

1979

T. Val Christiansen v. Utah-Idaho Sugar Company : Brief in Opposition to Petition for Rehearing

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/uofu_sc2



Part of the [Law Commons](#)

Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errors.

Cohne, Rappaport; Attorneys for Plaintiffs-Appellants;

McKay, Burton, Thurman & Condie; Attorneys for Defendants-Respondents;

Recommended Citation

Response to Petition for Rehearing, *Christiansen v. Utah-Idaho Sugar Co.*, No. 15751 (Utah Supreme Court, 1979).
https://digitalcommons.law.byu.edu/uofu_sc2/1225

This Response to Petition for Rehearing is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs (1965 –) by an authorized administrator of BYU Law Digital Commons. For more information, please contact hunterlawlibrary@byu.edu.

IN THE SUPREME COURT OF THE STATE OF UTAH

* * * * *

T. VAL CHRISTIANSEN,

Plaintiff-Appellant,

-vs-

UTAH-IDAHO SUGAR COMPANY,
a corporation, and UNION
PACIFIC RAILROAD, a
corporation,

Defendants-Respondents.

* * * * *

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF HABEAS CORPUS

Appeal from the District Court of the
Fourth Judicial District, Salt Lake County,
Hatch, Utah.

McKAY, BURTON, ATTORNEYS AT LAW,
500 Kennedy Building,
Salt Lake City, Utah.
Withdrawn as counsel for
Defendants-Respondents.

IN THE SUPREME COURT OF THE STATE OF UTAH

* * * * *

T. VAL CHRISTIANSEN,)	
	:	
Plaintiff-Appellant,)	
	:	
-vs-)	CASE NO. 15751
	:	
UTAH-IDAHO SUGAR COMPANY,)	
a corporation, and UNION	:	
PACIFIC RAILROAD, a)	
corporation,	:	
)	
Defendants-Respondents.	:	

* * * * *

BRIEF IN OPPOSITION TO DEFENDANTS-RESPONDENTS'
PETITION FOR REHEARING

Appeal from the Summary Judgment of the
Fourth District Court for Utah County
Honorable J. Robert Bullock

COHNE, RAPPAPORT & SEGAL
66 Exchange Place
Salt Lake City, Utah 84111
Attorneys for Plaintiff-Appella

McKAY, BURTON, THURMAN & CONDIE
500 Kennecott Building
Salt Lake City, Utah 84133
Withdrawn as Attorneys for
Defendants-Respondents

INDEX

	<u>Page</u>
STATEMENT OF CASE-----	1
ARGUMENT	
POINT I. DEFENDANTS-RESPONDENTS' PETITION FOR REHEARING IS IMPROPER IN LIGHT OF THE FACTS AND CIRCUMSTANCES OF THIS CASE AND SHOULD BE DENIED.-----	2
POINT II. DEFENDANTS-RESPONDENTS' ARGUMENT THAT THIS COURT FAILED TO CONSIDER UTAH CASE LAW IN ITS DETERMINATION IS WITHOUT MERIT, ON ITS FACE.-----	4
POINT III. THIS COURT HAS DETERMINED THAT MATERIAL ISSUES OF FACT REMAIN TO BE DECIDED, TO WIT: WHEN PLAINTIFF-APPELLANT FIRST RECEIVED NOTICE OF THE EASEMENT, AND WHETHER PLAINTIFF-APPELLANT WAS EVER EVICTED FROM THE PROPERTY IN QUESTION----	6
A. THE TIME THAT PLAINTIFF-APPELLANT FIRST RECEIVED NOTICE OF THE EASEMENT IS THE MATERIAL ISSUE OF FACT CONCERNING WHEN THE CAUSE OF ACTION AROSE AND WHEN THE STATUTE OF LIMITATION COMMENCED RUNNING.-----	7
B. DEFENDANTS-RESPONDENTS' ARGUMENT THAT PLAINTIFF-APPELLANT HAS NOT BEEN EVICTED, EITHER ACTUALLY OR CONSTRUCTIVELY, FAILS TO CONFRONT THE PERTINENT ISSUE REGARDING EVICTED.-----	7
CONCLUSION-----	8

AUTHORITIES CITED

	Page
Cummings v Nielson, 42 Utah 157, 129 P. 619 (1913).-----	6
Dahlquist v Denver & R. G. R. Co., 52 Utah 438, 174 P 833-----	3
Ducheneau v House, 4 Utah 483, 11 P 618 (1886)-----	3
Pacific Bond & Mortgage Company v Rohn, 101 U. 335, 121 P. 2d 635 (1942)-----	5
Pingree Nat. Bank of Ogden v Weber County, 54 Utah 599, 183 P 334 (1919)-----	3
Soderberg v Holt, 86 Utah 485, 46 P 2d 428 (1935)-----	4
Swanson v Sims, 51 Utah 485, 170 P 774 (1918)-----	4
Vernard v Old Hickory M & S Co., 4 Utah 67, 7 P 408 (1885)-----	2

IN THE SUPREME COURT FOR THE STATE OF UTAH

* * * * *

T. VAL CHRISTIANSEN,)	
	:	
Plaintiff-Appellant,)	
	:	
-vs-)	CASE NO. 15751
	:	
UTAH-IDAHO SUGAR COMPANY,)	
a corporation, and UNION	:	
PACIFIC RAILROAD, a)	
corporation,	:	
)	
Defendants-Respondents.	:	

* * * * *

BRIEF IN OPPOSITION OF DEFENDANTS-RESPONDENTS'
PETITION FOR REHEARING

Statement of Case

Plaintiff-Appellant appealed from the Summary Judgment of the Honorable J. Robert Bullock. This court reviewed the file, as well as the Original Brief and Reply Brief of Plaintiff-Appellant, and the Brief of Defendants-Respondents. Neither party requested oral argument. After consideration, this court reversed the Summary Judgment previously granted and remanded the case for trial. Defendants-Respondents then filed a Petition for Rehearing, and subsequent to the Petition, counsel for Defendants-Respondents made a formal withdrawal of counsel.

Argument

POINT I

DEFENDANTS-RESPONDENTS' PETITION FOR REHEARING IS IMPROPER IN LIGHT OF THE FACTS AND CIRCUMSTANCES OF THIS CASE AND SHOULD BE DENIED.

The law is well established in Utah that in order to justify the granting of a Petition for Rehearing, the Petitioner has the burden of making a strong showing justifying the Petition. The Defendants-Respondents in the present case have failed to meet that burden.

This court set forth the requirement necessary for the granting of a Petition for Rehearing as early as 1885. The court in Vernard v Old Hickory M & S Co., 4 Utah 67, 7 P 408 (1885):

"To justify a rehearing, a strong case must be made. We must be convinced, either that the court failed to duly consider some material point in the case, or that it erred in its conclusions, or that some matter has been discovered which was unknown at the time."

In the present case the court had sufficient information supplied to it, in order to render an informed decision. Defendants-Respondents have made no allegation in their petition that any additional matter has been discovered which was unknown at the time of the decision by this court. The opinion of the court fully sets forth the basis for their decision and indicates that the court duly considered all material points, applicable statutes and controlling case law.

Defendants-Respondents in their Petition for Rehearing are merely attempting to reargue the same major points that have been previously raised and decided by this court. As this court

has held in Ducheneau v House, 4 Utah 483, 11 P 618 (1886):

"We again say that we cannot grant a rehearing unless a strong showing therefor be made. A re-argument, or an argument with the court upon the points of the decision, with no new light given, is not such a showing."

It is well settled that all points and arguments by a party, to an appeal, must be timely raised. A party cannot raise new issues, points, or theories on a petition for rehearing. At the Petition for Rehearing step in the procedure, any matters not previously presented are waived. This court in, Dahlquist v Denver & R. G. R. Co., 52 Utah 438, 174 P 833, cited 4 C. J. 627, 268 and approved of the rule stated therein, as follows:

"A rehearing will not be granted on the ground that petitioner has failed to argue an important point on the hearing. All points relied upon in support of the case must be presented by the briefs and arguments on appeal, and the practice of reserving certain points to be argued subsequently, in the event of an adverse decision, is condemned by the courts."

This rule has deemed extremely important and is so firmly established that this court in the case of, Pingree Nat. Bank of Ogden v Weber County, 54 Utah 599, 183 P 334 (1919) denied consideration of the constitutionality of a statute because this contention was first raised as error on a petition for rehearing. The court stated:

"An inflexible rule of this court requires that every proposition relied on as ground for reversing a judgment must be assigned as error. It is one of our most important rules of practice and its importance has been emphasized in numerous decisions of this court. Lyon v Mauss, 31 Utah, 283, 87 Pac. 1014; Egelund v Fayter, 172 Pac. 313; Holt v. Great Eastern Casualty Co., 173 Pac. 1168."

This same rule has prevented this court from considering whether a party had waived a reply to a counterclaim by failing to reply to that counterclaim. In, Swanson v Sims, 51 Utah 485, 170 P 77 (1918) this court stated:

"Now, for the first time, we are presented with a new theory. Counsel ought to at least be consistent. We considered the questions argued by counsel, and decided the case on the theory contended for by him, and he will not now be permitted to present to this court a new theory or contention which was neither in the record as it was before this court nor in the arguments made. Under the circumstances we do not feel called upon to pass upon the question as to whether appellant might not or did not waive the filing of reply."

As exemplified in the above cases, this rule has been strictly construed, and has been deemed so important that it can prevent constitutional consideration of a statute as well as consideration of a waiver based on an unanswered counterclaim. Certainly, Defendants-Respondents cannot seriously contend that they have met the burden of showing sufficient grounds for granting a rehearing in this particular situation.

Defendants-Respondents' petition for a Rehearing should be denied.

POINT II

DEFENDANTS-RESPONDENTS' ARGUMENT THAT THIS COURT FAILED TO CONSIDER UTAH CASE LAW IN ITS DETERMINATION IS WITHOUT MERIT, ON ITS FACE.

Defendants-Respondents' primary argument used to support their petition for Rehearing is that the court failed to consider the Utah case of, Soderberg v Holt, 86 Utah 485, 46 P 2d 428 (1935), and the ramifications of Soderberg on the present case. Plaintiff-Appellant would point out that both parties to this ap

have cited extensively from the Soderberg case. (The Defendants-Respondents on pages eleven through fourteen of their brief, and the Plaintiff-Appellant on pages four and six of their initial brief and pages two and eight of their reply brief). Defendants-Respondents have acknowledged that the court cited the Soderberg case in their opinion, but allege that this court did not consider the Soderberg case, it determining when a cause of action accrues. Plaintiff-Appellant submits that this contention is erroneous on its face. The Soderberg case is cited by this court in the same paragraph and immediately prior to the portion of the opinion in which this court holds:

"The time the cause of action occurs therefore, is the time at which the grantee first receives notice either actual or constructive, of an encumbrance against his property."

Defendants-Respondents' contention is without merit.

Alternatively, Defendants-Respondents argue that if the court did consider the Soderberg case in deciding the present case, the court is in effect reversing Soderberg. Plaintiff-Appellant submits that this contention is also without merit. Both Appellant and Respondents have cited the Soderberg case and this court has accepted Appellant's analysis as further supported by another decision of this court, to wit: Pacific Bond & Mortgage Company v Rohn, 101 U. 335, 121 P. 2d 635 (1942).

The court in its opinion specifically refers to Soderberg in the same citation as it makes reference to the Pacific Bond and Mortgage Company v Rohn case. Defendants-Respondents make no mention of this second case in their Petition for Rehearing. It appears that Defendants-Respondents are merely trying to reargue

points, theories, and issues that have previously been raised and decided by this court. The opinion in this case is in conformance with Utah law.

Plaintiff-Appellant submits that Defendants-Respondents' Petition for Rehearing is clearly inadequate and erroneous on its face. This court has not left any dispute on the question of when a party to an appeal should make a petition for rehearing. As stated in, Cummings v Nielson, 42 Utah 157, 129 P. 619 (1913):

"When this court, however, has considered and decided all of the material questions involved in a case, a rehearing should not be applied for, unless we have misconstrued or overlooked some material fact or facts, or have overlooked some statute or decision which may affect the result, or that we have based the decision on some wrong principle of law, or have either misapplied or overlooked something which materially affects the result. In this case nothing was done or attempted by counsel, except to reargue the very propositions we had fully considered and decided. If we should write opinions on all the petitions for rehearings filed, we would have to devote a very large portion of our time in answering counsel's contentions a second time; and, if we should grant rehearings because they are demanded, we should do nothing else save to write and rewrite opinions in a few cases."

Plaintiff-Appellant respectfully submits that Defendants' Petition for Rehearing is without merit and this court should consider the reasonable award of attorney's fees and costs occasioned by the need to respond to Defendants-Respondents' petition.

POINT III

THIS COURT HAS DETERMINED THAT MATERIAL ISSUES OF FACT REMAIN TO BE DECIDED, TO WIT: WHEN PLAINTIFF-APPELLANT FIRST RECEIVED NOTICE OF THE EASEMENT, AND WHETHER PLAINTIFF-APPELLANT WAS EVER EVICTED FROM THE PROPERTY IN QUESTION.

- A. THE TIME THAT PLAINTIFF-APPELLANT FIRST RECEIVED NOTICE OF THE EASEMENT IS THE MATERIAL ISSUE OF FACT CONCERNING WHEN THE CAUSE OF ACTION AROSE AND WHEN THE STATUTE OF LIMITATION COMMENCED RUNNING.

Defendants-Respondents argue that the time of notice of this easement is immaterial to Plaintiff-Appellant's cause of action. As Plaintiff-Appellant has stressed in POINT II of this brief, under the law of the State of Utah, the cause of action cannot commence until Plaintiff-Appellant was put on notice of the easement. The court has previously decided that issue. The court has ruled:

"Before the statute of limitations problem can be resolved it must be precisely determined as to when Plaintiff first learned of the encumbrance. This is a factual matter which must be resolved at trial."

This is a substantial factual matter and a legitimate area of dispute. Defendants-Respondents' attempt to characterize this in any other light is in direct contradiction of the holding in this court, both in the present case and in previously decided cases.

- B. DEFENDANTS-RESPONDENTS' ARGUMENT THAT PLAINTIFF-APPELLANT HAS NOT BEEN EVICTED, EITHER ACTUALLY OR CONSTRUCTIVELY, FAILS TO CONFRONT THE PERTINENT ISSUE REGARDING EVICTION.

Plaintiff has alleged that, "but for", this easement or encumbrance resulting in a cloud to his title, he would have been able to sell or refinance this property, thus preventing his loss of the subject property. This court ruled that this eviction:

"may be either actual or constructive".

Defendants-Respondents seem to argue that because they did not personally evict the Plaintiff-Appellant there

consideration Plaintiff-Appellant's allegations as to the cause and result relationship between the Defendants-Respondents granting of this easement, and the Plaintiff-Appellant's being evicted from his property. It is undisputed that Defendants-Respondents did in fact convey the easement in question. If Plaintiff-Appellant can show, at time of trial, that as a direct result of Defendants-Respondents' action no buyer or lending institution was willing to buy or refinance this property, and, as a direct result thereof he lost the property, this is certainly a constructive eviction.

The court was fully apprised of the law in regard to eviction. Both parties presented that point extensively in their respective briefs. Plaintiff-Appellant's claim is not merely that an eviction took place, because of a mortgage foreclosure, but that this foreclosure would not have occurred were it not for the actions of the Defendants-Respondents. This is a material issue of fact and so determined by this court.

CONCLUSION

Defendants-Respondents have failed to meet the burden of establishing sufficient grounds for a rehearing. Their petition is an attempt to reargue the same points, arguments, and theories that were originally presented to this court. Their attempt to have this court specifically reverse the Soderberg case fails to consider the language of that case, as well as subsequent case law.

Material issues of fact remain to be decided, and Plaintiff-Appellant should be allowed to proceed at the time of trial.

Defendants-Respondents' Petition for Rehearing should be denied.

DATED this 26th day of February, 1979.

Respectfully submitted,

COHNE, RAPPAPORT & SEGAL

By:

Neils E. Mortenson

Neils E. Mortenson

Attorney for Plaintiff-Appellant

I hereby certify that I hand delivered a true and correct copy of the foregoing Brief of Plaintiff-Appellant to McKay, Burton, Thurman & Condie, Attorneys for Defendants-Respondents, 500 Kennecott Building, Salt Lake City, Utah this 26th day of February, 1979.

Neils E. Mortenson