

1978

# Howard Charles Pitts Jr. and Marilyn J. Pitts v. Pine Meadow Ranch, Inc. , Db a Jensen Associates and Db a Deseret Diversified Development, and John Does I Through X : Brief of Defendants/Appellants

Utah Supreme Court

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IN THE SUPREME COURT

STATE OF UTAH

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HOWARD CHARLES PITTS, JR. )  
and MARILYN J. PITTS, )

Plaintiffs and )  
Respondents, )

vs. )

Case No. 15428

PINE MEADOW RANCH, INC., dba )  
JENSEN ASSOCIATES and dba )  
DESERET DIVERSIFIED DEVELOP- )  
MENT, and JOHN DOES I THROUGH )  
X, )

Defendants and )  
Appellants. )

---

BRIEF OF DEFENDANTS/APPELLANTS

Appeal from a Judgment of the Third District Court of  
Salt Lake County, Honorable David Dee, Judge

---

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JAN 16 1978

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IN THE SUPREME COURT

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X,                                        )  
  )  
          Defendants and                )  
          Appellants.                 )  
  )

---

BRIEF OF DEFENDANTS/APPEL-  
LANTS

Case No. 15428

NATURE OF THE CASE

This is an action brought by plaintiff against defendant corporations alleging damage to real property located in Summit County and requesting compensatory and punitive damages.

DISPOSITION IN LOWER COURT

A judgment by default was entered on August 1, 1977 by the Honorable David Dee in the amount of \$36,000. Defendants' Motion to Accept an Answer and Vacate the Default Judgment was denied on August 31, 1977.

RELIEF SOUGHT ON APPEAL

Defendants seek vacation of the judgment and a remand to

the District Court for a trial upon the issues. In the alternative defendants seek a remand to the District Court for a hearing on damages only or for an order of this Court vacating all punitive damages.

#### STATEMENT OF FACTS

On August 2, 1976 a complaint was filed against the four defendant corporations. Plaintiffs alleged that they were owners of a certain lot contained in Forest Meadow Ranch, Summit County, State of Utah. Plaintiffs alleged that defendants trespassed upon said property, used the property as a dump, destroyed valuable timber on the property, and committed waste and destruction. Plaintiffs asked for compensatory damages of \$11,000 for damages to the property, \$15,000 trebled damages for destroying the timber, and an additional \$10,000 as general punitive damages. (R., pp. 2-3).

A summons was issued by plaintiff's attorney on July 30, 1976. (R., p. 4). It was not served until approximately nine months later on April 14, 1977. (R., p. 5). Approximately 3-1/2 months after service plaintiffs went before the Honorable David Dee and requested a default judgment be entered. The minute entry reflects that the plaintiff was sworn and examined. (R., p. 7). A court reporter was not present at said hearing. Accordingly, a judgment by default was entered on August 1, 1977 and a default certificate was entered on Au-



gust 2, 1977. (R., pp. 8, 6).

One week later plaintiff moved for an Order in Supplemental Proceedings. (R., p. 9). On August 11, 1977 Brent Jensen was served with the Motion for Order in Supplemental Proceedings. (R., p. 11).

On August 30, 1977 defendants moved "To Accept Answer And Vacate Default Judgment". (R., pp. 12-13). An affidavit of Stanley Adams, defendants' attorney, accompanied the motion. (R., pp. 14-15). A proposed answer was also filed at that time. (R., pp. 16-17).

On August 31, 1977 defendants' Motion to Vacate came before the Honorable David Dee and after arguments of counsel the motion was denied. (R., p. 20).

#### ARGUMENT

#### POINT I

THE TRIAL COURT ERRED IN FAILING TO SET  
ASIDE THE DEFAULT JUDGMENT AGAINST DEFENDANTS.

It is undisputed that the complaint in this action was filed in August of 1976. Nine months later in April of 1977 it was served upon Brent Jensen who was an officer and director of all of the defendant companies. Three and one-half months after service the default judgment was taken against defendants.

During the hearing to set aside the default judgment de-

defendants' counsel stated to the Court that Mr. Jensen could not specifically recall being served with the summons but that he could not deny service. The trial judge acknowledged at the hearing that Mr. Jensen had been before him previously in a number of separate court proceedings involving real estate. Defendants' counsel informed the Court that Jensen either became confused from the other cases or simply forgot to notify his attorney. Defendants' attorney stated in court and in his affidavit that defendants had valid defenses to all of plaintiffs' claims and were prepared to prove their defenses if the judgment were vacated. The record is also clear that immediately upon being served with an Order In Supplemental Proceedings defendants filed their motion to set aside the judgment and filed a proposed answer to the complaint.

It is apparent from the Record that this is not a case in which a party has flagrantly violated court mandates by failing to file answers or discovery documents. Except for the initial service of the complaint upon agent Jensen, there was never any contact by plaintiff's attorney nor any type of notice given that a default would be taken. While notice may not be required under the Rules of Civil Procedure, it is obvious that a case in which repeated demand or notice has been given to a party is a much stronger case for affirmance of a default judgment than one where only an initial contact of service was

made upon an agent representing many corporations.

There are, of course, numerous decisions by this Court stating that a default judgment should be vacated if there is any reasonable excuse so that a litigant may have his day in court. As stated by Justice Crockett in one such example:

To clamp a judgment rigidly and irrevocably on a party without a hearing is obviously a harsh and oppressive thing. It is fundamental in our system of justice that each party to the controversy should be afforded an opportunity to present his side of the case. For that reason it is quite uniformly regarded as an abuse of discretion to refuse to vacate a default judgment where there is reasonable justification or excuse for the defendant's failure to appear, and timely application is made to set it aside. Mayhew v. Standard Gilsonite Company, 14 U.2d 52, 376 P.2d 951, 952 (1962) (Emphasis added).

See also Warren v. Dixon Ranch Company, 260 P.2d 741 (Utah 1953); Central Finance Company v. Kynaston, 452 P.2d 316 (Utah 1969); Downey State Bank v. Major Blakeney Corporation, 545 P.2d 507 (Utah 1976).

Default judgments are indeed "harsh" remedies. In this case, however, an additional hardship is present since \$20,000 of the \$36,000 default judgment is for punitive damages. Plaintiff claimed damage to their property of \$11,000, and damage to their trees of \$5,000 which was trebled pursuant to Section 78-38-3, U.C.A. The remaining \$10,000 consisted of punitive damages awarded for alleged injury in destroying and wasting plaintiff's property. Thus, even assuming plain-

tiff's prayer to be correct, the default judgment included compensatory damages of \$16,000 and punitive damages of \$20,000. Such a result can only be termed as extraordinarily harsh, far beyond the normal consequences of a default judgment.

Finally, the default judgment was taken in a county other than the correct county mandated by the Utah venue statute, 78-13-1, U.C.A. This provision states that an action for injuries to real property must be tried in the county in which the subject of the action is situated. Thus, the default judgment was entered in the wrong county causing confusion on the part of defendants' attorney and being in clear violation of Utah statutory law.

Justice requires that defendants be given an opportunity to defend the claims made against them. Plaintiffs have shown no substantial harm that will result by the vacating of the default judgment especially since defendants have offered to pay all costs incurred as a result of defendants' failure to respond to the initial complaint. For these reasons, therefore, the default judgment of \$36,000 should be vacated and the case remanded to the District Court for venue transfer and trial on the issues.

## POINT II

ASSUMING ARGUENDO THAT THE DEFAULT JUDGMENT IS NOT VACATED, THE CASE SHOULD BE REMANDED TO THE DISTRICT COURT FOR A DETERMINATION OF DAMAGES.

Rule 55(a)(2) states that a default judgment must be taken by the Court in all cases where it is necessary to determine the amount of damages or to establish the truth of any averment by evidence and that the court may conduct such hearings as necessary and proper. There is no question that \$20,000 of the judgment consisted of punitive damages. Since plaintiffs claimed that they had suffered \$5,000 for the loss of their timber the trebled award of \$15,000 consisted of \$10,000 punitive damages upon the timber issue alone. This Court has stated in Pehrson v. Saderup, 498 P.2d 648 (Utah 1972) that treble damages cannot be obtained under Section 78-38-3 U.C.A. for a mistaken cutting of timber unless there is evidence that the cutting was willful, wanton, or malicious. These are elements of punitive damages.

Likewise, paragraph 6 of plaintiff's complaint specifically asks for punitive damages of \$10,000 which must necessarily partially include the cutting of the timber.

Unlike liquidated damages plead in a complaint, unliquidated damages must be specifically proved by a plaintiff if he is to prevail in a default judgment. In other words, the entry of a default precludes defendant from offering testimony in defense, but does not necessarily obviate the obligation of the plaintiff to furnish adequate proof on the issue of damages. Metric Investment Inc. v. Patterson, 236 A.2d 187 (Sup.

Ct. N.J. 1967).

This same principle of liquidated damages especially applies to punitive damages since their award is not a matter of right but depends upon that degree of proof showing wanton and willful conduct of a defendant. The quantum of punitive damages must be established by sufficient proof. Flaks v. Koegel, 504 F.2d 702 (2nd Cir. 1974). This Court has also recognized the necessity of proof before punitive damages can be awarded in a default judgment. Security Adjustment Bureau v. West, 437 P.2d 214 (Utah 1968).

In reviewing whether or not sufficient proof has been offered to a trial court during a default proceeding the normal rules of evidence are applicable. Where proof of the cause of action or of the amount of a plaintiff's claim or demand is necessary, the general rules of evidence apply in a proceeding for a default judgment with regard to the admissibility and the weight and sufficiency of the evidence. Plaintiff's proof must conform to his allegations, and must be sufficient to make out his case with legal certainty. 49 C.J.S., Judgments, Section 213(b), pp. 375-376.

Thus, in order to show sufficient evidence for an award of punitive damages there must appear, not only that there was a wrongful invasion of plaintiffs' rights, but that it was done willfully and maliciously. It must appear that mere re-

compense for actual loss is inadequate and that the plaintiffs should have added compensation. The punitive damages should not be unreasonably disproportionate to the actual damages suffered or to the nature of the wrong done and the injury caused. Kesler v. Rogers, 542 P.2d 354 (Utah 1975); Palombi v. D. & C. Builders, 452 P.2d 325 (Utah 1969).

In this instance there is no justification for an award of punitive damages. Even the plaintiffs' complaint fails to contain the necessary allegations for punitive damages to be awarded. Paragraphs 4 and 5 of the complaint ask for treble damages from destruction of the trees but do not allege malicious or wanton conduct on the part of defendants. Paragraph 6 of the complaint while alleging "intentional" and "willful" conduct does not allege "malice" or "wantonness"--necessary elements of a punitive damage allegation. 25 C.J.S., Damages, Section 123(b), p. 721.

The record itself contains no evidence of any malicious conduct of defendants. There is no record of the testimony of plaintiff at the default hearing so it is impossible to know what was stated before the trial court. There are no findings, minute entries, exhibits, or affidavits by which this Court can review the award of punitive damages.

The Colorado Court of Appeals in Norton v. Raymond, 491 P.2d 1403 (Ct. App. Colo. 1971) addressed this problem. The

Court stated:

It is the duty of the trial court to make sufficient findings to enable the appellate court to clearly understand the basis of the trial court's decision and to enable it to determine the grounds on which it rendered its decision. The trial court made no findings in this case as to jurisdiction, nature of the plaintiff's action, basis of the court's decision, amount of principal involved as distinguished from interest in the final judgment, nor was there evidence before the court at the time the judgment was entered to give the basis of any appropriate findings.

\* \* \*

It is clear from the absence of evidence in the record that it is impossible to determine if substantial justice has been done. Therefore, in the interest of substantial justice, the plaintiff should be required to prove his claim and the defendant should be given an opportunity to present his defense. Id. at 1404-1405.

The Missouri Court of Appeals also addressed this question of reviewing a default judgment containing punitive damages. In that case a record of the proceedings had been made to enable the appellate court to review the proof offered to the trial court. That court stated:

A review of the evidence leads us to the conclusion that it is wholly insufficient to sustain the judgment on that count. Said count deals with alleged fraud and misrepresentations by defendants with respect to the condition of the stairway of the apartment building. The burden was on plaintiff to adduce some substantial evidence to sustain said allegations to entitle him to actual damages, to say nothing about punitive damages.



As sometimes happens in trials by default, the evidence as to the second count appears to have been presented hurriedly and without proper regard for its probative value to prove the issues being tried. The practice should be exactly the opposite. Where a party seeks a judgment against another who is in default and not represented by counsel, he should proceed with even more care than usual to see that all requirements of the law are met. This for the very reason that the other side is not represented. Riley v. White, 231 S.W.2d 291, 297-298 (Ct. App. Mo. 1950). (Emphasis added).

In the instant case there is no record or evidence in the file showing a justification for the award of the unliquidated punitive damages. The judgment on its face shows that punitive damages were clearly excessive since they totaled \$20,000 as opposed to \$16,000 of compensatory damages (even assuming such damages did in fact occur). As such this Court, as a matter of law, should modify or vacate the punitive damage award. Kesler v. Rogers 542 P.2d 354 (Utah 1975); Palombi v. D. & C. Builders, 452 P.2d 325 (Utah 1969).

The Arizona Appellate Court in reviewing a default judgment for \$50,000 concluded that there was no sufficient evidence in the record to justify such an award and remanded the case back to the trial court for an evidentiary hearing upon the issue of damages alone. The court stated:

We hold that when proof of damages after a default in an unliquidated damage case

is as scanty as that presented to the court here, an order setting aside a default judgment, but not the default itself, is justified. Camacho v. Gardner, 435 P.2d 719 (Ariz. App. 1967).

Defendants respectfully request, therefore, that if this Court fails to grant the relief asked for in Point I of this brief, i.e., vacation of the judgment and remand to the lower court for trial of all issues, that a second or third remedy be afforded defendants--reduction of the judgment as a matter of law by this Court or remand to the trial court for a hearing of record limited solely to the question of damages.

#### CONCLUSION

A motion to set aside a default judgment necessarily involves a weighing of substantial interests. On the one hand, it is in the interest of society to effectively provide a system for redress of grievances and to discourage unnecessary delay and breakdown of the system. On the other hand, it is desirable to provide all litigants a fair opportunity to present their case and to receive a trial on the issues.

In the instant case there is no doubt that defendants' agent neglected his duty to respond to the allegations of plaintiffs' complaint within the time allowed by law. Such failure was clearly a mistake on the part of Mr. Jensen. However, the record shows that this is not an instance where a party has willfully refused to obey the court process or has

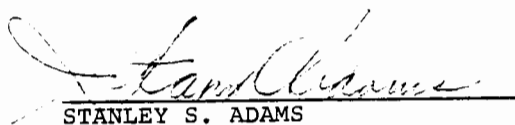
intentionally disregarded repeated demands to respond to plaintiffs' pleadings. Rather, it shows a pure and simple case of excusable neglect and inadvertence on the part of defendants.

In weighing the interests of the parties it should be apparent that defendants' two-month tardy response does not justify imposition of a judgment totaling \$36,000--\$20,000 of which is for punitive damages. The normally harsh remedy of default becomes unconscionably harsh with the addition of the punitive damage award.

For this reason the previous decisions of this Court and the dictates of substantial justice require that the judgment be vacated, that defendants be ordered to pay any damages incurred by plaintiffs for such delay, and that the case be remanded to the trial court for adjudication of the issues.

In the alternative, although much less satisfactory in view of the facts of this case, defendants request that the case be remanded for a trial on the issue of damages alone or that the judgment be reduced by this Court.

Respectfully submitted,



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