

1986

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

Utah Supreme Court

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George H. Mortimer; Attorney for Appellants.

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UTAH SUPREME COURT  
BRIEF

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DOCKET NO. 1986-21000

IN THE SUPREME COURT  
STATE OF UTAH

JOSEPH CHAPMAN, and  
MYRNA CHAPMAN,

Plaintiffs and Respondents,

vs.

DENNIS B. CHAPMAN, and  
NANCY S. CHAPMAN,

Defendants and Appellants.

Case No 21000

RESPONDENTS' REPLY TO APPELLANTS'

PETITION FOR REHEARING

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Clerk, Supreme Court, Utah

IN THE SUPREME COURT

STATE OF UTAH

JOSEPH CHAPMAN, and  
MYRNA CHAPMAN,

Plaintiffs and Respondants,

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RESPONDANTS' REPLY TO APPELLANTS

PETITION FOR REHEARING

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STATEMENT OF ISSUES

The issue presented on original appeal was whether the plaintiffs' motion for summary judgment was appropriately granted.

The issue involved in the motion for rehearing is the request of the appellants' to have this Court consider answers to interrogatories and to requests for admissions that were not filed with the trial court.

STATEMENT OF FACTS

The facts of the case are as stated in the appellants' brief except as follows:

1. The statements contained in paragraphs 1 and 2: The

complaint was filed by mail, and the plaintiffs' counsel was not made aware of the number assigned. When the summons was delivered to counsel after service, it was returned by counsel to the Clerk of the Court for filing, but the deputy clerks in the office were unable to locate the file because the matter had not yet been indexed. A new file was prepared, another complaint was filed and another fee was paid. When the fact of the duplicate filing was confirmed, the two cases were consolidated into the earlier numbered case and the second filing fee was ordered refunded.

2. The statements contained in paragraph 11: The plaintiffs' counsel received a copy of the defendants' answers to the Request for Admissions (first request for admissions), but the date is unknown, but no copy of the defendants' answers to the second request for admissions has been received.

#### SUMMARY OF ARGUMENT

1. The record of the case, by virtue of Rule 36, Utah Rules of Civil Procedure, contains the admissions of the defendants regarding all issues of liability that are necessary for the trial court to find judgment in favor of the plaintiffs and against the defendants. The cited rule, under paragraph (a), provides that if no answer is received or no objection is filed to the request for admission the request will be deemed admitted. The defendants have not answered the requests for admissions, and, by operation of the rules, have admitted:

a) That they signed the promissory note (first request

number one, 1-10).

b) That they received value for their promise to pay the plaintiffs the sum of \$11,760.56 at interest (first request number three, 1-10).

c) That they received \$1,500.00 from the plaintiffs in June, 1975 (second request number one, R-21).

c) That they received \$1,500.00 from the plaintiffs in July, 1975 (second request number two, R-21).

e) That they received \$700.00 from the plaintiffs in August, 1975 (second request number three, R-21).

f) That they received \$6,700.00 from the plaintiffs in September, 1975 (second request number four, R-21).

g) That they paid their last payment to the plaintiffs in May, 1975 (second request number ten, P-22).

2. The allegation in the complaint together with the admissions and the plaintiffs' affidavit (P-50), provided the trial Court with facts sufficient to properly grant the motion for summary judgment. It is interesting to note that every promissory note is made with some requirement that it be signed or the requested loan of money will not be granted. The letters of the defendant Dennis B. Chapman clearly acknowledge that the defendants owe the debt, and none of the letters indicate that any duress or pressure was used to obtain the signatures on the promissory note.

3. The motion was filed pursuant to Rule 2.8, The Rules of Practice in the District Courts and Circuit Courts of the State

of Utah. No responsive memoranda was prepared or filed within the ten days provided in the said rule. The trial Court's ruling was made well after the time provided within which the defendants ought to have responded. The failure of the defendants to respond must be deemed as an acknowledgement on their part that they have no meritorious position.

#### ARGUMENT

1. The record in the case shows no disputed issue of facts in light of the admissions of the defendants and the affidavit of the plaintiffs. The failure and refusal of the defendants to respond to the motion in accordance with the rules further constitutes an admission that there is no issue of fact in dispute.

2. The facts are that the defendants signed a promissory note, received consideration for their promise to pay, made their last payment within the period of limitations, and such facts were sufficient upon which the trial based its granting of the motion for summary judgment.

3. The appellants contend that they should not be punished due to an error made by the clerk of the trial court in omitting to send the answers to requests for admissions and to interrogatories, but none were received by the plaintiffs' counsel and none were in the record. Based upon the record of the case, this Court has made the proper ruling in its per curiam decision.

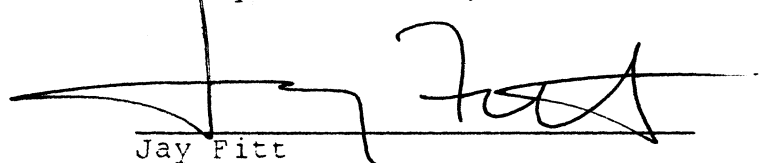
#### CONCLUSION

Every reasonable effort has been made by the plaintiffs to

pursue this cause of action against the defendants. Efforts at discovery were frustrated, delayed or not answered. The plaintiffs have attempted to follow the rules in order to obtain all of the facts necessary to assist the trial Court in making its decision. The defendants have failed and refused to comply with the rules. The simple fact is that the defendants owe the balance of principal and interest on the promissory note to the plaintiffs, but they do not want to pay it, and have and are continuing to attempt to wear the patience of the plaintiffs to a point of total frustration in the hope that the plaintiffs will eventually abandon the claim.

The defense in this action has been brought in bad faith, but, because of the family relationship between the parties, the plaintiffs have only sought to obtain the amounts due them under the promissory note, but under the circumstances of the repeated delays which include this motion for rehearing, the plaintiffs are compelled to request that this Court make an award of costs and attorney's fees.

Respectfully submitted this 21st day of October, 1986.

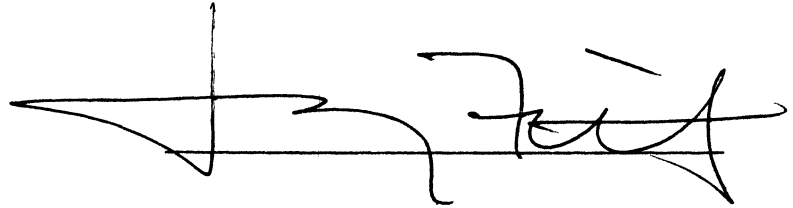


Jay Fitt  
Attorney for Plaintiffs/  
Respondents

CERTIFICATE OF SERVICE

I, Jay Fitt, attorney for the plaintiffs/respondents, hereby certify that I have caused a copy of the annexed RESPONDENTS' REPLY TO APPELLANTS' PETITION FOR REHEARING to be served by first class mail, postage prepaid, this 21st day of October, 1986, to:

George F. Mortimer, Esq.  
Attorney for Appellants  
3587 Littlerock Drive  
Provo, Utah 84604

A handwritten signature in black ink, appearing to read "Jay Fitt", is written over a horizontal line.