

1986

# Joseph Chapman and Myrna Chapman v. Dennis B. Chapman and Nancy S. Chapman : Petition for Rehearing

Utah Supreme Court

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Jay Fitt; Attorney for Respondents.

George H. Mortimer; Attorney for Appellants.

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UTAH SUPREME COURT  
BRIEF

1986

1986  
21000

SUPREME COURT OF UTAH

STATE OF UTAH

JOSEPH CHAPMAN and  
MYRNA CHAPMAN,  
Plaintiffs and Respondents

vs.

DENNIS B. CHAPMAN and  
NANCY S. CHAPMAN,  
Defendants, Appellants  
and Petitioners.

No. 21000

PETITION FOR REHEARING

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Attorney for respondents

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Attorney for petitioners

**FILED**

OCT 1 1986

Clerk, Supreme Court, Utah

SUPREME COURT OF UTAH

STATE OF UTAH

JOSEPH CHAPMAN and  
MYRNA CHAPMAN,  
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PETITION FOR REHEARING

POINTS OF LAW AND FACT FOR CONSIDERATION ON REHEARING

Petitioners, who are defendants and appellants, state here with particularity the points of law and fact which petitioners claim the Court has overlooked or misapprehended.

1. The unverified answer to plaintiffs' complaint raises an issue of fact about duress in defendants' execution of the promissory note which is supported by sworn statements of defendants in answers to interrogatories and to requests for admissions which neither the Court below nor this Court considered.

2. The answers to interrogatories and to requests for admissions were not considered because copies of them were not in the record by clerical error in the Court below because counsel for plaintiffs was duly served in person and counsel

for defendnats went personally to the office of the Clerk of the Court below and filed them promptly after serving them on counsel for plaintiffs but, unknown to counsel for petitioners until the record was prepaed for the appeal, were never entered in the record.

#### SUMMARY OF PETITIONERS' POSITION

1. Petitioners concur with what this Court states in its per-curiam opinion that defendants' unverified pleading (answer) alone would not prevent the grant of summary judgment and further that the record contained no answers to the affidavits in support of the two motions for summary judgment. But the absence of the verified answers to interrogatories and to requests for admissions from the record was due to a clerical error in the office of the Clerk of the Court below.

2. Defendants concur with this Court's holding that the affidavit of plaintiff Joseph Chapman executed in Utah is defective, that the other affidavit which he executed in California is not defective, is admissible and supports summary judgment provided defendants' answers to interrogatories and to requests for admissions cannot be considered by this Court.

#### ARGUMENT

The decision on this PETITION FOR RECONSIDERATION turns on the answer to the question whether defendants' verified answers to interrogatories and to requests for admissions, copies of which are attached to APPELLANT'S BRIEF, can be considered to establish a genuine issue of material fact which, under Rule 56

(c), would preclude the grant of summary judgment.

This question, so far as the legal research made by counsel for petitioners revealed, has never before been decided by a court of record in the State of Utah. It is a novel question which this Court can properly consider on this PETITION.

Petitioners respectfully submit that a party should not be penalized by or suffer from an error in the clerical function of a Court. In this case, counsel for petitioners personally served on counsel for the party seeking summary judgment the verified answers to the interrogatories and to the requests for admissions, which this party had served on petitioners, and had the acknowledgment of service entered on the copies of these two answers that were to be filed in the Clerk's office. Plaintiffs and their counsel knew, therefore, not only from the pleadings but also from sworn statements in the two answers that there was in fact a genuine issue with respect to a material fact between the two parties, viz., whether petitioners has signed the promissory note upon which the action is based under duress and/or misrepresentation.

The two decisions cited by this Court at the top of page 2 of the per-curiam decision do not present the factual situation which obtains here, viz, that the absence of sworn statements from the record here, but not there, was due to an error in the office of the Clerk when counsel for petitioners had done everything he could to make the said verified answers of

record.

It seems unjust and unfair to deprive petitioners of the right to have the issue of the propriety of the grant of summary judgment decided on the basis of all the papers which they filed with the Clerk.

Petitioners, therefore, respectfully pray that the Court reconsider its per-curiam decision, withdraw it, render a decision overruling the grant of summary judgment and ordering a trial of the action.

Respectfully submitted

*George H. Mortimer*  
George H. Mortimer  
Attorney for Petitioners

CERTIFICATE OF SERVICE

I , George H. Mortimer, attorney for Petitioners, hereby certify that I have caused four (4) copies of the annexed PETITION FOR RECONSIDERATION to be served by first class mail on Jay Fitt, Esq., attorney for plaintiffs-appellants at 1325 South 800 East, Orem, Utah 84058 this 26th day of September, 1986.

*George H. Mortimer*  
George H. Mortimer