

1989

# Troy Darrington v. Stanley L. Wade, Janet Wade, Robert Iverson : Reply Brief

Utah Supreme Court

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UTAH COURT OF APPEALS  
BRIEF

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DOCKET NO.

900544

IN THE SUPREME COURT  
STATE OF UTAH

TROY DARRINGTON, )  
 )  
Plaintiff/Appellant, )  
 )  
vs. )  
 )  
STANLEY L. WADE and JANET )  
WADE and ROBERT IVERSON, )  
 )  
Defendants/Appellees. )

REPLY BRIEF OF APPELLANT

50-0711-00

Case No. 890274

REPLY BRIEF OF APPELLANTS

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Clerk, Supreme Court, Utah

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IN THE SUPREME COURT  
STATE OF UTAH

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TROY DARRINGTON,	)	
	)	REPLY BRIEF OF APPELLANT
Plaintiff/Appellant,	)	
	)	
vs.	)	
	)	
STANLEY L. WADE and JANET	)	Case No. 890274
WADE and ROBERT IVERSON,	)	
	)	
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581 P.2d, 567 (Utah 1978)

RULES AND STATUTES

Rules 59 and 60(b), Utah Rules of Civil Procedure Page 2

REPLY BRIEF

COMES NOW the Appellant and pursuant to Rule 24(c) of the Rules of the Utah Supreme Court, submits the following Reply Brief. This Reply Brief is limited to responding only to new matters set out in the Brief of the Appellee, Stanley L. Wade.

STATEMENT OF THE CASE

The lower Court twice entered Default Judgments against the Defendant Stanley Wade. A Default Judgment entered by prior Judge Dean Condor was reversed by the new Judge, Richard Moffat. Judge Moffat then entered a second Default Judgment only to set it aside. Judge Moffat then entered a Summary Judgment against the Plaintiff.

STATEMENT OF FACTS

The Defendant Stanley Wade owned the skateboard park which is the subject of this claim. He leased it as a skateboard park to a tenant for the purposes of operating it as a skateboard park.

The premises as they were leased were defective in that a drain cover was apparently omitted from the premises.

The Plaintiff's injuries occurred within one month of the date the Defendant leased the premises.

Since this is a review of a Summary Judgment, the Plaintiff is entitled to have all inferences drawn in favor of the Plaintiff.

ARGUMENT

The lower Court does not have unlimited authority to set aside its own Judgment.

The lower Court entertained an untimely Motion to Set Aside a Judgment. There is no procedural rule which authorizes vacating a Judgment outside of the Utah Rules of Civil Procedure, Rule 59 and Rule 60(b). The cases cited by the Appellee do not stand for the proposition that timely requests are not required under the Rules of Civil Procedure. Rather, they cite to the Utah Rules of Civil Procedure and require compliance therewith. Nothing in the cited cases supports the proposition that a lower Court can, without any regard to a timely filing of an appropriate Motion, merely set aside its Judgments.

POINT TWO

The Court appropriately struck the pleadings of the Defendant for its failure to cooperate in the discovery process. It was an abuse of discretion and beyond the authority of the lower Court to entertain an untimely Motion and to give the Defendant a "third bite at the apple".

POINT THREE

There are material issues of fact which, when viewed in the light most favorable to the Plaintiff, entitle Plaintiff to his day in Court.

Assuming that the Court does not summarily re-enter Judgment against the Defendant, the Plaintiff is entitled to have his day in Court. On Summary Judgment, the Plaintiff is entitled

to have the facts viewed in the light most favorable to the Plaintiff.

Both parties are in agreement as to the legal standard by which the actions of the landlord are to be measured. The standard is quoted in Defendants' Brief, page 7 where Defendants cite Stephenson vs. Warner and Greenwood, 581 P.2d 567 (Utah 1978). The standard holds the landlord to exercise ordinary care and prudence. The landlord may be held liable for injuries caused by any defects or serious conditions which he created, or of which he was aware. It is a question of fact as to whether or not the landlord created the unreasonable condition or whether he knew of its existence one month previous to the injury when he leased the premises. In the present case the Plaintiff is entitled to have the facts construed in the light most favorable to him. The facts, when viewed in the light most favorable to the Plaintiff, would support the inference that the missing drain cover was missing at the time that the property was leased by the landlord one month previous to the injuries.

The Plaintiff is entitled to have a jury weigh the facts and decide whether or not the Defendant here has any responsibility for the injuries. It is a question of fact. A jury could reasonably conclude that leasing the premises without a drain cover was negligent. The question of whether or not the movement of the drain cover from one area to another is a matter for the defense to urge and for the jury to weigh. The absence of a drain cover in and of itself was negligent. The landlord

should not have leased the premises without securing drain covers for all of the drains on the leased premises.

The Defendants' argument that the condition came into existence after the lease is specious. The drain cover was missing at the time that the premises were leased by the landlord. The fact that the drain cover was moved from one place to another is reasonable and foreseeable. It is the absence of the drain cover which caused the movement of drain covers from one area to another. Had the landlord insured that all drains were properly covered at the outset, there would have been no need for the drain cover to be moved from one place to another. It was the landlord's negligence in failing to provide sufficient drain covers which created the hazard, and not the tenant's movement of a drain cover from one area to another.

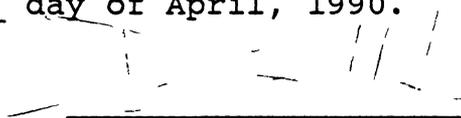
#### CONCLUSION

The proceedings below were irregular, and the Court lacked authority to untimely set aside its Default Judgment. Since there was no timely motion filed by the Defendant below, and since the Rules do not contemplate any procedure which authorizes the lower Court to sit in appeal of itself, the lower Court erred in setting aside the Default Judgment. This Court should reenter the Default Judgment, and it should be a final, unappealable decision.

The lower Court also erred in granting Summary Judgment against Plaintiff. From the facts viewed in the light most

favorable to Plaintiff, Summary Judgment should not issue.

DATED this 23 day of April, 1990.

  
\_\_\_\_\_  
Denver C. Snuffer, Jr.

CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the foregoing Reply Brief was mailed postage prepaid to the following:

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DATED this 15 day of April, 1990.

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