

1997

Edward L. Brenda DeWolf v. Michael V. Turley : Reply Brief

Utah Court of Appeals

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DOCKET NO. 970174-CA

IN THE UTAH COURT OF APPEALS

Edward L. and Brenda DEWOLF,
Plaintiffs and Appellees,

v.

Michael V. TURLEY
Defendant and Appellant.

REPLY BRIEF OF APPELLANT

970174-CA

No. 970039
940401013
Priority No. 15

Appeal for Fourth District
Court, Millard County,
Judge Donald Eyre, Jr.

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TABLE OF AUTHORITIES AND CASES

NONE

ARGUMENT

On page 3 of DeWolf's Brief they allege that Mr. Turley breached his contract and "actively hid the home's numerous defects from Appellees prior to closing." This is not true. The biggest claim of DeWolfs was that the well water was contaminated. However, prior to purchasing the home DeWolfs had the water tested by an independent company and Mr. Turley also got an independent test, and the water was found by both test to be potable. (R. at 126-127) Thus, not only did Mr. Turley not hide anything with regard to the water, but DeWolfs had two independent tests, one of which was their own, which means that Dewolfs could not have relied on Mr. Turley in any way with regard to quality of the water. The issue of reliance may be summary judgment material for Mr. Turley if the case is tried. Not only was the water tested by both parties, but Mr. Turley raised his family on the water. (Record at 122) In addition, after the sale when Mr. Turley went back with a police officer to obtain water for a third test Dewolfs would not allow him to take any water. (R. at 161). Nevertheless, the lower Court awarded \$10,000 for the claim that the water was contaminated based on requests for admissions which the Court deemed admitted.

On page 4 DeWolfs claim that Mr. Turley failed "to leave the home within the time specified in the addendum to the contract." This is not true. Mr. Turley moved out on the agreed upon date as stated in the documents. The evidence will not support damages for delay. (R. at 159)

DeWolfs further claim on page 4 that Mr. Turley left the home in shambles and breached his agreement by failing to clean the home. This is also not accurate. Mr. Turley complied with the contract and the parties agreed to reduce the price of the home so that DeWolfs could do some of the work themselves. (R. at 157-159)

On page 5 DeWolfs argue "... nor was the Court notified that the mail was delayed in reaching Mr. Turley until he filed his affidavit in regard to the Motion for Relief from Judgment." This is not true. The phone message to the Court which was received the day before trial clearly states that Mr. Turley notified the Court that he was not receiving his mail on time. Specifically, the note says, "Someone picks up his mail and sends it to him and it takes a while to get to him." (Record at bottom page on right hand side of file)

On page 10 DeWolfs argue that Mr. Turley "... did attempt to have the trial

continued without any indication as to when an appropriate time would be." This is not true. Again, the phone message to the Judge states when Mr. Turley expected to be back in the United States which was some time in the Summer. Specifically, the phone message stated: "he requested a continuance of the trial. He is not scheduled back in the U.S. until probably April-July or August." (Record at bottom page on right hand side of file) In fact Mr. Turley did return in July and the trial could have been continued for that short time until he returned home without prejudice to the other party.

On page 11 DeWolfs argue that Mr. Turley was in the United States for "a month and a half prior to filing his motion before he did anything." A month and a half is not a long time under the circumstances, and is not evidence of bad faith. In addition, this argument is misleading. Within thirty days after returning to the United States Mr. Turley learned that judgment had been entered against him and he contacted his attorney. (Record at 124) It took his attorney some time to learn about the case and prepare documents in support of a motion for relief which is dated August 15. (Record at 120)

On page 12 DeWolfs argue that Mr. Turley is making "confusing claims which touch on most of the Rule 60(b) subdivisions." DeWolfs then go on to argue each section of Rule 60(b) as though those sections were issues in the case. In actuality the arguments relating to 60(b) 1,2,3, and 4 are really strawmen which DeWolfs set up and then argue away. There should be nothing confusing about the issues after argument before the Trial Court and in light of the Court's Memorandum Decision. The issues are clear.

On page 19, DeWolfs attempt to distinguish Nelson v. Jacobsen, from the present case. DeWolfs argue that in Nelson the person who sought relief " (1) was involved in all pretrial activities; (2) attended the hearings; and (3) read his mail." In reality, the Nelson case cannot be distinguished on the grounds that Mr. Turley did not read his mail. He read his mail. Although he missed hearings, it was under very difficult and unusual circumstances which Nelson does not address. Nelson does address the need to have time to prepare for trial and the importance of according a layman without counsel "every consideration that may reasonably be indulged."

DeWolfs also argue on page 19 that "Mr. Turley: (1) refused to correspond with opposing parties, 2) failed to contact the Court in any pretrial where the trial date was

set; (3) did not inform the court of his current address; and (4) did nothing for most of one year,..". Of course it is obvious that if Mr. Turley was in Utah he would not have a problem attending a pretrial or receiving his mail. However, he was in China and DeWolfs and DeWolf's attorney knew he was in China and no longer had an attorney and was not getting some of his mail. (Record at 88-91, 108) In addition, with that knowledge, DeWolfs and their attorney proceeded to take advantage of Mr. Turley by filing a request for admissions on each issue, pretending to send Mr. Turley copies, making what Mr. Turley considers misrepresentations to the Trial Court regarding the facts, and then proceeding to get a judgment against him. How can DeWolfs argue that this is a basic fairness.

On page 20 and 21 DeWolfs argue that Mr. Turley did not receive Notice of Withdrawal of Counsel, Notice to Appear or Appoint, Notice of Hearing Date sent out by the Court, Notice of Setting of Pretrial in Provo, or Notice of Hearing. Mr. Turley's Affidavit states that he did not receive a Notice to Appear or Appoint Counsel. (Record at 157) However, it is clear he received notice of the Trial Date. Unfortunately he received it just one day before the trial which made it impossible for him to prepare or properly respond. In addition, Mr. Turley participated fully for a year and a half while he had local counsel from May 1994 through August 1995. His participation included filing an answer to the complaint, responses to Dewolfs' discovery requests, a response to Dewolfs' motion for attachment, and a motion to compel. (Record at 13,30,33,36)

On page 21 DeWolfs argue that Mr. Turley did not receive "any of the other documents sent while he was out of the United States." This is obviously an inaccurate statement because the main fact supporting Mr. Turley's of lack of due process is the fact that he received Notice of Trial but he received it only a day before trial.

On page 21 DeWolfs argues that Mr. Turley's takes the unreasonable position that opposing counsel and the Court's have an obligation "to insure that every mailing is received, not simply properly mailed..." This is not what Mr. Turley proposes. Mr. Turley proposes that when he did not receive timely notice due to circumstances beyond his control and the Court's control and the other party's control, that reasonable accommodation be made to allow him to prepare a defense.

On page 17 DeWolfs argue that Mr. Turley is asking the Court to find lack of

due process and make an "...accommodation of his voluntary inaccessibility..." Mr. Turley was trying to rectify the problem caused by the fact that his employment took him to China. When it became apparent that he wasn't receiving the mail and could not properly carry on his case, he informed the Court when he would return and requested a continuance. That continuance would have meant a few months delay, but that was not unreasonable under the circumstances. Rescheduling trials within this time frame is common. Because he had discharged his attorney, and was in China, it was difficult for him to hire a new attorney and that obviously left him in a position of weakness and vulnerability.

CONCLUSION

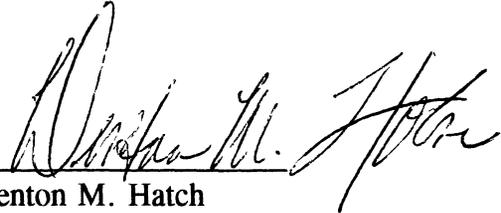
Wherefore, Turley requests that the Appellate Court reverse the Trial Court by vacating the default judgment, reinstating his answer, allowing him an opportunity to respond to DeWolfs' Requests for Admissions, and directing the Trial Court to try the case on its merits.

DATED this 24th day of June, 1997.


DENTON M. HATCH,
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Michael V. Turley

MAILING CERTIFICATE

I hereby certify that I delivered two true and correct copies of the Reply Brief of the Appellant to Richard C. Coxson, 457 North Main, Spanish Fork, UT 84660 this 25 day of June, 1997.



Denton M. Hatch