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# Rose O. Swedin (Wall) v. Thorsten Fred Swedin : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT

OF THE STATE OF UTAH

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|---|---|---|
| ROSE O. SWEDIN, | : | |
| Plaintiff-Respondent, | : | |
| -vs- | : | Case No. 16003 |
| THORSTEN FRED SWEDIN, | : | |
| Defendant-Appellant. | : | |

APPELLANT'S BRIEF

APPEAL FROM JUDGMENT OF THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY

The Honorable G. Hal Taylor, Presiding

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FILED

DEC 14 1978

Clerk, Supreme Court, Utah

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IN THE SUPREME COURT

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IN THE SUPREME COURT

OF THE STATE OF UTAH

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| ROSE O. SWEDIN,<br>Plaintiff-Respondent,<br>-vs-<br>THORSTEN FRED SWEDIN,<br>Defendant-Appellant. | Case No. 16003 |

APPELLANT'S BRIEF

STATEMENT OF THE NATURE OF THE CASE

Plaintiff brought an order to show cause against defendant seeking, among other claims, to recover for alleged arrearages on the mortgage obligation on real property awarded to plaintiff pursuant to the Decree of Divorce.

DISPOSITION IN LOWER COURT

Judgment was rendered in favor of plaintiff for the alleged arrearages in an undetermined amount.

RELIEF SOUGHT ON APPEAL

Appellant seeks a reversal of the judgment and order entered against defendant.

STATEMENT OF FACTS

On January 25, 1978 plaintiff served defendant with an order to show cause and petition for modification, including therein a claim against defendant for alleged arrearages as to the mortgage obligation on real property awarded to plaintiff in a Decree of Divorce entered on

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April 21, 1976.

Said claim for arrearages had already been dismissed with prejudice and on the merits pursuant to an order signed on February 25, 1978 by the Honorable David K. Winder. (R. 38-39)

On March 3, 1978 defendant's attorney filed a motion to refer the above matter to the Honorable David K. Winder, claiming that the points asserted by plaintiff were the same as those already heard and decided by said Judge. Further, defendant claimed that plaintiff's petition constituted an attempt at a rehearing of the same issues. (R. 55-56)

At the hearing on plaintiff's order to show cause held on March 9, 1978, the Honorable G. Hal Taylor denied defendant's motion for referral. The court granted judgment for plaintiff against the defendant on said alleged arrearages, leaving the amount of said judgment open for proof at a later time. An amended judgment and order reflecting such was signed on July 25, 1978. (R. 91-93)

On August 10, 1978 defendant filed a Notice of Appeal from said amended judgment and order.

## ARGUMENT

## POINT I

### THE LOWER COURT ERRED IN DENYING DEFENDANT'S MOTION FOR REFERRAL AND IN GRANTING JUDGMENT FOR PLAINTIFF ON THE CLAIMED ARREARAGES

Section 78-7-19, Utah Code Annotated (1953) prohibits repeated applications for the same order. Said

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statute reads as follows:

> If an application for an order, made to a judge of a court in which the action or proceeding is pending, is refused in whole or in part, or is granted conditionally, no subsequent application for the same order can be made to any other judge, except of a higher court; but nothing in this section applies to motions refused for any informality in the papers or proceeding necessary to obtain the order, or to motions refused with liberty to renew the same.

As an indication of the seriousness of the prohibition against repeated applications, the legislature provided that violations of the above statute may be punished as a contempt. §78-7-20, Utah Code Annotated (1953)

The policy underlying these statutory provisions is sound. In the interest of preserving judicial order and promoting certainty, multiple applications for the same relief should be limited to circumstances involving mere procedural defects or where leave is granted to renew a motion.

In the instant case, the claim brought by plaintiff concerning alleged arrearages on mortgage obligations on property awarded to plaintiff was identical to the claim already dismissed with prejudice by the Honorable David K. Winder in a prior hearing. Following is a portion of the transcript of that hearing held on February 11, 1977:

> MR. ALLRED: Before we get into that, May I at least inquire.



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I think there are three things in the Petition. One is a modification of the Decree to require payment on an obligation on which the plaintiff now owes, and I don't think I heard Mr.--

MR. THURBER: We are going to limit this.

THE COURT: You are going to waive that particular claim?

MR. THURBER: For the present.

THE COURT: That is, as I understand, his mother is owed an obligation out of a property that was awarded to her and you are dropping that claim. Is that correct?

MR. THURBER: Yes. We are not going to argue that at this time.

MR. ALLRED: May we include that in the order that the Court will deny that aspect of relief?

THE COURT: If you are not pursuing it, the order will be that this is _dismissed with prejudice_. (Reporter's partial transcript, p. 2, emphasis added)

The order signed by the court on February 25, 1977 included a provision dismissing plaintiff's claim with prejudice and on the merits. (R. p. 39, paragraph 4). Counsel for plaintiff did not object to said provision nor was the order appealed from.

Despite this prior ruling on the same issue by a different judge, the Honorable G. Hal Taylor denied defendant's motion for referral and, further, granted judgment on said claim for plaintiff against defendant. Appellant contends that clearly the court erred in so doing.

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The case of In Re: Estate of Mecham, 537 P.2d 312, (1975), concerned the question of one judge vacating the order of a different judge of the same court. In Mecham, the administrator of the estate filed an accounting and petition for distribution and discharge. At a hearing on the matter, the Honorable Joseph G. Jeppson denied the petition with leave to amend. Subsequently, the administrator filed a supplemental accounting and his attorney obtained an ex parte order approving the accounting and granting final distribution and discharge. Five days later, the heirs filed objections to the accounting and requested that the matter be set for trial.

Subsequently, the administrator's attorney filed a motion to strike the objections and noticed it for hearing. Counsel for the objectors failed to appear at said hearing, claiming he was not aware of the hearing because the notice pertaining thereto had been buried near the end of the motion to strike, a document amounting to some thirty-nine pages.

Therefore, counsel for the objectors filed a motion to vacate the judgment in favor of the administrator and, upon inquiring of Judge Jeppson, the matter was ordered placed on the law and motion calendar, where it could be properly heard by any other judge of the same court.

At the hearing on the motion to vacate Judge Jeppson's order, the Honorable G. Hal Taylor vacated Judge Jeppson's order striking the objectors' exceptions and ordered that a hearing on the merits should be held concerning

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the objections to the petition for distribution and discharge. No motion was made by counsel for the administrator to rescind or modify said order, nor was it appealed from.

At the hearing on the objections to the accounting, the Honorable Stewart M. Hanson, Sr. held that Judge Taylor's vacating of Judge Jeppson's previous order approving the accounting was in error, and on his own motion dismissed the objections.

The Supreme Court of Utah, in vacating and remanding, held that Judge Taylor's order was proper in that Judge Jeppson had directed that the matter be placed on the general law and motion calendar. However, as to Judge Hanson's order, the Court held that he had improperly overruled Judge Taylor's order. The Court stated:

> While in normal procedure and protocol this motion would have come up before Judge Jeppson, when he directed that it be placed on the general law and motion calendar, any judge of the court had jurisdiction to act in the matter. When Judge Taylor did so, and his order was not changed or appealed from, it became the effective order in the case. However, what happened with respect to Judge Hanson's order, entered 19 months later, was entirely different. It was attacked by a proper and timely motion for a new trial; and that failing, by this appeal.
>
> Accepting and applying the rule stated above, that one district judge of concurrent jurisdiction cannot act as an appellate judge and reverse the ruling of another, precludes Judge Hanson himself from

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vacating the order of Judge Taylor.
537 P.2d at 314.

The case at bar involves precisely the same type of situation. No attempt was made to modify or vacate Judge Winder's prior order, nor did plaintiff attempt to appeal therefrom. Consequently, that order became final as to the same claim raised by plaintiff in the later hearing before Judge Taylor. Under the rationale of Mecham, Judge Taylor erred in first denying defendant's motion for referral and then, in vacating Judge Winder's order and granting judgment for plaintiff on the claimed arrearages.

POINT II

THE LOWER COURT ERRED IN GRANTING JUDGMENT ON A CLAIM WHICH HAD NOT YET MATURED

If Judge Taylor's actions in granting judgment for plaintiff were held not to be error despite Judge Winder's prior ruling, appellant contends that the lower court improperly granted judgment on the claimed arrearages. The evidence presented against defendant consisted solely of plaintiff's affidavit and testimony concerning alleged claims against her by the mortgage obligee. No corroborating evidence or testimony was introduced. Further, no action against plaintiff for such alleged arrearages had yet been brought by the mortgage obligee.

Consequently, judgment was granted on the basis of unsupported hearsay evidence. This fact was reflected in the amended judgment and order in that a determination as to the amount of the alleged damages was left open.

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for further hearing if and when an action for said arrearages was filed against the plaintiff.

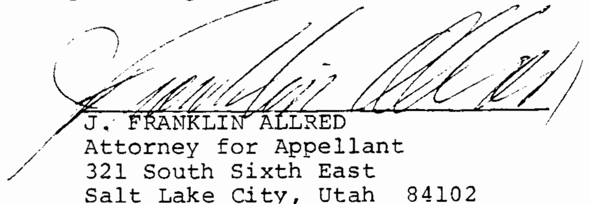
Appellant contends that judgment was granted prematurely on a claim not proven to be in existence at the time the judgment was rendered.

CONCLUSION

Appellant, on the basis of the foregoing, respectfully requests this court to reverse the judgment of the lower court and remand the matter for the purpose of vacating the judgment and order against the defendant on the basis that the claims involved therein were already decided in appellant's favor by a different judge.

DATED this 12th day of December, 1978.

Respectfully submitted,



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MAILING CERTIFICATE

I hereby certify that I mailed two copies of Appellant's Brief, postage prepaid, to E. H. Fankhauser, Cotro-Manes, Warr, Fankhauser & Green, Attorney for Respondent, 430 Judge Building, Salt Lake City, Utah 84111 this 14th day of December, 1978.

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