

2001

## Cazares v. Cosby : Reply Brief

Utah Supreme Court

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IN THE UTAH SUPREME COURT

---

ROSALIND CAZARES, as personal  
Representative of THE ESTATE OF  
ROSEMARY COSBY,  
Plaintiff/Appellant,

Supreme Court No.: 20010599-SC

vs.

ROBERT C. COSBY, ANNIE L.  
JOHNSON, CHASE MANHATTAN  
MORTGAGE COMPANY, HEADLANDS:  
MORTGAGE COMPANY, HEADLANDS:  
HOME EQUITY LOAN TRUST, UNITED:  
SECURITY FINANCIAL AND JOHN  
DOES 1-10,  
Defendants/Appellees,

Priority No: 15

---

HEADLANDS MORTGAGE COMPANY  
and HEADLANDS HOME EQUITY  
LOAN TRUST,

Third-Party Plaintiffs/Appellees,

vs.

LINDA WEIR and WESTERN SURETY  
COMPANY,

Third-Party Defendants/Appellees,

---

REPLY BRIEF OF THE PLAINTIFF / APPELLANT

---

Appeal from the Third District Court, Salt Lake County, Judge William B. Bohling

**FILED**  
UTAH SUPREME COURT

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## ARGUMENT

Defendant's Cosby, Johnson and United Security filed a brief in response to the Appellant Cazares brief.

Defendant Chase Manhattan filed a separate brief to the Cazares brief involving separate issues, but also adopted the brief filed by Cosby et al. The other Defendants adopted the brief filed by Cosby et al.

Rather than file a separate reply brief to each of the Appellee briefs, Cazares will combine the arguments in this one reply brief.

### POINT I

#### THE COURT HAD NO BASIS FOR ORDERING A RULE 104(A) EVIDENCE HEARING.

Defendants argue to this court that although the qualifications and credentials of George Throckmorton were not questioned by any party in this case, the Court was called upon to determine whether the presumption of validity of a notary seal precluded all evidence of forgery.

Ordering a 104(a) evidence hearing was error. The customary use of this rule is when evidence offered by a party is challenged and a classic case is where an expert opinion is purposed grounded on science that has not yet been accepted by the scientific community. That is no the case here.

The order of the Court requiring Plaintiff to produce the evidence of forgery prior to a jury trial has no precedence. The lower Court evidently invented a new procedure requiring a party to prove a prima-facie case before it would allow that same evidence to go to a jury. This was done in the Court's own initiative. Again, none of the parties had requested such a hearing



and no one contested the qualifications of George Throckmorton, or the science used in forming his opinion.

Defendant's then turn to the acknowledgment statutes stating that they are a bar to the introduction of any forgery evidence. This was a subject of a Motion in Limine filed by Defendant's shortly before the 104(a) hearing. However, in their brief, Defendant's allude to the fact that a notary seal is attended by a presumption of validity and must be overcome by clear and convincing evidence. It is certainly not a conclusive presumption.

There is no explanation by Defendants as to how and in what manner evidence of forgery is limited by the acknowledgment statutes.

Defendant's then argue that the two notaries that testified Patricia Tunson and Linda Weir stated that decedent, Rosemary, was either personally present or on the telephone with them at the time of the acknowledgments. It is well to note at this point, that both the acknowledgements act (57-2a-2) and the Notaries Public Act (46-1-2) require that the signer appear in person before the notary. Without that personal appearance, the notary seal and certificate is invalid.

---

The order of the lower Court setting a 104(a) hearing is addendum 4 to Plaintiff's initial brief. Paragraph 6 of the order as submitted by Defendants to the Court for signature states:

“a 104 hearing will be held commencing at 9:00 a.m. May 21, 2001”

However, when the Court considered and signed that order, it scratched out the letters 104 and interlined the following:

“a rule 104(a) of the Utah Rules of Evidence hearing will be held . . . . .”

Now for the first time on appeal, Defendant's would have this Court consider Evidence Rule 104(b).

Defendants would have this Court rule that when the relevance of evidence depends on the fulfillment of a condition of fact, the Court may hold a hearing and require the proponent to come forward with sufficient evidence for a jury to find the condition exists.

Defendants overlook the fact that a Court on appeal will not entertain an issue not raised in the lower Court and furthermore, there is absolutely no evidence in the record that Rosemary Cosby signed the deeds or in any other way admitted in the presence of the notary having signed the document voluntarily for its stated purpose (46-1-2 Notaries Act).

It should also be understood that none of the Defendants have raised any affirmative defenses nor offered any evidence that the signatures of Rosemary are genuine.

Further, there is no legal requirement that any evidence be introduced before the introduction of evidence of forgery. If Defendant's claim a proper signature and acknowledgement, it would be their burden to so prove.

## POINT II

### THE COURTS EXCLUSION OF HANDWRITING EVIDENCE OF FORGERY IS CONTRARY TO UTAH LAW

Defendant's cite the case of *Northcrest Inc. v. Walker Bank and Trust Company* 248 P.2d. 692 (Utah 1952). Plaintiffs rely on this case to show that at the time the deed was notarized, the grantor was not in the State of Utah and that evidence was introduced that her signature was forged. The Court did hold that a presumption attends a notarized document and

can only be rebutted by clear and convincing evidence. However, the Court found that the forgery and the fact that the grantor was out of state was clear and convincing evidence.

Defendant's then cite Title 57-2-10 and 14 stating that handwriting evidence could not be entertained unless the subscribing witnesses are dead or unavailable. The answer to this assertion is that there are no subscribing witnesses to any of the documents claimed to be forgeries

Under this point, Defendant's argue that a notary is the closest modern equivalent of a subscribing witness. This is not true. Time has not changed the law on this subject. Notaries public and subscribing witnesses perform a different function. A subscribing witness attests to the signature of the document signer. A notary public takes an acknowledgement of that signature.

Defendants misstate the position of Defendant regarding the acknowledgement statute and the notaries public statute. Plaintiff's rely explicitly on those two (2) statutes and both require that the document signer appear before the notary and prove identity and admit in the notaries presence having signed the document voluntarily for its stated purpose.

There is no evidence in the record that the statutory command was met by any of the notaries. Tunson testified that Rosemary Cosby was in Florida when the deed was supposedly notarized or acknowledged (it will be remembered the deed was not stamped until after Rosemary had died).

Tarci Eastburn notarized the Chase Manhattan loan package on August 18, 1995. Evidence introduced by Plaintiff and also proffered show that Rosemary was in Florida on that

date and recovering from a serious operation. Further, Eastburn in her affidavit, said that she did not remember this transaction.

As to the deed supposedly notarized by Tunson on December 16, 1996, Defendants say there was some conversation between Tunson and Rosemary, who was in Florida, concerning the fact that the document was to “reduce interest”, however, when we look at that document, we find that it has nothing to do with reducing interest, but has everything to do with transferring title from Rosemary to Robert C. Cosby and Rosemary Cosby as joint tenants. If we can believe Tunson, it was notarized just over 2 weeks before Rosemary died. However, this is difficult to believe because the stamp of Tunson did not exist until January 20, 1997 (the deed is addendum 1 to this brief).

So far, three (3) notaries are involved in this case. The lower Court found that they were credible. However, this is what the evidence shows:

- a. All three notarized forgeries;
- b. Tunson and Eastburn notarized documents where the alleged signer was out of state, contrary to law, and in fact the conduct amounts to a crime.

How much evidence to the lack of credibility is necessary?

---

### **THE BRIEF OF CHASE MANHATTAN MORTGAGE COMPANY**

Plaintiff challenges the statement of the case proceedings and facts set forth by Chase Manhattan.

## **I. NATURE OF THE CASE.**

Chase states that the only evidence Plaintiff offered in support of a forgery claim was a two page report of George J. Throckmorton.

Chase overlooks the fact that the Court ordered Plaintiff to set forth in detail those documents that she claimed were forged. This claim is set forth in record at page 00320. All of those deeds and other documents are attached to the list and the loan package supplied by Chase was available for inspection at the office of counsel.

Additionally Plaintiff filed a list of those who would testify as lay witnesses to the forgery and proffered that proof to support the record. (Record 257 and 258)

Thereafter by granting the Motion in Limine, the Court said that it would allow no testimony as to forgeries, expert or lay witnesses, if the document was notarized. Necessarily, at the evidence hearing 104(a), Plaintiff could offer no evidence except by proffer. Plaintiff did proffer evidence to the fact that all of the documents listed and filed for record, as set forth above, were forgeries and would be so declared by George Throckmorton. In addition, it proffered proof from all those witnesses listed on the lay witness list that the signatures of Rosemary Cosby were forged.

The Court ordered the 104(a) hearing erroneously to determine if Plaintiff had sufficient evidence of forgery. The Court ruled that Plaintiff did not submit sufficient evidence, but had already ruled that Plaintiff could not submit any evidence in view of the notary certificate. This is a legal "catch 22".

## **II. THE CHASE MANHATTAN DEED OF TRUST.**

All signatures of Rosemary Cosby on that loan package were forged. Also, Plaintiff proffered proof that Rosemary was in Florida at the time her alleged signature was notarized.

### **A. Acquisition of the Deer Hollow Property.**

Rosemary Cosby acquired the Deer Hollow property in her name only. There is no evidence in the record that she executed a Deed of Trust in favor of Banco Mortgage Company.

### **B. United Security Loan and Deed of Trust.**

There is no evidence that Rosemary Cosby wanted to refinance the so-called Banco loan.

The deed of November 2, 1994 to Rosemary and Robert Cosby as joint tenants is a forgery. The Deed of Trust in favor of United Security Financial is a forgery and there is no evidence that the proceeds of any loan were paid to pay off the Banco loan. There is no evidence in the record that Rosemary Cosby objected to or did not object to the United Security loan, the Quit-Claim Deed or the United Security Trust Deed. All were forgeries. How could she object? The forgeries were not discovered until after she died.

### **C. Chase Manhattan Loan and Deed of Trust.**

There is no evidence in the record that the Chase Manhattan loan was used to pay off the United Security loan and there is no evidence in the record that a check for the remaining proceeds was issued jointly to Rosemary Cosby and Robert Cosby.

There is no evidence in the record that Rosemary Cosby objected to the Chase Manhattan loan or challenged the validity of the Chase Manhattan Trust Deed. Indeed the documents were forged and there is no evidence that Rosemary Cosby knew of the existence of these documents,

and there is no evidence that she ever made any payments to Chase Manhattan. The only evidence on this point is the unsworn statement of counsel.

It is true, that Plaintiff did not call Tarci Eastburn as a witness. Plaintiff was content to rely on the fact that all of those documents she notarized were forgeries. She did not remember this transaction and gave no evidence that these documents were signed in her presence. On the other hand, Plaintiff proved that Rosemary was in Florida on the date that these documents were allegedly signed and notarized. In addition to the medical record that is contained in the Court file, Plaintiff proffered proof from other witnesses that in fact Rosemary Cosby was not in the city on August 18, 1995.

---

Plaintiff relied on the proffered evidence, expert and lay, that the signature of Rosemary Cosby were forged. Such being the case, there was clear and convincing evidence that overcame any presumption afforded a notary stamp -- the *Northcrest* case so states.

We also call attention to a statement in 1 Am. 2d. Acknowledgments § 105 which reads:

“Proof that a certificate of acknowledgement is false and a forgery may be sufficient, in and of itself, to establish the fact that the acknowledger did not execute the instrument.”

Proof of forgery entirely rebuts any presumption afforded a notarized document.

### CONCLUSION

The Lower Court in its own initiative set an Evidence Rule 104(a) to determine a sufficiency of forgery evidence claimed by Plaintiff. At that point, no one questioned either the qualifications or science of George Throckmorton, a renowned document examiner. In essence,

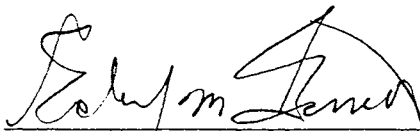
the Court set a mini-trial requiring Plaintiff to prove a prima-facie case of forgery before the evidence was submitted to the jury.

Before the 104(a) hearing occurred, the court granted a Motion in Limine ruling in effect that if a document were notarized that no handwriting evidence of forgery could be introduced. This reduced the 104(a) hearing to a sham. Plaintiff necessarily at that point had to introduce its evidence by proffer. The evidence would show that all of the signatures of Rosemary Cosby on the documents in the record and introduced as exhibits were forgeries.

The statutory law is clear that a notary public can not notarize a document by telephone. Plaintiff's proof was that Rosemary Cosby was not in the state at the time certain document were notarized. The credibility of the involved notaries was there by successfully attacked. The Court erroneously ruled otherwise.

RESPECTFULLY submitted this <sup>ju</sup> 7 day of February, 2002.

GARRETT & GARRETT

By:   
Edward M. Garrett



**CERTIFICATE OF MAILING**

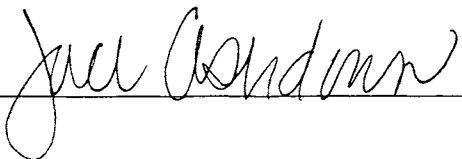
I hereby certify that on this \_\_\_ day of February, 2002, a true and correct copy of the foregoing APPELLATE REPLY BRIEF was mailed, post pre-paid to the following:

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Robert C. Olsen  
PLANT, WALLACE, CHRISTENSEN & KANELL  
136 East South Temple # 1700  
Salt Lake City, Utah 84111

  
\_\_\_\_\_

**ADDENDUM**

ADDENDUM

DOCUMENT

1

Quit-Claim Deed

# ADDENDUM 1

6570818

6570818  
02/11/97 4:53 PM 10.00  
NANCY WORKMAN  
RECORDER, SALT LAKE COUNTY, UTAH  
PETTEY, BRANTLEY & ROBINSON  
REC BY: J FERGUSON DEPUTY - WI

WHEN RECORDED MAIL TO:

ROBERT C. COSBY  
UNITED SECURITY FINANCIAL  
406 West South Jordan Parkway #100  
South Jordan, Utah 84095

QUIT - CLAIM DEED

ROSEMARY COSBY

Grantor(s) of SANDY, County of SALT LAKE, State of Utah  
hereby QUIT-CLAIM to:

ROBERT C. COSBY AND ROSEMARY COSBY, HUSBAND AND WIFE AS JOINT  
TENANTS WITH FULL RIGHTS OF SURVIVORSHIP

of SANDY, Utah, grantees for the sum of TEN AND NO/100 DOLLARS,  
and other good and valuable consideration, the following described  
tract of land in SALT LAKE County, State of Utah:

UNIT NO. 808 B, SION SUMMIT CONDOMINIUM, A  
CONDOMINIUM VALIDLY FORMED UNDER THE UTAH  
CONDOMINIUM OWNERSHIP ACT IN FEE, TOGETHER  
WITH AN UNDIVIDED INTEREST IN THE COMMON AREAS  
AND FACILITIES ACCORDING TO THE OFFICIAL PLAT  
ON FILE AND OF RECORD IN THE OFFICE OF THE  
SALT LAKE COUNTY RECORDER, ALSO PARKING STALL  
NO. GWA 17 AND STORAGE LOCKER NO. GWA 17 AS  
SET FORTH AND DESCRIBED IN THAT CERTAIN  
DECLARATION RECORDED IN JANUARY 13, 1997 BY  
ENTRY NO. 189744 IN BOOK 4487 AT PAGE 1019 OF  
THE OFFICIAL RECORDS.

Situate in Salt Lake County, State of Utah

WITNESS the hand of said grantor(s), this 14TH day of  
DECEMBER, 1996.

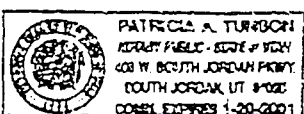
*Rosemary Cosby*  
ROSEMARY COSBY

STATE OF UTAH  
COUNTY OF SALT LAKE

On the 16TH day of DECEMBER, A.D. 1996, personally appeared  
before me ROSEMARY COSBY, the signers of the within instrument,  
who duly acknowledged to me that she executed the same.

*Patricia A. Tursochi*  
NOTARY PUBLIC

My Commission Expires  
*Jan 2001*



OK 7597

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