

1990

William Paul Barron, Jr. v. Southland Corporation : Brief of Appellee

Utah Court of Appeals

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William Paul Barron, Jr.; Pro Se.

T.J. Tsakalos; Hanson, Epperson & Smith; Attorneys for Defendants and Appellees.

Recommended Citation

Brief of Appellee, *Barron v. Southland Corporation*, No. 900553 (Utah Court of Appeals, 1990).
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UTAH COURT OF APPEALS
BRIEF

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DOCKET NO.

900553-CA

IN THE UTAH COURT OF APPEALS

WILLIAM PAUL BARRON, JR.

Plaintiff and Appellant,

v.

SOUTHLAND CORPORATION, et al.,

Defendants and Appellees.)

Civil No.: 900553-CA

WILLIAM PAUL BARRON, JR.

Plaintiff and Appellant,

v.

SOUTHLAND CORPORATION, 7-11
STORES, KEMPER GROUP, CITGO
PETROLEUM CORPORATION,

Defendants and Appellees.)

Civil No.: 910150-CA

APPELLEE'S BRIEF

ARGUMENT PRIORITY CLASSIFICATION NO. 16

T. J. TSAKALOS NO. 3289
HANSON, EPPERSON & SMITH, P.C.
Attorneys for Defendants and
Appellees
4 Triad Center, Suite 500
P. O. Box 2970
Salt Lake City, Utah 84110-2970
Telephone: (801) 363-7611

WILLIAM PAUL BARRON, JR. Pro Se
11475 Holiday Way
Hillsboro, OH 45133-9368
(513) 393-3925 or 372-2744

FILED

AUG 21 1991

Mary T. Noonan
Clerk of the Court

PARTIES TO THE PROCEEDING UNDER APPEAL

APPELLANT - WILLIAM PAUL BARRON

APPELLEE - SOUTHLAND CORPORATION

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STATUTES AND RULES CITED

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STATEMENT OF JURISDICTION

Jurisdiction is conferred on this Court pursuant to Utah Code Annotated § 78-2-2(3)(j).

ISSUES PRESENTED AND STANDARDS OF REVIEW

Appellee will respond to the issues raised in Appellant's Brief and the order raised by Appellant.

The standard of review for each of the issues raised as stated by the Appellant is the clearly erroneous and abuse of discretion standard.

STATEMENT OF THE CASE

Appellee strongly objects to a number of the exhibits contained in Appellant's brief. Many of the exhibits are not matters of record and are therefore not appropriate exhibits in an appellate brief. The exhibits to which Appellee objects are Exhibit C, Exhibit F, Exhibit H, Exhibit I, and Exhibit J. These exhibits are not appropriately before this Court and should not be used in the Court's determination of the issues presented.

A. Nature and Disposition of the Case

This is a claim for property damage brought by the Appellant pursuant to an accident which occurred on or about March 26, 1989, in Provo, Utah. Late at night, the Appellant was pulling into a 7-11 gas station when he struck cement filled steel posts which were placed beside the gas pump island. The Appellant, the plaintiff in the proceedings below, filed a

complaint against Southland Corporation ("Southland") on or about October 21, 1989. Trial was scheduled for July 16, 1990. The Appellant failed to appear at the trial. Appellant has blamed this failure to appear on his medical condition. Counsel for the Appellee, the defendant in the proceedings below, appeared at trial. Pursuant to that proceeding an order of dismissal was entered in favor of Southland.

Appellant filed a motion for new trial and a notice of appeal on or about July 29, 1990. Appellant's motion for a new trial was denied on or about September 29, 1990.

B. Statement of Facts

Due to the fact that Appellant failed to appear for the trial, no adequate trial record of the proceedings below has been created. Therefore, it is difficult to support the factual statements by citation to the transcript as is proper. A copy of the entire proceedings before Third Circuit Court Judge Paul Grant (three pages), is attached to this brief as Exhibit A.

When Mr. Barron failed to appear for trial, Appellee's counsel made a motion to dismiss and a claim for bad faith. Appellee's counsel listed a number of cases in which the Appellant was currently or recently involved. In his discussion of these cases, Appellee's counsel stated that all of them had been dismissed. Appellee's counsel did not go into the background or nature of the dismissals of each case. The purpose

for discussing each of these different cases was to show that none of these cases had been pursued to a judgment, and, moreover, none of these cases had resulted in a judgment in favor of the Appellant.

Appellant filed a motion for a new trial on July 29, 1990. This motion was denied by the trial judge on September 29, 1990.

On two separate occasions, October 1, 1989, and January or February 1990, the Appellant made objections and motions for sanctions under URCP Rule 11 against defense counsel for alleged violations of that rule. At the time this case was dismissed on July 31, 1990, the trial court had not rendered decisions on those motions.

SUMMARY OF ARGUMENT

1. A claim of "fraud upon the court" by one of the parties under Utah law must be raised by filing an action separate from the underlying case. As the Appellant failed to raise a claim of "fraud upon the court" in the proper manner it should not be addressed by this Court. However, even if the Court reaches the merits of this issue, Appellee's counsel did not commit "fraud upon the court" since Appellee's counsel never prevented the Appellant from presenting his position at trial. Moreover, Appellee did not affirmatively misrepresent facts to the trial court.

2. The Appellant's motion for a new trial was

inappropriate under Rule 59(a)(3) since new trials are granted under this section for accident or surprise at trial rather than the inability of a party to attend the trial. However, should this Court reach the merits of this issue, the trial court judge properly denied the motion for a new trial since there was not sufficient evidence given by the Appellant to justify a new trial.

3. The trial court did not abuse its discretion by granting judgment to the Appellee while there were outstanding Rule 11 motions against Appellee's counsel. Rule 11 motions have nothing to do with the merits of the case and do not preclude judgment being entered. Moreover, it is standard practice and it is suggested that decisions regarding Rule 11 motions be delayed until the end of litigation.

ARGUMENT

POINT I.

A. A CLAIM OF "FRAUD UPON THE COURT" IS INAPPROPRIATELY BEFORE THIS COURT. ALTERNATIVELY, APPELLEE'S COUNSEL DID NOT COMMIT "FRAUD UPON THE COURT."

Appellant's claim for "fraud upon the court" is inappropriately before this Court. Under Utah law, an action for "fraud upon the court" must be raised in an action separate from the action in which the alleged fraud took place. "Fraud upon the court" cannot be raised by a motion in the underlying case and therefore cannot be a point of contention on appeal.

We believe and hold that where "fraud upon the court" is the gravamen of the proceeding, such proceeding must be pursued in an independent action by filing a separate suit, paying the statutory filing fee therefor (which was not done here), and requiring the statutory issuance and service of process.

Shaw v. Pilcher, 341 P.2d 949, 950 (Utah 1959). See also:
McGavin v. McGavin, 494 P.2d 283, 284 (Utah 1972).

In the present case, as was the case in Shaw, the party complaining of "fraud upon the court" has failed to raise that claim in a separate proceeding. The Appellant in the present case has not filed a separate action, paid the statutory filing fee, or perfected process as is required. Therefore, the issue of "fraud upon the court" is not properly before this Court and should be dismissed.

B. THE ACTS COMPLAINED OF BY APPELLANT DO NOT AMOUNT TO THE "FRAUD" NECESSARY FOR SETTING ASIDE A JUDGMENT.

Under Utah law, in order to use fraud to set aside a judgment, it must be the type of fraud which "has the effect of depriving the other party of the opportunity to present his claim or defense." Haner v. Haner, 373 P.2d 577, 578 (Utah 1962).

The Haner court continues:

This type of fraud, which is regarded as a fraud not only upon the opponent, but on the court itself, can be accomplished in a number of ways, such as making false statements or representations to the other party or to witnesses to prevent them from contesting the issues; or by that means or otherwise preventing the attendance of the parties or

witnesses; or by destroying or secreting evidence; so that a fair trial of the issues is effectively prevented.

373 P.2d at 578-79.

The actions complained of by the Appellant do not fall within any of the categories listed as appropriate categories for the setting aside of judgment due to fraud. The Appellee or Appellee's counsel in no way prevented the Appellant from appearing at trial or contesting his issues. Appellee and counsel for Appellee simply appeared at trial and made the appropriate motions in order to defend their position. Appellee's counsel was not required to make Appellant's case for him or to insure that the Appellant would be able to present his claims at a later date.

It is the position of Appellee that Appellee's counsel did not make any fraudulent misrepresentations to the court. However, even if such statements had been made, they would not be grounds for setting aside the judgment. The Haner court continues:

It is obvious that quite a different situation exists where there is no prevention of the party from contesting the issues in a trial and where the complaint is simply that one party presented perjured testimony or false evidence. This charge is simply a continuation of the same dispute which the trial was supposed to resolve.

373 P.2d at 579.

Appellee vigorously denies that he presented any fraudulent misrepresentation to the court. However, even if Appellee's counsel made a misstatement to the court, this is not grounds for setting aside a judgment under Utah law.

C. APPELLEE'S COUNSEL MADE NO FRAUD OR MISREPRESENTATION TO THE COURT.

At the July 16, 1990 hearing on Appellee's Motion to Dismiss (see Exhibit A) Appellee's counsel represented to the Court that the Appellant had recently filed numerous claims against numerous defendants, and most, if not all of them, had been dismissed. Appellee's counsel then represented that he thought that an additional case brought by the Appellant against the State of Utah and the Utah State Tax Commission had been dismissed. Apparently, that case had been appealed to the United States Supreme Court. Appellee's counsel made no representations as to how or why these cases were dismissed. The above representations made to the trial court by Appellee's counsel do not constitute "fraud upon the court." Appellee's counsel represented to the trial court that numerous other cases had been filed by the Appellant at approximately the same time and had been dismissed and did not elaborate further. Appellee's counsel had no duty to elaborate further and did not intentionally misrepresent any of the facts pertaining to Appellant's other litigation.

At page 24 of Appellant's brief, Appellant argues that ". . . the canon of ethics require one to advise the court fully of all material facts." The Appellant does not offer any authority for this proposition, but rather states:

Appellant does not offer any case law or other authority because Appellant is not able to undertake legal research at this time, because he is not able to quickly or conveniently locate and drive to a law library with adequate resources appropriate to Utah law. This argument is made in accordance with standard ethical considerations.

Brief of Appellant, footnote 8, page 30.

There is absolutely no basis for the proposition that "standard ethical considerations" require an opposing party to make the case for his opponent. The representations made by Appellee's counsel to the trial court were substantially correct.

At page 25 of Appellant's brief, he states that defense counsel "knowingly and with malicious intent" made false statements to the trial court. There is absolutely no evidence presented that would support a finding of knowing and malicious intent on the part of Appellee's counsel. Rather, as has been explained above, Appellee's counsel simply represented to the trial court that the plaintiff had filed numerous other suits at approximately the same time. Moreover, most if not all those suits had been dismissed. While Appellant certainly has every right to pursue remedies to valid claims in the judicial system, it is uncommon for this amount of litigation to be pursued at one

time. Appellee's counsel only wanted to point this out to the court.

Under Utah law, Appellant's claim of "fraud against the court" by Appellee's counsel is inappropriately before this Court. Also, the acts complained of by the Appellant do not constitute the type of fraud by which a judgment can be set aside. If this Court feels it must reach the merits of this issue, it is clear that Appellee's counsel's representations to the trial court do not amount to "fraud upon the court."

POINT II.

APPELLANT'S MOTION FOR A NEW TRIAL WAS INAPPROPRIATE. EVEN IF THE MOTION FOR A NEW TRIAL WAS APPROPRIATE, APPELLANT DID NOT PROVIDE A SUFFICIENT BASIS ON WHICH A NEW TRIAL COULD BE GRANTED.

Appellant claims he was unable to attend the July 16, 1990 trial because of mitral valve prolapse syndrome which renders him incapacitated for hours at a time. Appellant claims that on the day of the hearing he was incapacitated due to this illness.

Appellant based his motion for a new trial on Rule 59(a)(3) of the Utah Rules of Civil Procedure. Rule 59(a)(3) states that a new trial may be granted for "accident or surprise, which ordinary prudence could not have guarded against." This basis for a new trial is usually construed as requiring accident or surprise at trial, rather than accident or surprise in prohibiting attendance at trial. See, Anderson v. Bradley, 590

P.2d 339 (Utah 1979); Powers v. Gene's Bldg Materials, Inc., 567 P.2d 174 (Utah 1977); (A "surprise" at trial which could have been easily guarded against by utilization of available discovery procedures may not serve as a ground for a new trial under subdivision (a)(3)); (Rule 59(a)(3) requires that the moving parties show that ordinary prudence was exercised to guard against the accident or surprise); Ericksen v. Wasatch Manor, 802 P.2d 1323 (Utah App. 1990); (because the depositions of three witnesses were taken by the defendant, the defendant had notice of the expected testimony. Thus, no unfair surprise was shown and a new trial was not warranted); see also: Chournos v. D'Agnillo, 642 P.2d 710 (Utah 1982); Jensen v. Thomas, 570 P.2d 695 (Utah 1977); Myer ex rel. Myer v. Bartholomew, 690 P.2d 558 (Utah 1984).)

There is no case law interpreting Rule 59(a)(3) of the Utah Rules of Civil Procedure which would allow this rule to serve as the basis for a new trial when the accident or surprise did not occur at trial, but rather which prevented a party from attending trial. Therefore, this is an appropriate basis on which to grant a new trial.

However, even if the Rule 59(a)(3) was an appropriate grounds for a new trial, Appellant failed to provide a sufficient basis on which a new trial could be granted. Under Utah law, a trial judge in granting or denying a motion for a new trial has

broad latitude, and should not be overturned by an appellate court absent a clear abuse of discretion by a trial judge. Barson by and through Barson v. E. R. Squibb & Sons, Inc., 682 P.2d 832 (Utah 1984); Nelson v. Trujillo, 657 P.2d 730 (Utah 1982); Lembach v. Cox, 639 P.2d 197 (Utah 1981). It is not an abuse of discretion in this case for the trial court to have found that there was an inadequate basis for the Appellant to claim that he was prevented from attending trial due to accident or surprise.

The Appellant has provided absolutely no medical documentation in support of his position that he was incapacitated on the day of his hearing. The Appellant did submit three affidavits in support of the proposition that he was incapacitated on that day. These affidavits are contained in Exhibit E of Appellant's brief. However, the documents found in Exhibit J of Appellant's brief were never submitted to the trial court for the trial court's use in its determination on the motion for a new trial. As such, those documents constitute new evidence which is inappropriate to present for the first time on appeal.

Appellant filed his own affidavit stating that he was incapacitated (see Exhibit E of Appellant's Brief). Appellant has also submitted an affidavit of his apartment building manager (see Exhibit E of Appellant's Brief) which

states that he had seen the Appellant incapacitated prior to the day of the hearing. The manager then stated that on the day of the hearing, the Appellant did not come out of his apartment until early evening. The apartment manager does not claim to have seen the Appellant incapacitated on the day of the hearing.

The only medical affidavit submitted by the Appellant is the Affidavit of Michael Lowry, M.D. (see Exhibit E of Appellant's Brief). In his affidavit, Dr. Lowry does diagnose the Appellant with mitral valve prolapse. However, he does not state that the symptoms of this condition actually result in incapacitation, and further, does not express an opinion as to whether the Appellant actually became incapacitated on the day of the hearing or even if it was likely that the Appellant became incapacitated on that day.

Due to the lack of evidence supporting Appellant's proposition that he was incapacitated on the day of the hearing, it was not an abuse of discretion of the trial court to deny a new trial.

POINT III.

**THE TRIAL COURT DID NOT ABUSE ITS DISCRETION
BY GRANTING JUDGMENT TO THE APPELLEE WHILE
THERE WERE OUTSTANDING RULE 11 MOTIONS AGAINST
APPELLEE'S COUNSEL.**

During the course of litigation at the trial level, the Appellant filed motions for sanctions against Appellee's counsel pursuant to Utah Rule of Civil Procedure 11. These motions had

not been ruled upon by the trial judge as of the date of the dismissal of the case. However, this is not a valid ground for appeal since the motions for sanctions pursuant to Rule 11 have nothing whatsoever to do with the merits of the case and could not in any way affect the judgment rendered. Since this issue in no way affects the judgment rendered in this case, it is not an appropriate issue for this Court to address.

The 1983 Advisory Committee Note to Federal Rule of Civil Procedure 11, upon which Utah Rule of Civil Procedure is based states:

A party seeking sanctions should give notice to the court and the offending party promptly upon discovering a basis for doing so. However, it is anticipated that in the case of pleadings, the sanctions issue under Rule 11 will normally be determined at the end of litigation, and in the case of motions, at the time when the motion is decided or shortly thereafter. (emphasis added.)

Under this Advisory Committee Note, the trial court has the discretion to rule on the propriety of sanctions under Rule 11 at any time. Since the Rule 11 motions have no bearing on the outcome of the underlying case, which is an action for property damage, the trial court is within his discretion to decide on the propriety of sanctions at a time after a judgment in the underlying case has been rendered.

Case law also supports this proposition:

It makes no difference that the district court decided to impose the sanctions for the

litigation only after the post-judgment motions, or that the court changed its prior position with respect to sanctions in doing so. The Advisory Committee Notes to Amended Rule 11 explicitly state that 'the time when sanctions are to be imposed rests in the discretion of the trial judge.'

McLaughlin v. Bradlee, 803 F.2d 1197, 1205 (D.C. Cir. 1986).

Not only was the trial court's decision to wait until the end of litigation to decide on sanctions within the trial court's discretion, but some cases have held that, as a general rule, a trial court should wait until the end of litigation to decide on Rule 11 sanctions.

A district court's decision of whether to impose Rule 11 sanctions based on the complaint should wait until the end of litigation. See Federal Rule of Civil Procedure 11, Advisory Committee Note.

Donaldson v. Clark, 786 F.2d 1570, 1576 (11th Cir. 1986).

It is not a proper grounds for appeal to complain that a trial court rendered judgment prior to the time Rule 11 sanctions were decided.

CONCLUSION

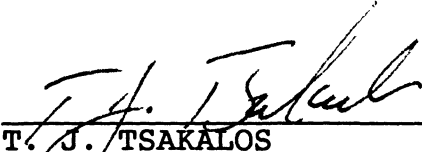
None of the three issues presented by Appellant provide a basis on which to set aside the judgment. The issue of "fraud upon the court" is not properly before this Court since a claim for "fraud upon the court" should be brought by separate action. Moreover, the acts complained of by the Appellant do not amount to "fraud upon the court." The trial court did not abuse its

discretion by denying Appellant's motion for a new trial since the Appellant moved for a new trial on inappropriate grounds and the Appellant did not provide an adequate basis on which to grant a new trial. It was not an abuse of discretion for the trial court to enter judgment against the Appellant while there were motions for Rule 11 sanctions outstanding against Appellee's counsel.

Accordingly, Appellee respectfully requests that this Court affirm the trial court's rulings.

RESPECTFULLY SUBMITTED this 21 day of August, 1991.

HANSON, EPPERSON & SMITH



T. J. TSAKALOS
Attorneys for Defendant and
Appellee

CERTIFICATE OF MAILING

I hereby certify that I caused to be mailed postage prepaid, on the 21 day of August, 1991, four true and correct copies of the foregoing, to the following:

William Paul Barron, Jr. Pro Se
11475 Holiday Way
Hillsboro OH 45133-9368



Exhibit A

ORIGINAL

EXHIBIT D

IN THE THIRD CIRCUIT COURT, STATE OF UTAH

SALT LAKE DEPARTMENT, SALT LAKE COUNTY

-o0o-

WILLIAM PAUL BARRON, JR.

Plaintiff,

vs.

SOUTHLAND CORPORATION,
7-11 STORES, CITGO PETROLEUM
AND KEMPER GROUP,

Defendants.

-o0o-

Case No. 89-2010924

MOTION TO DISMISS

Paul G. Grant

FILED
91 JUN 3 PM 12:55
CLERK OF THE DISTRICT COURT
SALT LAKE COUNTY

BE IT REMEMBERED that on the 16th day of July, 1990,

the above-entitled matter came on for hearing before the

Honorable Paul G. Grant, sitting as Judge in the above-named

Court for the purpose of this cause, and that the following

proceedings were had.

-o0o-

APPEARANCES:

For the Plaintiff:

No appearance

For the Defendant:

MR. T. J. TSAKALOS

Attorney at Law

4 Triad Center, #500

Salt Lake City, Utah 84180

ASSOCIATED PROFESSIONAL REPORTERS

10 WEST BROADWAY, SUITE 200
SALT LAKE CITY, UTAH 84101

1 P R O C E E D I N G S

2

3 THE COURT: Barron vs. Southland Corporation,

4 MR. TSAKALOS: (Inaudible) Taskalos on behalf of

5 Southland Corporation and Citgo Petroleum. I've checked down

6 the hall, he's not here, we sent him notice of the trial, at

7 least the plaintiff in this matter.

8 THE COURT: Let's give him five and if he doesn't come

9 in, then we'll strike it.

10 MR. TSAKALOS: Thank you, your Honor.

11 (Whereupon, the Court handled unrelated matters.)

12 THE COURT: Is Mr. Barron here?

13 MR. TSAKALOS: Barron is not here, your Honor.

14 THE COURT: I presume I will hear your motion.

15 MR. TSAKALOS: My motion is to dismiss with prejudice,

16 and for the Court record, Mr. Barron was driving his car and ran

17 into our pumps and sued us. And this--

18 THE COURT: Well, why didn't your pumps get out of the

19 way?

20 MR. TSAKALOS: Well, because they weren't fast enough.

21 THE COURT: Oh.

22 MR. TSAKALOS: I also brought a claim for bad faith in

23 this, your Honor. Just for the record, in October of '89, he

24 brought a malpractice suit on his own against a doctor in L.D.S.

25 Hospital and IHC, and that has been dismissed. On June 26, '89,

1 he sued Charter Summit Hospital and several people and that--
2 pro se, and that has been dismissed. On June 25, '89, he sued
3 Midvale City and Midvale P.D. and that was dismissed. On
4 October 31 of '89, he sued the State of California and the
5 California Department of Food & Agriculture, 'cause they stopped
6 him at the border, wouldn't allow him to bring in fruit and
7 vegetables. That was dismissed in the United States District
8 Court. On November 29, '89, he re-filed that suit again and that
9 has been dismissed.

10 November 16, '89, he sued the State of Utah and the
11 Utah State Tax Commission for his taxes. I think that one has
12 been dismissed, and then he sued us when our pumps did not get
13 out of his way, and now has not appeared.

14 THE COURT: And your claim for attorney's fees is how
15 much?

16 MR. TSAKALOS: I will prepare an affidavit.

17 THE COURT: All right. If you'll send that with the
18 judgment.

19 MR. TSAKALOS: Thank you, your Honor.

20 (Whereupon, this hearing was concluded.)
21

22 * * *
23
24
25

C E R T I F I C A T E

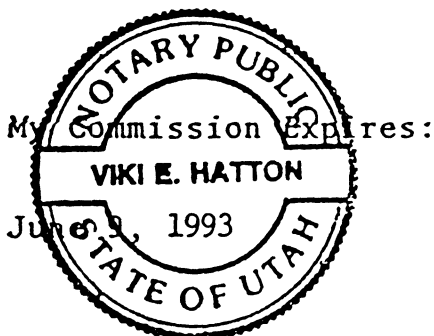
STATE OF UTAH
COUNTY OF SALT LAKE

THIS IS TO CERTIFY that WILLIAM PAUL BARRON, JR. vs.
SOUTHLAND CORPORATION was electronically recorded by the
THIRD Circuit Court, SALT LAKE COUNTY
Utah.

That the said witnesses were, before examination, duly
sworn to testify the truth, the whole truth, and nothing but
the truth in said cause.

That the said testimony of said witnesses was electronically
recorded, and thereafter caused by me to be transcribed into
type writing, and that a true, and correct transcription of
said testimony so taken and transcribed is set forth in the
foregoing pages numbered from 2 to 3, inclusive
and said witnesses testified and said as in the foregoing
annexed testimony.

WITNESS MY HAND and official seal at Salt Lake City, Utah,
this 29 day of MAY, 1991.



Viki E. Hatton
VIKI E. HATTON

ASSOCIATED PROFESSIONAL REPORTERS

10 WEST BROADWAY, SUITE 200
SALT LAKE CITY, UTAH 84101