

1989

Wilbert Rowley v. Jeff Layton : Reply Brief

Utah Court of Appeals

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UTAH COURT OF APPEALS
BRIEF

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UTAH COURT OF APPEALS

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

REPLY BRIEF OF APPELLANT

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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MAY 8 1989

COURT OF APPEALS

UTAH COURT OF APPEALS

WILBERT ROWLEY,)	
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LEARNED TREATISES

<u>1 Freeman on Judgments</u> (5th Ed.) Section 302, pp. 71-72.	2
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STATEMENT OF THE ISSUE

The only issue raised in Respondent's Brief and which will be addressed in this Reply Brief relates to the timeliness of this appeal.

ARGUMENT

The Brief of Plaintiff/Respondent raises an issue as to the timeliness of the appeal of Defendant/Appellant. Plaintiff claims that the order being appealed was entered in September of 1987, and that the appeal must therefore have been filed within thirty (30) days from entry of such order.

Plaintiff's only citation to any authority is to Rule 4 of the Rules of Appellate Procedure, and Rules of the Court of Appeals, dealing with appeals as a matter of right. However, the

law of Utah and most states is that an order vacating a Judgment is an interlocutory order, and is not a final order which is appealable as a matter of right. (See Van Wagennen v. Walker, 597 P.2d 1327, 1328 (Utah 1979); Rogers v. Tovrea, 484 P.2d 1246 (Colo. App. 1971); Bates v. Berry, 537 P.2d 189, 217 Kan. 322 (1975); Stensvad v. Montana National Bank, 541 P.2d 768, 168 Mont. 167 (1975); Hall v. American National Plastic, Inc., 437 P.2d 693, 73 Wash. 2nd 203 (1968); Cook Ford Sales, Inc. v. Benson, 381 P.2d 68 (Wyo. 1963); 1 Freeman on Judgments (5th Ed.) Section 302, pp. 71-72.) Rule 4 is therefore inapplicable.

In Haslam v. Paulsen, 389 P.2d 736, 15 Utah 2nd 185 (1964) the court discussed the rights of a party who is in disagreement with an interlocutory decision of the trial court. The court specifically held ". . . the proper redress is either in a petition for interlocutory appeal, which may be granted in a proper case (Citation omitted); or the claimed error can be preserved and reviewed if necessary upon the final outcome of the case. (Citation omitted, emphasis added.)"

The possibility that an appeal might be filed in the instant case was considered immediately upon being notified of the trial court's decision to set aside the Summary Judgment. However, upon reviewing the above authorities it was felt that the appeal would be rejected because the setting aside of the judgment was not a "final order", and that pursuing the appeal would only result in further expense and delay. Defendant therefore determined to exercise that right enunciated in Haslam

v. Paulsen, Supra, to allow "the claimed error (to) be preserved and reviewed if necessary upon the final outcome of the case."

Respectfully submitted this 5 day of May 1989.

ASHTON, BRAUNBERGER, POULSEN
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CERTIFICATE OF MAILING

This is to certify that a true and correct copy of the foregoing APPELLANT'S REPLY BRIEF was mailed, postage prepaid, to the following this 5 day of May, 1989.

Del Rowe
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