

1978

Park City Utah Corporation, A Corporation, Et Al.,
Joseph L. Krofcheck, M.D v. Ensign Company, A
Limited Partnership; Ski Park City West, Inc., A
Corporation; Aspen Grove, Inc. (Name Changed
To National Property Management, Inc.), A
Corporation, Ensign Company, A Limited
Partnership, (Supra) : Respondents' Brief

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

PARK CITY UTAH CORPORATION, a corporation, et al.,

Plaintiffs-Respondents,

JOSEPH L. KROFCHECK, M.D.,

Judgment Assignee-
Respondent,

vs.

ENSIGN COMPANY, a limited partnership; SKI PARK
CITY WEST, INC., a corporation; ASPEN GROVE, INC.,
(Name changed to National Property Management, Inc.),
a corporation,

Defendants,

ENSIGN COMPANY, a limited partnership, (supra.),

Appellant.

Case No. T5570

RESPONDENTS' BRIEF

Appeal From Judgment Of The Third Judicial District Court For Salt Lake
County, State Of Utah, The Honorable James S. Sawaya, Judge, Presiding

* * * * *

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Clerk, Supreme Court

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STATEMENT OF CASE

On July 23, 1971, the final, foundation Judgment on Stipulation herein was entered in the court below. The sum effect of said judgment was to partition certain land between the parties and to require that the Defendants-Appellant discharge the financial obligations which encumbered Respondents' share of such partitioned land in order for Respondents to obtain free and clear title thereof. Said final Judgment on Stipulation was never appealed.

During the period August, 1971, through February, 1975, numerous pleadings were filed and hearings held in connection with Respondents' efforts to have said Judgment on Stipulation enforced against the Defendants-Appellant, the latter being in default of that part of said judgment requiring them to discharge the financial obligations against Respondents' subject property.

On April 8, 1975, the lower court executed an Order, entered on April 28, 1975, confirming that the Defendants-Appellant had to discharge whatever financial obligations existed against Respondents' subject land sufficient for its release to the latter, and, granting Respondents' motion for leave to execute against the Defendants-Appellant relative to said obligations. The April 8, 1975, Order was not appealed, nor a notice rendered preserving such right of appeal for Defendants-Appellant.

Subsequently, the Defendants-Appellant moved to vacate the said April 8th Order, which motion was denied by the lower court's Order dated November 6, 1975, (entered November 10, 1975). An attack was made by Defendants-Appellant seeking to set aside said November 6, 1975, Order, which was denied by the court below under its Memo-

random Decision dated June 21, 1977, (Order thereon entered September 2, 1977); and, said Memorandum Decision further required that the Respondents' financial claims in this action be brought current and embodied in a money judgment.

Thus, in compliance with the lower court's said June 21, 1977, Memorandum Decision requiring Respondents' claims to be brought current by way of a money judgment herein, Respondents filed a motion for partial summary judgment in the sum of \$98,000.00. This matter was heard in the court below on July 18, 1977, and constitutes the primary subject-matter of the within appeal being prosecuted by Appellant.

DISPOSITION OF LOWER COURT

On September 6, 1977, after hearing Defendants-Appellant's objections to the court's proposed findings and judgment, the court below made and entered findings and Judgment in favor of Respondents on the latter's motion for partial summary judgment in the sum of \$98,000.00. From that ruling by the Honorable James S. Sawaya, Judge, of the Summit County District Court, the Appellant has taken its appeal herein; and, said appeal is apparently also taken from the lower court's Memorandum Decision (and Order thereon dated September 2, 1977), dated June 21, 1977, executed by the Honorable Peter Leary, District Court Judge.

The other Defendants in the court below have not joined in the subject appeal.

RELIEF SOUGHT BY THIS APPEAL

Respondents respectfully represent to this Utah Supreme Court that the September 6, 1977, Judgment executed by Judge James S. Sawaya

and the Memorandum Decision of June 21, 1977 (with Order thereon dated September 2, 1977) executed by Judge Peter Leary, should be affirmed in all particulars in this proceeding.

STATEMENT OF THE FACTS

Under date of July 23, 1971, the court below executed a Judgment on Stipulation [Record: 308] constituting the basic decree in this action. Said adjudication partitioned certain land between the parties, and imposed upon the Appellant, inter alios, a duty to discharge financial obligations that burdened the land thus partitioned to the Respondents. Said Judgment on Stipulation was not appealed.

All the lower court Defendants, including Appellant, were at once in substantial default on their responsibilities under said Judgment on Stipulation which required them to pay-off the monetary obligations against the property partitioned to Respondents. Appellant allowed funds earmarked for the trust (described in the July 23, 1971, decree; supra.), which funds belonged to Respondents, to be used for the Defendants-Appellant's benefit involving the latter's partitioned land instead of the obligations called for by said decree favoring the Respondents. Said diversion of funds involved in excess of \$200,000.00. [Record: All documentation during period August 1971, to March 1, 1975].

For said period August 1971, through February, 1975, the Respondents sought to have said financial payment provisions of the original July, 1971, decree (supra.) enforced by the court below. Respondents' said claims and Appellant's purported defenses thereto comprised the subject-matter of various pleadings and hearings in the lower court during said 1971 to 1975 period.

Although the venue of this case vested in the Summit County Dist-

riect Court, conduct of the matter occurred mainly in Fourth Judicial headquarters, Provo, Utah, over 60 miles distance from the Summit County Clerk's office. For these reasons the filing of court orders and other administrative efforts were often delayed between Provo and Coalville Courthouse in Summit County. The disparate chronology of entry dates in this respect is thus reflected in the record on appeal.

In consequence of all that took place during the aforementioned August 1971, through February 1975, time period, the court below executed its Order dated April 8, 1975, [Record:914-917]. Said April 8th Order of the court below confirmed the validity, intent and purpose of the original Judgment on Stipulation (supra.) whereby the Appellant was to discharge any financial requirements necessary to release Respondents' land free and clear of encumbrances. Said April 8th Order further granted Respondents leave to execute against Appellant for recovery of sufficient funds to accomplish such intent and purpose, by which Respondents' land would be released to them. This April 8, 1975, Order (entered April 28, 1975) of the lower court was not appealed, nor was the same otherwise preserved for appeal at a later date.

On or about May 2, 1975, one of Appellant's attorneys, David C. Cook, was personally informed of the aforesaid April 8, 1975, Order, [Record: 878], a copy of which Order had been previously mailed to said attorney's employers (Appellant's attorneys of record). Thereafter, a second copy of the April 8th Order was mailed to said attorney for Appellant since he had recently left the employ of Appellant's counsel of record firm, Nielsen, Conder, Henroid and Gottfredson [Record: 878]

On May 16, 1975, Appellant's said co-counsel, David C. Cook, received the above mentioned second copy of the April 8th Order [Record:808(4)].

Pursuant to the April 8th Order, the current monetary amount due from Appellant, then outstanding and necessary to obtain the release of Respondents' partitioned property, was determined and presented to the Summit County Court Clerk, who in turn issued a Writ of Execution, dated May 15, 1975, in the sum of \$73,653.53 [Record: 426].

Under date of June 5, 1975, Appellant filed a motion which sought to vacate and set aside the aforesaid April 8, 1975, Order [Record:428]. On July 11, 1975, by further motion Appellant attempted to vacate the aforementioned May 15, 1975, Writ of Execution, [Record: 437].

During the Summer and Fall of 1975 several hearings were held concerning Appellant's said June 5th and July 11th motions, (supra.) dealing with the court's April 8th Order and May 15th Writ [Record:809(6) 850(9)].

On November 6, 1975, the court below executed its Order denying Appellant's said June 5, 1975, and July 11, 1975, motions, which denial Order was entered November 10, 1975, [Record: 766].

On or about said November 6, 1975, date a copy of the said Order denying Appellant's motions was mailed to Appellant's counsel of record, Nielsen, Conder, Henroid & Gottfredson [Record: 849].

During, and subsequent to, the proceedings concerning the issues embraced by said November 6, 1975, Order, Respondents attempted to find assets of the Appellant in the state of Utah, without success, [Record: 850(8)]. However, nearly one year later Respondents discovered certain of Appellant's assets in California. Whereupon, a sister state civil action was filed in said latter state, based upon the

original Judgment on Stipulation herein (supra.) together with all the subsequent decrees and orders of the court below.

Thus, on being surprised by Respondents' discovery of their California assets, after nearly one year's search therefor, on October 12, 1976, Appellant filed its "Motion For Relief From Order Dated November 6, 1975" [Record: 806], based primarily on their claim that Appellant's previous co-counsel, David C. Cook, the employee-lawyer of Appellant's counsel of record, Nielsen, Conder, Henroid & Gottfredson, had not been formally served with the aforesaid November 6, 1975, Order, one year earlier. No mention was made of the fact that said counsel of record had been so served, just after the November 6th Order was rendered [Record: 849 ; supra.]. Moreover, said David C. Cook's new employers were at no time substituted or made co-counsel of record for Appellant. At all times hereinabove mentioned the firm of Nielsen, Conder, Henroid & Gottfredson appeared as counsel in this regard, in spite of David C. Cook's new employment and his submitting several documents to the lower court from his new address. When said Cook finally withdrew from this case, he did so as an individual without reference to any other firm [Record: 840].

Respondents filed a motion dated October 23, 1976, requesting the lower court for an order increasing the previous amount determined 18 months earlier (May 15, 1975, Writ; supra.), to the most recent figure due from Appellant in the sum of \$98,000.00, [Record: 836]. Such latter amount resulted from additional "principal, interest and other costs and expenses attributable" to Appellant's obligations, as permitted by the lower court's April 8, 1975, Order (supra.; second paragraph thereof).

On June 21, 1977, the court below executed its Memorandum Decision [Record: 883] embracing issues raised by Appellant's October 12, 1976, motion (supra.) as well as Respondents' October 23, 1976, motion (supra.). An Order based upon said Memorandum Decision was later entered [Record:1029].

The net effect of the lower court's ruling contained in the June 21, 1977, decision was to: 1.) deny Appellant's October 12th motion; and, 2.) require that the latest accumulated monetary obligations due to Respondents from the Appellant be brought current in the form of a money judgment, "after notice and a hearing", (Memorandum Decision, supra.; Page 4, last paragraph).

Therefore, as of June 21, 1977, by virtue of the lower court's ruling on said date, there remained but one single issue to be determined herein: what amount of money did Appellant (and the other defendants below) currently owe to Respondents, in order to compensate the latter for expenditures made to obtain the release of their property partitioned under the original Judgment on Stipulation, dated July 23, 1971, (supra.) ?

In accordance with the said June 21, 1977, ruling (supra.), Respondents filed a motion for partial summary judgment, dated July 6, 1977, [Record: 919], seeking the latest accumulated sum due from Appellant, in the amount of \$98,000.00. Annexed to said Respondents' motion were affidavits and exhibits showing: 1.) that Respondents had disbursed the sum of \$98,000.00; 2.) that said sum was paid to third parties in order to obtain the release of specific real property to Respondents; and, 3.) that all of the specific property so released was part of the land described in

the original July 23, 1971, Judgment on Stipulation partitioned to the Respondents.

Appellant filed only one affidavit [Record: 954] in opposition to Respondents' aforesaid motion for partial summary judgment. Nowhere in said affidavit, entitled: "Affidavit of Robert W. Ensign", (supra.), filed as a purported response to Respondents' motion, does the same contradict the specific, limited facts set forth in the Respondents' supporting affidavits and exhibits annexed to their said motion for partial summary judgment [Record:921-935].

Instead, Appellant addressed itself to factual issues outside the scope of the limited, material facts recited by Respondents in the latter's supporting affidavits and exhibits.

Because of the justification stated in Respondents' said supporting affidavits with exhibits attached, and the failure of Appellant's single counter-affidavit (supra.) to raise a material, factual issue relating thereto, the court below determined that on the undisputed facts, and based upon the legal obligations under the original stipulated judgment of 1971, the April 3, 1975, Order, the November 6, 1975, Order and June 21, 1977, Memorandum Decision hereinbefore described, there was no triable issue; and, as a matter of law the Respondents were entitled to their summary judgment.

On July 26, 1977, the Honorable James S. Sawaya, Judge of the court below, granted Respondents' motion for partial summary judgment, "as prayed" [Record: 958].

On July 28, 1977 Respondents submitted proposed findings and judgment to Appellant who then objected to the same and set the matter for hearing on September 6, 1977, [Record:993,999]. Respondents

answered Appellant's said objections in a subsequent memorandum, [Record: 980].

After a hearing held on September 6, 1977, concerning Appellant's objections to the proposed findings and judgment form, the lower court executed said findings-judgment instrument and overruled Appellant's objections thereto, [Record: 1016].

From said Judgment of September 6, 1977, the Appellant has taken its appeal in this proceeding.

ARGUMENT

POINT I: THE 1971 STIPULATED JUDGMENT AND APRIL 8, 1975, ORDER, FORM THE BASIS OF APPELLANT'S OBLIGATIONS HEREIN, WHICH MUST GUIDE THIS APPEAL.

The July 23, 1971, stipulated judgment [Record: 308] was not appealed, nor was the April 8, 1975, Order [Record: 914-917] interpreting the same appealed, or preserved for review as required by Rule 72 (a) and Rule 72 (b), U.R.C.P. Since the filing date for the April 8th Order was April 28, 1975, (supra.), Appellant had until May 28, 1975, to seek an appeal or otherwise plead to protect their right of review thereof. Having failed to do so, Appellant is anchored to said decrees.

Hence, as of April 8, 1975, whatever else had transpired in this case until then, such factors were immutably validated and/or merged into said July 23, 1971, and April 8, 1975, decrees by virtue of the language set forth in said latter, 1975, Order. Implicitly, the lower court, acting by and through the Honorable Maurice Harding, Judge, considered any and all the multitude of pleadings, evidence and argument that occurred from July, 1971 through April 8, 1975, in reaching

its decision of April 8th, 1975.

Any attempt by Appellant to have issues reviewed in this appeal which were raised, or should have been raised, prior to the hearings and other proceedings upon which either or both said 1971 and April 8th decrees were based, such issues are barred, according to these rulings:

" A prior judgment [or order] is res judicata on matters which were raised or could have been raised on matters litigated or litigatable" (Emphasis and brackets ours)

Orwit v. Bd. of Dental Examiners etc., (Calif.) 55 Cal App.2d 388

" The doctrine of res judicata extends not only to questions actually decided but to all matters which might have been raised or determined, and defenses which parties might have presented, whether they did so or not." (Emphasis ours)

Brady v. F & C Co. of New York (Ill.) 24 NE 2d 895, 303 Ill App. 230

In support of the foregoing doctrine of res judicata, including the principle of collateral estoppel, is this Utah view:

"[1] Strictly speaking, the term res judicata applies to a judgment between the same parties who in a prior action litigated the identical questions which are presented in the later case. Not only are the parties bound by the ruling on matters actually litigated, but they are also prevented from raising issues which should have been raised in the former action. The rule of law is wise in that it gives finality to judgments and also conserves the time of the courts..." (Emphasis added)

Richards v Hodson, (Utah 1971), 485 P2d 1044, at page 1046

Thus, having demonstrated that the July 23, 1971 stipulated judgment and its implementing Order dated April 8, 1975, are the governing decrees in these proceedings which bar all issues prior to either one of them, that cannot be attacked on appeal herein, the next step is to ascertain what said instruments hold relative

to Appellant's financial obligations herein. A progressive review of said decrees discloses the following:

The Judgment on Stipulation
Dated July 23, 1971
[Record: 308]

"...it is hereby ordered that the property be divided, awarded and confirmed to the parties as follows: TO THE PLAINTIFF:... Those certain parcels...described as follows:...8, 9, 10, 11 and 12."

(Bottom of Page 2; Top of Page 3 in judgment)

"IT IS FURTHER ORDERED...A.)... the defendants [Appellant, et al.] shall deposit said proceeds in a separate trust account...said proceeds are to be segregated...and applied only to original seller obligations...by the defendants [Appellant et al.] to insure performance of the obligations..."

(Middle of Page 6 in judgment)

SPECIAL NOTE: Throughout the voluminous record on appeal, too extensive to be repeated here, are unchallenged references and evidence indicating that one or all of the defendants did collect the funds mentioned above, either directly or by borrowing on the "trust" (supra.) corpus, but diverted the same solely to their own use and benefit thereby defaulting on their obligations to Respondents herein.

" IT IS FURTHER ORDERED that the above stated payment procedure... is without prejudice to plaintiff [Respondents] invoking all of its rights and remedies against defendants in the event of breach or default."

(Next to last paragraph, Page 7, in judgment)

Order Dated April 8, 1975
[Record: 914 to 917]

"...Judgment on Stipulation dated July 23, 1971..... said decrees are final and valid, and binding upon the parties hereto, it being the duty of the defendants [Appellant et al.] to pay and discharge the purchase money obligations on the land divided to plaintiff... some of which obligations are now in default."

(Page 1, First Paragraph, in Order)

"...defendants shall certify in writing to this court...the amounts of principal and interest, and other costs and obligations attributable thereto, currently due and owing upon original purchase money

obligations encompassing land divided to said plaintiff [Respondents]...sufficient to obtain release of property to said plaintiff which are currently due for release..."

(Page 1, Second Paragraph, in Order)

"...plaintiffs' motion for leave to execute..is hereby granted as to amounts herein referred to sufficient to discharge outstanding purchase money obligations for the release of land therefrom embracing land divided herein to...[Respondents]..."

(Page 1, Third Paragraph, in Order)

"...balances currently due and owing...for the release of land originally divided to said plaintiffs..."

(Page 1, Fourth Paragraph; Page 2, in Order)

The Summary Of Point I

Therefore, the foregoing analysis clearly indicates the validity and controlling nature of the July 23, 1971, Judgment on Stipulation and April 8, 1975, Order, and that Appellant was required to discharge the monetary obligations against "parcels...8, 9, 10, 11 and 12" (supra). "sufficient to obtain release of property to said plaintiff" (supra). Further, "...that the above stated payment procedure...is without prejudice to plaintiff invoking all of its rights and remedies against defendants [Appellant] in the event of breach or default.." (supra.); and, that Appellant, along with the other defendants, had indeed defaulted as of April 8, 1975.

POINT II: THE NON-APPEALABLE NOVEMBER 6, 1975, ORDER REAFFIRMED THE PRIOR DECREES HEREIN.

The Statement of Facts hereof show that the Appellant attacked both the aforementioned April 8, 1975, Order and the Writ of Execution thereon dated May 15, 1975. Appellant's said effort was presented by way of its motions dated June 5th and July 11th of that year [Record:428,437].

After several hearings held on said motions of June 5th and July 11th

during the summer and fall of 1975, [Statement of Facts], the same judge of the lower court, the Honorable Maurice Harding, who had executed the original 1971 Judgment on Stipulation as well as the April 8, 1975, Order, and who had heard and considered all the issues involved herein for the intervening four years between those decrees, overruled Appellant's attack thereon by denying the latter's said motions.

Said lower court's ruling was executed on November 6, 1975, and entered on November 10, 1975, [Record: 766]. However, said Order of November 6th did not adjudicate "substantial rights" (infra.) of the parties, since that affirmative action had been previously accomplished by the court below in its original 1971 stipulated judgment and by its April 8, 1975, Order, [POINT I, supra.]. On the contrary, all the lower court actually did via its November 6, 1975, Order, was to refuse to act in the way Appellant wished under the latter's motions. Overruling a motion and making an order that affirmatively requires specific performance are entirely different matters. The said November 6th Order neither added or subtracted anything to or from the cumulative action taken by the court below through the May 15, 1975, Writ of Execution date. For these reasons we submit that the said November 6, 1975, Order is non-appealable, based on the following decisions:

" The overruling of motion...was not a judgment or decree, nor an order affecting a substantial right that in effect determines the action or suit so as to prevent a judgment or decree thereon, and is not reviewable on appeal." (Emphasis added)

Francisco v. Stringfield, (Ore.) 114 P2d 1026, 1028

" The overruling of a motion...cannot be an order affecting a substantial right made in a special proceeding...within the statutory definition of appealable, final order, because in effect it constitutes refusal to make order rather than making of order"

Swanson v. Ridge Tool Co., (Ohio) 178 NE2d 255, (Emphasis ours)

"..appeal from an order 'affecting a substantial right' relates only to the subject matter of the litigation, and not to mere matters of practice. Thus, an order denying a motion to set aside a judgment [the facts in this appeal herein!]...is not one affecting a substantial right." (Emphasis and brackets added)

Rahn v. Gunnison, (Wis) 12 Wis 528, 531 (Apparently the only reporting volume)

Even if the said November 6, 1975, Order was an appealable order, (which it was not, supra.), the Appellant had timely notice of the same [Record: 849]. Counsel of record at that time who had notice for Appellant was the firm of Nielsen, Conder, Henroid & Gottfredson. The fact that an employee of such firm, Mr. David C. Cook, purportedly did not know of the Order until one year later, does not present the Appellant with a defense. Aside from the very unlikely notion that a lawyer who had made two extensive motions (June 5th, July 11th, supra) would not be expected to make some kind of inquiry within a year thereafter, as claimed by Mr. Cook, there are other reasons why the November 6, 1975, Order cannot be appealed or otherwise reviewed at this point.

That is, Rule 73 (a), U.R.C.P. limited the period for taking an appeal from said November 6th Order to: "...not exceeding one month from the expiration of the original time" for filing the notice of appeal, or 60 days from the date the order complained of was entered. In any event, Appellant had until January 10, 1976, to take an appeal or to preserve its right, assuming it had obtained a proper extension of the first 30 day period (supra.). Appellant failed to so protect its right of appeal with regard to said November 6th Order, so whether or not the same is or is not appealable in nature can be considered moot. The case of Anderson v. Anderson, 3 Utah 2d 277, 282 P2d 845, 847, supports Respondents' analysis in this connection.

Thus, the subject November 6th Order effectively confirmed the prior action of the court below in these terms:

" ...July 23, 1971 [Judgment]...defendants [Appellant et al.] were ordered to discharge certain monetary obligations to the original sellers of the plaintiffs' [Respondents] property, are final and valid judgments binding upon all parties...the time for appeal of within proceeding having expired in the year 1971...Joseph L. Krofcheck [a Respondent]..acquired his interest in the aforementioned real property as a purchaser from plaintiff [a Respondent]...and as an assignee of certain rights of said plaintiffs in and to such judgments-----defendants' motion... seeking to vacate this court's prior order of April 8, 1975, and the execution thereof [May 15, 1975, Writ]...are hereby denied." (Emphasis and brackets added)

November 6, 1975, Order, court below (supra.)

The Summary Of Point II

The above discussion establishes that the subject November 6, 1975, Order was probably a non-appealable order, but, in any event, Appellant failed to take any action toward perfecting an appeal within the time permitted by Rule 73 (a) U.R.C.P..

Said Order, again, validated the July 23, 1971, stipulated judgment and the April 8, 1975, Order. Said ruling also reaffirmed that the Appellant had to discharge the monetary obligations on Respondents' property, and in assessing such liability the Order clearly states that the decrees are "binding upon all parties" (supra.).

Respondent Joseph L. Krofcheck, M.D., as a judgment assignee in the within proceeding, is identified at this juncture in the case.

POINT III: THE JUNE 21, 1977, MEMORANDUM DECISION, WITH ORDER OF SEPTEMBER 2, 1977 THEREON, ARE NON-APPEALABLE AND CONFIRM THE PRIOR DECREES HEREIN.

The lower court's June 21, 1977, Memorandum Decision [Record: 883] together with its implementing Order dated September 2, 1977 [Record: 1029],

overrule Appellant's motion that sought to vacate an order, which order itself was overruling two other motions filed by Appellant (June 5th and July 11, 1975) that sought to vacate still another Order (April 8, 1975) and its execution.

Only the last mentioned Order of April 8, 1975, acted on the "substantial rights" of the parties, which Appellant failed to appeal. Like the November 6, 1975, Order before it (POINT II, supra.), the subject June 21, 1977, Memorandum Decision merely refused to act as to such substantial rights, by denying action urged by Appellant, (Its October 12, 1976, motion; supra; Statement of Facts).

Hence, for the same legal reasons set forth under POINT II hereof, relating to non-appealability, the subject Memorandum Decision, and Order thereon, are non-appealable rulings. Only the decrees discussed under POINT I are appealable, which were, of course, not appealed.

Beyond the appealability issue of the said Memorandum Decision, the lower court, acting through the Honorable Peter Leary, recognized it could not set aside the prior November 6, 1975, Order of Judge Harding's (supra.), a colleague on the District Court bench, as requested by Appellant's motion of October 12, 1976. The controlling Utah decisions have repeated said rule of law several times in the recent past in these cases:

Harward v. Harward, (Utah 1974), 526 P2d 1183
Peterson v. Peterson, (Ut.1974), 530 P2d 821
State of Utah v. Morgan, (Ut.1974), 527 P2d 225

Leaving the said validity issue, it is necessary to observe exactly what effect said Memorandum Decision had on the within proceedings. Aside from denying Appellant's motion of October 12th (supra.), which upheld all prior decrees and orders of the court,

there remained essentially one question for current resolution, namely: what is the present monetary amount due from Appellant to Respondents under the lower court's decrees herein?

Said current amount due from Appellant was claimed to be \$98,000.00, by Respondents, before Judge Leary [Record: 836]. However, the prior Writ of Execution was for \$73,653.53, [Record: 426].

Therefore, Judge Leary, of the court below, ordered that a hearing be held, after notice, to ascertain exactly what was due under the lower court's various decrees. This was the substantive, net effect of the subject Memorandum Decision and Order thereon dated September 2, 1977. Such issue was narrowly drawn and the procedure for resolving the same spelled out by requiring a hearing in the future on said matter. This was the posture of the case on June 21, 1977, the date Judge Leary executed his Memorandum Decision.

The Summary Of Point III

Our foregoing evaluation shows that the June 21, 1977, Memorandum Decision and September 2, 1977, Order thereon, are most likely non-appealable rulings. However, despite this condition Judge Leary could not set aside Judge Harding's prior rulings, under Utah law, and of course did not do so.

After demonstrating the propriety of Judge Leary's subject rulings, it is seen that only a single issue remained for current resolution, as of June 21, 1977, involving the amount outstanding due from Appellant to Respondents under the lower court decrees. Said matter was to be determined in a hearing, after notice thereof. All else stated by Judge Leary merely confirmed the prior decrees.

POINT IV: THE LOWER COURT'S SEPTEMBER 6, 1977 JUDGMENT AND FINDINGS ARE FULLY SUPPORTED BY THE RECORD AND UTAH LAW.

On June 21, 1977, the lower court had rendered its latest decision (POINT III, supra.) in these proceedings, to the effect that prior orders and decrees executed by it were valid and subsisting, and, that a hearing must be held to determine the current, outstanding balance due from Appellant (et al.) to Respondents.

Pursuant to said edict of the court below, Respondents filed a motion for partial summary judgment [Record: 919] addressing the only current question open for determination, to wit: how much money did Appellant presently owe to Respondents?

Attached to Respondents' said motion were affidavits and exhibits that clearly and unequivocally showed how much was due, on what basis it was due and why it was due from Appellant, inter alios.

However, when Appellant replied to Respondents' affidavits and exhibits they did so with a single, self-serving affidavit which did not address the material facts before the lower court [Record: 954] involving Respondents' motion for partial summary judgment. In essence, here are the irrelevant points set forth in Appellant's said counter-affidavit executed by one Robert W. Ensign:

1.) Ensign Company [Appellant] is now dissolved. (COMMENT: A conclusion without stating evidentiary facts; and, wholly immaterial).

2.) Ensign Company has not had anything to do with the real property or financial transactions which is the subject matter of the Respondents' motion since the fall of 1969. (COMMENT: Two years later, in 1971, the within Judgment on Stipulation held Ensign Company liable as a named defendant, relative to many transactions and parcels of land)

3.) Ensign Company had no dealings with funds received from the sale of certain real property, and makes no claim on said monies. (COMMENT: Under the July 23, 1971, judgment, Ensign was liable for the funds and sale of said property, and if it did not involve itself with such matters it did so irresponsibly. In any case, has nothing to do with the amount of liability to Respondents).

4.) Ensign Company had no dealings with the Respondent Joseph L. Krofcheck, M.D. since 1969. (COMMENT: Does not change or affect Krofcheck's status as a judgment assignee, nor Ensign's status as a judgment debtor).

5. It is Robert Ensign's opinion that the subject-matter land is not worth \$98,000.00. (COMMENT: The only point involved is what it cost to obtain the release of the property, despite what it may be worth. Said allegation, is merely Ensign's unsubstantiated opinion at best.).

6. Ensign Company did not encumber the Respondents' property. (COMMENT: Totally irrelevant. All the documentation in the record admits that third parties had the encumbrances. It was Ensign's responsibility to pay them off).

From the foregoing analysis of Appellant's only counter-affidavit, we easily see that said allegations, whether in good form or not, neither directly or indirectly refute the narrow allegations set forth by Respondents with their motion for partial summary judgment [Record 921-935], as called for by the lower court's June 21, 1977, Memorandum Decision (supra.), as follows:

A.) Parcels 8, 9, 10, 11 and 12 described in the July 23, 1971, Judgment on Stipulation, is the real property upon which the Appellant

failed to pay the outstanding financial obligations due, as required by the lower court's decrees. (COMMENT: Nowhere does Appellant ever dispute this allegation of Respondents.)

B.) Respondents paid the sum of \$98,000.00 cash to recover said real property, after Appellant, et al., failed to pay anything whatever toward said property's release. (COMMENT: This is not denied. Only an unsubstantiated opinion concerning value is offered by the Appellant).

C.) Appellant, et al., have at no time reimbursed or otherwise compensated Respondents for any portion of the \$98,000.00 expended by the latter on Appellant's obligation covered by the lower court decrees. (COMMENT: Appellant has never denied this).

Thus, Respondents' said affidavits and exhibits stand undisputed. All that is left for the court below is to ascertain if said uncontroverted facts are a basis for recovery under the court's decrees, as a matter of law.

Based upon the aforesaid pleadings and evidentiary material, a hearing was held on July 18, 1977, before the Honorable James S. Sawaya, of the court below. Appellant was as unresponsive to the material facts presented by Respondents' motion, as it had been before the hearing through the Robert W. Ensign affidavit. Hence, Appellant's case must rest on whatever legal effect said Ensign affidavit has on this case, and nothing else, respecting the Respondents' motion for partial summary judgment.

Therefore, the Appellant has failed to meet the criteria imposed by Rule 56 (e) U.R.C.P., in purportedly opposing the said motion for summary judgment, since it has failed to: "set forth specific facts showing that there is a genuine issue for

trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him ", (Rule 56 (e), supra.).

Appellant's said counter-affidavit is filled with opinion and unsupported conclusions, which this Utah case deems inadequate:

" Affidavit does not comport with the requirements of this rule [Rule 56 (e)] where it reveals no evidentiary facts but merely reflects the unsubstantiated opinions and conclusions in regard to the transactions." (Emphasis ours)

Walker v. Rocky Mountain Recreation Corp., 508 P2d 538 (Utah)

Even if one were to construe Ensign's affidavit (supra.) as containing some competent recitals of evidentiary fact, it certainly does not contain any that are material and responsive to Respondents' affidavits and exhibits, annexed to their summary judgment motion.

Besides the main award of \$98,000.00 embraced by the lower court's Judgment, granting Respondents' said motion, said instrument also set forth findings which Appellant has likewise attacked in the court below. Before defending on the merits of such attack, the following doctrine should be raised:

" The traditional function of an appellate court is merely to apply the law to findings of fact made below...the appellate court is ordinarily without authority to make independent findings..."

5 Am Jur2d 337, Section 900

The specificity of the lower court's findings set forth in its subject September 6, 1977, Judgment, is fully supported by the record in this action that preceded said Judgment; and, as to those portions of said record particularly relied upon by the lower court, acting by and through the Honorable James S. Sawaya, Judge, the same were either unchallenged by Appellant, or were beyond challenge by reason of the Appellant's failure to take an appeal therefrom.

It follows that the next question on this subject should inquire: what precisely did Judge Sawaya find, and on what basis did he find it? Referring to said September 6, 1977, Judgment document itself [Record: 1016], the outline below discloses the substance of each finding and the corresponding basis for the same in the record:

Re: Findings 1 and 2: The validity of the lower court's prior decrees, the binding effect thereof on all parties herein and the obligation of Appellant and the other Defendants to obtain the release of Respondents' real property awarded in this action, are matters clearly raised and adjudicated in those specific terms by some or all of the lower court's proceedings before entry of the said September 6, 1977, Judgment and findings, (See July 23, 1971 Judgment on Stipulation; April 8, 1975, Order; November 6, 1975, Order).

Re: Finding 3: The fact that Appellant's default under the lower court's decrees would compel them to legally remedy that default, as provided by law and equity, is fundamental. Moreover, one of the said decrees specifically contemplates that should Appellant and the other defendants fail to meet their payment obligations to Respondents, "it is without prejudice to plaintiff [Respondents] invoking all of its rights and remedies against defendants in the event of breach or default", (See July 23, 1971, Judgment on Stipulation, bottom of page 7).

Re: Findings 4, 5, and 6: The failure of the Appellant, et al., to meet their subject financial obligations to Respondents as to parcels 8 through 12, Respondents' payment of \$98,000.00 to recover such land and the fact that no part of that sum was ever reimbursed, are facts left undisputed by Appellant's counter-affidavit to Respondents'

motion for partial summary judgment, (See this POINT IV, supra.).

Re: Finding 7: Dr. Joseph L. Krofcheck's status as a proper judgment assignee herein has never been challenged, although said fact was set forth in both the lower court's orders; and, also a direct statement thereof appeared with Respondents' motion (See November 6, 1975, Order and Krofcheck affidavit annexed to motion for partial summary judgment, supra.).

Re: Finding 8: The fact a change has occurred in the outstanding balance due Respondents is not disputed, thereby necessitating an amendment to the original Writ of Execution, (See June 21, 1977, Memorandum Decision).

The Summary Of Point IV

Therefore, just prior to Judge Sawaya entering the case, in the Summer of 1977, at the trial court level, there remained a single issue for determination, namely: what was the current outstanding balance due from Appellant to Respondents under the prior decrees? Thereupon, Respondents presented their affidavits and exhibits showing they had paid out \$98,000.00 cash to recover land awarded earlier in this case, an obligation which really devolved upon Appellant and the other defendants herein. In reply to Respondents' said evidence, Appellant confronted extraneous issues having no material bearing on the former's motion for partial summary judgment, yet failed to dispute in any way Respondents' said evidence.

After the hearing on Respondents' motion for partial summary judgment, the lower court reviewed the files herein and developed findings which were founded on those parts of the record with substantial evidentiary and/or judicial support, thereby removing the competency

of said findings as an issue in these appellate proceedings, (5 Am Jur2d 337, supra.).

By virtue of said unchallenged facts presented by Respondents with their motion for partial summary judgment and the clear record before it, the lower court's September 6, 1977, Judgment and findings are fully supported by Utah law.

POINT V: CERTAIN SPECIFIC DEFENSES IN APPELLANT'S BRIEF WARRANT REFUTATION.

Re: Appellant's Claim That It
Had No Knowledge Of The July 23,
1971, Judgment On Stipulation

Where Appellant asserts that it was not bound by the basic July 23, 1971, Judgment on Stipulation because said party had no knowledge thereof, although its counsel executed the same, we must observe that there is nothing whatever in the record on appeal to substantiate this claim whether by Appellant's affidavit, or otherwise, nor so much as a hint therein that said party even makes the claim in the first place. Instead, we have Appellant's present cocounsel only now raising the said issue merely by way of argument herein nearly seven years after the fact. In addition to being barred by the doctrine of laches, it should be pointed out that such issue being raised for the first time on appeal in the form of argument herein is not evidence and on that basis is likewise barred from consideration by this Honorable Supreme Court.

Re: Appellant's Raising Of A Wide
Variety Of Factual Issues

Appellant's argument that there were "crucial issues" of fact to be tried which would bar entry of the subject summary judgment by the court below, fails to cite what facts were at issue that were material to the

Respondents' motion for partial summary judgment herein. There was only one counter-affidavit presented by Appellant opposing Respondents' said motion (See Statement of Facts hereof, Pages 7-8), and in that document no such "crucial issues," nor any material issue at all, were forthcoming.

However, Appellant manages to raise a wide variety of factual issues in its brief which arose during the period July 1, 1971, through January, 1975, (See Statement of Facts hereof, Pages 3-4), involving land parcels, third party buyers, assignment of contracts, ad infinitum. An examination of the record on appeal for that period will disclose an extremely broad spectrum of such issues represented in voluminous pleadings, exhibits and testimony; and, the court below disposed of said issues by virtue of its decrees rendered thereafter which decrees were not appealed nor otherwise preserved for appeal (See POINTS I and II of this Respondents' Brief). Moreover, even if said facts which arose before the April 8, 1975, Order and the November 6, 1975, Order (*supra*.) could be reviewed by this Utah Supreme Court hereunder (which they cannot be), to the extent such orders created ambiguity concerning the same, said facts would have to be viewed in a light favoring the Respondent. Also, whatever findings that the lower court has thus far rendered involving factual issues in this connection, they are to be similarly viewed in favor of Respondent, all as set forth in these statements of the rule:

" Viewing the evidence and all fair inferences therefrom [is done] in the light most favorable to the plaintiffs [Respondents] (citing: Toomer's Estate v. Union Pacific R. Rd. Co., 239 P2d 163, Utah)."

Mud Control Lab. v. Covey, (Utah) 269 P2d 854, (@ Page 858, "[5]", first sentence; by Justice Crockett)

In support of the rule: (Continued next page)

" [1] Facts must be viewed in light most favorable to respondent."

" [2] Where any inference can be drawn to support findings, reviewing court may not make determinations of factual issues contrary to those made below."

Solomon v. Polk Dev. Co., 54 Cal Rptr 22 (Calif.)

Thus, we recognize that the Appellant desperately tries to have this Utah Supreme Court review the April 8, 1975, Order, and the November 6, 1975, Order, both of which were based upon evidentiary hearings and all the multitude of pleadings and exhibits which preceded them; and, we have clearly shown that should this court be able to conduct such a review (which it cannot, *supra.*) the facts raised by Appellant would in any event be determined in Respondents' favor under the legal principles set forth above.

The net result of all the foregoing discussion indicates that after all of the facts raised by Appellant in its prolix argument were adjudicated by the April 8, 1975, and November 6, 1975, orders, there remained only a very narrow issue: how much money did the Respondents have to pay out for which the Appellant was liable under the July 23, 1971, Judgment on Stipulation? The subject motion for summary judgment involved only that issue and the Appellant did not respond with a triable issue of fact in its single counter-affidavit, (*supra.*)! In addition, the other defendants below have offered no ^{law or} facts opposing Respondents' said position, by declining to appeal herein.

ARGUMENT CONCLUSION

The substantive rights of the parties were resolved by the July 23, 1971, Judgment on Stipulation and the April 8, 1975, Order, both of which decrees were not appealed. These instruments form the controlling basis for the within action, (POINT I).

The subsequent November 6, 1975, Order, the June 21, 1977, Memorandum Decision and September 2, 1977, Order, in sum effect merely reaffirm the two controlling decrees first above mentioned, (POINTS II and III).

The lower court's September 6, 1977, Judgment and findings were a reasoned, proper extension of all that had gone on before in this case, fully supported by the record and applicable law thereto. The narrow issue raised by Respondents' motion for partial summary judgment was not addressed by Appellant in the latter's opposition to said motion. Further, granting full credence to Appellant's single, self-serving counter-affidavit, there was still no triable issue of a material fact before the court below, (POINT IV).

Appellant raises for the first time on this appeal the claim that it had no knowledge of the July 23, 1971, Judgment on Stipulation, and then proceeds to re-hash issues already determined, and beyond appeal, while obliquely referring to certain "crucial issues of fact" remaining that would bar summary judgment herein without showing what those facts may be! In any case, all of the other factual issues discussed by Appellant, ad infinitum in its brief, were considered and adjudicated by the April 8, 1975, and November 6, 1975, orders, after full evidentiary hearings thereon and if it were possible to review such orders (which this court may not do), whatever findings were rendered by the court below the same must be upheld if there is any inference whatever to support them in favor of Respondent, (POINT V).

DATED this 8th day of February 1978, and respectfully submitted,

By: 
DON R. STRONG, for
Respondents.

CERTIFICATE OF SERVICE BY MAIL

SERVED two copies of the foregoing Respondents' Brief upon counsel for the Appellant by mailing the same, postage prepaid, care of said counsel addressed as follows:

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Salt Lake City, Utah
84111

FABIAN & CLENDENIN
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84111

On this _____ day of _____ 1978,

By: _____

Residing at: _____

State of Utah.