

2009

Gordon Jones, an individual; and Richard Barney, an individual v. Allen F. Grazer : Brief of Appellee

Utah Court of Appeals

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_ca3



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.

Unknown.

Attorneys for Appellant: Lincoln W. Hobbs; Margaret H. Olson; Julie Ladle; Kathy A.F. Davis; Hobbs&Olson. Attorneys for Appellees; Joseph M.R. Covey; Michael T. Hoppe; Parr Brown Gee & Loveless.

Recommended Citation

Brief of Appellee, *Jones v. Grazer*, No. 20090983 (Utah Court of Appeals, 2009).
https://digitalcommons.law.byu.edu/byu_ca3/2037

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. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

IN THE UTAH COURT OF APPEALS

GORDON JONES, an individual; and
RICHARD BARNEY, an individual,

Plaintiffs/Appellees,

v.

ALLEN GRAZER, an individual,

Defendant/Appellant.

BRIEF OF APPELLEE

ALLEN F. GRAZER,

Counterclaim Plaintiff/Appellant,

v.

GORDON A. JONES; and RICHARD
BARNEY,

Counterclaim Defendants/Appellees.

Appellate Case No. 20090983-CA

ORAL ARGUMENT REQUESTED

GORDON JONES, an individual; and
RICHARD BARNEY, an individual,

Third Party Plaintiffs,

v.

R W DESIGN, INC., a Utah
corporation; ROBERT W. SPEIRS
PLUMBING, INC., a Utah
corporation; SCOTT SESSIONS, an
individual; and NU-TREND
ELECTRIC COMPANY, a Utah
corporation,

Third Party Defendants.

FILED
UTAH APPELLATE COURTS
JUN 01 2010

IN THE UTAH COURT OF APPEALS

GORDON JONES, an individual; and
RICHARD BARNEY, an individual,

Plaintiffs/Appellees,

v.

ALLEN GRAZER, an individual,

Defendant/Appellant.

BRIEF OF APPELLEE

ALLEN F. GRAZER,

Counterclaim Plaintiff/Appellant,

v.

GORDON A. JONES; and RICHARD
BARNEY,

Counterclaim Defendants/Appellees.

Appellate Case No. 20090983-CA

ORAL ARGUMENT REQUESTED

GORDON JONES, an individual; and
RICHARD BARNEY, an individual,

Third Party Plaintiffs,

v.

R W DESIGN, INC., a Utah
corporation; ROBERT W. SPEIRS
PLUMBING, INC., a Utah
corporation; SCOTT SESSIONS, an
individual; and NU-TREND
ELECTRIC COMPANY, a Utah
corporation,

Third Party Defendants.

ALLEN F. GRAZER,

Plaintiff/Appellant,

v.

GORDON A. JONES; and LINDA G. JONES, husband and wife and as Trustees of the Gordon and Linda Jones Family Trust; CHERYL GUDMUNDSON, an individual; G. SCOTT JONES, an individual; JASON JONES, an individual; GS JONES CONSTRUCTION, INC., a Utah corporation, J & J LIVESTOCK, L.L.C., a Utah limited liability company; RICHARD H. BARNEY and RENAE CARNON BARNEY, husband and wife; RENAE CARNON BARNEY, Trustee of the Renae Carnon Barney Trust; RENAE CARNON BARNEY FAMILY PARTNERSHIP; ROCHELLE C. BARNEY; RICHILYN WOODIN; THE LINDA G. JONES FAMILY PARTNERSHIP; and JOHN DOES 1-20,

Defendants/Appellees.

Appeal from the Second Judicial District Court of Davis County Farmington Department,
State of Utah,
The Honorable Michael G. Allphin

COUNSEL FOR APPELLANT

LINCOLN W. HOBBS
MARGARET H. OLSON
JULIE LADLE
HOBBS & OLSON, L.C.
466 EAST 500 SOUTH, #300
SALT LAKE CITY, UT 84111
Phone: (801) 519-2555

COUNSEL FOR APPELLEES

JOSEPH M.R. COVEY
MICHAEL T. HOPPE
PARR BROWN GEE & LOVELESS
185 SOUTH STATE, SUITE 800
SALT LAKE CITY, UT 84111
Phone: (801) 532-7840

PARTIES TO THE PROCEEDING

Plaintiff/Appellant

Allen F. Grazer

Defendants/Appellees

Gordon A. Jones

Linda G. Jones (Estate)

Gordon Jones Construction, L.C., a Utah limited liability company

Richard H. Barney (Estate)

Rena C. Barney, Personal Representative of Richard H. Barney Estate

Ludvig D. Olsen and Jackie M. Olsen, Trustees of the Ludvig D. Olsen and Jackie M. Olsen Trust (the “Olsen Trust”)

TABLE OF CONTENTS

STATEMENT OF JURISDICTION.....	7
CONSTITUTIONAL OR STATUTORY PROVISIONS	7
STATEMENT OF THE CASE.....	10
STATEMENT OF FACTS.....	12
SUMMARY OF ARGUMENT	15
ARGUMENT	18
I. The Olsen Trust’s July 8, 2008 Redemption Attempt Complied, or at a Minimum, Substantially Complied with the Rule 69C Redemption Requirements.....	18
A. The Rejection by Mr. Hobbs of the Olsen Trust’s Notice of Redemption and Tendered Check and the Subsequent Recording of the Notice of Amounts Paid and Owed Was Improper and Should Not Be Effective.....	21
B. Grazer Waived Any Claim for Additional Redemption Amounts Beyond What the Olsen Trust Originally Tendered	23
C. The Olsen Trust Substantially Complied with Rule 69C Despite Its Failure to Provide Documents and Information Already in Grazer’s Possession.....	24
II. The Trial Court Properly Found that the Equities of the Case Further Supported Its Ruling.....	26
CONCLUSION.....	29

TABLE OF AUTHORITIES

Utah Cases

<i>Bailey v. Bayles</i> , 2002 UT 58, ¶ 10, 52 P.3d 1158.....	27
<i>Brockbank v. Brockbank</i> , 32 P.3d 990 (Utah App. 2001).....	27
<i>Huston v. Lewis</i> , 818 P.2d 531 (Utah 1991)	21
<i>Luddington v. Bodenvest Ltd.</i> , 855 P.2d 204 (Utah 1993).....	21
<i>Mollerup v. Storage Sys. Int’l</i> , 569 P.2d 1122 (Utah 1977).....	26
<i>Pender v. Dowse</i> , 265 P.2d 644 (Utah 1954).....	28
<i>Pyper v. Bond</i> , 2009 UT App. 331, ¶ 10, 224 P.3d 713.....	26, 27, 28
<i>Springer v. Springer</i> , 853 P.2d 888 (Utah 1993)	20
<i>Tech-Fluid Servs., Inc. v. Gavilan Operating Inc.</i> , 787 P.2d 1328 (Utah App. 1990).....	18, 20
<i>United States v. Loosley</i> , 551 P.2d 506 (Utah 1976)	20, 21, 23, 25, 26
<i>Young v. Schroeder</i> , 37 P.252 (Utah 1894).....	26

Statutes

<i>Utah Code Ann. § 78B-6-906</i>	7
---	---

Rules

<i>Utah Rule of Civil Procedure 69C</i>	7, 11, 13, 15, 16, 18-21, 23-26
---	---------------------------------

STATEMENT OF JURISDICTION

The Utah Court of Appeals received this case by transfer from the Utah Supreme Court. Jurisdiction is proper in this case under Utah Code section 78A-4-103(2)(j). *See* Utah Code Ann. § 78A-4-103(2)(j).

CONSTITUTIONAL OR STATUTORY PROVISIONS

The following statute and rule are of central importance to this appeal:

Utah Code Section 78B-6-906. Right of redemption – Sales by parcels – Of land and water stock.

- (1) Sales of real estate under judgments of foreclosure of mortgages and liens are subject to redemption as in case of sales under executions generally.
- (2) In all cases where the judgment directs the sale of land, together with shares of corporate stock evidencing title to a water right used, intended to be used, or suitable for use, on the land, the court shall equitably apportion the water stock to the land. If the court divides the land into individual parcels for sale, the water stock may also be divided and applied to each parcel. The land and water stock in each parcel shall be sold together, and for the purpose of the sale shall be regarded as real estate and subject to redemption as previously specified.
- (3) In all sales of real estate under foreclosure the court may determine the parcels and the order in which the parcels of property shall be sold.

Utah R. Civ. P. 69C. Redemption of real property after sale.

(a) *Right of redemption.* Real property may be redeemed unless the estate is less than a leasehold of a two-years' unexpired term, in which case the sale is absolute.

(b) *Who may redeem.* Real property subject to redemption may be redeemed by the defendant or by a creditor having a lien on the property junior to that on which the property was sold or by their successors in interest. If the defendant redeems, the effect of the sale is terminated and the defendant is restored to the defendant's estate. If the property is

redeemed by a creditor, any other creditor having a right of redemption may redeem.

(c) *How made.* To redeem, the redemptioner shall pay the amount required to the purchaser and shall serve on the purchaser:

(c)(1) a certified copy of the judgment or lien under which the redemptioner claims the right to redeem;

(c)(2) an assignment, properly acknowledged if necessary to establish the claim; and

(c)(3) an affidavit showing the amount due on the judgment or lien.

(d) *Time for redemption.* The property may be redeemed within 180 days after the sale.

(e) *Redemption price.* The price to redeem is the sale price plus six percent. The price for a subsequent redemption is the redemption price plus three percent. If the purchaser or redemptioner files with the county recorder notice of the amounts paid for taxes, assessments, insurance, maintenance, repair or any lien other than the lien on which the redemption was based, the price to redeem includes such amounts plus six percent for an initial redemption or three percent for a subsequent redemption. Failure to file notice of the amounts with the county recorder waives the right to claim such amounts.

(f) *Dispute regarding price.* If there is a dispute about the redemption price, the redemptioner shall within 20 days of the redemption pay into court the amount necessary for redemption less the amount in dispute and file and serve upon the purchaser a petition setting forth the items to which the redemptioner objects and the grounds for the objection. The petition is deemed denied. The court may permit discovery. The court shall conduct an evidentiary hearing and enter an order determining the redemption price. The redemptioner shall pay to the clerk any additional amount within seven days after the court's order.

(g) *Certificate of redemption.* The purchaser shall promptly execute and deliver to the redemptioner, or the redemptioner to a subsequent redemptioner, a certificate of redemption containing:

(g)(1) a detailed description of the real property;

(g)(2) the price paid;

(g)(3) a statement that all right, title, interest of the purchaser in the property is conveyed to the redemptioner; and

(g)(4) if known, whether the sale is subject to redemption.

The redemptioner or subsequent redemptioner shall file a duplicate of the certificate with the county recorder.

(h) *Conveyance.* The purchaser or last redemptioner is entitled to a conveyance upon the expiration of the time permitted for redemption.

(i) *Rents and profits, request for accounting, extension of time for redemption.*

(i)(1) Subject to a superior claim, the purchaser is entitled to the rents of the property or the value of the use and occupation of the property from the time of sale until redemption. Subject to a superior claim, a redemptioner is entitled to the rents of the property or the value of the use and occupation of the property from the time of redemption until a subsequent redemption. Rents and profits are a credit upon the redemption price.

(i)(2) Upon written request served on the purchaser before the time for redemption expires, the purchaser shall prepare and serve on the requester a written and verified account of rents and profits. The period for redemption is extended to five days after the accounting is served. If the purchaser fails to serve the accounting within 30 days after the request, the redemptioner may, within 60 days after the request, bring an action to compel an accounting. The period for redemption is extended to 15 days after the order of the court.

(j) *Remedies.*

(j)(1) *For waste.* A purchaser or redemptioner may file a motion requesting the court to restrain the commission of waste on the property. After the estate has become absolute, the purchaser or redemptioner may file an action to recover damages for waste.

(j)(2) *Failure to obtain property.*

(j)(2)(A) A purchaser or redemptioner who fails to obtain the property or who is evicted from the property because the judgment against the defendant is reversed or discharged may file a motion for judgment against the plaintiff for the purchase price plus amounts paid for taxes, assessments, insurance, maintenance and repair plus interest.

(j)(2)(B) A purchaser or redemptioner who fails to obtain the property or who is evicted from the property because of an irregularity in the sale or because the property is exempt may file a motion for judgment against the plaintiff or the defendant for the purchase price plus amounts paid for taxes, assessments, insurance, maintenance and repair plus interest. If the court enters judgment against the plaintiff, the court shall revive the plaintiff's judgment against defendant for the amount of the judgment against plaintiff.

(j)(2)(C) Interest on a judgment in favor of a purchaser or redemptioner is governed by Utah code Section 15-1-4. Interest on a revived judgment in favor of the plaintiff against the defendant is at the rate of the original judgment. The effective date of a revived judgment in favor of plaintiff against defendant is the date of the original judgment except as to an intervening purchaser in good faith.

(k) *Contribution and reimbursement.* A defendant may claim contribution or reimbursement from other defendants by filing a motion.

STATEMENT OF THE CASE

Allen Grazer obtained a judgment against Gordon A. Jones and Richard H. Barney related to the construction of a luxury home. As a result of the judgment, on January 17, 2008, pursuant to a writ of execution from Grazer, the Davis County Sheriff sold all of Jones' and Barney's interest in certain real property (approximately 5.25 acres) (the "Property") to the highest bidder. Lincoln Hobbs, Grazer's attorney and agent, was the highest bidder at the sheriff's sale and purchased the Property with a credit bid of only \$191.00, although the tax assessed value of the Property exceeded \$550,000.00. On July 7, 2008, Jones and the estate of Barney assigned their right to redeem the Property to the Olsen Trust.

On July 8, 2008, the Olsen Trust attempted to redeem the Property by delivering a copy of the assignment to Mr. Hobbs as well as a check payable to Mr. Hobbs as Grazer's agent in the amount of \$210.00 (\$191.00 plus 6% interest accruing from the date of the sheriff's sale). Although Mr. Hobbs had been representing Grazer in the case continuously since 2002, Mr. Hobbs rejected the tender, returning the documents and the check based on the asserted reason that he was not authorized to accept service of the redemption materials on Grazer's behalf.

Within a day of rejecting the tender, Mr. Hobbs, on behalf of Grazer, prepared and recorded a Notice of Amounts Paid and Owed (the “Notice”) with the Davis County Recorder’s Office claiming that Grazer was entitled to receive \$2,178.02 for costs incurred in conjunction with the sale along with an additional \$2,750 for use of the Property. Within a day after recording the Notice, Mr. Hobbs then informed the Olsen Trust that he was authorized to accept service of the redemption materials but did not inform it that he had recorded the Notice. On July 10, 2008, in a good-faith effort to remedy any perceived defect with the initial redemption attempt, the Olsen Trust delivered to Mr. Hobbs another copy of the assignment and a check made payable to Grazer in the amount of \$210.00. Four days later, on July 14, 2008, Mr. Hobbs again rejected the Olsen Trust’s attempt to redeem the Property, this time claiming that the redemption amount was inadequate because of the additional amounts listed in the Notice.

In the resulting litigation, Grazer filed a motion for summary judgment seeking to establish that the Olsen Trust’s redemption attempts were invalid because the Olsen Trust did not strictly comply with the redemption requirements of Rule 69C. The Olsen Trust filed a cross motion seeking to establish that its redemption attempts were valid and effective. Although the parties dispute the legal effect of the facts in this case, the underlying material facts are not in dispute. On June 16, 2009, the trial court entered its ruling denying Grazer’s motion for summary judgment and granting the Olsen Trust’s motion. The trial court held that under Utah law, the Olsen Trust need only substantially comply with the procedural requirements of Rule 69C(c), and that its delivery of the

proper amount within the redemption period to Grazer's agent and attorney, along with a copy of the pertinent assignment, substantially complied with those requirements. Grazer now appeals that ruling, seeking to overturn the trial court's determination that the Olsen Trust's redemption efforts were valid and effective. In so doing, Grazer is attempting to gain a windfall by obtaining a large and valuable piece of property for a mere \$191.00, while reducing his judgment against Jones by only that meager amount.

STATEMENT OF FACTS

1. Lincoln Hobbs has continually represented Allen Grazer in the pre-judgment and post-judgment proceedings in the above-captioned case from 2002 to the present time. (R. 6478, 6785.)

2. On January 17, 2008, pursuant to a writ of execution dated November 8, 2007, the Davis County Sheriff sold all of Gordon A. Jones' and the estate of Richard H. Barney's interest in certain real property (approximately 5.25 acres) located in Davis County, Utah (the "Property"), to the highest bidder. (R. 6478-79, 6785.)

3. Acting on behalf of Grazer, Mr. Hobbs was the highest bidder at the sheriff's sale and purchased the Property with a credit bid of \$191.00. (R. 6479, 6785.)

4. At the time Mr. Hobbs purchased the Property on behalf of Grazer for \$191.00, the Property had a tax-assessed value of over \$550,000. (R. 6336, 6379-85.)

5. On July 1, 2008, Mr. Hobbs, continuing to represent Grazer, filed a motion to compel discovery from Cheryl Gudmundson, another party in the underlying lawsuit. (R. 6250.)

6. On July 7, 2008, Jones/Barney executed an Assignment of Redemption Rights (the “Assignment”), assigning their rights to redeem the Property to the Olsen Trust. (R. 6496-500.)

7. On July 8, 2008, within the 180-day redemption period set forth in Rule 69C(d) of the Utah Rules of Civil Procedure, the Olsen Trust attempted to redeem the Property by delivering to Grazer’s counsel: (1) a copy of the Assignment; (2) a check made payable to Grazer’s counsel in the amount of \$210.00, purporting to cover the \$191.00 purchase price plus six percent (6%) annual interest accruing from the date of the sheriff’s sale; and (3) a certificate of redemption. The Olsen Trust requested that Grazer sign and acknowledge the certificate of redemption and return the executed certificate no later than July 11, 2008. (R. 6479, 6786, 6491-504.)

8. Subsequently, on July 8, 2008, Grazer’s counsel, Mr. Hobbs, returned the documents and the check to the Olsen Trust rejecting its tender. By letter of same date, Grazer’s counsel informed the Olsen trust that his reason for rejecting the tender of the documents and check was that he was not authorized to accept service of the redemption materials on Grazer’s behalf and that the check was made payable to him, rather than Grazer. (R. 6931, 6479-80, 6786-87.)

9. On July 9, 2008, Mr. Hobbs, on behalf of Grazer, recorded a Notice of Amounts Paid and Owed with the Davis County Recorder’s Office, Utah, in which Grazer claimed that he had incurred and paid \$2,178.02 in conjunction with the sale along with an additional \$2,750.00, due to the use of the Property after the date of the sheriff’s sale. (R. 6480, 6787, 6463.)

10. In a good-faith effort to remedy any perceived defect with its redemption efforts, on July 10, 2008, again within the 180-day redemption period, the Olsen Trust attempted to redeem the property for a second time. The Olsen Trust, after being informed that Grazer's counsel now had authorization to accept service of the redemption materials, delivered a copy of the Assignment, a check made payable to Grazer in the amount of \$210.00, and a certificate of redemption. (R. 6932, 6480, 6787-88.)

11. On July 14, 2008, Mr. Hobbs again rejected the Olson Trust's second attempt to redeem the Property and, for the first time, indicated that he did not believe the \$210.00 redemption amount was adequate. (R. 6932, 6480, 6788.)

12. Upon subsequently discovering that Mr. Hobbs had recorded the Notice, and recognizing a dispute in the amount claimed by Grazer, counsel for Jones and the Olsen Trust submitted a Request for Accounting of Rents and Profits to Grazer on July 15, 2008, asking Grazer for a written and verified account of rents and profits with respect to the Property during the redemption period, and a Petition for Establishment of Redemption Price on August 15, 2008. (R. 6480-81, 6788-89.)

13. On September 3, 2008, Grazer filed a Motion to Strike Petition for Establishment of Redemption Price, claiming that the Olsen Trust's Petition for Establishment of Redemption Price was untimely filed, which the Court granted on December 12, 2008. (R. 6316, 6438, 6932.)

14. On January 9, 2009, Grazer filed a motion for partial summary judgment regarding the validity of the attempted redemptions, and on February 9, 2009, the Olsen

Trust filed a cross motion for partial summary judgment on the same issue. (R. 6466, 6507.)

15. On June 16, 2009, the trial court entered its ruling denying Grazer's motion for partial summary judgment and granting the Olsen Trust's cross motion, confirming the validity of the attempted redemption of the Property. (R. 6927, 6971.)

SUMMARY OF ARGUMENT

At issue is whether the Olsen Trust's redemption attempts were valid and effective. The trial court properly determined that they were. In his brief, Grazer has asserted that strict compliance with the requirements of Rule 69C is required under Utah law, but he fails to distinguish between the procedural components of Rule 69C and the substantive components of the same, citing in support of his strict compliance argument cases dealing with the substantive redemption requirements of timing and amount. Grazer's argument misses the mark because it is undisputed that the Olsen Trust attempted to redeem the property by delivering the proper amount within the time period required, and the only issue is whether the Olsen Trust complied with the procedural requirements of Rule 69C(c) when it timely delivered the proper amount. It is well-settled under Utah law that substantial compliance with the procedural requirements of Rule 69C(c) is sufficient for effective redemption. The trial court properly held that the Olsen Trust's delivery of the assignment to Grazer's attorney and agent, along with a check in the proper amount made payable to the same, all within the redemption period, constituted substantial compliance with the requirements of Rule 69C(c).

First, it is undisputed that at the time of the redemption attempt on July 8, 2008, the proper redemption amount was \$210.00 (\$191.00 plus 6% interest from the date of the sale). Mr. Hobbs' rejection of the redemption attempt based on the assertion that he was not authorized to accept delivery of the same and Mr. Hobbs' subsequent recordation of the Notice were improper and ineffective in increasing the redemption amount. To the extent additional amounts were actually incurred by Grazer, such amounts were waived under Rule 69C(e) due to Grazer's failure to record a notice of the same prior to redemption. Consequently, the trial court correctly determined that the Olsen Trust's tender of the proper amount to Grazer's agent constituted delivery to Grazer.

Second, Grazer's challenge of the redemption amount based on the Olsen Trust's failure to deliver a certified copy of Grazer's own judgment, as well as an affidavit showing the amount Grazer was due under his own judgment, seeks to elevate form over substance. Such requirements are clearly intended to apply to junior lien holders and therefore the trial court properly determined that the Olsen Trust substantially complied with Rule 69C(c).

Finally, the trial court properly determined that the equities in the case supported its finding that the Olsen Trust's redemption efforts were effective. (R. 6941.) Under Utah law, courts can properly consider the equities of the case in addressing issues of redemption. In fact, Utah law provides that a court may even extend the redemption period where the property was sold for a grossly inadequate price and there were irregularities in the conduct of the party benefited by the sale. In the instant case, the trial court found that Grazer would receive a windfall if he prevailed on his technical

arguments concerning the Olsen Trust's redemption attempts. Grazer paid only \$191.00 for approximately 5.25 acres of property that had a tax-assessed value of over \$550,000. In short, the price paid by Grazer was grossly inadequate. The very purpose of the redemption remedy is to discourage such low-balling. In addition, there were irregularities in the conduct of Grazer and/or his agent prior to the expiration of the redemption period. Namely, Grazer's attorney, who had been acting as Grazer's agent since 2002 in all matters relating to the Property (including its purchase), rejected the Olsen Trust's redemption attempt only quickly to file a Notice of Amounts Paid and Owed seeking to increase the redemption amount. After filing the Notice, Mr. Hobbs then notified the Olsen Trust that he was authorized to accept service, but did not disclose the fact that he had just filed the Notice seeking to increase the redemption price. Such conduct in conjunction with the grossly inadequate price paid by Grazer through his agent provided additional support for the trial court's ruling.

In short, the trial court properly ruled that the Olsen Trust had substantially complied with the redemption requirements and its redemption attempt was effective. This ruling is consistent with settled Utah law that where a debtor, acting in good faith, has substantially complied with the procedural requirements of the rule in such a manner that the purchasing party is not injured or adversely affected, and is getting what he is entitled to, the law will not aid in depriving the mortgagor of his property for merely falling short of exact compliance with technicalities.

ARGUMENT

The trial court properly held that the Olsen Trust's July 8 redemption attempt substantially complied with the redemption requirements and was, therefore, effective. In his brief, Grazer asserts that the timing and amount of a redemption payment are substantive rights that demand strict compliance with the requirements of Rule 69C. Grazer's argument misses the mark, however, because the real issue is not the timing or the amount of the redemption payment made by the Olsen Trust. The undisputed facts demonstrate that the Olsen Trust delivered the proper amount within the redemption period to Grazer's agent and attorney, Mr. Hobbs. Therefore, the real issue on appeal is whether the Olsen Trust substantially complied with the procedural redemption requirements when it made its redemption attempt. As demonstrated below, the trial court properly ruled that it did.

I. The Olsen Trust's July 8, 2008 Redemption Attempt Complied, or at a Minimum, Substantially Complied with the Rule 69C Redemption Requirements.

Rule 69C states in relevant part:

(b) *Who may redeem.* Real property subject to redemption may be redeemed by the defendant . . . or by their successors in interest.^[1] . . .

(c) *How made.* To redeem, the redemptioner shall pay the amount required to the purchaser and shall serve on the purchaser:

(c)(1) a certified copy of the judgment or lien under which the redemptioner claims the right to redeem;

(c)(2) an assignment, properly acknowledged if necessary to establish the claim; and

(c)(3) an affidavit showing the amount due on the judgment or lien.

¹ “‘Successors in interest’ clearly includes assignees.” *Tech-Fluid Servs., Inc. v. Gavilan Operating Inc.*, 787 P.2d 1328, 1331 n.3 (Utah App. 1990).

(d) *Time for redemption.* The property may be redeemed within 180 days after the sale.

(e) *Redemption price.* The price to redeem is the sale price plus six percent. . . . If the purchaser or redemptioner files with the county recorder notice of the amounts paid for taxes, assessments, insurance, maintenance, repair or any lien other than the lien on which the redemption was based, the price to redeem includes such amounts plus six percent for an initial redemption or three percent for a subsequent redemption. Failure to file notice of the amounts with the county recorder waives the right to claim such amounts.

(g) *Certificate of redemption.* The purchaser shall promptly execute and deliver to the redemptioner . . . a certificate of redemption

(h) *Conveyance.* The purchaser or last redemptioner is entitled to a conveyance upon the expiration of the time permitted for redemption.

Utah R. Civ. P. 69C(b)-(h).

A close review of the facts at issue in this case reveals that while the parties may dispute the legal effect given to the facts, the underlying events, or material facts, are not disputed. Thus, the trial court did not err when it entered summary judgment. There is no dispute that the Olsen Trust timely served on Grazer's counsel the appropriate documents and a check payable to his counsel for the sales price plus six percent. Indeed, on July 8, 2008 (within the 180-day redemption period), the Olsen Trust delivered a copy of the assignment whereby Jones/Barney had assigned the redemption right to the Olsen Trust along with a \$210.00 check and requested that Grazer execute and return a Certificate of Redemption as required under Rule 69C(g). Furthermore, there is no dispute that on July 8, 2008, the proper redemption price was \$210.00, because, as of July 8, 2008, Grazer had not filed with the Davis County Recorder notice of any additional costs (as required by Rule 69C(e)).

The only issue before the trial court on summary judgment was whether delivering the redemption documents and check to Grazer's counsel complied, or substantially complied, with Rule 69C(c). The trial court properly ruled that it did.

The Utah Supreme Court has held that:

rules and statutes dealing with redemption are regarded as remedial in character and should be given liberal construction and application to permit a property owner who can pay his debts to do so, and thus make his creditor whole, and save his property. Therefore, ***if a debtor, acting in good faith, has substantially complied with the procedural requirements of the rule*** in such a manner that the lender mortgagee is not injured or adversely affected, and is getting what he is entitled to, ***the law will not aid in depriving the mortgagor of his property for mere falling short of exact compliance with technicalities.***

United States v. Loosley, 551 P.2d 506, 508 (Utah 1976) (emphasis added) (quoted in and relied upon by *Tech-Fluid Services, Inc. v. Gavilan Op. Inc.*, 787 P.2d 1328, 1331 n.3 (Utah Ct. App. 1990)).

In his brief, Grazer asserts that “[s]ince 1991, Utah case law has emphasized that substantive rights of a purchaser in the redemption process require strict compliance with the rules.” [Appellant Brief at 37.] Presumably, Grazer selects this cutoff date in order to exclude the relevant cases of *Loosley* and *Tech Fluid Services*, under which the courts held “that substantial compliance is the proper test under Rule 69(f)(2) [the substantive predecessor to Rule 69C(c)].” In fact, even the post-1991 cases cited by Grazer reaffirm that substantial compliance with the provisions of 69C(c) is sufficient. For example in *Springer v. Springer*, 853 P.2d 888, 891 (Utah 1993), the Utah Supreme Court stated that “[t]his court has allowed substantial compliance with the requirements of rule 69(f)(2) [predecessor to Rule 69C(c)], which prescribes the process by which redemption is made,

United States v. Loosley, 551 P.2d 506, 508 (Utah 1976), but not with rule 69(f)(3) [predecessor to Rule 69(d) and (e)].” Similarly, in *Huston v. Lewis*, 818 P.2d 531, 535 n.13 (Utah 1991), the Utah Supreme Court cited *Loosley* in favor of the proposition that “not all redemption procedures can be characterized as substantive in all circumstances,” and “[i]n dealing with procedures that do not affect substantive rights, substantial compliance is generally sufficient.”

In the instant case, because it is undisputed that the Olsen Trust tendered the proper amount to Grazer’s agent, Mr. Hobbs, within the time period required by Rule 69C, and that the Olsen Trust otherwise substantially complied with the requirements of Rule 69C(c), the trial court was correct in determining that the Olsen Trust’s efforts to redeem the Property were valid and effective.

A. The Rejection by Mr. Hobbs of the Olsen Trust’s Notice of Redemption and Tendered Check and the Subsequent Recording of the Notice of Amounts Paid and Owed Was Improper and Should Not Be Effective.

General agency principles allow an agent to act for a principal where the agent has actual or apparent authority to do so. *See, e.g., Luddington v. Bodenvest Ltd.*, 855 P.2d 204, 208 (Utah 1993) (stating that apparent authority exists where conduct of the principal, “reasonably interpreted, causes the third person to believe that the principal consents to have the act done on his behalf by the person purporting to act for him” (quoting RESTATEMENT (SECOND) OF AGENCY § 27)). Here, it is difficult to understand how Grazer can claim that by sending the redemption notice and check to Grazer’s counsel the Olsen Trust did not comply with Rule 69C. It is also difficult to comprehend

how Mr. Hobbs can claim he did not have authority to accept the papers and check. The case history demonstrates that Grazer authorized Mr. Hobbs to act on his behalf in the lawsuit, including post-judgment matters.

Mr. Hobbs represented Grazer and acted as his agent throughout this case. Mr. Hobbs obtained the initial judgment against Jones. Mr. Hobbs obtained a writ of execution to have Jones' property sold. Mr. Hobbs attended the execution sale of the Property. Mr. Hobbs bid on the Property. Mr. Hobbs purchased the property on behalf of Grazer. Mr. Hobbs continued to represent Grazer in efforts to collect on Grazer's judgment by filing a motion to compel as late as July 1, 2008. Yet, when the Olsen Trust attempted to exercise its statutory right, as properly assigned to it by Jones, by notifying Grazer through his attorney of record on July 8, 2008 of the redemption, providing proof of the assignment, and tendering a check for the proper amount, Mr. Hobbs claimed that he did not have authority to accept service on behalf of his client.

Even more troubling, after refusing to accept service—because he claimed not to have authority from his client to do so—Mr. Hobbs immediately went to the Davis County Recorder's Office on July 9, 2008, on behalf of his client, and recorded the Notice. Then, without notifying the Olsen Trust or Jones of the Notice, Mr. Hobbs simply told the Olsen Trust that he could now accept service for Grazer of the Olsen Trust's redemption papers. And, in a final blow, Mr. Hobbs subsequently claimed that the amount he received from the Olsen Trust on July 10, 2008 was ineffective because it did not reflect the amount in the Notice of Amounts Paid and Owed, which he first recorded on July 9, 2008.

The facts in *Loosley* are remarkably similar to those in the instant case. There, after having his property sold at a foreclosure sale, Loosley assigned his rights to another party who exercised Loosley's redemption rights by delivering a check to the purchaser's attorney. *See id.* at 507. The purchaser's attorney returned the check claiming that all of the necessary documents were not included and the check should have been delivered to the purchaser himself. *See id.* The court found that the purchaser's reasons for rejecting the attempted redemption were excuses to justify a preconceived desire to refuse to accept the tender and release the mortgage and that the purchaser was not justified in refusing to accept the tendered payment and was obligated to release the mortgage. *See id.* at 508. Similarly, the trial court in the instant case properly determined that the Olsen Trust substantially complied with Rule 69C and its redemption efforts were effective.

B. Grazer Waived Any Claim for Additional Redemption Amounts Beyond What the Olsen Trust Originally Tendered.

Because the Olsen Trust's July 8, 2008 redemption efforts at least substantially complied with Rule 69C, the trial court properly concluded that Grazer's recording of the Notice was untimely and had no effect on the redemption amount. Rule 69C(e) makes clear that "[f]ailure to file notice of [such] amounts with the county recorder waives the right to claim such amounts." Utah R. Civ. P. 69C(e). When the Olsen Trust tendered a check for the sale price plus 6% and submitted the documents required by Rule 69C(c) to Grazer's counsel on July 8, 2008, Grazer had not given notice of any additional amounts paid and owed. Only after the Olsen Trust redeemed the Property did Grazer file its Notice. By waiting until after the Olsen Trust redeemed the Property to file the Notice,

Grazer waived his right to claim such amounts. Therefore, Grazer has no legal basis for disputing the redemption price. Any other result would completely nullify the effect of the language contained in Rule 69C(e), which clearly provides for waiver of claims for additional amounts if proper notice is not recorded prior to redemption.

C. The Olsen Trust Substantially Complied with Rule 69C Despite Its Failure to Provide Documents and Information Already in Grazer's Possession.

Grazer also attempts to attack the Olsen Trust's redemption efforts by claiming he did not receive all of the required documentation. Grazer asserts that because the Olsen Trust failed to provide a certified copy of his own judgment as well as an affidavit showing the amount due Grazer on his own judgment, the Olsen Trust failed to substantially comply with the requirements of Rule 69C(c). The trial court correctly rejected this argument.

Rule 69C provides in relevant part as follows:

(c) *How made.* To redeem, the redemptioner shall pay the amount required to the purchaser and shall serve on the purchaser:

(c)(1) a certified copy of the judgment or lien under which the redemptioner claims the right to redeem;

(c)(2) an assignment, properly acknowledged if necessary to establish the claim; and

(c)(3) an affidavit showing the amount due on the judgment or lien.

However, a careful review of Rule 69C(b) demonstrates that Rule 69C sets forth requirements for redemption by either a defendant (and its assignee) or by a junior lien holder.² The requirements that Grazer claims were not met (providing a copy of the

² Rule 69C(b) provides: "*Who may redeem.* Real property subject to redemption may be redeemed by the defendant or by a creditor having a lien on the property junior to that on which the property was sold or by their successors in interest. If the defendant redeems,

judgment and an affidavit of the amount owing on the lien) clearly apply to a junior lien holder and not to the defendant. It would be illogical for the Olsen Trust to have provided Grazer with a copy of Grazer's own judgment or to have secured an affidavit showing the amount Grazer claimed he was owed on his own judgment. At the time of the July 8 redemption, Grazer had already executed on several pieces of real property pursuant to his judgment, making Grazer the only one who really knew how much he was owed under his judgment. The only requirement necessary for the assignee of the defendant is to provide service of a properly-acknowledged assignment. There is no dispute that such a document was provided to Grazer's agent on July 8, 2008, in good faith compliance with 69C(c). Moreover, even if Rule 69C(c) required the Olsen Trust to provide such documents, its failure to do so would not have affected a substantive right or caused any prejudice to Grazer, especially in light of the fact that he already possessed the information. To allow Grazer to invalidate the redemption effort based on the Olsen Trust's failure to provide these documents would truly elevate form over substance.

In sum, the Olsen Trust's efforts warrant a "liberal construction" of the redemption rule under *Loosley* because: (1) Jones/Barney and the Olsen Trust acted in good faith; (2) the Olsen Trust complied, or substantially complied, with the procedural requirements of Rule 69C; (3) Grazer has not cited and cannot demonstrate any injury or adverse effect that he would sustain if his attorney accepted service of the July 8, 2008 materials; and (4) Grazer is receiving the redemption price to which he is entitled under the effect of the sale is terminated and the defendant is restored to the defendant's estate. If the property is redeemed by a creditor, any other creditor having a right of redemption may redeem."

the Rule. Therefore, the Olsen Trust has “substantially complied with the procedural requirements of the rule [Rule 69C]” so that the Olsen Trust should not be deprived of its property “for mere falling short of exact compliance with technicalities.” *Loosley*, 551 P.2d at 508.

II. The Trial Court Properly Found that the Equities of the Case Further Supported Its Ruling.

In the proceedings below, the trial court found additional support for its ruling in the equities of the case, particularly the fact that Grazer would obtain a large and unjustified windfall if the Olsen Trust’s good faith efforts to redeem the Property were rejected on the basis of a technicality. Utah courts have long considered equity when evaluating redemption of property.

For example, “[i]t is long established in Utah law that ‘a court, sitting in equity, may in appropriate instances extend the [redemption] period.’” *Pyper v. Bond*, 2009 UT App 331, ¶ 10, 224 P.3d 713 (quoting *Mollerup v. Storage Sys. Int’l*, 569 P.2d 1122, 1124 (Utah 1977)). In *Pyper*, a case upon which Grazer heavily relies in his brief, the Utah Court of Appeals applied the two-part test set forth in the seminal case *Young v. Schroeder*, 37 P. 252 (Utah 1894), in order to determine that the extension of a redemptive period was proper: (1) gross inadequacy of price; and (2) irregularities attending the sale. *Pyper*, 2009 UT App 331 at ¶ 11. The *Pyper* court held that the “irregularities” required for the second element of the *Young* test. were not limited to irregularities in the sale itself, but could also relate to “the purchasers’ conduct after the sale. In particular, prior to the expiration of the redemption period.” *Id.* at ¶ 14.

In the instant case, both elements of the *Young* test set forth in *Pyper* are easily met, justifying an equitable extension of the redemption period.³ First, Grazer purchased the Property through his agent for a grossly inadequate price – Grazer paid a mere \$191.00 for approximately 5.25 acres. Significantly, in *Pyper*, the court found that “the sale of the Pyper’s \$75,000 of equity in the property for \$329 both ‘shocks the conscience of an impartial mind’ and was ‘[such a] sacrifice of [Pyper’s] property . . . that an honest man would hesitate to take advantage of it.’” *Id.* at ¶ 12 n.5 (citations omitted). The gross inadequacy of price is even more egregious in this case. Grazer purchased the Property at the sheriff’s sale for a ridiculously low amount of \$191.00, when the tax-assessed value of the Property was over \$550,000.00. If the trial court had allowed Grazer to block the redemption of the Property, only \$191.00 would have been credited against the Jones/Barney judgment, and Grazer would have received an enormous windfall. This would have defeated the very purpose of the redemption remedy, which is to “provide a check on bids that are well below market value.” *Brockbank v. Brockbank*, 32 P.3d 990, 993 (Utah App. 2001) (citing with approval an Illinois appellate court case holding that the purpose of that state’s redemption statute “was . . . to secure for the debtor the highest price possible for his property and the satisfaction of as many of his

³ Although, in considering the equities below, the trial court did not expressly rely on the doctrine of equitable extension, “[i]t is well settled that an appellate court may affirm the judgment appealed from ‘if it is sustainable on any legal ground or theory apparent on the record.’” *Bailey v. Bayles*, 2002 UT 58, ¶ 10, 52 P.3d 1158. This is true “even though such ground or theory differs from that stated by the trial court to be the basis of its ruling or action.” *Id.*

debts as possible and “to compel creditors to bid a fair and adequate price for the debtor’s property, and to prevent them from bidding a small sum”).

The second element of the test set forth by the *Pyper* court is also met in the instant case; namely, the presence of irregularities in the conduct of Grazer and his agent prior to the expiration of the redemption period. Because of the extreme inadequacy of the price paid by Grazer, the Olsen Trust need only show “slight circumstances of unfairness in the conduct of the party benefited by the sale to raise the presumption of fraud.” *Pyper*, 2009 UT App 331, ¶ 17 (quoting *Pender v. Dowse*, 265 P.2d 644, 648 (Utah 1954)). The refusal by Grazer’s agent to accept tender of the proper redemption amount under the assertion that he was not authorized to accept service of such items, only to immediately record a notice of additional costs without informing the Olsen Trust and then notify the Olsen Trust the following day that he was authorized to accept service certainly constitutes, at the very least, “slight circumstances of unfairness in the conduct of the party benefited by the sale.” In light of the gross inadequacy of price, such circumstances are sufficient to meet the second element of the test set forth in *Pyper*.

Accordingly, the equities of the case also militate in favor of the trial court’s ruling. To the extent Grazer is prevented from gaining the six-figure windfall he hoped to gain by bidding a ridiculously low amount for the Property at the Sheriff’s Sale, Grazer brought this predicament upon himself when he voluntarily decided to buy the Property at a fraction of its actual worth. *See id* at 993 n.3 (recognizing that “[t]he judgment creditor always has it in his power to make the land sold under execution of his judgment bring its real value, so that, if a redemption is effected, he cannot be hurt”). Thus, Grazer

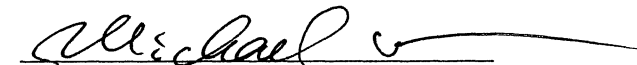
should not be rewarded for his own decision to provide a low-ball bid at the Sheriff's Sale.

CONCLUSION

For the reasons set forth above, the Appellees respectfully request that this Court affirm the trial court's ruling that the Olsen Trust's redemption attempt was effective, and grant such further relief as this Court finds appropriate.

DATED this 14 day of June, 2010.

PARR BROWN GEE & LOVELESS

A handwritten signature in black ink, appearing to read "Michael", followed by a long horizontal flourish.

Joseph M.R. Covey

Michael T. Hoppe

*Attorneys for Gordon Jones and his Redemption Right
Assignee, Ludvig D. Olsen and Jackie M. Olsen, as
trustees of the Ludvig D. Olsen and Jackie M. Olsen
Trust*

The undersigned hereby certifies that on June 1, 2010, a true and correct copy of the **BRIEF OF APPELLEE** was served via U.S. Mail postage prepaid on the following:

LINCOLN W. HOBBS
MARGARET H. OLSON
JULIE LADLE
HOBBS & OLSON, L.C.
466 EAST 500 SOUTH, #300
SALT LAKE CITY, UT 84111

