

1977

# Verna R. Smith v. Albert Coon and Twentieth Century Housing : Respondent's Petition for Rehearing and Supporting Brief

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

VERNA R. SMITH,

Plaintiff,

vs.

ALBERT COON and  
HOUSING, a Nevada Corporation,

Defendants.

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Verna R. Smith,  
908 South Main Street,  
Salt Lake City,  
Utah  
Pro. Sec. State  
Appellant

IN THE SUPREME COURT OF THE STATE OF UTAH

VERNA R. SMITH, )

Plaintiff-Appellant, )

vs. )

Case No. 14519

ALBERT COON and 20th CENTURY )

HOUSING, a Nevada corporation, )

Defendants-Respondent. )

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RESPONDENT'S PETITION FOR REHEARING  
AND SUPPORTING BRIEF

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Appeal from a Judgment of the  
District Court of Salt Lake County  
Honorable Bryant H. Croft, Judge

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Respondent

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IN THE SUPREME COURT FOR THE STATE OF UTAH

VERNA R. SMITH,	)	
Plaintiff-Appellant,	)	
vs.	)	Case No. 14519
ALBERT COON and TWENTIETH CENTURY	)	
HOUSING, a Nevada corporation,	)	
Defendants-Respondent.	)	

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RESPONDENT'S PETITION FOR REHEARING  
AND SUPPORTING BREIF

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PETITION FOR REHEARING

Twentieth Century Housing, defendant and respondent herein, petitions the court for a rehearing on the following grounds:

1. The court's decision herein is improperly based on the record of the lower court which was never filed herein and therefore should not have been referred to.
2. The decision of this court is not consistent with its own precedent which holds that in cases on appeal where no record is filed with the appellate court, the decision of the lower court must be affirmed.
3. The record of the lower court proceedings, if available herein, would demonstrate that there were no material issues of fact left unresolved.

4. If the court herein is now going to reverse its own precedent, respondent should be allowed to file the record on appeal and submit an additional brief based on that record, to demonstrate the validity of the lower court's decision.

#### BRIEF IN SUPPORT OF PETITION

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#### NATURE OF CASE

Plaintiff appellant sought judgment for breach of a Uniform Real Estate Contract, possession of the subject real property, treble damages, attorney's fees and costs. Defendant-respondent, Twentieth Century Housing (hereinafter referred to as TCH) counterclaimed for an order requiring plaintiff-appellant to accept defendant-respondent's payments and to submit an accounting of all sums received pursuant to the Uniform Real Estate Contract, damages for abuse of process, attorney's fees and costs.

#### DISPOSITION IN LOWER COURT AND ON APPEAL

The trial court rendered judgment on the parties' cross motions for summary judgment in defendant-respondents' favor, except for the awarding of \$30.55 to appellant, as is more particularly stated in respondent's prior brief. This court remanded and awarded costs to appellant

#### RELIEF SOUGHT

Respondent seeks reargument of the issues herein,

reversal of this court's decision and affirmance of the lower court's decision; or, if necessary, an opportunity to file the record herein and submit a further brief based on that record.

#### STATEMENT OF FACTS

The facts relevant to this case are in part as stated by this court in its opinion, with some notable exceptions and additions as will be noted here and in the arguments to follow.

Simply stated, the subject of this lawsuit is a Uniform Real Estate Contract, originally between appellant as seller, and defendant Coon, as buyer. The interest of defendant Coon was assigned to respondent, TCH, on February 20, 1974. That assignment of contract recited a specific balance due on the contract. After receiving notice of said assignment, appellant informed respondent that the recited balance was incorrect and thereafter refused to accept the required monthly payments from respondent. Appellant thereafter brought suit, after mailing or serving notices for unlawful detainer, alleging a failure to make the required monthly payments from and since February of 1974. Respondent counter-claimed for an accounting of all sums paid and received under the contract.



## ARGUMENT

### I

THE COURT'S DECISION HEREIN IS IMPROPERLY BASED ON THE RECORD OF THE LOWER COURT WHICH WAS NEVER FILED HEREIN AND THEREFORE, SHOULD NOT HAVE BEEN REFERRED TO

The court, in considering the appeal herein, had before it the briefs of the parties and the judgment of the lower court, rendered after cross-motions for summary judgement. No record was ever designated or filed herein. By rudimentary principles of appellate review, the court herein is limited solely to those parts of the record designated and filed by the parties. 4 Am. Jur. 2d Appeal and Error §491; Bagnall v. Suburbia Land Company, 542 P.2d 183 (Utah 1975). In Bagnall, only a partial record was filed, and that part was seldom referred to in the briefs submitted. This court stated that the absence of the record and lack of use of the record to substantiate the parties' contentions was "an apparent invitation that we perform their procedural obligation and conduct their research," but stated that "we cannot indulge them such luxury under the circumstances here." 542 P.2d at 184.

In this case, because of the failure of appellant to designate or file any part of the record, this court should have limited its review solely to the judgment roll. See In Re Lavell's Estate, 122 Utah 2d 253, 248 P.2d 372 (1952);

U.S. Building and Loan Ass'n. v. Midvale Home Finance Corp.  
86 Utah 506, 44 P.2d 1090 (1935); Bagnall, op. cit.

It is obvious that this rule of appellate review was not honored herein, as the court's decision to remand cites at great length matters to be found exclusively in the record which was not filed, and, therefore, not available to this court. So far as can be determined by respondent's counsel, this is the first and only case where the Utah Supreme Court has undertaken the burden of obtaining and examining the record which has not been filed by appellant in accordance with the requirements of the Utah Rules of Civil Procedure, and has contravened its own precedent of presuming, in such cases "that the trial court's findings were supported by competent and substantial evidence." Sawyers v. Sawyers, 558 P.2d 607 (Utah 1976). Such a perusal and use of the unfiled record is obviously improper and makes a mockery of the rules under which this court conducts its proceedings.

## II

THE DECISION OF THIS COURT IS NOT CONSISTENT WITH ITS OWN PRECEDENT WHICH HOLD THAT IN CASES ON APPEAL WHERE NO RECORD IS FILED WITH THE APPELLATE COURT THE DECISION OF THE LOWER COURT MUST BE AFFIRMED.

Respondent's prior brief cites several cases for the proposition that if no record is filed on appeal, the court must affirm the lower court's decision. Also cited was

4 Am Jur. 2d, which states that this is the rule not only in Utah, but throughout the country. Counsel for respondent was unable to discover any cases in this jurisdiction or any other, which hold to the contrary view or indeed, which even intimate that there may be any circumstances which would dictate a different result.

The court's decision herein did not even refer to the above-cited principle, although it was the major argument of respondent for affirmance, and oft-cited rule of this court and seemingly, binding precedent.

The most recent case cited by respondent in its brief was Bagnal, op. cit., which was decided in 1975. However, this issue has received further attention much more recently. On December 13, 1976, in Sawyer v. Sawyer 558 P.2d 607, (Utah 1976), the defendant appealed pro se, but failed to provide a record on appeal. This court affirmed stating that because of said failure, it had no choice but to presume that the decision of the lower court was upported by competent and substantial evidence.

Again, as recently as January 19, 1977, this court, again affirmed the lower court's decision, when and because, no record was filed. American Nat'l. Mortgage, Inc. vs. Bowen (Case No. 14473, unreported)

Respondent finds it difficult to believe that the court would now reverse itself on this issue, and urges it to reconsider.

### III

THE RECORD OF THE LOWER COURT PROCEEDINGS, IF AVAILABLE HEREIN, WOULD DEMONSTRATE THAT THERE WERE NO MATERIAL ISSUES OF FACT LEFT UNRESOLVED.

The decision appealed from herein, was rendered pursuant to respondent's motion for partial summary judgment and appellant's cross motion for summary judgment. These motions were made and considered only after extensive discovery had been completed. The purpose of respondent's discovery was to establish certain crucial facts as uncontroverted. This purpose, respondent contends, was accomplished to the extent necessary for the issuance of summary judgment.

Before discussing the facts established in the lower court, it would be useful to outline the exact nature of the issues presented both in the pleadings and in the cross motions for summary judgment. Appellant's complaint alleged breach of the Uniform Real Estate Contract solely because of a failure by defendants to make the required monthly payments. There was no allegation of breach for failure to pay taxes or insurance, or anything else, as is implied in this court's decision. Whether or not the alleged breach had occurred was the first issue presented to the lower court.

The other issue presented was raised by respondent's

counterclaim seeking an accounting of all sums paid and received pursuant to the contract.

Facts relevant to the first issue were established by appellant's response to respondent's Interrogatories and Requests for Admissions. These facts include the following:

1. The complaint alleged that the default in monthly payments occurred as of February of 1974.

2. Payments were made by defendants and accepted by appellant through March of 1977.

3. Subsequent monthly payments were tendered by check to appellant and were refused.

4. Reasons given by appellant for her refusal of tender were that the checks were not legal tender and one of the following reasons: the balance claimed on the contract at the time of assignment between the defendants was incorrect, the assignment was invalid or the contract was unenforceable.

5. Respondent requested an accounting from appellant of the correct balance and of sums received and paid by appellant pursuant to the contract.

6. Appellant did not provide the aforesaid accounting requested by respondent until after the filing of the lawsuit and in response to respondent's interrogatories.

7. Defendants received the two notices.

8. Respondent offered to make the required monthly payments in any medium desired by appellant.

9. Appellant failed to specify an acceptable medium.

10. Respondent was ready and willing at all time to transmit the accrued monthly payments to appellant.

From the above undisputed facts, the district court found, as a matter of law, that appellant had wrongfully refused respondent's tender of payments and that therefore, there had been no default by reason of failure to make monthly payments as alleged in the complaint.

On the second issue, the parties submitted accountings of monies paid and received, amortization schedules, cancelled checks, receipts, and affidavits. The documents disclosed several extra payments by Mr. Coon which had not been credited by appellant. These payments were finally admitted by appellant. A final reconciliation of taxes paid by Mrs. Smith and extra payments made by Mr. Coon resulted in the conclusion that payment to appellant of \$30.55 would reimburse her for all unpaid net taxes. A careful scrutiny of the record below would support that decision and reveal that some of the statements rendered in the decision herein are not completely accurate or are not relevant to the issues presented.

For example, the decision states that Mr. Coon, a defendant below, is the respondent herein. In fact, he died during the proceedings and the court declined to name an administrator herein, finding that the assignment between

the parties was valid and that he had left no estate. The only respondent herein is Twentieth Century Housing.

Also, as another example, the 10-day notice referred to in the court's decision, referred to the monthly \$60.00 payments, not taxes and insurance. All monthly payments were paid or tendered throughout the term of the contract.

#### IV

IF THE COURT HEREIN IS NOW GOING TO REVERSE ITS OWN WELL-ESTABLISHED PRECEDENT, RESPONDENT SHOULD BE ALLOWED TO FILE THE RECORD ON APPEAL AND SUBMIT AN ADDITIONAL BRIEF BASED ON THAT RECORD TO DEMONSTRATE THE VALIDITY OF THE LOWER COURT'S DECISION.

Respondent urges the court to keep in mind the nature of this lawsuit and what transpired prior to the filing of the appeal. Respondent, as assignee on the Uniform Real Estate Contract, made every attempt to comply with its obligations under that contract. Having only the figures and accountings provided by the assignors, Mr. and Mrs. Coon, and being informed by Mrs. Smith, the appellant, that those figures were inaccurate and the balance as represented by the Coons wrong, it repeatedly requested that Mrs. Smith supply it with the proper balance and the accounting to support that figure. Mrs. Smith refused to do so. Then all of respondent's payments were refused. Respondent is a business enterprises accustomed, as are most businesses, to

conducting its financial transactions by check or similar medium. However, in an effort to avoid litigation, respondent offered to pay appellant in any medium she desired, if she would only specify that medium. Appellant did not even bother to respond to that request. Suit was filed and respondent attempted to resolve the issues as expeditiously and clearly as possible. An accounting was finally obtained from appellant, whereafter she admitted its inaccuracies. All of this entailed a great deal of time and money expended for legal fees by respondent. The problems could have been resolved without a lawsuit had appellant simply provided the requested information when asked to, shortly after the assignment of contract in 1974. Respondent demonstrated at many times, its willingness to amicably resolve the difference and compare the figures, if they had been provided. Appellant refused to act in any kind of reasonable manner. Instead, she refused payments, refused to provide needed information, alleged all manners of problems which were not alleged in the lawsuit and filed suit against the defendants.

Now, this court has directed that this case be remanded for further proceedings in the lower court, meaning further expense and time for respondent in a case which should not and need not have ever been filed.

In filing its brief herein, respondent relied on this

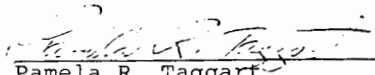


court's prior decisions which consistently held that in those instances where no record was filed, the decision of the lower court would be affirmed. If this court now intends to reverse that long standing precedent, respondent contends that it would only be equitable to allow it to file the record herein, and drawing from that record, present its case in detail to this court.

#### CONCLUSION

In this case where no record was filed on appeal this court improperly sought out and utilized that record in arriving at its decision and declined to affirm the decision of the lower court. These acts are in direct conflict with the established precedent of this court and others, which precludes examination of and reliance upon an unfiled record in rendering an appellate decision, and mandates affirmance in the absence of a record having been filed. If this court now intends to reverse itself in this manner with no prior notice, it would be only equitable to allow respondent to file the record and submit an additional brief, wherein it would be obvious that there were no material issues of fact and that the lower court was correct in its determinations.

Respectfully submitted,

  
Pamela R. Taggart  
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Attorneys for Respondent

CERTIFICATE OF MAILING

Mailed two copies of the foregoing Respondent's Brief,  
postage prepaid, this 27 day of June, 1977, to  
Verna R. Smith, 906 South 19th East, Salt Lake City, Utah  
84108, acting pro se for plaintiff-appellant.

Becky Porter