

1994

Gary Goldberg and Diana Meehan v. Jay Timmons and Associates : Reply Brief

Utah Court of Appeals

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GARY GOLDBERG and DIANA
MEEHAN,

V.

Defendants-Appellants.

Priority No. 15

Appeal From A Final Judgment Of
The Third District Court Of Summit County
Judge David S. Young

Attorneys for Plaintiffs-Appellees

Attorneys for Defendants-Appellants

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DETERMINATIVE LEGAL PROVISIONS

The following legal provisions are determinative and are set forth verbatim in the Addendum to the Brief of Appellants:

Utah Constitution Art. I, § 10;
Utah Code Ann. §§ 78-21-1 and -2;
Utah Rules of Civil Procedure 38 and 39.

(Add. 20-25.)

COMMENT ON APPELLEES' STATEMENT OF FACTS

Approximately three pages of Appellees' brief is dedicated to summarizing the trial court's determination of facts. As expected, Appellees describe the trial court's determination in a way that favors their defense to this appeal. To characterize the trial court's findings of fact, as opposed to the jury's findings of fact, as the "facts" of this case is misleading and begs the question presented by this case; namely, from a procedural and constitutional point of view, whose determination of facts should control, the jury's or the trial court's. For this reason, Appellants object to any consideration given to Appellees' statement of fact relating to the alleged violation of the CC&Rs.

In addition, Appellants object to Appellees' statement of fact because Appellees' summary of the trial court's findings of fact is completely irrelevant to the procedural issue presented by this Appeal. The relevant facts are completely, yet concisely, stated

as follows: (1) before trial both parties formally requested a trial by jury on all issues (R. 232-241, 415-417, 553-554, 901-902), (2) this case was tried in its entirety before a jury (R. 1226), (3) at the close of evidence, Appellees did not make a motion for a directed verdict and thereby acknowledged that there was sufficient evidence to require that the case be submitted to the jury, (4) the jury was instructed on the law and, in particular, they were directed to find whether a breach of the CC&Rs had occurred and whether damages should be awarded (R. 1152-1189), (5) based on the evidence presented at trial, the jury concluded that Appellees had failed to prove, by a preponderance of the evidence, that Appellants' residence violated the Evergreen CC&Rs (R. 1226), (6) it was not until after the jury rendered its verdict that Appellees asked the court for the first time to treat the jury as advisory and disregard the jury's verdict (R. 1258-1286), and (7) upon Appellees' request, the trial court entered findings of fact that were inconsistent with the jury's verdict (R. 1486-1487).

Appellants likewise object to the self-serving and misleading color photograph of Appellants' residence which is reproduced at page 6 of Appellee's Brief. The primary objection to this photograph is that it is evidence. Appellees are apparently trying to retry this case at the appellate level. The sufficiency of the evidence to support the jury's verdict or the trial court's findings is not at issue in this appeal. To refer to the evidence presented at trial is therefore inappropriate.

Moreover, to refer to this particular photograph in a statement of "facts" is especially misleading. It is common knowledge that photographs can distort reality through carefully selected perspectives and by narrowing the scope of focus. However, rather than being lured into responding to Appellees' photographic distraction with an equally irrelevant essay on how photographs are not appropriate indicators of fact, it seems sufficient to respond with the fact that the jury traveled as a group to the premises in question as part of the presentation of evidence at trial, and after so doing, found that Appellants' residence did not violate the CC&Rs. The jury's finding was not based upon one carefully selected photograph but instead after having personally viewed Appellants' residence and Appellees' residence in complete panoramic context (R. 1128).

ARGUMENT

POINT I: *ROMRELL V. ZIONS FIRST NATIONAL BANK* IS INAPPLICABLE BECAUSE THE PARTIES IN *ROMRELL* STIPULATED THAT THE CASE PROCEED ONLY AS AN EQUITY CASE WHILE THE CASE AT HAND ALWAYS REMAINED A MIXED CASE OF EQUITY AND LAW.

Appellees Gary Goldberg and Diana Meehan ("Goldberg and Meehan") argue that *Romrell v. Zions First National Bank, N.A.*, 611 P.2d 392 (Utah 1980), is a controlling precedent in this appeal. The facts of the case at hand, however, are

markedly different from the facts in *Romrell* and, more importantly, the issues presented in the present case are completely different from the issues addressed in *Romrell*. *Romrell* is therefore inapplicable to the present case.

In *Romrell*, the plaintiff sought specific performance of a contract to sell real estate and, alternatively, damages for breach of contract and fraud. *Id.* at 393. "The parties stipulated in a pretrial order that should plaintiff be found entitled to specific performance, her other claims for relief would be dismissed as moot." *Id.* at 393-94. At the conclusion of trial, "[t]he jury was instructed that if they found an oral contract for the conveyance of the land in question, the contract could be enforced if there was sufficient part performance on the part of plaintiff or if defendants had acted in such a manner as to be estopped from asserting the statute of frauds." *Id.* at 395. The case was submitted to the jury on a general verdict. The jury's general verdict was as follows:

We, the jury empaneled in this action, hereby find the issues in favor of the plaintiff and against the defendants and find that the plaintiff is entitled to an order directing defendants to convey to plaintiff the property in dispute.

DATED this 19th day of October, 1978.

John W. Peterson
Foreman

Id. at 394.

It is clear that *Romrell* was properly treated as an equity case. This is because the parties' stipulated that it proceed as an equity case first and then, if equitable relief were denied, that it proceed second as a case at law. In effect, by so stipulating, the parties in *Romrell* waived their constitutional right to have the legal issues decided first by the jury.

In the case at hand, the parties did not stipulate to the equity case being decided first. Instead, the parties proposed jury instructions on the issues of whether the CC&Rs had been violated and whether damages should be awarded; in other words, on the legal issues of the case. The trial court so instructed the jury and the jury rendered a special verdict finding there was no violation of the CC&Rs. Because the jury found there was no violation of the CC&Rs, the jury never reached the question of damages.

Another important distinction between *Romrell* and the case at hand is that the jury's verdict was followed in *Romrell* and the jury's verdict was rejected in the present case. The issue of whether or not a trial court can reject a jury's findings and enter its own inconsistent findings of fact in a mixed case of equity and law was not even addressed by *Romrell*.

Yet another very important distinction between *Romrell* and the case at hand is that *Romrell* was decided before *International Harvester Credit Corp. v. Pioneer Tractor*

and Implement, Inc., 626 P.2d 418 (Utah 1981), and *Zions First Nat'l Bank v. Rocky Mountain Irrigation, Inc.*, 795 P.2d 658 (Utah 1990). *International Harvester* recognized for the first time in the State of Utah that Utah Const. Art. I, § 10 guarantees a right to a jury trial in civil cases. *Zions*, decided nine years after *International Harvester*, expands the ruling in *International Harvester* to require that "when legal and equitable issues turn on the same operative facts, a jury must decide the legal issue first; the jury's factual determination binds the trial court in its determination of the parallel equitable issue." *Zions*, 795 P.2d at 662. The implication of *International Harvester* and *Zions* on the case at hand are discussed in Point II of this brief. Also discussed in Point II is a discussion of how Goldberg and Meehan's proposed interpretation of *Romrell* is inconsistent with *International Harvester* and *Zions*.

In conclusion, because of the dramatic factual and procedural differences between *Romrell* and the case at hand and because of the evolution of case law after *Romrell*, the *Romrell* case has no application to the issues presented in this appeal.

POINT II: GOLDBERG AND MEEHAN'S INTERPRETATION OF *ROMRELL* WOULD MAKE *ROMRELL* INCONSISTENT WITH *INTERNATIONAL HARVESTER* AND *ZIONS* AND GOLDBERG AND MEEHAN'S PROPOSED APPLICATION OF *ROMRELL* TO THE PRESENT CASE WOULD VIOLATE TIMMONS' CONSTITUTIONALLY PROTECTED RIGHT TO A JURY TRIAL OF THE LEGAL ISSUES.

Goldberg and Meehan assert that under *Romrell*, whenever an equitable remedy is sought as an alternative to a legal remedy, the trial court can simply disregard a jury's findings of fact on the legal issues and enter its own inconsistent findings of fact to support whatever equitable relief the court deems appropriate. Such an interpretation, however, is totally inconsistent with the *International Harvester* and *Zions* decisions. In *International Harvester*, as stated above, the Utah Supreme Court addressed for the first time whether Art. I, § 10 of the Utah Constitution guarantees a right to a jury trial in civil cases. *Id.* at 419. The plaintiff in *International Harvester* had brought a claim for amounts due under a contract. The defendants requested a trial by jury and the plaintiffs responded by arguing that the defendants had no constitutional or statutory right to a trial by jury. The trial court granted plaintiff's motion to strike the jury trial demand. On appeal, however, the Utah Supreme Court remanded for a trial by jury, holding "that the right of jury trial in civil cases is guaranteed by Art. I, § 10 of the Utah Constitution." *Id.* at 421.

Plaintiff apparently argued on appeal in *International Harvester* that the proceeding was equitable and therefore not triable to a jury. The Supreme Court rejected this argument, however, finding that the action "concerned only money damages" and "was clearly a law action." Nevertheless, the Supreme Court went on to state that even if the claim for damages was only incidental to a claim for equitable relief, "a jury trial should be accorded the parties on the issues of fact raised in a legal cause of action when legal relief is sought in conjunction with equitable relief." *Id.* at 421.

In deciding *International Harvester*, the Utah Supreme Court looked to the United States Supreme Court's decisions in *Dairy Queen, Inc. v. Wood*, 369 U.S. 469 (1962), and *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500 (1959), which considered the issue of a right to a jury trial in a civil action in light of the United States Constitution's guarantee of the right to trial by jury on legal issues, 626 P.2d at 421 n.2. In *Beacon*, the United States Supreme Court granted *certiorari* because "[m]aintenance of the jury as a fact finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care." *Beacon*, 359 U.S. at 501. The plaintiff in *Beacon* asked for an order enjoining defendant from violating antitrust laws and also claimed treble damages as a result of past violations. The *Beacon* case, therefore, is

factually similar to the case at hand; both cases involve claims for injunctive relief and for damages resulting from alleged historical violations of applicable rules. The United States Supreme Court noted in *Beacon* that the constitutional protection of the right to a trial by jury with respect to legal claims would in effect be violated in cases that involved a concurrent claim for equitable relief if the trial court were allowed to decide the equitable issue first and then rely upon its own findings of fact, rather than the jury's, to dismiss the legal action. *Id.* at 509-11.

In *Dairy Queen*, the plaintiff likewise sought both equitable and legal relief. The United States Supreme Court in *Dairy Queen* noted that under the federal rules allowing consolidation of equitable and legal claims,

attempts were made indirectly to undercut [the constitutional right to a jury trial in civil actions] by having federal courts in which cases involving both legal and equitable claims were filed decide the equitable claim first. The result of this procedure in those cases in which it was followed was that any issue common to both the legal and equitable claims was finally determined by the Court and the parties seeking trial by jury on the legal claim was deprived of that right as to these common issues.

392 U.S. at 472. The Court thus decided in *Dairy Queen* as follows:

We conclude therefore that the district judge erred in refusing to grant petitioner's demand for a trial by jury on the factual issues related to the question of whether there has been a breach of contract. Since these issues are common with those upon which respondent's claim to

equitable relief is based, the legal claims involved in the action must be determined prior to any final court determination of respondent's equitable claims.

Dairy Queen, 369 U.S. at 479.

Before moving on, it should be noted that the *International Harvester* case was decided nine months after the *Romrell* case. In the Court's instruction in *International Harvester* on how trial courts should proceed in cases involving both equitable and legal claims, the *Romrell* decision is not mentioned once. Instead, the Court refers back to the earlier decisions of *Dugan v. Jones*, 615 P.2d 1239 (Utah 1980), and *Valley Mortuary v. Fairbanks*, 225 P.2d 739 (Utah 1950), as controlling. This is further evidence that the *Romrell* decision was not intended to be a ruling on the issues presented by this appeal.

The rule of law in *International Harvester* was further clarified nine years later in *Zions*. The plaintiff in *Zions* filed suit "to enforce notes, take possession of collateral under security agreements, and to foreclose mortgages." *Id.* at 660. The defendant asserted the affirmative defense that the notes had been materially and fraudulently altered. *Id.* Prior to trial, the trial court ruled that the issue of whether the notes had been altered was for the court to determine. *Id.* at 661. The Utah Supreme Court ruled that the trial court committed reversible error in reserving this factual

determination to itself. *Id.* at 662-63. The rationale of the Court in *Zions* was as follows:

In *International Harvester*, we noted that our analysis was in harmony with that of the United States Supreme Court on the issue of the right to a jury trial in civil cases when equitable issues are also involved. *International Harvester*, 626 P.2d at 421 n.2. In the federal courts, there is no question that when legal and equitable issues turn on the same operative facts, a jury must decide the legal issue first; the jury's factual determination binds the trial court in its determination of the parallel equitable issue. [Citations omitted.] We approve of this procedure.

. . .

The trial court should have allowed the jury to decide the material, fraudulent alteration issue, and as to the two notes creating the line of credit, the Court should not have ruled on enforcement, the right to collateral, or foreclosure until it had the jury's verdict. *It should then have deferred to that verdict in making its rulings.*

Id. (emphasis added).

The *Zions* decision was decided 10 years after the *Romrell* decision. Once again, it is interesting to note that the *Romrell* decision is not once cited in the *Zions* decision, suggesting that *Romrell* was never intended to be a ruling on the issues presented by this appeal.

The trial judge in this case committed error in concluding that this case is an equity case as opposed to a mixed case containing equitable claims and legal claims.

Legal counsel for Goldberg and Meehan assert that *Valley Mortuary, International Harvester* and *Zions* are not controlling of this appeal because Goldberg and Meehan's legal claim for damages was intended to be as an alternative to the equitable relief sought when, on the other hand, *Valley Mortuary, International Harvester* and *Zions* involved legal claims that were asserted in addition to the equitable claims. This distinction made by opposing counsel is one without any relevant meaning in relation to this appeal and is certainly not a distinction that was made by the court in *Romrell*. Regardless of whether the legal claim is asserted as an alternative to the equitable claim or in addition to the equitable claim, the fact remains that when a legal claim is being submitted for decision, the Utah Constitution protects a party's right to a trial by jury not only on the legal claim but also on the underlying factual questions presented by such claim; that is, unless the parties waive this protection, as was the case in *Romrell*.

As the *Dugan*, *Valley Mortuary, International Harvester*, and *Zions* cases hold, the constitutional right to a trial by jury in civil cases must be protected even in cases where the legal claim is incidental to an equitable claim. The only feasible way of protecting that right is to require that the jury not only decide the legal claim but also that the jury determine the factual questions underlying the legal claim. If the jury's determination on questions of fact has bearing upon the equitable claim, the jury's

finding of fact is binding and the court must defer to that finding in deciding the equitable claim.

Although not expressly stated in any of the cases cited above, the policy reasons are clear for applying the jury's factual determinations not only to the legal issues but also to the Court's determination of the equitable claims. If a trial court were allowed to justify its ruling on an equitable issue by entering findings of fact that are inconsistent with a jury's previous findings on a legal issue, it would no doubt cause both the court and the jury to be reduced in stature in the perception of both the public and participants in legal proceedings. It is quite troubling to believe that two inconsistent versions of the facts could be established as true for their different purposes; the jury's version being applicable to the legal issues and the judge's version being applicable to the equitable issues. For example, if the trial court's findings of fact and order were allowed to stand in the case at hand, there would be two inconsistent findings of fact; namely, (1) the jury's finding that Timmons *did not* violate the CC&Rs for purposes of Goldberg and Meehan's legal claim for monetary damages and (2) the trial court's inconsistent finding that there *was* a violation of the CC&Rs for purposes of Goldberg and Meehan's claims for injunctive relief. The natural inclination is to wonder who was right, the jury panel or the judge. Inevitably, either

the ruling of the jury or the ruling of the trial court would be criticized as being based upon the "corrupt" set of facts as opposed to the "true" set of facts.

Moreover, if this Court were to uphold the trial court's ruling, it could lead to abuse. In cases where a claimant wants a trial by the court rather than a trial by jury, the claimant could start asserting alternative equitable claims in every possible case so as to undermine the adverse parties' constitutional right to a trial by jury on the legal issues.

In conclusion, the trial court committed error by disregarding the jury's findings of fact and entering its own inconsistent findings of fact. In so doing, the trial court not only deprived Timmons of his constitutional right to trial by jury of the legal issues and underlying facts, it also failed to follow the procedure adopted in *Zions*; namely, it failed to follow the jury's findings of fact on the legal issue in its "determination of the parallel equitable issue." *Zions*, 795 P.2d at 602.

POINT III: THE PARTIES DID NOT CONSENT TO THE JURY ACTING AS AN ADVISORY JURY.

Goldberg and Meehan assert that Timmons consented to the jury acting as an advisory jury when the following dialogue with the court occurred following the jury returning its special verdict:

The jury returned their verdict and were discharged.

THE COURT: All right, Gentlemen, Mr. Winterholler, would you please prepare an Order/Judgment of the court consistent with this jury's verdict.

MR. WINTERHOLLER: I will, Your Honor.

THE COURT: And then is there anything further that this court needs to do about this case?

MR. WINTERHOLLER: You need to determine whether or not you independently wish to award Injunctive Relief and also you need to address the issue of the appropriateness of the ammount [sic] of fees.

THE COURT: How did you wish to handle that? Why don't you, unless you really want oral argument; why [sic] don't you submit a memorandum and let the court decide at that point whether I desire some oral argument on that? And that would be the issue of attornie's [sic] fees and submit an affidavit together with your argument, that you're entitled to it. And then any opposition to that, and also your position with regard to Injunctive Relief?

MR. STRACHAN: Very well.

MR. WINTERHOLLER: We'll do that.

THE COURT: And in the court's findings the court would need to make and how you want to handle that. Would you please prepare a submission to the court within the next ten days.

MR. WINTERHOLLER: Yes.

THE COURT: All right. And then give you five days thereafter in which to respond.

MR. STRACHAN: That would be fine.

THE COURT: All right. That will be the Order. The court will be in recess.

(R. 1786-88).

Taken in context, it is clear that rather than expressing consent to the jury being treated as an advisory jury, legal counsel for Timmons was merely following the procedure clearly established in *Zions*. In essence, Timmons' legal counsel was stating that the trial court still needed to make a determination, *albeit merely as a formality*, on the equitable issue even though the legal issue had been decided by the jury and the factual determination of the jury in reaching the legal conclusion was, in effect, determinative of the equitable claim.

As the Utah Supreme Court stated in *Zions*:

[W]hen legal and equitable issues turn on the same operative facts, a jury must decide the legal issue first; the

jury's factual determination binds the trial court in its determination of the parallel equitable issue.

Following the procedure in *Zions*, Timmons' legal counsel was merely requesting that the trial court also order that Goldberg and Meehan's equitable claim for injunctive relief be denied based upon the jury's findings of fact that the CC&Rs had not been violated.

Rather than showing that the parties consented to the jury acting in an advisory capacity, the above dialogue between the trial judge and the parties' legal counsel, taken in context, instead shows that the trial court and legal counsel viewed the jury's verdict as binding. Once the jury verdict was read, the trial judge asked Timmons' legal counsel to "prepare an Order/Judgment of the court *consistent* with this jury's verdict." (emphasis added). The trial judge then asks if there is anything further that the court needs to do about the case. Clearly, if the trial judge had already decided that the jury was acting in an advisory capacity, he would *know* that he still had to decide whether to accept or reject the jury's verdict.

In addition, if Goldberg and Meehan's legal counsel had already decided prior to the jury verdict that they wanted the jury treated as an advisory jury, they surely would have said something when the jury's verdict went against them. Instead, there is no mention by anybody about the jury being "advisory." The record indicates that the

concept of the jury being treated as "advisory" was an afterthought by Goldberg and Meehan and it was not presented to the trial court until well after the jury had rendered its verdict.

CONCLUSION

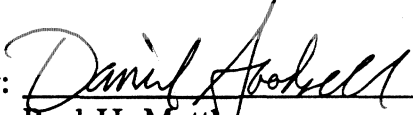
Goldberg and Meehan's legal claim for monetary damages was properly submitted to the jury. In fact, Timmons had a constitutional right to have Goldberg and Meehan's legal claim for damages decided by a jury. Under *Zions, International Harvester, Dugan* and *Valley Mortuary*, Timmons also has a right to have the jury's determination of facts also be binding on the court's ruling on Goldberg and Meehan's equitable claim. Because the jury found no breach of the CC&Rs, Goldberg and Meehan clearly are not entitled to any equitable relief. As a result, this case should be remanded with the instructions that the judgment on the jury verdict be entered and that Goldberg and Meehan's equitable claim be denied based upon the jury's findings of fact and also with the instruction that Timmons is the prevailing party in this action

and that attorneys' fees should be awarded upon presentation of the proof of the same to the trial court.

DATED this 1st day of November, 1994.

Respectfully submitted,

KIRTON & McCONKIE

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CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of November, 1994, two true and correct copies of the foregoing REPLY BRIEF OF APPELLANTS was mailed by United States mail, postage prepaid, to the following:

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