

1993

N. H. Hansen v. Wayne Parker : Reply Brief

Utah Court of Appeals

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Robert W. Hughes.

Frederick N. Green; Julie V. Lund; Green and Berry; Attorneys for Plaintiff.

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UTAH COURT OF APPEALS
BRIEF

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GREEN & BERRY
FREDERICK N. GREEN (1240)
JULIE V. LUND (4875)
Attorneys for Defendant
622 Newhouse Building
10 Exchange Place
Salt Lake City, Utah 84111
Telephone: (801) 363-5650

DOCKET NO. 930451

IN THE UTAH COURT OF APPEALS

N. H. HANSEN,
Plaintiff/Respondent,
vs.

REPLY BRIEF

Docket No. 930138

930451-CA

WAYNE PARKER,
Defendant/Appellant.

Appeal from the Third Judicial District Court,
Salt Lake County, Judge Timothy R. Hansen

Argument Priority Classification 15

FREDERICK N. GREEN
JULIE V. LUND
GREEN & BERRY
Attorneys for Plaintiff
10 Exchange Place
622 Newhouse Building
Salt Lake City, Utah 84111
Telephone: (801) 363-5650

ROBERT W. HUGHES
7050 South Union Park Avenue, #420
Midvale, Utah 84047

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Mary T. Noonan
Mary T. Noonan
Clerk of the Court

GREEN & BERRY
FREDERICK N. GREEN (1240)
JULIE V. LUND (4875)
Attorneys for Defendant
622 Newhouse Building
10 Exchange Place
Salt Lake City, Utah 84111
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FREDERICK N. GREEN
JULIE V. LUND
GREEN & BERRY
Attorneys for Plaintiff
10 Exchange Place
622 Newhouse Building
Salt Lake City, Utah 84111
Telephone: (801) 363-5650

ROBERT W. HUGHES
7050 South Union Park Avenue, #420
Midvale, Utah 84047

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GREEN & BERRY
FREDERICK N. GREEN (1240)
JULIE V. LUND (4875)
Attorneys for Defendant
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10 Exchange Place
Salt Lake City, Utah 84111
Telephone: (801) 363-5650

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DETERMINATIVE LAWS OR STATUTES

Rule 8, Utah Rules of Civil Procedure.

ARGUMENT

PARKER HAS NOT WAIVED THE AFFIRMATIVE DEFENSE OF FRAUD.

Shortly after signing the Promissory Note which is being sued upon in this case, Parker learned that the vehicle he had purchased from Hansen was not in the condition that had been represented. He made some repairs, Hansen paid for some repairs and he learned a valuable and expensive lesson. At some point he made the decision not to compound his losses with the expense of litigation. Instead, he sold the vehicle and paid to Hansen the value of the vehicle.

Over two years later, Hansen decided to sue Parker on the Note. Parker responded by alleging that there was fraud and misrepresentation involved in the circumstances which led up to his

execution of the Note. He was legally entitled to raise the issues surrounding the consideration given for the note as they are relevant to question of non-payment.

Hansen now seeks to penalize Parker for his failure to initiate his own litigation for fraud. Hansen argues that Parker's failure to file a lawsuit constitutes a waiver of his right to assert fraud as an affirmative defense to this action.

An affirmative defense is considered waived if it is not asserted in an Answer or other responsive pleading. Rule 8, Utah Rules of Civil Procedure. In this case, Parker raised the defense of fraud in his Answer which was timely filed. There is no statutory or case law supporting the Plaintiff's position that a failure to sue for fraud results in a waiver of that argument as an affirmative defense.

Hansen relies on several cases which state that an affirmation of a contract predicated on fraud constitutes a waiver of any claim of fraud. These cases all involve a Complaint for fraud, not fraud as asserted as a defense. Bezner v. Continental Dry Cleaners, 548 P.2d 898 (Utah 1976); Burke Aviation Corp v. Alton Jennings Co., 377 P.2d 578 (Okla. 1963). There is a big difference between asserting a claim for fraud in connection with a contract which you are seeking to avoid and raising the issue of fraud as an affirmative defense to explain some degree of non-performance.

Parker was the victim of a fraud. He lost money and was angry but he chose to pay the Plaintiff the value of the vehicle and get on with his business. Adoption of the Plaintiff's argument that

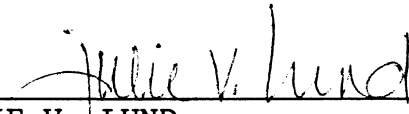
Parker has waived his right to assert and prove fraud in his defense of this action would be contrary to law and equity.

CONCLUSION

Appellant Wayne Parker asks that this Court reverse the District Court order granting summary judgment to Hansen and remand this matter for a determination of the factual issues surrounding the sale of this vehicle to Mr. Parker.

DATED this 22 day of September, 1993.

GREEN & BERRY



JULIE V. LUND
Attorney for Defendant

CERTIFICATE OF MAILING

STATE OF UTAH)
 :ss
COUNTY OF SALT LAKE)

I, JULIE V. LUND, certify that on September 22, 1993 I served four copies of the attached REPLY BRIEF upon Robert W. Hughes, the counsel for the Appellee in this matter, by mailing it to him by first class mail with sufficient postage prepaid to the following address:

Robert W. Hughes, Esq.
Attorney for Plaintiff
7050 South Union Park Avenue #420
P.O. Box 57005
Salt Lake City, Utah 84157-005

