

1986

William D. Blodgett and Florence G. Blodgett, his wife v. Joe Martsch, Betty Purcell, aka Betty Purcell Martsch : Brief of Appellant

Utah Court of Appeals

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DOCKET NO

WILLIAM D. BLODGETT and
FLORENCE G. BLODGETT, his
wife,

Plaintiffs-Respondents,

vs.

JOE MARTSCH, BETTY PURCELL,
aka BETTY PURCELL MARTSCH,

Defendants-Appellants.

Category No. 13b

APPEAL FROM THE JUDGMENT OF THE
THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY,
THE HONORABLE DAVID B. DEE, JUDGE

LESTER A. PERRY
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FILED
JUN 15 1987

Clerk, Supreme Court, Utah.

IN THE SUPREME COURT
FOR THE STATE OF UTAH

WILLIAM D. BLODGETT and)	
FLORENCE G. BLODGETT, his)	
wife,)	
)	
Plaintiffs-Respondents,)	
)	
vs.)	Case No. 860544
)	
JOE MARTSCH, BETTY PURCELL,)	
aka BETTY PURCELL MARTSCH,)	Category No. 13b
)	
Defendants-Appellants.)	

BRIEF OF APPELLANT BETTY PURCELL

APPEAL FROM THE JUDGMENT OF THE
THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY,
THE HONORABLE DAVID B. DEE, JUDGE

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IN THE SUPREME COURT
FOR THE STATE OF UTAH

WILLIAM D. BLODGETT and)	
FLORENCE G. BLODGETT, his)	
wife,)	
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Plaintiffs-Respondents,)	
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vs.)	Case No. 860544
)	
JOE MARTSCH, BETTY PURCELL,)	
aka BETTY PURCELL MARTSCH,)	
)	
Defendants-Appellants.)	

BRIEF OF APPELLANT BETTY PURCELL

STATEMENT OF ISSUES PRESENTED ON APPEAL

The issues presented on appeal relate to the ability of the plaintiffs to amend a final order of the Third Judicial District Court entered approximately six years earlier.

ISSUE NO. 1

May a party file a motion to amend a final order of the district court without first notifying the other party to appoint counsel when counsel for the moving party is aware that the other party is not currently represented by counsel?

ISSUE NO. 2

May a party file a motion to amend a final order of the district court entered approximately six years earlier pursuant

to Rule 60(b) of the Utah Rules of Civil Procedure?

ISSUE NO. 3

Is the Amended Order and Judgment of Quiet Title entered August 13, 1986 void because it purports to set aside the Order signed May 5, 1980 and to relate back and be effective as of May 5, 1980 in contravention of Rule 60(b) of the Utah Rules of Civil Procedure?

ISSUE NO. 4

Was the alleged error in the judgment entered May 5, 1980 a clerical error that could be corrected by motion pursuant to Rule 60(a) of the Utah Rules of Civil Procedure?

STATEMENT OF FACTS

For simplicity, references to pages in the record of Civil No. 223407 will be preceded by "R_I" and references to pages in the record of Civil No. C-78-8017 will be preceded by "R_{II}".

1. In 1971 plaintiffs-respondents and defendant-appellant entered into a transaction pursuant to which defendant-appellant and others acquired an interest in certain real property located in Salt Lake County, Utah (R_I 3).

2. In 1974 plaintiffs-respondents commenced a case against defendant-appellant and others (Civil No. 223407), seeking in their Amended Complaint a judgment against defendants in the sum of \$260,000 or reconveyance of the

subject real property. (R_I 221). In 1978 plaintiffs-respondents commenced a separate action against defendant-appellant and others (Civil No. C-78-8017) seeking a judgment requiring the defendants to convey the subject real property to plaintiffs or a judgment awarding plaintiffs the value of the property. (R_{II} 96). The trial court subsequently consolidated these actions. (R_I 555).

3. On or about March 20, 1980, plaintiffs and defendants executed a written stipulation regarding settlement and dismissal of the legal actions in the consolidated cases. Such Stipulation of Dismissal was prepared by counsel for plaintiffs. (R_I 991). A copy of such Stipulation of Dismissal is attached hereto.

4. On or about May 5, 1980, Judge Ernest F. Baldwin, signed an Order dismissing the cases with prejudice. Such Order was prepared by counsel for plaintiffs. (R_I 990). A copy of such Order is attached hereto.

5. In addition to the payments defendant-appellant had made to plaintiffs-respondents, plaintiffs-respondents received back the subject property with extensive improvements defendant-appellant had made on the property, which improvements had cost defendant-appellant in excess of \$50,000. (R_I 1109-1111).

6. On or about March 28, 1986 plaintiffs filed a Motion to Set Aside Order of Dismissal and Enter Judgment of Quiet Title. (R_I 1009).

7. On or about March 28, 1986 plaintiffs filed an Affidavit of Lester A. Perry in which Mr. Perry stated that Mr. Ronald A. Barker "indicated that he no longer represented Ms. Purcell and wants nothing to do with her." (R_I 1010).

8. Without giving defendant Pursell written notice to appoint another attorney or to appear in person, plaintiffs proceeded with their Motion to Set Aside Order of Dismissal and Enter Judgment of Quiet Title. (R_I 1110).

9. In plaintiffs' Memorandum of Points and Authorities in Support of Motion to Set Aside Order of Dismissal and Enter Judgment of Quiet Title, plaintiffs state in the first sentence of their argument:

Rule 60(b) allows the court to set aside an order or judgment for any reason justifying relief from the operation of the order or judgment. (R_I 1017).

10. Plaintiffs submitted to the Court an Order and Judgment of Quiet Title, which was executed by the Court and entered on May 13, 1986. (R_I 1037-1039). A copy of such Order and Judgment of Quiet Title is attached hereto.

11. Plaintiffs subsequently submitted to the Court an Order and Judgment of Quiet Title, which was executed by the Court and entered on August 13, 1986 with the handwritten notation "Amended." (R_I 1040-1042). A copy of such Amended Order and Judgment of Quiet Title is attached hereto.

12. On September 11, 1986 defendant Pursell filed a Motion to Set Aside Amended Order and Judgment of Quiet Title on the following grounds:

a. That plaintiffs failed to give defendant written notice to appoint counsel or appear in person as required by Utah Code Ann. Section 78-51-36 (1953).

b. That without notice to defendants plaintiff sought an Amended Order and Judgment of Quiet Title executed by the Court on August 13, 1986.

c. That a motion for relief of a final judgment or order pursuant to Rule 60(b) of the Utah Rules of Civil Procedure must be made "within a reasonable time," and for certain reasons must be made within 3 months after the order or judgment was taken.

d. That the Amended Order and Judgment of Quiet Title entered August 13, 1986 is void because it purports to set aside the Order signed May 5, 1980 and to relate back and be effective as of May 5, 1980 in contravention of Rule 60(b) of the Utah Rules of Civil Procedure. (R_I 1055-1057).

13. On September 11, 1986 defendant Pursell filed an Ex Parte Motion to extend time to file Notice of Appeal. On the same date the Court entered its order extending time to file a Notice of Appeal to October 12, 1986, which date was 30 days after the prescribed time for filing a Notice of Appeal with respect to the Amended Order and Judgment entered August 13, 1986. (R_I 1048-1049).

14. On or about September 15, 1986 plaintiffs filed a Motion to Correct Clerical Error under Rule 60(a) of the Utah Rules of Civil Procedure and a Motion to Set Aside Order Extending Time to File Notice of Appeal. (R_I 1043-1044).

15. Without ruling on Defendant's Motion to Set Aside the Amended Order and Judgment of Quiet Title, Judge David B. Dee signed a third Order and Judgment of Quiet Title, which was entered September 26, 1986. (R_I 1091-1093). A copy of such Order and Judgment of Quiet Title is attached hereto.

16. Because the District Court had not ruled on defendant Pursell's motion to set aside the Amended Order and Judgment of Quiet Title entered August 13, 1986, defendant Pursell filed a Notice of Appeal on October 9, 1986 with respect to both the Amended Order and Judgment of Quiet Title entered August 13, 1986 and the Order and Judgment of Quiet Title entered September 26, 1986. (R_I 1097-1101).

17. On January 26, 1987, Judge David B. Dee entered an order denying the motion of defendant Pursell to set aside the Amended Order and Judgment of Quiet Title entered August 13, 1986 and denying the motion of plaintiffs to set aside the Order Extending Time to File Notice of Appeal. (RI 1117-1118). A copy of such Order is attached hereto.

SUMMARY OF ARGUMENT

Plaintiffs could not amend the Order entered by Judge Baldwin on May 5, 1980 for the following reasons:

(a) Plaintiffs failed to require defendant Pursell to appoint new counsel or appear in person before plaintiffs proceeded with their motion to set aside the order and enter judgment of quiet title in violation of Utah Code Ann. Section 78-51-36 (1953).

(b) Plaintiffs were not entitled to amend the order dated May 5, 1980 pursuant to Rule 60(b) of the Utah Rules of Civil Procedure because that rule requires that a motion for relief must be made within a reasonable time, and for certain reasons must be made within 3

months after the order or judgment was taken.

(c) The Amended Order and Judgment of Quiet Title entered August 13, 1986 is void because it purports to set aside the Order signed May 5, 1980 and to relate back and be effective as of May 5, 1980 in contravention of Rule 60(b) of the Utah Rules of Civil Procedure.

(d) The alleged error of failing to include reference to quiet title in the Order signed May 5, 1980 was not a clerical error subject to correction by motion pursuant to Rule 60(a) of the Utah Rules of Civil Procedure.

ARGUMENT

I. PLAINTIFFS FAILED TO REQUIRE DEFENDANT PURSELL TO APPOINT NEW COUNSEL OR APPEAR IN PERSON BEFORE PLAINTIFFS PROCEEDED WITH THEIR MOTION TO SET ASIDE THE ORDER AND ENTER JUDGMENT OF QUIET TITLE IN VIOLATION OF UTAH CODE ANN. SECTION 78-51-36 (1953).

Utah Code Ann. Section 78-51-36 (1953) provides:

When an attorney dies or is removed or suspended, or ceases to act as such, a party to an action or proceeding for whom he was acting as attorney must before any further proceedings are had against him be required by the adverse party, by written notice, to appoint another attorney or to appear in person.

According to the Affidavit of Lester A. Perry dated March 17, 1986 and filed with the District Court as Exhibit "A" to plaintiffs' Motion to Set Aside Order and Enter Judgment of Quiet Title,

On March 10, 1986, I spoke with Mr. Ronald C. Barker, the attorney of record for Ms. Purcell during the latter part of the litigation within the case at bar. Mr. Barker indicated that he no longer represented Ms. Purcell and wants nothing to do with her. . . .

Because plaintiffs' counsel was aware that the attorney of record had ceased to act as defendant Pursell's attorney, counsel was required to notify defendant Pursell to appoint new counsel or appear in person before proceeding with the Motion to Set Aside Order and Enter Judgment of Quiet Title. Accordingly, any actions by plaintiffs until counsel for defendant Pursell entered his appearance should be void.

II. PLAINTIFFS WERE NOT ENTITLED TO AMEND THE ORDER DATED MAY 5, 1980 PURSUANT TO RULE 60(b) OF THE UTAH RULES OF CIVIL PROCEDURE BECAUSE THAT RULE REQUIRES THAT A MOTION FOR RELIEF MUST BE MADE WITHIN A REASONABLE TIME, AND FOR CERTAIN REASONS MUST BE MADE WITHIN 3 MONTHS AFTER THE ORDER OR JUDGMENT WAS TAKEN.

Rule 60(b) of the Utah Rules of Civil Procedure provides, in part:

(b) **Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, Etc.** On motion and upon such terms as are just, the court may in the furtherance of justice relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party; (4) when, for any cause, the summons in an action has not been personally served upon the defendant as required by Rule 4(e) and the defendant has failed to appear in said action; (5) the judgment is void; (6) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (7) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time and for reasons (1), (2), (3), or (4), not more than 3 months after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its

operation. . . .

Plaintiffs' Motion to Set Aside Order and Enter Judgment of Quiet Title was made pursuant to Rule 60(b), although plaintiffs did not specify the exact reason for which they were entitled to relief. In their Memorandum of Points and Authorities in support of Motion to Set Aside Order of Dismissal and Enter Judgment of Quiet Title, plaintiffs argued:

Rule 60(b) allows the court to set aside an order or judgment for any reason justifying relief from the operation of the order or judgment. (R₁ 1017).

The only possible basis for setting aside the Order dated May 5, 1980 was that counsel for plaintiffs had not included a provision regarding quieting title in the Order that counsel for plaintiffs had prepared and submitted to the court. A motion to set aside an order due to mistake or inadvertance must be made within 3 months after entry of the judgment or order. If relief is granted under a provision of Rule 60(b) other than items (1), (2), (3), and (4), the motion must be made within a reasonable time after entry of the judgment or order. Plaintiffs did not allege and the trial court did not find that plaintiffs' motion, which was made nearly six years after the court signed the Order date May 5, 1980, was made within a reasonable time nor did the court enter any findings as to a reason justifying relief from the operation of the Order dated May 5, 1980.

III. THE AMENDED ORDER AND JUDGMENT OF QUIET TITLE ENTERED AUGUST 13, 1986 IS VOID BECAUSE IT PURPORTS TO SET ASIDE THE ORDER SIGNED MAY 5, 1980 AND TO RELATE BACK AND BE EFFECTIVE AS OF MAY 5, 1980 IN CONTRAVENTION OF RULE 60(b) OF THE UTAH RULES OF CIVIL PROCEDURE.

The Amended Order and Judgment of Quiet Title dated August 13, 1986 differed from the Order and Judgment of Quiet Title dated May 13, 1986 in several respects. The August 13, 1986 Order contained the following provision, not found in the earlier Order:

3. This Order shall relate back to and be effective as of May 5, 1980.

The Amended Order and Judgment of Quiet Title entered August 13, 1986 was based upon plaintiffs' Motion to Amend pursuant to Rule 60(b). Rule 60(b), however, provides, in part:

. . . A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. . . .

The Amended Order and Judgment of Quiet Title could not relate back and be effective as of May 5, 1980 because that would affect the finality of the earlier judgment and suspend its operation. Accordingly, paragraph 3 of the Amended Order and Judgment of Quiet Title is void.

IV. THE ALLEGED ERROR OF FAILING TO INCLUDE REFERENCE TO QUIET TITLE IN THE ORDER SIGNED MAY 5, 1980 WAS NOT A CLERICAL ERROR SUBJECT TO CORRECTION BY MOTION PURSUANT TO RULE 60(a) OF THE UTAH RULES OF CIVIL PROCEDURE.

The Utah Supreme Court, in reviewing cases involving alleged errors in judgments, has distinguished between clerical errors and judicial errors. In Richards v. Siddoway, 471 P.2d 143 (Utah 1970), the defendant sought, ten years after judgment was entered in another case, to correct an alleged clerical error by an order in the case at bar. The Court, citing 46 Am. Jr. 2d Judgments §202, stated at page 145:

The distinction between a judicial error and a clerical error does not depend upon who made it. Rather, it depends on whether it was made in rendering the judgment or in recording the judgment as rendered.

The Court concluded that the trial court in the earlier case may have erred in giving the plaintiff the remainder of the land in question but that there was no clerical error involved. The error resulted from the failure of the judge to follow the written agreement signed by the parties. The Court pointed out that only the plaintiff and her father knew whether the decree entered by the court was according to their wishes and intentions. Neither of the parties appealed, and the judgment became final nine years before an answer was filed in the case at bar. The Court stated:

The record does not show that the judgment did not follow the findings of fact. Such an error must be corrected by a timely motion for a new trial, by timely appealing the matter, or by an independent action wherein all of the parties to the original proceeding are made parties to a new suit in equity.

In the instant case, plaintiffs' counsel prepared the Stipulation executed by the parties and the Order executed and entered by the court. The record does not show that the Order did not follow the Stipulation prepared by the parties. The error that plaintiffs allege occurred was not an error in recording the judgment but was an error in rendering the judgment (i.e., in preparing the Order that was signed by the court). Accordingly, under the reasoning of the Utah Supreme Court in Richards v. Siddoway, plaintiffs cannot correct the alleged error by a motion under Rule 60(a).

Plaintiffs-respondents also cited Stanger v. Sentinel Sec. Life Ins. Co., 669 P.2d 1201 (Utah 1983) in support of

their argument that the alleged error was a clerical error that can be corrected upon motion under Rule 60(a). The error in that case involved the calculation of the amount of the judgment. The Supreme Court, citing a federal district court, stated at page 1206:

"It is the type of mistake or omission mechanical in nature which is apparent on the record and which does not involve a legal decision or judgment by an attorney."
[Citation omitted.]

In the instant case there is no mistake apparent on the record. The Order entered by the court follows in every regard the written Stipulation prepared by plaintiffs' counsel and executed by the parties. Moreover, the alleged error was not a mechanical error involving the computation of a dollar amount, as was the situation in Stanger.

In Lindsay v. Atkin, 680 P.2d 401 (Utah 1984), the trial court signed an order submitted by counsel for a third party defendant dismissing the case with prejudice. After judgment was entered against the defendants, the defendants, having satisfied the judgment, instituted an action against the former third party defendant, apparently for indemnification or contribution. The former third party defendant raised the dismissal with prejudice as a bar to the action, and the defendants thereafter returned to the original trial court and moved, under Rule 60(a), to correct the dismissal with prejudice to one without prejudice. Again this Court cited Am. Jur. 2d to differentiate between a judicial error and a clerical error. The Court stated at page 402,

Rule 60(a) is not intended to correct errors of a substantial nature, particularly where the claim of error is unilateral. The fact that an intention was subsequently found to be mistaken would not cause the mistake to be "clerical." [Citations omitted.]

The Court then concluded:

In the instant case, the error complained of may not be characterized as "clerical." The court may have erred in granting Parrish Oil Tools a dismissal with prejudice, but the appropriate remedy was a timely motion to amend and/or a timely appeal to this Court.

In the instant case, the error complained of (i.e., that the Order should have been a judgment that quieted title in plaintiffs) is very similar to the error complained of in Lindsay, where Order of Dismissal was with prejudice. The alleged error is not clerical.

Finally, plaintiffs argue that the court ordered "quiet title" but that the subsequent written judgment omitted those words. The minute entry in the case states:

The within case settled as set out in the Record. (R_I 979).

The transcript of the conference before the judge, which was attached to plaintiffs' Memorandum of Points and Authorities in Support of Motion to Set Aside Order of Dismissal and Enter Judgment of Quiet Title, does not reflect any order of "quiet title" by the judge. The only reference in the record to quiet title is an uncompleted sentence by defendant's counsel. The settlement between the parties was described by defendant's counsel as follows:

In the two consolidated cases our stipulation is we dismiss all of our claims and counterclaims and rights of appeal and quit-claim any right, title or interest in and to the real property involved in exchange for a complete and total release by Blodgetts in both cases as to their

claims and as to their judgment.

That characterization of the settlement was not disputed by plaintiffs' counsel, and the rest of the hearing was spent dealing with the mechanics of implementing the stipulation. Contrary to the allegation of plaintiffs' counsel, there was no order of quiet-title.

Moreover, on or about January 18, 1980 plaintiffs filed a Motion for Judgment Against Defendant Betty Purcell, in which plaintiffs sought a judgment ordering the transfer of any and all interest of Betty Purcell and Raco Car Wash Systems in and to the property to the plaintiffs, the release to plaintiffs of the sum of \$2,450 on file with the Clerk's Office and finding defendant in contempt of court for failing to execute the quit-claim deed. Defendant Betty Purcell had refused to execute the Quit Claim deed on the ground that she did not have any interest in the property. Plaintiffs argued that counsel for defendant Betty Purcell had:

stipulated in open court than [sic] in exchange for a release of any claims by plaintiffs against said defendant, said defendant on behalf of herself and her corporations would execute a quit claim deed in favor of the plaintiffs to all of the property in question. (R₁ 982).

In plaintiffs' Motion there was no reference to an order for quiet title.

Even if there had been a more definitive reference to quiet title by the parties in the conference with Judge Baldwin, the subsequent Stipulation signed by the parties superceded any prior discussion concerning quiet title. The

Order signed by the trial court clearly places the instant in the same category as the Lindsay case.

CONCLUSION

Plaintiffs-respondents filed several motions with the trial court in an attempt to correct an alleged error in the Order entered May 5, 1980. If the alleged error was an error identified in Rule 60(b) of the Utah Rules of Civil Procedure, plaintiffs-appellants failed to identify the nature of the error or to show that their motion to set aside that order was filed within a reasonable time after the Order was entered. Accordingly, the Amended Order and Judgment of Quiet Title entered by the trial court on August 13, 1986 was erroneous.

The alleged error was a not a clerical error under the prior rulings of this Court. Therefore, the Order and Judgment of Quiet Title entered by the Court on September 26, 1986 was in error.

Defendant-appellant requests the Supreme Court to reverse the Amended Order and Judgment of Quiet Title entered by the trial court on August 13, 1986 and the Order and Judgment of Quiet Title entered by the trial court on September 26, 1986.

Dated this _____ day of June, 1987.

Respectfully submitted,

James A. Arrowsmith

CERTIFICATE OF MAILING

I hereby certify that on the _____ day of June, 1987 I
delivered four copies of the foregoing Brief of Appellant to:

Lester A. Perry
Robert M. Dyer
KIRTON, McCONKIE & BUSHNELL
330 South Third East
Salt Lake City, Utah 84111

ADDENDUM

FILMED

FILED IN OFFICE
SALT LAKE CITY

MAY 5 1 55 PM '80

BY *[Signature]*
DEPUTY CLERK

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IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY,

STATE OF UTAH

WILLIAM D. BLODGETT and
FLORENCE G. BLODGETT, his
wife,

Plaintiffs,

vs.

JOE MARTSCH, BETTY PURCELL,
aka BETTY PURCELL MARTSCH,
et al.,

Defendants.

STIPULATION OF DISMISSAL

Civil No. 223407 and
C-78-8017
(Consolidated)

Plaintiffs and defendants Betty Purcell Martsch, Raco Car Wash Systems, Inc. and Water Park Corporation stipulate and agree as follows:

1. To the extent that judgment has not heretofore been entered, the Complaint of plaintiffs against the said defendants and specifically any claim of plaintiffs against defendant Betty Purcell Martsch with regard to the property in question are to be dismissed with prejudice.

2. Any and all counterclaims by the defendants are to be dismissed with prejudice.

3. The judgments heretofore entered against defendants Raco Car Wash Systems, Inc. and Water Park Corporation are deemed paid and satisfied.

4. Any monies on deposit, specifically including the sum of \$2,450 heretofore deposited by Michael Roll dba Aaron's Cottonwood Mowers as property rentals, are to be paid to plaintiffs.

5. Judgments heretofore entered against any of the said defendants by the court will not be appealed to the Supreme Court.

KIRTON & McCONKIE
ATTORNEYS AT LAW
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SALT LAKE CITY, UTAH

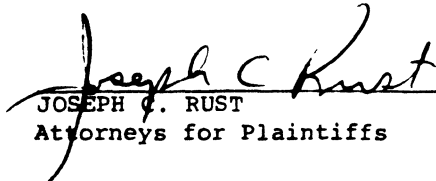
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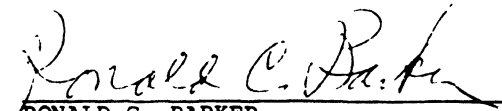
of the State of Utah.

6. Each party is to bear its own costs.

Dated this 20 day of March, 1980.

KIRTON & McCONKIE


JOSEPH C. RUST
Attorneys for Plaintiffs


RONALD C. BARKER
Attorney for Betty Purcell

FILMED

May 5 1980
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IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY,

STATE OF UTAH
* * * * *

WILLIAM D. BLODGETT and
FLORENCE G. BLODGETT, his
wife,)

Plaintiffs,)

vs.

JOE MARTSCH, BETTY PURCELL,)
aka BETTY PURCELL MARTSCH,
et al.,)

Defendants.)

ORDER

Civil No. 223407 and
C-78-8017
(Consolidated)

* * *

Upon the Stipulation of counsel and for good cause appearing,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that to the extent judgment has not heretofore been entered, the Complaint of plaintiffs against defendants Betty Purcell Martsch, Raco Car Wash Systems, Inc., and Water Park Corporation is hereby dismissed with prejudice and any and all counterclaims of said defendants are hereby dismissed with prejudice, and each party to bear its own costs.

IT IS FURTHER ORDERED that the sum of \$2,450 on deposit with the court in this case be paid over to plaintiffs by the clerk of the court.

Dated this ____ day of _____ 1980.

ERNEST F. BALDWIN, JUDGE

ATTEST
W. STEPHEN EVANS
CLERK
[Signature]
Deputy Clerk

KIRTON & McCONKIE
ATTORNEYS AT LAW
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000520

FILED

MAY 18 1986

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Telephone: (801) 521-3680

BA 206 NO 3970
5-16-86 9:53 AM

IN THE THIRD JUDICIAL DISTRICT COURT FOR SALT LAKE COUNTY
STATE OF UTAH

WILLIAM D. BLODGETT and
FLORENCE G. BLODGETT, his wife,

Plaintiffs,

vs.

JOE MARTSCH, BETTY PURCELL,
aka BETTY PURCELL MARTSCH,

Defendants.

ORDER AND JUDGEMENT
OF QUIET TITLE

Civil No. 223407 and
C-78-8017 (Consolidated)

Be it remembered that Plaintiffs' Motion To Set Aside
Order of Dismissal and Enter Judgement of Quiet Title came for
hearing before the Honorable David B. Dee, of the above entitled
court on May 2, 1986, at the hour of ten o'clock a.m.

Plaintiff was present by and through its counsel of
record, Mr. Lester A. Perry, of Kirton, McConkie & Bushnell.
Defendant, Betty Purcell, aka Betty Purcell Martsch, was not
present, either in person or through counsel; said defendant
having been previously served with Plaintiffs' Motion and the
associated pleadings by personal service on April 1, 1986.

The court being fully advised in the premises and having considered the Motion of plaintiff hereby orders, adjudges and decrees:

1. The Order of Dismissal against defendant Betty Purcell, aka Betty Purcell Martsch, signed and entered May 5, 1980 by the Honorable Earnest F. Baldwin Jr., is hereby set aside.

2. Judgement is hereby entered against Betty Purcell, aka Betty Purcell Martsch, quieting Title of all right, title and interest of said defendant within the following identified real property in and to the plaintiffs', William D. Blodgett and Florence G. Blodgett. The real property to which this quiet title judgement applies is located within Salt Lake County, State of Utah, and is more particularly identified as:

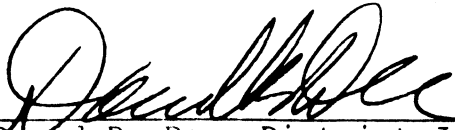
Beginning at a point in the center of Highland Drive on the projected North line of Vine Street (6100 South), said point being North 668.9 feet, more or less, and West 215.3 feet, more or less, from the Southeast corner of Section 16, Township 2 South, Range 1 East, Salt Lake Base and Meridian, and running thence North 0°20'50" East along center line of Highland Drive 154.0 feet; thence south 89°15'45" West 197.17 feet; thence South 0°17'45" West 154.0 feet to North line of Vine Street (6100 South); thence North 89°15'45" East along said North line 197.03 feet to the point of beginning.

Excluding from said above-described property that certain property taken by Salt Lake County as a part of the Cottonwood Expressway, Project S-0160-1, and more particularly described as follows: Beginning at the intersections of grantors West property line and centerline of survey at Engineer's Station 176+92.29, which point is North 668.90 feet and West 484.09 feet from the Southeast corner of said Section 16; and tangency to the curve of said

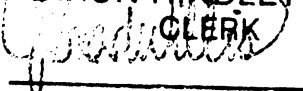
Engineer's Station 176+92.29 bearing South 38°54'40" East; thence North 116.0 feet to a point on a 2367.0 foot radius curve to the right; thence Southeasterly along the arc of said curve a distance of 150.20 feet, more or less, to the North line of 6100 South Street; thence West along the North line of 6100 South Street 95.41 feet, more or less, to grantors West boundary line, the place of beginning, less Tract deeded to Salt Lake County and Street.

Dated this 13 day of May, 1986.

BY THE COURT:


David B. Dee, District Judge

H. DIXON HINDLEY
CLERK

By 
Deputy Clerk

FILMED

FILED IN CLERK'S OFFICE
SALT LAKE COUNTY, UTAH

AUG 13 11 34 AM '86

BY *Charles Simon*

Lester A. Perry - A2571
Robert M. Dyer - A0495
KIRTON, McCONKIE & BUSHNELL
330 South Third East
Salt Lake City, Utah 84111
Telephone: (801) 521-3680

IN THE THIRD JUDICIAL DISTRICT COURT FOR SALT LAKE COUNTY
STATE OF UTAH

WILLIAM D. BLODGETT and)
FLORENCE G. BLODGETT, his wife,)

Plaintiffs,)

vs.)

JOE MARTSCH, BETTY PURCELL,)
aka BETTY PURCELL MARTSCH,)

Defendants.)

Amended
ORDER AND JUDGMENT
OF QUIET TITLE

Civil No. 223407[✓] and
C-78-8017 (Consolidated)

Be it remembered that Plaintiffs' Motion To Set Aside Order of Dismissal and Enter Judgment of Quiet Title came for hearing before the Honorable David B. Dee, of the above entitled court on May 2, 1986, at the hour of ten o'clock a.m.

Plaintiff was present by and through it's counsel of record, Mr. Lester A. Perry, of Kirton, McConkie & Bushnell. Defendant, Betty Purcell, aka Betty Purcell Martsch, was not present, either in person or through counsel; said defendant having been previously served with Plaintiffs' Motion and the associated pleadings by personal service on April 1, 1986.

The court being fully advised in the premises and having considered the Motion of plaintiff hereby orders, adjudges and decrees:

1. The Order of Dismissal against defendant Betty Purcell, aka Betty Purcell Martsch, signed and entered May 5, 1980 by the Honorable Earnest F. Baldwin Jr., is hereby set aside.

2. Judgment is hereby entered against Betty Purcell, aka Betty Purcell Martsch, quieting Title of all right, title and interest of said defendant within the following identified real property in and to the plaintiffs', William D. Blodgett and Florence G. Blodgett. The real property to which this quiet title judgement applies is located within Salt Lake County, State of Utah, and is more particularly identified as:

Beginning at a point in the center of Highland Drive on the projected North line of Vine Street (6100 South), said point being North 668.9 feet, more or less, and West 215.3 feet, more or less, from the Southeast corner of Section 16, Township 2 South, Range 1 East, Salt Lake Base and Meridian, and running thence North 0°20'50" East along center line of Highland Drive 154.0 feet; thence south 89°15'45" West 197.17 feet; thence South 0°17'45" West 154.0 feet to North line of Vine Street (6100 South); thence North 89°15'45" East along said North line 197.03 feet to the point of beginnning.

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curve to the right; thence Southeasterly along the arc of said curve a distance of 150.20 feet, more or less, to the North line of 6100 South Street; thence West along the North line of 6100 South Street 95.41 feet, more or less, to grantors West boundary line, the place of beginning, less Tract deeded to Salt Lake County and Street.

3. This Order shall relate back to and be effective as of May 5, 1980.

4. The Complaint of plaintiffs against defendants Betty Purcell Martsch, Raco Car Wash Systems, Inc., and Water Park Corporation is hereby dismissed with prejudice and any and all counter-claims of said defendants are hereby dismissed with prejudice with the parties to bear their own costs.

5. The sum of \$2,450 on deposit with the court in this case be paid over to plaintiffs by the clerk of the court.

Dated this 13 day of August, 1986.

BY THE COURT:


David B. Dee, District Judge

ATTEST
H. DIXON HINCHES

By 
Deputy Clerk

FILMED

FILED IN CLERK'S OFFICE

SALT LAKE COUNTY

SEP 26 1986

[Signature]

Lester A. Perry - A2571
Robert M. Dyer - A0495
KIRTON, McCONKIE & BUSHNELL
330 South Third East
Salt Lake City, Utah 84111
Telephone: (801) 521-3680

BR 209 NO. 3390
10-1 86 - 8:27 a.m.

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WILLIAM D. BLODGETT and)
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JOE MARTSCH, BETTY PURCELL,)
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Plaintiff was present by and through it's counsel of
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Defendant, Betty Purcell, aka Betty Purcell Martsch, was not
present, either in person or through counsel; said defendant
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associated pleadings by personal service on April 1, 1986.

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001021

The court being fully advised in the premises and having considered the Motion of plaintiff hereby orders, adjudges and decrees:

1. The Order of Dismissal against defendant Betty Purcell, aka Betty Purcell Martsch, signed and entered May 5, 1980 by the Honorable Earnest F. Baldwin Jr., is hereby set aside.

2. Judgment is hereby entered against Betty Purcell, aka Betty Purcell Martsch, quieting Title of all right, title and interest of said defendant within the following identified real property in and to the plaintiffs', William D. Blodgett and Florence G. Blodgett. The real property to which this quiet title judgement applies is located within Salt Lake County, State of Utah, and is more particularly identified as:

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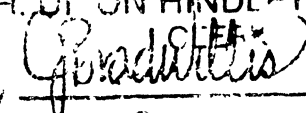
5. The sum of \$2,450 on deposit with the court in this case be paid over to plaintiffs by the clerk of the court.

Dated this 26 day of September, 1986.

BY THE COURT:



DAVID B. DEE, District Judge

TEST
H. D. ON HANDLEY


H. D. ON HANDLEY

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Gardner

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Defendant Purcell was not present in person but was represented by counsel, Mr. James A. Arrowsmith. The plaintiffs, the Blodgetts, were not present in person, but were represented by counsel, Mr. Lester A. Petty of Kirton, McConkie & Bushnell.

The court, having heard the arguments of counsel, and being fully advised in the premises, hereby orders that the motion of defendant Purcell to set aside the amended order of August 13, 1986 is denied, and the motion of the plaintiffs to set aside the order extending time to file a notice of appeal is denied.

DATED this 26 day of January, 1987.


BY THE COURT:


District Court Judge

CERTIFICATE OF MAILING



I hereby certify that I mailed a copy of the above and foregoing Order, postage prepaid, to James A. Arrowsmith, 2102 East 3300 South, Salt Lake City, Utah 84109, this 5th day of January, 1987.



78-51-34. Change of attorney.—The attorney in any action or special proceeding may be changed at any time before judgment or final determination, as follows:

(1) Upon his own consent, filed with the clerk or entered upon the minutes.

(2) Upon the order of the court or judge thereof upon the application of the client, after notice to the attorney.

History: R. S. 1898 & C. L. 1907, § 117; C. L. 1917, § 328; R. S. 1933 & C. 1943, 6-0-33.

Notice of withdrawal.

Where counsel who filed answer for defendants had attempted to withdraw from case before day set for trial, but did not give notice or have minute entry made of his withdrawal, as required by this section, court did not err in proceeding with trial in absence of defendants or their attorney, since plaintiff's counsel and court were justified in relying upon notice given attorney for defendants until such time as he had withdrawn from case as provided by statute. *Stabel v. Adams*, 16 U. 276, 190 P. 781.

Order of substitution.

Where circumstances leading to application for substitution of attorneys indicate bad faith, collusion, fraud, or attempt to cheat attorney of record out of his just claims, court will not make order of substitution until such claims

are paid. *Sandberg v. Victor Gold & Silver Min. Co.*, 18 U. 66, 55 P. 74.

District court's order granting motion, made during pendency of action by person to whom plaintiff, without knowledge of his uncompensated attorneys, had assigned his cause of action, for substitution of attorneys, held appealable to Supreme Court, by supplanted attorneys, as final judgment. *Sandberg v. Victor Gold & Silver Min. Co.*, 18 U. 66, 55 P. 74.

Collateral References.

Attorney and Client—75(1), 76(1).

7 C.J.S. Attorney and Client § 119 et seq.

7 Am. Jur. 2d 132 et seq., Attorneys at Law § 138 et seq.

Adjustment or determination of compensation of discharged attorney as condition of substitution of attorney by court order, 124 A. L. R. 725.

Withdrawal, discharge, or substitution of counsel in criminal case as ground for continuance, 73 A. L. R. 3d 725.

78-51-35. Effect—Notice of change.—When an attorney is changed as provided in the next preceding section [78-51-34], written notice of the change and of the substitution of a new attorney or of the appearance of the party in person must be given to the adverse party; until then he must recognize the former attorney.

History: R. S. 1898 & C. L. 1907, § 118; C. L. 1917, § 329; R. S. 1933 & C. 1943, 6-0-34.

Necessity for notice of change.

Under this section, an attorney who has appeared for a party may be treated as such by opposing counsel until opposing counsel are notified of dismissal or change of attorneys. Notice of appeal may be served upon him. *Salina Canyon Coal Co. v. Klemm*, 76 U. 372, 290 P. 161.

Collateral References.

Attorney and Client—75(1), 76(1).

7 C.J.S. Attorney and Client § 123.

Construction and effect of statutory provision requiring adverse party to give notice when attorney ceases to act as such, 42 A. L. R. 1347.

78-51-36. Notice to appoint successor.—When an attorney dies or is removed or suspended, or ceases to act as such, a party to an action or proceeding for whom he was acting as attorney must before any further proceedings are had against him be required by the adverse party, by written notice, to appoint another attorney or to appear in person.

new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party; (4) when, for any cause, the summons in an action has not been personally served upon the defendant as required by Rule 4(e) and the defendant has failed to appear in said action; (5) the judgment is void; (6) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (7) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time and for reasons (1), (2), (3), or (4), not more than 3 months after the judgment, order, or proceeding was entered or taken. A motion under this Subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order or proceeding or to set aside a judgment for fraud upon the court. The procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

Compiler's Notes. — This rule is patterned after, and similar to, Rule 60, F R C P

Cross-References. — Fee for filing motion to set aside judgment, § 21-2-2

NOTES TO DECISIONS

ANALYSIS

Clerical mistakes.

—Computation of damages.

—Correction after appeal.

—Date of judgment

—Void judgment

—Estate record.

—Inherent power of courts

—Intent of court and parties

—Judicial error distinguished.

—Order prepared by counsel

—Predating of new trial motion.

Other reasons

—"Any other reason justifying relief."

—Default judgment

—Impossibility of compliance with order

—Incompetent counsel

—Lack of due process

—Merits of case

—Mistake or inadvertence

—Real party in interest.

—Requirements

—Effect of set-aside judgment

—Admissions

—Fraud

—Divorce action

—Independent action.

—Constitutionality of taxes

—Divorce decree

—Fraud or duress

—Motion distinguished.

—Invalid summons.

Dev. Corp. v. Sather, 605 P.2d 1240 (Utah 1980).

Cited in *National Farmers Union Property & Cas. Co. v. Thompson*, 4 Utah 2d 7, 286 P.2d 249 (1955); *Holmes v. Nelson*, 7 Utah 2d 435, 326 P.2d 722 (1958); *Howard v. Howard*, 11 Utah 2d 149, 356 P.2d 275 (1960); *Nunley v. Stan Katz Real Estate, Inc.*, 15 Utah 2d 126, 388 P.2d 798 (1964); *Hanson v. General Bldrs Supply Co.*, 15 Utah 2d 143, 389 P.2d 61 (1964); *James Mfg. Co. v. Wilson*, 15 Utah 2d 210, 390 P.2d 127 (1964); *Porcupine Reservoir Co. v. Lloyd W. Keller Corp.*, 15 Utah 2d 318, 392 P.2d 620 (1964); *Watson v. Anderson*, 29 Utah 2d 36, 504 P.2d 1003 (1973); *Nichols v.*

State, 554 P.2d 231 (Utah 1976); *Edgar v. Wagner*, 572 P.2d 405 (Utah 1977); *Time Com. Fin. Corp. v. Brimhall*, 575 P.2d 701 (Utah 1978); *Anderton v. Montgomery*, 607 P.2d 828 (Utah 1980); *Miller Pontiac, Inc. v. Osborne*, 622 P.2d 800 (Utah 1981); *Mulherin v. Ingersoll-Rand Co.*, 628 P.2d 1301 (Utah 1981); *Kohler v. Garden City*, 639 P.2d 162 (Utah 1981); *Pozzolan Portland Cement Co. v. Gardner*, 668 P.2d 569 (Utah 1983); *Nelson v. Jacobsen*, 669 P.2d 1207 (Utah 1983); *Golden Key Realty, Inc. v. Mantas*, 699 P.2d 730 (Utah 1985); *Estate of Kay*, 705 P.2d 1165 (Utah 1985); *York v. Unqualified Washington County Elected Officials*, 714 P.2d 679 (Utah 1986).

COLLATERAL REFERENCES

Am. Jur. 2d. — 58 Am. Jur. 2d New Trial §§ 11 to 14, 29 et seq., 187 to 191.

C.J.S. — 66 C.J.S. New Trial §§ 13 et seq., 115, 116, 122 to 127.

A.L.R. — Consent as ground of vacating judgment, or granting new trial, in civil case, after expiration of term or time prescribed by statute or rules of court, 3 A.L.R.3d 1191.

Propriety and prejudicial effect of suggestion or comments by judge as to compromise or settlement of civil case, 6 A.L.R.3d 1457.

Necessity and propriety of counter-affidavits in opposition to motion for new trial in civil case, 7 A.L.R.3d 1000.

Quotient verdicts, 8 A.L.R.3d 335.

Propriety and prejudicial effect of instructions in civil case as affected by the manner in which they are written, 10 A.L.R.3d 501.

Prejudicial effect of unauthorized view by jury in civil case of scene of accident or premises in question, 11 A.L.R.3d 918.

Propriety and prejudicial effect of reference by counsel in civil case to result of former trial

of same case, or amount of verdict therein, 15 A.L.R.3d 1101.

Absence of judge from courtroom during trial of civil case, 25 A.L.R.3d 637.

Juror's voir dire denial or nondisclosure of acquaintance or relationship with attorney in case, or with partner or associate of such attorney, as ground for new trial or mistrial, 64 A.L.R.3d 126.

Amendment, after expiration of time for filing motion for new trial, in civil case, of motion made in due time, 69 A.L.R.3d 845.

Authority of state court to order jury trial in civil case where jury has been waived or not demanded by parties, 9 A.L.R.4th 1041.

Deafness of juror as ground for impeaching verdict, or securing new trial or reversal on appeal, 38 A.L.R.4th 1170.

Jury trial waiver as binding on later state civil trial, 48 A.L.R.4th 747.

Key Numbers. — New Trial ⇐ 13 et seq., 110, 116.

Rule 60. Relief from judgment or order.

(a) **Clerical mistakes.** Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court.

(b) **Mistakes; inadvertence; excusable neglect; newly discovered evidence; fraud, etc.** On motion and upon such terms as are just, the court may in the furtherance of justice relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a