

1988

# Ernest G. Clark and Verda G. Clark v. Morian E. Both, Trustee, and Royal K. Hunt : Response to Petition for Rehearing

Utah Supreme Court

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Royal K. Hunt; Pro Se.

L. Rich Humpherys; Christensen, Jensen, and Powell; Attorney for Plaintiffs.

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## Recommended Citation

Legal Brief, *Clark v. Hunt*, No. 880109.00 (Utah Supreme Court, 1988).

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UTAH SUPREME COURT

890046 BRIEF  
880486  
880109

IN THE SUPREME COURT OF THE STATE OF UTAH

ERNEST G. CLARK AND VERDA G. CLARK,	)	
	)	
Plaintiffs-Appellees,	)	
	)	
v.	)	
	)	
MARIAN E. BOOTH, TRUSTEE, and ROYAL K. HUNT,	)	Civil Nos. 880109, 880486 and 890046
	)	
Defendants-Appellants.	)	

ANSWER TO PETITION FOR REHEARING

Appeal from final Judgment and Orders of the Third Judicial District Court of Salt Lake County, State of Utah  
The Honorable J. Dennis Frederick, Presiding

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FILED

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UTAH

IN THE SUPREME COURT OF THE STATE OF UTAH

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ERNEST G. CLARK AND VERDA G. CLARK, )  
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 Plaintiffs-Appellees, )  
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 ) Civil Nos. 880109,  
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Plaintiffs-Appellees Clark hereby answer the petition for rehearing filed by Royal K. Hunt.

I. THE PETITION FOR REHEARING WAS UNTIMELY FILED.

The opinion from this court was issued and entered Friday, August 30, 1991. Rule 35(a) Utah R. App. P., states:

A rehearing will not be granted in the absence of a petition for rehearing. A petition for rehearing may be filed with the clerk within 14 days after the entry of the decision of the court, unless the time is shortened or enlarged by order.

Hunt did not lodge his petition for rehearing until September 16, 1991, seventeen days after this court's decision was entered. Based upon Rule 35, the petition had to be filed by Friday, September 13, 1991. Since the petition was untimely filed, a rehearing should not be granted.

II. HUNT HAS NO STANDING TO CONTEST THE SETTING ASIDE OF THE DEFAULT JUDGMENT.

In his petition Hunt first claims that the default judgment had been assigned to Myers, who could proceed in the action in the name of Booth pursuant to Rule 25(c), U.R.C.P. This is not a new argument and is covered extensively in Appellee-Clark's brief in point V (page 26). Hunt argues, however, that upon receiving notice, Myers did not appear at the rehearing to set aside the judgment because Meyer did not believe that the rehearing was "a meaningful hearing at a meaningful time and would not be served by a post-vacation remedy." (Petition, p. 4.)

To properly analyze Hunt's position, it is important to first understand the parties and their representation. Hunt filed this petition "pro se" in behalf of himself. Hunt's right and standing to raise issues in the petition are therefore restricted to his personal involvement in the case as a party. As this Court recognized in its decision, Hunt's personal interest arises only out of an assignment of a trust deed by Associate Financial Services, which assignment took place in February, 1988. Before this time, there is no evidence of any kind that Hunt had any personal interest in the property, in the counter-claim or in any other matter involved in the litigation. His prior involvement was as an attorney for Booth and/or Myers.

The default judgment was taken in April, 1987, and was set aside in August, 1987, approximately 6 months before Hunt had any personal interest in the case. Associates never claimed any interest in the counterclaim filed by Booth. Therefore, Hunt (pro se) has no standing to challenge any part of this Court's or the trial court's ruling regarding the setting aside of the default judgment.

III. MYERS HAS WAIVED ANY OBJECTION TO THE SETTING ASIDE OF THE DEFAULT JUDGMENT.

Even though Hunt filed this petition in behalf of himself only and even though Myers was not a party to this appeal, Hunt nonetheless argues in behalf of Myers that this Court should consider Myers' position because Myers could proceed in the name of

Booth, the original judgment creditor. Clarks strenuously object to Hunt indirectly representing Myers even though he claims not to represent Myers.

One of the most difficult aspects of this case has been Mr. Hunt's evasiveness and inconsistent positions. For example, when plaintiffs moved to set aside the default judgment, Hunt appeared and indicated that he did not represent Myers, but suggested to the court that there may be a due process problem since the court had not given notice of the motion to Myers. This representation was made, despite the fact that Hunt was assisting Myers in the execution issued from the default judgment. Thereafter when Myers and Hunt were again served with notice of a rehearing on the Motion to Set Aside, neither he nor Myers appeared or objected. After this Court rendered its decision that Myers thereby waived his right to challenge the order setting aside the judgment, Hunt now represents Myers' position that there has been no waiver. Hunt conveniently disclaims or represents the interests of various parties, depending upon what position is convenient for his current argument.

Hunt's argument fails for other reasons as well. Rule 25(c) U.R.C.P. indicates that if an interest is assigned, the assignee may proceed under the assignor's name. However, Booth made a formal assignment to Myers that was filed as a matter of record (R. 44-45) Therefore, Myers was the interested party of record, and by failing to object at the hearing or by failing to appeal the order



setting aside the judgment, Myers has no claim through Hunt's petition for rehearing; nor does Hunt have any right of any kind to assert Myers' claim herein.

Finally, Hunt argues that, "Myers did not appear [at the second hearing on the Motion to Set Aside] because due process would require notice and a meaningful hearing at a meaningful time and would not be served by a post-vacation remedy." (Petition, p. 4) There is no evidence whatsoever to support the factual basis of this statement, since Myers never appeared at any time before the trial court or before this Court. In any event, the assertion is false. There was nothing unmeaningful about the hearing or time provided to Myers to appear and present his case regarding why the default judgment should not be set aside. The prior order setting aside the judgment was not a final order and could have easily been vacated or modified.

#### IV. HUNT'S RULE 11 SANCTION IS NOT "DOUBLE RECOVERY."

Hunt next argues that the motion for sanction was actually a "motion for fees already included in the decree," (Petition p. 5) and the sanction is therefore double recovery. A quick perusal of the record will show this statement is untrue. The motion for sanctions, memorandum in support and court order clearly demonstrate that the motion was not used as a guise for some other purpose. The sanction was a punishment, not a compensatory award. It's purpose was to punish and discipline Hunt for violating Rule

11. Since a sanction is not designed to compensate but to punish, "double recovery" is irrelevant. There is no authority whatsoever that a sanction must be a set-off or a reduction from compensable damages. Otherwise the very purpose of Rule 11 (to punish) would be frustrated.

V. HUNT RAISES NO NEW ISSUE REGARDING THE CLAIM OF NON-FINALITY OF THE FORECLOSURE ORDER.

The issue of non-finality of the foreclosure decree has been fully briefed in the appellants and reply brief. No new facts or legal support have been advanced by Hunt in his petition. This Court has thoroughly examined Hunt's position on this issue and has ruled. It is a waste of judicial time to again revisit the same issue without something significantly new being advanced.

VI. THE AWARD OF ATTORNEYS FEES SHOULD STAND.

Hunt asserts that, after Associates assigned its interest to Hunt and he personally became a party on February 26, 1988, "he made and filed any number of objections to the award of attorneys fees." (Petition, p. 8.) This is not true and he gives no citation to any record to support this allegation. The award of attorneys fees had been fully litigated and determined by the trial court prior to February 1, 1988, when the judge executed the decree of foreclosure. It is true that Hunt objected to the award of sanctions after February 1, 1988, however, there was no further proceeding regarding the foreclosure fees. As discussed above, a

sanction is not a compensatory award for attorneys fees. An objection to the sanction therefore is not an objection to the fees awarded pursuant to the foreclosure action.

Concerning Booth's standing to challenge the attorneys fees, Hunt asserts that Booth suffered actual injuries, yet cites nothing in the record to support the allegation. Since Booth had transferred all of his interest in the property months before the foreclosure action commenced and he therefore had no equity in the property, he has no right to challenge any aspect of the fees and expenses awarded by the court. Hunt claims, however, that Booth "was entitled to possession of the property" during relevant times. Hunt again makes this allegation without any reference to the record. It was this same unfounded factual assertion that Judge Frederick determined was untrue and was part of the basis for the Rule 11 sanctions. Yet, Hunt continues to make this argument in his petition. This claim, even if true, does not belong to Hunt. Hunt's petition was filed only in behalf of himself "pro se," and Hunt cannot properly raise this issue in behalf of Booth in any event.

After arguing that Booth had an interest in the property, Hunt then argues on page 10 of his petition that the attorneys fees were improper because there were only four recorded interest holders in the property (Gurr, the Lockhart Company, Draper Bank & Trust, and Co-vest Corp.). Thus only these four parties were necessary parties in the foreclosure proceedings. This statement confirms

that Hunt knew Booth did not have an interest in the property. Hunt then represents that there is no evidence in the record to support the court's assertion that there were other encumbrances besides Gurr and Lockhart. (Petition, p. 11.) This is also untrue and was fully discussed in appellee's brief. It was necessary for plaintiffs to bring the foreclosure action against all of the named defendants in order to obtain insurable title. See R. 220, 230-46, 292.

Assuming Hunt has the right to challenge the attorneys fees, the mere assertion that there is insufficient evidence to support the award is improperly made. Hunt has not met his duty to marshall all of the evidence which supports the judge's ruling as required on appellate review. E.g. Morgan v. Quailbrook Condominium Co., 704 P.2d 573, 577 n.3 (Utah 1985). There is ample evidence to support the award, particularly in retrospect since this matter has been appealed without an award of attorneys fees.

VII. BOOTH HAD NO INTEREST IN THE PROPERTY DURING RELEVANT TIME PERIODS.

Hunt argues on page 12 of his petition that Booth's possessory interest in the property is admitted in the record. Again, Hunt is trying to argue the claim of Booth which he cannot do "pro se." Putting that aside, this point illustrates more cogently why sanctions were awarded against Hunt.

At the beginning when Hunt represented Booth, Hunt pursued a bogus counter-claim, alleging that Booth held an interest in the

property and was damaged by the actions of the plaintiffs. This counter-claim was made despite the fact that Booth had transferred all of her interest in the property many months before the alleged wrongful actions by Clarks. Hunt then surreptitiously proceeded to take default on the counter-claim and in silence, tried to execute on the very property on which the Clarks were foreclosing. Hunt was cunningly taking away the Clarks' claim to foreclosure. When the default judgment and execution were discovered by Clarks, they immediately moved to set aside the judgment. Hunt then claimed improper notice to Myers. When proper notice to Myers was given, Hunt then claimed the notice to be meaningless. Then depositions of Mr. and Mrs. Booth were taken and the testimony was unrefuted and clear that Booth had no interest in the property after she had transferred her interest in May, 1987, and under any circumstance, Booth would have no interest at least by August, 1987 (months before any alleged misconduct by the Clarks) when the property again changed hands to another third party.

Based upon clear and unrefuted evidence by the Booths, Judge Frederick awarded sanctions against Hunt and Booth for filing the meritless counter-claim. Thereafter, Hunt continued to assert the validity of Booth's default judgment on appeal. When this court affirmed the lower court, Hunt again represents to the court, "Booth held a possessory interest in the property upon which she based her claims against plaintiffs. The allegations of possessory interest is admitted in this record." Hunt cites no record nor is

there any record to support this contention. On the contrary, Booth's own testimony clearly establishes the contrary.

It appears that the sanctions against Mr. Hunt still have had no effect. Granting Hunt's petition for rehearing will only reinforce Hunt's distorted perspective of filing meritless claims and then trying to justify the wrongdoing by technicalities.

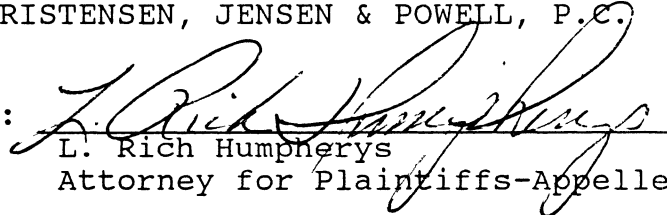
CONCLUSION

Hunt filed this petition "pro se" and cannot argue the positions of Booth or Myers. The Court has fully considered and addressed previously in its decision all issues raised by Hunt in his petition. This Court should therefore deny his petition for rehearing.

DATED this 20<sup>th</sup> day of December, 1991.

CHRISTENSEN, JENSEN & POWELL, P.C.

By:

  
L. Rich Humpherys  
Attorney for Plaintiffs-Appellees

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing ANSWER TO PETITION FOR REHEARING was mailed, postage prepaid, this 20 day of December, 1991, to:

Royal K. Hunt  
356 South 200 #9  
St. George, UT 84770

A handwritten signature in cursive script, appearing to read "J. Reid Humphrey", written over a horizontal line.