

2010

John D. Jacob and Aqua Resources Unlimited v. Jerald L. Cross and Juniper Ridge : Brief of Appellee

Utah Court of Appeals

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Bryce D. Panzer; Blackburn & Stoll; Attorneys for Appellees.

Jerrold L. Cross; Defendant/Appellant.

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH

JOHN D. JACOB, and AQUA
RESOURCES UNLIMITED, L.L.C., a Utah
limited liability company in dissolution,

Plaintiffs and Appellees,

Case No. 20100992-CA

v.

JERROLD L. CROSS and JUNIPER
RIDGE, LLC, a Utah limited liability
company.

Defendants and Appellants.

**BRIEF OF APPELLEES JOHN D. JACOB AND
AQUA RESOURCES UNLIMITED, LLC**

On Appeal from the Fourth Judicial District Court of Utah County
Honorable Fred D. Howard

JERROLD L. CROSS
Defendant/Appellant
1494 South Carterville Road
Orem, UT 84097

BRYCE D. PANZER (A2509)
BLACKBURN & STOLL, LC
Attorneys for Appellees John D. Jacob
and Aqua Resources Unlimited, LLC
257 East 200 South, Suite 800
Salt Lake City, Utah 84111

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UTAH APPELLATE COURTS

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BRYCE D. PANZER (A2509)
BLACKBURN & STOLL, LC
Attorneys for Appellees John D. Jacob
and Aqua Resources Unlimited, LLC
257 East 200 South, Suite 800
Salt Lake City, Utah 84111

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Case No. 20100992-CA

v.

JERROLD L. CROSS,

Defendant and Appellant.

**BRIEF OF APPELLEES JOHN D. JACOB
AND AQUA RESOURCES UNLIMITED, LLC**

JURISDICTION

This is an appeal by Defendant Jerrold L. Cross (“Cross”), from a Judgment by Default Against Defendant Jerrold L. Cross and Rule 54(B) Certification (the “Judgment”), entered on November 8, 2010, by the District Court. Jurisdiction to hear this appeal is conferred on the Utah Court of Appeals pursuant to Sections 78A-3-102(3)(j), -3-102(4), and -4-103(2)(j).

For purposes of clarification, it should be noted that although Juniper Ridge, LLC (“Juniper Ridge”), is identified by Cross as an appellant in the caption of his Notice of Appeal and brief, the Notice of Appeal states that Cross is the only appellant. In addition, the Judgment against Cross was entered, in part, in favor of Juniper Ridge and against Cross, on account of derivative claims asserted

by John D. Jacob, as a member of Juniper Ridge. The Judgment removed Cross as the manager of Juniper Ridge; therefore, Cross would have no authority to bring an appeal on behalf of Juniper Ridge. (R. 2326.)

**STATEMENT OF ISSUES PRESENTED ON APPEAL AND
STANDARDS OF APPELLATE REVIEW**

Issue on Appeal No. 1: Whether the District Court erred in accepting and relying upon proffered testimony and evidence in a default proceeding against Cross, where Cross personally attended the proceeding, but failed to object to the testimony and evidence, or to the proffer.

Cross' opening brief does not identify where in the record this issue was preserved in the trial court. Indeed, although Cross was present for the proceeding, he made no statement or objection of any sort. (R. 2567, Tr. 2-26.)

Standard of Review: Whether an issue has been properly preserved for appeal is determined by the appellate court. *See Prinsburg State Bank v. Abundo*, 2011 UT App 239; Utah R. App. P. 24(a)(5).

Issue on Appeal No. 2: Whether the Judgment should be reversed based upon Cross' allegation that "Plaintiff presented false information to the Court."

Cross' opening brief does not identify where in the record this issue was preserved in the trial court. The sole focus of Cross' brief on this issue relates to matters that came to light in late October 2011, after the entry of the Judgment and the filing of Cross' appeal. Cross has not sought, and the trial court has not made, any ruling with respect to Cross' arguments. Such

matters, if not appropriately addressed by Appellees, must be first raised in the trial court pursuant to a motion under Utah R. Civ. P. 60(b).

Standard of Review: Whether an issue has been properly preserved for appeal is determined by the appellate court. *See Prinsburg State Bank v. Abundo*, 2011 UT App 239; Utah R. App. P. 24(a)(5).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

The following rule is of central importance to this matter:

Utah R. Civ. P. 55(b): Judgment. Judgment by default may be entered as follows:

* * * * *

(2) By the court. In all other cases the party entitled to a judgment by default shall apply to the court therefor. If, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter, the court may conduct such hearings or order such references as it deems necessary and proper.

STATEMENT OF FACTS

The following facts are pertinent to the issues raised by Cross in his opening brief. Jacob and Aqua Resources Unlimited, L.L.C. ("Aqua Resources"), filed their Complaint on February 16, 2007, against Cross, Juniper Ridge, Painted Horse Holdings, L. C., David W. Olsen, and Hearthstone Development, Inc. (R. 1-16.) The Complaint asserts, among other claims, derivative claims on behalf of Juniper Ridge against Cross. (R. 5-10.) Through counsel, Cross and Juniper Ridge filed an answer and Cross asserted counterclaims against Jacob and Aqua Resources. (R. 35-64.)

On July 30, 2010, the trial court entered its Order Granting Plaintiffs' Further Motion for Sanctions, pursuant to which the Court struck all of Cross' pleadings, including his counterclaim,

and entered his default on all claims asserted in the Complaint, including the derivative claims asserted on behalf of Juniper Ridge. (R. 2216-18; Appendix A hereto.) As set forth in the Court's Ruling on the motion for sanctions, Cross failed to provide discovery and an accounting, as previously ordered by the Court. (R. 2209-12.)¹

Thereafter, Jacob and Aqua Resources requested that the district court conduct a hearing to determine plaintiffs' damages, pursuant to Utah R. Civ. 55(b)(2). (R. 2230-32.) Notice of the hearing was sent to the parties, including Cross. (R. 2233-35.) The requested hearing was held on November 10, 2010, before District Judge Fred Howard. Cross was personally present at the hearing, representing himself. (R. 2567, Tr. 2, 3.)² The District Court was presented with a proposed judgment. (R. 2567, Tr. 4-5.) As the Plaintiffs' Complaint sought certain types of nonmonetary relief, the proposed judgment simply reiterated the demand of the Complaint with respect to such matters. (R. 2567, Tr. 4-5.) Counsel for Jacob and Aqua Resources proffered the testimony and exhibits that were being relied upon to establish the monetary damage claims. (R. 2567, Tr. 3-25.) The proffer included the testimony of an appraiser, Tom Boyer, and his appraisal was presented as an exhibit. (R. 2567, Tr. 10-12, Ex. 10.) Cross did not object to the proffer in any respect, nor did he request to be heard, or to present any other evidence or testimony. (R. 2567, Tr. 3-26.)

The District Court granted damages as requested by Plaintiffs, the amounts of the damages were written into the blanks in the proposed judgment, and the Judgment was signed by

¹Although Cross' docketing statement suggests that he disagreed with the district court's order striking his pleadings, the issue is not addressed by his opening brief.

²Cross' last legal counsel withdrew on April 8, 2010. (R. 2139-41.) The required Notice to Appear in Person or Appoint Counsel was given to Cross and Juniper Ridge. (R. 2145-46.)

Judge Howard. (R. 2324-29.) As the **default proceedings** resolved all of the claims between Plaintiffs and Cross, Plaintiffs requested, and the District Court granted, a certification under Utah R. Civ. P. 54(b). Cross filed his Notice of Appeal on November 26, 2010. (R. 2338-39.)

The following information is not reflected in the record, but is pertinent to Cross' claims respecting the inaccuracy of certain information relied upon by the District Court, and as referenced in Exhibit 5 to Cross' opening brief. The balance of Plaintiffs' claims against the remaining parties were recently tried to Judge Howard, with the trial commencing on November 2, 2011. As of the date of this brief, a decision has not yet been rendered with respect to the remaining claims. Just prior to the trial, an error in the appraisal (Ex. 10 herein) was brought to the attention of Plaintiffs and their counsel. The error related to the quantity of water that was controlled by the Indianola Irrigation Company water stock, which was a portion of Juniper Ridge's property wrongly conveyed, at the direction of Cross, to Painted Horse Holdings, L.C. The appraisal incorrectly stated that 250 Class A shares of stock in the Indianola Irrigation Company controlled 1,000 acre-feet of water; whereas, in fact, the shares controlled 250 acre-feet of water. That error reduced the value of the water stock, per the appraisal, from \$1,800,000 to \$450,000, a reduction of \$1,350,000. The overall value of the property and water rights (including the water stock) was reduced from \$8.3 million to \$6.95 million. An exhibit reflecting the correction was introduced at the recent trial to correct this error. A copy of the trial exhibit is attached hereto as Appendix B.

Cross was subpoenaed to testify at the trial, and at that time, Plaintiffs' counsel advised him that an error was made in the appraisal, and that an appropriate motion to correct the default

Judgment against Cross would be brought when the balance of the case was resolved.³

SUMMARY OF ARGUMENT

Cross appeared at the hearing to establish the damages to be awarded Plaintiffs, but failed to object to the proffered evidence, and further failed to provide any evidence of his own. Accordingly, Cross cannot now be heard to complain of any perceived errors in the proffered evidence, or in the trial court's determinations of damages.

Cross' other argument is that there was an error in the evidence presented, which was made known to him in November 2011. If the error is not appropriately addressed through other proceedings, then Cross must first seek relief with respect to such error in the District Court before bringing any appeal to this court.

ARGUMENT

POINT I

CROSS FAILED TO PRESERVE ANY OBJECTION TO THE EVIDENTIARY PROCEEDING.

The record establishes that Cross was given notice of the evidentiary hearing under Utah R. Civ. P. 55(b)(2) to establish damages, and he, in fact, attended the hearing. While the transcript reflects his attendance, there is nothing in the record that indicates he made any statements or objections to any of the proceedings.

³As was stated in the damages hearing held on November 10, 2010, the amount of damages also depends upon the trial court's treatment of Plaintiffs' claim to a constructive trust on the Indianola Irrigation Company stock, which stock is in the possession of Defendant Hearthstone Development, Inc. If the trial court grants the constructive trust, and Juniper Ridge recovers the water stock, then the monetary damage award would be reduced by the value of the water stock, as set forth in the appraisal. (R. 2567, Tr. 13-17.)

It is elementary that a party may not pursue an appeal with respect to an issue that was not presented to or preserved in the trial court.

[I]n order to preserve an issue for appeal[,] the issue must be presented to the trial court in such a way that the trial court has an opportunity to rule on that issue. This requirement puts the trial judge on notice of the asserted error and allows for correction at that time in the course of the proceeding. For a trial court to be afforded an opportunity to correct the error “(1) the issue must be raised in a timely fashion[,] (2) the issue must be specifically raised[,] and (3) the challenging party must introduce supporting evidence or relevant legal authority.” Issues that are not raised at trial are usually deemed waived.

438 Main St. v. Easy Heat, Inc., 2004 UT 72, ¶ 51, 99 P.3d 801 (alterations in original) (citations omitted) (internal quotation marks omitted).

Cross did not, in fact, object to any of the proceedings or evidence at the evidentiary hearing on damages. Had he wished to do so, he could have spoken up, but there is nothing in the transcript that suggests he did so. Perhaps more importantly, there is nothing in the transcript that indicates he was prevented from being heard.⁴

To the extent the Court reaches the merits of any of Cross’ allegations, the transcript further establishes the regularity of the proceedings, and evidentiary support for the district court’s findings. Cross’ liability was established by his default. The amount and nature of the damages was established by the proffered testimony of witnesses (who were present and available to be cross-examined), as well as exhibits that established the nature of the claims and the amount of damages that were suffered by Plaintiffs. While Cross complains generally about

⁴Cross relies upon *State v. Gall*, 2008 UT App 174, for the proposition that he was entitled to be present and to be heard at the evidentiary hearing. The basic proposition is not disputed; however, the fact is that Cross was present at the evidentiary hearing and could have spoken.

the outcome, he does not present any evidentiary or other basis for overturning the District Court's determinations of damages.

POINT II

ANY REMAINING ISSUES ARGUED BY CROSS ARE NOT RIPE FOR APPEAL AT THIS TIME.

Plaintiffs relied upon an appraisal in presenting their damages evidence on certain issues. As is set forth in the Statement of Facts, Plaintiffs and their counsel learned of an error in the appraisal just prior to the recent trial of the remaining claims in the underlying case. Cross was advised of the error, and an exhibit was used at trial to correct the error in the appraisal. When the District Court resolves the balance of the case, Plaintiffs intend to seek an amendment of the judgment against Cross to correct the error.

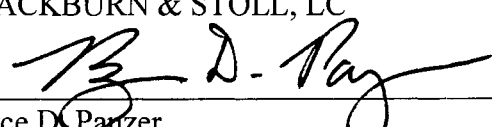
At this point, there is no error in the trial court that can be the subject of an appeal by Cross. Should Plaintiffs fail to take action to correct the error, then Cross can bring an appropriate motion under Utah Rule Civ. P. 60(b). If the district court errs in resolving such a motion, then Cross may have a further appeal; however, there is nothing for this Court to address at this time.

CONCLUSION

The Judgment should be affirmed in all respects.

DATED this 13th day of December, 2011.

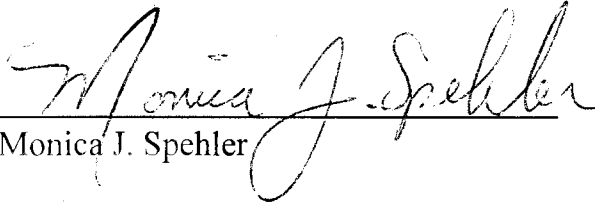
BLACKBURN & STOLL, LC


Bryce D. Panzer
Attorneys for Appellees John D. Jacob and
Aqua Resources Unlimited, L.L.C.

CERTIFICATE OF MAILING

Monica J. Spehler says that she is employed by the law offices of Blackburn & Stoll, LC, attorneys for appellees John D. Jacob and Aqua Resources Unlimited, LLC, and that on the 13th day of December, 2011, she served the **BRIEF OF APPELLEES JOHN D. JACOB AND AQUA RESOURCES UNLIMITED, LLC** (Utah Ct. App., Case No. 20100992), along with a courtesy CD, upon the following party by first-class mail, postage prepaid:

Jerrold L. Cross
1494 South Carterville Road
Orem, UT 84058



Monica J. Spehler

“APPENDIX A”

BRYCE D. PANZER (A2509)
BRETT N. ANDERSON (11809)
BLACKBURN & STOLL, LC
Attorneys for Plaintiffs
257 East 200 South, Suite 800
Salt Lake City, Utah 84111
Telephone: (801) 521-7900
Fax: (801) 521-7965
E-mail: bpanzer@blackburn-stoll.com

FILED
Fourth Judicial District Court
of Utah County, State of Utah

7/30/10 MT Deputy

IN THE FOURTH JUDICIAL DISTRICT COURT OF UTAH COUNTY

STATE OF UTAH

JOHN D. JACOB, and AQUA
RESOURCES UNLIMITED, L.L.C., a Utah
limited liability company in dissolution,

Plaintiffs,

**ORDER GRANTING PLAINTIFFS'
FURTHER MOTION FOR SANCTIONS**

v.

JERROLD L. CROSS; JUNIPER RIDGE,
LLC, a Utah limited liability company;
PAINTED HORSE HOLDINGS, L.C., a
Utah limited liability company; DAVID W.
OLSEN; and HEARTHSTONE
DEVELOPMENT, INC., a Utah
corporation;

Defendants.

Civil No. 070400563

Judge Fred D. Howard

Plaintiffs' Further Motion for Sanctions for Failure of Defendant Jerrold L. Cross to
Comply with Court Order Compelling Discovery and Accounting (the "Motion"), came on
regularly for decision before the above-entitled Court, the Honorable Fred D. Howard, District
Court Judge, presiding. This action includes the cases initially filed in this Court as Civil Nos.

070402514 and 070401583, which were consolidated in this matter by the Court's Order Consolidating Cases, entered on November 26, 2007.

The Court having duly considered the Motion, and having issued its Ruling Re: Plaintiff's Motion for Sanctions, dated July 8, 2010, and good cause appearing therefor, it is hereby

ORDERED that Plaintiffs' Motion be, and the same hereby is, granted. All of Defendant Jerrold L. Cross' pleadings herein are hereby stricken, including his Counterclaim, his default is hereby entered on the claims set forth in Plaintiffs' Complaint, including the derivative claims asserted on behalf of Juniper Ridge, LLC, and a judgment by default will be entered against Defendant Jerrold L. Cross. The Court reserves the issue as to the amount of damages to be awarded to Plaintiffs on the Complaint, pending a hearing on damages pursuant to Utah R. Civ. P. 55(b)(2).

DATED this 30 day of July, 2010.

BY THE COURT:

/S/ FRED D. HOWARD

Fred D. Howard
District Court Judge

BDP23810.001\ORDERGRANTINGMTNSANCTIONS.WPD

CERTIFICATE OF MAILING

Monica J. Spehler says that she is employed by the law offices of Blackburn & Stoll, LC, attorneys for plaintiffs, and that on the 14th day of July, 2010, she served upon the following counsel of record **ORDER GRANTING PLAINTIFFS' FURTHER MOTION FOR SANCTIONS** (Fourth District Court of Utah County, Civil No. 070400563):

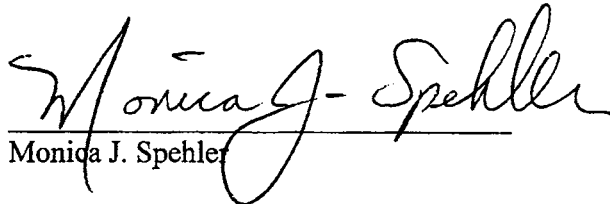
Chris L. Schmutz
SCHMUTZ & MOHLMAN, LLC
533 West 2600 South, Suite 200
Bountiful, Utah 84010

Frederick A. Jackman, PC
867 North 900 West
Orem, UT 84057

Jerrold L. Cross
Juniper Ridge, LC
1494 South Carterville Road
Orem, UT 84058

William L. Filmore
Scott D. Preston
FILLMORE SPENCER, LC
3301 North University Ave.
Provo, UT 84604

Richard D. Allen
2975 West Executive Parkway, #509
Lehi, UT 84043


Monica J. Spehler

“APPENDIX B”

TVB Management Company

Thomas V Boyer, AFM, ARA, AAC

Bryce Panzer
Blackburn & Stoll, LC
257 East 200 South, Suite 800
Salt Lake City, UT 84111

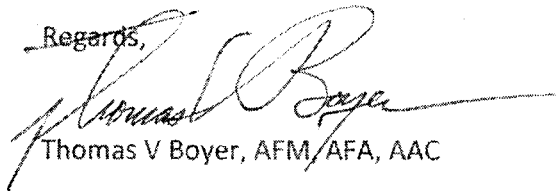
October 31, 2011

Dear Mr. Panzer,

I am providing this letter to correct an error in my appraisal Blackhawk Mountain Estates which is dated September 23, 2010 with an effective date of August 26, 2004. On page 26 of the report in the water rights chart, I state there are 250 shares [Class A Stock] of Indianola Irrigation Company water shares which equal 1000 acre feet of irrigation water capable of irrigating 250 acres. I obtained this information from Norma Bigler who was secretary of the irrigation company as of the effective date of the appraisal. During my first interview with Norma she indicated that each share of the irrigation company would irrigate 1 acre. Since each acre requires 3-4 acre feet of water I assumed each share contained 4 acre feet of water. Further, I called Willa Knight who is a water specialist with the Utah Division of Water Rights and verified that each irrigated acre of land requires 4 acre feet of water for season long irrigation. Recently it was brought to my attention that possibly each share [Class A Stock] of Indianola Irrigation Company only contains .25 acre feet resulting in the need for 4 shares to irrigate an acre for a full season. I called Norma Bigler back again to determine her position on the matter and she indicated that 1 share will irrigate 1 acre for a full season. I then asked her if each share contains 4 acre feet of water and she responded that she wasn't sure. Then she indicated that she is in her 80's now and that I should call her son John Bigler who has been President of the Irrigation Company. I called John and he indicated as did his mother that they always use one share to irrigate one acre for the full season. I then asked him if each share then contains 4 acre feet of water. He responded that no it only contains .25 acre feet. I then verified this information with Willa Knight. Based on the correct amount of water associated with the subject, I am amending the value of my appraisal from \$8,300,000 to \$6,950,000.

If I can provide additional information, please contact me.

Regards,



Thomas V Boyer, AFM/AFA, AAC

2200 Chalk Creek, Coalville, Utah 84017
435-336-7000 Office 801-376-4685 Cell ewenique@allwest.net