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National Advertising Company v. Murray City Corporation : Brief of Appellee

Utah Court of Appeals

Donald L. Dalton; Dalton & Kelley; Attorney for Plaintiff and Appellee.
Randy B. Hart; Murray City Attorney\'s Office; R. Stephen Marshall; Steve K. Gordon; Durham, Evans, Jones & Pinegar; Attorneys for Defendants and Appellants; Frank M. Nakamura; Murray City Attorney\'s Office; Attorneys for Murray City Corporation.

IN THE UTAH COURT OF APPEALS

NATIONAL ADVERTISING COMPANY,	Case No. 980238-CA
Plaintiff/Appellee,	Priority No. 15
vs.	
MURRAY CITY CORPORATION, GENE V. CRAWFORD, SHERRY T. CRAWFORD dba "Val-Dev, L.L.C.,"	
Defendants/Appellants.	

APPELLEE'S BRIEF

On Appeal from Judgment
of the Third Judicial District Court,
Salt Lake County, State of Utah
Honorable J. Dennis Frederick, Presiding

R. Stephen Marshall (2097)
Steve K. Gordon (5958)
DURHAM, EVANS, JONES & PINEGAR
50 South Main, Suite 850
Salt Lake City, Utah 84144
Telephone: (801) 538-2424

Attorneys for Gene V. Crawford and Sherry T. Crawford

Donald L. Dalton (4305)
DALTON & KELLEY
Post Office Box 58084
Salt Lake City, Utah 84158
Telephone: (801) 583-2510

Attorneys for National Advertising Company

Frank M. Nakamura
MURRAY CITY ATTORNEY'S OFFICE
5025 South State Street
P.O. Box 57520
Murray, Utah 84157-0520
Telephone: (801) 264-2642

Attorneys for Murray City Corporation

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Donald L. Dalton (4305)
DALTON & KELLEY
Post Office Box 58084
Salt Lake City, Utah 84158
Telephone: (801) 583-2510

Attorneys for National Advertising Company

Frank M. Nakamura
MURRAY CITY ATTORNEY'S OFFICE
5025 South State Street
P.O. Box 57520
Murray, Utah 84157-0520
Telephone: (801) 264-2642

Attorneys for Murray City Corporation

TABLE OF CONTENTS

	Page
TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	ii
JURISDICTION	1
STATEMENT OF FACTS	1
SUMMARY OF ARGUMENTS	6
ARGUMENTS	9
I. THE CRAWFORDS HAD MORE THAN ADEQUATE OPPORTUNITY TO PRESENT THEIR CASE	9
II. THERE WERE NO ISSUES OF FACT MATERIAL TO THE QUESTION OF WHOSE PERMIT SHOULD PREVAIL, AND NAC WAS ENTITLED TO JUDGMENT AS A MATTER OF LAW	13
III. THE CRAWFORDS CANNOT PREVAIL ON SUMMARY JUDGMENT JUST BECAUSE NAC DID NOT RAISE ANY FACTUAL ISSUES IN RESPONSE TO THEIR MOTION	16
IV. THERE WAS NO NEED FOR A FACTUAL STATEMENT IN NAC'S SECOND MOTION FOR SUMMARY JUDGMENT	18
CONCLUSION	19

TABLE OF AUTHORITIES

Page(s)

Cases

Celebrity Club Inc. v. Utah Liquor Control Comm'n, 657 P.2d 1293 (Utah 1982)..... 12

Olwell v. Clark, 658 P.2d 585 (Utah 1982)..... 17

Salt Lake City Corp. v. James Constructors, Inc., 761 P.2d 42 (Utah App. 1988)..... 4 n.5

Statutes and Rules

Utah Code Ann. § 78-2a-3(2)(j)..... 1

Ut. R. of Civ. Proc. 54(b)..... 8, 19

Ut. R. of Civ. Proc. 56(c)..... 8, 17

Ut. R. of Civ. Proc. 56(e)..... 16, 17

JURISDICTION

This Court has jurisdiction under Utah Code Ann. § 78-2a-3(2)(j).

STATEMENT OF FACTS

The Crawford's statement of facts is factually inaccurate in several material regards. The first such inaccuracy appears in the Crawford's "brief statement of procedural history." (Pg. 1) We are referring to the statement on pg. 1 that the Crawfords were not "parties to the action" at the time the district court first granted summary judgment against them.[1] As can be plainly seen from the record of this case, the Crawfords were parties to the action before the Motion for Summary Judgment was filed. Murray City joined the Crawfords as parties to the action in its Answer and Counterclaim for Interpleader. (R. 13) NAC's Motion for Summary Judgment was filed after Murray City answered the Complaint. (R. 20) The Motion for Summary Judgment itself reflects that the Crawfords were "Counterclaim Defendants" at that time. (R. 22) Inexplicably, the Crawfords concede in another part of their brief that they were parties to the action at the time Murray City filed its Answer, (pg. 8, ¶19) though this plainly contradicts their earlier representations.

The second such inaccuracy is more subtle and therefore much more indelible. Though they never come right out and say it, the Crawfords suggest throughout their brief that they received no notice of the action until NAC filed its Amended Complaint (three months later). That is the import of a statement appearing on pg. 4 of their brief: "Later,

[1] This statement was repeated on pg. 4 of the Crawford's brief.

National filed an Amended Complaint, adding the Crawfords as defendants and seeking injunctive relief against them." This is also the import of a statement appearing on pg. 9, ¶24: "National's First Amended Complaint added the Crawfords as defendants and sought injunctive relief against them."

NAC's Amended Complaint (R. 214) did not add the Crawfords as parties to the action. What it did was add new claims against the Crawfords and against Murray City.[2] When the district court granted NAC's Motion for Summary Judgment, NAC sought to remove its sign from the Crawford's property but the Crawfords refused to permit entry. (R. 211) However, Paragraph 11 of the Lease required the Crawfords "to allow the Lessee full access to the property occupied by the displays for the purpose of erecting, maintaining, changing ***or removing the displays at any time***." (R. 37) NAC had no count for injunctive relief or damages in its Complaint against either defendant. Therefore, NAC sought leave to amend its Complaint to add such claims. (R. 212) That is all the Amended Complaint did.

Despite the obvious implication of the passages quoted in the paragraph above, including others throughout their brief, the Crawfords never actually claim lack of notice.[3] There is a good reason for this. There is evidence in the record, which the Crawfords have ignored in their brief, that they knew about the action ***and*** about NAC's Motion for Summary Judgment at a time when they could have appeared and protected their rights. The evidence shows that the Crawfords (through their attorney) communicated with Murray City about the response to NAC's Motion for Summary Judgment. This evidence shows that Murray City

[2] The claims were the same against each.
[3] What they do claim is that they were not "parties" and were not "served." (See pp. 8-9, ¶21)

tried to get the Crawfords to appear in the action and answer NAC's Motion for Summary Judgment for themselves. The evidence shows that the Crawfords chose to sit out NAC's Motion for Summary Judgment and let Murray City make their arguments for them.

The evidence we are referring to is the Affidavit of Cindy L. Tooms, (R. 143) of the Murray City Attorney's Office. In ¶4 of the Affidavit, Ms. Tooms testified that Randy Hart, Murray City Attorney, instructed her to prepare an acceptance of service form for the Crawford's attorney to sign. This of course was for Murray City's Answer and Counterclaim for Interpleader (joining the Crawfords as defendants). Ms. Tooms was told by Mr. Hart that Martin Tanner, the Crawford's attorney, had agreed to accept service of the Counterclaim on behalf of the Crawfords. (Id.)

On October 25, 1996, Ms. Tooms sent Mr. Tanner a copy of the Counterclaim and an Entry of Appearance for him to sign. (¶5) This was before NAC had even filed its Motion for Summary Judgment. (R. 20) On November 4, 1996, Ms. Tooms spoke with someone named "Sue" in Martin Tanner's office. Ms. Tooms was told by Sue that Mr. Tanner had "accepted service" of the Counterclaim for Indemnity on behalf of the Crawfords. (¶6) On November 7, 1996, Ms. Tooms left a message for Mr. Tanner about his failure to return the Entry of Appearance. (¶[4])[4] Ms. Tooms wrote Mr. Tanner a letter about this same subject that same day. (¶[5])

The most significant thing is that on that same day, November 7, 1996, Cindy Tooms sent Martin Tanner a copy of NAC's Motion for Summary Judgment. (¶[6]) She and Mr. Tanner then discussed NAC's Motion for Summary Judgment "at length." (¶[7]) They also

discussed "the arguments that Murray City would be making in response, and the necessity that Mr. Tanner file a response on behalf of his clients." (Id.) Ms. Tooms "was under the impression that Mr. Tanner would file a response." (Id.) It is easy to see why the Crawfords failed to comment on the substance of Ms. Tooms' Affidavit, though they do attempt to dismiss it with the lame objection that portions of it contain hearsay. (Pg. 8, ¶20)[5]

NAC's Motion was served by hand-delivery on October 30, 1996. (R. 21) That made a response due November 12, 1996. No one requested an extension of time within which to file a response, though the undersigned would have granted such a request if it had been made. By the time Mr. Tanner was undeniably informed of the existence of the Motion for Summary Judgment, there was plenty of time for him to file a response if he so desired. The fact that he did not suggests he wanted to sit out the first round and see how it turned out. That way, if he did not like the result, he could formally appear for the Crawfords and try again. That seems to be the only explanation for his conduct in this case. In any event, the Crawfords can hardly complain about "lack of notice."

The Crawfords claim to have terminated the Lease in advance of its term, the last day of which was February 1, 1997. (Pp. 5-6, ¶¶8-10) They claim to have done this in accordance with Paragraph 9 of the Lease. (Pg. 6, ¶8) However, Paragraph 9 provides in pertinent part as follows: "In the event that the portion of the Lessor's property occupied by the Lessee's displays is to be improved by permanent construction or remodeling, as evidenced by a

---

[4] There was an error in the numbering of the paragraphs.
[5] Which of course avails them nothing since they did not move to strike the Affidavit. Salt Lake City Corp. v. James Constructors, Inc., 761 P.2d 42, 46 (Utah App. 1988).

building permit, ***requiring the removal of the Lessee's displays***, the Lessor may terminate this lease...." (R. 37)

Just as the Crawfords claim, they provided NAC with a copy of their site plan. (Pg. 6, ¶10) The site plan is part of the record in this case. (R. 122) The Court may note that NAC's sign did not conflict with any of the structural improvements intended by the Crawfords. The Crawford's site plan clearly demonstrates that NAC's sign merely occupied four new parking spaces. NAC concluded that on the basis of the site plan, Paragraph 9 did not require removal of its sign.

NAC also noted what appears in the upper right-hand corner of the site plan: The typewritten language, "New Location for Billboard Sign (Relocated)." This showed that the Crawfords had at one time made allowance for NAC's sign. The Crawfords never claimed that the site plan had changed in such a way that required removal of NAC's sign. NAC justifiably concluded that the Crawfords were using Paragraph 9 of the Lease as a pretext to get NAC to remove its sign. After all, as we now know, the Crawfords had applied for a sign permit of their own before notifying NAC that its sign had to go. (Pg. 6, ¶12) It is obvious that the Crawfords wanted a sign of their own and that was what required removal of NAC's sign. Their remodeling efforts had nothing to do with it.

Paragraph 9 aside, the Crawfords recognized that their sign permit would expire before termination of NAC's Lease. (Pg. 7, ¶14) Because of this, Murray City rescinded the Crawford's permit on September 10, 1996. (R. 61, ¶12) Murray City recognized the necessity of this because the Crawford's permit was "not to become effective unless and until [NAC's] sign was removed from the Property." (R. 60, ¶7) Since the Crawfords did not have it in their

power to remove NAC's sign any sooner than the end of the Lease term, which would have been longer than the 180-day term for the sign permit, Murray City had no choice but to rescind the Crawford's sign permit. However, at the Crawford's request, Murray City extended their permit another 180 days (R. 61, ¶11) even though they had no ability to begin construction within the original period. This extension was the only basis on which the Crawfords can claim that their permit was valid. Obviously, as recognized by the district court, their original permit was void ab inito. This was the principled basis on which the district court granted NAC's Motion for Summary Judgment.

NAC, on the other hand, did have a valid permit at the time it was issued (August 5, 1996). (Rr. 60-61, ¶9) NAC's permit was similarly conditioned "not to become effective unless and until [NAC] removed its existing sign from the Property and the Lessors' sign permit expired." (Id.) However, unlike the Crawfords, NAC had it within its power to remove its own sign and terminate the Lease within the 180-day term of its permit. Paragraph 11 of the Lease provides that "[a]ll structures, displays and materials placed upon the said property by the Lessee are Lessee's trade fixtures and equipment,...and may be removed by the Lessee at any time prior to...termination of this lease or any extension thereof." (R. 37) Of course, in such a case, NAC would have remained obligated to pay rent to the Crawfords, but Murray City's condition would have been satisfied.

SUMMARY OF ARGUMENTS

1. Due process was satisfied in this case. The Crawfords received notice of the action and of NAC's Motion for Summary Judgment before it was decided. They even participated in the drafting of a response by Murray City. It was their choice to stay out of the

action at a time when they could have appeared to defend their interests. They did so for the obvious purpose of having another "bite at the apple" in case the district court ruled against Murray City and in NAC's favor. After NAC's Motion was granted, the Crawfords appeared and made their own arguments and defenses to the action. By NAC's count, they had five separate opportunities to present their case after the district court granted NAC's Motion for Summary Judgment. The Crawfords suggest that Judge Frederick ignored their case after granting NAC's Motion for Summary Judgment, but there is nothing in the record to support this contention. Due process requires "the right to a hearing before a competent court, with the privilege of being heard and introducing evidence." The Crawfords had that right in spades.

2. There has to be a principled basis for distinguishing between the two conflicting sign permits. The Crawfords argue that theirs should prevail because it was first in time. That is not a very principled basis for any decision. NAC argued that its permit should prevail because it was the only one of the two permit holders who could satisfy the permit's condition within the 180-day term of the permit. Both permits were conditioned on removal of NAC's sign. For reasons explained more fully above (and below), only NAC had the power to remove its sign within the 180-day term of its permit. NAC argued to the district court that this made the Crawford's permit void ab initio and the district court agreed. In fact, Murray rescinded the Crawford's permit for this very reason, though it was later reinstated at request of the Crawfords. By that time, however, NAC had a valid sign permit of its own that precluded reinstatement or extension of the Crawford's permit. There were no genuine issues

as to any of the facts material to this determination. Thus, summary judgment was properly granted in NAC's favor.

3. Summary judgment may be granted only if "there is no genuine issue as to any material fact ***and...the moving party is entitled to a judgment as a matter of law***." Rule 56(c), URCP. The Crawfords forgot the second element of this Rule. They were not entitled to summary judgment just because NAC did not raise any factual issues in opposition thereto. They may have satisfied the first part of the Rule, but (for reasons stated above) they were not entitled to judgment as a matter of law. Therefore, the district court acted correctly in denying their Motion.

4. The Crawfords are wrong when they say that NAC's second Motion for Summary Judgment was not supported by a "statement of facts." They recognized otherwise at the time they responded to the Motion. In any event, NAC's second Motion for Summary Judgment was necessitated only by Rule 54(b), URCP. Even though the district court had rejected the Crawford's Motion for Summary Judgment, their claims still remained. There was nothing new to say at that point, which is why NAC merely referred to its earlier Motion for Summary Judgment. For their part, the Crawfords said nothing new either. They merely referred to the facts stated in all their previous pleadings. There was no error in granting the technically necessary though practically inconsequential second Motion for Summary Judgment.

ARGUMENTS

I. THE CRAWFORDS HAD MORE THAN ADEQUATE OPPORTUNITY TO PRESENT THEIR CASE.

The Crawfords are careful not to say that they were denied an opportunity to be heard in this case. They were certainly given such an opportunity when Murray City mailed their counsel a copy of the Counterclaim for Interpleader. They were given such an opportunity when Murray City mailed their counsel a copy of NAC's Motion for Summary Judgment. They were given such an opportunity when Murray City discussed with their counsel the substance of NAC's Motion for Summary Judgment and the response thereto. Murray City plainly desired for the Crawfords to appear in the action and defend themselves. However, there is no suggestion that Murray City did not make the arguments against NAC's Motion for Summary Judgment that had been discussed with counsel for the Crawfords.

Murray City's interest in the matter was such that it had good reason to resist NAC's Motion. Murray City is the one who (innocently) created the problem that gave rise to the action. It issued competing sign permits to the Crawfords and to NAC that left them with no alternative to litigation. Unfortunately, Murray City had to be a party to this litigation, but the Crawfords did not. There was no dispute between the Crawfords and NAC. NAC could not complain about the Crawfords' applying for a sign permit before the end of the Lease term. Similarly, NAC could not complain to the Crawfords about the permit issued to them by Murray City. The only person to whom NAC could complain, about the Crawfords' permit, was Murray City. Murray City had to defend itself against the charges that it acted unlawfully in issuing the Crawfords' sign permit.

This helps explain why NAC did not join the Crawfords in the first place. NAC gave a fuller explanation in its Memorandum in Opposition to Murray City's Motion to Substitute and for Realignment of Parties (R. 73):

> Murray City's removal from the action would eliminate the only justiciable controversy that exists in this case. There is no dispute between [NAC] and the putative third-party defendants: Gene B. Crawford and Sherry T. Crawford dba Val-Dev L.L.C. [NAC] has a sign on property owned by the Crawfords; [NAC] pays rent according to the terms of the lease between [NAC] and the Crawfords. That lease is presently existing and in good standing.

After NAC's Motion for Summary Judgment was granted, the Crawfords were given several more opportunities to be heard. The first such opportunity was their Motion to Reconsider the Summary Judgment, for Temporary Restraining Order and Injunction and for Summary Judgment. (R. 85) In support of their Motions, the Crawfords filed a seven-page Memorandum in Support containing twelve separate factual statements and four separate arguments. (R. 89) The Motion was also supported by a three-page Affidavit of Brad Crawford (R. 98) containing a pair of exhibits; and also by a two-page Affidavit of Anne Vonweller (R. 106) containing several more exhibits. Finally, the Crawfords also filed a three-page Reply Memorandum in Support of Motion to Reconsider and for Summary Judgment. (R. 190) It is plain to see that in all these pleadings, the Crawfords made the same arguments in the trial court that now they make on appeal. All of this was therefore before the district court before entry of final judgment in this case.

The second such opportunity was in opposition to NAC's Motion for Temporary Restraining Order. (R. 174) The Crawfords filed a two-page Objection to Motion for

Temporary Restraining Order. (R. 200) The third such opportunity was in their twelve-page Answer to First Amended Complaint, Cross-Claim and Counterclaim. (R. 229) The Counterclaim contained nineteen separate factual allegations. (Rr. 237-40) The fourth such opportunity was in their Motion for Summary Judgment on Cross-Claim and Counterclaim. (R. 291) In support of said Motions, the Crawfords filed a nine-page Memorandum in Support containing twelve separate factual statements and five exhibits. (R. 263) The Crawfords also filed a six-page Reply Memorandum in Support of Motion for Summary Judgment on Cross-Claim and Counterclaim containing two more exhibits. (R. 303) The fifth such opportunity was in opposition to NAC's (final) Motion for Summary Judgment. (R. 321) In response, the Crawfords filed a four-page Memorandum in Opposition. (R. 328) It is plain to see that the Crawfords made the same arguments in these pleadings that they now make on appeal. All of this was therefore before the district court before entry of final judgment.

Throughout their brief, the Crawfords suggest that Judge Frederick ignored everything filed in the case after the Crawfords finally appeared: "On this first fatally flawed ruling [granting NAC's Motion for Summary Judgment], the trial court based its subsequent denial of the Crawfords' Motion to Reconsider and the Crawfords' Motion for Summary Judgment on their Counterclaim, and its grant of National's second Motion for Summary Judgment." (Pg. 12) And again: "This unconstitutional ruling [granting NAC's Motion for Summary Judgment] subsequently formed the basis for the trial court's: (1) denial of the Crawfords' Motion to Reconsider; (2) denial of the Crawfords' Motion for Summary Judgment on their Counterclaim; and (3) granting of National's second Motion for Summary Judgment." (Pg.

19) Hidden away in their "Conclusion," however, the Crawfords come right out and say it: "Indeed, the trial court never gave the evidence presented by the Crawfords even a cursory review, let alone the type of fair and serious review required by the Utah and federal constitutions." (Pg. 27)

There is nothing in the record of this case to support any of these statements. Though the Crawfords give three record references for the first such statement, (pg. 12) they all say that the various motions were granted or denied for reasons stated in NAC's Memoranda. (Rr. 78, 316, 348-49) There is nothing in any of those references to suggest that Judge Frederick simply ignored what was before him and returned to the reasoning behind his original ruling. There is no way to know why Judge Frederick ruled the way he did, except in the record of the case. And in each case, he gave reasons that suggested he was paying the utmost attention to the matter. To suggest otherwise is to impugn one of the finest judges on the Utah bench.

The Crawfords cite a great many due process cases in their brief. They all state general principles of constitutional law that are completely unobjectionable.[6] Unfortunately, none of those cases advances the issue in this case.

Celebrity Club Incorporated v. Utah Liquor Control Commission, 657 P.2d 1293 (Utah 1982) is the one relied upon most heavily by the Crawfords. (Pg. 16) Its most salient point, with respect to this case, is that "a party shall have his day in court – that is each party shall have the right to a hearing before a competent court, with the privilege of being heard and introducing evidence to establish his cause or his defense,...." 657 P.2d at 1296. In that

[6]. For instance, the Crawfords spend most of their time arguing that their sign permit is a "property interest," (pp. 13-15) something NAC has never denied.

case, the owner of a private club had its state-controlled liquor license revoked. There was a public hearing, but the owner of the club was neither notified nor invited. This was done under a statutory scheme that was plainly unconstitutional, and the Court ruled as such.

That is a far cry from what happened here. The Crawfords appeared in the action shortly after the first Motion for Summary Judgment was decided. Judgment did not become final until the Crawfords had five more opportunities to make out their causes and defenses. Every party is entitled to "a hearing before a competent court, with the privilege of being heard and introducing evidence to establish his cause or his defense,...." 657 P.2d at 1296. We say that happened here in spades.

The Crawfords' real point seems to be that a due process violation, if established, can never be remedied. In other words, if there is a due process violation at the start of a case, a party with notice of the proceeding may sit back, take no action and reap the benefits. Worse yet, according to the Crawfords, a party may later appear in the action and defend its interests, but will get a new hearing no matter the extent to which it was able to state its position and defend its interests. There is no authority for this ridiculous assertion, at least none cited by the Crawfords. Notice is notice. Once you have it, you fail to act your own peril. Assuming (as we must) that the decision by the Crawfords to sit out the first Motion for Summary Judgment was calculated, due process has been completely satisfied.

II. THERE WERE NO ISSUES OF FACT MATERIAL TO THE QUESTION OF WHOSE PREMIT SHOULD PREVAIL, AND NAC WAS ENTITLED TO JUDGMENT AS A MATTER OF LAW.

The second half of the Crawford's appeal has to do with the merits of the case: In other words, whose permit should prevail. There was never any question in this case that

these were conflicting permits and that they both could not be valid. (Pg. 3) For the Crawfords, the question settled on whose permit was issued first. (Pp. 22-23) But this assumed that the Crawford's permit was valid in the first place. The Crawfords keep forgetting that their permit was conditioned on removal of NAC's existing sign. However, there was no way for the Crawfords to get NAC's sign removed before their permit expired. As a practical matter, this made the Crawford's permit void when it was issued. Of course, this was recognized by Murray City when it invalidated the Crawford's permit. Unfortunately, by the time the Crawfords got their permit reinstated, NAC already had a valid permit that pre-empted theirs.

All of the Crawford's efforts in this regard center on their attempt to terminate the Lease within the 180-day term of the permit. The Crawfords seized on Paragraph 9 of the Lease. On April 23, 1996, the Crawfords notified NAC "that [they were] developing the Property and that [NAC's] sign must be removed." (Pp. 5-6, ¶8) This "notice" came in the form of a letter from Brad Crawford, (R. 108) attorney in fact for the owners of the property. Mr. Crawford claimed as follows: "It has been determined that your sign is located in an area that will be used for parking for this new development. Because your sign will hinder development, I request that you remove the sign as soon as possible."

NAC was not required to accept Mr. Crawford's unsubstantiated assertion. Paragraph 9 of the Lease required proof of remodeling or improvement in the form of a "building permit." (R. 37) Mr. Crawford seems to have recognized this in his second notice (June 10, 1996): "A copy of the building permit for the new development will be sent as soon as it is issued." (R. 109) Mr. Crawford apparently complied with the building permit requirement on

August 3, 1996. (R. 111) However, he went beyond the specific requirements of the Lease and provided NAC with a "site plan showing the proposed use of the area where the sign is located." (R. 112)

From the start, NAC had its doubts whether Paragraph 9 applied to this situation. After all, Paragraph 9 speaks of "permanent construction or remodeling...requiring removal of the Lessee's displays." (R. 37) That did not appear to be the case with the Crawford's parking lot. However, when NAC saw the Crawford's site plan, its doubts were sealed.

It is obvious that provision had originally been made for relocating the sign. This is apparent from the printed language in the upper right-hand corner of the site plan: "New Location for Billboard Sign (Relocated)." (R. 122) However, none of Mr. Crawford's notices mentioned relocating the sign. (Rr. 108, 109, 111) All they mentioned was removing the sign. NAC suspicions were confirmed when it learned, shortly after receiving the site plan, that the Crawfords had applied for a sign permit shortly before giving their first notice. (Pg. 6, ¶12)

It is obvious that the Crawfords wanted NAC to remove its sign, possibly on the guise of relocating it elsewhere on the property. If it had done so, NAC would have been denied a permit because of the Crawford's existing permit. Whatever the motives of the Crawfords, it is apparent that Paragraph 9 of the Lease did not apply to this situation. The Crawford's site plan demonstrated that the remodeling did not "require removal" of NAC's sign. At most, it required "relocation" of the sign, but that, unfortunately, was not covered by the Lease. Therefore, the Crawfords could not terminate the Lease until its anniversary (February 1, 1997). By then, it was too late.

In a last, desperate effort to avoid summary judgment, the Crawfords claim: "The trial court erred by not acknowledging the evidence and failing to grant summary judgment for the Crawfords, ***or at a minimum, ruling that summary judgment for [NAC] was precluded by genuine, material issues of fact.***" (Pg. 23) However, the Crawfords identify no such issues. The fact is that none of the Crawford's factual statements were placed in issue by NAC. NAC responded to the Crawford's Motion for Summary Judgment by objecting that a great many such statements were legal conclusions. (Rr. 295-96) However, NAC never denied the genuineness of any of those statements. In fact, NAC admitted a great many of such statements. Without any factual issues to resolve at trial, the district court was permitted to decide the case on summary judgment as a matter of law.

III. THE CRAWFORDS CANNOT PREVAIL ON SUMMARY JUDGMENT JUST BECAUSE NAC DID NOT RAISE ANY FACTUAL ISSUES IN RESPONSE TO THEIR MOTION.

This third argument of the Crawfords is just plain wrong. They contend that the district court should have granted their Summary Judgment Motion because NAC did not raise any factual issues in response thereto. In so arguing, they make a common mistake when it comes to summary judgment jurisprudence. They rely on Rule 56(e) to the effect that "[w]hen a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." (Pg. 24)

However, they stop short of the truth because they fail to quote all of the very next sentence: "If he does not so respond, summary judgment, ***if appropriate***, shall be entered

against him." Those two words make obvious reference to Rule 56(c): "The judgment sought shall be rendered if the pleadings, depositions, answer to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact ***and that the moving party is entitled a judgment as a matter of law***." There are two parts to summary judgment analysis. There may be no genuine issue as to any material fact, as in this case, but the moving party may not be entitled to judgment as a matter of law. This is just the flip side of the Crawford's argument above. Since there was no genuine issue as to any material fact and NAC was entitled to judgment as a matter of law, the district court was correct in granting NAC's Motion for Summary Judgment and, for the same reasons, denying the Crawford's own.

Actually, the Crawfords cannot have been unmindful of their mistake. They quoted the last sentence of Rule 56(e), but left out the two operative words. (Pg. 24) They have cited no authority (other than the Rule) for their mistaken contention that "if a party opposing summary judgment does not satisfy the burden imposed by Rule 56, summary judgment '***shall*** be entered against him.'" (emphasis in original) The case authority that stands against them, among many others, is Olwell v. Clark, 658 P.2d 585 (Utah 1982): "[U]nder Rule 56, URCP, it is not always required that a party proffer affidavits in opposition to a motion for summary judgment in order to avoid judgment against him....Rule 56(e) states specifically that a response in opposition to a motion must be supported by affidavits or other documents only in order to demonstrate that there is a genuine issue of fact for trial. Where the party opposed to the motion submits no documents in opposition, the moving party may be granted summary judgment only 'if appropriate,' that is, if he is entitled to judgment as a matter of

law." 658 P.2d at 586. By twisting the clear meaning of this Rule, the Crawfords have done the Court and themselves a great disservice.

NAC needs to be mindful of one mistake of its own. In response to the Crawford's Motion for Summary Judgment, NAC did say that the Crawfords had failed to present a building permit in support of their attempt to terminate the Lease before February 1, 1997. (R. 297) This statement was wrong, of course. However, this mistake could not have been the basis for any serious misunderstanding on the part of the trial court. NAC went on to say that the real reason the Crawfords could not terminate the Lease is that their improvements did not "require removal" of the sign. (R. 298)

IV. THERE WAS NO NEED FOR A FACTUAL STATEMENT IN NAC'S SECOND MOTION FOR SUMMARY JUDGMENT.

Even though the trial court had already granted NAC's first Motion for Summary Judgment and denied all of the Crawford's Motions bearing on the same issues, the Crawfords contend that the trial court should not have granted NAC's second Motion for Summary Judgment because it did not contain a factual statement. (Pg. 26) Actually, the Crawfords did not make this argument below.

At the time they were responding to NAC's second Motion for Summary Judgment, the Crawfords recognized that NAC had "referenced its prior Motion for Summary Judgment." (R. 329) Because of this, the Crawfords "assume[d] that the Statement of Undisputed Material Facts contained in that motion [the first Motion for Summary Judgment] [were] incorporated into the plaintiff's second motion." (Id.) In this, the Crawfords were correct. However, this does not square with their arguments on appeal. As for the Crawford's

own "Additional Material Facts," all they did was refer to all their previous pleadings filed in the case, (R. 330) which is no worse than what NAC did in supporting its Motion.

NAC's second Motion for Summary Judgment was necessitated only by Rule 54(b), URCP. As stated above, the Crawfords filed a Counterclaim against NAC and a Cross-Claim against Murray City. (R. 229) The Crawfords moved for summary judgment on both these pleadings. (R. 291) The district court denied the Crawford's Motion "for the reasons specified in the opposing memorandum." (R. 316) Even though the district court denied the Motion, it did not dismiss the claims contained in those pleadings. (Id.) It was technically necessary (as stated by NAC) to file a second Motion for Summary Judgment to get those claims dismissed so there could be a final, appealable judgment. (R. 324)[7]

As stated in NAC's Memorandum in Reply, there was nothing new in the Crawford's response. (R. 338) NAC explained to the district court that he might then "enter a final, appealable order granting plaintiff's motion for summary judgment and dismissing the remainder of this action, including all claims by the Crawfords." (R. 339) The district court, of course, granted the Motion "for the reasons specified in the supporting memoranda." (R. 343)

CONCLUSION

It should be apparent by now that the Crawfords got their day in Court. In fact, they had many days in Court. They could have had those days in Court earlier than they did, but it was their choice to sit out the proceedings at that early stage. It is difficult to see how that did

them any harm. They were able to discuss with Murray City the response to be made to NAC's Motion for Summary Judgment. Murray City appeared in the action and vigorously opposed the Motion. Murray City made many of the arguments that the Crawfords would later make on their own. After that, the Crawfords had many chances to make their own arguments. The district court had to make a decision between the two permits, and he had before him all the information the Crawfords claim was material to the question. Due process was satisfied in this case.

The Utah Rules of Civil Procedure were also satisfied. There were no issues as to any material facts. This meant that the district court was permitted to rule as a matter of law. He ruled as a matter of law that the Crawford's permit was invalid when it was issued. He must have concluded that the Crawfords could not satisfy the condition to their permit within the 180-day term of the permit. He must have concluded that the Crawford's attempts to terminate the Lease before its February 1, 1997 term were unavailing. He also must have concluded that NAC's permit was a different matter. Under Paragraph 11 of the Lease, NAC had the right to remove its sign, at any time, and satisfy the condition to its permit. NAC's permit was issued before the Crawford's permit was reinstated or extended. Therefore, neither reinstatement nor extension had any practical effect. The Crawford's permit therefore violated the spacing requirements of Murray City and was void for that reason. NAC's permit, on the other hand, was the only valid permit.

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[7] There was also a claim for damages in NAC's First Amended Complaint. (R. 220) The pendency of this claim would have prevented entry of a final, appealable order. NAC moved to dismiss said claim with prejudice at the time it filed the second Motion for Summary Judgment. (R. 324)

For all the foregoing reasons, NAC respectfully urges the Court to affirm the judgment of the district court.

DATED this 29th day of January, 1999.

DALTON & KELLEY

By _____
Donald L. Dalton
Attorneys for Appellee

CERTIFICATE OF SERVICE

THIS WILL CERTIFY that true and correct copies of the within and foregoing "Appellee's Brief" were mailed, postage prepaid, this 29th day of January, 1999, to:

R. Stephen Marshall
Steve K. Gordon
Durham, Evans, Jones & Pinegar, P.C.
50 South Main, Suite 850
Salt Lake City UT 84144

Frank M. Nakamura
Murray City Attorney's Office
5025 South State Street
Murray UT 84157-0520

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