

1998

Mary M. Tuck v. The Beehive House, a Utah Limited Partnership, and S. Chad Godfrey, and individual : Reply Brief

Utah Court of Appeals

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_ca2



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Court of Appeals; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

Ronny L. Cutshall; Vincent C. Rampton; Jones, Waldo, Holbrook and McDonough; Attorneys for the Appellee.

Kim R. Wilson; David L. Pinkston; Snow, Christensen and Martineau; Attorneys for the Appellant.

Recommended Citation

Reply Brief, *Tuck v. The Beehive House*, No. 980118 (Utah Court of Appeals, 1998).

https://digitalcommons.law.byu.edu/byu_ca2/1419

This Reply Brief is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Court of Appeals Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at

http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.



IN THE UTAH COURT OF APPEALS

MARY M. TUCK,

Plaintiff/Appellee,

vs.

Appeal No. 980118-CA
(Civil No. 950908242CN)

THE BEEHIVE HOUSE, a Utah
Limited Partnership, and S. CHAD
GODFREY, an individual,

(Argument Priority: 15)

Defendants/Appellants.

REPLY BRIEF OF APPELLANT

On Appeal from the Third Judicial District Court of Salt Lake County
Judge Anne M. Stirba

**UTAH COURT OF APPEALS
BRIEF**

**UTAH
DOCUMENT
K F U
50**

DOCKET NO. 980118-CA

KIM R. WILSON (A3512)
DAVID L. PINKSTON (A6630)
SNOW, CHRISTENSEN & MARTINEAU
Attorneys for Appellant, S. Chad Godfrey
10 Exchange Place, Eleventh Floor
Post Office Box 45000
Salt Lake City, Utah 84145
Telephone: (801) 521-9000

RONNY L. CUTSHALL (#0793)
VINCENT C. RAMPTON (#22684)
Jones, Waldo, Holbrook & McDonough
Attorneys for Appellee, Mary M. Tuck
170 South Main, #1500
P.O. Box 45444
Salt Lake City, Utah 84145-0444
Telephone: (801) 521-3200

FILED

Utah Court of Appeals

DEC 21 1998

Julia D'Alesandro
Clerk of the Court

IN THE UTAH COURT OF APPEALS

MARY M. TUCK,

Plaintiff/Appellee,

vs.

Appeal No. 980118-CA
(Civil No. 950908242CN)

THE BEEHIVE HOUSE, a Utah
Limited Partnership, and S. CHAD
GODFREY, an individual,

(Argument Priority: 15)

Defendants/Appellants.

REPLY BRIEF OF APPELLANT

On Appeal from the Third Judicial District Court of Salt Lake County
Judge Anne M. Stirba

KIM R. WILSON (A3512)
DAVID L. PINKSTON (A6630)
SNOW, CHRISTENSEN & MARTINEAU
Attorneys for Appellant, S. Chad Godfrey
10 Exchange Place, Eleventh Floor
Post Office Box 45000
Salt Lake City, Utah 84145
Telephone: (801) 521-9000

RONNY L. CUTSHALL (#0793)
VINCENT C. RAMPTON (#2684)
Jones, Waldo, Holbrook & McDonough
Attorneys for Appellee, Mary M. Tuck
170 South Main, #1500
P.O. Box 45444
Salt Lake City, Utah 84145-0444
Telephone: (801) 521-3200

TABLE OF CONTENTS

Page

ARGUMENT 1

I. THE TRIAL COURT ABUSED ITS DISCRETION BY RELYING ON A NON-EXISTENT ORDER COMPELLING DISCOVERY 1

II. IT WAS AN ABUSE OF THE TRIAL COURT’S DISCRETION TO SANCTION MR. GODFREY WITH THE ULTIMATE SANCTION -- DEFAULT JUDGMENT -- ARISING OUT OF THE INABILITY, AFTER DILIGENT SEARCHING, TO LOCATE DOCUMENTS IT WAS NOT HIS DUTY TO MAINTAIN 3

III. MR. GODFREY HAS SATISFIED THE MARSHALLING REQUIREMENT 4

CONCLUSION 5

TABLE OF AUTHORITIES

Page

Cases

<u>Associates v. First Security Financial</u> , 889 P.2d 467 (Utah Ct. App. 1995)	4
<u>In re Bartell</u> , 776 P.2d 885 (Utah 1989)	4
<u>Mountain States Broadcasting Co. v. Neale</u> , 783 P.2d 551 (Utah App. 1989)	4
<u>Shepherd v. American Broadcasting Companies, Inc.</u> , 62 F.3d 1469 (D.C. Cir. 1995)	4

Rules and Regulations

Rule 34, Utah R. Civ. P.	2
Rule 37(d), Utah R. Civ. P.	2

ARGUMENT

Appellant, S. Chad Godfrey (“Mr. Godfrey”) submits the following arguments in reply to the brief of the Plaintiff/Appellee in this matter.

I. THE TRIAL COURT ABUSED ITS DISCRETION BY RELYING ON A SUPPOSED ORDER COMPELLING DISCOVERY THAT DID NOT ACTUALLY EXIST.

Throughout its brief, plaintiff consistently refers to an order of the Trial Court compelling Mr. Godfrey to produce discovery. A thorough search of the record reveals no such order. The Trial Court’s Order of April 21, 1997, regarding discovery simply states that once sanctions are paid, “the parties shall thereafter schedule the deposition of S. Chad Godfrey at a time and place agreeable to counsel.” (R. at 217-18.) There is no language in that Order compelling production of documents.

At the hearing on plaintiff’s Second Motion for Sanctions,¹ the Trial Court erroneously assumed, without reviewing the record, that such an order to compel had been entered previously. The court stated: “I set a deadline for discovery responses in the first order, but I haven’t reviewed that particular order, but that’s my practice” (R. at 548, at p. 33.) The Trial Court did not verify whether it had, in fact, placed such requirements in its Order dated April 21, 1997. Rather, the Trial Court, from the bench, proceeded on its incorrect assumption and authorized default judgment against Mr. Godfrey.

This assumption was incorrect. The Trial Court did not, in fact, enter an order compelling discovery or setting a deadline for discovery responses, nor did it take the

¹A copy of the transcript of the relevant portions of that hearing are attached in addendum C to Mr. Godfrey’s principal brief.

opportunity to review the record to verify the accuracy of its stated assumption.

Therefore, the Trial Court abused its discretion by defaulting Mr. Godfrey based on that flawed assumption.

Plaintiff argues that its second Motion for Sanctions was based on subsection (d) of Rule 37, Utah R. Civ. P., and thus, no compelling order was required. That subsection, however, is not completely applicable here; it only authorizes sanctions if a party fails to appear for a scheduled deposition, after proper service of notice, or fails to respond in writing to a request for inspection pursuant to Rule 34. It is not disputed that Mr. Godfrey was prepared to be sworn and deposed on the day and at the location of his scheduled deposition. He was downstairs, prepared to come to the designated room for the deposition. Plaintiff's counsel, however, chose not to depose him. (R. at 315, 324.) Further, it is not disputed that Mr. Godfrey brought certain documents with him at that time, which documents were delivered to Plaintiff's counsel that morning. Those documents were produced as a result of a diligent search by both defendants for documents responsive to Plaintiff's requests, and were documents pertaining to Mr. Godfrey responsive to the document requests. Thus, because Mr. Godfrey complied with the requests and the deposition notice to the best of his ability, sanctions under any part of Rule 37 were not appropriate.

II. IT WAS AN ABUSE OF THE TRIAL COURT'S DISCRETION TO SANCTION MR. GODFREY WITH THE ULTIMATE SANCTION -- DEFAULT JUDGMENT -- ARISING OUT OF THE INABILITY, AFTER DILIGENT SEARCHING, TO LOCATE DOCUMENTS IT WAS NOT HIS DUTY TO MAINTAIN.

Plaintiff's discovery request sought the Bank Records -- documents that pertain solely to the business of co-defendant, The Beehive House, and which should normally be in the control and possession of that entity.² As set forth at length in Mr. Godfrey's principal brief, Mr. Godfrey and The Beehive House undertook significant efforts to locate those documents as soon as the request was received--not just the day prior to the scheduled deposition, as Plaintiff suggests. The search was not fruitful, despite their diligent efforts. Plaintiff, however, mischaracterizes Mr. Godfrey's argument. Mr. Godfrey does not take the position that sanctions were inappropriate solely because the Bank Records were in the possession of The Beehive House and not in his possession. Nor does Mr. Godfrey suggest anywhere that Plaintiff is not entitled to the Bank Records it has requested. Mr. Godfrey simply argues that default judgment was too harsh a sanction when (1) both defendants, after reasonable efforts, could not locate the Bank Records in time for the scheduled deposition and (2) it was not Mr. Godfrey's duty to maintain the Bank Records or produce them.

Mr. Godfrey simply had no duty to maintain or control those documents. That fact is emphasized by the Trial Court's conundrum regarding this issue created at the hearing

²This Reply Brief employs the same abbreviations and short-hand references, such as "Bank Documents" as used and identified in Mr. Godfrey's principal brief.

on plaintiff's second Motion for Sanctions. The Trial Court first castigated Mr. Godfrey for not producing the Bank Records. Moments later, the court criticized The Beehive House for allowing Mr. Godfrey, as a non-employee, to look for the Bank Records. (R. at 548, p.38). It was simply not fair to Mr. Godfrey for the Trial Court to impose the most drastic sanction available because the other defendant was unable to locate its documents, even after a thorough search for them. See Shepherd v. American Broadcasting Companies, Inc., 62 F.3d 1469, 1481 (D.C. Cir. 1995).

III. MR. GODFREY HAS SATISFIED THE MARSHALLING REQUIREMENT.

Plaintiff argues that Mr. Godfrey's brief is deficient because it does not "marshall" the evidence. Generally, an appellant only needs to marshal the evidence if he is challenging the sufficiency of the evidence to support the trial court's or the jury's findings of fact. The appellant must then show that "despite this evidence, the trial court's findings are so lacking in support as to be 'against the clear weight of the evidence.'" Mountain States Broadcasting Co. v. Neale, 783 P.2d 551, 553 (Utah App. 1989) (quoting In re Bartell, 776 P.2d 885, 886 (Utah 1989)). Where the findings are not challenged and the review turns on a question of law, however, marshalling is not required. See Associates v. First Security Financial, 889 P.2d 467 (Utah Ct. App. 1995).

In the present case, the marshalling requirement is satisfied for two reasons. First, Mr. Godfrey is not challenging any findings because the Trial Court did not make any specific findings, per se, against him. The court simply reviewed the affidavits,

memoranda, and arguments of counsel and determined that Mr. Godfrey should be defaulted because the Bank Records had not been produced. Mr. Godfrey does not dispute that the Bank Records had not been produced at that point, but he challenges the Trial Court's imposition of sanctions as an abuse of discretion, as a matter of law. See Askew v. Hardman, 918 P.2d 469 (Utah 1996) (review of abuse of discretion in entering discovery sanctions is, primarily, a question of law).

Second, beyond the affidavits of DeeAnn Schaugaard and Mr. Godfrey, as well as a few lines from the deposition of B. Ralph Godfrey, there is no further evidence to marshal. The facts in those affidavits have all been set forth and discussed in Mr. Godfrey's principal brief. No evidence was presented at the hearing on the Plaintiff's Motion for Sanctions, and a transcript of that hearing is attached as Addendum C to Mr. Godfrey's principal brief. (See Transcript, R. at 548, pp. 34-35.) Thus, to the extent any marshalling would be necessary, it has been done by setting forth those facts in the brief. As such, Plaintiff's argument is unpersuasive.

CONCLUSION

Based on the foregoing, Appellant S. Chad Godfrey respectfully requests that this Court reverse and vacate the trial court's November 18, 1997 Default Order (Order on Plaintiff's Motion for Sanctions for Failure to Make Discovery), as to him, and vacate the entry of default and default judgment against him.

DATED this 21 day of December, 1998.

SNOW, CHRISTENSEN & MARTINEAU

By


Kim R. Wilson

David L. Pinkston

Attorneys for S. Chad Godfrey

CERTIFICATE OF SERVICE

I hereby certify that I caused two true and correct copies of the foregoing Reply Brief of Appellant to be served by first class mail, postage prepaid, on December 21, 1998, to the following:

Vincent C. Rampton
JONES, WALDO, HOLBROOK & MCDONOUGH
170 South Main, #1500
P. O. Box 45444
Salt Lake City, Ut 84145-0444

Andrea Nuffer-Godfrey
POOLE & ASSOCIATES
4543 South 700 East, #200
Salt Lake City, UT 84107



Kim R. Wilson
David L. Pinkston

NA19330\1\DLPREPLY.BRF