

1983

## Paul Christensen v. Weldon S. Abbott : Brief in Answer to Petition for Rehearing

Utah Supreme Court

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Wallace D. Hurd; Attorney for Appellant;

George E. Mangan; Attorney for Respondent;

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IN THE SUPREME COURT OF THE STATE OF UTAH

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PAUL CHRISTENSEN, )

Plaintiff, Respondent )  
and Cross-Appellant, )

vs. )  
)

WELDON S. ABBOTT. )

Defendant, Appellant, )  
and Cross-Respondent. )

Supreme Court No. 18115

---

BRIEF IN ANSWER TO PETITION FOR REHEARING

---

Appeal from the Judgment of the Seventh  
Judicial District Court for Duchesne County  
Honorable Allen B. Sorensen

---

GEORGE E. MANGAN, of  
GEORGE E. MANGAN, APC  
47 North Second East  
Roosevelt, Utah 84066  
801-722-2428  
Attorney for Plaintiff, Respondent  
and Cross-Appellant

WALLACE D. HURD  
32 Exchange Place, Suite 404  
Salt Lake City, Utah 84111  
801-355-1888  
Attorney for Defendant, Appellant  
and Cross-Respondent

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Clerk, Supreme Court, Utah

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47 North Second East  
Roosevelt, Utah 84066  
801-722-2428  
Attorney for Plaintiff, Respondent  
and Cross-Appellant

WALLACE D. HURD  
32 Exchange Place, Suite 404  
Salt Lake City, Utah 84111  
801-355-1888  
Attorney for Defendant, Appellant  
and Cross-Respondent

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BRIEF IN ANSWER TO PETITION FOR REHEARING

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Plaintiff/Respondent Christensen submits this brief in answer to Defendant/Appellant Christensen's petition and brief for rehearing.

OPENING STATEMENT

Appellant's petition for rehearing and brief in support thereof fails to show that this court, in its majority opinion, did not consider all points on the appeal; that there are any newly discovered matters; that this court misconstrued or overlooked any material matters of fact; or, that the court based its decision on any wrong principle of law or that it misapplied or overlooked any material matter.

Appellant merely asserts that respondent "wrongfully" retained respondent's cattle and therefore had "unclean hands." Appellant goes on to state that because of respondent's "unclean

hands" he should not be allowed to profit from his "wrongful acts." This is a redundant charge which Appellant has made at every step of the proceeding in this case, including a previous appeal to this court.

I. CHRISTENSEN DID NOT WRONGFULLY RETAIN  
POSSESSION OF ABBOTT'S CATTLE

A. An agistor is entitled to retain possession of animals by U.C.A., §38-2-1 (1953), until paid any amount due is paid.

An agistor may obtain a quantum meruit recovery for the care and feeding of cattle so long as he has rightful possession of them. 3A C.J.S. Animals §56 (1973). Under §38-2-1 U.C.A. (1953) "Every ranchman, farmer, agistor, . . . shall have a lien upon such animals for the amount that may be due him . . . and is authorized to retain possession of such animals until such amount is paid.

While there was a sharp division in the testimony between the plaintiff and defendant, plaintiff denied that defendant had made the demands alleged by defendant, for the return of the cattle. Nevertheless, the trial court held that plaintiff was entitled to the reasonable value of the feed fed to defendant's cattle. Based on the finding of the trial court, which should be given considerable deference, it should be assumed that respondent (hereinafter Christensen) had rightful possession of the animals in connection with a joint ranching operation with appellant (hereinafter Abbott). The parties terminated their joint interest on April 28, 1976, by means of a court decreed

accord and satisfaction. Christensen did not understand the legal effect of this agreement, and in the original opinion, Chief Justice Hall in his dissenting opinion clearly illustrates how reasonable men, like Christensen, could reach a different conclusion from that of the majority of the court. Because of the various claims of the parties against each other, including Christensen's agistor's lien on Abbott's 200 head of black cattle, Christensen was authorized by §38-2-1 to retain possession of the cattle after April 28, 1976, until those claims were litigated or stipulated to.

In the original Christensen v. Abbott opinion, this court stated "The record indicates no demand by Abbott after the date of the settlement for his cattle, which Christensen was feeding." 595 P.2d 900, at pg. 903. While the court later determined that Abbott was entitled to possession of his cattle on April 28, 1976, the record is sharply divided as to when he made demand for their return. The fact is, Christensen continued to feed and care for Abbott's 200 head of cattle as he had done prior to April 28, 1978, until the cattle were released by stipulation to Abbott on April 19, 1977.

When, after April 28, 1976, Abbott requested the release of his cattle, Christensen rightly retained possession under §38-2-1 as he had a lien for the amount due him for the feeding, herding and pasturing of the cattle since April 28, 1976. As Christensen's possession for even one (1) day was not wrongful,



he was not then disqualified from a quantum meruit recovery for services performed.

B. The doctrine of Issue Preclusion operates to prevent Abbott from re-litigating the issue of whether or not Christensen's possession was wrongful.

Despite this court's express statements that there were no demands by Abbott after the settlement in its final decision, *Christensen v. Abbott*, Utah, 595 P.2d 900 (1979) the trial court, on remand, allowed Abbott to testify as to the demands he allegedly had made for the return of his cattle. Although Christensen had put this question in issue both in the pleadings and at the initial trial, and Abbott asserted this defense in his answer (See Record p.9, Third Defense #9), Abbott, for whatever tactical reasons, did not present any evidence in the initial trial as to any demands made for the return of the cattle or as to Christensen's wrongful retention of them. The trial court, in effect, allowed Abbott to re-assert an already adjudicated issue upon remand, after he had the advantage of hindsight and this court's initial opinion to guide him. Allowing Abbott to do this flies in the face of the doctrine of issue preclusion by permitting him two bites of the apple. This court has made clear that parties are not entitled to such privileges, and only recently reaffirmed its support of that position in Penrod, et al., v. Nu Creation Creme, et al., No. 18197, (filed September 2, 1983).

C. The trial court was correct in finding that even if Abbott's demands for the return of his cattle were timely, Christensen's continued retention of the cattle did not constitute "unclean hands" so as to disqualify Christensen from a quantum meruit recovery.

Even after granting Abbott the second bite of the apple, the trial court, upon remand, found that "from and after April 28, 1976, defendant (Abbott) did make repeated demand of plaintiff (Christensen) for possession of the cattle by telephone, personal confrontation and by letter" (see Record p. \_\_, Findings of Fact #3). However, the court went on to state that Christensen was entitled to judgment for the reasonable cost of caring for the cattle (Findings of Fact #5, Conclusion of Law #1 and Judgment). Such findings and judgment preclude the possibility of the trial court finding that Christensen had "unclean hands" because he wrongfully retained Abbott's cattle.

Christensen, in good faith, refused to return Abbott's cattle after the April 28, 1976 court imposed accord and satisfaction. There was an on going, bona fide, dispute as to what was covered in the accord and satisfaction until this court ruled on that issue in 1979. Even this court was not unanimous as to what was covered by that agreement. How could a lay-man rancher be expected to know or understand such final legal

nuances when learned members of the legal profession have deep and well-founded disagreements over their meanings? There was no bad faith or wrongful conduct on the part of Christensen which could be the basis for refusing him compensation for valuable services rendered to Abbott under the "Clean Hands" or other doctrine.

#### CONCLUSION

Abbott's petition and brief for rehearing reveals nothing new, overlooked or misconstrued in fact or law. Simply stated, Abbott asserts, once again, that Christensen's possession of the cattle was wrongful, and therefore, under the equitable doctrine of clean hands, it would be unjust and inequitable to give Christensen a judgment for the care and feeding of the cattle.

While it is unquestionably true that "he who asks equity must do equity," this is hardly a new or overlooked argument in this case. Abbott alleged Christensen was in wrongful possession of the cattle in his answer. He alleged that defense in front of this court twice, once in Christensen v. Abbott, Utah, 595 P.2d 900 (1979) and again in the original hearing of this Case, No. 18115. Each time both courts have addressed itself to this issue, and yet Abbott "urges" that neither the majority opinion of this court nor the trial court gave due consideration to the record and testimony regarding this issue. It is hard to see how

a court could examine the issue more closely than the courts involved have done.

Appellant's petition for rehearing should be denied.

DATED this 4<sup>th</sup> day of October, 1983.

GEORGE E. MANGAN, APC  
Attorney for Plaintiff, Respondent  
and Cross-Appellant

*George E. Mangan*

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George E. Mangan  
47 North Second East  
Roosevelt, Utah 84066  
801-722-2428

CERTIFICATE OF MAILING

I do hereby certify that on the 4<sup>th</sup> day of October, 1983, I mailed a true and correct copy of the foregoing BRIEF IN ANSWER TO PETITION FOR REHEARING, postage prepaid, to Wallace D. Hurd, Attorney for Defendant, Appellant and Cross-Respondent, 32 Exchange Place, Suite 404, Salt Lake City, Utah 84111, by depositing the same in the United States Post Office at Roosevelt, Utah.

*Gwen Graves*

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Secretary