

1987

# Jackson v. Hinckley : Brief of Appellant

Utah Court of Appeals

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Bruce Plenk; attorney for respondents.

Matthew N. Olsen; Olsen & Olsen; attorney for appellants.

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UTAH COURT OF APPEALS  
BRIEF

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IN THE UTAH COURT OF APPEALS

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STEVEN P. and MELODY JACKSON,	:	
	:	
Plaintiffs and Respondents,	:	BRIEF OF APPELLANTS
	:	
vs.	:	#146
	:	
REED and DELORES HINCKLEY,	:	Case No. 870042-CA
	:	
Defendants and Appellants.	:	

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APPEAL FROM THE ORDER OF  
THE FIFTH CIRCUIT COURT FOR THE COUNTY OF SALT LAKE  
MURRAY DEPARTMENT  
RANDY S. LUDLOW, JUDGE PRO TEM

BRUCE PLENK  
Attorney for Respondents  
637 East 400 South  
Salt Lake City, Utah 84102

MATTHEW N. OLSEN  
OLSEN & OLSEN  
Attorney for Appellants  
8138 South State Street  
Midvale, Utah 84047

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MAY 28 1987

Court of Appeals

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### STATUTES CITED

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Rule 40 (b) (c) Utah Rules of Civil Procedure . . . . .	ii,iii, 3

### STATEMENT OF THE ISSUES

The following issues are presented in this appeal:

1. Whether defendants should have been allowed a continuance in order to have obtained the necessary evidence and to have allowed the defendant's wife to be present so that defendants could have established the damages plaintiffs had done to the property owned by defendants.

2. Whether defendants should have been allowed to retain the deposit of the plaintiffs to offset the damages which plaintiffs had done to the property owned by defendants.

### STATUTORY PROVISIONS

UTAH CODE ANN. Section 57-17-3 (1981):

**Deductions from deposit - Written itemization - Time for return.** Upon termination of the tenancy, property or money held as a deposit may be applied, at the owner's or designated agent's option, to the payment of accrued rent, damages to the premises beyond reasonable wear and tear, other costs provided for in the contract and cleaning of the unit. The balance of any deposit and prepaid rent, if any, and a written itemization of any deductions from the deposit, and reasons therefor, shall be delivered or mailed to the renter within 30 days after termination of the tenancy or within 15 days after receipt of the renter's new mailing address, whichever is later. The renter shall notify the owner or designated agent of the location where payment and notice may be made or mailed. If there is damage to the rented premises, this period shall be extended to 30 days.

UTAH RULES OF CIVIL PROCEDURE, RULE 40 (b) (c):

**Assignment of cases for trial; continuance. (b) Postponement of the trial.** Upon motion of a party, the court may in its discretion, and upon such terms as may be just, including the payment of costs occasioned by such postponement, postpone a trial or proceeding upon good cause shown. If the

motion is made upon the ground of absence of evidence, such motion shall also set forth the materiality of the evidence expected to be obtained and shall show that due diligence has been used to procure it. The court may also require the party seeking the continuance to state, upon affidavit or under oath, the evidence he expects to obtain, and if the adverse party thereupon admits that such evidence would be given, and that it may be considered as actually given on the trial, or offered and excluded as improper, the trial shall not be postponed upon that ground.

(c) **Taking testimony of the witnesses present.** If required by the adverse party, the court shall, as a condition to such postponement, proceed to have the testimony of any witness present taken, in the same manner as if at the trial; and the testimony so taken may be read on the trial with the same effect, and subject to the same objections that may be made with respect to a deposition under the provisions of Rule 32(c)(1) and (2) Rule 32 (d) (3) (A) and (B).

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STEVEN P. and MELODY JACKSON,	:	
	:	
Plaintiffs and Respondents,	:	
	:	
vs.	:	
	:	
REED and DELORES HINCKLEY,	:	Case No. 870042-CA
	:	
Defendants and Appellants.	:	

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BRIEF OF APPELLANTS

- - - - -

STATEMENT OF THE CASE

Plaintiffs, Steven P. and Melody Jackson, in January, 1987, commenced an action in the Circuit Court of Salt Lake County, Murray Department, seeking the return of a deposit which they had previously provided to defendants when they leased defendants' property. The matter was heard on January 20, 1987 before Randy S. Ludlow, Judge Pro Tem. The court granted the plaintiffs a judgment against the defendants in the sum of \$355.75.

STATEMENT OF THE FACTS

The plaintiffs leased a home from the defendants and lived within the dwelling for approximately 2 1/2 years. (Tr. at 2). When the plaintiffs leased the premises from the defendants, they gave to defendants the sum of \$475.00 as a deposit. (Tr. at 6). The plaintiffs left the premises in approximately August 1986 and requested a return of the deposit. The defendants entered the premises and found extensive damage done to the property. The kitchen and entry hall had been damaged. (Tr. at 8). A window was damaged which plaintiff admitted her son broke with a marble. (Tr. at 9). The sprayed ceiling was damaged when plaintiffs' children wrote on the ceiling from their

bunkbeds. (Tr. at 10). The defendants were required to hire an electrician to repair a light fixture which plaintiffs had evidently removed. (Tr. at 11). Plaintiffs further damaged the fireplace (Tr. at 12), damaged various drawers (Tr. at 13), failed to clean and repair the range (Tr. at 13 and 14), and damaged the aluminum on the house when they put a nail through the aluminum and interior walls in order to attach a thermometer. (Tr. at 16). The plaintiffs' children also damaged pieces of aluminum which were in defendants' garage (Tr. at 15), did damage to the stair well (Tr. at 17), and the plaintiffs' children used a sledge hammer and broke a platform of cement which defendants intended to build upon (Tr. at 17). There were also damages to a window in the nursery and damage to the utility room. (Tr. at 16).

As a result of all the damages done to the premises, defendants were unable to rent the premises for a period of six (6) weeks while they attempted to repair the damages. (Tr. at 14). The defendants retained the deposit to offset the damages plaintiffs had done to the property and defendants did not seek additional sums from plaintiffs because defendants felt plaintiffs did not have the money sufficient to pay for costs of any damages which exceeded the deposit. (Tr. at 8).

#### **SUMMARY OF ARGUMENTS**

The Small Claims Judgement of Randy S. Ludlow, Judge Pro Tem, should be reversed and remanded to the Circuit Court, State of Utah, Salt Lake County, Murray Department on the following basis:

1. The Small Claims Court should have granted defendants a continuance so that defendants could have obtained copies of the checks from their credit union which would have verified the amount of money they had expended on the repair of the premises. The trial court also should have continued the



trial so that the defendant, Delores Hinckley, could have been present to testify to the repairs made on the premises.

2. The defendants should have been allowed to retain the deposit of the plaintiffs to be applied against the damages which the plaintiffs did to the premises.

### **ARGUMENT**

#### **POINT I**

**THE DEFENDANTS SHOULD HAVE BEEN GRANTED A  
CONTINUANCE SO THAT THEY COULD HAVE OBTAINED  
THE EVIDENCE NECESSARY TO ESTABLISH DAMAGES  
TO THE PROPERTY AND SO DEFENDANT, DELORES  
HINCKLEY COULD HAVE BEEN PRESENT TO TESTIFY TO DAMAGES**

Rule 40 (b) of the Utah Rules of Civil Procedure states:

Upon motion of a party, the court may in its discretion...postpone a trial or proceeding upon good cause shown. If the motion is made upon the ground of the absence of evidence, such motion shall also set forth the materiality of the evidence expected to be obtained and shall show that due diligence has been used to procure it.

As the above rule states the court should have allowed the defendants a continuance so the defendants could have obtained copies of their checks from their credit union. (Tr. at 3). The checks would have established the amount of monies the defendants expended on the repairs of the premises. The Utah Supreme Court has stated,

When counsel has made timely objections and given necessary notice and has made a reasonable effort to have the trial date changed for a good cause, courts have held it to be an abuse of discretion not to grant a continuance. Griffiths v. Hammon, 560 P.2d 1375 (Utah 1977).

Applying the above ruling to the present case, the defendants attempted to contact the court in regard to a continuance but due to Martin Luther King's birthday, the court was closed on Monday, January 19, 1987.

(Tr. at 4). On Tuesday morning at 9:00 a.m. the defendants called the court in an attempt to get the matter continued but were unable to do so. (Tr. at 4). The defendant's wife was ill and unable to attend the hearing which resulted in the defendants being unable to establish the damages done to the premises. It was defendant's wife who had taken care of the repairs of the premises and the bookkeeping. (Tr. at 2).

The Utah Supreme Court has further stated,

...it is in accord with the most fundamental traditions of our legal system that a party should be afforded every reasonable opportunity to be in attendance at his trial. Bairas v. Johnson, 13 Utah 2d. 269, 373 P.2d 375 (1962).

In the present case it would appear that it was an abuse of discretion for the court not to give the defendants a continuance on the matter due to the wife of the defendant being ill and unable to attend the trial in question. (Tr. at 2). The failure of the court to grant a continuance resulted in the defendants being unable to establish the damages done to the premises and as the court specifically stated, "I believe there are damages, in fact, to the house. I am unable to determine the exact amount of those particular damages". (Tr. at 24). If the court would have granted the defendants a continuance and allowed the defendants the opportunity to bring in the necessary evidence and testimony, the court would have had the necessary information to establish the exact amount of damages done to the premises.

To avoid having all the witnesses present at the trial return as a result of a continuance, the court could have taken the testimonies of those witnesses present. The court could have used Rule 40 (c) of the Utah Rules of Civil Procedure, wherein the rule allows the court to take testimonies of witnesses present "in the same manner as if at trial". Rule 40 (c) U.R.C.P.

## POINT II

### **THE DEFENDANTS SHOULD HAVE BEEN ALLOWED TO RETAIN THE DEPOSIT OF THE PLAINTIFFS TO OFFSET THE DAMAGES DONE TO THE PREMISES**

Utah Code Annotated, Section 57-17-3, states:

Upon termination of the tenancy, property or money held as a deposit may be applied, at the owner's or designated agent's option, to the payment of accrued rent, damages to the premises beyond reasonable wear and tear, other costs provided for in the contract and cleaning of the unit. The balance of any deposit and prepaid rent, if any, and a written itemization of any deductions from the deposit, and reasons therefor, shall be delivered or mailed to the renter within 30 days after termination of the tenancy or within 15 days after receipt of the renter's new mailing address, whichever is later.

The defendants in the present case upon the termination of the tenancy, applied the deposit to the damages done to the premises. (Tr. at). The damages exceed the deposit though the defendants did not seek additional sums due to their belief that the plaintiffs did not have sufficient income to cover the additional damages. (Tr. at 8). The defendants upon receiving knowledge of plaintiffs' address, notified the plaintiffs of the damages done to the premises. The plaintiffs did extensive damage to the property of the defendants and as the above statute states, they should be allowed to apply the deposit to the damages done. The defendants' inability to obtain copies of their checks and to have defendant's wife present, created the problem of the court being unable to determine the extent of the damage and therefore being unable to determine what amount of the deposit could be applied to the damages. (Tr. at 24). If defendants would have been able to have all the necessary evidence and witnesses present on the date in question, the witnesses

and evidence would have established that the amount of damages exceeded the amount of deposit.

CONCLUSION

The defendants' inability to obtain and present evidence and witnesses denied defendants the right to establish the damages which had occurred to the property. The Judge was also unable to determine the exact amount of damages due to the lack of evidence. The defendants should have been allowed a continuance to obtain the evidence and have the witnesses present to establish the amount of damages they had suffered as a result of plaintiffs' actions.

The defendants respectively ask this court to reverse the decision of the lower court and remand the matter to the court below to allow defendants to present the evidence of damages done to their property.

DATED this 28<sup>th</sup> day of May, 1987.

RESPECTFULLY SUBMITTED.

By: Matthew N. Olsen

MATTHEW N. OLSEN  
Attorney for Defendants

**ADDENDUM TO APPELLANTS' BRIEF**

The following is the Judgment from the Fifth Circuit, Salt Lake County, State of Utah, Murray Department, which is the subject matter of this appeal.

# Circuit Court, State of Utah

SALT LAKE COUNTY, MURRAY DEPARTMENT

STEVEN P. & MELINDY JACKSON  
\_\_\_\_\_  
\_\_\_\_\_  
*Plaintiff*  
vs  
BEED & DOLORES HINCINLEY  
2911 TOLCATE LANE  
\_\_\_\_\_  
*Defendant*  
SLC, UTAH 84121

**SMALL CLAIMS**

**JUDGMENT**

Case No. 260022150 SCM

This matter came before the court for hearing on the affidavit of plaintiff, and the defendant has been served with the affidavit of plaintiff and order to defendant, and return of service has been made. The following parties appeared at the hearing:

- ☐ Plaintiff Only. The defendant failed to appear.
- ☐ Defendant Only. The plaintiff failed to appear.
- ☐ Both plaintiff and defendant appeared and presented evidence.

Court orders judgment as follows: ☐ for plaintiff ☐ for defendant.

\$ 325.00 Principal  
\$ 30.75 Court costs, and  
\$ 355.75 TOTAL JUDGMENT

- ☐ No cause of action.
- ☐ Dismissed with/without prejudice.

DATED JAN. 20, 19 87

with interest on the total judgment at 12% per annum from the date of this judgment until paid.

[Signature]  
JUDGE

☒ Both Plaintiff and Defendant received copies of the Judgment at Hearing [Signature]  
Clerk

## TO THE DEFENDANT ONLY:

If the above judgment was granted in favor of the plaintiff, you now have a judgment against you in the Circuit Court in the amount specified above. If you are dissatisfied with this judgment, you have FIVE (5) days from receipt of this notice to appeal the case to the District Court.

## TO THE PLAINTIFF:

You should mail a copy of this notice of judgment to the defendant IMMEDIATELY. The defendant has five days from receipt of the notice to appeal the case. You must complete the mailing certificate and file the original of this judgment with the court before you can proceed with any further court action.

I hereby certify that I mailed a copy of this judgment, postage prepaid, addressed to the above named defendant(s) at \_\_\_\_\_

Address & Zip Code

Dated \_\_\_\_\_

\_\_\_\_\_  
SIGNATURE

CERTIFICATE OF MAILING

I hereby certify that on the 28<sup>th</sup> day of May, 1987, I mailed four (4) true and correct copies of the foregoing BRIEF OF APPELLANTS to: Bruce Plenk, attorney for plaintiffs-respondents, 637 East 400 South, Salt Lake City, Utah 84102, postage prepaid thereon.

Matthew M. O.