

1995

Jack Perry v. Verl A. Jensen, Margene H. Jensen, C and A Construction, Inc., Eric Orton : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

BUCKET NO. 950813-CA

JACK PERRY,

Plaintiff/Appellee,

vs.

VERL A. JENSEN, MARGENE H.
JENSEN, C & A CONSTRUCTION,
INC. and ERIC ORTON,

Defendants/Appellants.

Case No. 95-0813 CA

Argument Priority No. 15

REPLY BRIEF OF APPELLANTS

APPEAL FROM THE JUDGMENT AGAINST THE DEFENDANTS BY
THE FOURTH JUDICIAL DISTRICT COURT OF UTAH COUNTY,
STATE OF UTAH, THE HONORABLE RAY M. HARDING, SR.

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COURT OF APPEALS

IN THE UTAH COURT OF APPEALS

JACK PERRY,

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OF UTAH, THE HONORABLE RAY M. HARDING, SR.

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ARGUMENT

POINT I.

THE APPELLEE’S “MARSHALING” ARGUMENT MISSES THE POINT ENTIRELY

Mr. Perry argues in the Brief of Appellee that the Jensens failed to marshall the evidence. However, it is abundantly clear from the argument that the point on which Perry claims that the evidence should be marshaled is not at all the point that the Jensens wish to make in this appeal.

The entire thrust of Perry’s argument is that the Jensens have not proved that *they themselves* relied upon the false statements of Mr. Perry and therefore fraud is not proven. However, Jensens do not make that claim. As will be shown below, the essence of the Jensen’s appeal is that Mr. Perry made false statements to third parties, intending to damage the Jensens, and that the Jensens were in fact damaged thereby.

All other elements of fraud are also met. Mr. Perry conceded that all other elements, aside from the reliance element, are supported by the Court’s findings and are supported by the record. (See Appellee’s Brief p. 29.)

The only evidence to which the marshaling argument would apply, in suggesting that all evidence both pro and con should be marshaled, would be any evidence relating to the Plaintiff's denial of having made false statements. The fact is, there simply is no such evidence in the record anywhere. The Plaintiff attempts to *justify* his deceit, but nowhere *denies* it. The Brief of Appellee fails to indicate any such evidence. There simply is no such evidence to be marshaled.

Mr. Perry proceeded to marshal evidence that the Jensens themselves did not rely upon the false statements, asserting that therefore the fraud is not proven.

The Jensens base this appeal on the fact that a *third party*, acting reasonably and in ignorance of the falsity of the misrepresentation, did in fact rely upon it, causing the Jensens' injury and damage.

The entire marshaling argument made by Mr. Perry can be thrown out as it is totally inapposite to the point made on appeal.

POINT II.

JUSTIFIABLE RELIANCE BY A THIRD PARTY, UNDER THE FACTS OF THIS CASE, SUPPORTS THE CLAIM OF FRAUD.

The Jensens counterclaimed against Mr. Perry based on the fact that, through Perry's misrepresentation and deceit, he obtained Quit Claim Deeds which clouded the Jensens' title forced them to defend their title in Court, and threatened them with the loss of their property. Mr. Perry's defense is that the statements were not made to the Jensens themselves but to other parties, and therefore the *Jensens* did not rely upon the false statements.

The Jensens assert in this appeal that, provided all other elements of fraud are present, the element of justifiable reliance is met when, as under the circumstances of this case, a third party is deceived and the third party acts reasonably and justifiably in reliance upon it to cause the damage to the injured party.

Although a case such as this, of blatant, scheming deceit, rarely reaches an Appellate Court, the principle of fraud based upon misrepresentation to third parties is not without precedent. According to *Ellis v. Hale*, 373 P.2d 382 (Utah, 1962), "[i]f a person fraudulently makes a misrepresentation of facts to another with the intent that it will be

transmitted to a third person, the latter may have a cause of action against the misrepresenter.” The logical and proper extension of this principle is that if a person fraudulently makes a misrepresentation of facts to another with the intent that a third person will be damaged, the latter has a cause of action against misrepresenter. This is more clearly explained in Section 533, Restatement of Torts, which reads as follows:

The maker of a fraudulent misrepresentation is subject to liability for pecuniary loss to another who acts in justifiable reliance upon it if the misrepresentation, although not made directly to the other, is made to a third person and the maker intends or has reason to expect that its terms will be repeated or its substance communicated to the other, and that it will influence his conduct in the transaction or type of transaction involved.

Cases illustrating this principle follow.

In *Handy v. Beck*, 581 P.2d 68, (Oregon 1978), a Domestic water well driller was sued for damages when oil placed on a road running in front of the property seeped into the well, damaging the plumbing in the house and making the well unusable. The Plaintiff was a subsequent purchaser of the property. The lower Court held that the Plaintiff was not entitled to recover because he failed to prove that a misrepresentation had been made “directly” to him, or that he had relied upon the Defendant’s

misrepresentation. On appeal, the Court held that the trial Court's requirement of proof that the Plaintiff had relied upon the misrepresentation conveyed to him was erroneous since, where the Defendant had both failed to make the required disclosure in the filing log with the State Engineer and had affirmatively concealed from the Plaintiff's predecessors in interest the fact that the well was not cased and sealed in compliance with State standards, thus creating a condition which injured the Plaintiff, the Plaintiff's right to recover against the Defendant for fraud was not dependent upon a misrepresentation being conveyed to him.

In a case involving an automobile title, *Varwig v. Anderson-Bethel Porsche/Audi, Inc.*, 141 Cal. Rptr. 539 (Cal. App. 1977), a Nevada dealer sold an automobile to a wholesaler which sold it to a California dealer. The Plaintiff purchased the automobile from the California dealer, and the Nevada dealer subsequently caused the car to be repossessed. The wholesale dealer argued that its representation was made only to the California dealer and hence was not actionable by the Plaintiff. The Plaintiff alleged that the wholesale dealer represented itself to be the owner of the automobile but knew that the representations were not true. The Plaintiff contended that the wholesale dealer's uncontradicted declaration

effectively removed any issue of direct representation to the Plaintiff since an actionable representation may be made directly as well as indirectly. The Court, citing the Restatement Second of Torts, noted that the maker of a fraudulent representation is subject to liability to another who acts in justifiable reliance on it if that misrepresentation, although not made directly to the other, is made to a third person and the maker intends, or has reason to suspect, that its terms will be repeated or its substance communicated to the other and that it will influence his conduct.

The Jensens ask this Court to extend that principle to a situation in which misrepresentation is made to a third party, and the third party justifiably acts upon the misrepresentation, to the damage of the Plaintiff.

In *Ostano Commerzanstalt v. Telewide Systems, Inc.*, 794 F.2d 763 (2nd Cir. 1986) a licensor of Movie Films misrepresented to its licensee that it had authority to license and distribute certain films. The licensee contracted with a sublicensee, who sued the licensor when the misrepresentation was discovered. The Court ruled that a fraudulent misrepresentation made with “notice in the circumstances of its making” that the person to whom it was made would communicate it to third party

subjects the person making the misrepresentation to liability to the third party.

In *Committee on Children's T.V. v. Gen. Foods*, 197 Cal. Rptr. 783 (Cal. 1983) a class action was brought charging Defendants with fraudulent, misleading and deceptive advertising in marketing of sugared breakfast cereals. In its defense to the fraud claim, the Defendant alleged the Complaint was deficient because it described the one group (the children) who received the misrepresentations and a different group (the parents) who purchase the product. The Court, in recognizing that Section 533 or the Restatement Second of Torts did not precisely cover the case presented (the Plaintiffs did not allege that the children repeated the representations to their parents but simply expressed their desire for the product), held that it should be sufficient that the Defendant makes misrepresentations to one group and then intending to influence the behavior of the ultimate purchaser and that he succeeds in his plan.

Although in a different context, the language of *Committee on Children's T.V.* applies directly to the facts of the present case.

In a similar case, *Michael v. Shiley, Inc.*, 46 F.3d 1316 (3rd Cir. 1995), the makers of a defective heart valve were sued by a patient in whom

the valve was implanted. The sources of the misrepresentation were letters written by the Defendant to doctors as well as advertisements and other promotional material. The Court concluded that the Defendant had ample reason to expect that the patients and eventual recipients of the defective valve implants would be affected by the information published and distributed to doctors. That, in fact, was the Defendant's intent. The Defendant had to anticipate that its letters and advertisements would lead doctors to recommend, and the patients to choose, the Defendant's valve. The fact that the Defendant initially made its representations to the doctors, rather than directly to the patients, does not undermine the claim of fraud.

In *Florida Rock & Tank Lines, Inc. v. Moore*, 365 S.E.2d 836 (Ga. 1988), a gas station owner promised the gasoline supplier that he would make payment for future deliveries of gasoline. The gasoline supplier, in reliance upon that representation, authorized the gasoline delivery company to make delivery of gasoline shipments. Upon the gas station owner's failure to pay, the delivery company reimbursed the gasoline supplier and sued the owner of the station. The Court held that the requirement of reliance is satisfied where A, having as his objective to defraud C, and knowing that C will rely upon B, fraudulent induces B to act in some

manner on which C relies and whereby A's purpose of defrauding C is accomplished. In this case, the Court did not require a showing of a representation made directly to the person who suffered damages from the fraud.

There are several automobile odometer roll-back cases in which the Court allowed recovery against the person that rolled back the odometer, despite the fact that there were intervening owners. See *Freeman v. Myers*, 774 S.W.2d 892 (MO. App. 1989) and *Pelster v. Ray*, 987 F.2d 514 (8th Cir. 1993). It is only one small step, which is supported in logic and in equity, to conclude that the reliance by a third party on a fraudulent statement, if justifiable, supports a cause of action by the person that is actually damaged by the fraud, particularly where the damage done was that damage precisely intended by the misrepresentor.

Mr. Perry does not assert that the third parties, in this case Judd and Judy Kemp and Barry Fillmore, did not rely upon the statements of Mr. Perry. They obviously did rely upon them, since they acted in signing the Quit Claim Deeds. Nor does Mr. Perry suggest that they were not justified in their reliance. In fact, as it turns out, the very party that the innocent

third parties were intending to aid turned out to be the party that they unwittingly injured because of Mr. Perry's misrepresentation.

The fact that the third parties were justified in their reliance is demonstrated by the following:

1. When Mr. Perry asked the Kemps to sign the Quit Claim Deed, he represented that the deed was requested to take care of a minor discrepancy about title to the property. (See Affidavit of Judd Kemp, Exhibit "R" to Jensens' Countermotion for Partial Summary Judgment.)

(For references to the record, see exhibits attached to Brief of Appellant.)

2. The meeting during which the Quit Claim Deed was obtained from the Kemps occurred late at night, and it was represented to them that there was some urgency about the matter that required it to be done that night. (See Exhibit "V" to Countermotion, Kemp Deposition p. 27.)

3. Mr. Perry represented that he was already the owner of the property in question. (See Trial Transcript pgs. 337 - 334; Countermotion Exhibit "R," Judd Kemp Affidavit; and Countermotion Exhibit "V," Kemp Deposition pgs. 26 - 31.)

4. Mr. Perry stated that he was attempting to clear up problems or difficulties to allow development of the corner property (the Jensens property) to go forward, and that he was attempting to rectify errors on documents that Kems had previously signed. (See Exhibit “V” to Countermotion, Kemp Deposition pg. 29.)

5. The Kems were not experts in legal descriptions (Judd Kemp Deposition p. 16, Exhibit “V” to Countermotion).

6. Furthermore, Mr. Perry misrepresented to Barry Fillmore that he was owner of the Jensen parcel and that he had purchased it. (Trial transcript pgs. 350 - 351; Barry Fillmore Affidavit Exhibit “S” to Countermotion; Fillmore Deposition pgs. 15 - 20, Exhibit “W” to Countermotion.)

7. Mr. Perry concealed from Mr. Fillmore that by obtaining the Quit Claim Deed he was attempting to obtain control over a 20-foot strip of Jensens’ property. (Trial Transcript p. 353)

There is no evidence in the record that suggests that either Kems or Mr. Fillmore suspected or should have suspected that Mr. Perry was deceitful or unreliable. Therefore, there is nothing to show that their

reliance upon Mr. Perry's representations was anything other than reasonable and justified.

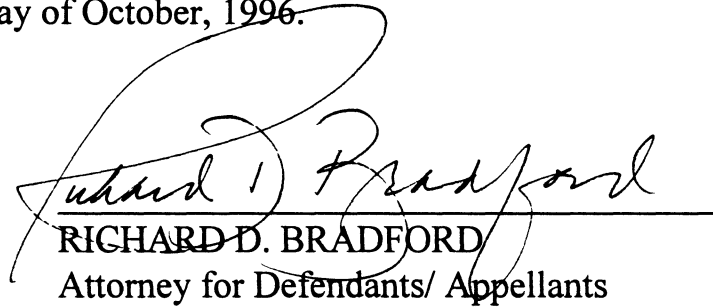
CONCLUSION

This Reply Brief addresses only new matters set forth in the Brief of Appellee. His "marshaling" argument does not apply. The marshaling argument argues that the Jensens should have marshaled the evidence on the issue of Jensens own reliance. That is not the issue. The Jensens are willing to rest their case on the principle that, provided all other elements of fraud exist, justifiable reliance upon a misrepresentation made to a third party, is actionable by another party who was injured. The fact of making a misrepresentation to someone other than the injured party, when the misrepresentation causes the intended damage, does not insulate the wrongdoer from liability to any degree.

Because all other elements of fraud are conceded, this Court should overrule the lower Court's findings No. 36, ("There is not evidence that Plaintiff made any fraudulent statements to Defendants or to anyone else") and No. 37 ("There is no evidence that Plaintiff engaged in fraudulent conduct toward Defendant or anyone else."), enter a finding that fraud was

committed, and remand the case back to the lower Court for entry of judgment for the full amount of the Jensens' damages.

DATED this 25 day of October, 1996.


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CERTIFICATE OF SERVICE

On this 25 day of October, 1996, two copies of the foregoing

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