

1983

David Kim Bevan and Sherry Bevan v. Robert Graham et al : Respondents' Supplemental Brief

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

DAVID KIM BEVAN and)
SHERRY BEVAN,)

Plaintiffs and)
Respondents,)

vs.)

Civil No. 18078

ROBERT GRAHAM, JACK HALE)
and J. H. CONSTRUCTION , INC.,)

Defendants and)
Appellants.)

RESPONDENTS' SUPPLEMENTAL BRIEF

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Clark, Supreme Court, Utah

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TABLE OF CONTENTS

	<u>Page</u>
Relief Sought on Appeal-----	1
Statement of Facts-----	1
Argument	
POINT I.	
This Supplemental Brief Responds to the Court's Letter Request of January 28, 1983, Raising "The Question of Timely Filing Under Rule 73(a), URCP-----	2
Summary-----	5
Mailing Certificate-----	5

RULES CITED

Rule 73(a), URCP-----	2
Rule 73A(a), URCP-----	2
Rule 73A(e), URCP-----	2
Rule 75(a), URCP-----	3
Rule 75(a)(1), URCP-----	3
Rule 72(a), URCP-----	3
Rule 76(f), URCP-----	3

CASES CITED

<u>Nunley v. Stan Katz Real Estate Inc.</u> 15 U2d 126, 388 P2d 798-----	3
<u>Holton v. Holton</u> , 121 U 451, 243 P2d 438-----	4

RELIEF SOUGHT ON APPEAL

Respondents pray that appellants' appeal be dismissed without consideration of the points of law raised therein for the reason that appellants have failed to properly pursue their appeal.

STATEMENT OF FACTS

Appellants timely filed their notice of appeal and docketing fee. Having done so, appellants then:

1. Filed no docketing statement;
2. Filed no designation of record;
3. Appellants' Brief on Appeal due January 7, 1982, was filed January 21, 1983, without extension of time.
4. Appellants have neither filed a statement certifying that a transcript of the evidence has been ordered nor a statement that they do not intend to rely on a transcript.

On February 4, 1982, respondents filed a motion to dismiss the appeal. When this was heard by the court, appellants' attorney, C. Glenn Robertson, gave no written affidavit justifying failure to comply with the rules and stated verbally during the hearing that he had had difficulty in getting clear lines of authority from his clients, appellants, as to how they wanted him to proceed and whether they wanted to authorize the funding for a transcript of the testimony, as respondent's counsel recalls.

After the hearing on March 5, 1982, the court entered its order sustaining the findings of the trial court as to the

merits of this case and leaving open for review only "the legal issue of damages" raised by the appeal.

ARGUMENT

POINT I.

THIS SUPPLEMENTAL BRIEF RESPONDS TO THE
COURT'S LETTER REQUEST OF JANUARY 28, 1983,
RAISING "THE QUESTION OF TIMELY FILING
UNDER RULE 73(a), URCP

Respondents contend that as a matter of law, the appeal should be dismissed for appellants' failure to reasonably comply with the Utah Rules of Civil Procedure. Since the filing of their Motion to Dismiss in February, 1982, the additional information obtained by the court as stated by appellants' attorney to the court indicated really nothing more than the wish of the appellants to have their appeal pursued with minimum attorney time charges and costs, such as preparation of the trial transcript.

Every appellant must share in those emotions, but are they an adequate justification for patent and repeated violations of the Rules of Civil Procedure?

The specific sections of the appellant rules violated are:

Rule 73A(a) requires that the docketing statement be filed within 15 days after the notice of appeal, and Rule 73A(e) provides that failure to file a proper docketing statement "may result in dismissal of the appeal or petition.

Rule 75(a) requires the party taking the appeal designate the portions of the records, proceedings and evidence, to be contained in the record on appeal. The Rule further provides at Rule 75 (a) (1), that the appellant within 15 days after filing of the notice of the appeal shall file a certificate stating that a transcript of evidence has been ordered or that he does not intend to rely on such transcript, and provides that failure to file such certificate can result in dismissal of the appeal.

Rule 72(a) dealing with the basic right of appeal provides that appeals to the Utah Supreme Court are to be taken "in accordance with these rules."

Rule 76(f) dealing with extension of time provides that time for filing any papers with the court can be extended provided that such extension be based on good cause shown and approved by a Justice of the Court.

Appellants have complied with none of the foregoing rules.

In Nunley v. Stan Katz Real Estate Inc., 15 U2d 126, 388 P2d 798, an appeal was dismissed by the Supreme Court on motion because the designation of record on appeal was filed 27 days late, 37 days after the Notice of Appeal was filed. The rationale of the court was that while failure to timely serve the designation of record was non-jurisdictional, there had to be a showing of excusable neglect. The appellant's attorney was specifically "charged with knowledge of when the designation of record on appeal should be filed." 15 U2d at 129.

Nunley specifically affirmed the previous Utah case of Holton v. Holton, 121 U 451, 243 P2d 438, which stated:

"Although the New Rules of Civil Procedure were intended to provide liberality in procedure, it is nevertheless expected that they will be followed, and unless reasons satisfactory to the Court are advanced as a basis for relief from complying with them, parties will not be excused from so doing."

In Holton, appellant had filed the designation of record with the District Court but not with opposing counsel. It would seem that the rationale in Holton is that ignorance of the appellate rules is not within the territory considered as being grounds for excusable neglect.

The Rules of Civil Procedure have to be applied with a certain degree of mercy and charity because there is no attorney who does not on occasion slip. Both to protect the attorney, and to preserve the rights of his clients to their day in court, a degree of judicial tolerance is necessary, or the judicial system stands in some danger of losing its primary goal of doing justice. Sometimes even egregious error might properly be overlooked if no harm has been done to the other side as, in the words of the late Fiorello LaGuardia, "When I make a mistake, its a beaut." Litigants are entitled to some dispensation when that occurs.

This case here though is one where essentially a half-hearted, improperly documented appeal has been pursued with no genuine effort to even attempt to comply with the Rules of Civil Procedure. Respondants have been genuinely prejudiced by having

the case remain unresolved through this appeal time. Their counsel has also had to put in additional time, as in preparing a motion to dismiss, which is a loss which should not be borne by the innocent parties.

SUMMARY

As appellant's have not attempted to justify their violation of the appellate rules, their appeal should be dismissed.

DATED February 28, 1983.

Respectfully submitted,

SAMUEL KING

MAILING CERTIFICATE

I certify that I mailed two copies of the foregoing Respondents' Supplemental Brief to C. Glenn Robertson, attorney for appellants, 2320 Bonniebrook Drive, Salt Lake City, Utah 84118, U. S. Mail, postage prepaid, February 28, 1983.

Becky Christiansen