

1989

LMV Leasing, Inc. v. Roy W. Mallory, Val Conlin, Barbara Conlin, Tubber T. Okuda, Mary Y. Okuda : Reply Brief

Utah Court of Appeals

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D. Frank Wilkins; Haley and Stolebarger; Kenneth M Histake; Attorneys for Appellants.

Weston L. Harris; Paul A. Hoffman; Watkiss and Saperstein; Attorneys for Respondent.

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BRIEF

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IN THE COURT OF APPEALS OF THE STATE OF UTAH

890504-CA

LMV LEASING, INC., :

Plaintiff/Respondent, :

vs. :

ROY W. MALLORY, VAL CONLIN, :

BARBARA CONLIN, TUBBER T. :

OKUDA, MARY Y. OKUDA, :

Defendants/Appellants : Case No. 890504-CA

No. 14b

TUBBER T. OKUDA, MARY Y. OKUDA, :

VAL J. CONLIN, and :

BARBARA CONLIN, :

Third-Party Plaintiffs, :

vs. :

MAUREEN MALLORY, :

Third-Party Defendant. :

REPLY BRIEF OF THE APPELLANTS

Appeal from a Judgment and Ruling
of the Third Judicial District Court
In and For Salt Lake County, State of Utah
Honorable Pat B. Brian, Judge

Weston L. Harris, Esq.
Paul A. Hoffman, Esq.
WATKISS & SAPERSTEIN
310 South Main, Suite 1200
Salt Lake City, Utah 84101
Attorneys for Plaintiff
and Respondent

D. Frank Wilkins, Esq.
HALEY & STOLEBARGER
175 South Main, Suite 1000
Salt Lake City, Utah 84111
Co-counsel for
Defendants and Appellants

Kenneth M. Hisatake, Esq
1825 South Seventh East
Salt Lake City, Utah 84105
Co-counsel for
Defendants and Appellants

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Salt Lake City, Utah 84101
Attorneys for Plaintiff
and Respondent

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HALEY & STOLEBARGER
175 South Main, Suite 1000
Salt Lake City, Utah 84111
Co-counsel for
Defendants and Appellants

Kenneth M. Hisatake, Esq.
1825 South Seventh East
Salt Lake City, Utah 84105
Co-counsel for
Defendants and Appellants

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REPLY BRIEF OF APPELLANT

INTRODUCTION

Pursuant to Rule 24(c), Rules of Utah Court of Appeals, defendants' Reply Brief addresses only that portion of Plaintiff's brief which has not been addressed by Defendants' original brief.

STATEMENT OF FACTS

The Statement Of Facts in this Reply Brief will be limited to the issue of waiver which plaintiff raises in its brief.

The trial court initiated a telephone conference between

the court, counsel for plaintiff and counsel for the defendants on March 14, 1989. The court stated that the issues of damages would be disposed of by affidavits and memoranda rather than by trial. Prior to this announcement, there had been no prior discussion between the trial court and the attorneys regarding the disposition of the issues on damages by affidavit and memoranda. The trial court ordered that the affidavits and memoranda from plaintiff and defendants be delivered to the court not later than April 1, 1989, at 12:00 noon. The trial court did not inquire whether the proposed manner of disposition of the issues on damages was acceptable to the parties.

Defendants question the propriety of the trial court's order directing the defendant to submit the issues of damages by affidavit and memoranda and further question the propriety of the trial court order directing defendants to simultaneously submit their affidavits and memorandum on damages with plaintiff's memorandum and affidavit.

No minute entry or any other record was made by the court of the telephone conferences or the trial court's order that the issues on damages be submitted on affidavits and memoranda. Therefore, counsel for defendants will supplement the record on appeal by affidavit pursuant to Rule 11(g), Rules of the Utah Court of Appeals.

Plaintiff contends that defendants waived any error the trial court may have committed on the disposition of the issues on damages because defendants did not object to the trial court's

order that the issue of damages be disposed of by simultaneous filing of memoranda and affidavits by plaintiff and defendants.

SUMMARY OF ARGUMENT

I. DEFENDANTS DID NOT WAIVE THEIR RIGHT TO TRIAL ON THE ISSUES OF DAMAGES BY FAILING TO OBJECT TO THE TRIAL COURT'S ORDER THAT THE ISSUES OF DAMAGES BE DISPOSED OF BY AFFIDAVITS AND MEMORANDA.

II. DEFENDANT DID NOT WAIVE THEIR RIGHT TO APPEAL THE TRIAL COURT'S ORDER THAT AFFIDAVITS ON DAMAGES BE SUBMITTED SIMULTANEOUSLY WITH PLAINTIFF'S AFFIDAVIT.

ARGUMENT

POINT I. THE DEFENDANTS DID NOT WAIVE THEIR RIGHT TO A TRIAL BY FAILING TO OBJECT TO THE TRIAL COURT'S ORDER THAT THE ISSUES OF DAMAGES BE DISPOSED OF BY AFFIDAVITS AND MEMORANDA.

Defendants contend that the trial court deprived them of their right to trial on the issues of damages in violation of their due process rights when the trial court ordered that the issues of damages be disposed of by affidavits and memoranda which were simultaneously due on April 1, 1989 at 12:00 noon.

Counsel for plaintiff assert that defendants waived their right to a trial on the issues of damages because no objection was interposed when the trial court ordered the damage issues be submitted by affidavits and memoranda. In support of its position, plaintiff cites Salt Lake City Corp. v. James Construction, 761 P.2d 42, Hobelman Motors, Inc. v. Allred, 685 P.2d 544, and Strange v. Ostlund, 594 P.2d 877.

Two of the cases cited by plaintiff in its brief on this particular issue pertain to waivers for failure to object to an improper affidavit or failure to move to strike an improper affidavit. Defendants have no quarrel with that statement of the law. Rule 56, Utah Rules of Civil Procedure, and Rule 4-501, Utah Code of Judicial Administration, both impose upon a party, an affirmative duty to respond to affidavits or risk the court's acceptance of the information contained in the affidavits as true. Plaintiff cites no cases which support plaintiff's assertion that defendants were obligated to object to the trial court's Order directing the issue of damages to be submitted by memoranda and affidavits to preserve the issue for appeal. In essence, plaintiff contends the defendants were obligated to object to the trial court's decision to deprive defendants of their right to trial on the issue of damages.

Plaintiff also relies upon Salt Lake City Corp. v. James Construction to support their claim that defendants waived their right to trial on the issues of damages because they did not object to the trial court's order. In Salt Lake City Corp. v. James Construction, Utah Supreme Court was asked to rule upon a claim which had not been pled nor tried to the trial court. The Utah Supreme Court refused to review that issue since it was raised on appeal for the first time. That statement of the law is inapplicable to the situation before this Court.

In cases where there is a question as to whether a party should be afforded the opportunity to have a trial, the Utah

Supreme Court has held that any doubts should be resolved in favor of granting the party the right to trial. In Rivas v. Pacific Finance Company, 16 Utah 2d 183, 397 P.2d 990, Justice Crockett stated:

". . . The desirable objective in administering justice under the law is for the court to see that any person who has a cause with any merit whatsoever is afforded the privilege of a trial. And where doubts exist they should be resolved in favor of fulfilling that objective."

In this case, there is little doubt that defendants are entitled to a trial on at least the issues of damages.

POINT II. DEFENDANTS DID NOT WAIVE THEIR RIGHT TO APPEAL THE TRIAL COURT'S ORDER THAT AFFIDAVITS ON DAMAGES BE SUBMITTED SIMULTANEOUSLY WITH PLAINTIFF'S AFFIDAVIT.

Defendants contend that the trial court improperly placed the burden of proof of damages on defendants by requiring defendants to file their affidavits on damages simultaneously with plaintiff. In effect Defendants were required to defend against plaintiff's proof of damages without the benefit of plaintiff's proof of damages. As the circumstances developed, plaintiff filed its Memorandum and Affidavit approximately two (2) weeks after the deadline set by the Court and after defendants filed their Affidavits and Memorandum.

Defendants relied, in part, on State v. Sorenson, 758 P.2d 466, (Utah, 1988) in which the Utah Supreme Court held that the trial court erred in finding the defendant guilty in absentia for consuming and possessing alcoholic beverages in the State of

Utah because defendant did not prove the consumption and possession did not occur in Utah. In that case, although counsel for defendant argued what he believed to be the State's burden of proof, he did not object to the trial court's ruling that defendant was obligated to disprove jurisdiction over the defendant or the matter before the court. The Utah Supreme Court nevertheless reversed the trial court's judgment for improperly shifting the burden of proof to defendant.

CONCLUSION


Defendants respectfully submit that the issues pertaining to the trial court's denial of trial on the issue of damages and the trial court's shifting of the burden of proof to the defendants are properly before this Court for review.

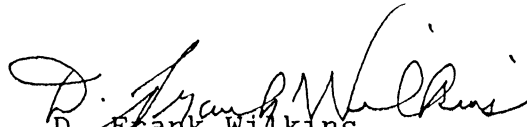
Even if the defendants were obligated to object to the trial court's order which deprived defendants of the right to trial on the issues on damages and failed to object to the trial court's order which shifted the burden of proof of damages to the defendants, the Utah Supreme Court has held that such failure is not necessarily fatal to appellants' appeal where justice dictates the relief be granted. The Utah Supreme Court has so held even when a specific rule dictates an objection be filed to preserve the issue for appeal. Williams v. Lloyd, 403 P.2d 166, (Utah, 1965).

Defendants respectfully submit that they did not waive their right to a trial on the issues of damages. The defendants further submit that they did not waive their right to appeal the trial court's improper shifting of the burden of proof.

Defendants request the Utah Court of Appeals remand this case to the District Court for trial on all issues.

Respectfully submitted,


Kenneth M. Hisatake


D. Frank Wilkins
Co-counsel for Appellants

CERTIFICATE OF MAILING

I hereby certify that I mailed four (4) true and accurate copies of the foregoing Reply Brief of Appellants, postage prepaid, to:

Weston L. Harris, Esq., and
Paul A. Hoffman, Esq.
WATKISS & SAPERSTEIN
310 South Main Street, Suite 1200
Salt Lake City, Utah 84101
Attorneys for Plaintiff

this 2nd day of January, 1990.

