

2007

## K & T, Inc v. Todd L. Vowell : Reply Brief

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.

**REPLY BRIEF OF APPELLANT**

Court of Appeals Case No.

20070624-CA

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

Judge Robert P. Faust  
Civil No. 050901114

Oral Argument Requested

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## **IDENTIFICATION OF THE PARTIES**

Appellant is K & T, Inc. dba Budget Rent-a-Car, referred to herein as “Budget.” Appellee is Todd L. Vowell, referred to herein as “Vowell.”

Nonparty Manuel Deano Herrera is referred to as “Herrera” and nonparty DLSS, Inc. is referred to as “DLSS.”

## **INTRODUCTION**

This case is about one word – “belonging.” In Budget’s previous case against DLSS, the trial court ruled the credit card “belonged” to Herrera. In doing so, the court indicates only that Herrera had the authority to use the credit card. However, Vowell strains the interpretation of the word to argue that Herrera *owned* the card. Further, Vowell argues that because Herrera allegedly owned the card, Vowell cannot be made to answer for any charges incurred thereon. However, both Herrera and Vowell were obligors of the card. “If an individual ... voluntarily allows another to use his or her credit card, the cardholder has authorized the use of that card and is thereby responsible for any charges.” 47 C.J.S. *Interest & Usury* § 524. Further, Utah law is clear that a “judgment against one or more of several obligors ... shall not discharge a co-obligor who was not a party to the proceeding where judgment was rendered.” UTAH CODE ANN. § 15-4-2. Here, Vowell authorized Herrera to use Vowell’s credit card on behalf of DLSS. Budget’s judgment against DLSS in no way relieves Vowell of his obligation to honor the charges he authorized.

## ARGUMENT

### **I. THIS COURT SHOULD NOT DISREGARD PARAGRAPHS 2 THROUGH 6 OF THE APPELLATE BRIEF**

Vowell argues the Court should disregard paragraphs 2 through 6 of Budget's statement of facts in its appellate brief, alleging the facts are unsupported by the record. However, paragraphs 2 through 6 of Budget's appellate brief contain the same factual allegations contained in Budget's complaint against Vowell (the "Complaint"), attached as Addendum "A" to the appellate brief. Specifically, support for paragraphs 2 through 6 of the appellate brief is found in paragraphs 8 through 13 of the Complaint. Because this is an appeal from the district court's order granting Vowell's motion to dismiss, the Court must accept the factual allegations in the Complaint, as reiterated in the appellate brief, as true, and draw all reasonable inferences from those facts in a light most favorable to plaintiff. *See Cruz v. Middlekauff Lincoln-Mercury, Inc.*, 909 P.2d 1252, 1253 (Utah 1996).

Vowell also objects to the information contained in Addendum "C" to the appellate brief, which is a record of conversations between Vowell and American Express, in which Vowell identifies himself as a "silent officer" and "joint owner" of DLSS. Again, this appeal is of an order granting Vowell's motion to dismiss. Vowell's objection serves to underscore that there has been limited factual development of the case. Budget did not have the opportunity to enter into extensive discovery with Vowell before the case was dismissed. For that reason, the lower court record is indeed sparse.

Budget's Addendum "C" shows only that there are factual issues that have not been, and which need to be, explored.

**II. UTAH LAW SPECIFICALLY AUTHORIZES LAWSUITS AGAINST CO-OBLIGORS WHERE JUDGMENT AGAINST AN OBLIGOR HAS ALREADY BEEN ENTERED**

The theme of Vowell's arguments is that because Budget has already obtained a judgment against DLSS for the debts incurred on the credit card, Vowell is relieved from his obligation for the debt. However, Utah law clearly contemplates that even where judgment is obtained against one obligor of an obligation, such judgment does not preclude seeking recovery from a co-obligor. "A judgment against one or more of several obligors ... shall not discharge a co-obligor who was not a party to the proceeding where the judgment was rendered." UTAH CODE ANN. § 15-4-2. The evidence submitted in the case against DLSS and the limited evidence discovered in the present matter clearly show that Vowell was an obligor for the credit card at issue. He is listed as a the "cardmember" on American Express's invoices. *See* American Express Invoice, submitted in the previous action as "Plaintiff's Exhibit 6," attached hereto as Addendum "A."

**III. BUDGET'S CLAIMS ARE NOT BARRED BY ISSUE PRECLUSION**

The first element necessary for successfully asserting issue preclusion is the issue decided in the prior adjudication must be identical to the one presented in the instant action. *See Buckner v. Kennard*, 99 P.3d 842, 847 (Utah 2004). Although Vowell argues the issues litigated in Budget's action against DLSS are identical to the ones asserted here, this is not true. In Budget's action against DLSS, the issue presented for the court's

consideration was whether the contracts DLLS entered into with Budget were enforceable. The court found they were. Here, the issue presented for the court's consideration is whether Vowell is obligated to answer for the debt of DLSS.

Further, in order to successfully assert issue preclusion, Vowell must show that the issue in the first action was completely, fully and fairly litigated. *Id.* Two central issues in Budget's action against Vowell were not fully litigated in Budget's action against DLSS: (1) whether Vowell is obligated to answer for the debts of DLSS, as discussed above; and (2) whether the American Express Credit Card at issue is owned by Vowell. In his brief, Vowell argues the court's statement in the previous case that the credit card "belongs to DLLS" is conclusive proof that the issue was completely, fully and fairly litigated. *See* Brief of Appellee ("Vowell's Brief"), p. 10. However, the issue of ownership of the credit card was not litigated as part of that case except to the extent to show that DLSS exercised control of and authority to use the credit card. Ultimate ownership of the card was not fully and fairly litigated. Although Vowell may see no distinction between "ownership" and "belonging," the distinction is significant in this case – the previous court only determined that Vowell had authorization to use the credit card, but did not determine ultimate ownership of the card.

Vowell's insistence on a rigid interpretation and enforcement of the court's statement is the type of formalism rejected by Justice Cardozo in *Wood v. Lucy, Lady Duff-Gordon*, 118 N.E. 214 (N.Y. 1914). There, where the defendant insisted on a rigid interpretation and enforcement of a contract, Justice Cardozo noted, "The law has outgrown its

primitive style of formalism where the precise word was the sovereign talisman, and every slip was fatal. It takes a broader view today.” *Id.* Despite the court’s statement that the card “belongs” to DLSS, the issue of ownership of the credit card and, more broadly, the issue of Vowell’s obligation to answer for the debt of DLSS, were never litigated.

#### **IV. BUDGET’S ACTION AGAINST VOWELL IS NOT PRECLUDED BY CLAIM PRECLUSION**

Vowell argues the elements of claim preclusion are met. Claim preclusion “bars a party from prosecuting in a subsequent action a claim that has been fully litigated previously.” *Brigham Young University v. Tremco Consultants, Inc.*, 110 P.3d 678, 686 (Utah 2005). As argued above, Budget’s claim that Vowell is responsible for the debt of DLSS was not previously litigated at all, let alone fully litigated.

Vowell complains “he was not a party to the prior action, did not get to conduct discovery, did not get to review evidence, etc.” Vowell’s Brief, p. 12. However, Vowell is not precluded in the present action from questioning witnesses, including Herrera, conducting discovery and reviewing evidence. Vowell is not precluded in the present action from asserting defenses based upon an alleged lack of authorization for the use of the credit card. In short, Vowell will be permitted his day in court.

Vowell also argues Budget’s claims against him were “available” in the action against DLSS and should have been brought there. However, Budget’s attempt to obtain satisfaction from the corporate debtor before pursuing Vowell does not serve as a waiver

of its claims against Vowell.

**V. BUDGET'S ACTION SHOULD NOT BE DISMISSED FOR FAILURE TO JOIN INDISPENSABLE PARTIES**

Vowell argues he cannot be ordered to answer for the debt of another without being given the opportunity to contest the underlying debt. Vowell does not cite to any relevant legal authority to support his argument. Even so, nothing in the Complaint against Vowell precludes Vowell from disputing not only his liability to answer for the debt of DLSS, but the debt itself. Budget has not claimed the judgment against DLSS has any preclusive effect on Vowell.

Vowell also argues he will need both Herrera and DLSS and co-defendants in the present action in order to defend himself. *See* Vowell's Brief, p. 16. Vowell does not explain why he needs Herrera and DLSS as co-defendants. If Vowell needs testimony or other evidence from them, he may call them as witnesses or subpoena any necessary information. If he feels strongly that they should be parties, he may bring them in as third parties pursuant to UTAH R. CIV. P. 14(a).

Vowell is also concerned that a failure to join Herrera and DLSS as parties raises the risk of incurring inconsistent obligations. *See* Vowell's Brief, p. 17. There is no risk of inconsistent obligations. If Vowell is held liable to answer for the debt of DLSS, or even if he is not, the result will not be inconsistent with Judge Dever's finding that DLSS is responsible for the debt.

Finally, if it's true, as Vowell alleges, that Herrera and DLSS are indispensable

parties, the proper remedy is to order that they be joined, rather than dismiss the action in its entirety. Vowell has jumped to the conclusion that the lower court in this case must either proceed without DLSS or dismiss the case. Vowell has not shown why DLSS and Herrera are indispensable. Further, he has not shown why, even if they are indispensable, they cannot be joined to the present action. Thus, the lower court committed error by failing to give Budget the opportunity to join parties it considered indispensable.

**Conclusion**

The lower court's decision to grant Vowell's motion to dismiss should be reversed because: (1) Utah statute specifically allows a subsequent suit against an obligor where a judgment has already been entered against his co-obligor; (2) Budget's claims are not precluded by either issue preclusion or claim preclusion; (3) Budget did not fail to join indispensable parties; and (4) even if Budget failed to join indispensable parties, the correct remedy is to order the joinder of those parties, rather than dismiss the case.

DATED this 20 day of December, 2007.

WINDER & HALSAM, P.C.



DONALD J. WINDER

LANCE F. SORENSON

Attorneys for Plaintiff K & T, Inc. d/b/a Budget  
Rent-A-Car

CERTIFICATE OF SERVICE

I hereby certify that on this 24 day of December, 2007, I caused two true and correct copies of the foregoing REPLY BRIEF OF APPELLANT to be sent via U.S. Mail, postage prepaid, to the following:

N. Adam Caldwell  
Snow, Jensen & Reece  
134 North 200 East, #302  
St. George, Utah 84711

  
\_\_\_\_\_

## ADDENDUM A



## Chargeback Report

Friday, December 27 2002 11:33:48 AM

Chargeback Period: 12/01/2002 through 12/27/2002

Chargeback Status	No. of chargebacks	Total Chargeback Amount	Average Chargeback Amount
Total no. of new chargebacks:	3	(\$105,774.21)	(\$35,258.07)
Total no. of viewed chargebacks:	0	\$0.00	\$0.00
Total no. of sent chargebacks:	0	\$0.00	\$0.00
Total no. of no reply:	0	\$0.00	\$0.00
Total no. of others:	0	\$0.00	\$0.00
<b>Total :</b>	<b>3</b>	<b>(\$105,774.21)</b>	<b>(\$35,258.07)</b>

Chargeback details for merchant #: 5433910213						Location: BUDGE RENT A CAR				
Location	Merchant Number	Status	Charge Date	Original Cardmember Number	Cardmember Name	ChargeBack Date	ChargeBack Amount	Case Number	Charge Amount	Dispute Amount
BUDGE RENT A CAR	5433910213	New	02/08/2002	372711181843012	TODD L VOWELL	12/24/2002	(\$58,403.07)	0227801	\$4,918.10	\$0.00
BUDGE RENT A CAR	5433910213	New	03/01/2002	372711181843012	TODD L VOWELL	12/24/2002	(\$47,304.78)	0227802	\$7,215.32	\$0.00
BUDGE RENT A CAR	5433910213	New	10/03/2002	378518787781007	KENT LEWIS FORTIFIBER	12/09/2002	(\$81.36)	0230801	\$81.38	\$0.00
<b>Location Total:</b>							<b>(\$105,774.21)</b>		<b>\$12,194.80</b>	<b>\$0.00</b>

