

1989

Helen Coleman v. Brian R. Florence, Florence & Hutchison, John Blair hutchison, Fleshaw king, King & King, and Does 1 through 10 : Brief of Respondent

Utah Court of Appeals

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_ca1

 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.

Carmen E. Kipp; Shawn McGarry; Kipp & Christian; Thomas L. Kay; Paul D. Newman; Ray, Quinney .

Helen Coleman, Pro Se.

Recommended Citation

Brief of Respondent, *Coleman v. Florence*, No. 890380 (Utah Court of Appeals, 1989).
https://digitalcommons.law.byu.edu/byu_ca1/1985

This Brief of Respondent 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. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

LIST OF PARTIES

1. Oscar Howard Coleman, plaintiff (this plaintiff dismissed his claims against defendants in the lower court and is not a party to this appeal).
2. Helen S. Coleman, plaintiff and appellant.
3. Brian R. Florence, defendant and respondent.
4. Florence & Hutchison, defendant and respondent.
5. John Blair Hutchison, defendant and respondent.
6. Felshaw King, defendant and respondent.
7. King and King, defendant and respondent.
8. Glen T. Cella, defendant (dismissed as defendant in lower court and not a party to this appeal).

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES.....	ii.
I. JURISDICTION OF THE COURT OF APPEALS....	1
II. NATURE OF THE PROCEEDINGS BELOW.....	1
III. ISSUES PRESENTED FOR REVIEW.....	1
IV. STATEMENT OF THE CASE.....	2
A. NATURE OF THE CASE, COURSE OF PROCEEDINGS AND DISPOSITION IN COURT BELOW.....	2
B. STATEMENT OF FACTS.....	2
C. SUMMARY OF ARGUMENTS.....	2
V. ARGUMENT.....	3
A. PLAINTIFF CANNOT DISPUTE THE FACTS SUBMITTED BY DEFENDANTS IN SUPPORT OF THEIR MOTIONS FOR SUMMARY JUDGMENT FOR THE FIRST TIME ON APPEAL.	3
B. JUDGMENT IN FAVOR OF THE FLORENCE DEFENDANTS MUST BE AFFIRMED BECAUSE PLAINTIFF FAILED TO PRODUCE EVIDENCE ESTABLISHING THE ELEMENTS OF HER LEGAL MALPRACTICE CLAIM.....	4
C. THE ADMITTED FACTS SHOW THAT SUMMARY JUDGMENT IN FAVOR OF THE FLORENCE DEFENDANTS MUST BE AFFIRMED.....	5
VI. CONCLUSION.....	6

TABLE OF AUTHORITIES

	<u>Page</u>
Rules of the Utah Court of Appeals, Rule 11 (a).....	3
Utah Code Ann. §78-2-2(4).....	1
Utah Code Ann. §78-2a-3.....	1

I. JURISDICTION OF THE COURT OF APPEALS

This Court has jurisdiction over this appeal pursuant to the provisions of Utah Code Ann. §78-2a-3 and Utah Code Ann. §78-2-2(4).

II. NATURE OF THE PROCEEDINGS BELOW

Defendants Brian R. Florence, Florence & Hutchison, and John Blair Hutchison (hereafter Florence defendants) and defendants Felshaw King and King and King (hereafter King defendants) filed separate motions for summary judgment which were granted by the district court.

III. ISSUES PRESENTED FOR REVIEW

1. Whether plaintiff can dispute for the first time on appeal the facts submitted by defendants in support of their motion for summary judgment despite the provisions of Rule 56 of the Utah Rules of Civil Procedure, and Rule 4-501 of the Utah Code of Judicial Administration, and whether plaintiff can raise for the first time on appeal facts not contained in the record on appeal.

2. Whether judgment in favor of the Florence defendants should be affirmed because plaintiff failed to produce evidence establishing the elements of her legal malpractice claim.

3. Whether the admitted facts demonstrate that judgment in favor of the Florence defendants should be affirmed.

IV. STATEMENT OF THE CASE

A. NATURE OF THE CASE, COURSE OF PROCEEDINGS, AND DISPOSITION IN COURT BELOW.

The Florence defendants adopt and incorporate herein by reference the statement of the nature of the case set forth at pages 1 through 3 of the Brief of Respondents Felshaw King and King and King.

B. STATEMENT OF FACTS

The Florence defendants adopt and incorporate herein by reference the statement of facts set forth at pages 3 through 5 of the Brief of Respondents Felshaw King and King and King.

C. SUMMARY OF ARGUMENTS

The defendants properly filed motions for summary judgment supported by legal memoranda that recited the factual basis for the motions. The motions complied with the requirements of Rule 56 of the Utah Rules of Civil Procedure and Rule 4-501 of the Utah Code of Judicial Administration. Plaintiff failed to file or present any evidence contradicting the facts set forth in the memoranda supporting defendants' motions for summary judgment. Plaintiff cannot now ask this Court to reverse the district court based on factual disputes not raised below or on facts that are not contained in the

record on appeal.

Plaintiff failed to present any expert testimony to establish the standard of care applicable to the Florence defendants or that any breach of that standard occurred. Plaintiff also failed to produce any evidence to establish that the Florence defendants' alleged negligence proximately caused any damage. The judgment in favor of the Florence defendants must therefore be affirmed.

The admitted facts in the record on appeal demonstrate that plaintiff cannot establish a breach of any duty by the Florence defendants. Accordingly, the judgment in favor of the Florence defendants must be affirmed.

V. ARGUMENT

A. PLAINTIFF CANNOT DISPUTE THE FACTS SUBMITTED BY DEFENDANTS IN SUPPORT OF THEIR MOTIONS FOR SUMMARY JUDGMENT FOR THE FIRST TIME ON APPEAL.

The Florence defendants adopt and incorporate herein by reference the argument set forth at pages 8 through 10 under Section V.B of the Brief of Respondents Felshaw King and King and King.

In addition, plaintiff has attempted on appeal to introduce factual evidence which is not contained in the record on appeal as defined in Rule 11(a) of the Rules of the Utah Court of Appeals. Any such materials must be disregarded by this Court.

B. JUDGMENT IN FAVOR OF THE FLORENCE DEFENDANTS
MUST BE AFFIRMED BECAUSE PLAINTIFF FAILED TO
PRODUCE EVIDENCE ESTABLISHING THE ELEMENTS OF
HER LEGAL MALPRACTICE CLAIM.

The Florence defendants adopt and incorporate herein by reference the argument set forth at pages 10 through 14 under Section V. C of the Brief of Respondents Felshaw King and King and King as though that argument were made on behalf of the Florence defendants. Just as plaintiff failed to establish that the King defendants breached any duty to plaintiff, she likewise failed to establish that the Florence defendants breached any duty to her. Plaintiff claims in her complaint that the Florence defendants failed to conduct the foreclosure proceedings in such a way that liability for a deficiency would be imposed on the Logans and Wayne Carlos. To prevail on her claim, plaintiff is required to establish the standard of care owed to her by the Florence defendants and that the Florence defendants breached that standard of care. Such a duty of care is not within the common knowledge of the lay person and could be established only by expert testimony. In the face of defendants' motion for summary judgment, plaintiff failed to present any expert testimony to establish the standard of care or that a breach of that standard occurred. Failure to establish this essential element of her case is fatal to it.

Additionally, just as plaintiff failed to produce any evidence to establish that the King defendants' alleged negligence proximately caused damage to plaintiff, she has

likewise failed to produce any evidence that the Florence defendants' alleged negligence proximately caused any damage. There is no evidence that plaintiff would have been in any different position had the foreclosure action been handled any differently. Without such evidence plaintiff cannot establish the proximate cause element of her claim, and judgment in favor of the Florence defendants must be affirmed.

C. THE ADMITTED FACTS SHOW THAT SUMMARY JUDGMENT
IN FAVOR OF THE FLORENCE DEFENDANTS MUST BE
AFFIRMED.

These defendants adopt and incorporate herein by reference the argument set forth at pages 14 through 16 under Section V.D(1) of the Brief of Respondents Felshaw King and King and King as though that argument were made on behalf of the Florence defendants. Just as the admitted facts show that plaintiff cannot establish a breach of a duty by the King defendants, likewise the facts show that plaintiff cannot establish a breach of any duty by the Florence defendants. Plaintiff alleges that the Florence defendants were negligent in failing to conduct the foreclosure proceedings in a manner that would result in the Logans and Wayne Carlos being held liable for a deficiency. However, failure to have the Logans and Wayne Carlos held liable cannot constitute negligence because no one other than Kim Carlos had any obligation to plaintiff after the modification agreement was executed. Plaintiff herself acknowledged under oath in her verified complaint in the foreclosure action that there had been a discharge of the Logans

and Wayne Carlos from further liability and that the modification agreement had the effect of "substitut[ing Kim] Carlos as the sole buyer of the premises."

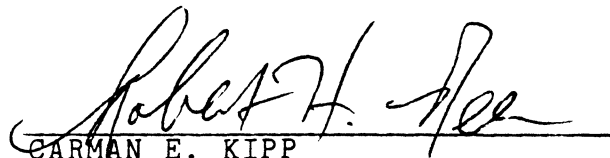
The admitted facts establish that the Logans and Wayne Carlos had no further obligation to plaintiff following execution of the modification agreement. There can, therefore, be no negligence in failing to conduct the foreclosure action in such a manner that the Logans and Wayne Carlos would be held liable for any deficiency. Accordingly, the judgment in favor of the Florence defendants must be affirmed.

VI. CONCLUSION

For the foregoing reasons, the Florence defendants respectfully request this Court to affirm the judgment of the district court in their favor.

DATED this 8th day of September, 1989.

KIPP AND CHRISTIAN, P.C.



CARMAN E. KIPP

ROBERT H. REES

SHAWN McGARRY

Attorneys for Defendants/

Respondents Brian R. Florence

Florence & Hutchison and John

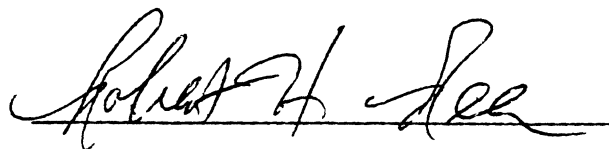
Blair Hutchison

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on the 8th day of September, 1989, four (4) true and correct copies of the foregoing Brief of Respondents Brian R. Florence, Florence & Florence and John Blair Hutchison, were mailed, postage prepaid, to the following:

Helen Coleman
PRO SE
261 Marilyn Drive
Clearfield, Utah 84015

Thomas L. Kay
Paul D. Newman
RAY, QUINNEY & NEBEKER
79 South Main Street
P.O. Box 45385
Salt Lake City, Utah 84145

A handwritten signature in cursive script, appearing to read "Robert H. Lee", written over a horizontal line.