

1978

William T. Blodgett and Florence G. Blodgett, His  
Wife v. Joe Martsch, Betty Purcell, Aka Betty Purcell  
Martsch, Doyle Nease, Raco Car Wash Systems,  
Inc., A Utah Corporation, Wayne A. Ashworth,  
Trustee, Karl W. Tenney, Valley Bank and Trust  
Company, A Utah Banking Corporation, First  
Security Bank of Idaho, N.A., State of Utah, and  
John Does, 1-10 : Reply Brief

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

-----ooOoo-----

WILLIAM T. BLODGETT and  
FLORENCE G. BLODGETT, his wife,

Appellants,

vs.

JOE MARTSCH; BETTY PURCELL,  
aka Betty Purcell Martsch;  
DOYLE NEASE: RACO CAR WASH  
SYSTEMS, INC., a Utah Cor-  
poration; WAYNE A. ASHWORTH,  
Trustee; KARL W. TENNEY;  
VALLEY BANK & TRUST COMPANY,  
a Utah Banking corporation,  
FIRST SECURITY BANK OF IDAHO,  
N.A., STATE OF UTAH, and JOHN  
DOES, 1 through 10,

Respondents.

Case No. 15608

FILED

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Clerk, Supreme Court, Utah

REPLY BRIEF

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Appellants respectfully submit this Reply Brief in answer to the four briefs filed by respondents.

### POINT I

#### APPELLANTS ARE ENTITLED TO A TRIAL OF THIS CASE

It is a fundamental aspect of Rule 56 of the Utah Rules of Civil Procedure, enunciated in appellant's original brief, that before summary judgment can be granted there can be no disputed facts which, if taken in the light most favorable to the party against whom the summary judgment is urged, would result in a decision favorable to that party.

Although this point was fully noted in the first brief filed by appellants, the respondents have filled their briefs with "facts" which the respondents have construed in their own favor. If those "facts" were construed against the respondents, as they should be in determining whether summary judgment should be granted, it is clear that appellants would prevail in this particular case.

For example, in the brief of respondents Tenny and Valley Bank on pages 2, 3, and 9 reference is made to the "fact" that everyone knew "the entire property" of the Blodgetts was included in the trust deed. On page 9 of their brief, respondents bank and Tenney cite that part of the deposition of Mrs. Purcell in which she is repeating a statement allegedly made by the bank officer at the closing. She claimed that the Blodgetts were told that if the loan was not paid, they would be

"in danger of losing all of your property." Not only is that statement contradicted by what the Blodgetts said occurred at that closing, but also in its very nature it is a most ambiguous statement. If the statement "all of your property" really meant every bit of property which the Blodgetts owned at the time, then it was in error since they owned other properties to which none of the respondents make any claim. Even though appellants question that such a statement was made to them, nevertheless it could be construed as meaning "all" of the car wash property. Actually the statement quoted by respondents is best explained by that portion of the deposition respondents (for obvious reasons) chose not to quote:

A. He told them, he said, "Now you understand that if this is not paid, you are in danger of losing all of your property?"

Q. He said that?

A. Yes sir, he said that.

Q. Did he say what property they were in danger of losing?

A. No.

Betty Purcell Martsch Deposition, page 43. (Emphasis added.)

Again on page 6 of respondent Martsch's brief it is alleged that the Blodgetts were advised by the respondent bank that they were in peril of losing both the car wash property and the grocery store property. Not only is this statement contested strongly by the Blodgetts, but also it is not even a fact which has been established by any of the parties. The bank itself does not contend that it made such a statement to the Blodgetts.

The Blodgetts' action in paying the remainder of the money owing on the first mortgage on the store property is clear evidence that they were never advised the note in default covered the grocery store property. In other words, the only way the respondents can get to the position they are advocating before this Court is not only to take the facts in the light most favorable to them but also to put in "facts" which were not in any way established below.

Taking the facts in the light most favorable to appellants it is clear that the lease between Raco and the Blodgetts referred only to the car wash property and in fact was specifically limited to the car wash property. Further, the Blodgetts were not the parties securing the loan and, in any case as defined by the lease, were not the ones who would have to come up with any additional security if any security was necessary. Moreover, as explained in appellants' first brief, the loan documents do not in any way reflect a requirement by the loan committee of the respondent bank to obtain the store property of the Blodgetts as additional security.

It is indeed very strange conduct for a reputable bank to deal as the respondents now claim that it in fact dealt. The loan was presented to the bank on the basis of the subordination of the car wash property and nothing else. There is no separate appraisal for the store property and the only current appraisal in the loan file was that of the car wash property. There is no reference in the loan committee documents to additional collateral. The only indication of the position now taken by

respondents is the self-serving statement of Mr. Thronson. He claims that the loan committee required additional security and would not make the loan on the basis of just the car wash property. But the tangible evidence does not support that position.

It is most unusual that the respondent bank, having before it a lease document which limited the subordination to the car wash property and which subordination was made by people who were not seeking the loan, would then turn around and then insist that such people provide additional property as security. Stranger still is the claim that all of this was done without the bank even talking to the people whose property it sought to include as security. On top of that the request for more security would have been in direct contravention of the lease document in the possession of the bank. Moreover, the land which the bank allegedly insisted it had to have as additional collateral was worth many times the value of the car wash property and itself over three times the value of the loan being obtained.

It is so ludicrous as to be beyond any reasonable construction of the facts to believe that the respondent bank ever intended the store property to be subordinated as additional security. And since it is such a ridiculous position of the bank to be taking at this time, certainly it is sufficient to merit a review by a trier of fact. When this case is reviewed in the light most favorable to appellants, the rules of law demand that this case be submitted for trial.



The case against respondents bank and Tenney is actually quite simple when viewed in the light most favorable to appellants. The bank had no intention of including the store property with the car wash property since that was not even under discussion by the loan committee. As the deposition of Mr. Thronson makes clear, the bank added the Blodgetts' name at the last moment not realizing that it was the Blodgetts rather than Raco Car Wash who even owned the property. Then when the documents were being prepared, it is very likely that the person preparing the same misunderstood the instructions of Mr. Thronson and put down the Blodgetts as co-signers. Thronson admitted that this was an error.

The store property description was most likely added in order to get a description of the property over which a right of way would be passing. Certainly, if the bank intended to have two parcels of land included in the document as both being security for the trust note, it would have been more specific in the description of the property in the trust deed. The fact that First Security Bank of Idaho in drawing up its trust deed with Mr. Martsch numbered the parcels 1 and 2 is evidence that that bank saw an ambiguity in the trust deed drawn up by respondent bank.

The Blodgetts were never told that the store property was included because it was never intended to be included. On the other hand, if it was intended to be included, then it was fraudulent conduct on the part of the bank to deceptively hide

its intention from the Blodgetts. Either way the conduct of the bank was in violation of a duty owed to the Blodgetts.

Respondents argue that somehow because the Blodgetts used an attorney at one time or another and because they received a copy of the default notice, that that put them on notice of the claim now made by respondents that the store property was included as part of the trust deed. Quite to the contrary, the bank continually made representations through Mr. Tenney and others that the bank did not intend on taking any of the Blodgetts' property in default and hoped that there would be some way to resolve the matter so that the Blodgetts could get the car wash property back. Never at any time did the bank ever suggest in their dealings with the Blodgetts that the store property was in jeopardy. In fact the bank continually assured the Blodgetts that it would make an effort to get the car wash property back to the Blodgetts. Therefore, at the time of the sale, the Blodgetts fully expected the bank to protect them. In any case, it is clear from their conduct and the conduct of the bank towards them that there was never any intention that the store property would be included in the sale or that the Blodgetts had any notice of the same.

Since the bank and Mr. Tenney seemed so concerned about the Blodgetts not losing the car wash property, certainly had they any intention that the store property was included in the transaction they would have or should have warned the Blodgetts of that fact. None of the respondents can point to anything other than the default notice to suggest any such warning.

Respondents treat this case as though there had been a trial on the facts and that the facts should now be construed in a manner most favorable to them. This is obviously not the case. The such claim made by all respondents is that because the Blodgetts used an attorney to draw the lease with the Raco Car Wash and consulted the same attorney from time to time thereafter, that somehow that transforms itself into the fact that they should be on notice as to any defects in the documents which were signed by them. The fact of the matter is that the attorney did not attend the closing, did not attend the trust deed sale and was used by the Blodgetts only on a sporadic basis. Thus there is no evidence that the Blodgetts were ever on notice that the store property was to be sold at the trust deed sale.

## POINT II

RESPONDENT MARTSCH WAS NOT A BONA FIDE PURCHASER FOR VALUE.

It is argued by respondent Martsch that he was a bona fide purchaser for value. The facts of the case, particularly when viewed in the light most favorable to the appellants, do not permit such a construction of his position. At the time of the sale Joe Martsch was according to the records a creditor of Raco Car Wash by reason of a loan to Raco Car Wash for the completion of the structures on the property. (Betty Purcell Martsch Deposition, Exhibit 3) Lorin Pace, who apparently bid in at the sale on behalf of Joe Martsch, was the secretary of Raco Car Wash. (Pace Deposition, Page 3) Betty Purcell who had the power of attorney from Joe Martsch was the president and principal

shareholder of Raco Car Wash. Because of the significant amount of money Martsch is said to have loaned the company, and because he received as security shares of the company, he could well be considered to be the principal owner of Raco after the loan. Certainly his contribution to the company was much greater than that of the alleged principal, Betty Purcell, and was not secured by anything other than the company itself. ( Betty Purcell Martsch Deposition, page 48.) Also at the time of the sale Betty Purcell and Joe Martsch were common law husband and wife.

It was precisely because Raco Car Wash defaulted on its note with the bank that the property in question was sold at the trustee sale. Moreover, and probably as important, is the fact that at the time of the trustee sale, if the store property was really included in that sale it was by reason of negotiations or agreements between the bank and the personnel connected with Raco Car Wash.

Summing up, the people who were involved in the purchase at the trustee sale, i.e., Joe Martsch, Betty Purcell, and Lorin Pace, were individuals who had active or constructive notice that the store property was not to be included in the trust deed as far as the Blodgetts were concerned. They also knew or should have known that the value of the store property far outweighed the value of any amount outstanding on the loan Raco Car Wash had taken with the bank.

If in fact the store property was sold at the trustee sale, which claim is disputed in this lawsuit, Joe Martsch had actual or constructive notice that the Blodgetts never intended

the same and that it was contrary to their agreement with Raco. Martsch knew at the time of the sale that the car wash property could be sold to the State of Utah at a figure more than the amount owed to the bank. (Joe Martsch Deposition, page 15) He was therefore bidding in on the sale to recover his investment to Raco. (Id.) In other words, he knew that just the car wash property itself was sufficient to cover the loan to the bank. That being the case, he knew that if the store property was included that would be a clear windfall. Under such circumstances Joe Martsch was not a bona fide purchaser for value of the store property.

### POINT III

#### RESPONDENTS ASHWORTH AND THE STATE OF UTAH ARE NOT ENTITLED TO SUMMARY JUDGMENT

Respondent Ashworth claims that the incorrect legal description and the lack of posting as required by the law did not substantially affect the conditions of the sale. That is not the case. Otherwise how does one justify the fact that the only people in attendance at the sale were those who were intimately connected with the original bank loan, namely the bank, the Blodgetts and the officers of Raco Car Wash. There was no other potential purchaser at the sale. Yet it is now claimed by all of the respondents that the store property, worth in excess of \$100,000 as well as the car wash property, itself worth more than the \$30,000 paid, was included in that sale. There are too many bargain hunters in the State of Utah who are looking for silent investments to believe that the legal description

difficulties and the lack of the posting did not affect the number of purchasers at the sale. As noted above, respondent Martsch certainly knew of the bargain of the car wash property by itself. Moreover, the lack of potential purchasers at the sale is further evidence that no reasonable person who looked at that sale notice believed that it included any more property than the car wash property. Appellant should be given the opportunity at trial to present testimony along this line.

The first brief of appellants answers the arguments of the State of Utah. The State required a quit-claim deed from Raco and Purcell even though they had no claim to the property. The State also had had negotiations with Purcell even before the sale. (Betty Purcell Martsch Deposition, page 82.) Hence the State by its action showed that it knew of potential or real defects in the title to the property. Opportunity should be given appellants to establish their claim against the State in Court.

#### SUMMARY

This case is a very complex one and cries out to be tried by a jury. There are questions of fact strewn through the entire record which, if resolved in favor of the Blodgetts, would with almost any one of them result in a verdict favorable to the Blodgetts. The conduct of the bank and of Tenney in their dealings with the Blodgetts show either the greatest of frauds perpetrated on long-time customers who relied on their dealings with the bank for guidance and assistance or else show that the

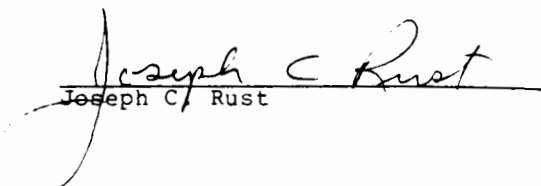
bank had no intention of ever having more than the car wash property as the security for the loan made to Raco Car Wash. Either way, the bank and Tenney have a responsibility to the Blodgetts which should be answered in damages. Respondent Martsch was privy to and participated in a scheme whereby in all likelihood he had no intention of acquiring anything other than the car wash property at the trustee sale since the profit from that alone would be great. If he thought that the store property was included, he purchased it with full knowledge that that the Blodgetts had no intention of having their store property so included. He also was aware that the amount of money being offered at the sale was so disproportionate to receiving both the car wash and the store properties as to be unconscionable. Respondent Ashworth failed to follow the good practices outlined by statute in advertising the sale, in describing the property, and in conducting the sale both in the way it was offered to those who were to participate as well as the way it was postponed for a full day in which to accommodate the purchasers. The State of Utah was put on notice that there was defect in the title by reason of its insistence on a quit claim deed and by reason of other dealings with Purcell and Martsch.

All of the above adds up to one important fact, namely that this case has not had an opportunity to be tried before a trier of fact. There are many questions that need to be determined and they can be determined properly only before a

jury. It was improper for the lower court to have granted the summary judgment. This case should be reversed and remanded to the lower court for trial on the issues.

Respectfully submitted,

KIRTON, McCONKIE, BOYER & BOYLE

  
Joseph C. Rust



CERTIFICATE OF HAND DELIVERY

I hereby certify that I hand-delivered 2 copies of the foregoing to the following on the 10th day of November, 1978:

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