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IN THE SUPREME COURT OF THE STATE OF UTAH

CAROLYN E. THOMAS,
Plaintiff and Appellant,

vs.

MICHAEL CALDWELL and
STANLEY CALDWELL,
Defendants and Respondents.

Case No. 12570

BRIEF OF APPELLANT
In Support of Petition for Rehearing

Appeal from a Judgment of the Third Judicial District Court in and for Salt Lake County, Honorable Stewart M. Hansen, Judge.

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Clerk, Supreme Court, Utah

TABLE OF CONTENTS

TEXTS CITED

CASES CITED

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NATURE OF THE CASE

This is an action to recover possession of certain large vases and for punitive damages.

DISPOSITION IN LOWER COURT

The trial court found there was no confidential or fiduciary relationship, that there was no misrepresenta-

tion and that there was no fraud, and entered judgment that the vases be returned to the defendants and that the $1,400.00 deposited by the plaintiff with the clerk of the court on the commencement of her action be returned to the plaintiff.

DISPOSITION BY SUPREME COURT ON ORIGINAL HEARING

The Supreme Court affirmed the decision of the Trial Court.

RELIEF SOUGHT

The plaintiff seeks a rehearing by this court, a reconsideration of its decision and a reversal of the trial court's decision.

STATEMENT OF FACTS

The statement of facts as set out in the original brief of the plaintiff-appellant is herein adopted by reference with the expanded additional statements as set forth with citations to the record in the argument of the points herein.

POINT I

THE COURT ERRED IN UPHOLDING THE TRIAL COURT'S FINDING THAT THERE

WAS NO FIDUCIARY RELATIONSHIP ESTABLISHED BETWEEN THE PARTIES.

The court does not specify upon what grounds it sustains the trial court in its finding of no fiduciary relationship. It does not, in fact, specifically state there was no fiduciary relationship. But having mentioned the plaintiff's contention that a fiduciary relationship existed, it then stated "The record reveals that Mrs. Thomas owned a large number of antiques and was generally familiar with their value," thus implying a personal knowledge of the value of the vases.

It is true Mrs. Thomas owned a number of antiques, but that she was generally familiar with their value cannot in any way be supported by the evidence and the trial court made no such finding. In point of fact, Mrs. Thomas had inherited her antiques. Record Page 112. The two vases in question had been purchased by her grandfather in New York around the turn of the century and she had no knowledge of their original purchase price. Record Page 118. She had no prior appraisals on the two vases because she "didn't know of anyone who would be qualified to do so." Record Page 115.

The off-hand offer of Mr. Irvine cannot be construed as an appraisal in any sense of the word. It was an arms length offer. The fact that the offer was made cannot and did not give Mrs. Thomas any knowledge or understanding as to the value of the vase.

Mrs. Thomas testified she had been trying for the

last few years to find some way of putting a value on the two vases, as well as some other things. Record Pages 112 and 113. No place in the record does she express any knowledge as to the value of the vases in particular. The mere fact that she, as a person who had inherited a number of antiques, has wandered through an antique store in San Francisco, Record Page 116, cannot by any application or stretch of logic be held to support the proposition that she had a general knowledge of the value of her specific pieces.

Mrs. Thomas is bound by the record before the court but she has the benefit of that record as well and nowhere is there support for the court's statement that she "was generally familiar" with the value of her antiques.

Mrs. Thomas was disappointed in the value of the vases as stated by the defendants. She had not sold the cloisonne to Mr. Irvine because she did not know its value and had hoped it was worth more.

In her ignorance, she had turned to the defendants, friends of her children, who were extolling to her their expertise in the area of appraising. For the past few years, she had been looking for someone qualified to appraise her antiques and here, if she could believe them, were the men she had been looking for; and there was no reason not to believe them. Even if there had been reason to doubt, the defendants are surely estopped by all that is equitable from arguing that they should not have been believed. Their self-expressed credentials were

overwhelming: Stanley was an appraiser of antiques, Record Page 111 and 135; he was more than that, he was an expert antique appraiser, Record Page 111; he was a certified antique appraiser, Record Page 143; he was licensed as an appraiser, Record Page 143; he was a member of an antique appraisal society, Record Page 112; he had considerable experience in appraising antiques, Record Page 143; he was the only certified antique appraiser in the intermountain area. Record Page 136. All of the above and more were heaped upon the unsuspecting and trusting Mrs. Thomas to enduce her to permit them to assume with her a relationship of appraiser and client and then having won her confidence, they embarked upon the duties of that relationship. They appraised a number of pieces, including the two vases in question. Record Pages 114 and 137. They appraised the satsuma vase for $400.00, Record Page 113; and the cloisonne for $1,000.00, Record Pages 113 and 137; and assured Mrs. Thomas these were retail values, Record Page 113.

In consideration of their service, Mrs. Thomas gave the defendants a large gold frame and oil painting which they accepted. Record Pages 123 and 124.

Then, to enhance the decor of an anticipated shop, Record Pages 117 and 141 (although shortly after receiving the vases, they attempted to sell them) the defendants offered to buy the vases for the appraised value. Mrs. Thomas was concerned, and even after consulting with her two children, both of whom had been present

throughout all or part of the defendants' representations and likewise had no reason not to believe them, she said she would perhaps sell "if that is what they are worth . . ." "I will have to get all they are worth." Record Page 121. Since Stanley was a "qualified appraiser," Record Page 121, and had put that value on them and since he would use them to enhance the decor of his shop, Record Page 121, she agreed to sell the vases.

There is no evidence of any kind upon which the trial court or this court could rely to find the facts in any other manner. The defendants accepted the evidence as presented and did not enter any evidence to contradict, even so much as the crossing of a 't' or the dotting of an 'i'.

It is respectfully submitted the above facts meet the tests for a fiduciary relationship in Utah; Newell v. Halloran, 250 P. 986, 68 Utah, 407 (1926); Renshaw v. Tracy Loan & Trust Company, 49 P. 2d, 403, 87 Utah 364 (1935); Perry v. McConkie, 264 P. 2d 852, 1 Utah 2d 189 (1953); and the tests set out by other jurisdictions and the authorities; 37 Am Jur 2d Fraud and Deceit, Sec. 16, P. 40, and Sec. 165, P. 225; 56 A.L.R. P. 434.

The relationship is clear; the elements of fraud are present. The only other point of fact placed in question by the Court is the value of the vases.

POINT II

THE COURT ERRED IN HOLDING THE EVIDENCE "FAILS TO MEET THE TEST FOR DETERMINING *MARKET VALUE* OF THE PROPERTY . . ."

As authority for this holding, the court cites 12 A.L.R. 2d 903. That annotation, in its entirety, deals with "measure of damages for conversion or loss of, or damage to, personal property having *no market value*, not with determining market value of personal property. The court thus erred in applying a test for market value and in citing as authority for its holding, that the plaintiff had not established a market value, an annotation dealing with methods for establishing value of items having no market value.

Specifically, the evidence is clear that there is *No* market value for the pieces. The plaintiff's expert, Madill Sarkisian, could not find a recorded sale of vases of this size from the present to as far back as 1955. Record Page 91. In his two trips around the world, since being retained to establish the value of these vases, including extensive contacts and visits to the orient, the record reveals he was unable to find vases of this size and quality for sale anywhere. Record Pages 83 through 107 covering Mr. Sarkisian's entire testimony.

The facts of this case thus clearly fall under the heading of personal property having no market value. The problem then is: By what method do we establish the value of personal property having no market value.

12 A.L.R. 903 deals with measure of damages for conversion, or loss of, or damage to, such property. It is not specifically in point as to the purpose for establishing value but the method of establishing value is of direct concern. What then is the method? Sections 3, 4, 5, 7, and 9 of that annotation deal with specific methods accepted by the courts to one degree or another to determine value. Sections 1 and 2 are introductory and do not apply. Section 6 deals with repairing a damaged item and so does not apply. Section 8 deals with consequential damages; loss of profits and so does not apply. Section 10 deals with various inapplicable special cases. Each of the applicable sections will be reviewed in order.

Section 3: Actual value; Value to Owner.

The actual value is the point in question; if it were known, no additional testing would be required. But since the law suit has resolved to the issue of value and the method of determining value, the actual test value is of no use. The actual value is unknown.

The value to owner test does have some applicability here. The defendants, thinking themselves the owners, placed a value of $30,000.00 on the two pieces. Whether this establishes actual value or not, it does establish that the defendants thought them to be worth a great deal more than $1,400.00, and based upon the defendant, Stanley Caldwell's claimed qualifications, their thoughts as to value are certainly probative. Certainly, in dealing with rare art objects of this nature, Mrs. Thomas should not, in equity, be held to fail if she estab-

lished the vases were worth more than the amount for which they were appraised and purchased, on the ground she cannot establish an exact dollar value for the vases.

Section 4: Original Cost.

It has already been stated Mrs. Thomas did not know the original cost, Supra Page 3. This method of proof is, therefore, not available to her.

Section 5: Reproduction or Replacement Cost.

Part of the value of an antique or ancient piece of art work is its age. There is built into the two vases in question a factor affecting value which cannot be duplicated or reproduced. Thus, even if a similar piece could be made today and there is no evidence that it could be, it would have less value because it does not represent a period of art development and has not survived the years. It would in no sense of the word, be a museum piece. Thus, Section 5 cannot provide Mrs. Thomas with an adequate method of proof of value.

Section 7: Sentimental Value or Fanciful Value.

There has been no effort on the part of Mrs. Thomas to establish a sentimental or fanciful value. She has attempted only to establish their actual value.

Section 9: Estimate of Value; Opinion Evidence.

The owners estimate of value appears, to a degree, a duplication of Section 3. But there is a distinction between "value to the owner" and "estimate of value by the owner."

Mrs. Thomas made no estimate of the value of the vases. She indicated clearly she did not know their value and asked the defendants to appraise them for her. The defendants, on the other hand, while thinking themselves the owners, must surely have estimated the value of the vases to be in the area of their asking price of $30,000.00. To conclude otherwise would suggest the possibility that they intended to sell the vases for more than they thought them to be worth.

There is a suggestion in the court's opinion that the off-hand offer of Mr. Irvine was an opinion of value. Nothing could be more foreign to logic. If the fact of that offer has any probative value at all, it must be that the vase was valued by Mr. Irvine in excess of that amount, since he would be expected to anticipate a profit. Further, there was nothing in the evidence to qualify Mr. Irvine as an expert other than that he was a local antique dealer.

Another local dealer, in whose shop the defendants had placed the vases for display and through whom they had offered the vases for sale, stated the vases were "extremely valuable pieces" and that the one vase (without specifying which one) was "worth at least $10,000.00." Record Page 148. These statements were made by Mr. Dewey Moore under the stress of nervous excitement brought on by the entry of the deputy sheriff into his place of business and the physical removal of the vases. They were made to Sheriff Larsen by telephone, in the presence of the witness, John Thomas, and permitted

into evidence by the court as an exception to the hearsay rule. Mr. Moore was at the time an agent for the defendants in attempting to sell the vases and was acting under the stress of nervous excitement brought on by the replevin.

But Mr. Moore's qualifications as an expert are likewise and admittedly sketchy in the evidence. He is identified merely as a local dealer in whose store the vases were placed for display and sale.

Locally, then, we have the defendants offering the vases for sale at $30,000.00, and Mr. Moore, in a moment of stress, apprising Sheriff Larsen that they are "extremely valuable pieces" and one is "worth at least $10,000.00." Both indicate the vases to be worth substantially more than the $1,400.00, at which the defendants appraised them before offering to buy at the appraised value on the same day and before they had left the home.

This was not the only evidence of value, however, and certainly not the most impressive, although the original brief on appeal obviously failed to impress upon the court the eminent qualifications of Mr. Madill Sarkisian and the extent and depth of his study before expressing an opinion as to the value of the vases.

Mr. Sarkisian is in the business of fine arts, mainly the oriental arts. He imports from all over the world. He has worked in his business now for forty-two years. He has done a great deal of research in oriental art and was curator of the museum in Denver when the oriental art collection was founded there. He has been extensively

interested in Chinese and Japanese art and studied both Chinese and Japanese art in Japan prior to World War II. He is presently engaged in research on certain aspects of oriental art in connection with one of the universities in Great Britain. He makes an annual trip around the world buying and trying to stay abreast of museum acquisitions throughout Europe and to determine what is available in the area of fine arts, and recently returned from such a trip which had lasted for four and one half months. He is fluent in Chinese and reads and writes Japanese and Chinese, as a matter of interest, he also speaks Russian, German and French as well as English. Record Pages 83 and 84.

Mr. Sarkisian's testimony demonstrated acutely detailed knowledge of the art forms of the two vases, their history, and of the elements which contribute to the value of such pieces. Record Pages 87 through 92.

In addition to his knowledge and expertise in the area, Mr. Sarkisian undertook an exhaustive research and investigation to assist him in arriving at his opinion as to value.

First: He came to Salt Lake from Denver and personally examined the vases. Record Pages 87 and 100.

Second: He caused his staff to study the old catalogues of art sales, and the reports of the international art market; plus a review of sales at the Denver Public Library back to 1955 and found no mention of similar pieces being sold. Record Page 91.

Third: He made comparisons with other vases in museums. Record Page 90.

Fourth: He made two trips around the world between the date he was first retained to appraise the vases and the date of his testimony in the trial of the matter. Record Page 91.

Mr. Sarkisian's credentials and his methods of informing himself as to these two vases are not only impressive but eminently impressive and what is more, are wholly and completely uncontroverted.

The court in its opinion notes that Mr. Sarkisian "based his estimate of value on the prices of Chinese vases produced at a different period of time and which he stated to be of a lesser value than the Japanese vases we are concerned with." To imply that his opinion as to value was based solely on these Chinese vases would be to ignore his testimony and his eminent stature as a expert in the field. Even so, Mr. Sarkisian stated of you were to buy one of the Chinese pieces he found in Hong Kong and bring it to the States, you could not "ask less than $15,000.00 or $16,000.00 for it," and "it should be up around $20,000.00. . . ." But he didn't think he could get a buyer for $20,000.00, Record Page 95. Again, as the court points out, in its opinion, the vases with which we are dealing, particularly the cloisonne, are of greater value than the vases in Hong Kong.

The court appears to discount the value of the cloisonne vase here in question on the grounds that it has

been damaged and would cost at least $2,300.00 to restore. Mr. Sarkisian testified, however, that the damage would reduce its value only if there were other vases like it. He stated, "If it is the only example and one of the very few examples you have to accept it on the basis it is damaged . . ." In all his travels and searching, Mr. Sarkisian had not seen nor found another vase similar to this particular vase in an undamaged condition although he had seen a much smaller vase which was undamaged at the Victoria and Albert Museum. Record Page 96. Thus, the damage would not affect the value of the piece, and the piece in question, in spite of its damage, would, in Mr. Sarkisian's opinion, be considered a museum piece. Record Page 97.

Mr. Sarkisian did not rely merely on his credentials as an expert but conducted an elaborate investigation and laid an extensive foundation for his opinion as to the value of the two vases. Based on his knowledge of the art forms, their rarity, their age, the quality of workmanship, his personal examination of the pieces, his research, his personal search for similar pieces both in the market and in museums, and by comparing with the five Chinese pieces he was able to find, although the pieces here involved, in particular the cloisonne, were superior in quality and workmanship and so would be worth more according to his expert testimony, taking into account the costs of transportation, packing, overhead, risk and other factors which would affect the value of the Chinese pieces if they were to be shipped to this country and placed for sale, together with current economic condi-

tions, taking into account the damage to the cloisonne (the satsuma was not damaged) and the attempted repair (not restoration) and calling upon his peculiar educations and forty-two years of experience, Mr. Sarkisian formed an opinion as to the value of the two vases. When asked what that opinion was, he said the cloisonne "has to be worth over $15,000.00 today," and that the retail value of the satsuma "would not exceed $2,000.00."

The defendants did not enter any evidence of any kind to refute Mr. Sarkisian's qualifications, his methods, or his opinion as to value. It is respectfully submitted that Mrs. Thomas could not have done more, nor could she have obtained the services of a more competent expert. The rules of law set forth in the annotations appearing in 12 A.L.R. 2d 903 have been as carefully and completely met and satisfied as it is humanly possible to do. To require more would be to require an absolute where no absolute exists and would destroy all stability in the law and abandon all justice in equity. The tests of the law were met. The combined value of the vases was at least $17,000.00.

POINT III

THE COURT ERRED IN ITS APPLICATION OF THE RULE THAT THEY WERE OBLIGED TO REVIEW THE EVIDENCE IN A LIGHT MOST FAVORABLE TO THE FINDINGS OF THE COURT BELOW AND TO SUSTAIN ITS JUDGMENT IF POSSIBLE.

There is no question but that the above rule has been frequently reiterated by this court as for example in the case of Jardine v. Brunswick Corporation, 18 Utah 2d 378, 423 P. 2d 659 (1967). The rule must, however, receive its application separately in each given case based on its particular facts and if applied arbitrarily would become a tool by which the court could ignore its duty to correct error and to cure injustice. Our court system has evolved from the concept of law for the sake of law to the concept of law for the sake of equity, and where there is equity, the rules of law have adjusted to effect justice. We have now reached a plateau in our legal evolvement where it can truly be said not that where there is law there is justice, but rather where there is justice, there is law.

The responsibility of this court is not to sustain judgments but to sustain law and equity. The rule espoused, in strict application, ignores that responsibility and ignores also another duty of the court which is, in cases of equity to review both law and the facts, and to consider the weight and sufficiency of the evidence. This, too, is a well established rule as set out by this court. Richins v. Struhs, 412, P. 2d 314, 17, Utah 2d 356 (1966). The two rules appear to be in direct conflict but there are qualifications and considerations which do and ought to reconcile the two apparently opposing thoughts.

The rule establishing the duty to review law and facts and to consider the weight and sufficiency of the evidence is by internal qualification applied only to cases

of equity and the court has consistently held that the trial court, with its advantaged position, must be given due respect and consideration, Petty v. Clark, 192 P. 2d 589, 113 Utah 205 (1948).

The more strict rule, that the court is obliged to sustain the judgment of the trial court if possible, developed generally within cases at law, Charlton v. Hackett, 360 P. 2d 176, 11 Utah 2d 389 (1961); Cheney v. Rucker, 381 P. 2d 86, 14 Utah 2d 205 (1963). There has admittedly been some overlapping in the wording of the rules which has led to an occasional misapplication or to misstatement of the rule within particular cases but in general, the distinction prevails and must prevail.

Since we are dealing here with a case in equity, the court has the duty as well as the prerogative to review both law and the facts and to consider the weight and sufficiency of the evidence.

The only justification, stated repeatedly by this court, for applying the qualifying rule that the evidence must preponderate against the findings and judgment of the trial court to support reversal even in cases of equity, is the trial court's advantaged position. The cases making reference to this consideration have become too numerous to require citation. When, however, as here there is no dispute in the evidence, the advantages "referred to are not of any great importance." Richins v. Struhs, Supra Page 16.

Thus, the court should have applied, not the rule that they were obliged to uphold the judgment if pos-

sible, but the rule that they have a duty to review the facts as well as the law and to weigh and determine the sufficiency of the evidence, and in the present case, to do so without the restrictions of the rule of preponderance, leaving the court free and indeed duty bound to make its own judgments and evaluations based on the evidence and the uncontroverted testimony of Mrs. Thomas and her witnesses.

POINT IV

THE COURT ERRED IN APPLYING THE TEST OF "CLEAR AND CONVINCING EVIDENCE" IN A CASE FOR EQUITABLE RESCISSION BASED ON MISTAKE INDUCED BY THE DEFENDANTS.

It is the position of the plaintiff that the burden as to the issue of fraud has been sustained. Particularly would this be so in light of the considerations set fourth in points I, II, and III above.

In addition to her action in fraud, however, Mrs. Thomas also sought rescission on the ground of mistake induced by the defendants' representations and accordingly tendered to the court the $1,400.00 received from the defendants as consideration for the vases. In such cases, less stringent rules of burden of proof apply.

In the present case, the evidence clearly preponderates in favor of the tests for rescission as established by this court and supported by the authorities. Smith v.

Columbus Buggy Company et al., 123 P. 580, 40 Utah 580 (1912); Ogden Valley Trout and Resort Company v. Lewis, 125 P. 687, 41 Utah 138 (1912); Herrington v. Hodges, 197 P. 1035, 58 Utah 254 (1921); Guaranty Mortgage Company v. Ellison, 239 P. 29, 66 Utah 1 (1925); 37 Am Jur 2d Fraud and Deceit, Sec. 221 at Page 294; 56 A.L.R. at Page 434.

CONCLUSION

There was in point of fact a fiduciary relationship between the parties. Since the evidence as to value is not conflicting as to the point that the vases were at least worth many times what the defendants represented them to be worth, there was in fact a misrepresentation of the value of the vases.

This court is not obliged to search out ways and arguments on which it can sustain the trial court's judgment but rather in the circumstances has a duty to make its own evaluation of the evidence. The evidence clearly and convincingly sustains Mrs. Thomas' allegations of fraud.

Even, however, if this court cannot, on its own evaluation of the evidence conclude the evidence is clear and convincing on the issue of fraud, there is still uncontroverted evidence of the mistake as to value on the part of Mrs. Thomas which was induced by the defendants and she is thus entitled to a rescission of the contract. In this regard, she has deposited the $1,400.00 with the court

and the defendants will be placed in a status quo. They will, thus, come out uninjured whereas if they are permitted to retain the vases, they will be unjustly enriched by their own misrepresentations. Only a rescission can be sustained in justice. Mrs. Thomas is entitled to that at least.

Respectfully submitted,

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