

1978

Park City Utah Corporation, A Corporation, and  
City Development Corporation, A Corporation v.  
Ensign Company, A Limited : Petition of Appellant  
For Rehearing and Memorandum of Points and  
Authorities In Support thereof Partnership

Utah Supreme Court

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Warren Patten; Attorneys for Appellant Don R. Strong; Attorneys for Respondents

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IN THE SUPREME COURT OF THE STATE OF UTAH

PARK CITY UTAH CORPORATION, )  
a corporation, and CITY )  
DEVELOPMENT CORPORATION, a )  
corporation, )

Plaintiffs-Respondents, )

Case No. 15410

VS. )

ENSIGN COMPANY, a limited  
partnership,

Defendant-Appellant. )

**Petition of Appellant for Rehearing and  
Memorandum of Points and Authorities in Support Thereof**

Appeal from a Judgment of the Third  
District Court, Summit County  
Honorable James S. Sawaya, Judge

Warren Patten  
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Attorneys for Respondents

FILED

NOV 13 1978

Clark, Supreme Court, Utah

PARK CITY UTAH CORPORATION,  
a corporation, and CITY  
DEVELOPMENT CORPORATION, a  
corporation,

vs.

Defendant-Appellant.

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### Statement of the Nature of the Case

This is an action in which plaintiff sought division of real estate and in which the court below entered summary judgment against appellant Ensign Company in the sum of \$98,000.00.

### Disposition of Appeal Following Prior Hearing

This appeal was premised upon multiple grounds involving both due process considerations and interpretations of a Judgment on Stipulation of July 23, 1971. The appeal was argued orally on September 13, 1978; and on October 23, 1978, the Court filed a written opinion, concurred in by all Justices, affirming the Judgment below.

Appellant seeks rehearing before this Court on the important issue of whether a party's due process rights are invaded when his attorney, without the party's knowledge or consent, enters into a Stipulated Judgment compromising the claims of the party.

At pages 12-15 of Appellant's Brief, appellant persuasively showed that a well-recognized rule with which this Court agrees holds that an attorney may not compromise his client's substantive claims without consent, and that an unauthorized stipulation doing so is not enforceable. This rule rests on the due process clauses of the United States and Utah Constitution.

The Court Failed to Consider That Part of the Record Which Clearly Showed Appellant Raised Below the Issue of Lack of Authority

This Court declined to consider appellant's due process argument on the ground that appellant failed to raise the issue of non-authorization in the district court:

Defendant, Ensign, further contends he is not bound by the 1971 Judgment on Stipulation on the ground he had not authorized his attorney to do so. Defendant raises this matter for the first time on appeal. The record herein includes the hearing held on February 27 and 28, 1975; counsel specifically represented his appearance was for defendant, Ensign. Counsel did not assert at that time Ensign had not authorized the stipulation. Thereafter, Ensign has been represented in several hearings including the one for summary judgment, and such an assertion has not been made. Ensign did not make such a claim in his affidavit to support his pleading in opposition to the motion for summary judgment. Where a party neither raises an issue in its pleadings nor presents it to the trial court, the issue cannot be considered for the first time on appeal.<sup>1</sup>

Slip Opinion at 6.

Appellant respectfully submits that this ground overlooks crucial parts of the record before the Court. First, the failure of the attorney who purported to represent appellant at the February 27 and 28, 1975 hearing to raise the issue of lack of authority should make no difference -- the attorney who appeared at that hearing is the same attorney who agreed to the Judgment on Stipulation without appellant's knowledge or consent. It is clear from the record that appellant had no notice of that February hearing, and indeed had no notice of any proceedings until he was served in California on September 28, 1976 with a Notice of Entry of Sister State Judgment. (R. 814, App. 66).

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1/ Hanover Limited v. Fields, 568 P.2d 751 (Utah 1977).

Second, appellant did raise before the district court the issue of lack of notice. After being served with the Notice of Entry of Sister State Judgment, he hired a different attorney (Mr. Bennett) (R. 806, App. 60). Under Mr. Bennett's direction, an affidavit of Robert Ensign was prepared and filed with the district court; the affidavit raises the issue of appellant's lack of notice. In the affidavit, appellant acknowledges that a division of real property was accomplished by a Stipulated Judgment, but states that he at no time had notice that any money judgment had ever been entered or even sought:

Affiant states that, the ENSIGN COMPANY, being no longer involved with SKI PARK CITY WEST, INC., he heard little about any of the pending litigation in Utah involving the Park City resort until September 28, 1976 at which time he was served by a Los Angeles County Deputy Sheriff with a copy of a document filed in the Superior Court for California entitled "Notice of Entry of Sister State Judgment." . . . Prior to this time, affiant was unaware that any monetary judgment had been entered (or even sought) in connection with the Utah action seeking a distribution of land. (R. 814, App. 66) (emphasis added).

A review of the critical events involving the entry of the Judgment on Stipulation reveals that prior to the institution of this lawsuit, appellant had transferred all of its interests to Ski Park City West, Inc. (R. 813, App. 65) and as a result, when the suit was filed, appellant did not take an active part but relied on the attorneys who appeared for all defendants but were hired by Ski Park City West, Inc. (Id). In June of 1971, appellant exchanged its stockholdings in Ski Park City West, Inc. for stock in another corporation (R. 814, App. 66).

Appellant knew only that a suit had been filed seek a division of real property and that this division was accomplished in July, 1971 by a Stipulated Judgment (R. 814, App. 66), but appellant's general partner had never been served with any judgment or other papers in connection with the lawsuit and the defendants' counsel had never provided the general partner with any of the suit papers. (R. 814-815, App. 67). The first appellant knew that any money judgment was authorized or sought was when he was served with a Notice of Entry of Sister State Judgment, which itself was premised upon the order of April 8, 1975.

The Ensign affidavit placed all of these facts before the district court prior to the entry of the summary judgment. This affidavit clearly presents the issue of lack of knowledge of the terms of the Judgment on Stipulation, and hence, of necessity, of authorization of those terms, especially those terms the Court relies upon in its decision.

Hence, the Court, when it ruled that Appellant failed to raise the issue of lack of authority in the district court, failed to consider the record made below, and especially the full import of the Ensign affidavit.

For the foregoing reasons, Appellant respectfully requests this Court to rehear argument on the issue of lack of authorization of the Judgment on Stipulation and the due process implications



arising therefrom. If this Petition for Rehearing is denied, appellant will be faced with a final \$98,000.00 judgment based on a compromise of claims that appellant never authorized.

Respectfully submitted this 13<sup>th</sup> day of November, 1978.

FABIAN & CLENDENIN

By Warren Patten  
Warren Patten

By Charles B. Casper  
Charles B. Casper

Attorneys for Appellant

#### CERTIFICATE OF MAILING

I hereby certify that on the 13<sup>th</sup> day of November, 1978, I hereby caused to be mailed, postage prepaid, a true and correct copy of the foregoing Petition of Appellant for Rehearing and Memorandum of Points and Authorities in Support Thereof to each of the following: Don R. Strong, Esq. P. O. Box 124, Springville, Utah 84663; Marvin E. Garrett, Esq. 707 Wilshire Boulevard, UCB Building, Suite 4100, Los Angeles, California 90017; Wendell E. Bennett, Esq., 370 East 500 South, Suite 100, Salt Lake City, Utah 84111.

Warren Patten

IN THE SUPREME COURT OF THE STATE OF UTAH

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Park City Utah Corporation,  
a corporation, et al.,  
Plaintiffs and Respondents,

No. 15410

v.

FILED  
October 23, 1978

Ensign Company, a limited  
partnership, et al.,  
Defendants and Appellants.

Geoffrey J. Butler, Clerk

MAUGHAN, Justice:

Defendant appeals from a motion for partial summary judgment wherein plaintiff was awarded \$98,000. The judgment is affirmed. No costs awarded. All statutory references are to U. C. A., 1953.

This present action is the culmination of the efforts of plaintiff, by a series of motions, to implement a judgment on stipulation rendered July 23, 1971. The judgment by stipulation was predicated on a complaint wherein it was alleged a dispute existed between plaintiff and defendants concerning their respective interests in certain properties subject to an agreement, which was attached to the pleadings as Exhibit A. Plaintiff sought a declaratory judgment wherein the properties would be divided and distributed as contemplated by the parties pursuant to the agreement. The defendant, Ensign Company, was a limited partnership, with Robert W. Ensign, as the general partner. In this present appeal Ensign alone appeals, although there were two other defendants, namely, Ski Park City West, Inc. and Aspen Grove, Inc. (the name of which was changed to National Property Management, Inc.), two corporations.

Exhibit A, the agreement attached to the complaint, was dated January 24, 1967, and set forth the terms for the development of a recreational ski resort by Major-Blakeney Corporation and Robert W. Ensign. The complaint alleged Ensign's interest was assigned to Ensign Company and the corporate defendants acquired an interest in the property. All of the interest in the agreement and to the properties of Major-Blakeney Corporation was assigned to plaintiff, Park City Utah Corporation on June 26, 1968.

The 1967 agreement provided:

5. Ensign shall be responsible for paying any and all cash consideration, fees, charges and other costs initially and subsequently required to acquire good title to the land which will be conveyed through escrows; this to include installments that become due upon promissory notes secured by mortgages or other security instruments, covering encumbered land thus purchased. . . .

To terminate their dispute regarding the 1967 agreement and the proper division of property acquired pursuant thereto, the parties entered into a judgment on stipulation. In addition to awarding each party specific parcels, the judgment provided:

~~It Is Further Ordered~~ That for the protection of the existing original sellers and third party purchasers the defendants shall without restriction or limitation, except as herein provided, apply third party purchasers proceeds to original seller obligations.

A. On receipt of third party proceeds not heretofore assigned and pending disbursements thereof to original seller obligations, the defendants shall deposit said proceeds in a separate trust account, the establishment, terms and conditions of withdrawal therefrom to be subject to the approval of plaintiff. It is the intent hereof that said proceeds are to be segregated from the general funds, accounts and expenditures of defendants and applied only to original seller obligations, and are to be received and held in trust by the defendants to insure performance of the obligations to the original sellers.

\* \* \*

It Is Further Ordered That the above stated procedure of permitting defendants to apply third party purchaser proceeds to original seller obligations shall not be construed or interpreted as a waiver, modification or alteration of any other basic agreement or agreements between the parties and should the defendants fail to perform as herein ordered, this payment procedure is without prejudice to plaintiff to revoke the same and reinstate the original contractual prohibition against said payment procedure.

It Is Further Ordered That the above stated payment procedure does not alter, amend or modify defendants' obligations to original sellers or third party purchasers and is without prejudice to plaintiff invoking all of its rights and remedies against defendants in the event of breach or default.

Subsequent to the entry of the judgment, defendants did not discharge their obligations to the original sellers on certain parcels of land awarded to plaintiffs. (It should be interjected that although defendants had the duty to pay for all the land in the project, the proceeds from third party sales was to be used for this purpose. The land was to be equally divided between plaintiff and defendants; each then sold an equal amount of land to third party buyers, the proceeds from which would be sufficient to pay for the entire acquisition cost.)

Pursuant to a hearing held on February 27 and 28, 1975, an order of the court was issued April 8, 1975, wherein the court ruled the judgment on stipulation was final, valid, and binding. It also ruled it was the duty of the defendants to pay and discharge the purchase money obligations on the land divided to plaintiffs. The court further ordered a means to determine the amounts currently due and owing upon the original purchase money obligations. The court granted plaintiff's motion for leave to execute as to amounts sufficient to discharge the outstanding purchase money obligations for the release of the land. Thereafter a writ of execution for the sum of \$76,653.53 was issued; it was returned unsatisfied. Subsequently, plaintiff filed a motion for a money judgment in the sum of \$98,000. According to the motion this amount represented the sum required to release parcels 7, 8, 9, 10, 11, 12, which should have been released by the defendants making the necessary payments as required by the judgment on stipulation of 1971, and the court orders of April 8 and November 6, 1975. Pursuant to this motion, plaintiff moved for partial summary judgment.

In its motion for summary judgment, plaintiff set forth as grounds the judgment on stipulation of July 23, 1971, had been deemed by the court a valid, subsisting decree binding upon all parties thereto. The judgment of July 23, 1971, ordered defendants to discharge the outstanding purchase money obligations encumbering the land awarded to plaintiff, sufficient to cause the release of the property to plaintiff and third party purchasers. Defendants had defaulted on these obligations. The court had confirmed the foregoing facts, and had granted plaintiff's prior motion to execute, under the judgment of 1971. Defendants had at no time sought to meet their obligations pursuant to the judgment and orders. The court ruled on July 21, 1977, there remained one factual issue for determination, the current money amount due from defendants to plaintiffs for the formers' default, under the 1971 judgment, and subsequent orders based on it. Neither defendants nor any party whatever could refute that certain real property awarded to plaintiff went through a foreclosure proceeding as a result of defendants' failure to meet their obligations under the 1971 judgment; also, it was necessary to raise \$98,000 cash to recover most of the foreclosed land. Such was disclosed by the affidavits annexed to the motion. Plaintiff concluded with a claim there was no material issue of fact to litigate, the judgment and orders had described defendants' legal duty thereunder, and plaintiff was entitled to judgment as a matter of law. The affidavits included with the motion established the sums paid to recover parcels 8, 9, 10, 11, and 12 from the purchasers at the foreclosure sale.

Defendant, Ensign, filed an objection to the motion for partial summary judgment and an affidavit. His claim was Ensign Company had sold all its interest to the property in question to Ski Park City West, Inc., in the autumn of 1969. Ensign had had no dealings with the property or monies received or financial transactions involving the property since the autumn of 1969. Ensign further claimed he was familiar with the land in question, and in his opinion it was not worth \$98,000. Ensign claimed there were a substantial number of disputed facts, making inappropriate a summary judgment. He urged, if any of the defendants had engaged in conduct of misusing the funds collected, there was a factual dispute as to Ensign's involvement.

At the hearing on the motion Ensign asserted as factual issues: (1) Was a trust account established by defendants; (2) Were monies collected and were they applied or diverted; and (3) What was the value of the property in parcels 8, 9, 10, 11, and 12.

Plaintiff responded that it was irrelevant whether the money was, in fact, paid into the trust fund. Defendants had such a duty; and if they failed to perform, they were to hold plaintiff harmless from damages and allow plaintiff to clear title. Plaintiff asserted it had no knowledge as to what happened to the money collected from third party purchasers, such was an issue to be resolved among the defendants. The facts established proved the vendors to the parties foreclosed their mortgages and to protect plaintiff's interest, plaintiff paid \$98,000. Under the 1971 judgment, defendants were responsible.

The trial court granted plaintiff's motion, and awarded judgment in the sum of \$98,000 to plaintiff. The court further affirmed its previous order of April 8, 1975, granting plaintiff's motion for leave to execute.

Defendant, Ensign, describes in his brief the original action as a complaint seeking partition of real estate. Partition is a statutory action to which there must be strict adherence as set forth in Chapter 39, Title 78. A review of the pleadings indicates the complaint did not include all persons with an interest in the property, such as, those having any interest in, or liens of record, by mortgage, judgment, or otherwise.<sup>1</sup> Rather, as previously noted, the action was in the nature of a declaratory judgment to determine the rights of the parties pursuant to their agreement of 1967.

On appeal, Ensign contends the trial court adopted an erroneous interpretation of the judgment of July 23, 1971. Specifically, this judgment imposed upon defendants a duty in all events to pay for the land awarded to plaintiffs. This interpretation was the basis to authorize a money judgment for damages awarded to plaintiff.

Ensign argues the terms of the 1971 judgment are ambiguous in that the terms "original seller obligations" "defendants' obligations to original sellers" are indefinite.

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1. See Sections 78-39-2, 3, 5.

Further, Ensign asserts the 1971 judgment applied only to that land from which there were proceeds, and there was no evidence to indicate there were any such proceeds as to the land in question. He claims the judgment requires the existence of proceeds from third party sales contracts for parcels 8, 9, 10, 11, 12. The record affirmatively shows that all of the third party purchase contracts dealt with land other than that foreclosed by the bank. Therefore, Ensign urges no duty arose as to this land as no proceeds were available to be applied to it. Defendant further urges the judgment applied only to the extent the proceeds had not heretofore been assigned, and whether there had been such an assignment was an unresolved issue of fact.

An ambiguous judgment is subject to construction according to the rules that apply to all written instruments:

. . . In construing a court order or judgment, resort may be had to the pleadings and findings.

Where construction is called for it is the duty of the court to interpret an ambiguity which will make the judgment more reasonable, effective, conclusive, and one which brings the judgment into harmony with the facts and the law. . . .<sup>2</sup>

If the language of a judgment be clear and unambiguous, it must be enforced as it speaks. However, when the meaning is obscure or ambiguous, the entire record may be resorted to for the purpose of construing the judgment.<sup>3</sup>

Here, the trial court ruled it was the duty and obligation of defendants to obtain the release from monetary encumbrances of the real property awarded to plaintiff in the 1971 decree. The three defendants, in fact, failed to discharge the financial obligations on parcels 8, 9, 10, 11, 12, the property awarded to plaintiff by the 1971 judgment, with a resulting foreclosure of same pursuant to decree. Plaintiff's judgment assignee recovered back all but two acres of parcels 8 through 12 inclusive by paying \$98,000 cash to judicial sale purchasers at sheriff's foreclosure sale. The factual issues concerning questions of the foreclosure and the recovery payment of \$98,000 are materially uncontroverted by defendants. The trial court further ruled the prior May 15, 1975, Writ of Execution was superseded and modified to reflect the current amount due from defendants to plaintiff and its judgment assignee.

The trial court did not err in its interpretation of the 1971 judgment. Therein it is clearly specified that the payment procedure was not to be deemed a waiver of any of the basic agreements between the parties and that the payment

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2. Moon Lake Water Users Association v. Hanson, Utah, 535 P.2d 1262; 1264 (1975).

3. Westbrook v. Lea General Hospital, 85 N.M. 191, 510 P.2d 515 (1973).



procedure did not alter, amend, or modify defendant's obligations to original sellers. When these provisions are construed in conjunction with plaintiff's complaint including the attached Exhibit A, the 1967 agreement, the asserted ambiguity in the 1971 judgment is resolved.

Defendant, Ensign, further contends he is not bound by the 1971 judgment on stipulation on the ground he had not authorized his attorney to do so. Defendant raises this matter for the first time on appeal. The record herein includes the hearing held on February 27 and 28, 1975; counsel specifically represented his appearance was for defendant, Ensign. Counsel did not assert at that time Ensign had not authorized the stipulation. Thereafter, Ensign has been represented in several hearings including the one for summary judgment, and such an assertion has not been made. Ensign did not make such a claim in his affidavit to support his pleading in opposition to the motion for summary judgment. Where a party neither raises an issue in its pleadings nor presents it to the trial court, the issue cannot be considered for the first time on appeal.<sup>4</sup>

Defendants final point on appeal concerning the order of April 8, 1975, is without merit, since the matters resolved therein were reconsidered at the time the summary judgment was granted.

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WE CONCUR:

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A. H. Ellett, Chief Justice

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J. Allan Crockett, Justice

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D. Frank Wilkins, Justice

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Gordon R. Hall, Justice.

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4. Hanover Limited v. Fields, Utah, 568 P.2d 751 (1977).