

1995

# Chan v. NG : Reply to Response to Petition for Rehearing

Utah Court of Appeals

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**IN THE UTAH COURT OF APPEALS**  
**UTAH COURT OF APPEALS**  
**BRIEF**

SHUI KWONG CHAN and )  
 GRACE CHAN, )  
 )  
 Plaintiffs and Appellees, )  
 )  
 vs. )  
 )  
 EDDIE NG, GRACE SCOTT, )  
 individuals, and )  
 THE PEARL RESTAURANT, INC.)  
 a Utah corporation, )  
 )  
 Defendants and Appellants. )

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 DOCKET NO. 950206CA

Case No. 950206-CA

Priority 15

**APPELLEES' REPLY RE: PETITION FOR REHEARING**

From Decision of Court of Appeals reversing and  
 remanding a portion of a judgment of the Third District Court,  
 Pat B. Brian, District Court Judge, Presiding

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FILED

APR - 9 1996

COURT OF APPEALS

**IN THE UTAH COURT OF APPEALS**

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SHUI KWONG CHAN and )  
GRACE CHAN, )

Plaintiffs and Appellees, )

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## **TABLE OF AUTHORITIES**

No authorities contained in this brief.

This reply is made to defendants' response (dated April 4, 1996) regarding plaintiffs' petition for rehearing.

**I.**

**ARGUMENT**

1. The items of benefit upon which the trial court failed to make findings were stipulated to, and defendants have shown nothing to the contrary. The plaintiffs rely upon the discussion of the applicable law set forth in their initial petition for rehearing. Defendants do not quarrel with the general proposition that a trial court's failure to make findings on uncontroverted facts is harmless error.

This reply is made mainly to point out what plaintiffs believe are inaccurate references to the record contained in defendants' response.

A. The \$28,487.69 loan payment to Zions Bank. All of the documents supporting the fact that this payment was made from the plaintiffs funds were stipulated to at trial. (R.510, 950; Trial Exhibits 20 and 49). That defendants benefitted from the payment to Zions was stipulated to. (R.901, 902). The defendants themselves proposed findings of fact

recognizing and conceding that the \$28,487.69 had conferred a benefit upon them. (R.574, defendants' proposed Finding No. 11). At page 4 of their response, defendants argue that the account from which the payment was made "contained money deposited by both [plaintiffs and defendants]". Defendants cite to R.803 in support of this statement. That reference is to the deposition testimony of Eddie Ng, which testimony was not repeated at trial. This deposition testimony ignores Finding of Fact No. 9 (R.580) that \$65,000.00 of plaintiffs' funds were deposited into this account in October and November, 1992, shortly before the payment was made to Zions on behalf of Grace Scott. Defendants then state that they included the statement that this loan payment conferred a benefit upon them in their proposed findings "only because corollary findings compensating defendants for their deposits to the account were also requested." (p. 5). Conveniently, defendants do not identify the "corollary findings", probably because there

were none. And probably because defendants' trial counsel<sup>1</sup> knew that the benefit and the source of the funds was not disputed at trial.

Defendants' arguments that the benefit conferred by the \$28,487.69 payment to Zions was disputed is not supported by anything in the trial record, ignores stipulations of the defendants, and is based upon defendants' hope that this Court will not check defendants' references to the record and see that the "facts" defendants rely upon do not exist.

B. The Equipment. Defendants contend that they offered evidence at trial to substantiate the claim that they received no benefit from any of the equipment listed in Item 6 of Exhibit 64. This statement is contrary to defendants' trial counsel's stipulation, R.902, 1. 18-20, that only some of the equipment was challenged. Again, defendants' references to the record (at p. 4 of their response) do not support their contention. R.575 is defendants' proposed Findings of Fact. Certainly this is not evidence. R.893-894 is plaintiffs' testimony showing that the equipment was purchased with Mr.

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<sup>1</sup> Defendants are represented on appeal by a different law firm than the one that tried the case.

Ng's knowledge and agreement. R.922-927 is plaintiffs' testimony again discussing the equipment that was purchased and brought to Salt Lake. R.1066 is the only testimony disputing any portion of the equipment listed in Item 6, Exhibit 64, and was brought to this Court's attention by the plaintiffs at page 6 of the Petition for Rehearing. This testimony challenges only the dim sum steam table, a \$4,152.00 portion of the \$27,114.00 benefit described in item 6, Exhibit 64. \$22,962.00 of the equipment listed in Item 6, Exhibit 64 was never challenged and was otherwise stipulated to (R.901, 902).

Defendants' arguments that these items of benefit, the \$28,487.69 Zions loan payment and the \$22,962.00 in equipment purchases, were disputed is wishful thinking, not supported by the record, contrary to stipulations made at trial, and certainly not supported by those pages in the record cited by the defendants in their response to the petition for rehearing.

The only items of benefit that the trial court did not make specific findings of fact on were those which were undisputed. The disputed items of benefit upon which specific findings were made total \$128,761.00 (Finding Nos. 11, 12, and 13, R.581). The stipulated to benefits upon which no

special findings were made total \$51,449.00, resulting in a total benefit of \$180,210.00, by anyone's reckoning "approximately \$180,000.00" as determined by the trial court (R.585, Conclusion of Law No. 2).<sup>2</sup>

Finally, defendants argue (p.5) that plaintiffs did not meet their burden of proving the value of the benefit conferred. This argument ignores the fact that the benefit was stipulated to by the defendants. (R.901, l. 15-13;R.902, l. 9-12; and R.902, l. 18-20). Certainly a stipulation that a benefit was conferred satisfies plaintiffs' evidentiary burden, and at a minimum, shifts the burden to disprove the stipulated facts onto the defendants.

### **CONCLUSION**

For the reasons set forth in the plaintiffs' Petition for Rehearing and herein, this Court should either:

1. Determine that the benefits conferred by the plaintiffs by making the Zions Bank payment (\$28,487.69) for Grace Chan's loan and the

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<sup>2</sup> Defendants assert at page 2 of their response that "even if these particular benefits had been conclusively proven at trial . . . the sum of their values does not equal the difference between the \$128,761 and the \$180,000." This statement is accurate. The totals miss by \$210.00.

equipment purchases (less the only disputed item - leaving \$22,962.00 undisputed), both of which were otherwise stipulated to, are clear, uncontroverted and capable of supporting only a finding in favor of the judgment, and, were properly included in the judgment, and reinstate the full amount of the trial court's judgment; or

2. Remand the case for further findings of fact on the Zions Bank payment and the equipment purchases described in Trial Exhibit 64.

For this Court to simply eliminate these undisputed benefits from plaintiffs' judgment is a great injustice.

DATED this 8 day of April, 1996.

  
\_\_\_\_\_  
Keith W. Meade  
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Attorney for Appellees/Plaintiffs

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that true and correct copies of the foregoing were mailed, postage fully prepaid, on the 8<sup>th</sup> day of April, 1996, to the following:

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