

1998

# Chris Swanson and Laurie Swanson v. Beverly Swanson, Clinton Swanson, and Nikki Shumway dba Swanson Enterprises : Brief of Appellee

Utah Court of Appeals

Follow this and additional works at: [https://digitalcommons.law.byu.edu/byu\\_ca2](https://digitalcommons.law.byu.edu/byu_ca2)

 Part of the [Law Commons](#)

Original Brief Submitted to the Utah Court of Appeals; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

John Valentine; Phillip E. Lowry; Attorneys for Corporate Defendant/Appellee; Thomas W. Seiler; Attorney for Individual Defendants/Appellees.

Chris Swanson; Laurie Swanson; Plaintiffs/Appellants; Pro Se.

---

## Recommended Citation

Brief of Appellee, *Chris Swanson and Laurie Swanson v. Beverly Swanson, Clinton Swanson, and Nikki Shumway dba Swanson Enterprises*, No. 980285 (Utah Court of Appeals, 1998).

[https://digitalcommons.law.byu.edu/byu\\_ca2/1580](https://digitalcommons.law.byu.edu/byu_ca2/1580)

This Brief of Appellee is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Court of Appeals Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at [http://digitalcommons.law.byu.edu/utah\\_court\\_briefs/policies.html](http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html). Please contact the Repository Manager at [hunterlawlibrary@byu.edu](mailto:hunterlawlibrary@byu.edu) with questions or feedback.

IN THE UTAH COURT OF APPEALS

NO. 980285-CA

STATE OF UTAH

CHRIS SWANSON and LAURIE )  
 SWANSON, )  
 )  
 Plaintiffs and Appellants, )  
**PRO SE** )  
 )  
 vs. )  
 )  
 BEVERLY SWANSON, an individual, )  
 and CLINTON SWANSON, an )  
 individual, and NIKKI SHUMWAY, )  
 an individual, all dba SWANSON )  
 ENTERPRISES INC., a Utah )  
 Business, )  
 )  
 Defendants and Appellees. )

~~APPELLANTS BRIEF~~

~~PRO SE~~

**Brief of Individual Appellees**

Case No. 980285-CA

Priority 29 (b) (15)

APPEAL FROM A RULING ON JUDGMENTS IN THE  
 FOURTH JUDICIAL DISTRICT COURT, UTAH COUNTY, STATE OF UTAH  
 THE HONORABLE ANTHONY W. SCHOFIELD, JUDGE

Thomas W. Seiler  
 ROBINSON, SEILER & GLAZIER, LC  
 80 North 100 East  
 P.O. Box 1266  
 Provo, Utah 84603-1266  
 Attorneys for Defendants/Appellees

John L. Valentine  
 Attorney for Corporate Defendant/Appellee  
 120 East 300 North  
 Provo, UT 84603

Chris Swanson and Laurie Swanson  
 Plaintiffs/Appellants  
 823 Palm Drive  
 Glendale, CA 91202

**FILED**

SEP 23 1998

COURT OF APPEALS

---

IN THE UTAH COURT OF APPEALS

STATE OF UTAH

---

CHRIS SWANSON and LAURIE SWANSON,	)	APPELLANTS' BRIEF
	)	
	)	<b>PRO SE</b>
Plaintiffs and Appellants,	)	
<b>PRO SE</b>	)	
	)	
vs.	)	
	)	
BEVERLY SWANSON, an individual,	)	
and CLINTON SWANSON, an individual,	)	
and NIKKI SHUMWAY, an individual,	)	
all dba SWANSON ENTERPRISES INC., a Utah Business,	)	Case No. 980285-CA
	)	Priority 29 (b) (15)
	)	
Defendants and Appellees.	)	

---

APPEAL FROM A RULING ON JUDGMENTS IN THE  
FOURTH JUDICIAL DISTRICT COURT, UTAH COUNTY, STATE OF UTAH  
THE HONORABLE ANTHONY W. SCHOFIELD, JUDGE

---

Thomas W. Seiler  
ROBINSON, SEILER & GLAZIER, LC  
80 North 100 East  
P.O. Box 1266  
Provo, Utah 84603-1266  
Attorneys for Defendants/Appellees

John L. Valentine  
Attorney for Corporate Defendant/Appellee  
120 East 300 North  
Provo, UT 84603

Chris Swanson and Laurie Swanson  
Plaintiffs/Appellants  
823 Palm Drive  
Glendale, CA 91202

**TABLE OF CONTENTS**

	<b><u>Page</u></b>
STATEMENT OF JURISDICTION . . . . .	1
STANDARD OF REVIEW . . . . .	2
STATEMENT OF THE CASE . . . . .	2
1. Argument I . . . . .	2
2. Argument II . . . . .	4
3. Argument III . . . . .	5
4. Argument IV . . . . .	5
5. Argument V . . . . .	6
CONCLUSION . . . . .	7

**TABLE OF AUTHORITIES**

	<b><u>Page</u></b>
<b><u>Cases Cited</u></b>	
<u>Gardiner and Gardiner Builders v. Swapp</u> , 656 P.2d 429 (Ut. 1982) . . . . .	2
<u>Hughs v. Sanders</u> , 287 F.Supp. 332, 334 (E.D.Okla. 1968) . . . . .	4
<u>Laub v. South Cent. Utah Tel. Ass'n</u> , 657 P.2d 1304, 1306-07 (Ut. 1982) . . . . .	4
<u>Lincoln Ben. Life v. D.T. Southern Prop.</u> , 838 P.2d 672 (Ut. App. 1992) . . . . .	4
<u>Pitts v. McLachlan</u> , Utah 567 P.2d 171 (1997) . . . . .	4
<u>State by and through D. of S.S. v. Musselman</u> , 667 P.2d 1053 (Ut. 1983) . . . . .	5
<u>Walker v. Carlson</u> , 740 P.2d 1372 (Ut. App. 1997) . . . . .	3

**Statutes and Rules Cited**

Utah Rules of Appellate Procedure, Rule 3 . . . . .	1
Utah Rules of Appellate Procedure, Rule 5(a) . . . . .	1
Utah Rules of Appellate Procedure, Rule 54(b) . . . . .	2, 6
Utah Rules of Appellate Procedure, Rule 60(b) . . . . .	6, 7, 8
Utah Rules of Appellate Procedure, Rule 60(b) (1) . . . . .	3
Utah Rules of Appellate Procedure, Rule 60(b) (7) . . . . .	2, 3, 6

### STATEMENT OF JURISDICTION

The Plaintiffs and Appellants (hereinafter "Appellants") Statement of Jurisdiction notes their appeal is from a partial summary judgment dated December 10, 1996, in favor of the individual Defendants, a judgment entered on or about May 13, 1997, in favor of the Corporate Defendant, and a ruling on the Appellants' 60(b) Motion to Set Aside entered October 10, 1997. This is at odds with the Notice of Appeal which states that the Appellants, "appeal to the Utah Supreme Court the final order and judgment of the Honorable Anthony Schofield entered in this matter on November 10, 1997."

An appeal of the partial summary judgment entered December 10, 1996, and of the Judgment entered on or about May 13, 1997, is not timely and, accordingly, this Court has no jurisdiction. An appeal of the ruling entered October 10, 1997, is an appeal of an Order which is not final and, accordingly, the Appellate Courts have no jurisdiction. (See Rule 3 of the Utah Rules of Appellate Procedure). This is not a discretionary appeal pursuant to Rule 5 of the Utah Rules of Appellate Procedure because there has been no petition for permission to appeal as required by Rule 5(a) of the Utah Rules of Appellate Procedure. Accordingly, for those reasons this appeal must be dismissed for lack of jurisdiction. Nevertheless, the individual Defendants will address the issues raised by the Appellants in this matter.

**STANDARD OF REVIEW**

The standard of review in this matter is abuse of discretion. The Utah Supreme Court has found in Gardiner and Gardiner Builders v. Swapp, 656 P.2d 429 at page 430:

"The trial court has considerable discretion in ruling on a motion to set aside a default judgment under Rule 60(b) and this Court will reverse the trial court only where a clear abuse of discretion is shown."

As to a standard of review relative to a summary judgment granted by the trial court, the individual Defendants adopt the standard of review set forth in the Corporate Defendants' brief.

**STATEMENT OF THE CASE**

The individual Defendants adopt the statement of the case as set forth in the Corporate Defendants' Brief.

**ARGUMENT I**

The partial summary judgment entered December 10, 1996, in this matter should not be set aside. Plaintiffs' Rule 60(b)(7) Motion to Set Aside Partial Summary Judgment and Request for a Hearing and Plaintiffs' Response to Plaintiff's Rule 54(B) Motion was filed with the trial court on July 23, 1997. The matter was argued before the trial court on September 4, 1997. On November 10, 1997, the trial court entered its "Order Denying Plaintiff's Motion to Set Aside Partial Summary Judgment; and, Judgment Order Granting Certification under Rule 54(b)."

By way of history, on November 6, 1996, the individual Defendants served their Motion for Partial Summary Judgment

together with an accompanying Memorandum of Points and Authorities and Affidavit on the Plaintiffs by hand-delivering a copy of it to Plaintiffs' counsel, Mark K. Stringer. On November 19, 1996, individual Defendants mailed a Notice of Submission for Decision regarding their Motion for Partial Summary Judgment to counsel for the Plaintiffs and counsel for the Corporate Defendants. Thereafter, on December 10, 1996, the Court entered the Partial Summary Judgment, signing the proposed form of which had been served upon the Plaintiffs by hand-delivering a copy of it to their counsel on November 19, 1996.

In the Appellants' Motion, the Appellants claim that the Partial Summary Judgment should be set aside because Plaintiffs' counsel, Mark Stringer, failed to respond to the Motion for Summary Judgment which gave rise to the Partial Summary Judgment and failed to inform the Plaintiffs of that motion. Mr. Stringer's neglect is imputed to the Appellants through principles of agency. In Walker v. Carlson, 740 P.2d 1372 (Ut. App. 1997) the Court found:

"If counsel failed to inform Smith of the pendency of the action or was less than diligent in the discovery process, such neglect on the attorney's part is imputed to Smith through principles of agency."

The Appellants in this matter claim that, "the actions of Mark K. Stringer go well beyond excusable neglect, mistake, surprise or inadvertence" as outlined under Rule 60(b)(1). (See Appellants' Brief, page 12). Such an argument does not provide relief to the Appellants under Rule 60(b)(7) of the Utah Rules of Civil



Procedure. As is stated by the Gardiner court:

"We have previously held that the provisions of Rule 60(b)(7) may not be used to circumvent the time limitation of Rule 60(b)(1)." Pitts v. McLachlan, Utah, 567 P.2d 171 (1997). Swapp's contention that his motion was brought on grounds other than negligence is without merit."

That position is further bolstered by the Utah Court of Appeals in Lincoln Ben. Life v. D.T. Southern Prop., 838 P.2d 672 (Ut. App. 1992) where the Court states that page 674:

"As the residuary clause of Rule 60(b), subsection (7), embodies three requirements for relief: 'first, that the reason be one other than those listed in subdivisions (1) through (6); second, that the reason justify relief; and third, that the motion be made within a reasonable time.'" Laub v. South Cent. Utah Tel. Ass'n, 657 P.2d 1304, 1306-07 (Ut. 1982). Subsection (7) "'should be very cautiously and sparingly invoked by the Court only in unusual and exceptional instances.'" Id. at 1307-08 (quoting Hughs v. Sanders, 287 F.Supp. 332, 334 (E. D.Okla.1968)). Furthermore, subsection (7) may not be employed for relief when the grounds asserted are encompassed within subsection (1)." (Further citations deleted).

## **ARGUMENT II**

Plaintiffs' pleadings do not set forth facts on the record to avoid summary judgment.

The individual Appellants incorporate the corporate Defendants' position in this matter.

The Appellants argue that the Plaintiffs' Complaint, with other pleadings on file, contain a sufficient meritorious defense to the counterclaims of the Appellee's in this matter. That is not the case. These pleadings are not verified. The affidavits which

were properly before the trial court on September 4, 1997, allege no specific facts in opposition to either the individual Defendants' Motion for Partial Summary Judgment or the Corporate Defendants' Motion for Partial Summary Judgment. In order for the Appellants to be relieved from either the Partial Summary Judgment or the Judgment which were entered in this matter, they must show that the judgments were entered against them through a reason specified in Rule 60(b) of the Utah Rules of Civil Procedure, that the motion to set aside the judgment was timely, and that they had a meritorious defense to this action. (State by and through D. of S.S. v. Musselman, 667 P.2d 1053 (Ut. 1983)). There being no facts on the record before the trial court at the time of the hearing on September 4, 1997, which would support any of the Appellants' contentions adverse to the respective Appellee's Motions for Summary Judgment, there was not even an effort to show that they had a meritorious defense.

### **ARGUMENT III**

The individual Defendants incorporate and adopt the Corporate Defendants' Brief in this matter.

### **ARGUMENT IV**

The District Court's conclusions were correct.

The trial court in this matter concluded that the individual Appellee's Partial Summary Judgment was entered in December of 1996 and that the Plaintiffs did not file a Motion to set aside that Partial Summary Judgment until July of 1997, some 7 ½ months later.

The trial court further found that the affidavits of the Appellants which were filed with the Court on the date of the hearing, September 4, 1997, were not timely and, accordingly, the trial court found that, as to the individual Appellees, the Plaintiffs' Rule 60(b) Motion was not timely and that the Plaintiffs failed to demonstrate a meritorious defense.

#### ARGUMENT V

The trial court did not error in its decision and it did allow the new attorney for the Appellants to present arguments and be heard before the Court. The transcript (exhibit Y to the Appellants' Brief) of the September 4, 1997, hearing consists of 28 pages.

The Appellants' counsel at the September 4, 1997, hearing was Mr. Schollian. Mr. Schollian disposes of the Appellants' objection to the Rule 54(b) Motion starting at line 24 of page 6 and going over to line 2 of page 7 of the transcript where he admits that the only reason the Partial Summary Judgment and Judgment should not be certified under Rule 54(b) as final judgments is because he believes that the Court should grant the Appellants' Rule 54(b) Motion. The trial court then goes on to invite Mr. Schollian to make his Rule 60(b) arguments. Mr. Schollian starts his Rule 60(b)(7) arguments on line 8, page 8 of the transcript and continues to and through line 11, page 12 of the transcript at which time he asks the Court:

"Would you like me to go into Rule 60(b) Motion, your Honor?".

Mr. Schollian then argues his Rule 60(b) Motion as applies to the Judgment obtained by the Corporate Appellees starting on line 15, page 12 of the transcript and going through line 20 of page 6 of the transcript. Then he relinquishes his time to counsel for the individual Appellees.

### CONCLUSION

The Appellants' appeal should be denied for the following reasons:

1) In the Appellants' Statement of Jurisdiction, it is clear that the three things appealed are the Partial Summary Judgment entered December 10, 1996, the Judgment entered on or about May 13, 1997, and a Ruling entered on October 10, 1997. The Notice of Appeal claims an appeal to the Utah Supreme Court of the final order and judgment of the Honorable Anthony Schofield entered on November 10, 1997. Accordingly, the Appellants do not brief the matter appealed. Furthermore, an appeal started by a Notice of Appeal filed on November 25, 1997, regarding a Ruling dated October 10, 1997, is not timely.

2) The Partial Summary Judgment in favor of the individual Appellees in this matter was entered on December 10, 1996. The Appellants' motion to set aside that Partial Summary Judgment was not filed until July 23, 1997, a period of some 7 ½ months. In that motion, the Appellants claim that the Partial Summary Judgment should be set aside "on the grounds that said judgment was entered as a result of the inadvertence, mistake, excusable neglect and

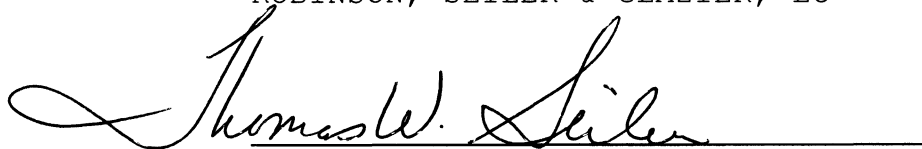
incompetence of counsel and on the grounds that it would be in the furtherance of justice to try this matter on the merits." (See page 1, Exhibit S to Appellants' Brief). Such a motion must be filed within three months of the entry of judgment.

3) The Partial Summary Judgment ordered among other things at the Lis Pendens filed with the Utah County Recorder, Utah County, State of Utah, on behalf of the Appellants and encumbering the real property which is the subject matter of this dispute, be released. It has been released and various parties have relied upon it, thus making that release the law of the case.

4) Subsection 7 of Rule 60(b) may not be employed for relief when the grounds asserted are encompassed within subsection (1).

Respectfully submitted this 22nd day of September, 1998.

ROBINSON, SEILER & GLAZIER, LC

A handwritten signature in cursive script, reading "Thomas W. Seiler", written over a horizontal line.

THOMAS W. SEILER

Attorney for Defendants and Appellees

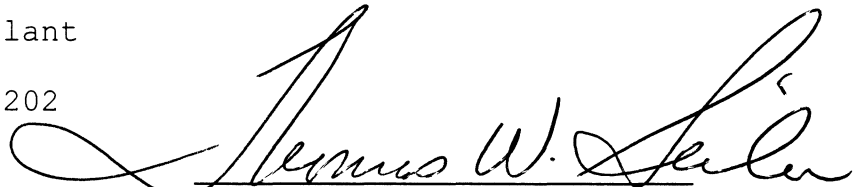
**MAILING CERTIFICATE**

I hereby certify that I mailed <sup>2</sup>~~2~~ true and correct copy<sup>s</sup> of the foregoing, with postage prepaid, this 23<sup>rd</sup> day of September, 1998, to the following:

John Valentine  
P.O. Box 778  
120 East 300 North  
Provo, UT 84603

Chris Swanson  
Plaintiff/Appellant  
823 Palm Drive  
Glendale, CA 91202

Laurie Swanson  
Plaintiff/Appellant  
823 Palm Drive  
Glendale, CA 91202

  
THOMAS W. SEILER