

1977

J.W. Broadwater v. Glen Van Tassell, Erma Van Tassell, His Wife, and Dick Van Tassell v. J.W. Broadwater and Jane Doe Broadwater, His Wife and Andrew R. Birrell, Jr., and Patricia J. Birrell, His Wife, and Joseph H. Shool and Jane Doe Shool, His Wife : Brief of Appellant

Utah Supreme Court

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IN THE  
SUPREME COURT  
OF THE  
STATE OF UTAH

J. W. BROADWATER,

\*

Plaintiff and  
Respondent,

vs.

\*

ELLEN VAN TASSELL, ERMA VAN  
TASSELL, his wife, and  
DICK VAN TASSELL,

\*

Defendants and  
Appellants.

Case No. 15319

ELLEN VAN TASSELL and  
ERMA VAN TASSELL, his wife,

\*

Third-Party Plaintiffs,

vs.

\*

J. W. BROADWATER and JANE DOE  
BROADWATER, his wife, and  
ANDREW R. BIRRELL, JR., and  
PATRICIA J. BIRRELL, his wife,  
and JOSEPH H. SHOOL and  
JANE DOE SHOOL, his wife,

\*

Third-Party Defendants. \*

APPELLANTS' BRIEF

Appeal from the Judgment of the Second Judicial District  
Court for Davis County, Honorable J. Duffy Palmer, District Judge.

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IN THE  
SUPREME COURT  
OF THE  
STATE OF UTAH

---

J. W. BROADWATER,

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Plaintiff and  
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vs.

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GLEN VAN TASSELL, ERMA VAN  
TASSELL, his wife, and  
DICK VAN TASSELL,

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GLEN VAN TASSELL and  
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Third-Party Plaintiffs,

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BROADWATER, his wife, and  
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PATRICIA J. BIRRELL, his wife,  
and JOSEPH H. SHOOL and  
JANE DOE SHOOL, his wife,

\*

\*

Third-Party Defendants.

\*

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APPELLANTS' BRIEF

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STATEMENT OF KIND OF CASE

This is an action by the Respondent to collect on  
certain promissory notes from the Appellant and to foreclose  
on certain mortgages securing the notes and Appellant's  
Counterclaim claiming an overpayment of monies.

## DISPOSITION IN LOWER COURT

On April 11, 1977, the case came on regularly for Trial in the Second Judicial District Court in Davis County before the Honorable J. Duffy Palmer, sitting without a jury. Upon the conclusion of testimony, the Judge ruled that the Respondent was entitled to Judgment on all of the issues set forth in the Complaint, and the Appellant's Counterclaim was dismissed with prejudice. That Order was entered on May 16, 1977 and on May 26, 1977, Appellant made a Motion for a New Trial. That Motion was denied by Judge Palmer on June 9, 1977. On July 8, 1977, Appellant moved for a re-hearing on his Motion for a New Trial and that was denied on July 21, 1977.

## RELIEF SOUGHT ON APPEAL

Appellant requests the Court to reverse the Trial Court's decision denying Appellant's Motion for a New Trial.

## STATEMENT OF FACTS

The facts of this case are very long and complex, but for the purposes of this appeal, can be summarized as follows:

During a period of time from December 12, 1967 to December 1, 1971, Respondent J. W. Broadwater made several loans to Appellant, Glen Van Tassell. In exchange for these loans, Appellant executed and delivered several promissory notes to Respondent. Each was secured by a separate mortgage. During the course of the dealings, each party kept a separate accounting of the money paid on the loans. The only issue raised in the Trial Court and the issue that has been appealed

is which accounting is correct.

Respondent kept his accounting on a check size piece of paper written on both sides (Plaintiff's Exhibit D, Tr. 11) from this piece of paper, Respondent made summaries (Plaintiff's Exhibits D, O and N, Tr. 21 & 22). According to Respondent's testimony, Exhibit D is a complete record of all the money he ever received from the Appellant (Tr. 32). Respondent testified that he never gave any receipt to the Appellant (Tr. 35).

Appellant is in the gas station business. It is his practice to keep an accounting of his transactions by the use of individual receipts. Whenever a customer would come in and buy gas or other service station goods or services on credit, he would write a ticket in triplicate. He would then give a copy to the customer and file the other two copies in his records. Appellant claims that when Respondent would come into the station, he would buy gas or accessories and charge them, then he would ask Appellant if he had any money to pay him on the notes. Appellant would get cash out of the till and give it to the Respondent and then write it down on Respondent's ticket (Tr. 95). Appellant introduced 76 such receipts into evidence (some were for gas and money, others were just for gas and accessories) (Tr. 97).

Respondent claims that there is still a total of \$53,640.68 still due on all the notes. Appellants claim that there has been an overpayment.

At Trial, Respondent produced a handwriting expert,

Grube, who did some analysis of the tickets introduced into

evidence. It was Mr. Grube's testimony that on Defendant's Exhibits 16-21, that Respondent's signature was put on prior to the amount of money supposedly received by Respondent. Mr. Grube testified that he had examined more than just Defendant's Exhibits 16-21, but he could only reach a conclusion on Exhibits 16-21(Tr. 170). Mr. Grube said that he was unable to determine the time lapse between the two entries (Tr. 176); he also testified that it would be extremely difficult to take the ticket out of the machine and then replace the ticket back in the machine so that the copies would match identically(Tr. 177).

At the conclusion of the Trial, the Judge delivered his ruling from the bench. It was his decision that the Respondent's accounting was correct in every detail. In fact, he even suggested to the Respondent that he contact the County Attorney's Office and ask for a perjury investigation(Tr.

On May 16, 1977, the final Order was entered(Tr. 139). On May 26, 1977, Appellant filed a Motion for a New Trial. That Motion was heard on the same day as another part of the Trial and was denied. On July 8, 1977, Appellant filed a Motion for a Re-Hearing on Defendant's Motion for a New Trial. This was denied on July 21, 1977. On July 8, 1977, Appellant filed his Notice of Appeal.

#### ARGUMENT

POINT I. THE COURT'S DECISION AT TRIAL WAS NOT SUPPORTED BY THE EVIDENCE PRESENTED.

While it is true that because the Trial was before a Judge sitting without a jury, the Judge's decision as a trier of fact and law should be given much deference, he cannot stubbornly ignore and refuse to be guided by credible uncontested evidence. DeVas v. Noble, 13 Ut.2d 133.

At Trial, there was one piece of evidence that seems to have been ignored by the Judge, Defendant's Exhibit 13. Defendant's Exhibit 13 is a receipt that bears the signature of the Respondent and indicates that the Respondent received \$3,000.00 cash from the Appellant on February 15, 1972. This exhibit is important for a number of reasons. First, since it does not appear on the Respondent's accounting sheet, it completely contradicts Respondent's testimony that he did not receive any other money from the Appellant. Second, it contradicts Respondent's testimony that he received only small amounts of money, \$500.00 or less. Third, it supports Appellant's contention that he paid large sums of cash to the Respondent. In his deposition (Broadwater Deposition, p. 34), Respondent denied that he signed Defendant's Exhibit 13. As shown from the markings on Defendant's Exhibit 22, Mr. Grube, the handwriting expert, checked the signature of some of the tickets to determine if they were authentic. Mr. Grube never indicated that Respondent's signature on Defendant's Exhibit 13 was forged. In fact, he did not testify that any of the signatures on the 76 tickets were forged. Further, at Trial, Respondent would not directly answer whether or not his signature appeared on Exhibit 13. At Trial, when asked to

identify Defendant's Exhibit 13, Respondent answered, "That certainly is not my signature, I don't think, it does not look like it." (Tr. 54). Later, he said, "I never received a nickel and I don't think that's my signature." (Tr. 347). In his deposition, he flatly denied that Exhibit 13 was his signature. Later he hired a handwriting expert to examine the tickets, and at Trial, he was not sure whether or not his signature appeared on Exhibit 13. Respondent, being aware of Defendant's Exhibit 13, surely had Mr. Grube examine it and if Mr. Grube had found it to be a forgery, surely he would have so testified. On the other hand, it was Appellant's firm testimony that Mr. Broadwater signed Defendant's Exhibit 13 (Tr. 105).

The Judge seemed to place heavy reliance on the fact that Mr. Grube testified that on tickets 16-21, the amount of money that was supposedly received was written after the Respondent's signature. Assuming this to be true, it still does not controvert the Appellant's testimony. Appellant testified that on several occasions, Mr. Broadwater would purchase gas or accessories and then come in and ask for some money (Tr. 105-106). On several occasions, he even bought the gas or accessories from some other employee and then came to talk to the Appellant about getting some money on the notes. It was Appellant's testimony that all of the entries on the tickets were made prior to the tickets being taken out of the machine (Tr. 106). It is very possible that Respondent could have signed for the gas and received the money and just added the amount of money to the already signed

Again referring to Mr. Grube's testimony, he stated that it would be almost impossible to put the tickets back into the machine so that the white and yellow copies would match. In his Motion for a New Trial, Appellant submitted the yellow sheet so that the trier of fact could determine if the two copies matched. The fact that Respondent's signature was put on for the amount shown to have been received is meaningless. The only issue that matters is whether the amount received by Respondent was on the ticket when the ticket was taken from the machine and a copy given to Respondent. Just because the signature was put in first does not mean that Respondent did not receive and acknowledge the receipt of the money. While there were six tickets that the signature appeared to have been put on first, there are seventeen tickets, 1-15 and 67 which purport to be receipts of money received by Respondent, which were not challenged by the Respondent. Appellant respectfully submits that based on the receipts presented by Appellant as evidence at Trial, that the Appellant carried his burden or proof and made a prima facie showing that he paid a large sum of money to the Respondent. That prima facie showing has not been rebutted by Respondent and therefore, the ruling of the Trial Court was erroneous.

POINT II. THE TRIAL COURT'S DENIAL OF APPELLANT'S  
MOTION FOR A NEW TRIAL WAS ERRONEOUS.

Rule 59 of the Utah Rules of Civil Procedure provides in part, that:

Subject to the provisions of Rule 61, a New Trial may be granted to all or any of the parties and on all or part of the issues for any of the following causes; provided, however, that on a Motion for a New Trial in an action tried without a jury, the Court may open the Judgment, if one was entered, take additional testimony, amend Findings of Fact and Conclusions of Law or make new Findings and Conclusions and direct the entry of a new Judgment:

.  
.

(4) Newly discovered evidence, material for the party making the application which could not, with reasonable diligence have been discovered and produced at Trial.

.  
(6) Insufficiency of the evidence to justify the verdict or other decision or that it is against law.

Appellant's original Motion for a New Trial was not properly heard. There was never any notice that the Motion was to be heard. The Trial was bifurcated into two hearings, one as to the issue of the notes and mortgages and the other one as to the ownership of the ten foot strip of land surrounding the Appellant's service station. The Trial on the notes and mortgages was heard first on April 11, 1977. On June 9, 1977, the second Trial was held (Tr. 405). At that time, the Trial Judge sua sponte brought up the Motion for a New Trial and summarily denied it. Appellant's counsel was not given notice to prepare for that hearing and as a result, was not given an opportunity to be adequately heard.

In order to remedy the injustice, Appellant filed a Motion for a Re-Hearing of the Motion for a New Trial. While the rules of civil procedure do not provide for a Motion for re-hearing, the Court should have allowed it on one of two

grounds. First, since the Appellant did not have proper notice of the original Motion, he should be given an opportunity to be heard. Second even if the Motion for re-hearing was improper, the requirements of Rule 60 were met and the Court should have considered the Motion for re-hearing as a Motion for relief from Judgment under Rule 60B. In the case of Durrey v. Lunford, 18 Ut.2d 74, 415 P2d 662, the Court in holding that the motion to reconsider a denial of a new trial was improper, said:

The rules of civil procedure do not provide for a motion to reconsider or review its ruling granting or denying a motion for a new trial and where the requirements of Rule 60 are not met, the Court has not the authority to entertain or grant a motion to reconsider.

In the present case, the requirements of Rule 60 were met and thus, the Court did have authority to hear and grant Appellant's second Motion. Rule 60b provides in part that:

The Court may in the furtherance of justice, relieve a party or his legal representative from a final Judgment, Order or proceeding for the following reasons (1) mistake, inadvertance, surprise or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under 59B; ...

As to item (1) in Rule 60(b), since the Court brought the original Motion for a New Trial sua sponte without notice in advance of the hearing, Appellant did not have the opportunity to adequately prepare for that hearing and as a result, was truly surprised and any neglect on his part should be excused. This being the case, item (2) clearly applies in that the newly discovered evidence could not have been presented timely in the original Motion for a New Trial, since Appellant was not

was not informed of the time of hearing. It is the Appellant's position that the Motion for re-hearing on the Defendant's motion for a new trial was justified.

In ruling on a Motion for a New Trial, the Trial Judge's decision should be given much deference. King v. Union Pacific Railroad Co., 117 Ut. 40, 212 P2d 692. But again the Judge cannot be allowed to "stubbornly ignore and refuse to be guided by credible, uncontradicted evidence when all reasonable minds would accept it." DeVas v. Noble, supra at 137. The primary concern of the Court in deciding whether to grant a new trial on the basis of newly discovered evidence is that justice be done. Crellin v. Thomas, 122 Ut. 122, 247 P2d 264. If the Judge finds that on the basis of the newly discovered evidence that there is a reasonable likelihood that the result would be different, he should grant a new trial. See Browers v. Gray, 99 Ut. 336, 106 P2d 765; Saltas v. Affleck, 99 Ut. 381, 105 P2d 708. In the present case, there were three pieces of newly discovered evidence presented in Appellant's Motion for a New Trial that were uncontested and concusively show that Respondent's accounting was incomplete. A. Check from Appellant to Respondent dated March 20, 1970. In his second motion for a new trial, Appellant submitted as newly discovered evidence a check dated March 20, 1970 from Appellant to Respondent for \$100.00 ( R. 442). This exhibit was submitted and was not challenged by Respondent and the check was endorsed by the Respondent. The check does not appear on Respondent's accounting slip (Plaintiff's Exhibit D).

In his testimony, Respondent stated that all the money he

received from Appellant was listed on his accounting slip, but this check shows conclusively that the accounting is not totally correct. B. Affidavits of Erma Van Tassell and Ronald Ditmar (R . 445, R . 451). At Trial, Ronald Ditmar testified that he was present at five or six times when he saw Appellant give Respondent some cash (Tr. 75). He further testified that on another occasion, he took several checks from the till and from Mr. Van Tassell's wallet up to the bank to obtain cash and after he returned with that cash, he saw Appellant give that cash to Respondent (Tr. 77-78). At Trial, Mr. Ditmar was somewhat hazy on when the events took place and how money was transferred. After the Trial, Mr. Ditmar was reminded by Appellant's wife of a specific time when she was sent up to the bank to get \$2,000.00. When she returned and counted out the money, there was only \$1,900.00 and Mr. Ditmar was called in to count the money and verify whether there was \$1,900.00 or \$2,000.00. In his Affidavit, Mr. Ditmar states because of this being brought to his attention, his memory was refreshed and that in fact, this event did not take place and the \$1,900.00 was given to Respondent ( R. 452). This testimony was never contradicted by Respondent which is important for three reasons. First, it shows that Respondent was not willing to accept checks from Mr. Van Tassell, but rather insisted on cash. Secondly, again, this \$1,900.00 does not appear on the Respondent's accounting slip, Exhibit D. Again showing that Respondent's accounting was not totally correct. Thirdly, it directly contradicts Respondent's testimony that he never received

4. Payments over: \$500.00. C. Check from Appellant's wife

wife to Respondent dated November 16, 1969. Along with Erma Van Tassell's Affidavit (R . 445), was submitted a copy of a check for \$200.00 dated November 11, 1969 from Erma Van Tassell to Respondent. This check was also endorsed by Respondent. Again the check does not appear on Respondent's accounting slip and again conclusively shows that Respondent's accounting was not totally correct.

CONCLUSION

The Trial Judge placed too much reliance on the expert testimony of Mr. Grube and as a result was led to believe that Mr. Van Tassell had perjured himself. As a result of this belief, he failed to consider properly the uncontraverted, newly discovered evidence presented by Appellant on his motions for a new trial. Appellant respectfully submits that the Trial Judge erred in failing to grant Appellant a New Trial.

Respectfully Submitted,

FULLMER & HARDING

BY

Boyd M. Fullmer  
BOYD M. FULLMER  
Attorney for Appellants

CERTIFICATE OF DELIVERY

I hereby certify that I delivered two copies of the Appellants' Brief to Allen H. Tibbals, Attorney for Respondent, Suite 400, Chancellor Building, 220 South Second East, Salt Lake City, Utah 84111 on this 30th day of September, 1977.