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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 Respondent

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

J. W. BROADWATER, Plaintiff and Respondent, vs. GLEN VAN TASSELL, ERMA VAN TASSELL, his wife, and DICK VAN TASSELL, Defendants and Appellants. GLEN 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.	:	Case No. 15319

BRIEF OF RESPONDENT

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

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FILED

OCT 26 1977

Clerk, Supreme Court, Utah

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IN THE SUPREME COURT

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INTRODUCTION

In order to facilitate continuity throughout this brief, the parties will be referred to herein either by name or in their respective capacities in the Court below - J. W. BROADWATER, Plaintiff - GLEN VAN TASSELL, ERMA VAN TASSELL, his wife, and DICK VAN TASSELL, Defendants. Third Party Defendants JANE DOE BROADWATER, ANDREW R. BIRRELL, JR., and PATRICIA J. BIRRELL, his wife, and JOSEPH H. SHOOL and JANE DOE SHOOL, his wife, are not involved in this appeal.

NATURE OF CASE

This is an action by the Plaintiff J. W. Broadwater to collect arrearages due on several promissory notes signed by the Defendant, and to foreclose on certain mortgages and motor vehicle security agreements securing said notes. Defendants Glen Van Tassell, Erma Van Tassell, his wife, and Dick Van Tassell counterclaimed asserting that the notes had been paid off and, in fact, monies were due them because of the overpayment of said loans.

DISPOSITION IN LOWER COURT

Plaintiff filed this action on September 26, 1973. During the pleading stage of this case several other parties were joined as parties to the action and several collateral issues were brought into the case. After several years of dis

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covery procedures, including interrogatories and depositions, upon stipulation of all counsel, the case was bifurcated, and the collateral issues separated for trial. On April 11, 1977, the part of this action that this appeal is concerned with 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 all testimony and evidence, Judge Palmer ruled that Respondent was entitled to judgment as set forth in his complaint and decreed the foreclosure of the mortgages. Defendants' counterclaim was dismissed with prejudice. The remaining or collateral issues presented in this case were tried on June 9, 1977, again before the Honorable J. Duffy Palmer sitting without a jury. On May 26, 1977, Defendants filed their first motion for new trial on the issues involved in this appeal. This motion was denied on June 9, 1977, at the conclusion of the trial on the other or collateral issues. On July 8, 1977, Defendants moved for a rehearing on their motion for a new trial. Judge Palmer granted Appellants another hearing which was held on July 21, 1977. After examining the affidavits, the supporting evidence and hearing all of the argument counsel presented, Judge Palmer again denied Defendants' motion for a new trial. No appeal has been prosecuted from any of the remaining or collateral issues decided June 9, 1977, and the time for appeal has expired.

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RELIEF SOUGHT ON APPEAL

Plaintiff seeks to have the judgment of the lower court in favor of Plaintiff J. W. Broadwater and against Defendants Glen Van Tassell, Erma Van Tassell, his wife, and Dick Van Tassell affirmed.

STATEMENT OF FACTS

Plaintiff views the purported statement of facts set forth in Defendants' brief as an argumentative exposition of the evidence, much of which cannot be supported upon a reading of the record. Accordingly, Plaintiff elects to make a brief statement of facts involved in this action. During a period of time commencing in the early part of 1966 and ending December 1, 1971, Plaintiff J. W. Broadwater made numer loans to Defendants Glen Van Tassell, Erma Van Tassell, his wife, and Dick Van Tassell. This action concerns several but not all of those loans. The Appellants executed and delivered to Respondent promissory notes, some of which were secured by separate mortgages and some by motor vehicle security agreement On September 26, 1973, Plaintiff J. W. Broadwater filed a complaint against the Defendants seeking to recover on the loans and foreclose the mortgages by reason of Defendants' failure t repay the above-mentioned loans, and to recover reasonable attorneys' fees and costs of court. There is no dispute betwe the parties concerning the validity of the notes and the mort gages or the amount of the loans made by the Respondent to the Appellants. (R. 464, Tr. 4) Consequently, the court [illegible]

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cussion prior to trial, pursuant to stipulation of counsel declared that the only issue before the court was what payments had been made on the loans, the amount thereof and the date of any such payments, and the balance remaining due on the obligations, or whether Defendants had overpaid the obligations and had an enforceable claim against the Plaintiff for such claimed overpayment. (R. 464, Tr. 4, 5)

ARGUMENT

Point I

THE TRIAL COURT'S DECISION IS SUPPORTED BY THE EVIDENCE PRESENTED AND IS CORRECT IN LAW.

It is the well-settled rule of law in Utah that the trial judge's ruling will not be overturned if there is any reasonable basis in the evidence to support it. Sullivan v. Turner, 22 Utah 2d 85, 448 P.2d 907. The reasons for such a rule were reiterated by this court in Barrett v. Vickers, 24 Utah 2d 334, 471 P.2d 157, wherein the court said:

> ". . . that due to the trial court's prerogatives and advantaged position the presumptions favor his findings and judgment; that where there is dispute and disagreement in the evidence we assume that he believed those aspects of it and drew the inferences fairly to be derived therefrom which give them support; and if upon our survey of the evidence in that light, there is a reasonable basis to sustain them they will not be disturbed."

In this case the trial judge had two stories presented to him concerning payments made by Defendants on the loans due Plaintiff.

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Plaintiff J. W. Broadwater produced evidence of his accounting which included the date of each loan, the date and amount of payments made on each loan, and a running balance of the amount owed on each loan. (R. 464, Tr. 11, 12, Ex. O) Defendants did not introduce any accounting whatever of payments made on the loans, or the outstanding balance on the loans. Defendants did introduce 76 gas receipts, 21 of which it was claimed by Defendants constituted receipts for money paid by the Defendants to Plaintiff on the loans. (R. 464, Tr. 90, 91, 92, Ex. 1-76) Defendants did not deny any of the dates or amounts of payments as credited to them in Plaintiff's accounting, but claimed that the accounting was incomplete in that it did not include 14 payments in cash of large sums of money represented by notations on gas receipts claimed to have been made by Defendant Glen Van Tassell to Plaintiff. Defendants claim that the 14 cash payments on the loans were acknowledged by Plaintiff by signing gas receipts which included notations referring to cash being paid by Defendant Glen Van Tassell to Plaintiff J. W. Broadwater. (R. 464, Tr. 103-113) Defendants claim that payment has been made in full on the loans is an affirmative defense and he who alleges such a defense has the burden of proving it. (See Rees v. Archibald, 6 Utah 2d 264, 311 P.2d 788, and Bell v. Jones, 100 Utah 87, 110 P.2d 327.) Plaintiff testified that he never received a payment from Defendants in excess of $500.00 and that when he signed the 14 disputed receipts for gas and accessories there were no notations there-

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concerning cash payments being made on the loan and that he did not receive the money which Van Tassell claimed to have paid. (R. 464, Tr. 55, 56) Defendant Glen Van Tassell testified that he gave Plaintiff the money represented by the 14 receipts in cash and had Mr. Broadwater acknowledge the payments by signing the gas receipts. (R. 464, Tr. 103-113) Defendant Glen Van Tassell further testified that 99 percent of the time Mr. Broadwater signed the gas receipts after the amount of money being paid had been written on them. (R. 464, Tr. 137)

Because Defendant Glen Van Tassell's testimony at his deposition differed so greatly from Plaintiff J. W. Broadwater's testimony concerning the gas receipts, and particularly when and under what circumstances they were signed and what appeared on them at the time they were signed, Plaintiff hired a qualified document examiner, Mr. Robert Grube. Mr. Grube was asked to examine the receipts and determine if possible whether the notations concerning cash payments had been made on the several receipts before or after Mr. Broadwater signed them. Of the 14 receipts in dispute, Mr. Grube testified that he could reach a conclusion on 6 of them, Defendants' exhibits 16-21. (R. 464, Tr. 171) Mr. Grube testified that there were not sufficient intersecting lines between Mr. Broadwater's signature and the notations on the receipts to reach a conclusion on the other 8 disputed receipts. (R. 464, Tr. 170) Mr. Grube testified that on all 6 receipts where there were sufficient

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intersecting lines for him to give an opinion, the signature of Plaintiff J. W. Broadwater was written on the receipts before the notations representing the cash purportedly paid to Mr. Broadwater by Mr. Van Tassell had been written on the exhibits. (R. 464, Tr. 171-175) Mr. Grube's testimony corroborated that of Plaintiff and contradicted the testimony of Defendant Glen Van Tassell concerning the signing of the gas receipts. (R. 464, Tr. 55, 56, 137)

Defendants' brief suggests that Defendants' exhibit 13 was one piece of evidence that was ignored by Judge Palmer. There is nothing in the record to suggest that the court did, in fact, ignore Defendants' exhibit 13. The fact is that Defendant Glen Van Tassell's testimony and that of Plaintiff J. W. Broadwater differed drastically concerning said exhibit. Plaintiff testified that he did not receive the money represented on Defendants' exhibit 13 and that the signature on said exhibit did not appear to be his, that he did not think he had signed it, and therefore that he denied signing the exhibit. (R. 464, Tr. 54) Defendant Glen Van Tassell testified that Plaintiff had signed Defendants' exhibit 13 and was given the money. Defendant Glen Van Tassell did not testify that he actually saw the Plaintiff sign Defendants' exhibit 13. The testimony given by Plaintiff J. W. Broadwater and Defendant Glen Van Tassell was the only testimony concerning Defendants'

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exhibit 13. Since Mr. Broadwater denied that the signature on the receipt was his, it became the burden of the proponent of the exhibit, Mr. Van Tassell, to prove the authenticity of the signature. (See 29 Am. Jur. 2d [evidence, Sec. 849].) This he made no effort to do. He offered no expert testimony, he offered no witness who positively asserted he had seen Mr. Broadwater sign the document. Again, under Utah law, it was Judge Palmer's prerogative where conflicting testimony was given to evaluate the testimony and believe the testimony which seemed most persuasive to him. (See Schlatter v. McCarthy, et al., 113 Utah 543, 196 P.2d 968.

All of the gas receipts offered into evidence by Defendants were preprinted receipts which bore preprinted, consecutive numbers. Defendant Glen Van Tassell testified that the receipts came to him in packages of 50, and that each duplicating receipt machine held 50 receipts at a time. However, in examining the receipts, there was little or no correlation between the date written on the receipt and the number on the receipt. One example of this discrepancy is Defendants' exhibit 1 and 21. Defendants' exhibit 1 is dated October 14, 1971, and bears the numerical number of 3999. Defendants' exhibit 21 is dated September 25, 1969, and bears the numerical number of 3934. (R. 464, Tr. 126) When asked how there could have been a lapse of only 65 numbers in over two years, Defendant Glen Van Tassell

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said that he was out of business for a period of time between those two dates. (R. 464, Tr. 127) However, Defendant introduced 22 receipts which were dated between September 25, 1969 and October 14, 1971, all of which bore numerical numbers above 3999. (R. 464, Ex. 3, 8-12, 20, 44-53, 55, 56, 58, 63-73) Another discrepancy in the receipts is found in Defendants' exhibits 10 and 49. Defendants' exhibit 10 is dated April 1, 1970, and is number 4432. Defendants' exhibit 49 is dated April 2, 1970, and is number 4433. When asked how number 4433 could be used two days before number 4432, Defendant answered:

> "Well, probably the date was mixed up somewhere. That's all I can say." (R. 464, Tr. 131)

Yet another discrepancy in Defendant Glen Van Tassell's testimony concerning the receipts is found in Defendants' exhibits 11 and 56. Defendants' exhibit 56 is dated July 2, 1970, and is for 16.7 gallons of gasoline for $6.65. Defendants' exhibit 11 is also dated July 2, 1970, and is also for 16.7 gallons of gasoline for $6.65. However, Defendants' exhibit 11 also has a notation written on it:

> "Received $2500 on note on home and interest and principal." (R. 464, Tr. 135)

Defendant Glen Van Tassell testified that twice on the same day Plaintiff came into his gas station and purchased 16.7 gallons of gasoline for a total of $6.65, one time receiving nothing but gas, and the other time receiving the gas plus $25

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in cash. (R. 464, Tr. 136) Defendants' exhibits 58 and 12 are both dated September 24, 1970, and are both for $1.85 worth of gasoline. Again, one of the exhibits, exhibit 12, also has a notation:

"Received $1900." (R. 464, Tr. 138)

When asked to explain how Plaintiff could have come in yet another time and purchased the exact amount of gas twice on the same day, Defendant answered that it would happen quite often. (R. 464, Tr. 138)

Plaintiff's accounting was not contradicted in any way at trial. It was Defendants' burden to prove the payments claimed to have been made. The Defendants' submission of the gasoline receipts did not constitute either proof of payment or an accounting. The record supports Judge Palmer's conclusion that the Defendants had not carried their burden of proof.

ARGUMENT

Point II

APPELLANTS' MOTION FOR NEW TRIAL WAS NOT SUPPORTED BY ANY CREDIBLE EVIDENCE THAT THE PROFFERED, SUPPOSEDLY NEWLY DISCOVERED, EVIDENCE COULD NOT HAVE BEEN PRESENTED AT TRIAL AND THE TRIAL COURT PROPERLY DENIED THE MOTION FOR NEW TRIAL.

The prerequisites for granting a new trial in Utah due to newly discovered evidence are detailed in Universal Investment Co. v. Carpets, Inc., 16 Utah 2d 336, 400 P.2d 564:

"In order to warrant granting such a motion

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> the moving party must meet these requirements: there must be material, competent evidence which is in fact 'newly discovered'; which by due diligence could not have been discovered and produced at the trial; and it must not be merely cumulative or incidental, but it must be of sufficient substance that there is a reasonable likelihood that with it there would have been a different result."

In the present case the trial judge heard argument and accepted affidavits from Defendants in support of their motion for new trial not once, but twice. Judge Palmer was more than reasonable in giving Defendants two opportunities to argue their motion.

Defendants argue in their brief that there were three pieces of newly discovered evidence presented to Judge Palmer which justified the granting of a new trial.

FIRST: A check from Glen Van Tassell to J. W. Broadwater dated March 20, 1970, in the amount of $100.00. Ignoring the fact that no plausible explanation for the failure to produce this evidence at time of trial was given by Defendants, the purported evidence cannot inherently be tied to the transactions before the court save by the self-serving declaration of counsel for the Defendants. In addition, at no time during the trial did Defendants claim that they had paid Plaintiff any money on the loans in question on March 20, 1970. The amount of this check does not appear on any of the receipts offered by Defendants as receipts for money paid on the loans

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at issue in this case. Defendant Glen Van Tassell testified at trial that on several occasions Respondent lent him money other than the loans at issue in this case. (R. 464, Tr. 142, 163) It seems equally plausible that since this check does not appear on either parties accounting that it was made to pay off one of the other loans mentioned by Defendant Glen Van Tassell.

SECOND: Affidavits of Erma Van Tassell and Ronald Ditmar. Plaintiff submits that these affidavits are not newly discovered evidence. This case was filed on September 26, 1973, and yet, after nearly four years of preparation for trial, Defendant Erma Van Tassell did not testify at the trial. Defendants, having lost the case, now urge upon the court that her affidavit is newly discovered evidence. Defendants give no explanation of why Mrs. Van Tassell did not testify during the trial but choose to give her testimony by way of affidavit almost three months after the case was tried and the verdict given. Ronald Ditmar did testify at the trial and made no mention whatever of the incident recalled in his affidavit. Only after Defendant Erma Van Tassell contacted Mr. Ditmar sometime after the trial to refresh his memory did he recall with such clarity the incident.

THIRD: A check from Erma Van Tassell to J. W. Broadwater dated November 16, 1969, for $200.00. This check is

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subject to the same objections raised as to the first check and does not appear on Mr. Broadwater's accounting, nor as an item on any of the receipts offered at trial by Defendants. This check was very possibly a payment on one of the other loans mentioned by Mr. Van Tassell.

Appellants' "newly discovered evidence" simply does not meet any of the requirements to be treated as such set out in Universal Investment Co. v. Carpets, Inc., supra at page 11.

The determination of whether or not the requirements for granting a new trial on the basis of newly discovered evidence have been met lies in the sound discretion of the trial court, and unless there is a plain showing of abuse, his action should not be disturbed. Universal Investment Co. v. Carpets, Inc., supra at page 11. (See also Marshall U.S. Auto Supply v. Cashman, 111 F.2d 140 (10th Cir. 1940); Thorley v. Kolob Fish & Game Club, 13 Utah 2d 294, 373 P.2d 574, and James Manufacturing v. Wilson, 15 Utah 2d 210, 390 P.2d 127.) Defendants have failed to show any abuse of discretion by Judge Palmer in his failure to grant them a new trial.

CONCLUSION

Based upon the evidence presented at trial, Judge Palmer correctly ruled that Plaintiff's accounting was correct and that Defendants were in arrears in their payment on the

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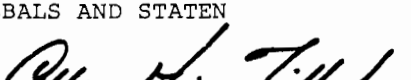
loans. Defendants' motion for new trial did not meet the requirements for granting a new trial on the basis of newly discovered evidence, and therefore Judge Palmer's denial of the motion was correct and well within his discretion. Plaintiff submits that Judge Palmer's decision should be affirmed and that Plaintiff should be awarded judgment for his costs incurred in defending this matter on appeal.

Respectfully submitted,

TIBBALS AND STATEN

By 
ALLEN H. TIBBALS

By 
MICHAEL T. HAYES

Attorneys for Respondent

CERTIFICATE OF DELIVERY

I hereby certify that I delivered two copies of the Respondent's brief to Boyd M. Fullmer, attorney for Defendants, 530 East Fifth South, Suite 203, Salt Lake City, Utah 84102, on this _____ day of October, 1977.

_____

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