of.....	<u>10,000.00</u>
	\$11,140.00
Less land value returned.....	<u>\$ 1,140.00</u>
	\$ 9,700.00
Less Securities pledged	<u>1,400.00</u>
NET LOSS	\$ 8,300.00

Plaintiffs respectfully submit that this great loss could not have been appreciated and understood by the Court. These figures are significant in two ways:

(1) They demonstrate the inequitable results which the Supreme Court's Decision will cause; and

(2) They demonstrate a part of the conduct of Rue Abraham which, when added to the other activities which he engaged in would, it is respectfully submitted, add sufficient evidence of his fraudulent intent to support the Trial Court's Finding of Fact, paragraph 4, to the effect that at the time the Uniform Real Estate Contract was signed defendant, Rue Abraham, had no intention of performing and paying the agreed price for the premises of plaintiffs. In effect, this Finding is that the Uniform Real Estate Contract and the other documents which par-

ties executed, were themselves fraudulent tools and the manner in which Abraham obtained the disproportionate and inequitable advantage over the plaintiffs.

It seems to plaintiffs inconceivable that the Court would desire defendant Abraham to retain title to plaintiff's home without payment of an equitable consideration for it. Yet, such will be the end result if the Court Decision reverses the Trial Court Judgment setting aside the Deed to Rue and Gloria Abraham and holds the mortgage to Mary Abraham to be a valid and existing obligation, encumbering the title to the home.

CONCLUSION

It is respectfully submitted that the Decision of this Court demonstrates that a most important and significant part of the evidence, Findings of Fact, Conclusions of Law and Decree have been overlooked by the Court and have not been considered or appreciated.

A Rehearing is, therefore, requested and appears to be necessary.

Respectfully submitted,

DWIGHT L. KING

*Attorney for Plaintiffs and
Respondents.*