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Exempt from fees pursuant to Government Code § 6103

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF FRESNO

SHERIFF CLAY PARKER, TEHAMA COUNTY SHERIFF; HERB BAUER SPORTING GOODS; CALIFORNIA RIFLE AND PISTOL ASSOCIATION; ABLE'S SPORTING, INC.; RTG SPORTING COLLECTIBLES, LLC; AND STEVEN STONECIPHER,

Plaintiffs and Petitioners,

v.

THE STATE OF CALIFORNIA; KAMALA D. HARRIS, IN HER OFFICIAL CAPACITY AS ATTORNEY GENERAL FOR THE STATE OF CALIFORNIA; THE CALIFORNIA DEPARTMENT OF JUSTICE, AND DOES 1-25,

Defendants and Respondents.

Case No. 10CECG02116

APPENDIX OF NON-CALIFORNIA AUTHORITIES IN SUPPORT OF THE STATE'S MOTION TO TAX COSTS

BY FAX

Date: May 3, 2011
Time: 3:30 p.m.
Dept: 402
Judge: Hon. Jeffrey Hamilton
Action Filed: June 17, 2010

Pursuant to California Rules of Court, rule 3.1113(i), defendants State of California, the California Department of Justice, and Attorney General Kamala D. Harris respectfully lodge with the Court copies of the non-California authorities cited in the State's Memorandum of Points and Authorities in Support of its Motion to Tax Costs.

Exhibit A: *Altsman v. Kelly, et al.* (Pa. 1939) 9 A.2d 423.

Exhibit B: *Hammons v. Table Mountain Ranches Owners Assoc.* (Wy. 2003) 72 P.3d 1153.

Dated: April 1, 2011

Respectfully Submitted,

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SA2010101624

EXHIBIT A

9 A.2d 423
336 Pa. 481, 9 A.2d 423
(Cite as: 336 Pa. 481, 9 A.2d 423)

C

Supreme Court of Pennsylvania.
ALTSMAN
v.
KELLY et al. (three cases).
Appeal of EXHIBITORS SERVICE CO.
Appeal of KELLY.

Nov. 27, 1939.

Appeals Nos. 253-255, March term, 1939, from judgment of Court of Common Pleas, Allegheny County, at No. 2898 April term, 1937; Thomas M. Marshall, Judge.

Three actions in trespass by Irene E. Altsman against Raymond P. Kelly and Exhibitors Service Company for injuries received by plaintiff when struck by truck driven by the defendant Raymond P. Kelly and owned by the corporate defendant. Judgment for plaintiff on a verdict for $16,000, and the defendants appeal.

Affirmed.

West Headnotes

[1] Automobiles 48A ⚖244(6)

48A Automobiles
48AV Injuries from Operation, or Use of Highway
48AV(B) Actions
48Ak241 Evidence
48Ak244 Weight and Sufficiency
48Ak244(2) Negligence
48Ak244(6) k. Injuries to Persons on Foot. Most Cited Cases

Automobiles 48A ⚖244(35)

48A Automobiles
48AV Injuries from Operation, or Use of Highway
48AV(B) Actions
48Ak241 Evidence
48Ak244 Weight and Sufficiency
48Ak244(35) k. Speed and Control. Most Cited Cases

Evidence justified judgment against truck owner and truck driver for injuries received by pedestrian when struck by truck at intersection on ground that truck driver crossed intersection at speed in excess of 30 miles an hour, went through red traffic signal, was driving to left of the regular traffic lane, failed to observe presence of pedestrian rightfully on crosswalk in time to avoid striking her, and swerved truck suddenly in her direction.

[2] Automobiles 48A ⚖160(3)

48A Automobiles
48AV Injuries from Operation, or Use of Highway
48AV(A) Nature and Grounds of Liability
48Ak160 Persons on Foot in General
48Ak160(3) k. Lights, Signals, and Lookouts. Most Cited Cases

Automobiles 48A ⚖168(6)

48A Automobiles
48AV Injuries from Operation, or Use of Highway
48AV(A) Nature and Grounds of Liability
48Ak168 Excessive Speed, Control, and Racing
48Ak168(6) k. Intersections and Crossings. Most Cited Cases

On approaching intersection, truck driver had duty to maintain high degree of vigilance to anticipate presence of pedestrians within intersection and to have truck under such control that he could stop at shortest possible notice or alter its direction in order to avoid striking persons committed to the crossing.

[3] Automobiles 48A ⚖160(4)

48A Automobiles
48AV Injuries from Operation, or Use of Highway
48AV(A) Nature and Grounds of Liability
48Ak160 Persons on Foot in General
48Ak160(4) k. Crossing Street or Way. Most Cited Cases

Automobiles 48A ⚿217(5)

48A Automobiles
48AV Injuries from Operation, or Use of Highway
48AV(A) Nature and Grounds of Liability
48Ak202 Contributory Negligence
48Ak217 Persons Crossing Highway
48Ak217(5) k. Duty to Stop, Look, and Listen. Most Cited Cases

A pedestrian crossing intersection with the green traffic light in his favor does not have an absolute right of way for the full distance of the crossing, and must continually be on guard for his safety.

[4] Automobiles 48A ⚿160(4)

48A Automobiles
48AV Injuries from Operation, or Use of Highway
48AV(A) Nature and Grounds of Liability
48Ak160 Persons on Foot in General
48Ak160(4) k. Crossing Street or Way. Most Cited Cases

A pedestrian crossing intersection in crosswalk with traffic light in her favor had superior right of way over truck approaching from her right where traffic light remained in favor of pedestrian until truck struck her.

[5] Automobiles 48A ⚿240(2)

48A Automobiles
48AV Injuries from Operation, or Use of Highway
48AV(B) Actions
48Ak236 Pleading
48Ak240 Issues, Proof, and Variance
48Ak240(2) k. Evidence Admissible Under Pleading. Most Cited Cases

In action for injuries received by pedestrian when struck by truck at intersection, admission of testimony with respect to truck driver's disregard of red traffic signal at intersection under general allegation of statement of claim was not error as against contention that charge of negligence should have been specifically pleaded, since evidence was relevant not only as to truck driver's negligence, but also with respect to question of contributory negligence.

[6] Automobiles 48A ⚿217(5)

48A Automobiles
48AV Injuries from Operation, or Use of Highway
48AV(A) Nature and Grounds of Liability
48Ak202 Contributory Negligence
48Ak217 Persons Crossing Highway
48Ak217(5) k. Duty to Stop, Look, and Listen. Most Cited Cases

Automobiles 48A ⚿245(72)

48A Automobiles
48AV Injuries from Operation, or Use of Highway
48AV(B) Actions
48Ak245 Questions for Jury
48Ak245(67) Contributory Negligence
48Ak245(72) k. Persons on Foot in General. Most Cited Cases

Although a pedestrian is required to exercise continued vigilance in crossing a street, he is not required to look constantly for approaching traffic, but just where he should look depends on shifting conditions and is fact question, especially where pedestrian is invited to cross by a favorable traffic signal.

[7] Automobiles 48A ⚿245(72)

48A Automobiles
48AV Injuries from Operation, or Use of High-

way
48AV(B) Actions
48Ak245 Questions for Jury
48Ak245(67) Contributory Negligence
48Ak245(72) k. Persons on Foot in General. Most Cited Cases

A pedestrian who entered crosswalk at intersection when traffic signal was in her favor was not negligent as matter of law in proceeding toward opposite corner after seeing approaching truck, since pedestrian had right to rely on assumption that truck driver would not ignore traffic signal or pedestrian's rightful presence on the crosswalk.

[8] Automobiles 48A ⚖245(6)

48A Automobiles
48AV Injuries from Operation, or Use of Highway
48AV(B) Actions
48Ak245 Questions for Jury
48Ak245(2) Care Required and Negligence
48Ak245(6) k. Persons on Foot. Most Cited Cases

Automobiles 48A ⚖245(72)

48A Automobiles
48AV Injuries from Operation, or Use of Highway
48AV(B) Actions
48Ak245 Questions for Jury
48Ak245(67) Contributory Negligence
48Ak245(72) k. Persons on Foot in General. Most Cited Cases

In action against truck driver and truck owner for injuries received by pedestrian when struck by truck at intersection which pedestrian entered after looking carefully in both directions and in reliance on favorable traffic signal, questions of truck driver's negligence and pedestrian's contributory negligence were for jury.

[9] Judgment 228 ⚖564(1)

228 Judgment
228XIII Merger and Bar of Causes of Action and Defenses
228XIII(A) Judgments Operative as Bar
228k564 Finality of Determination
228k564(1) k. In General. Most Cited Cases

By filing a motion to remove a nonsuit, the plaintiff submits the legal sufficiency of his case to the court in banc with the same effect as though the defendant had demurred to the evidence, and the determination of the motion is a "final judgment" and unless plaintiff appeals therefrom and secures its reversal the judgment is a bar to a second suit against the defendant on the same cause of action.

[10] Judgment 228 ⚖570(4)

228 Judgment
228XIII Merger and Bar of Causes of Action and Defenses
228XIII(A) Judgments Operative as Bar
228k570 Judgment on Discontinuance, Dismissal, or Nonsuit
228k570(4) k. Involuntary Dismissal or Nonsuit in General. Most Cited Cases

The effect of the withdrawal of a motion to remove a nonsuit was to place the record where it stood prior to the filing of the motion as though it had not been made and left on the record merely the entry of the nonsuit, the mere existence of which unaccompanied by refusal of the court in banc to take it off could not have the effect of "res judicata" as to a second suit.

[11] Judgment 228 ⚖570(4)

228 Judgment
228XIII Merger and Bar of Causes of Action and Defenses
228XIII(A) Judgments Operative as Bar
228k570 Judgment on Discontinuance, Dismissal, or Nonsuit
228k570(4) k. Involuntary Dismissal or Nonsuit in General. Most Cited Cases

The mere entry of a nonsuit does not bar the

right to bring a subsequent action.

[12] Judgment 228 ⚖570(4)

228 Judgment
228XIII Merger and Bar of Causes of Action and Defenses
228XIII(A) Judgments Operative as Bar
228k570 Judgment on Discontinuance, Dismissal, or Nonsuit
228k570(4) k. Involuntary Dismissal or Nonsuit in General. Most Cited Cases

In action for injuries, refusal to admit in evidence on issue of res judicata, record of prior action on same cause of action wherein trial judge entered compulsory nonsuit at conclusion of plaintiff's testimony and plaintiff filed motion to remove nonsuit which was argued before court in banc but, before decision was rendered, order granting leave to withdraw motion to remove nonsuit was granted, was not error.

[13] Evidence 157 ⚖207(1)

157 Evidence
157VII Admissions
157VII(A) Nature, Form, and Incidents in General
157k206 Judicial Admissions
157k207 In General
157k207(1) k. In General. Most Cited Cases

In action for injuries, record of prior action on same cause of action in which trial court entered compulsory nonsuit and plaintiff filed motion to remove nonsuit which motion was withdrawn by leave of court was properly rejected as an "admission," since discontinuance does not constitute either an adjudication of the party's right of action or an acknowledgment that the claim is not good in law.

[14] Pretrial Procedure 307A ⚖517.1

307A Pretrial Procedure
307AIII Dismissal
307AIII(A) Voluntary Dismissal
307Ak517 Effect
307Ak517.1 k. In General. Most Cited Cases
(Formerly 307Ak517, 128k42 Dismissal and Nonsuit)

In action for injuries, contention that order granting leave to withdraw and discontinue motion to take off nonsuit in prior action on same cause of action was invalid because it was granted by trial judge alone, was not available, since if defendants believed discontinuance to have been irregular they should have petitioned court in prior action to strike it off, and could not attack its validity collaterally in subsequent action.

[15] Appeal and Error 30 ⚖1069.3

30 Appeal and Error
30XVI Review
30XVI(J) Harmless Error
30XVI(J)19 Conduct and Deliberations of Jury
30k1069.3 k. Recalling Jury and Further Instructions. Most Cited Cases
(Formerly 30k1069(3))

In action for injuries, that additional instructions were given by trial court to jury at their written request in absence of counsel for parties was not harmful to defendant so as to warrant granting of new trial, where in open court and in presence of all parties and counsel trial judge again instructed jury in response to question which it had asked, and defendants were given full opportunity to suggest corrections.

482 **424** Argued before KEPHART, C. J., and SCHAFFER, MAXEY, LINN, STERN, and BARNES, JJ.483** E. O. Golden, of Kittanning, and A. E. Kountz and Kountz & Fry, all of Pittsburgh, for appellants.

Bloom & Bloom, of Washington, Arnold J. Lange, of Pittsburgh, and George I. Bloom, of Washington, for appellee.

BARNES, Justice.

On March 2, 1936, about eleven o'clock in the evening, plaintiff, while crossing the intersection of Fifth and Bellefield Avenues, in the City of Pittsburgh, was struck and severely injured by an automobile truck owned by the defendant company, and operated by its employee, the individual defendant. Fifth Avenue, a main thoroughfare for traffic, with double street car tracks thereon, runs approximately east and west at the place where the accident occurred, and is intersected diagonally by Bellefield Avenue, which extends generally north and south. The crosswalk for pedestrians from the southwest to the northwest corners of the intersection is upon an angle toward the east, and is 71 feet in length, although Fifth Avenue is only 48 feet from curb to curb. The double tracks, totaling 14 feet 4 inches in width, are 21 feet from the south curb, and approximately 13 feet from the north curb of Fifth Aven- ue.

The plaintiff testified that she had been a passenger on an eastbound Fifth Avenue trolley car, and had alighted ***484** therefrom when the car made its stop at Bellefield Avenue. She then walked to the southwest corner, where she waited until the trolley car passed, and the traffic light turned green for Bellefield Avenue. After looking to the left and observing that there was no oncoming traffic, she looked to her right or east, where she had a view for a distance of 320 feet to the point where Fifth Avenue curves toward the east, and there likewise the way was clear of vehicles. She started across the intersection to the northwest corner. As she neared the first rail of the trolley tracks, she looked again, ****425** and this time she noticed automobile headlights approaching from her right, about 300 feet distant. She continued to advance, directing her attention to the crosswalk upon which she was walking, which was rough and slippery from a recent rain, and at the same time watching for traffic upon Fifth Avenue.

She further testified that when she was between the second and third rails of the tracks she glanced again to the right and saw the defendant's truck bearing down upon her about 19 feet away, traveling west on Fifth Avenue. She thrust herself forward in an effort to escape injury, but the truck suddenly swerved and struck her with such force that she was hurled twenty feet from the place of impact. The truck was running upon the first or south rail of the tracks, over which plaintiff had just passed, and was, in consequence, upon the left or wrong side of Fifth Avenue, according to the direction in which it was proceeding.

Two disinterested witnesses corroborated plaintiff's testimony that the traffic light was green for Bellefield Avenue, and in plaintiff's favor, from the time she left the southwest curb until she was struck. It turned red for Bellefield Avenue almost immediately after the accident. These witnesses also said that at the time she was struck, plaintiff was walking upon the usual pedestrian crossing from the southwest to the northwest corners of the intersection. One of the witnesses, who ***485** was operating her car on Fifth Avenue in the same direction as and immediately behind defendant's truck, stated that the light did not turn green for Fifth Avenue traffic until her own car reached the intersection. She said that just prior thereto the truck had passed her upon the left at a time when she was driving astride the north rail on Fifth Avenue. Her speed was then thirty to thirty-five miles an hour, and she testified that the truck had overtaken and passed her, continuing ahead at a greater speed.

As a result of the injuries received the plaintiff is permanently disabled, and prevented from engaging in any gainful occupation. After trial in the court below the case was submitted to the jury which rendered a verdict for plaintiff. Defendants' motions for new trial and for judgment non obstante veredicto were overruled by the court in banc, and judgment having been entered upon the verdict, these appeals followed.

The defendants' contentions are (1) that there is insufficient evidence of negligence on the part of the driver of the truck to entitle plaintiff to recover;

(2) that plaintiff was guilty of contributory negligence.

[1][2] A review of the record convinces us that the charge of negligence against the defendants is fully sustained by the evidence. The jury was justified in finding that the defendant driver crossed the intersection at a speed in excess of thirty miles an hour, that he went through a red light, that he was driving to the left of the regular traffic lane, that he failed to observe the presence of pedestrian rightfully on the crosswalk in time to avoid striking her, and that he swerved the truck suddenly in her direction. On approaching the crossing it was his duty, as we have so often said, to maintain a high degree of vigilance, to anticipate the presence of pedestrians within the intersection and to have his car under such control that he could stop at the shortest possible notice, or alter its direction, in order to avoid striking persons committed to the crossing. ***486** Newman v. Protective M. S. Co., 298 Pa. 509, 148 A. 711; Ferguson v. Chris, 314 Pa. 164, 170 A. 131; Goodall v. Hess, 315 Pa. 289, 172 A. 693; MacDougall v. American Ice Co., 317 Pa. 222, 176 A. 428; Smith v. Wistar, 327 Pa. 419, 194 A. 486; Smith v. Shatz, 331 Pa. 453, 200 A. 620.

[3][4] While a pedestrian crossing an intersection with a green traffic light in his favor does not have an absolute right of way for the full distance of the crossing, and must continually be upon guard for his safety, Schroeder v. Pittsburgh Rys. Co., 311 Pa. 398, 165 A. 733; Jones v. Pittsburgh Rys. Co., 312 Pa. 450, 167 A. 332; Dando v. Brobst, 318 Pa. 325, 177 A. 831, here no testimoney was offered to support the defendants' contention that the plaintiff failed to exercise the degree of watchfulness required of pedestrians under such circumstances, or that she carelessly stepped into the path of approaching danger. Under the facts here appearing, the plaintiff had the superior right of way, for the traffic light was in her favor until the vehicle struck her. Maselli v. Stephens, 331 Pa. 491, 495, 200 A. 590.

[5] Defendants objected to the admission of any testimony with respect to the disregard by the driver of the truck of the red traffic signal at the intersection, under the general allegations of plaintiff's statement of claim. They assert that this ***426** charge of negligence should have been specifically pleaded, if it were to proved. We find no merit in this contention. The averments of the statement are sufficiently broad to include this evidence, and it was not error to permit it to be introduced. McNulty v. Joseph Horne Co., 298 Pa. 244, 148 A. 105. See also Nark v. Horton Motor Lines, Inc., 331 Pa. 550, 1 A.2d 655; Lynch v. Bornot, Inc., 120 Pa.Super. 242, 182 A. 49. It was relevant not only as to defendants' negligence, but also with respect to the question of plaintiff's contributory negligence, for the presence of a traffic signal has an important bearing upon the pedestrian's duty of care. See Newman v. Protective M. S. Co., supra, 298 Pa. at page 512, 148 A. at page 711.

[6] Under the evidence plaintiff cannot be held contributorily negligent as a matter of law. It is clear from the record that she looked carefully before entering upon ***487** the crossing, that she proceeded across in reliance upon a favorable traffic signal, that she kept to the crosswalk, and that she looked at least twice again as she advanced to the opposite side. While a pedestrian is required to exercise continued vigilance in crossing a street, he is not required to look constantly for approaching traffic. Healy v. Shedaker, 264 Pa. 512, 107 A. 842. 'Just where he should look depends upon shifting conditions and is a question of fact rather than of law'. Mackin v. Patterson, 270 Pa. 107, 110, 112 A. 738, 740. And especially is this so when the pedestrian is invited to cross by a favorable traffic signal. Newman v. Protective M. S. Co., supra, 298 Pa. at page 512, 148 A. at page 711.

[7][8] Moreover, it does not appear from the evidence that plaintiff was negligent in proceeding toward the opposite corner after seeing the truck approaching. Lamont v. Adams Express Co., 264 Pa. 17, 107 A. 373. She had the right to rely upon the assumption that the operator of the truck would

not ignore the traffic signal, and her own rightful presence upon the crosswalk. Villiger v. Yellow Cab Co. of Pittsburgh, 309 Pa. 213, 163 A. 537; Smith v. Wister, supra. Clearly this was a case for the jury to determine whether the driver exercised the degree of care required of him at a street crossing, and whether any lack of care on the part of plaintiff contributed to the accident. Gilles v. Leas, 282 Pa. 318, 127 A. 774. The jury having determined both questions in favor of plaintiff, we see no reason to disturb its findings.

A further question remains for discussion. Prior to bringing the present suit plaintiff sued the defendants upon the same cause of action to recover damages for the same injuries. In the trial of the first suit, at the conclusion of plaintiff's testimony, the trial judge entered a compulsory nonsuit. Thereafter the plaintiff filed a motion to remove the nonsuit, which was argued before the court in banc. Before a decision was rendered, however, plaintiff's attorney at the time, who is now deceased, presented an application to withdraw the motion to take off the nonsuit, and an order granting*488 leave to do so was signed 'By the Court'. The costs in that proceeding were paid and the following day the present suit was instituted.

At the trial of this case the defendants offered in evidence the entire record of the former suit on the ground that it constituted a bar to the present suit under the doctrine of res judicata, and that, in any event, it was proper evidence as an admission by the plaintiff, that by not pressing the motion to take off the nonsuit, the action of the trial judge in the first case was proper. Both offers were rejected by the trial judge, and the evidence was not received.

[9] By filing a motion to remove a nonsuit, the plaintiff submits the legal sufficiency of his case to the court in banc, with the same effect as though the defendant had demurred to the evidence. Its determination is a final judgment, and unless the plaintiff appeals therefrom and secures its reversal, that judgment is bar to a second suit against the defendant upon the same cause of action. Finch v. Conrade's Ex'r, 154 Pa. 326, 328, 26 A. 368; Scanlon v. Suter, 158 Pa. 275, 27 A. 963; Hartman v. Pittsburgh Incline Plane Co., 159 Pa. 442, 28 A. 145; Fine v. Soifer, 288 Pa. 164, 135 A. 742.

[10] This well settled rule is without application to the question here presented, because the motion to remove the nonsuit was withdrawn before it was acted upon by the court in banc. The effect of the withdrawal of the motion was to place the record where it stood prior to the filing of the motion,-as though it had not been made. Farne v. Penna. Lighting Co., 275 Pa. 444, 119 A. 537. In other words, it left upon **427 the record merely the entry of a compulsory nonsuit, the existence of which, unaccompanied by a refusal of the court in banc to take it off, could not have the effect of res judicata as to a second suit. Bliss v. Phila. Rapid Trans. Co., 73 Pa. Super. 173. See also Bournonville v. Goodall, 10 Pa. 133; Fitzpatrick v. Riley, 163 Pa. 65, 29 A. 783.

[11][12][13] *489 The mere entry of a nonsuit does not bar the right to bring a subsequent action. Bournonville v. Goodall, supra; Cleary v. Quaker City Cab Co., 285 Pa. 241, 132 A. 185; Fine v. Soifer, supra. Accordingly, as the record in the first case is devoid of any judgment that operates as a bar to the institution of this suit by the plaintiff, it contained nothing that was relevant in support of the defendants' plea of res adjudicata. Therefore the action of the trial judge in refusing its admission was proper. As a discontinuance does not constitute either an adjudication by an appropriate tribunal, of a party's right of action or an acknowledgment that the claim is not good in law, Sweigart v. Frey, 8 Serg. & R. 299, it was proper here to reject the record as an admission.

[14] Finally, it is urged by defendants in this connection that the order granting leave to withdraw and discontinue the motion to take off the nonsuit was invalied because it was granted by the trial judge alone. Defendants assert that once the motion to withdraw was submitted to the court in

banc, it could be withdrawn and discontinued only with the consent of that body, and the order of a single judge was accordingly insufficient and invalied. This contention, however, is not supported by the record. It appears that the order was signed 'By the Court', and there is no indication upon its face that it was improperly entered. If the defendants believed the discontinuance to have been irregular, they should have petitioned the court below, in the first suit, to strike it off. They cannot attack its validity collaterally in the present case. In Lindsay v. Dutton, 217 Pa. 148, at page 149, 66 A. 250, at page 251, we said: 'If the discontinuance was improperly or illegally entered the defendant should have applied to the court to strike it off. So long as the record of that case shows that the suit has been discontinued, we must, in this action, treat it as having been regularly and legally done.'

[15] There is no merit in defendants' complaint that they were prejudiced because certain additional instructions ***490** were given by the trial judge to the jury, at their written request, in the absence of counsel for the parties. Thereafter, in open court, and in the presence of all parties and counsel, the trial judge again instructed the jury in response to the question which it had asked. It clearly appears that defendants were given full opportunity to suggest corrections or modifications with respect to the additional charge. Under these circumstances no harm was done defendants and we find nothing to warrant the granting of a new trial for such reason. Cunningham v. Patton, 6 Pa. 355; Allegro v. Rural Valley Mut. Fire Ins. Co., 268 Pa. 333, 112 A. 140. See also Noreika v. Penna. Indemnity Corp., 135 Pa.Super. 474, 5 A.2d 619.

The assignments of error are overruled and the judgment is affirmed.

Pa. 1939
Altsman v. Kelly
336 Pa. 481, 9 A.2d 423

END OF DOCUMENT

EXHIBIT B

72 P.3d 1153, 115 A.L.R.5th 777, 2003 WY 85
(Cite as: 72 P.3d 1153)

H

Supreme Court of Wyoming.
Joseph R. HAMMONS and Darlene S. Hammons, Appellants (Plaintiffs),
v.
TABLE MOUNTAIN RANCHES OWNERS ASSOCIATION, INC., a Wyoming Corporation, Appellee (Defendant).

No. 01-151.
July 15, 2003.

After lot owners application to place modular home in subdivision was denied by subdivision's architectural control committee, lot owners brought declaratory judgment action seeking determination that covenants were invalid and they were entitled to have plans approved. The District Court, Laramie County, Nicholas G. Kalokathis, J., invalidated covenants, but ruled that committee acted reasonably in denying plans. Lot owners appealed. The Supreme Court, Kautz, District Judge, held that: (1) committee did not abandon covenants by allowing other prefabricated homes, and (2) architectural control committee acted reasonably when it denied lot owners' application to build modular home.

Affirmed.

West Headnotes

[1] Covenants 108 ⇐72.1

108 Covenants
108II Construction and Operation
108II(D) Covenants Running with the Land
108k72 Release or Discharge from Liability on Real Covenants
108k72.1 k. In General. Most Cited Cases

Covenants 108 ⇐103(3)

108 Covenants
108III Performance or Breach
108k103 Covenants as to Use of Property
108k103(3) k. Waiver of Breach. Most Cited Cases

Homeowners association did not abandon, or lose right to enforce, aesthetic provision in covenants prohibiting prefabricated homes because other prefabricated homes were built in subdivision, where purpose of protecting and enhancing value of property in subdivision by excluding certain prefabricated homes remained viable; a number of lots remained undeveloped, and manner in which those remaining lots were developed could have significant impact on value of existing homes.

[2] Appeal and Error 30 ⇐170(1)

30 Appeal and Error
30V Presentation and Reservation in Lower Court of Grounds of Review
30V(A) Issues and Questions in Lower Court
30k170 Nature or Subject-Matter of Issues or Questions
30k170(1) k. In General. Most Cited Cases

Issue of composition of subdivision's architectural control committee was not jurisdictional, and thus appellate court would not consider issue raised for first time on appeal.

[3] Appeal and Error 30 ⇐169

30 Appeal and Error
30V Presentation and Reservation in Lower Court of Grounds of Review
30V(A) Issues and Questions in Lower Court
30k169 k. Necessity of Presentation in General. Most Cited Cases

The Supreme Court will ordinarily entertain only arguments raised in the court below.

[4] Appeal and Error 30 ⇐169

30 Appeal and Error
30V Presentation and Reservation in Lower

Court of Grounds of Review
30V(A) Issues and Questions in Lower Court
30k169 k. Necessity of Presentation in General. Most Cited Cases
Exceptions to the rule that the Supreme Court will ordinarily entertain only arguments raised in the court below exist if the argument is jurisdictional, or if it is of such a fundamental nature that it must be considered.

[5] Motions 267 ⇐34

267 Motions
267k34 k. Countermanding, Withdrawal, or Abandonment. Most Cited Cases
A motion withdrawn leaves the record as it stood prior to the filing of the motion, i.e., as though it had not been made.

[6] Covenants 108 ⇐51(2)

108 Covenants
108II Construction and Operation
108II(C) Covenants as to Use of Real Property
108k51 Buildings or Other Structures or Improvements
108k51(2) k. Buildings in General. Most Cited Cases
Trial court's finding that architectural control committee of subdivision acted reasonably when it denied lot owners' application to build modular home on lot was not clearly erroneous, in light of evidence that vast majority of other homes in subdivision were not modulars, witnesses established that additional modulars would negatively impact value of existing homes and would change nature of subdivision, and committee did not single out lot owners for rejection, but consistently denied applications to erect modular homes.

[7] Covenants 108 ⇐49

108 Covenants
108II Construction and Operation
108II(C) Covenants as to Use of Real Property
108k49 k. Nature and Operation in General. Most Cited Cases
Covenants are contractual in nature and are to be interpreted in accordance with the principles of contract law.

***1153** Alexander K. Davison and Wendy J. Curtis of Patton & Davison, Cheyenne, Wyoming, Representing Appellants. Argument by Mr. Davison.

Julie Nye Tiedeken of Tiedeken Law Offices, Cheyenne, Wyoming, Representing Appellee.

Before HILL, C.J., and LEHMAN [FN*], KITE, and VOIGT, JJ., and KAUTZ, D.J.

FN* Chief Justice at time of oral argument.

***1154** KAUTZ, District Judge.

[¶ 1] This case considers whether an "Architectural Control Committee" properly denied Appellants', Joseph R. Hammons and Darlene S. Hammons (the Hammons), application to place a modular home in Table Mountain Ranches, a subdivision in Laramie County. The district court determined that covenants, which specifically excluded modulars in Table Mountain Ranches, were invalidly adopted. However, it found that prior covenants, still in effect, authorized rejection of the Hammons' plans on "aesthetic" grounds. The district court also found that the Architectural Control Committee acted reasonably in denying the plans.

[¶ 2] We conclude that the district court properly applied the law and that sufficient evidence supports its findings and conclusions. We affirm the trial court's declaratory judgment.

ISSUES

[¶ 3] The Hammons list these issues:

1. Did the District Court properly apply Wyoming Law of Aesthetic Covenants when determining that the decision of the Board of Table Moun-

tain Ranches was reasonable?

2. Is the District Court's reliance upon the testimony of the architectural control committee clearly erroneous considering its order invalidating the 1998 covenants?

The Appellee, Table Mountain Ranches Owners Association, Inc. (TMROA) rephrases the issues as follows:

Issue 1 Did the Trial Court properly hold that the original purpose of the covenants can still be accomplished and thus the covenants have not been abandoned?

Issue 2 Did the Trial Court properly hold that the actions of the Architectural Control Committee in disapproving the Hammons' proposed home was reasonable and made in good faith?

Issue 3 a) Since the membership of the Architectural Control Committee was not raised in front of the Trial Court, should it be considered by the Supreme Court on appeal?

b) Did the Trial Court properly hold that the decision of the Architectural Control Committee would have been the same under the 1973 version of the covenants and should stand even though the 1998 covenants were found to be invalid?

FACTS

[¶ 4] Table Mountain Ranches is a subdivision in Laramie County. In 1973 its developers filed a declaration of protective covenants. They made minor adjustments to those covenants in 1974 and 1977. (The 1973 covenants with the 1974 and 1977 amendments are referred to herein as the 1977 covenants). The 1977 covenants created an Architectural Control Committee (A.C.C.), whose declared purpose was

[t]o assure, through intelligent architectural control of building design, placement and construction, that Table Mountain Ranches shall become and remain an attractive community, and to uphold and enhance property values.

The A.C.C. consisted of three members. The subdivider appointed one member, and owners of complete dwellings in the subdivision selected the other two. After 90% of the tracts in the subdivision were sold, the "homeowners group" selected all three A.C.C. members. Initially, a three-member A.C.C. functioned. At some point, however, the Homeowner's Association Board assumed the role of the A.C.C.

[¶ 5] The covenants required that lot owners submit their plans and obtain written approval from the A.C.C. before they build. The A.C.C. had broad latitude in deciding what plans to approve or disapprove under the 1977 covenants. Those covenants stated, "[d]isapproval of plans and specifications may be based on any grounds including purely aesthetic grounds."

[¶ 6] Initially, the A.C.C. excluded prefabricated buildings except for "Boise Cascade Homes." The evidence established that Boise Cascades more resembled stick-built homes than prefabricated homes. Through 1993 the A.C.C. excluded modular homes. From 1994 to 1996 the A.C.C. napped rather than enforced the covenants of the subdivision*1155 and permitted prefabricated homes by failing to consider or respond to applications. After this lapse, the subdivision contained 107 undeveloped lots, 57 stick-built homes, and 11 prefabricated homes. In 1996, a more vigilant A.C.C. assumed the helm. Since then, it has consistently disapproved prefab homes with rectangular low-pitched roofs. It took legal action and forced the removal of a "double-wide" or modular prefabricated home.

[¶ 7] In 1998, the TMROA attempted to amend the covenants of the subdivision. For purposes of this case, the 1998 covenants contained two significant changes. First, they gave the TMROA board the role of the A.C.C. This change reflected the practice that had been followed for some time. Second, the 1998 covenants added this language:

"No mobile, manufactured, modular or site built homes resembling basic rectangular low pitch roof double wide manufactured or modular homes will be authorized."

[¶ 8] The Hammons bought two lots in the Table Mountain subdivision in 1995. On May 3, 1999, they sought approval for a prefabricated home. The A.C.C. denied approval twice, once after some members viewed a sample home, citing aesthetic grounds. Thereafter, the Hammons filed this case. Their complaint alleged that the 1998 amendments to the covenants were invalid, and that their plans would have been approved under the 1977 covenants.

PROCEDURAL HISTORY

[¶ 9] The Hammons sued for declaratory judgment. They sought (1) a declaration that the 1998 covenants were invalid, (2) a declaration that they were entitled to have their home plans approved, irrespective of which covenants governed, and (3) damages. The trial court invalidated the 1998 covenants, held that the 1977 covenants had not been abandoned, and held that under them, the A.C.C. acted reasonably and within their authority in denying the Hammons' plans.

[¶ 10] Inspired by the trial court's invalidation of the 1998 covenants, the Hammons asked the trial court to amend its Findings and Conclusions. They argued that because it invalidated the 1998 covenants, the court should also have disregarded the testimony of the Board as to whether the Hammons' home would have been disapproved under the older covenants. The Hammons asserted that because the 1977 covenants provided a different A.C.C. membership than the 1998 covenants, the TMROA could not speak as the A.C.C. under the older covenants. Several TMROA board members testified that they would not approve the Hammons' plans under either set of covenants.

[¶ 11] TMROA submitted a judgment under W.R.C.P. 58, to which the Hammons filed an objection, restating the grounds from their motion to amend. The trial court considered the motions on March 1, 2001, and entered the declaratory judgment without the Hammons' proposed amendments. The Hammons then filed both a Rule 50(b) motion and a motion nominally based on Rules 59(a)(6) and (e). However, in a strange turn, they withdrew those motions and timely filed this appeal.

STANDARD OF REVIEW

[¶ 12] The district court's decisions as to whether the covenants were abandoned, and whether the board acted reasonably, combine questions of law and fact. Questions of law are reviewed *de novo*. *Stansbury v. Heiduck*, 961 P.2d 977, 978 (Wyo.1998). A district court's findings of fact will be upheld unless the findings are clearly erroneous. *Mathis v. Wendling*, 962 P.2d 160, 163 (Wyo.1998). A finding is clearly erroneous when, "although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *Springer v. Blue Cross and Blue Shield of Wyoming*, 944 P.2d 1173, 1176 (Wyo.1997) (citing *Hopper v. All Pet Animal Clinic, Inc.*, 861 P.2d 531, 538 (Wyo.1993)).

ANALYSIS

Were the Covenants Governing the Table Mountain Ranches Subdivision Abandoned?

[1] [¶ 13] The Hammons claim that TMROA lost the right to enforce, or abandoned,*1156 the "aesthetic" provision in the 1977 covenants because other prefabricated homes were built in the subdivision.

[¶ 14] A protective covenant is abandoned by failure to enforce that covenant when the covenant is violated, the violations are ignored or acquiesced to, and the violations are

> ... so great, or so fundamental or radical as to neutralize the benefits of the restriction to the point of defeating the purpose of the covenant. In other words, the violations must be so substantial as to support a finding that the usefulness of the covenant has been destroyed, or that the covenant

has become valueless and onerous to the property owners.

Keller v. Bramon, 667 P.2d 650, 654 (Wyo.1983) (citing *Riley v. Stoves*, 22 Ariz.App. 223, 526 P.2d 747, 68 A.L.R.3d 1229 (1974)). The trial court properly utilized the standard from *Keller* in deciding the abandonment issue.

[¶ 15] The purpose and benefit of the "aesthetic" provision in the 1977 covenants is specified in the covenants themselves. The covenants specifically state that their intent is to "protect and enhance the value, desirability and attractiveness" of the subdivision.

[¶ 16] The record contains considerable evidence indicating that the purpose of protecting and enhancing the value of property in the subdivision by excluding certain prefabricated homes remains viable. Although 11 prefabricated homes now exist there, there are 57 stick-built homes and the balance of the 217 lots are undeveloped. The evidence indicated that the manner in which those remaining lots are developed could have a significant impact on the value of the existing homes. The trial court recognized this evidence and held that the "aesthetic" covenant was not abandoned. We find that this decision is supported by evidence and not "clearly erroneous."

Should this Court Consider Membership of the A.C.C. When that Issue Was Not Presented to the Trial Court Until After the Trial Court's Decision?

[2][3][4] [¶ 17] This Court will ordinarily entertain only arguments raised in the court below. *Cooper v. Town of Pinedale*, 1 P.3d 1197, 1208 (Wyo.2000). Exceptions to this rule exist if the argument is jurisdictional, or if it is "of such a fundamental nature that it must be considered." *Id.* (citing *WW Enterprises v. City of Cheyenne*, 956 P.2d 353, 356 (Wyo.1998) and *Bredthauer v. TSP*, 864 P.2d 442, 447 (Wyo.1993)).

[¶ 18] The Hammons did not allege in their complaint that the selection of A.C.C. members under the 1977 covenants was invalid. They did not assert that if the 1998 covenants were improperly adopted, the court should order a different committee to review the Hammons' plans. The Hammons did not present this issue to the trial court, and the trial court did not consider it. They asked only for a declaration that their plans should be approved under the 1973 covenants.

[¶ 19] The issue about composition of the A.C.C. is not jurisdictional. It is not so "fundamental" that it must be considered. The Hammons did not raise this issue until after the trial court decided the case. This Court will not consider the issue now.

[¶ 20] The Hammons imply that it is logically impossible for the trial court to invalidate the 1998 covenants, but then to consider testimony from the A.C.C. formed under the 1998 covenants. That testimony indicated that the 1998 A.C.C. would not approve the Hammons' plans even under the 1977 covenants. The evidence established, however, that the composition of the A.C.C. under the 1998 covenants was the same as had been put in practice before the 1998 amendments. The Hammons did not assert that the A.C.C. membership was invalid before the 1998 amendments, and we will not consider that issue now.

[5] [¶ 21] After the trial court issued its decision, the Hammons attempted to raise their questions about the A.C.C. membership through motions. Then they withdrew their motions.[FN1] Those motions did not timely raise ***1157** an issue that should have been presented before trial. A motion to alter or amend "cannot be used to raise arguments which could, and should, have been made before judgment issued." *Beyah v. Murphy*, 825 F.Supp. 213, 214 (E.D.Wis.1993); *F.D.I.C. v. World University Inc.*, 978 F.2d 10, 16 (1st Cir.1992). Further, Appellants withdrew the motions. A motion withdrawn leaves the record as it stood prior to the filing of the motion, *i.e.*, as though it had not been made. *In re Stoute*, 91

A.D.2d 1043, 458 N.Y.S.2d 640, 641 (1983); *People v. Steinhoff*, 38 Mich.App. 135, 195 N.W.2d 780, 781 (1972); 56 Am.Jur.2d *Motions, Rules, and Orders* § 32 (2000).

> FN1. The withdrawal of the Hammons' post-trial motions is not a direct issue in this case. We note, however, that the Hammons incorrectly believed they could not appeal while a motion was pending. The Hammons relied on *Rutledge v. Vonfeldt*, 564 P.2d 350 (Wyo.1977) for this belief. We decided *Rutledge* before adopting the Wyoming Rules of Appellate Procedure. WRAP 2.04 solves the Hammons' concerns under *Rutledge* by preserving the effect of a premature notice of appeal.

Did the Trial Court Properly Hold that the Actions of the Architectural Control Committee in Disapproving the Hammons' Proposed Home was Reasonable and Made In Good Faith?

[6][7] [¶ 22] Covenants "are contractual in nature and are to be interpreted in accordance with the principles of contract law." *McHuron v. Grand Teton Lodge Company*, 899 P.2d 38, 40 (Wyo.1995) (citing *Kindler v. Anderson*, 433 P.2d 268 (Wyo.1967)). The district court invalidated the 1998 covenants because of procedural defects in the amendment process. Neither side appealed that ruling. Consequently, the prior covenants remained effective. They said:

> Authority: ***No structure,*** including walls and fences ***shall be*** erected, converted, ***placed,*** added to or altered ***on any lot until the construction plans, specification*** (to include samples of exterior materials and colors to be used) ***and a plan showing the location of the structure have been approved in writing by the Architectural Control Committee.*** Consideration will be given to quality of workmanship and materials, harmony of external design with existing structure, location with respect to other structures (actual and planned), topography and to finished grade elevation. ***Disapproval of plans and specifications may be based on any grounds including purely aesthetic grounds.*** Structural color schemes will be compatible with the natural environment of the subdivision. Natural or earth colors will be required. [Emphasis added.]

[¶ 23] "Aesthetic grounds," should not be a *carte blanche* for arbitrary use of power by a homeowners' association. By that same token, courts should not be arbiters of taste. The majority approach in other states requires decisions under a consent-to-build covenant to be reasonable, *e.g., Riss v. Angel*, 131 Wash.2d 612, 934 P.2d 669, 678 (1997); *Trieweiler v. Spicher*, 254 Mont. 321, 838 P.2d 382, 385 (1992) (citing nine cases from eight states); *see also McHuron*, 899 P.2d at 43-44 (Golden, C.J., dissenting) (discussing the reasonableness approach). We adopt the requirement of reasonableness, even if the covenants do not specifically impose such a requirement.

[¶ 24] The trial court properly reviewed the A.C.C.'s denial of the Hammons' plans to determine if that decision was reasonably made. The trial court's finding of reasonableness was a finding of fact. *Trieweiler*, 838 P.2d at 385. That finding of fact will be upheld unless it is clearly erroneous. *Mathis*, 962 P.2d at 163. Such error is absent here.

[¶ 25] The district court found that, "[t]he decision of the A.C.C. was not based upon caprice, but was a good faith attempt to carry out the original intent of the developers of the subdivision." The court then went on to discuss the incompatibility between the Hammons' proposed prefabricated home and the character of the subdivision. There was evidence directly supporting the trial court's finding. A vast majority of the other homes in the subdivision were not modulars. Witnesses established that additional modulars would negatively impact the value of existing homes and would change the nature of the subdivision. The A.C.C. did not single out the Hammons for rejection, but consistently denied applications to erect modular homes. ***1158** This Court will not substitute its judgment on the value of this evidence for that of

the A.C.C. or the trial court. The trial court's finding of reasonableness was not clearly erroneous. We affirm the trial court's finding that the A.C.C. acted reasonably.

[¶ 26] The Hammons argue that the district court improperly employed a test that balanced their interests against TMROA's interests when it determined reasonableness. Although the district court's decision letter stated that "their (Hammons') plight ... must be ... ***weighed*** against the aspirations of the homeowners ..." and found in favor of TMROA "after ***weighing*** the factors," it did not employ a balancing of interests test. The "weighing" language does not demonstrate a balancing test, but only shows the trial court's serious consideration of the positions taken by each side. The district court's decision letter properly addresses the legal standard for enforceability of an aesthetic covenant. It discusses evidence that supports reasonableness in the A.C.C.'s decision.

CONCLUSION

[¶ 27] Sufficient evidence supports the trial court's findings that the aesthetic covenant was not abandoned, and that the A.C.C. of TMROA acted reasonably when it denied the Hammons' application to install a modular home. The Hammons did not claim that the A.C.C. membership was improper in the trial court, and this Court will not consider that new issue now. The judgment of the district court is affirmed.

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