

1989

Wilbert Rowley v. Jeff Layton : Brief of Respondent

Utah Court of Appeals

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BRIEF

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89 0066

UTAH COURT OF APPEALS

WILBERT ROWLEY,)	
)	
Plaintiff/Respondent,)	RESPONDENT'S BRIEF
)	
VS.)	Case No. 890066-CA
)	
JEFF LAYTON,)	(Civil No. 86-7440)
)	
Defendant/Appellant.)	

BRIEF OF RESPONDENT

APPEAL FROM THE JUDGMENT OF THE
THIRD JUDICIAL DISTRICT COURT
FOR SALT LAKE COUNTY, STATE OF UTAH
JUDGE JAMES S. SAWAYA

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FILED

MAY 3 1989

COURT OF APPEALS

UTAH COURT OF APPEALS

WILBERT ROWLEY,)	
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Plaintiff/Respondent,)	RESPONDENT'S BRIEF
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ADDENDUM:

EXHIBIT "A": ORDER OF TRIAL COURT VACATING SUMMARY
JUDGEMENT.

EXHIBIT "B": APPELLANT'S NOTICE OF APPEAL FROM
TRIAL COURT.

AUTHORITIES CITED

COURT RULES

Rules of the Utah Court of Appeals, Title II, Rule 4. (a), et seq.

Rules of the Utah Supreme Court, Title II, Rule 4. (a), et seq.

UTAH COURT OF APPEALS

WILBERT ROWLEY,)	
	:	RESPONDENT'S BRIEF
Plaintiff/Respondent,)	
	:	Case No. 890066-CA
vs.)	
	:	(Civil No. C86-7440)
JEFF L. LAYTON,)	
	:	
Defendant/Appellant.)	

NATURE OF THE PROCEEDINGS

This was a breach of contract action filed by Plaintiff relating to a contract for the purchase of trees and water rights. This appeal deals with the propriety of a determination by the trial court to vacate a summary judgment entered December 22, 1986.

STATEMENT OF THE ISSUES

The sole issue in this case is whether the Appellant filed the Appeal, to this court, timely. Namely, the appeal of the lower court's discretion in granting the Order to Vacate Judgment, dated the 1st day of September, 1987. There exists no matter of right to the Appellant's appeal and therefore this court has no jurisdiction over this subject matter.

DETERMINATIVE RULES

Both Title II of the Rules of the Utah Supreme Court Rule 4. (a) and Title II Rules of the Utah Court of Appeals Rule 4. (a) govern the disposition of this case.

STATEMENT OF THE CASE

Plaintiff filed a Breach of Contract Claim against Defendant for non-payment of certain funds which were allegedly due pursuant to a contract for the purchase of trees and water rights. (See pages 13-16 of the Record of Appeal) The case was originally filed by Plaintiff in Sanpete County District Court, but was later transferred to Salt Lake County pursuant to Defendant's motion. (See page 2 of the Record on Appeal.) After transfer of the case to Salt Lake County, Defendant filed an Answer to Plaintiff's Complaint (See pages 18-20 of the Record on Appeal.) and served Requests for admissions upon Plaintiff pursuant to Rule 36(a) of the Utah Rules of Civil Procedure. (See page 21 of the Record on Appeal.)

The Requests for Admissions remained unanswered for more than 30 days, and Defendant therefore moved for Summary Judgement on the grounds that the items deemed admitted entitled Defendant to judgement as a matter of law. (See pages 26-28 of the Record on Appeal.) A hearing was scheduled by Defendant's counsel for December 22, 1986, and Notice of Hearing was mailed to Plaintiff's counsel. (See pages 29-30 of the Record on Appeal.)

There was no appearance by Plaintiff's counsel at the

hearing on December 22, 1986, and the trial court entered Summary Judgment in Defendant's favor. (See pages 31-32 of the Record on Appeal.) Notice of the entry of Summary Judgment was mailed to Plaintiff's counsel within four (4) days following the entry thereof. (See pages 33-35 of the Record of Appeal.)

Plaintiff's counsel later contacted Defendant's counsel on January 16, 1987, regarding the Summary Judgment which had been entered and offered an explanation as to why Plaintiff's counsel had not appeared at the hearing on December 22, 1986. Plaintiff's counsel requested at that time that the Summary Judgment be voluntarily set aside. This request was not agreed to, and Plaintiff's counsel was specifically informed that he would have to file a Motion to Set Aside the Judgment with the Court. Plaintiff's counsel indicated that he would be filing such a motion, and the conversation was thereupon concluded. (See pages 122-125 of the Record on Appeal.)

Several weeks passed, and a Motion to Vacate was finally filed by Plaintiff's counsel. (See pages 36-37 of the Record on Appeal.) This document was dated May 6, 1987, but the clerk's notation indicates it was received by the Court on June 4, 1987.

A hearing on Plaintiff's Motion to Vacate the Judgment was held in August of 1987, and the trial court set aside the summary Judgment, "under Rule 60(b) (7) and the equitable powers of the court." The order was dated SEPTEMBER 1, 1987 (See copy attached hereto as Exhibit "A" which by reference is made a part hereof).

A trial was subsequently held on the 20th day of September,

1988, and subsequently judgment was entered in Plaintiff's favor in the sum of \$10,532.12 on the 4th day of November, 1988, whereupon the instant appeal was filed. (See Pages 223-231 of the Record on Appeal.)

The Appellant did not file his appeal until the 23rd day of November, 1988 a copy of which is attached hereto and by reference made a part hereof as Exhibit "B". The time elapsed since the entry of the Order Vacating the Summary Judgment on 09-01-87 was 449 days. Further, the Appellant's notice states that the appeal is based in the judgment entered, but in fact the Appellant's appeal is based in the Order vacating Summary Judgment.

SUMMARY OF THE ARGUMENT

This appeal of the Appellant on the Order to Vacate Summary Judgment of District Court Judge James S. Sawaya dated the 1st day of September, 1987 was filed 419 days beyond the filing deadline of Title II. Rules of the Utah Court of Appeals and Title II. Rules of the Utah Supreme Court. Pursuant to Title II. Rules of the Utah Court of Appeals, Rule 4. (a):

"Appeal as of right: When taken . . . Appeal from final judgment and order. In a case in which an appeal is permitted as a matter of right from the district court, juvenile court, or circuit court to the Court of Appeals, the notice of appeal required by Rule 3 shall be filed with the clerk of the court from which the appeal is taken within 30 days after the date of entry of the judgment or order appealed from.

The Order Vacating Summary Judgment dated the 09-01-87 is the basis of the Appellant's appeal and therefore was not timely filed pursuant to the foregoing rule. Further, Pursuant to Title II, Rules of the Utah Supreme Court, Rule 4. (a):

"Appeal from final judgment and order. In a case in which an appeal is permitted as a matter of right from the district court to the Supreme Court, the notice of appeal required by Rule 3 shall be filed with the clerk of the district court within 30 days after the date of entry of the judgment or order appealed from . . ."

Again, the appellant's Notice of Appeal was not timely filed and was in fact filed 419 days beyond the requirements of this rule and this court therefore lacks jurisdiction on this subject matter.

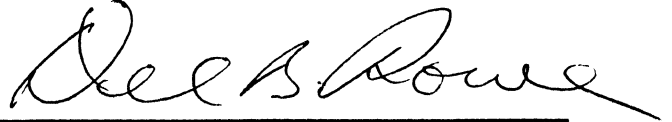
CONCLUSION

The eventual judgment of \$10,532.12 against the Defendant verified the wisdom of Judge Sawaya in setting aside Appellant's dismissal which was awarded on a "technicality". Justice and these courts historically do not condone final judgments on technicalities.

It is distinct that this court will not permit as a matter of right any case which does not conform with these rules and the respondent therefore demands that this appeal be dismissed on the basis that there exists no matter of right to appeal the Order Vacating Summary Judgment of the lower court dated the 1st day of

September, 1987 and this court lacks jurisdiction therefore over this subject matter.

DATED this 25th day of April, 1989.




DEL B. ROWE
Attorney for Respondent #2813
533 West 500 South #4
Bountiful, Utah 84010
(801) 298-0640

CERTIFICATE OF MAILING

I, the undersigned, hereby certify that I mailed a true and correct copy of the foregoing RESPONDENT'S BRIEF to the defendant's/respondent's counsel of record, DAVID A. WILDE, ESQ., at 302 West 5400 South #103, Murray, Utah 84107; postage pre-paid from Bountiful, Utah.

DATED this 25th day of April, 1989.


DEL B. ROWE

The Order Vacating Summary Judgment dated the 09-01-87 is the basis of the Appellant's appeal and therefore was not timely filed pursuant to the foregoing rule. Further, Pursuant to Title II, Rules of the Utah Supreme Court, Rule 4. (a):

"Appeal from final judgment and order. In a case in which an appeal is permitted as a matter of right from the district court to the Supreme Court, the notice of appeal required by Rule 3 shall be filed with the clerk of the district court within 30 days after the date of entry of the judgment or order appealed from . . ."

Again, the appellant's Notice of Appeal was not timely filed and was in fact filed 419 days beyond the requirements of this rule and this court therefore lacks jurisdiction on this subject matter.

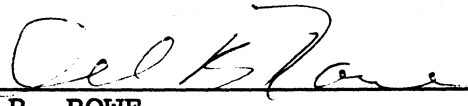
CONCLUSION

The eventual judgment of \$10,532.12 against the Defendant verified the wisdom of Judge Sawaya in setting aside Appellant's dismissal which was awarded on a "technicality". Justice and these courts historically do not condone final judgments on technicalities.

It is distinct that this court will not permit as a matter of right any case which does not conform with these rules and the respondent therefore demands that this appeal be dismissed on the basis that there exists no matter of right to appeal the Order Vacating Summary Judgment of the lower court dated the 1st day of

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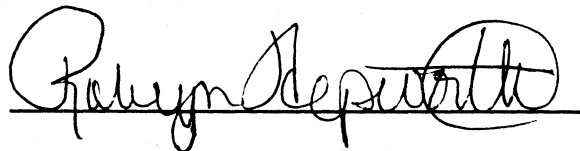
DATED this 25th day of April, 1989.


DEL B. ROWE
Attorney for Respondent #2813
533 West 500 South #4
Bountiful, Utah 84010
(801) 298-0640

CERTIFICATE OF MAILING

I, the undersigned, hereby certify that I mailed a true and correct copy of the foregoing RESPONDENT'S BRIEF to the defendant's/respondent's counsel of record, DAVID A. WILDE, ESQ., at 302 West 5400 South #103, Murray, Utah 84107; postage pre-paid from Bountiful, Utah.

DATED this 25th day of April, 1989.



RESPONDENT'S

EXHIBIT "A"

ORDER OF TRIAL COURT VACATING SUMMARY JUDGMENT

County of Salt Lake - State of Utah

FILE NO. C86-7440

PLAINTIFFS: (✓ PARTIES PRESENT)

DEFENDANTS: COUNSEL: (✓ COUNSEL PRESENT)

Wilbert Rowley

Milton J. Harmon

Jeff L. Layton

David A. Wilde

CLERK

REPORTER

BAILIFF

HON.

J. Sorenson

JUDGE

DATE:

8/31/87 heard petrs' motion to vacate judgment.

Ruling:

Petr's motion is granted under Rule 60B(7) and the equitable powers of the court and upon condition that petr pay deft a reasonable attorneys fee in the sum of \$200.

D.A.

Copies to counsel - Sept 1, 87

RESPONDENT'S

EXHIBIT "B"

APPELLANT'S NOTICE OF APPEAL FROM TRIAL COURT

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IN THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

WILBERT ROWLEY,)	
)	
Plaintiff,)	
)	NOTICE OF APPEAL
vs.)	
)	
JEFF L. LAYTON,)	
)	
Defendant.)	Civil NO. C86-7440
)	

Notice is hereby given that Jeff L. Layton, Defendant above-named, hereby appeals to the Utah Supreme Court from the judgment of Judge James S. Sawaya contained in the Judgment entered November 4, 1988.

DATED this 23 day of November, 1988.

ASHTON, BRAUNBERGER, POULSEN
& BOUD, P.C.

By David Alan Wilde
David A. Wilde
Attorney for Defendant