

2007

K & T, Inc v. Todd L. Vowell : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

K & T, Inc. a Utah corporation, dba
BUDGET RENT-A-CAR,

Plaintiff/Appellant,

vs.

TODD L. VOWELL, an individual,

Defendant/Appellee.

Court of Appeals Case No.

20070624-CA

BRIEF OF APPELLEE

Appeal from the Third Judicial District Court
in and for Salt Lake County, State of Utah

Honorable Robert P. Faust
Civil No. 050901114

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I. LIST OF ALL PARTIES

The Appellant is listed as shown on the heading. K & T, Inc., dba Budget Rent-A-Car will be referred to hereinafter as “Budget.” The Appellee is listed as shown on the heading. Todd L. Vowell will be referred to hereinafter as “Vowell.”

Manuel Deano Herrera, who is not a party to this present action, will be referred to hereinafter as “Herrera.” DLSS Transportation, Inc. is also not a party to this present action, and will be referred to hereinafter as “DLSS.”

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IV. STATEMENT OF JURISDICTION

The Utah Court of Appeals has jurisdiction over this matter pursuant to Utah Code Ann. § 78-2-2(4) and § 78-2a-3.

V. ISSUES PRESENTED AND STANDARD OF REVIEW

(1) Whether the trial court erred in ruling that Budget's claims are barred under the doctrine of res judicata – issue preclusion and claim preclusion.

(2) Whether the trial court erred in ruling under Rules 12(b)(7) and 19 of the Utah Rules of Civil Procedure that Budget failed to join indispensable parties.

Both issues were directly raised in Vowell's Motion to Dismiss. R. 25-26.

A trial court's decision on a motion to dismiss is a question of law which the appellate court reviews for correctness. *Buckner v. Kennard*, 99 P.3d 842, 846 (Utah 2004).

VI. STATUTES, ORDINANCES AND RULES OF CENTRAL IMPORTANCE TO THE APPEAL

Utah Rules of Civil Procedure, Rules 12 and 19.

VII. STATEMENT OF THE CASE

A. NATURE OF THE CASE, COURSE OF PROCEEDINGS, AND DISPOSITION IN COURTS BELOW

In 2002 and 2003, Budget sought and obtained a judgment against DLSS for nonpayment under an agreement whereby DLSS rented cars from Budget during the winter Olympics. R. 40-48. Budget conducted discovery then had a trial on the merits, and had abundant opportunity to name Vowell as a party to

this prior proceeding, but did not do so. R. 49-64. Budget has now sued Vowell for the same obligation, asserting that the credit card which was found after a trial on the merits in the prior case to belong to DLSS (R. 42, ¶ 7) now instead belongs to Vowell, and that Vowell is for some reason personally obligated to pay DLSS's debts. R. 1-3. The Trial court agreed with Vowell that Budget's effort is barred by the doctrine of res judicata, both issue preclusion and claim preclusion, and that Budget also failed to name indispensable parties. R. 133-135.

B. STATEMENT OF FACTS

As an initial matter, Vowell notes that none of the 8 paragraphs of "facts" submitted by Budget make any reference to the record as required by Rule 24(a)(7) of the Utah Rules of Appellate Procedure. While the first, seventh and eighth fact paragraphs may be acceptable because they reference exhibits attached by Budget to its brief, which exhibits are also found in the record (R. 1-18; R. 40-48), the other five "fact" paragraphs are completely unsupported by the record. Because Budget has failed to provide support for paragraphs 2 through 6 of its facts, the same should be disregarded.

Vowell also notes that Budget included certain documents as "Addendum C" which are not found anywhere in the record. "An appellate court's 'review is ... limited to the evidence contained in the record on appeal.' [A]lthough the record may be supplemented if anything material is omitted, it may not be done by simply including the omitted material in the party's addendum." *State v. Law*, 75

P.3d 923, 924 (Utah App. 2003) citing *State v. Pliego*, 974 P.2d 279, 280 (Utah 1999). Rather, the proper procedure is by motion under Rule 11 of the Utah Rules of Appellate Procedure, and even then, “motions under rule 11(h) of the Utah Rules of Appellate Procedure are ‘appropriate only when the record must be augmented because of an omission or exclusion, or a dispute as to the accuracy of reporting, and not to introduce new material into the record.” *Id.* citing *Olson v. Park-Craig-Olson, Inc.*, 815 P.2d 1356, 1359 (Utah Ct.App.1991)(emphasis added). That is exactly what Budget has attempted to do here.

An appellate court may “weigh only those facts and legal arguments preserved for [it] in the trial court record.” *Olson, supra*. Furthermore, “when crucial matters are not included in the record, the missing portions are presumed to support the action of the trial court.” *State v. Linden*, 761 P.2d 1386, 1388 (Utah 1988). Accordingly, Budget’s “Addendum C” must be disregarded, and any missing documentation in the record must be presumed to support the trial court’s ruling against Budget.

Vowell’s Statement of Facts are as follows:

1. Budget filed suit against DLSS on August 23, 2002, in the Third District Court. The case was identified as civil number 020908262, before Judge L.A. Dever. R. 40, 49-50.
2. Vowell was not named as a defendant in this prior suit. The sole defendant was Herrera, which then later became DLSS. There is no indication

that Vowell was ever identified or even mentioned in any way in this prior suit during its entire three year history, even though there is a record of 11 certificates of service being filed in the case, apparently in respect to discovery, and there were 9 subpoenas issued prior to trial. R. 40-64.

3. In this prior DLSS lawsuit, after a bench trial on December 16, 2003 (R. 40, 52-54), Judge Dever signed Findings of Fact and Conclusions of Law on February 10, 2004 (R. 40-48), which were prepared by Budget's counsel. R. 54. The Findings of Fact by Judge Dever include the following:

a. Between December 2001 and March 2002 (the time of the winter Olympics), DLSS rented various vehicles from Budget. R. 41, ¶ 1.

b. Herrera, as owner of DLSS, "represented that defendant [DLSS] would pay for vehicles it rented from plaintiff and that he would transfer money to American Express to cover the charges" (R. 41 ¶ 3) and that "Herrera gave Clark an American Express credit card number to use" (R. 41, ¶ 4).

c. Judge Dever found that "the American Express credit card number at issue in this case belongs to Defendant [DLSS]." R. 42, ¶ 7.

4. Budget has acknowledged that \$105,712.83 was charged back onto the American Express Card at issue on December 24, 2002, fully one year before the bench trial in the prior suit. R. 2-3, ¶ 13; R. 8.

5. In this first action, Judge Dever made conclusions of law as follows:

- a. There were contracts between DLSS and Budget. R. 45, ¶ 1.
 - b. DLSS owed Budget \$131,425.32 under the contracts, plus interest and attorney fees and costs. No other party was identified as sharing this obligation with DLSS. R. 46, ¶¶ 5-7.
6. Budget brought suit against Vowell on January 20, 2005. No other defendant was named in this new suit. R. 1.
7. Notwithstanding Judge Dever's specific prior finding that the American Express credit card at issue belonged to DLSS (R. 42, ¶ 7), Budget alleged in its Complaint against Vowell that the credit card actually belonged to him, and that between December 2001 and April 2002, "DLSS incurred rental charges ... which were charged to Vowell's American Express charge account," which Vowell supposedly authorized. R. 2, ¶¶ 9-11.
8. Budget acknowledged in its Complaint against Vowell that it had brought suit against DLSS in August 2002, and that in early 2004, a year before its Complaint against Vowell, a judgment had been entered against DLSS. R. 5, ¶¶ 14-16.
9. Budget asserted in its Complaint that Vowell had breached an agreement to pay car rental fees and owed Budget \$132,289.50. R. 3, ¶ 19.
10. Vowell filed a Motion to Dismiss Budget's Complaint on April 26, 2005 on the basis of res judicata and failure to join indispensable parties, namely

DLSS and Herrera (R. 25-26), who were mentioned 9 different times as involved parties in the few short paragraphs of Budget's Complaint against Vowell. R. 1-4.

11. Budget in its response to Vowell's Motion to Dismiss did not deny Vowell's fact paragraph 10 of its Memo in Support of its motion that Budget "at no time suggests that Defendant Vowell has attempted to hide either his identity and/or his whereabouts." R. 29, ¶ 10; R. 72-82.

12. Indeed, Budget failed to controvert any of Vowell's fact paragraphs in the manner provided in Rule 7 of the Utah Rules of Civil Procedure, and failed in its Memo in Opposition to even have a fact section at all. Specifically, Budget did not deny that Judge Dever after a trial on the merits and consideration of all the evidence had found that the American Express credit card at issue belonged to DLSS and not Vowell or any other party. R. 72-82.

13. Vowell's Motion to Dismiss was heard by the Honorable Robert P. Faust on July 11, 2007, following which the trial court issued a Memorandum Decision granting Vowell's Motion to Dismiss on the basis of res judicata and failure to join indispensable parties. R. 133-135.

VIII. SUMMARY OF THE ARGUMENT

Budget is attempting to have a second bite at the apple in this case by pursuing a new party on a debt that it failed to pursue previously when it had the chance. A clearer case of res judicata could hardly be found. After a trial on the merits and abundant opportunity for presentation of evidence, the court ruled, in

wording drafted by Budget's own counsel, that the American Express credit card that was to be used to pay for the car rentals from Budget (but was charged back a year before the trial) belonged to DLSS and not to Vowell or anyone else. Budget now seeks to relitigate this issue, asserting now that the credit card belongs to Vowell. In so doing, Budget tries to create a sense that Vowell is at fault in this matter. However, not only has Budget offered no support for this claim of fault, but in fact it is a red herring since Budget had its day in court in the prior case to show Vowell's fault but did not do so.

In addition, Budget failed to name DLSS and Herrera as indispensable parties in this matter, even though Budget admits that all of the negotiations were with Herrera on behalf of DLSS, and never once was there any contact between Budget and Vowell. Significantly, Herrera, by all accounts the key player in this matter, was originally named as the sole defendant in the original action, but was then, via stipulation, voluntarily replaced by DLSS as the sole defendant – instead of Herrera.

IX. ARGUMENT

A. THE TRIAL COURT PROPERLY DISMISSED THIS ACTION ON THE GROUNDS OF RES JUDICATA.

Res Judicata refers to the overall doctrine of the preclusive effects to be given to judgments. *Brigham Young University v. Tremco Consultants, Inc.*, 110 P.3d 678, 686 (Utah 2005); (citations omitted). The doctrine of res judicata embraces

two distinct theories: issue preclusion and claim preclusion. *Buckner v. Kennard*, 99 P.3d 842, 847 (Utah 2004).

Budget argues that res judicata is irrelevant in that “this case is not about a prior adjudication, but about responsibility for the debts of others.” Brief of Appellant, p. 5. However, the sole vehicle by which Budget seeks to make Vowell responsible for the debts of others is via an American Express card which was previously determined to belong to DLSS. R. 10. Hence, this case has everything to do with a prior adjudication.

Budget’s also argues against the trial court’s decision to dismiss this action on the grounds of res judicata by attempting to distinguish the words “belong” and “own.” This is because Judge Dever in the prior proceeding stated that the credit card belonged to DLSS, but Budget now claims that Vowell owns it. Brief of Appellant, p. 6. At first, Vowell was confused as to why Budget in its brief would use two different dictionaries to define two different everyday words – using Webster’s to define “belong” and Black’s to define “own.” However, the reason for Budget’s choice of dictionaries is likely apparent given that Black’s Law Dictionary defines “belong” as “[t]o appertain to; to be the property of; to be a member of; to be appropriate; to own.” BLACK’S LAW DICTIONARY 107 (6th ed. 1998),(emphasis added). This completely destroys Budget’s theory that there is a difference between these terms.

1. ISSUE PRECLUSION & DEFENSIVE COLLATERAL ESTOPPEL.

Issue preclusion, also known as collateral estoppel, “prevents parties or their privies from relitigating facts and issues in the second suit that were fully litigated in the first suit.” *Buckner*, 99 P.3d at 846; citing *Schaer v. State*, 657 P.2d 1337, 1340 (Utah 1983). “A judgment may have preclusive effects not only between the parties to the original proceeding, but also between such a party and one who was not a party to the first action.” See Geoffrey C. Hazard, Jr. *Pleadings and Procedure*, p. 689, (7th ed. 1994).

For the most part, Budget’s Brief of Appellant completely ignores the matter of issue preclusion and/or defensive collateral estoppel. Budget’s only argument is that the issues are not identical to the DLSS matter – in that the DLSS matter determined that the American Express card “belongs” (R. 10) to DLSS, and now, several years after the DLSS trial, Budget seeks to determine that Vowell “owns” the very card which “belongs” to DLSS. Other than some minor semantics, the record clearly demonstrates that the matters are identical to the DLSS case – even to the point where Budget repeatedly referenced the DLSS matter and attached the DLSS Findings of Fact and Conclusions of Law as an exhibit. R. 1-15.

The test for whether or not a matter should be barred on the basis of issue preclusion/collateral estoppel is as follows:

(1) the issue decided in the prior adjudication is identical to the one presented in the instant action; (2) the party against whom issue preclusion is asserted was a party, or in privity with a party, to the prior adjudication; (3) the issue in the first action was completely, fully, and fairly litigated; and (4) the first suit resulted in a final judgment on the merits.

Buckner, 99 P.3d at 847; citing *Snyder v. Murray City Corp.* 73 P.3d 325 (Utah 2003);

Timm v. Dewsnap, 851 P.2d 1178, 1184 (Utah 1993). In the case at hand, the four-prong test for issue preclusion/collateral estoppel is met as follows:

i. Prior Adjudication

The first requirement for issue preclusion/collateral estoppel is whether “the prior adjudication is identical to the one presented in the instant action.” In this present action, the new issue Budget has attempted to create is whether or not payment was authorized by Vowell to an American Express Credit Card belonging to him. R. 2, 3. However, there was already a “prior adjudication” that the American Express credit card belonged to DLSS and that it authorized the transactions. R. 10. It was the Honorable L.A. Dever’s findings that the “American Express credit card number at issue in this case belongs to defendant [DLSS], plaintiff obtained the credit card number from defendant [DLSS].” R. 11. This finding of fact was not a mistake or an oversight, given that this particular finding was drafted by Budget – with hand-written editing by Judge Dever. R. 10.

ii. Prior Party Against whom Issue Preclusion is Asserted

The second requirement for issue preclusion/collateral estoppel is whether the party against whom issue preclusion is asserted was a party to the prior adjudication. In the case at hand, Vowell is asserting the issue preclusion against Budget – which was a “party to the prior adjudication.”

iii. First Action Completely Litigated.

The third requirement for issue preclusion/collateral estoppel is whether the issue in the first action was completely, fully, and fairly litigated. In the first action, there was a full day bench trial on December 16, 2003, in which multiple witnesses were called and exhibits were offered. R. 52-54. As a result of trial in the first action, Budget received a judgment against DLSS. R. 8-15. There is nothing to suggest, in either the first action or this present action, that the first action was not “fairly litigated.”

iv. First Action – Final Judgment on Merits

The fourth and final requirement for issue preclusion/collateral estoppel is the first suit resulted in a final judgment on the merits. This requirement is met in that there were Findings of Fact and Conclusions of Law (drafted by Budget) issued as a result of trial in the first DLSS action. R. 8-15.

2. CLAIM PRECLUSION.

In dismissing Budget’s cause of action against Vowell, the trial court’s Memorandum Decision stated as follows:

[T]o the extent that [Budget] now seeks to assert claims based on theories of alter ego, principal/agent or silent partner, [Budget] should have joined [Vowell] in the first action and pursued such claims there. Having failed to do so, the doctrine of claim preclusion bars [Budget] from bringing such claims in this action.

R. 134.

Budget's only argument against claim preclusion is that the matters are "entirely different" in that the present matter is about making Vowell personally liable for DLSS's debts arising from the first matter. *See* Brief of Appellant, p. 8. In other words, Vowell should not concern himself with and/or question how or why judgment was entered against DLSS. Vowell should not be concerned with the fact that he was not a party to the prior action, did not get to question witnesses, did not get to conduct discovery, did not get to review evidence, etc. Vowell should simply pay DLSS's debt – the fewer questions asked about the prior DLSS matter the better.

Claim preclusion "bars a party from prosecuting in a subsequent action a claim that has been fully litigated previously." *Brigham Young University*, 110 P.3d at 686. For claim preclusion to apply, three requirements must be met:

(1) The subsequent action must involve the same parties, their privies, or their assigns to the first action, (2) the claim to be barred must have been brought or have been available in the first action, and (3) the first action must have produced a final judgment on the merits of the claim.

Id. In the case at hand, the three-prong test for claim preclusion was met as follows:

i. Same Parties, Privies, or Assigns

The first requirement for claim preclusion is that this present action involve the “same parties, their privies, or their assigns to the first action.” To overcome this requirement, Budget must show that Vowell and DLSS were lacking in privity. However, Budget’s Complaint asserted that Vowell is in privity with DLSS. R. 4, ¶ 21. Although Budget did not specify the link in its Complaint, Budget clearly attempted to tie Vowell into the original action via some unspecified alter ego, principal/agent, and/or silent partner theory where Budget asserted that “Vowell is bound for payment to [Budget].” R. 3, ¶ 18.

In short, Budget’s concession of privity prevents its attack on claim preclusion, and highlights the reason why res judicata should prevent Budget from relitigating this matter. Although Vowell has always denied privity between himself and DLSS, Budget has claimed otherwise. Budget cannot have it both ways. Either Vowell is in privity with DLSS, in which case claim preclusion bars Budget’s action, or Vowell has no privity with DLSS, in which case Budget’s own pleadings show that it has no case against Vowell.

ii. Claim Brought or Available in the First Action

The second requirement for claim preclusion is that the claim to be barred must have been brought or have been available in the first action. In this present action, the trial court properly barred Budget’s claims under the doctrine of claim

preclusion because the issue of the ownership and liability for the American Express Card was already brought and fully adjudicated in the first action. R. 10.

Even if this were true, certainly Budget's present claims against Vowell were "available in the first action." Any claim by Budget against Vowell both could have and should have been brought in the first action. There is no evidence, or even claim asserted for that matter, to suggest that Vowell was not available to be joined as a defendant to the first action. Instead Budget was content for more than 2 years to pursue Herrera and then DLSS in the first action before initiating an action against Vowell – searching for someone to pay off its judgment against DLSS.

iii. Final Judgment on the Merits

The third and final requirement for claim preclusion is that the first action must have produced a final judgment on the merits of the claim. As already stated, there were Findings of Fact and Conclusions of Law issued both as to liability and the ownership of the American Express credit card as a result of a trial and final judgment on the merits in the action against DLSS. R. 8-15.

B. THE TRIAL COURT PROPERLY DISMISSED THIS ACTION DUE TO BUDGET'S FAILURE TO JOIN NECESSARY AND INDISPENSABLE PARTIES.

The trial court properly determined, in dismissing this action against Vowell, that Budget failed to join necessary and indispensable parties – namely DLSS and Herrera. DLSS and Herrera are referenced multiple times in the

Complaint against Vowell. In fact, in the “General Factual Allegations” of Budget’s Complaint against Vowell, DLSS and Herrera are referred to more times than Vowell himself. When Vowell is mentioned, it is only with respect to a credit card that had his name on it, and never in conjunction with any action by Vowell. R. 1-4. At no point in time did Budget ever have any contact or interaction with Vowell until Budget filed suit against Vowell – more than two years after Budget’s trial against DLSS. R. 1, 52.

An indispensable or necessary party is “one whose presence is required for a full and fair determination of his rights as well as of the rights of the other parties to the suit.” *Cowen & Co. v. Atlas Stock Transf. Co.*, 695 P.2d 109 (Utah 1984). “The failure to join parties indispensable to a proper resolution of the controversy is grounds for dismissal of the action.” *Bonneville Tower v. Michie*, 728 P.2d 1017, 1020 (Utah 1986). “The basic purpose of rule 19 is to protect the interest of absent persons as well as those already before the court from multiple litigation or inconsistent judicial determinations.” *Landes v. Capital City Bank*, 795 P.2d 1127, 1130 (Utah 1990), (citations omitted).

Budget argues that “[c]omplete relief can be accorded with only Vowell in the present action, as the issue is simply to hold Vowell liable for that previously determined debt.” Brief of Appellant, p. 9. Vowell does not dispute that “complete relief” can be accorded to Budget. However, Vowell is more concerned that “complete relief” cannot be accorded to Vowell – in that DLSS’s

debt was “previously determined” in his absence. Justice Brandeis stated that “[u]nless duly summoned to appear in a legal proceeding, a person not a privy may rest assured that a judgment recovered therein will not affect his legal rights.” *Chase National Bank v. Norwalk*, 291 U.S. 431, 441 (1934). In other words, if Budget is to proceed against Vowell, he should have the right to defend all matters – including the original issue of liability as between Budget and DLSS – even if the end result is “inconsistent obligations” which Rule 19 seeks to avoid. To do so, Vowell will need both Herrera and DLSS as co-defendants in order to best defend himself.

In applying Rule 19, the trial court properly determined that DLSS and Herrera are necessary parties under Rule 19(a) and indispensable parties under Rule 19(b).

1. NECESSARY PARTIES PURSUANT TO RULE 19(A)

“Rule 19(a), U.R.C.P. requires the joinder of “persons having a joint interest.” *Johnson v. Utah State Retirement Office*, 621 P.2d 1324, 1236 (Utah 1980).

To determine whether a party is necessary, a court should consider the two general factors in rule 19(a). First, a party is necessary if “in his absence complete relief cannot be accorded among those already parties.” Utah R. Civ. P. 19(a) (1). Second, a party is necessary if he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest.

Landes, 795 P.2d at 1130.

In the present matter, it is not possible for Vowell to be afforded complete relief, let alone attempt to tender an adequate defense, without the presence DLSS and Herrera. Most importantly, failing to join these two defendants leaves Vowell at “a substantial risk of incurring...otherwise inconsistent obligations.” *Id.*

For reasons unknown to Vowell, Budget only pursued DLSS to a final trial in the first action. Budget originally filed suit against Herrera on August 22, 2002. R. 49. However, on April 7, 2003, an Order was signed – which apparently substituted DLSS in for Herrera. R. 50. Ultimately, the matter proceeded to trial with Judgment being entered against DLSS – the sole defendant to Budget’s original action. R. 40-48. Herrera did not have a judgment entered against him, even though he is clearly the key player and is referred to time and time again in both the first action and Budget’s Complaint against Vowell. If Vowell is now forced to defend this action, without joining these key players, Vowell will be prejudiced. Budget is seeking to make Vowell personally liable even though it apparently could not hold Herrera liable in the first action, who was obviously a major player to the overall issue. Clearly this puts Vowell at “a substantial risk of incurring...otherwise inconsistent obligations.” *Id.*

DLSS and Herrera are necessary parties to this action in that they are the parties that “rented various” vehicles from Budget, “dealt directly with . . . concerning vehicles . . . rented,” had “discussions” and represented they would “pay for the vehicles” and “indicated drivers were authorized to sign rental

contracts on [their] behalf.” R. 41, 42. Although DLSS and Herrera’s names are peppered throughout Budget’s Complaint against Vowell, Vowell’s name is nowhere to be found in the Findings of Fact in the original action against Herrera and then DLSS. Thus, while Vowell may not have been an indispensable party to Budget’s claims against DLSS and Hererra, DLSS and Herrera are indispensable to Budget’s claims against Vowell.

Finally, if DLSS and Herrera are necessary parties according to the above criteria, Rule 19 provides that they must be joined to this action. Under the language of the rule, “if the party is necessary and joinder is feasible, then joinder is mandatory.” *Landes*, 795 P.2d at 1131.

2. INDISPENSABLE PARTIES PURSUANT TO RULE 19(B)

Once a party is found to be necessary under Rule 19(a), then the attention is turned “to analyze indispensability under rule 19(b).” *Landes*, 795 P.2d at 1132. “Rule 19(b) analysis involves questions of equity and therefore is committed to the discretion of the court. The analysis is basically a balancing of the inequities that would result from proceeding without the nonjoined party, specifically including the four factors of rule 19(b).” *Id.*, citing *Bonneville*, 728 P.2d at 1020. Thus the trial court must exercise “the discretion to proceed without the party or to dismiss the action for failure to join an indispensable party.” *Id.* The “ultimate test under Rule 19(b) is ‘whether in equity and good conscience the action should proceed.’”

Seftel v. Capital City Bank, 767 P.2d 941, 945 (Utah Ct. App. 1989); citing *Manygoats v. Kleppe*, 558 F.2d 556, 558 (10th Cir. 1977).

Budget argues that “Herrera’s rights will not be affected since he filed bankruptcy, discharging any obligation.” Brief of Appellant, p. 11. Although it is Vowell’s understanding that Herrera received a discharge in Bankruptcy Case No. 05-37361 on April 18, 2006 – more than three years after Budget voluntarily substituted Herrera out of the matter for DLSS – the present matter is not whether Vowell is necessary to protect Herrera’s rights, but whether Herrera is necessary to protect Vowell’s rights.

The trial Court properly exercised its discretion – determining that this action should not proceed without DLSS and Herrera. Budget’s procedural problems in this present matter are a self-inflicted problem created by Budget, and Budget alone. Budget could have named Vowell as a defendant to the original action – had Budget believed the same to be appropriate – just as it did with Herrera, and then later DLSS.

In sum, the trial court, in its Memorandum Decision, correctly notes that Budget should have joined Vowell to the first action (R. 134) which would have avoided Budget’s present problem with indispensable and necessary parties.

X. CONCLUSION

The trial court properly ruled that res judicata bars Budget’s attempt to re-litigate this matter – due to both issue preclusion/collateral estoppel and the

doctrine of claim preclusion. The trial court also properly concluded that Budget failed to join indispensable parties. The ruling of the trial court should accordingly be upheld.

Respectfully submitted this 23rd day of November 2007.

SNOW JENSEN & REECE

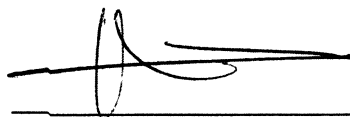
A handwritten signature in black ink, appearing to be "Curtis M. Jensen", written over a horizontal line.

Curtis M Jensen
N. Adam Caldwell
Attorneys for Todd Vowell

CERTIFICATE OF MAILING

This is to certify that on this 23rd day of November 2007, I caused a true and correct copy of the BRIEF OF APPELLEE to be delivered via first class U.S. Mail, postage prepaid, to the following:

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A handwritten signature in black ink, appearing to read 'N. Adam Caldwell', is written over a horizontal line.

N. Adam Caldwell