

2000

# Linda Munford v. Muriusz Bienkowski : Brief of Appellee

Utah Court of Appeals

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J. Kent Holland; Anderson and Holland; Attorney for Respondent.

Linda Munford; Pro Se.

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LINDA MUNFORD,

-v-

MURIUSZ BIENKOWSKI

**REPLY BRIEF OF  
DEFENDANT/APPELLEE  
MARIUSZ BIENKOWSKI**

Case No. 20000660-SC

**Priority No. 15**

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**FILED**  
**Utah Court of Appeals**

**JAN 18 2001**

**Pauletta Stagg**  
**Clerk of the Court**

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IN THE UTAH COURT OF APPEALS

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LINDA MUNFORD,	)	
	)	
Plaintiff/Appellant,	)	REPLY BRIEF OF
	)	DEFENDANT/APPELLEE
-v-	)	MARIUSZ BIENKOWSKI
	)	
MURIUSZ BIENKOWSKI	)	Case No. 920000660-SC
	)	
Defendant/Appellee.	)	

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APPEAL FROM FINAL ORDER  
OF THE THIRD DISTRICT COURT OF  
SALT LAKE COUNTY, STATE OF UTAH  
(HONORABLE GLENN K. IWASAKI)

---

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### **COMPLETE LIST OF ALL PARTIES**

Pursuant to Rule 24 (a) (1) of the Utah Rules of Appellate procedure, the undersigned counsel for Defendant/Appellee represent that the named parties, Linda Munford and Mariusz Bienkowski, are and have been the only parties to this litigation.

## TABLE OF CONTENTS

	<u>Page</u>
STATEMENT OF JURISDICTION .....	1
STATEMENT OF ISSUES PRESENTED FOR REVIEW .....	1
STATEMENT OF CASE .....	2
SUMMARY OF ARGUMENTS .....	4
ARGUMENT .....	6
A.    JUDGE GLENN K. IWASAKI RULED PROPERLY IN DENYING THE MOTION OF THE PLAINTIFF-APPELLANT LINDA MUNFORD AND DID NOT MISUSE OR ABUSE HIS DISCRETIONARY POWER .....	6
B.    THE EVIDENCE MARSHALLED .....	6
1.    WAS A WRONGFUL OR HARMFUL ACT PERFORMED BY THE DEFENDANT-APPELLEE? ....	7
2.    WAS THE PLAINTIFF-APPELLANT IN FEAR? .....	9
3.    WAS THE PLAINTIFF-APPELLANT IN SUCH FEAR AS TO COMPEL HER TO ACT AGAINST HER WILL? .....	10
CONCLUSION .....	11

## TABLE OF AUTHORITIES

	<u>Page</u>
<u>Cases</u>	
<u>Elm, Inc. v M.T. Enterprises, Inc;</u> 968 P.2d 861 (1998).....	11
<u>Estate of Bartell</u> , 776 P.2d 885, 886 (Utah 1989).....	11
<u>Fox vs Piercy</u> , 227 P.2d 763 (Utah 1951) .....	7
<u>Horgan vs.Industrial Design Corp.</u> 657 P.2d 751, 753 (Utah 1982) .....	6
<u>Inman vs. Clyde Hall Drilling Co.</u> , 369 P.2d 498, ..... (Alaska 1962) 4 A.L.R. 3d 430	8
<u>Retail Clerks Health &amp; Welfare Trust Funds v. Shopland Supermarkets, Inc.;</u> ..... 96 Wash.2d 939, 640 P.2d 1051, 1054 (1982)	6
<u>State Bank of Southern Utah vs. Troy Hygro Systems, Inc.;</u> ..... 894 P.2d 1270 (Utah App.1995)	6
<u>Totem Marine Tug &amp; Barge, Inc. vs Alyseka Pipeline Service Co.</u> , ..... 584 P.2d, (Alaska 1978) 9 A.I.R. 4 <sup>th</sup> 928	8
<u>Young v. Western Piling and Sheeting</u> , 680 P.2d 394, (Utah 1984) .....	1
<u>Statutes</u>	
<u>Utah Code Ann. § 78-2-2(j)</u> .....	1
<u>Utah Code Ann. § 78-2a-2(2)(j)</u> .....	1
<u>Rules</u>	
<u>Rule 42 of the Utah Rules of Appellate Procedure</u> .....	1

## **I. STATEMENT OF JURISDICTION**

This case is on appeal from a final order of the Third Judicial District Court of Salt Lake County issued by the Honorable Judge Glenn K. Iwasaki. Linda Munford, the Plaintiff-appellant, appealed to the Utah Supreme Court, which has jurisdiction pursuant to Utah Code Ann. § 78-2-2(j). The Utah Supreme Court, pursuant to Rule 42 of the Utah Rules of Appellate Procedure, moved this appeal over to this Court. This Court has jurisdiction over this appeal pursuant to Utah Code Ann. § 78-2a-2(2)(j).

## **II. STATEMENT OF ISSUE PRESENTED FOR REVIEW**

1. Whether Judge Glenn K. Iwasaki abused his discretionary power in denying Plaintiff-appellant's Motion to Set Aside Stipulation and Order?

### **APPLICABLE STANDARD OF APPELLATE REVIEW**

- (1) The applicable standard of appellate review with respect to this issue appears to be whether the District Court clearly abused its discretion when it denied Ms. Munford Motion to Set Aside Stipulation and Order. Young v. Western Piling and Sheeting, 680 P.2d 394, (Utah 1984).

## **III. DETERMINATIVE AUTHORITY**

The Constitutional provisions, statutes, ordinances, rules, and regulations, whose interpretation is determinative in the instant appeal, are set out verbatim, with the appropriate citation in the body and arguments of the instant brief.

#### **IV. STATEMENT OF THE CASE**

##### **A. BACKGROUND HISTORY**

The Defendant-Appellee came to Salt Lake City from Poland six years ago. He works two jobs; eight hours a day at Utah Bank Note and eight hours a day at Little America Hotel. He and Plaintiff-Appellant Linda Munford lived together for about 1½ years. Subsequently, Mr. Bienkowski discovered that Ms. Munford was opening joint charge accounts in Mr. Bienkowski's name. Ms. Munford used those credit cards up to their respective limits, without Mr. Bienkowski's knowledge. Ms. Munford failed to make the minimum required monthly payments. Mr. Bienkowski discovered their existence when he was contacted at work regarding those overdue accounts. Upon the discovery of Ms. Munford's fraudulent conduct, he moved out of the apartment that they shared.

Initially when he moved out, he could not take all of his personal property, as he had nowhere to store it. However, once he had made the appropriate arrangements for storage, he returned to pick up his personal property. At that time, Plaintiff-Appellant Ms. Munford told him that he could not retrieve the property, and that the only way he could have his own personal property, was if he returned to live with her. Mr. Bienkowski then left the apartment. Ms. Munford, the Plaintiff-Appellant, then began to follow Mr. Bienkowski everywhere especially to his two places of employment, as well as stalking his family. As a result of this conduct by Ms. Munford, Mr. Bienkowski filed for a protective order from the Third District Court. Following this action, Ms. Munford filed for a protective order. Both orders were granted. Ms. Munford continued to follow and shadow Mr. Bienkowski and the other members of his family.



Subsequently, Ms. Munford was charged with embezzlement of funds from her employer(s) and was convicted of Theft, a third degree felony. While serving time in the Salt Lake County Jail as a result of that conviction, Plaintiff-Appellant learned that she would be eligible for release with an ankle bracelet, if among other requirements, there were no protective order in place against her. She then contacted Mr. Bienkowski's attorney, Martin Pezely, requesting that a settlement agreement and an order be drawn up. This settlement agreement was and is a compromise between the parties. He was to receive some of his property back and receive some payment on her credit card debt done in his name. He, further, was to give up his claims for the remainder of her credit card debt. She and he were to receive dismissals of the respective protective orders, although Mr. Bienkowski did not care whether the protective order against him was released or not since he had no desire to come in contact with Plaintiff-Appellant. Mr. Bienkowski the Defendant-Appellee did have the protective order released against Plaintiff-Appellant. Ms. Munford, after her release from jail, refused to return Mr. Bienkowski's personal property, nor make any payment toward her credit card debt in Mr. Bienkowski's name.

## **B. HISTORY OF SIGNIFICANT PROCEEDINGS IN LITIGATION**

Ms. Munford, through her attorney filed an action in Third District Court claiming the ownership of Mr. Bienkowski's automobile. The Plaintiff-Appellant also filed an action in small claims court and received a partial judgment in small claims court. Mr. Bienkowski appealed the small claims judgment, through his newly retained attorney, Martin Pezely. Mr. Pezely also filed an answer and counterclaim to the automobile claim. In February 2000, Mr. Pezely was

contacted by Ms. Munford and requested that he prepare a settlement agreement, such that she could be released from jail. Mr. Pezely prepared the settlement agreement, pursuant to terms given by Ms. Munford. At her direction, he took the settlement agreement to the Oxbow Jail, where she was incarcerated. He was asked to leave the document for her review, which he did. He later returned and picked up the executed document. After Mr. Bienkowski performed his portion of the settlement agreement, the withdrawal of the protective order and relinquishment of his counterclaim, allowing Ms. Munford to be released from jail, Ms. Munford refused to comply with the terms of her own settlement agreement. She then filed a motion to set aside her own settlement agreement. Judge Iwasaki heard the motion, which was argued by her new attorney Rex Bushman and J. Kent Holland for Mr. Bienkowski. Mr. Holland was retained when it became apparent, that Mr. Bienkowski's attorney, Martin Pezely, would be a necessary witness to the terms of the settlement agreement and the conditions surrounding said settlement. After hearing argument, Judge Iwasaki ruled from the bench that the Settlement Agreement was enforceable and that Ms. Munford had not met the necessary burden to set aside the settlement Agreement, the settlement agreement she had requested and set the terms thereof.

## **V. SUMMARY OF ARGUMENTS**

The District Court did not abuse its discretion in denying the motion of Plaintiff-Appellant. The evidence presented in Court was totally insufficient to warrant the granting of Plaintiff-Appellant Motion to Set Aside Stipulation. The Plaintiff-Appellant Linda Munford alleged to the Court that she had signed the stipulated settlement agreement because she was under duress. This duress that she claimed, was due to act or acts of the Defendant-Appellee. However, Plaintiff-

Appellant was unable to provide any evidence to support her allegation. The three elements necessary to support the claim of duress in order to avoid a contract, namely:

- (1) harmful acts perpetrated by the Defendant-Appellee
- (2) such acts causing fear in Plaintiff-Appellant
- (3) such that she was compelled to perform acts against her will

were never supported with enough evidence to sustain their existence in this case.

Plaintiff-Appellant alluded to the harmful act or action of the Defendant-Appellee in that he wanted the return of certain personal property, which he believes to be his. This desire for the return of his property is alleged as harmful by the Plaintiff-Appellee in that she views it as immoral. Her allegation of immorality is based the fact that she was incarcerated and therefore, in distress; and that the Defendant-Appellee took advantage of her situation. However, Defendant-Appellee asserts that he was contacted by his own counsel with a request from the Plaintiff-Appellant to settle their affairs. With this information as his guide, he reasonably wanted to settle all of their outstanding issues: protective orders, lawsuits, and unresolved personal property issues. Clearly Defendant-Appellee's desire to retain his automobile, upon which he has made all of the payments, and to have his personal property returned, including pictures of his deceased father, is not a "harmful" or an "immoral" act. Whereas, the Plaintiff-Appellant may have had good reason to want a release of jail, there is no standard of duress that can be assigned to Mr. Bienkowski, Defendant-Appellee. He did not cause her to be in jail, her own dishonest actions caused her to be placed in jail. This settlement agreement came into existence because of Plaintiff-Appellant's need or desire to be released from jail, an incarceration of her own doing.

## VI.

## ARGUMENT

### **JUDGE GLENN K. IWASAKI RULED PROPERLY IN DENYING THE MOTION OF THE PLAINTIFF-APPELLANT LINDA MUNFORD, AND THUS DID NOT ABUSE HIS DISCRETIONARY POWER.**

This Court must review the District Court's decision to deny the Plaintiff-Appellant's motion under the abuse of discretion standard. The question being, was the evidence presented in support of the motion sufficiently so compelling such that the motion should have been granted. Defendant-Appellee is convinced that when the Court has become thoroughly acquainted with all the evidence in this case and all the reasonable inferences that can be drawn there from, the Court will conclude that the District Court did not misuse or abuse its discretionary power in denying the Plaintiff-Appellant's motion, but simply applied Utah law in denying the motion for lack of sufficient evidence to demonstrate that Judge Iwasaki's ruling was clearly erroneous.

Clearly, it is the duty of the Plaintiff-Appellant to marshal sufficient evidence to clearly show that the underlying stipulation agreed to by both parties should be voided. In the case of *State Bank of Southern Utah v. Troy Hygro Systems, Inc.*, 894 P.2d 1270 (Utah App.1995), this Court quoted an earlier case,

“ ‘[t]he mere fact that a contract is entered into under stress or pecuniary necessity is insufficient [to constitute duress].’ “ *Horgan v. Industrial Design Corp.* 657 P. 2d 751, 753 (Utah 1982) (quoting *Retail Clerks Health & Welfare Trust Funds v. Shopland Supermarkets, Inc.*, 96 Wash.2d 939, 640 P. 2d 1051, 1054 (1982))

This case clearly demonstrates that the fact that this Settlement Agreement was entered into at a stressful time for Ms. Munford is not sufficient to overturn the ruling of Judge Iwasaki.

In fact, in an earlier Utah ruling, the court put forth three considerations necessary for the invalidation of a contract on the grounds of duress. *Fox vs. Pericey*, 227 P. 2d 763 (Utah 1951).

These considerations are:

- (1). That the other contracting party performs a wrongful or harmful act
- (2) such that the other party is in fear
- (3) such fear as to compel that party to act against his will

The Plaintiff-Appellant contends that she signed the stipulation under duress and as such the stipulation should have been voided. By the denial of her motion, Judge Iwasaki obviously recognized the stress of Ms. Munford being in jail but disagreed that this stress constituted the duress necessary to void the settlement agreement prepared at her request and terms. For Plaintiff-Appellant to prevail in this appeal, the Plaintiff-Appellant must provide clear evidence sufficient to satisfy the above-cited three considerations to establish that the stipulation was indeed signed under duress. Simply stating that she felt under duress is not sufficient evidence to demonstrate such duress.

1. WAS A WRONGFUL OR HARMFUL ACT PERFORMED BY THE  
DEFENDANT-APPELLEE?

The Plaintiff-Appellant put forth no evidence in either the District Court trial or the Appellate Court Brief of any actual harmful act. Instead, Plaintiff-Appellant puts forth the argument that the requirement of a wrongful act may be met if the Defendant-Appellee performed an act wrongful in the moral sense (See Brief of Petition, page 13 paragraph 3) The case cited by

Plaintiff-Appellant, *Totem Marine Tug & Barge, Inc. vs. Alyseka Pipeline Service Co.*, 584 P.2d, (Alaska 1978) 9 A.I.R. 4<sup>th</sup> 928, defeats her own argument. In that case the Alaska Court stated,

“The assertion of duress must be proven that the duress resulted from defendant’s wrongful and oppressive conduct and not by the plaintiff’s necessities.”

The supposedly immoral act performed by the Defendant-Appellee is that he wanted a settlement of all outstanding issues between both parties, and the return of his own personal property. Certainly the fact that the Plaintiff-Appellant was incarcerated and her daughter was ill would have caused the Plaintiff-Appellant considerable distress (*id.* Page 13 paragraph 2) and could place her in self-imposed state of anxiety or duress, but this is not due to any action performed by the Defendant-Appellee. Defendant-Appellee did not perform the acts, nor had any part in the acts that sent Plaintiff-Appellant to jail or which caused Plaintiff-Appellant’s daughter to become ill.

Plaintiff-Appellant asserts that “courts will not enforce a bargain where one party was unconscionably taken advantage of the distress of the other”, *Inman vs. Clyde Hall Drilling Co.*, 369 P.2d 498, (Alaska 1962) 4 A.L.R. 3d 430. Again this assertion is not applicable here. First, it should be recalled that the Plaintiff-Appellant made the initial contact to begin settlement discussions. See *Affidavit Martin J. Pezely*, paragraph 4). **Tr. 000087.** Plaintiff-Appellant had fired her attorney, Mr. Ludlow, allowing her to personally make contact with Defendant-Appellee’s counsel directly. See *Affidavit Martin J. Pezely*, paragraph 3 **Tr. 000087.** Thereafter Plaintiff-Appellant expressed what she wanted in the settlement agreement and it was presented to her for her review and changes. See *Affidavit Martin J. Pezely*, paragraph 5 and 6 **Tr. 000087-88.** Plaintiff-Appellant signed the Settlement Agreement **Tr. 000079** as prepared and made no

changes. See *Affidavit Martin J. Pezely*, paragraph 8 **Tr. 000088**. Even though Plaintiff-Appellant contends that she “had the stipulation documents for about five minutes” and that “they were not in my possession for several hours” See *Reply Affidavit of Linda Munford* paragraph 12 **Tr.000102**, she did not hesitate to quickly sign these documents.

The reason for execution of these documents was not alleged duress supposedly imposed by Defendant-Appellee, but rather for the reasons stated by the Plaintiff-Appellant in her own words: “Not only was I awaiting hoped for release from the suffering of incarceration, but my daughter was having serious health problems” See *Reply Affidavit of Linda Munford* paragraph 9 **Tr.000101-102**. While it is understandable that these concerns may cause the Plaintiff-Appellant a high degree of anxiety, these concerns in no way constitute any element of duress alleged by Plaintiff-Appellant.

Thus in light of the above, Defendant-Appellee asserts that Plaintiff-Appellant has failed to establish any wrongful, harmful or immoral act performed by the Defendant-Appellee as regards the Plaintiff-Appellant in this matter.

## 2. WAS THE PLAINTIFF-APPELLANT IN FEAR?

The issue is whether or not the alleged fear held by the Plaintiff-Appellant is of the kind necessary to constitute an element of duress. Defendant-Appellee asserts that any alleged fear felt by the Plaintiff-Appellant was not caused by any wrong, harmful, or immoral act by him. Certainly, Plaintiff-Appellant may be fearful of remaining in jail, and she was may be fearful of the serious health condition of her daughter. These fears, however, cannot be attributed to any actions of the Defendant-Appellee, but rather to actions taken by the Plaintiff-Appellant to cause her incarceration. Again, Plaintiff-Appellant brings up the issue that “the release of protective order was required

before I could leave jail” See *Reply Affidavit of Linda Munford* paragraph 10 **Tr.000102** and arguably she could be in fear that if the protective order were not dismissed she would remain incarcerated. However the protective order obtained by Mr. Bienkowski Defendant-Appellee was issued due to actions of the Plaintiff-Appellant and not due to actions of the Defendant-Appellee.

3.     WAS THE PLAINTIFF-APPELLANT IN SUCH FEAR AS TO  
COMPEL HER TO ACT AGAINST HER WILL?

Plaintiff-Appellant has produced no evidence of such compelling fear having been caused by actions of the Defendant-Appellee. Without question the Plaintiff-Appellant may be in fear of not being released from jail and without question that release would not occur without the dismissal of Defendant-Appellant Protective Order. However, the Defendant-Appellant did not wish to dismiss the protective order for fear of his safety and peace of mind, but was willing to do so to achieve what he wanted, which was the return of his personal property and closure to this matter. See Reply to Motion to Set Aside Stipulation and Order **Tr. 000069-73**. Likewise it is obvious that Plaintiff-Appellant did not wish to give up her claim to certain personal property, but was ready to do so to achieve what she wanted, release from jail. This is exactly what a settlement agreement is: each party giving up something that they don’t want to give up in order to receive something they desire. Clearly, Plaintiff-Appellant initiated the settlement agreement. She had significant input into the actual verbiage of the agreement and had an opportunity to review and change the document. She signed the document in the presence of a notary and with no outward signs of coercion or duress.

At this stage, the only conclusion which a reasonable person could draw, is that the Plaintiff-Appellant effected her release from jail by the execution of this document and that now that she has what she wanted, freedom, she wished to abrogate the Settlement Agreement.



Thus, Defendant-Plaintiff asserts that the Plaintiff-Appellant has been unable to marshal any evidence to sustain her claim for duress.


## **VII. CONCLUSION**

There was no evidence presented by Ms Munford to demonstrate that Judge Iwasaki's ruling was clearly erroneous and therefore an abuse of his discretion. This is required. This Court stated in *Elm, Inc. v. M.T. Enterprises, Inc.*, 968 P.2d 861 (Utah App. 1998),

M.T. next appeals the trial court's determination that the payment Agreement was not signed under duress. In order to successfully attack factual findings, "(a) n appellant must marshal the evidence in support of the findings and then in support as to be ' against the clear weight of the evidence, ' thus making them 'clearly erroneous.' *In re Estate of Bartell*, 776 P. 2d 885, 886 (Utah 1989)

There was ample evidence to show that the Settlement Agreement was the idea of Ms. Munford and that Ms. Munford established the terms. Plaintiff -Appellant and Defendant-Appellee entered into a stipulated Settlement Agreement and both signed in front of a notary. Both entered the agreement to resolve issues between the parties and put this matter to rest. Both Parties gave up claims that they believed they had against the other. The Plaintiff-Appellant Ms. Munford failed to prove any of the three basic requirements necessary for the type of duress required to set aside the Settlement Agreement. Therefore the denial of Plaintiff-Appellant's Motion to Set Aside Stipulation and Order was not an abuse of discretionary power by Judge Iwasaki, but was well founded in the principles of Utah law.

RESPECTFULLY SUBMITTED this 18<sup>th</sup> day of January 2001.

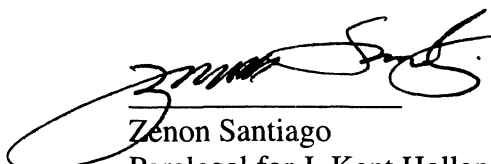
  
J. Kent Holland  
Attorney for Defendant-Appellee

**CERTIFICATE OF SERVICE**

I hereby certify that, on the 18th day of January 2001, I caused to served two true and correct copies of the foregoing REPLY BRIEF OF APPELLEE'S MARIUSZ BIENKOWSKI by method indicated below, and addressed to the following:

Linda Munford  
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HAND DELIVERED

  
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