

1987

Monroc, Inc., a Utah corporation v. M. Timmie Sidwell : Brief of Respondent

Utah Court of Appeals

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Craig S. Cook.

John Paul Kennedy.

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BRIEF

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870262 CA

IN THE COURT OF APPEALS FOR THE STATE OF UTAH

MONROC, INC., a Utah
corporation,

Plaintiff-Respondent,

vs.

M. TIMMIE SIDWELL,

Defendant-Appellant.

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NO. 870262 CA
Priority Classification
14b

BRIEF OF PLAINTIFF-RESPONDENT MONROC, INC.

Appeal and Cross-Appeal from the Judgment of the
Third Judicial District Court, Salt Lake County
Honorable Scott Daniels

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JURISDICTION OF COURT OF APPEALS

This Court has jurisdiction over this matter pursuant to a letter dated July 8, 1987, from the Clerk of the Utah Supreme Court, delegating this case to this Court.

NATURE OF THE PROCEEDINGS

This is an appeal and cross-appeal from findings of fact, conclusions of law, and judgment entered in a civil action in the Third Judicial District Court by the Honorable Scott Daniels on March 20, 1987.

STATEMENT OF THE ISSUES

1. When the Trial Judge enters Findings of Fact and Conclusions of Law which have been discussed, reviewed, modified, and then approved by attorneys for both parties, may one of those parties then file an appeal based upon a challenge to those very Findings without marshalling all of the evidence supporting the Trial Court's Findings and then demonstrating why those findings should not be accorded the presumption in favor of their being sustained?

2. Should this Court reverse or alter the trial court's findings of fact which are supported by competent and substantial evidence in the record?

3. Assuming that the trial court's findings of fact in

this case are supported by substantial and competent evidence in the record, are the conclusions of law founded thereon justified and consistent with other law?

4. With respect to Plaintiff-Respondent Monroc's cross-appeal, does the Utah Unlawful Detainer statute (Utah Code §§78-36-10 (2) and (3)) required that the damages incurred by the property owner be trebled?

DETERMINATIVE STATUTORY AND OTHER PROVISIONS

The following are determinative regulation and statutory provisions:

29 C.F.R. §785.23:

Employees residing on employer's premises or working at home.

An employee who resides on his employer's premises on a permanent basis or for extended periods of time is not considered as working all the time he is on the premises. Ordinarily, he may engage in normal private pursuits and thus have enough time for eating, sleeping, entertaining, and other periods of complete freedom from all duties when he may leave the premises for purposes of his own. It is of course difficult to determine the exact hours worked under these circumstances and any reasonable agreement of the parties which takes into consideration all of the pertinent facts will be accepted. This rule would apply, for example, to the pumper of a stripper well who resides on the premises of his employer and also to a telephone operator who has the switchboard in her own home. *Skelly Oil Co. v. Jackson*, 194 Okla. 183, 148 P.2d 182 (Okla. Sup. Ct. 1944); *Thompson v. Loring Oil Co.*, 50 F.

Utah Code 78-36-10 (2) and (3).

(2) The jury, or the court, if the proceeding is tried without a jury or upon the defendant's default, shall also assess the damages resulting to the plaintiff from any of the following: (a) forcible entry; (b) forcible or unlawful detainer; (c) waste of the premises during defendant's tenancy, if waste is alleged in the complaint and proved at trial; and (d) the amount of rent due, if the alleged unlawful detainer is after default in the payment of rent.

(3) The judgment shall be entered against the defendant for the rent, for three times the amount of the damages assessed under Subsections (2)(a) through (2)(c), and for reasonable attorneys' fees, if they are provided for in the lease or agreement.

STATEMENT OF THE CASE

Nature of the Case:

This action was initially commenced in the Circuit Court by Plaintiff-Respondent Monroc, Inc. (hereinafter referred to as "Monroc"), as an unlawful detainer action, seeking to evict the Defendant-Appellant (hereinafter, "Sidwell"), whose employment as a security person for Monroc had been terminated several months earlier.

A petition for an order of restitution in favor of Monroc was filed. Sidwell filed an answer, asserting that Monroc had harassed her and caused her \$515,000.00 in general and punitive damages. The case was transferred to the District Court. Monroc pursued the order of restitution, which was granted. Sidwell then filed an amended answer and counterclaim against Monroc,

asserting a claim under the Fair Labor Standards Act, 29 U.S.C. §201, et seq. ("FLSA"), and seeking approximately \$100,000.00 in damages.

Course of the Proceedings:

The case was set for trial before the Honorable Judge Scott Daniels, who tried the matter without a jury on March 2 and 3, 1987. At the close of the evidence and after hearing the arguments of counsel, Judge Daniels ruled in favor of Monroc and against Sidwell and directed Monroc's counsel to prepare an order and submit it after presenting it to opposing counsel for approval as to form. Transcript of Proceedings (included in the Record at page 224 and referred to herein as "Tr.") 300-03. Monroc submitted proposed findings of fact and conclusions of law to which Sidwell objected. After informal consultation between counsel, a second revised set of proposed findings of fact and conclusions of law were submitted. Again, Sidwell objected. R. 204-07. Sidwell submitted her own proposed supplemental findings and conclusions. R. 208-11. Judge Daniels held a conference to review the submissions by both counsel during which conference the attorneys agreed as to the wording which would be used in the final version of the findings and conclusions. See Findings of Fact and Conclusions of Law attached as a part of the Appendix to Sidwell's Brief.

After entry of the Judgment on March 20, 1987, Sidwell filed a notice of appeal on April 17, 1987, alleging that the trial court erred in denying relief for the asserted FLSA claims.

R.212. Monroc filed a cross appeal on April 27, 1987, asserting that the trial court erred in not trebling the damages under the initial unlawful detainer claim. R.214.

Disposition of Trial Court:

As indicated above, the Trial Court entered judgment in favor of Monroc on the claim for unlawful detainer in the amount of \$300. The Trial Court also entered judgment in favor of Monroc and against Sidwell on the FLSA counterclaim. R.202.

Relevant Facts:

The testimony in this case was conflicting at many points. The Trial Court was required to weigh that testimony and make factual determinations. In setting forth the relevant facts in this Brief, Monroc has taken the Findings of Fact as reviewed and approved as to form by counsel and adopted by the Trial Court and has added citations to the Record or Transcript of the Proceedings to show that Judge Daniels' Findings were all based upon the evidence before him. These Findings and the supporting citations are set forth in full because of the Appellant's attempt to ignore the material and relevant facts as found by the Trial Court.

FINDINGS OF FACT

1. Plaintiff brought this action pursuant to the Utah Forcible Entry and Unlawful Detainer Act, §§78-36-1 to 12.6, Utah Code Annotated. Defendant answered and asserted by way of counterclaim causes of action under

the Fair Labor Standards Act, 29 U.S.C. § 201, et seq. (hereinafter, the "FLSA"). R.93-95; R.48-75.

2. At the time of the commencement of the action herein, plaintiff was a Delaware corporation doing business in Utah and Idaho, with places of business in Salt Lake County, Utah, among other places. Tr. 300.

3. Since at least January, 1982, plaintiff's yearly gross sales has exceeded \$250,000. Tr. 300.

4. Defendant, M. Timmie Sidwell, is an individual who was employed by plaintiff as a security person at the plaintiff's Cottonwood Heights sand and gravel location in Salt Lake County from February 8, 1982, through March 31, 1986. Tr. 106.

5. When defendant was hired, the plaintiff and defendant agreed that she would be paid \$355 per month [Tr. 42] and would live in a mobile home located on the premises in a space provided by the plaintiff with utilities [Tr.42-43; 163-64] (gas, electricity, water, and septic tank [Ex. P-16]) furnished by the employer as further consideration for her services; it was understood that defendant would either rent or buy the mobile home in which she lived [Tr. 42].

6. In addition to residing on the premises, the purpose of which was to provide a presence to discourage and deter trespassers [Tr. 141; 158; 166-67], defendant was also assigned certain specific

duties which included ensuring that the gates to the property were locked [R.247], making one limited round each week-day and an additional two rounds [R.248; Tr. 52; Ex. P-11] on weekends and holidays, preparing periodic reports [Tr. 180], and occasionally performing other minor miscellaneous functions (including turning a pump switch on [Tr. 166; R.247], and checking a pilot light on windy days [R.272]) if she were available to do so [Tr. 250]; defendant had no other specific duties after daylight hours [Tr. 144; Ex. P-11] or when other Monroc personnel were on the premises [Tr. 143; 146; 161-62; Ex. P-11]; other than her rounds, defendant was not expected to keep any regular watch [Tr. 141; 146] or surveillance over the property but was merely asked to report any trespassing or vandalism which should happen to come to her attention.

7. Plaintiff and defendant agreed that defendant would reside on the premises [Tr. 42], although it was not a condition of her employment that she be present on the premises on a full-time basis or during any certain times [Tr. 141; 162; 250; 267; R.252] (except to perform some of her specific duties, the timing of some of which assignments was freely altered by defendant from time to time).

8. On one occasion when defendant was absent from the premises for several days, she arranged at her own

expense to have a another person live in the mobile home while she was away, but there was no showing that the duties of the other person were any different from those of defendant during said period. R.265.

9. On the occasion referred to in Finding 8, defendant's regular salary was paid without reduction.

10. Defendant was free to come and go as she wished [Tr. 141; 161; 246; 250; 267; R.252], and was free to pursue her own individual interests during the time she was employed by plaintiff and to use her time effectively for her own purposes [Tr. 262] to do such things as eat, sleep, go shopping, do personal errands, study, write, occasionally attend church and the Symphony [Tr. 221-22], accept full-time employment during the day [Tr. 183], and, with the prior permission of the plaintiff (which was freely given and never denied [Tr. 187, 260]), take evening classes at the University of Utah [Tr. 165, 179] and on one occasion for two or three months accept full-time employment which extended until approximately 9:00 p.m. on week days [Tr. 194], and engage in other normal private pursuits.

11. Defendant's actual duties under the agreement with plaintiff approximated no more than eight to ten hours per week [Tr. 54; 57; 151; 165; 254; R.248; Exs. P-10, P-12] for which she was paid by plaintiff at

rates in excess of the minimum wage required under the FLSA; and during the other times when defendant was living on the premises, she was not on duty, and those times did not constitute hours which were controlled or required by the plaintiff or its business [Tr. 243; 250; 255; 262; 266-67].

12. Under all of the circumstances of this case, the plaintiff paid the defendant for her hours of work at a rate which at all times exceeded the minimum rate required by the FLSA [Tr. 255; 269].

13. Plaintiff and its representatives did not act in careless disregard of the minimum wage or overtime compensation provisions of the FLSA and did not intentionally, knowingly, or voluntarily take any action which violated the minimum wage or overtime compensation provisions of the FLSA [Tr. 104; 119-20; 255; 263; 268; Ex. P-10].

14. Plaintiff's representatives acted in good faith without being cognizant of any possible violation of the minimum wage or overtime compensation provisions of the FLSA [Tr. 119-20; 255; 263; 268; Ex. P-10].

15. Defendant's employment was terminated by notice dated January 28, 1986, to be effective March 31, 1986, said notice requesting that she vacate the premises by the end of March, 1986 [Ex. P-14; and see Tr. 44].

16. When defendant failed to vacate by the stated date, plaintiff caused that a notice to quit be served upon her which was done on April 17, 1986 [R.6; Ex. P-9].

17. The complaint in this action was filed on April 25, 1986 [R.4], but defendant's mobile home was not removed from plaintiff's property until October 30, 1986 [see Tr. 237].

18. The damages thus incurred by plaintiff total \$300.00, computed by multiplying the reasonable rental value of the mobile home space (which the Court finds, after considering all the evidence [Tr. 302; 96], to be \$50.00 per month [Tr. 302]) times six months.

19. Plaintiff offered evidence that in addition to the reasonable rental value of the mobile home space, the average monthly value of utilities provided for defendant were gas: \$30; electricity: \$25; water \$8; and sewer: \$10 [Ex. P-16].

Summary of the Argument:

The Trial Court's rejection of Sidwell's FLSA claims was proper. This case is one which turns primarily on the facts. In the preparation of the Trial Court's Findings of Fact, attorneys for both parties gave great attention to those Findings, working on several drafts before finally submitting an approved version to the Trial Court for signature. As indicated

in the Statement of Facts, above, each of the Trial Court's findings is supported by substantial and competent evidence in the record. The Appellant Sidwell has failed to marshal the evidence supporting the Trial Court's Findings and has also then failed to demonstrate why those Findings should be rejected. This Court should not presume to retry the case on appeal, but should accept those supported Findings of the Trial Court, especially when the contents of those Findings were so carefully considered and so strongly supported by the record. The Findings of Fact support the Conclusions of Law which the Trial Court also adopted after careful consideration by the parties' attorneys. Existing regulations and applicable case law serve as clear precedent for the ultimate conclusions of the Trial Court.

The Trial Court did err, however, when he failed to treble the damages sustained by Monroc due to Sidwell's unlawful detainer of the premises. Utah law leaves no discretion for a judge in this regard; he must treble damages incurred after the notice in an unlawful detainer situation.

A R G U M E N T

I. IF THE FINDINGS OF FACT OF THE TRIAL COURT ARE SUPPORTED IN THE RECORD, THEY MAY NOT BE SET ASIDE ON REVIEW.

A. The Findings of Fact Which Were Adopted by the Trial Court Are All Supported in the Record.

Monroc has incorporated verbatim all of the Trial Court's Findings of Fact, adding citations to the Record for each point

and subpoint. See above. This detailed approach has been followed in this Brief because of the significance of those facts to the outcome of this appeal. As those reproduced Findings show, each of the Trial Court's findings is premised upon substantial and competent evidence in the Record.

Appellant Sidwell ignores that evidence and argues (Sidwell Brief, pp. 14-16) that the Trial Court erroneously found that Mrs. Sidwell was not required to be physically present at the work site during any specified hours. Attempting to support this argument, Sidwell cites three Findings (Nos. 7, 10, and 11), emphasizing certain language from each, which Sidwell asserts are contrary to the "clear weight of the evidence." This argument fails from the outset as the language of the Findings shows.

Sidwell's Brief points to the following passages as alleged error (Brief, pp. 14-15):

From Finding No. 7:

. . . it was not a condition of her employment that she be present on the premises on a full time basis or during any certain times (except to perform some of her specified duties, the timing of some of which assignments was freely altered by Defendant from time to time. [Emphasis in Sidwell Brief.]

From Finding No. 10:

Defendant was free to come and go as she wished, . . . [Emphasis in Sidwell Brief.]

From Finding No. 11:

Defendant's actual duties under the agreement with Plaintiff approximated no more than eight to ten hours per week . . . ; and the other times when Defendant was living on the

premises did not constitute hours which were
controlled by the plaintiff or its business.
[Emphasis in Sidwell Brief.]

Despite the portions emphasized by Sidwell's Brief, the remainder of the foregoing passages clearly indicates that the Trial Court found that some of Mrs. Sidwell's time was indeed required on a regular basis. The Trial Court found that she was compensated for that time at lawful rates. See Findings No. 11 and No. 12.

Sidwell's Brief, however, attempts to mislead the reader by suggesting that the Trial Court did not recognize the fact that some of Mrs. Sidwell's time was required on a regular basis. The misleading assertion is contained in the Brief at pp. 15-16:

These Findings and Conclusions are erroneous for the following two reasons. First, the clear weight of the evidence shows that Defendant Sidwell was in fact required to be physically present at the property during certain specified hours during the week. . . .

The Trial Court found (and Monroc does not dispute) that of course Mrs. Sidwell was required to be present during certain times. This was never contested at the hearing and the Trial Court adopted Findings so stating.

The effort in Sidwell's Brief to mislead is compounded in that portion of the Brief which underscores only certain parts of Findings 7, 10, and 11. The underscoring fails to include the qualifying language, without which the Findings are obviously incomplete. For example, Sidwell's Brief does not emphasize the words of Finding No. 7 which state that Mrs. Sidwell's presence

was not required during any certain times except to perform some of her specific duties. Also, in referring to Finding No. 11, Sidwell fails to emphasize that her actual duties under the agreement with Monroc approximated no more than eight to ten hours per week.

The attempt to mislead is further compounded by other statements in the Brief (at pp. 19, 26) which suggest that the Trial Court did not find that Mrs. Sidwell's "presence" around her home was anticipated. However, Findings 5, 6, and 7 each make reference to the fact that when Mrs. Sidwell was hired she was expected to live in the mobile home located on the Monroc property.

Sidwell's Brief, however, doesn't seem to contest the important Finding of the Trial Court that Mrs. Sidwell was not required to be on the premises on a full-time basis. Instead, Sidwell's Brief nit-picks the Findings, expecting this Court on review to quibble over the degree of freedom which Mrs. Sidwell enjoyed while living on the Monroc property.

In Sidwell's own proposed supplemental findings, Sidwell urged the Trial Court to hold that "during normal hours of plant operation, Defendant [Sidwell] was completely free to come and go as she wished, and was free to pursue her own individual interests, including accepting full-time employment with another employer and engaging in other normal, private pursuits with complete freedom from all duties or responsibilities." [R.209-10] Thus, Appellant in essence accepted some of the very

Findings which she now wishes to contest.

In making his ruling with respect to the degree of freedom enjoyed by Mrs. Sidwell, the Trial Court relied upon the Record, which included the following statements (among others):

(Testimony of Stanton Wilson, Tr. 54)

Q [by Kennedy] Now, in this document [P-12, which was written by Mrs. Sidwell herself], did the Defendant [Sidwell] attempt to set forth the amount of time that she spent on active guard duties each week?

* * *

A Yes. Middle of the second page she talks about there--well, all the way through it, but it culminates there on in Category D, she says seven hours and 50 minutes.

(Testimony of Foreman Bruce Squires, Tr. 141-42)

Q [by Kennedy] What were those duties?

A Well, they would vary. There was no set routine. When she was hired, she was told that what we really wanted on the premises was her presence, someone coming and going so there would be tire tracks in the snow and on the weekends the kids would know there was someone around because, you know Monroc had, had a problem with, you know the kids on the pond.

Q Did you expect her to be there all the time on the weekends?

A No. . . . And again, verbal, you know, number of years ago--I mean, it was in 1980 or '82, I mean, but--and just told her she needed to be there and that so there was a presence that she was free to come and go as she pleased.

Q She was free as she pleased?

A As she pleased.

Q And you told her that?

A Yes. I also recall telling her that, though, she is going to be gone, say a couple of days, we would like to know about it. And then I--or the foreman or someone could make some trips down there occasionally, you know, just to check. * * *

(Squires testimony, Tr. 151, 267)

Q [by Kennedy] Concerning what Mrs. Sidwell had indicated as her active guard duties, how many hours a week would you estimate would be required in performing those active guard duties that she defines in her memo [P-12]?

A Five to ten, maybe.

* * *

Q Mr. Squires, you've also been here and heard Mrs. Sidwell's testimony. Did you ever place any restrictions on her coming and going as a part of her job?

A No, sir.

(Testimony of Foreman Darrell Williams, Tr. 162, 164-65; R. 248, 252):

Q [by Kennedy] Was it your understanding that she was free to come and go as she pleased?

A Yes.

Q And in fact, she did come and go as she pleased, did she not, during the period of time that you had responsibility over her employment?

A Yes.

* * *

Q Did you contemplate that she had been performing any active guard duties when she was asleep?

A No.

Q Did you contemplate that she would be performing any active guard duties when she

was at the University attending classes?

A No.

Q Did you contemplate that she would be performing any active guard duties when she was employed full time at another job?

A No.

Q In her exhibit that she gave to the company, which I think is marked as P-12, she indicates that's the total time that she spent each week making her active guard duties, amounting to about seven hours and 50 minutes. From your knowledge of her duties, does that sound correct to you? Is it high or low or how would you characterize her estimate?

A Well, it might be a little high, but I couldn't say for certain.

* * *

Q Okay. All right. Now, knowing what you know about her duties, can you tell the Court how much time it would take over the course of a week on the average to perform all of the duties that she had to do?

A Five, six hours. Something like that.

* * *

Q Okay. Was Mrs. Sidwell ever instructed by you that she had to remain awake during the night to be on guard?

A Never.

Q Was she free to come and go other than the one round a day and two rounds on weekends that you say she was asked to perform?

A Yes.

Q And did she in fact come and go as she pleased?

A Yes.

(Mrs. Sidwell's Testimony, Tr. 183, 221-22)

Q [by Merkling] Why aren't you making a claim for those hours then?

A Because I was told by Mr. Darrell Williams when he gave me my job description that I would not be responsible for security duties or even for my presence on Saturday morning until 11:45.

Q How about the weekdays?

A On the weekdays, Mr. Darrell Williams, as I stated, told me that I was perfectly free to get myself a daytime job because it was very evident--

Q Well--

A Okay. That I was very free to get a daytime job, then.

* * *

Q [by Kennedy] Mrs. Sidwell, did you, did you include in the hours that you've listed here as hours worked [for compensation], time that you spent that you were actually asleep?

A Yes, Mr. Kennedy.

Q And you also included time where you were, maybe, eating dinner?

A Yes, Mr. Kennedy.

Q And maybe over the weekends, when you eating lunch?

A Yes, Mr. Kennedy.

Q And other meals?

A Yes.

Q You also included the time that you spent preparing meals?

A Yes, Mr. Kennedy.

Q You included time that you spent attending to other personal matters; for example, taking a bath or shower?

A Yes, Mr. Kennedy.

Q You included time that you spent even, maybe, running some errands?

A Yes, Mr. Kennedy.

Q And you included time that you spent attending church?

A Yes, Mr. Kennedy.

Q And you included time that you spent attending the symphony?

A Yes.

* * *

Q Did you include the time that you spent studying for these classes that you attended?

A Yes, Mr. Kennedy.

Q In fact, really, you've included time for a variety of matters where you were pursuing, oh, one personal interest or another in this time?

A I was living there, Mr. Kennedy.

Q I understand. But you included that, haven't you?

A Yes, I have.

(Testimony of another Foreman, Jann Vasey, Tr. 245-46, 250, 261-62, 266)

Q [by Kennedy] During that period of time [day in and day out basis], were you working in a position where you could see what was happening on the premises there at the site?

A Yes, I was.

Q Did you ever see Mrs. Sidwell make any rounds during that period of time?

A No, I did not.

Q You became her supervisor in May of 19--
let me ask you, did that bother you at all?

A No.

Q Why not?

A To the best of my knowledge she just lived
there and could come and go as she pleased.

Q You became her supervisor in May of 1985,
approximately?

A Yes.

Q And at that time did you change her duties
in any way?

A No, I did not.

Q Did you observe whether she made any
rounds at all after you became her
supervisor?

A No, I did not.

* * *

Q Did it upset you that she wasn't there
when you called to have her shut the pump
off?

A No, not at all.

Q Why not?

A Well, she just lived there. She could
come and go as she pleased.

Q Now, did you ever criticize her for not
being there under these circumstances?

A No, I did not.

* * *

Q When she became a concern of yours, did
you keep any records of when she was or
wasn't there?

A No, I did not.

Q Why not?

A I wasn't that worried about her comings and goings.

Q Did you ever restrict her in any way with respect to her comings and goings?

A No, I did not.

* * *

Q Did you ever indicate to Mrs. Sidwell she had to get permission in order to leave?

A No, I did not.

Q So, on her own she called you and said I'm going to be gone?

A That is correct.

The final segment of Mr. Vasey's testimony, quoted above, was omitted from Sidwell's Brief, which referred to some questions from the Court immediately preceding it. On the basis of the partial quotation, Appellant suggested an inconsistency in Mr. Vasey's recollection. (Brief p. 23.) That alleged inconsistency, however, disappears when Mr. Vasey's complete statement is considered.

Consequently, the Findings of the Trial Court are supported by substantial and competent evidence in the record. The inadequate attempts by Sidwell's Brief to question a small selection of those Findings cannot serve as cause for this Court on review to reject those Findings.

**B. The Credibility of Mrs. Sidwell's
 Testimony Was Called into Serious Question.**

In addition to the overwhelming weight of the evidence supporting the Trial Court's Findings, it must be noted that the Appellant's main witness (herself) was shown to be unreliable and not credible. The following passage from the Transcript demonstrates these points:

THE COURT: Wait a minute. He [Mr. Kennedy] just asked you a very simple question. Was that the question and the answer on that day [when your deposition was taken]?

THE WITNESS: This is what I said, Mr. Kennedy.

THE COURT: Thank you.

THE WITNESS: This is not what I am willing to hold to.

In addition to such evasive and equivocating testimony, the Trial Court also heard the admission from Mrs. Sidwell and her attorney that she had been convicted of a crime, theft of property from a prior employer. (Tr. 208) That evidence had been brought to light by Monroc to impeach the credibility of Mrs. Sidwell under the rules of evidence.

Hence, the Trial Court had more than an adequate basis for rejecting all of the contentions asserted by Mrs. Sidwell. She simply was not a credible witness.

C. Under Accepted Standards of Review, the Appellant Sidwell Failed to Meet her Burden To Challenge the Trial Court's Findings of Fact.

The Utah Supreme Court and this Court have recently and repeatedly restated the standard for appellate review of Findings of Fact. That standard is that a reviewing court will not overturn a trial Judge's Findings of Fact unless such Findings are clearly erroneous. In viewing the evidence, the reviewing court must be left with the definite and firm conviction that a mistake has been committed. Ball v. Volken, 741 P.2d 974, 64 Utah Adv. Rep. 8 (1987). Findings are presumed valid and correct as long as there is sufficient support for them in the evidence. Crimson v. Western Company, 742 P.2d 1219, 65 Utah Adv. Rep. 26 (Ct. App. 1987). A heavy burden rests upon the Appellant to marshal the evidence supporting the Trial Court's Findings and then to demonstrate that such evidence, when compared to the contrary evidence, is so lacking as to warrant the conclusion that clear error has been committed. Newmeyer v. Newmeyer, 69 Utah Ap. Rep. 32 (1987). This Court has stated that the Appellant is required to marshal all of the evidence supporting the Trial Judge's Findings. This requirement is neither elective nor optional. Nor will the reviewing court perform this task for Appellant. Fitzgerald v. Critchfield, 67 Utah Adv. Rep. 15 (Ct. App. 1987). To mount a successful attack on the Trial Court's Findings of Fact, Appellant must marshal all the evidence in support of the Trial Court's Findings and then demonstrate that even viewing it in the light most favorable to the court below,

the evidence is insufficient to support the Findings. Id.

The Fitzgerald case held that it was insufficient for an appellant simply to compare one party's version of the facts with the other party's version. In Hansen v. Green River Group, 74 Utah Adv. Rep. 44 (Ct. App. 1988), this Court ruled that appellate review is "strictly limited" concerning factual findings relating to the parties' intent as it pertains to an agreement. Those findings, if supported by substantial, competent evidence in the record, will not be disturbed on appeal. See, Wilburn v. Interstate Elec., 74 Utah Adv. Rep. 23 (Ct. App. 1988) This Court also very recently stated in Gillmor v. Gillmor, 745 P.2d 461, 68 Utah Adv. Rep. 22 (Ct. App. 1987), that the Court presumes the Findings of Fact of the Trial Court to be correct. It is not the function of the Appellate Court to make Findings of Fact because it does not have the advantage of seeing and hearing witnesses testify. On review, this Court views the evidence and all the references that can reasonably be drawn therefrom in a light most supportive of the Trial Court's Findings. If there is a reasonable basis in evidence, the Trial Court will be affirmed on appeal. Even where there is disparity in issue, the Trial Court's Findings will not be set aside unless the strict standard and requirements placed upon the Appellant have been satisfied. See Davies v. Olson, 746 P.2d 264, 70 Utah Adv. Rep. 42 (Ct. App. 1987); Salt Lake City School Dist. v. Galbraith & Green, 740 P.2d 284, 62 Utah Adv. Rep. 38 (Ct. App. 1987) (It is not for the Court to substitute its judgment for

that of the Trial Court).

And see Circle Airfreight v. Boyce Equipment, 74 745 P.2d 828, 69 Adv. Rep. 39 (Ct. App. 1987), which held that the reviewing Court must give due regard to the opportunity of the Trial Court to judge the credibility of the witnesses, and the Trial Court's Findings, if not against the clear weight of the evidence and not clearly erroneous, should not be disturbed on appeal.

In light of the foregoing rules which apply to this case, it is clear that the Appellant has failed to meet her burden to challenge the Trial Court's Findings. A review of Appellant's Brief reveals that Sidwell has completely failed even to attempt to marshal the evidence which supports the Trial Court's Findings. In the foregoing portion of this Brief, Respondent Monroc has set forth some of the evidence which supports the Trial Court's Findings, but, as indicated in the Newmeyer and Fitzgerald cases, cited above, this burden is a requirement placed upon the Appellant, not the Respondent. Sidwell's failure to meet that burden is a fatal flaw in her appeal. On that basis alone, her appeal must be rejected.

Monroc submits that the reason why Appellant Sidwell has failed to marshal the evidence supporting the Trial Court's Findings is that if Sidwell had done so, the overwhelming support of the evidence would become apparent. Instead, Appellant Sidwell's has mischaracterized the evidence and those Findings and then has attempted to attack the Findings on the basis of

inconsistencies which do not exist. As demonstrated above, there is substantial and competent evidence in the Record which supports each Finding of the Trial Court.

Certainly, viewing all the evidence in the light most supportive of the Trial Court's Findings, no rationale exists for disturbing those Findings. This is especially true in this case where the Trial Court's Findings are based in large part upon the testimony of witnesses whose demeanor on the stand was directly observed by the Trial Court, and where the Appellant's main witness' credibility was cast into serious question.

In summary, Appellant Sidwell has not met even the threshold test for challenging the Findings of the Trial Court. Moreover, Respondent Monroc (even though it does not have a burden to do so at this point) has demonstrated that those Findings are indeed supported by substantial competent evidence.

II. AMPLE LEGAL PRECEDENT EXISTS WHICH SUPPORTS THE FLSA DECISION OF THE TRIAL COURT IN THIS CASE.

Monroc does not dispute the fact that the FLSA requires an employer to pay an employee minimum wage (\$3.35 per hour) for all hours worked, nor does Monroc dispute that the law requires that time and one-half must be paid for hours worked in excess of forty in any one week. In this case, however, the question before the Trial Court was how many hours did Mrs. Sidwell actually work in any given week? Given the facts as found by the Trial Court, which were supported by substantial evidence in the

Record, the Trial Court properly applied the law in light of established precedents to determine that Monroc had correctly paid Mrs. Sidwell.

It should be emphasized that Sidwell's appeal is based entirely upon the erroneous premise that the Findings of the Trial Court are invalid. Nothing in Sidwell's Brief indicates that, if the Trial Court's Findings are indeed correct (which they are) the appeal would nonetheless have merit. Hence, because those Findings are indeed correct, Sidwell's appeal must fail.

Regardless of the unsupported contentions of Appellant Sidwell regarding the Trial Court's Findings, there are sufficient undisputed facts which would nevertheless support the lower court's decision. For example, Sidwell's proposed Supplemental Findings of Fact (R. 208-11) admit that Mrs. Sidwell was expected to deal with trespassing after operating hours; that she was paid \$355.00 per month; that her "active guard duties" totalled only seven hours and 50 minutes each week; that during the normal operating hours of the plant, she was completely free to pursue her own individual interests, including accepting full-time employment with another employer and engaging in normal, private pursuits with complete freedom from all duties and responsibilities; that she was free to attend classes at the university and go to the symphony, etc.

In light of such undisputed facts, legal authority supports the decision of the Trial Court. The federal regulation

applicable to this situation is 29 C.F.R. §785.23, which provides:

Employees residing on employer's premises or working at home.

An employee who resides on his employer's premises on a permanent basis or for extended periods of time is not considered as working all the time he is on the premises. Ordinarily, he may engage in normal private pursuits and thus have enough time for eating, sleeping, entertaining, and other periods of complete freedom from all duties when he may leave the premises for purposes of his own. It is of course difficult to determine the exact hours worked under these circumstances and any reasonable agreement of the parties which takes into consideration all of the pertinent facts will be accepted. This rule would apply, for example, to the pumper of a stripper well who resides on the premises of his employer and also to a telephone operator who has the switchboard in her own home. (Skelly Oil Co. v. Jackson, 194 Okla. 183, 148 P.2d 182 (Okla. Sup. Ct. 1944); Thompson v. Loring Oil Co., 50 F. Supp. 213 (W.D. La. 1943) [Emphasis added.]

Pursuant to the foregoing regulation, if Monroc and Mrs. Sidwell had a reasonable agreement regarding the conditions under which she would be compensated for the time she actually worked while living on the Monroc premises, such agreement would not be upset. In this case, the facts showed that such an agreement did exist: Monroc agreed to pay Mrs. Sidwell \$355.00 per month plus furnish the space and utilities for her trailer (Tr. 154) (which utilities and space were worth a total of \$123.00 additional compensation each month, Findings 18 and 19, Tr. 96, Ex. P-16). The gross pay for Mrs. Sidwell of \$478.00 each month was paid for active guard duties of between eight and ten hours per week (Finding 11). By simple mathematics, this means that Mrs. Sidwell was actually paid at least \$11.03 per hour worked (12 months

times \$478, divided by 10 hours times 52 weeks). In addition to the support of the above-cited regulation, established case precedent also supports the Trial Court's determination in this instance. For example, in Adkins v. Campbell Brown & Co., 189 F. Supp., 41 Labor Cases Par. 31,055 (S. D. W. Va. 1960), it was held that time spent by an employee on the property of an employer in the performance of a guard function did not constitute working time within the coverage of the FLSA, where the terms of the arrangement provided for the establishment of living quarters on the employer's property and for the guard to be seen about the property two or three times after operations had closed for the day in return for free living quarters, gas and electricity, pay at the rate of fifty dollars a month and enough odd jobs at the rate of one dollar per hour to bring his weekly earnings up to thirty-five or forty dollars per week. Although the presence of the guard on the employer's property in Adkins was intended as a precaution against vandalism, the time spent was not controlled by the employer and was found to be predominantly for the individual's own benefit. Under such circumstances, which are quite similar to those admitted to have existed here, the court in Adkins found no violation of the FLSA. See also, Skelly Oil Co. v. Jackson, 8 Labor Cases Par. 61. 133, 148 P.2d 182 (Okla. 1944). In another similar case, the same result was reached. Cordell v. Wilcox Oil & Gas Co., 5 Labor Cases Par. 60,807 (D. Okla. 1941). In that situation, the employee was a "pumper" on an oil well property. The court

stated:

A pumper on an oil well property usually lives in a house on the lease furnished by the oil company, and it is necessary that he spend almost all of his time on the lease in case something happens to the pumps; however, the testimony in this case shows that the pumper left the lease often to go to town, buy his groceries, take his children to school, etc.

* * *

Of course, all of these pumpers are required to be available on the lease for some period of time during the day other than the time during which they are actually required to perform some service for the employer. It is necessary for them to be available to take care of any breakdowns and attend to any trouble that might develop in connection with the pumping of a well. But I don't think the law contemplates that an employee is to be compensated for all the time that he is required to be available there on the lease for work in the event something should develop that would require his attention. [Emphasis added.]

The same conclusion was reached in Perry v. George P. Livermore, Inc., 6 Labor Cases Par. 61,310 (Ct. App. Tex. 1942), which was another oil lease case. In that decision, the court stated:

In harmony with the opinion of the [Wage and Hour] Administrator, as above expressed, we do not think it was contemplated by the Congress that such an employee as we have in this case should be compensated for the time he spent in sleeping, eating, relaxing, or otherwise engaging in entirely private pursuits, either on or off the premises of his employer. [Emphasis added.]

The opinion referred to in the foregoing passage appeared as Interpretative Bulletin No. 13:

In some cases employees are engaged in active work for part of the day but because of the nature of the job are also required to be on call for 24 hours a day. Thus, for example, a pumper of a stripper well often resides on the premises of his employer. The pumper engages in oiling the pump each day and doing any other necessary work around the well. In the event that the pump stops (at any time during the day or night) the pumper must start it up again. Similarly, caretakers, custodians, or watchmen of lumber camps during the off

season when the camp is closed, live on the premises of the employer, have a regular routine of duty, but are subject to call at any time in the event of an emergency. The fact that the employee makes his home at his employer's place of business in these cases does not mean that the employee is necessarily working 24 hours a day. In the ordinary course of events, the employee has a normal night's sleep, has ample time in which to eat his meals and has a certain amount of time for relaxation and entirely private pursuits. In some cases the employee may be free to come and go during certain periods. Thus, here again the facts may justify the conclusion that the employee is not working at all times during which he is subject to call in the event of an emergency, and a reasonable computation of working hours in this situation will be accepted by the Division. [Emphasis added.]

Here, as under the example cited in the Opinion, it was undisputed that Mrs. Sidwell in the ordinary course of events was able to have a normal night's sleep, eat her meals, relax, and enjoy private pursuits. Another case reaching a similar conclusion that not all the time in question should constitute working time is Brennan v. Williams Investment Co., Inc., 77 Labor Cases Par. 33,254 (W.D. Tenn. 1975). See also, Wage and Hour Opinion Letter No. 600 (May 25, 1967), ruling that employees residing on the employer's premises, such as house mothers in the women's dormitories of colleges or universities, are not considered as working all the time while on the premises; and see Wage and Hour Opinion Letter No. 783 (April 1, 1968).

The foregoing authorities demonstrate that virtually since the passage of the FLSA, the Agency and the courts have considered that employees who reside on the employer's premises are not to be regarded as working the entire time of their presence. In the present situation, which is factually very

similar to the example cited in the available precedent, Mrs. Sidwell was found to be engaged in "active guard duties" only for eight to ten hours per week. Under those circumstances, the arrangement agreed upon between Monroc and Sidwell was certainly reasonable and should not be upset.

The cases cited in Sidwell's Brief are not applicable here. For example, Witt v. Skelly Oil Co., 379 P.2d 61 (N.M. 1963), does not apply in this instance because the employee in that case was required to be on the premises during the entire weekend. Mrs. Sidwell, in contrast, was not required to be present throughout the weekend. Her duties consisted of only two rounds each weekend day (see Finding 6). At the same time, she was free on weekends to attend church, go to the symphony, and to come and go as she pleased. Similarly, the Crago v. Rockwell Mfg. Co., 301 F. Supp. 743 (D. Tenn. 1969), case also does not apply here. Mrs. Sidwell can hardly be described (as was the employee in Crago) as a "captive on the employer's premises for sixteen hours a day." In Mrs. Sidwell's own words, she was engaged in "active guard duties" only sever hours and 50 minutes each week (Ex. P-12). Likewise, Marshall v. Nauta-Crete, Ltd., 82 Labor Law Rep. Par. 33,589 (D. Va. 1977), is not applicable because the two guards in that case were required to stay on the premises throughout the period of their service each weekend. An entirely different regulation applied in that case (29 C.F.R. §785.22, entitled "Where an employee is required to be on duty for 24 hours or more"). Mrs. Sidwell was certainly not required to be

on duty 24 hours or more during any particular period of time. That was not her assignment, and even she doesn't claim that Monroc imposed such a requirement upon her.

In anticipation of Monroc's Brief, Appellant attempts to wipe away the cases cited to the Trial Court by Monroc and also referred to above as supportive of the lower court's decision (see Sidwell Brief, p. 32). Appellant attempts to negate that authority by the cryptic assertion that "each of these cases turns upon the peculiar facts and circumstances of employment. No sweeping generalizations can be made." Despite the fact that those cases were cited to the Trial Court by Monroc in support of its decision, Appellant Sidwell makes no effort in her Brief to attempt to distinguish the facts of those cases from those present in the case at hand. Monroc submits that the reason Appellant fails to do so is because the facts of those case are amazingly similar to the present case and simply cannot be distinguished on a factual basis. In addition, contrary to the generalization that "no generalizations can be made," it can be accurately stated that those cases to stand for several general propositions: Where employees reside on an employer's premises for extended periods of time, they are not considered to be working during all of such periods, particularly where they can engage in normal private pursuits and thus have time for eating, sleeping, entertaining, and enjoying other periods of complete freedom from all duties when they can leave the premises. In Mrs. Sidwell's case, as the Trial Court found, based upon

substantial evidence (including her own admissions), except for 8 to 10 hours per week, Mrs. Sidwell was not working for Monroc. As stated above, similar cases applying the rules relating to employees who reside on their employers' premises and are generally free to come and go as they please, are not considered working during such periods. Those cases offer significant support to the Conclusions reached by the Trial Court in this instance.

III. THE TRIAL COURT ERRED WHEN HE FAILED TO TREBLE
MONROC'S DAMAGES FOR UNLAWFUL DETAINER.

When the Trial Judge made his ruling on Monroc's request for treble damages, his statements from the bench indicated that he applied an incorrect rule of law in reaching his decision on this issue. His statement revealed that he believed that the statute required only that waste and damages to the premises be trebled. He equated rental payments owing before the notice of unlawful detainer was served with rents owing after the notice was served and the tenancy was ended. Monroc concedes that rent owing before the notice of unlawful detainer is not to be trebled. However, the reasonable value of the premises during the period of the unlawful detainer must be trebled under the statute.

Judge Daniels' comment on this issue appears in the Record at page 302:

As I read the unlawful detainer statute, I don't think you treble the rent. I know it's very ambiguous, but I think it talks about awarding damages and awarding rent, and I don't think you treble the rent.

I think your treble damages that rises as a result of the unlawful detainer, and particular waste or damage that is done, so I'm not going to award treble damages on the unlawful detainer action.

The Judge found that the notice of unlawful detainer was served on April 17, 1986. No rent is claimed by Monroc prior to that date. The Judge also found that the reasonable value of the premises during the unlawful detainer was \$50.00 per month and that the unlawful detainer extended for six months. He refused to treble the total of six time fifty dollars, or \$300.00. R.302.

The leading case on this issue is Forrester v. Cook, 292 Pac. 206 (Utah 1930). With respect to the issue of treble damages, that case presented an identical legal question to the one considered by this Court in his Memorandum Decision dated March 18, 1987. The holding of the Utah Supreme Court suggests that the Trial Court erred in reaching his conclusions in his bench ruling, cited above. It is appropriate that this Court now correct that error.

The relevant portion of the Forrester case is quoted below (see 292 Pac. 213-14):

The question may arise as to what is included within the term "damages" [under the unlawful detainer statute]. It is contended by defendants that the basis of the judgment here is for rental value or reasonable rental value of the use and occupation of the premises and that this comes within the term "rents" as used in the statute, rather than "damages," and that rents cannot be trebled. The statute itself indicates the meaning of the terms wherein it says that the jury shall "also assess the damages occasioned to the plaintiff by any * * * unlawful detainer."

The word "rent" has reference to "the amount of any rent due, if the alleged unlawful detainer be after the default in the payment of rent." The rents here spoken of are rents which accrued before default. In the present action there are no rents accruing before forfeiture. The plaintiff is entitled to recover such damages as are the natural and proximate consequences of the unlawful detainer. Clearly the loss of the value of the use and occupation of the premises, or the rental value thereof during the period when the premises were unlawfully withheld from plaintiff, is a damage suffered here. While damages may not be restricted to the rental value and may include more, yet the rental value during the unlawful withholding of the premises is the minimum damages [Citations omitted.] Rent, which may not be trebled, are such as accrue before termination of the tenancy. After the tenancy has been terminated by the notice required by the statute, the person in unlawful possession is not owing rent under the contract, but must respond in damages pursuant to the law. Rental value or reasonable value of the use and occupation of the premises becomes an element of damages for retaining possession. This is not rent, it is damages. [Emphasis added.]

Under the rule of Forrester as applied to the present factual situation, Mrs. Sidwell is liable for the rent due for the period from April 17, 1986, to October 30, 1986. The sums due following the service of the unlawful detainer notice do constitute "damages" incurred by Monroc and must be trebled under the statute.

The Forrester decision has been consistently followed by the Utah Supreme Court. It has been cited as a clear statement of the law on this point in Utah. See, Lincoln Financial Corp. v. Ferrier, 567 P.2d 1102, 1105 (Utah 1977); Ute-Cal Land Development v. Intermountain Stock Exchange, 628 P.2d at 1282

(Utah 1981). Clearly, under Utah law as enunciated in the Forrester line of cases, a landlord is entitled to have considered as "damages" the reasonable rental value of the unlawfully detained premises for the time following the service of the unlawful detainer notice.

Hence, Conclusion of Law No. 11 should be amended to provide that the damages incurred by reason of the unlawful detainer of \$300.00 should be trebled, to total \$900.00.

Correspondingly, Paragraph 1 of the Judgment should be amended to read: "Judgment is entered in favor of plaintiff and against defendant in the amount of \$900.00 as treble damages.

CONCLUSION AND RELIEF REQUESTED

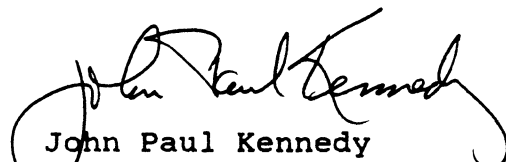
Appellant Sidwell has entirely failed to meet her heavy burden of marshalling all the evidence sustaining the Trial Court's Findings and then overcoming the presumption in favor of those Findings by demonstrating why that evidence does not constitute competent substantial evidence supporting those Findings when such evidence is viewed in the most favorable light supporting those Findings. In addition, Appellant Sidwell has failed to show why, according to undisputed facts, the ruling of the Trial Court concerning her FLSA claim should be altered. Indeed, applicable case precedent more than justifies the Trial Court's decision.

On the other hand, the Trial Court was clearly in error when he failed to treble the damages incurred by Monroc relating to the value of the premises following the notice of unlawful detainer.

On the basis of the foregoing and on the basis of the Record as a whole, Respondent Monroc submits that the appeal of Sidwell should be denied. The ruling of the Trial Court with respect to Mrs. Sidwell's claims under the Fair Labor Standards Act should be affirmed. However, the ruling of the Trial Court with respect to Monroc's claim for treble damages should be reversed and the rule of the Forrester case, supra, should be applied, increasing the amount of the Judgment against Mrs. Sidwell to \$900.00.

Dated: February 24, 1988.

Respectfully submitted,

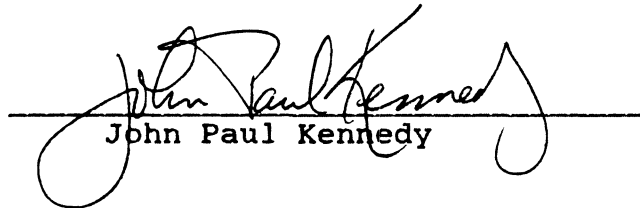

John Paul Kennedy
Attorney for Respondent Monroc

CERTIFICATE OF SERVICE

I hereby certify that four copies of the foregoing Brief of Respondent Monroc was served upon the person named below at the address indicated by personal delivery on the date stated.

Dated: February 24, 1988.

Craig S. Cook
3645 East 3100 South
Salt Lake City, Utah 84109


John Paul Kennedy