12-20-1976

Burrell Registration Co. v. McKelvey

IN THE SUPREME COURT OF THE STATE OF COLORADO

No. 27292

BURRELL REGISTRATION COMPANY, a Colorado General Partnership, et al.,

Plaintiffs-Appellants,

-vs-

EDWIN L. MCKELVEY, et al.,

Defendants-Appellees.

APPELLANTS' RESPONSE TO MOTION UNDER RULE 12 (f)

Plaintiffs-Appellants, by and through their attorney, Michael E. Wallace, resist Defendants-Appellees' motion to dismiss the Appeal and move the Supreme Court to file the trial transcript currently deposited with the Supreme Court Clerk and grant Appellants until December 23, 1976, to file brief. As grounds therefore, Appellants state as follows:

1. Appellants have docketed the Appeal and paid the docket fee.

2. The entire record of the case except for the trial transcript has been timely filed with the Appellate Court.

3. The Depositions of William E. Burrell and E. G. Laiwler are a part of the record by reference and incorporation in Defendants' Motions for Summary Judgment and Plaintiffs' Reply.

4. Appellants' Motion for New Trial alleges errors not only at trial but also in Pre-Trial Orders and rulings of law.

5. Defendant-Appellees (other than McKelvey) by instrument dated May 11, 1976, and filed in the District Court, requested the Clerk to notify them when the record was ready for transmittal, but asked that the record be kept in Durango for the parties use. Appellees' Motion fails to set forth that the Clerk ever gave notice that the record was ready for transmittal. The Affidavit of Floyd L. Gibble fails to set forth that notice was ever given that the record was ready for transmittal.

6. Although timely ordered, considerable delay in preparing the trial transcript has been caused by the firing and subsequent move to North Carolina of the stenographer who reported the trial. When the transcript was received in late August, the lines were not numbered, nor was it folioed.

7. The Affidavit of Floyd L. Gibble, Clerk of the District Court, does not state when folioing was completed, nor if and when any formal notification was given to the parties of the availability of the transcript for transmittal.

8. Preparation of Plaintiffs-Appellants' brief was delayed so that references could be made to the trial transcript by folio numbers.

9. The trial judge, the Honorable Frederic B. Emigh, certified the trial transcript on November 30, 1976, and the transcript was transmitted to the Supreme Court immediately thereafter.

10. The Appeal raises a constitutional question which was the reason for its removal to the Supreme Court from the Court of Appeals. Discretion should be exercised to allow the Supreme Court to review the constitutional question.

Wherefore, Appellants move the Supreme Court pursuant to C.A.R. 26 (b) to allow filing of the trial transcript currently deposited with the Clerk and extend the time for filing Appellants' brief to December 23, 1976;

Alternatively, Appellants move the Supreme Court to allow filing of the trial transcript and to consider the errors alleged in light of the Court's dicta in Patterson v. Serafini, No. 26467, and Princeville v. Brooks, No. 26685, and the briefs filed therein;

Alternatively, Appellants move the Supreme Court to consider the non-trial record timely filed and review the allegations of error as to rulings of law.

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