

2009

Michael Ward v. Caroline Coats Graydon : Reply Brief

Utah Court of Appeals

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Bruce D. Panzer; Blackburn & Stoll; Craig S. Cook.

Brad C. Smith; Stevenson & Smith.

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IN THE UTAH COURT OF APPEALS

MICHAEL WARD,

Case No. 20090714 CA

Petitioner and Appellant,

Trial Court No. 080903379

vs.

CAROLINE COATS GRAYDON,

Respondent and Appellee.

REPLY BRIEF OF PETITIONER MICHAEL WARD

On Appeal from the Third District Court for Salt Lake County,
Honorable Denise P. Lindberg

Bryce D. Panzer, A2509
Blackburn & Stoll, LC
257 East 200 South Suite 800
Salt Lake City, Utah 84111

Attorney for Respondent/Appellee

Brad C. Smith, No. 6656
Stevenson & Smith, P.C.
3986 Washington Boulevard
Ogden, Utah 84403

Attorney for Petitioner/Appellant

Craig S. Cook
3645 East 3100 South
Salt Lake City, Utah 84109

Attorney for Appellee and Cross-Appellant Peter Coats

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Stevenson & Smith, P.C.
3986 Washington Boulevard
Ogden, Utah 84403

Attorney for Petitioner/Appellant

Craig S. Cook
3645 East 3100 South
Salt Lake City, Utah 84109

Attorney for Appellee and Cross-Appellant Peter Coats

TABLE OF CONTENTS

Table of Contents	iii
Table of Authorities	iv
Corrected Statement of Facts	1
Argument	6
I. Joint Tenancy Necessarily Imposes Obligations on Cotenants	10
II. Because of the Multiple Legal Powers That She Exercised Over the Property, Graydon Had Obligations to Ward	11
III. There Are No Disputed Issues Of Material Fact Precluding an Award of Summary Judgment to Ward	14
A. Graydon's Actions Breached Her Obligations	14
B. The Failure to Close the Sale to Hagen is Immaterial and Graydon Should Be Estopped from Arguing It	15
C. The Amount of Ward's Damages is Not in Dispute	16
Conclusion	16
Certificate of Service	17

TABLE OF AUTHORITIES

CASES

<i>D.U. Co. Inc. v. Jenkins</i> , 216 P.3d 360 (Utah Ct. App. 2009)	15
<i>Jolley v. Corry</i> , 671 P.2d 139 (Utah 1983)	8, 10
<i>Olwell v. Clark</i> , 658 P.2d 585, 587 (Utah 1982)	10

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REPLY BRIEF OF PETITIONER MICHAEL WARD

Petitioner Ward's Appellate Brief included citations to the various documents that comprise the record on appeal. This reply brief includes a Corrected Statement of Facts with citations to the record. The Corrected Statement of Facts are identical to those in Ward's Appellate Brief, only the citations have been changed.

CORRECTED STATEMENT OF FACTS

- 1 By virtue of a series of property transactions, in late 2005, Ward became joint owner with Peter Coats of two adjacent parcels of property in South Jordan, Salt Lake County, State of Utah. One parcel consisted of 18 acres, the other of 22 acres [hereinafter "North Parcel" and "South Parcel" respectively]. Ward owned

- an undivided 9 82% interest, and Peter Coats owned an undivided 90 18% interest R 78 (¶ 2) and 85 (¶ 2)
- 2 Peter Coats and Graydon were previously married, having been divorced in a bifurcated proceeding R 78-79 (¶ 3) and 85-86 (¶ 3)
- 3 Graydon asserted claim to both the North and South Parcels by virtue of her marriage In asserting her claims, Graydon caused a lis pendens and other documents to be filed with the Office of the Salt Lake County Recorder to reflect her claim of interest in both the North and South Parcels R 79 (¶ 4) and 86 (¶ 4)
- 4 Both the North and South Parcels were subject to Trust Deeds in favor of Peter Coats' mother, Isabel Coats Isabel Coats is also the grandmother of Ward, who is the nephew of Peter Coats R 79 (¶ 5) and 86 (¶ 5)
- 5 As a part of the divorce proceeding between Graydon and Peter Coats Graydon was granted a special power of attorney to deal with marital property including its sale and disposition R 79 (¶ 6), 86 (¶ 6), and 100-103
- 6 Graydon testified that she was granted a power of attorney to deal with the marital property Peter Coats and Graydon were under an obligation to sell the marital property R 106
- 7 In the fall of 2005, Isabel Coats proceeded to foreclose on her Trust Deeds over both the North and South Parcels R 79 (¶ 7) and 86 (¶ 7)
- 8 In a quiet title action brought by Isabel Coats, Graydon requested the Court grant a temporary restraining order forbidding the sale of the property Ultimately Graydon and Isabel Coats entered into a stipulation R 79 (¶ 8) and 86 (¶ 8)

9. The Amended Stipulation¹ required Isabel Coats' cooperation in the sale of the properties, agreed to a cancellation of the Notice of Default, and recognized Isabel Coats' ownership of an undivided 9.82% interest in both the North and South Parcels. R. 79 (¶ 8), 86 (¶ 8), and 108-112.
10. Subsequent to the entry of the Stipulation, Isabel Coats transferred her ownership interest in the North and South Parcels to Ward in consideration of One Hundred Fifty Thousand Dollars (\$150,000.00). R. 79-80 (¶ 9), 86-87 (¶ 9), and 114-115.
11. Isabel Coats commenced a second foreclosure proceeding against both the North and South Parcels in the spring of 2006. R. 80 (¶ 13) and 87 (¶ 13).
12. By the fall of 2006, Graydon filed another motion for a temporary restraining order. The matter was contested in an evidentiary hearing on converting Graydon's temporary restraining order motion into a preliminary injunction, which was held before the Honorable Tyrone E. Medley on 5 December 2006. At the conclusion of that hearing, Judge Medley concluded that Graydon had not presented a case adequate for the issuance of a preliminary injunction, and therefore dissolved the temporary restraining order and denied the request for a preliminary injunction. R. 80 (¶ 14) and 87 (¶ 14).
13. Following the dissolution of the temporary restraining order, Isabel Coats proceeded with the foreclosure sale. R. 80 (¶ 15) and 87 (¶ 15).

¹ The Amended Stipulation merely corrected aspects of the property description. The substantive terms of the Amended Stipulation were identical to those of the original Stipulation.

14. The foreclosure sale was scheduled for 14 February 2007. R. 80 (§ 16) and 87 (§ 16).
15. In the month prior to the Trustee's Sale, Peter Coats worked diligently to procure a purchaser for the property. R. 80 (§ 17) and 87 (§ 17).
16. In the weeks and days preceding the foreclosure sale, Peter Coats was the procuring cause of various offers of purchase. One of the offers for purchase involved only the North Parcel, and was for the sum of Five Million Two Hundred Thousand Dollars (\$5,200,000.00). Ward and Peter Coats accepted that offer. R. 80-81 (§ 18) and 87-88 (§ 18).
17. Graydon did not accept this offer. R. 81 (§ 19) and 88 (§ 19).
18. In the weeks and days preceding the Trustee's Sale, both Peter Coats and Graydon made proposals and/or demands of conditions for closing. R. 81 (§ 20) and 88 (§ 20).
19. As a condition of closing, Graydon required Peter Coats agree to have his portion of the sales proceeds deposited into an escrow account pending the resolution of their divorce. R. 137-140.
20. None of the offers to purchase were ever accepted since Graydon would not accept any offer. R. 81 (§ 21) and 88 (§ 21).
21. Graydon was, at all time relevant, a licensed real estate agent and loan officer. Because of this experience, Graydon knew that if she postponed reaching an agreement on the terms of the sale and/or postponed the closing, she could effectively hold the sale hostage. R. 81 (§ 22) and 88 (§ 22).

22. Ward indicated to both Graydon and Peter Coats that he would accept any reasonable proposals for closing instruction which either of them might propose. R. 81 (¶ 24) and 88 (¶ 24).
23. No sale offer was accepted and the North Parcel was subject to a foreclosure sale on 15 March 2007. R. 81 (¶ 25) and 88 (¶ 25).
24. Accordingly, the property was sold at a Trustee's Sale on 15 March 2007, for the sum of Three Million Six Hundred Thousand Dollars (\$3,600,000.00). R. 142-146.
25. Had Graydon and Peter Coats agreed to accept the highest offer, Ward would have been entitled to 9.82% of \$5.2 million, or \$510,640.00. Instead, Ward received only \$195,397.28, representing 9.82% of the excess proceeds. R. 82 (¶ 27) and 89 (¶ 27).
26. Subsequent to the Trustee's Sale, on 10 November 2008, Judge Atherton entered a supplemental decree of divorce in Graydon's and Peter Coats' divorce action. Pursuant to the Supplemental Decree, Graydon was awarded damages against Peter Coats, which damages amounted to the portion of the sales proceeds she would have received had the property sold for \$5.2 million. R. 120-129.
27. Ward brought an action for damages for the loss of the benefit of the offer for \$5.2 million against Graydon and Peter Coats. R. 150-171.
28. Ward moved for Summary Judgment on 3 March 2009. The Court denied his motion, awarded summary judgment to Graydon, and dismissed Ward's

complaint against Graydon with prejudice. Graydon was also awarded costs as against Ward. R. 319-322.

29. The trial court granted summary judgment in favor of Ward as against Peter Coats. R. 319-322.

30. Peter Coats sought to have the trial court reverse its judgment, but his motion was denied. R. 411-413.

ARGUMENT

The underlying basis of Graydon's case is the untenable notion that her rights to the property in dispute are somehow segregable from any responsibilities that those rights include. Though not formally on title, Graydon has exercised power over the disposition of the property throughout this ordeal in multiple ways: she has filed a lis pendens, sought temporary restraining orders, obtained a court order in her divorce precluding the dissipation of marital assets, and was granted a power of attorney related to the sale of the property. Under these various powers, Graydon had an absolute veto over any sale of the north and south parcels. When the rancor of their divorce prevented she and Peter Coats from agreeing to acceptable stipulations on the sale of the property, Graydon exercised that power to prevent a sale of the property for \$5,200,000.00. It is undisputed that if that sale had occurred, Ward would have received 9.82% of that amount (minus commissions and costs of sale) instead of the lesser amount the property sold for in foreclosure.² Thus, the actual and proximate

² Graydon additionally contends that through the voluntary subordination of his interest, Ward caused his own injury and thus became "the sole architect of his downfall". Graydon's assertion erroneously assumes that the outcome of such subordination

cause of Ward's injury was the acrimonious bickering between Coats and Graydon and ultimately their decision to spoil the sale. Having exercised rights over the property, Graydon now seeks to eliminate her culpability for Ward's injuries by attempting to sever those rights from the responsibilities inherent in their operation. This she cannot do.

Graydon's position is made all the more indefensible by her own successful efforts to recover damages for the failed sale. After she and Peter Coats jointly scuttled the sale, Graydon sought and received a judgment against Peter Coats for the amount Graydon would have received had the sale been completed. In other words, Graydon recovered on grounds identical to those advocated by Ward in the present case: but for the failure to close the sale, she would have received a greater amount. Yet, despite her own recovery for the failed sale, Graydon curiously suggests that while she – not on title or a joint owner – is entitled to her share of the value of the property as if it had sold for \$5.2 Million, Ward – a joint tenant – is not. This proposition, that a divorcing spouse with only a marital interest in property is entitled to recover for the loss of value in such property, while an owner of the property is not, defies logic and controverts basic notions of fairness and equity. That Graydon was partially responsible for such loss in value only further underscores the inconsistent and discrepant nature of Graydon's position.

affects Ward's ability to recover. This is not the case. Had the sale to Hagen gone through, whether Ward's interest was superior or junior to the trust deed would have been immaterial. The only difference it makes would go to the amount of Ward's damages, not his right to recover. Thus, Ward's voluntary subordination of his interest has no bearing on his right to recover.

I. JOINT TENANCY NECESSARILY IMPOSES DUTIES AND OBLIGATIONS ON COTENANTS

Because joint tenancy creates a cooperative community of interest dependent upon good faith, Utah law imposes duties and obligations upon cotenants. Graydon's responsive brief attempts to obfuscate this issue by suggesting Ward's argument is based on the existence of a cotenant's alleged duty to sell real estate, an argument Ward has never made. Rather, Ward has made the broader point that by virtue of their joint interests, cotenants stand in a unique relationship to one another, and that under the specific and unusual facts and circumstances of this case, Graydon's refusal to cooperate in the sale of real estate violated the reciprocal obligations inherent in the community of interest shared by Graydon, Coats, and Ward.

It is undisputed, even by Graydon, that Utah law recognizes that a special relationship of confidence and trust exists among cotenants. In *Jolley v. Corry*, 671 P.2d 139 (Utah 1983) Utah's Supreme Court reaffirmed the existence of such a relationship and indicated that it necessarily included the imposition of obligations upon cotenants. Without reaching the question of whether those obligation rose to the level of a fiduciary duty, the *Jolley* Court concluded that the relationship among joint tenants precluded a cotenant from defaulting on an obligation and then attempting to extinguish the interest of his cotenants by purchasing the property at a foreclosure sale. While the Utah Supreme Court in *Jolley* opted not to decide whether a cotenant is under a fiduciary duty in every conceivable circumstance, the Court made two clear points: 1) in at least some circumstances, cotenants have a fiduciary duty to one another; and 2)

without using the label of “fiduciary,” cotenants have obligations to one another, the violation of which warrants legal redress. Whatever we call these responsibilities, whether fiduciary duties, reciprocal obligations, or otherwise, is immaterial: regardless of the label, mutual duties are an innate part of membership in the community of interest among cotenants.

The line of cases cited by Ward in his brief in chief stand for this proposition. Whether the case involves one cotenant’s adverse possession against others, or a cotenant’s purchase of property at a foreclosure sale, Utah courts have consistently recognized that cotenants cannot disregard the rights of their peers in joint tenancy. The essential premise of these lines of cases is that by virtue of the special relationship created in joint tenancy, cotenants owe a duty to one another. At the very least, this duty includes an obligation to not obstruct or impede a joint tenant’s efforts to enjoy their interest in the property. Yet Graydon and Coats allowed their personal dispute to stand in the way of Ward realizing the full value of his interest in the parcel, all to the mutual harm of the community.

Perhaps most peculiar is Graydon’s denial of the existence of this duty here, in the face of her reliance on it in her successful action to recover against Coats. In the divorce proceedings, Graydon did not receive an arbitrary or indiscriminate award for some indistinct contumacious conduct of Coats; she received the amount she would have been entitled to had the sale closed. According to the Supplemental Decree of Divorce, because of the failure of the sale Graydon “received approximately \$931,000.00, rather than [the] \$1,454,508.30” she would have received had the property sold for \$5,200,000.00. R. 123-125. As a result of the failure to close the sale,

the court assessed the loss in value against Coats, who was ordered to pay Graydon the difference between the amount she actually received and the amount she would have received if the sale had been completed. Had Coats not had a duty to prevent the dissipation of the property's value, Graydon would have had no basis for recovery. As a divorcing spouse with only a marital interest in the north and south parcels, Graydon sought the assistance of a court to preserve an asset over which she had no legal interest. The court's willingness to intervene stemmed from its recognition of Peter Coats' duty to conserve and maintain the value of his property, and the underlying public policies that give rise to such a duty. Whatever justifications Graydon thinks entitle her to recover for the failed sale, those same justifications must be even more applicable to a co-tenant with actual ownership, as they serve the same public policy interests.

Graydon further acknowledges that cotenants do have fiduciary duties under the facts and circumstances of specific cases. The Utah Supreme Court has indicated that two such situations are: 1) a cotenant attempting to adversely possess against other cotenants, and 2) a cotenant suffering default on property, and then extinguishing the interest of the others by purchasing it at the resulting foreclosure sale. See *Olwell v Clark*, 658 P.2d 585 (1982), and *Jolley v Corry*, 671 P.2d 139 (1983). The rationale behind these rulings is the same: namely, that one cotenant should not be allowed to benefit by disadvantaging other cotenants. This is exactly what has happened in the instant case. Coats, as a cotenant with Ward, and Graydon, as the functional equivalent of a cotenant, allowed personal resentments to interfere with and ultimately thwart the sale of the property to Hagen, in the process diminishing the value of

Ward's interest. Subsequently, Graydon sought and received compensation from Coats for the damages she allegedly incurred, in the process receiving a benefit for having cooperated in disadvantaging Ward. Thus, the facts of this case are analogous to *Olwell* and *Jolley*, and precisely the type in which the imposition of fiduciary duties is appropriate.

II. BECAUSE OF THE MULTIPLE LEGAL POWERS THAT SHE EXERCISED OVER THE PROPERTY, GRAYDON HAD OBLIGATIONS TO WARD

In her brief, Graydon seeks to downplay her accountability by suggesting that as a divorcing spouse not on title, she had only a peripheral interest in the marital property and failed transaction. But Graydon is not an ordinary divorcing spouse. She had a power of attorney related to the sale of the property, she filed a *lis pendens* on the property, she initiated legal proceedings related to the property, and she obtained a court order in her divorce action governing the property. Throughout this case, she has exercised these powers to such an extent that she cannot now claim to be a passive party, detached from these events, solely to avoid responsibility for the harm her actions helped to create.

Graydon relies on her contention, which she claims Ward has conceded, that the power of attorney granted to her in the divorce proceeding was wholly ineffective in giving Graydon the power to sell or convey the property. But Graydon misapprehends the point. Whether Graydon theoretically could have sold or conveyed the property under her power of attorney is irrelevant. What is of consequence is that in spite of any possible infirmities in the power of attorney, Graydon did have the ability, pursuant to the order and the *lis pendens*, to prevent the sale of the property. That the combined

effect of these legal rights gave Graydon the means to obstruct the sale of the property is evident, as she did just that. Because she did in fact have the capability to prohibit the sale, Graydon's attempt to minimize her culpability by understating her authority under the power of attorney misses the mark.

Moreover, by attempting to pull the separate strands of authority apart, Graydon ignores the combined effect of these strands when taken together. In addition to the power to prevent the sale, the combination of her legal rights also gave Graydon the ability to close the sale. Graydon made her assent contingent upon Coats agreeing to escrow the proceeds of the sale. Pursuant to the anti-dissipation order, she had the power to enforce this condition. When Coats refused to agree to it, Graydon could have asked the court to impose the condition to allow the sale to go forward. Yet during the nearly two months that the offer to purchase the property for \$5,200,000.00 was pending, Graydon did nothing to prevent the dissipation of the property or to seek enforcement of the anti-dissipation order. Instead she chose recalcitrance, blamed the collapse of the sale on Coats, and sought damages from him.

Graydon also argues that she exercised the power of attorney as an agent of Peter Coats, and therefore could not have been a cotenant of Ward. This argument is meritless. To suggest that when she vetoed the sale to Hagen and thereby diminished the value of Peter Coats' interest, Graydon was acting as the agent of Peter Coats is farcical. Agency, by its very nature, includes an obligation to protect the interests of the principal, something Graydon did not do. Graydon not only failed to protect the interests of Peter Coats pursuant to her power of attorney, but also successfully sought damages from him for her alleged injury as a result of her own actions. At all times relevant,

Graydon used the power of attorney to only further her own interests. Under these circumstances, efforts to characterize Graydon's actions as those of an agent are illogical and warrantless.

Even if accepted, Graydon's argument that she was the agent of Coats would support Ward's position. As the reputed agent of Coats, Graydon would have owed him fiduciary duties. She also would have stood in his shoes, in effect making her the co-tenant of Ward. And as Coats' agent, she could have personal liability to a third party for her actions as such. By purporting to be the agent of Coats, Graydon actually buttresses the justifications for recognizing the obligations she owed to Ward.

Finally, Graydon claims that her damages against Peter Coats for the value of the ruined sale are distinguishable from those sought by Ward, because those damages were premised on his dissipation of marital property, and Ward has never been married to Coats. In her endeavor to sever the rights of power from any obligations resulting from their action, Graydon suggests that Peter Coats is alone responsible for any injuries resulting from the failed sale. And while she reluctantly concedes Ward has suffered an injury, Graydon believes that only she is the victim of Coats' exploits, and therefore hers is the type of injury worthy of redress, while Ward's is not. This conclusion is preposterous. Graydon's marital interest in the property should not provide greater rights and protections than those of an owner. Nor is Graydon a passive victim. She employed her rights to block a sale of the property, in the process participating in the creation of the injury she subsequently obtained compensation for. As her own recovery makes clear, Graydon recognizes that the failure to close the sale

is a legally cognizable harm. Since her actions helped to produce the injury to Ward, he is entitled to a similar recovery against she and Coats.

III. THERE ARE NO DISPUTED ISSUES OF MATERIAL FACT PRECLUDING AN AWARD OF SUMMARY JUDGMENT TO WARD

Graydon's brief alleges that even if Ward's legal theory is sustained, material issues of disputed fact still preclude an award of summary judgment. In support of this allegation, Graydon lists three items, each of which she contends raises factual questions sufficient to overcome Ward's Summary Judgment Motion. As is shown below, none of the items listed are sufficient to obstruct an award of summary judgment to Ward.

A. Graydon's Actions Breached Her Obligations

As addressed in sections I and II above, Graydon and Peter Coats did breach their obligations to Ward. In yet another attempt to uncouple the exercise of authority from its obligations, Graydon suggests that her choice to prevent the sale to Hagen was reasonable under the circumstances, and therefore she should not be responsible for the resulting injury sustained by Ward. However, in the month preceding the foreclosure sale, Graydon refused to cooperate in reaching a workable compromise that would enable the sale to go forward, made no effort to secure an alternative means of protecting her interests, and did nothing to mitigate the concomitant harm to Ward. Because of her unbending 'all or nothing' demand that Peter Coats escrow his share of the proceeds, Graydon disregarded several reasonable alternatives that would have facilitated the sale to Hagen while protecting her interests, including seeking a court order governing the income from the sale. Instead of proactively working to arrange a

resolution that would profit all parties, Graydon chose intransigence, waited for the sale to spoil, and then sought and received a benefit for only herself. Having successfully exercised her power of attorney to deny Ward his legitimate interest, Graydon now seeks to evade responsibility by claiming her actions were necessary to prevent the dissipation of the property. But Peter Coats' expeditious and equal distribution of his share of the proceeds from the foreclosure lays bare the absurdity of her supposed concerns. Under the circumstances, her actions were neither reasonable nor necessary, and represent a breach of her obligations to Ward.

B. The Failure to Close the Sale to Hagen is Immaterial and Graydon Should Be Estopped From Arguing It

Graydon argues that whether the sale to Hagen would have closed is a question of fact that precludes an award of summary judgment to Ward. This argument seems somewhat presumptuous considering Graydon collected the value of her inchoate interest in the property as if it had sold for \$5,200,000.00 despite insufficient evidence that any and all contingencies to closing were satisfied. Having prevailed notwithstanding such uncertainty, Graydon should not be permitted to now assert it as an impediment to summary judgment. Under the doctrine of judicial estoppel a person may not, to the prejudice of another person, deny any position taken in a prior judicial proceeding involving the same subject matter if that person successfully maintained such a position. *D U Co Inc v Jenkins*, 216 P 3d 360 (Ut App 2009). Graydon has already successfully recovered for the amount she would have received had the sale closed, she should therefore be precluded from attempting to reverse position in this case. Moreover, her acknowledgment of a signed contract invalidates her argument.

Whether or not the sale would have closed is immaterial, as Hagen's failure to satisfy the contract would have given Ward a cause of action for breach of contract

C. The Amount of Ward's Damages is Not In Dispute

Finally, Graydon contends that the amount of Ward's damages is unascertained (and possibly in dispute), and therefore summary judgment would be inappropriate. Such is not the case. Ward's Statement of Facts includes the additional amount Ward would have received had the sale to Hagen closed. Calculation of Ward's percentage of the costs of sale (including broker commissions) can be quickly and easily determined, and is not the type of subject that is prone to factual dispute. The offer to sell to Hagen was for \$5,200,000.00; had that sale closed, it would have included a sum certain commission of 6%. If the sale had closed, Ward's 9.82% interest in the property would have been \$510,640.00 minus 6%, or \$30,638.40, for commissions. Ward would have received \$480,001.60. Instead, Ward received \$195,397.28. The difference between these amounts, \$284,604.32, is the amount in which Ward has been damaged. Thus, nothing related to the amount of Ward's damages poses an obstruction to an award of summary judgment in Ward's favor.

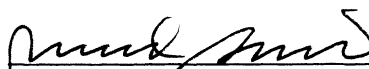
CONCLUSION

For the foregoing reasons, Petitioner Ward respectfully requests that Trial Court's granting of summary judgment to Graydon be reversed and remanded and that the Trial Court's denial of Ward's motion for summary judgment also be reversed and

remanded, and an instruction be given to enter an order granting summary judgment in favor of Petitioner Ward.

RESPECTFULLY SUBMITTED this 23 day of August 2010.

Stevenson and Smith, P.C.



Brad C. Smith
Attorney for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 23 day of August 2010, I mailed, postage prepaid, two true and correct copies of the foregoing document to:

Bryce D. Panzer
BLACKBURN & STOLL, L.C.
257 East 200 South, Suite 800
Salt Lake City, UT 84111-2142
Attorney for Appellee Graydon

Craig S. Cook
3645 East 3100 South
Salt Lake City, Utah 84109
Attorney for Appellee and Cross Appellant Coats

