

1958

Max E. Birch and Fontella Birch v. Forrest W. Fuller and Judith Hyde Fuller et al : Reply Brief

Utah Supreme Court

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Recommended Citation

Reply Brief, *Birch v. Fuller*, No. 8822 (Utah Supreme Court, 1958).
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IN THE SUPREME COURT

of the

STATE OF UTAH

DEC 19 1958

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EX E. BIRCH and FONTELLA
CH, his wife,

Respondents,

vs.

FORREST W. FULLER and
GITH HYDE FULLER, his wife,
KENNETH W. JUDD and
BY F. JUDD, his wife,
Appellants.

Clerk, Supreme Court, Utah

Case no 8822

REPLY BRIEF

Gordon I. Hyde and
Forrest W. Fuller

Attorneys for Appellants

TABLE OF CONTENTS

STATEMENT OF FACTS.....	page 1
ARGUMENT, POINT I	2
ARGUMENT, POINT II.....	3
CONCLUSION	7

CASES AND AUTHORITIES CITED

1 American Jurisprudence 319, Section 358.....	2
1 American Jurisprudence 843, Section 11.....	6
Beezely v. Beezely, 296 P 2d 274.....	5
Cawrse v. Cawrse, 103 P 2d 729.....	3
Cawrse v. Doris Trust Co., 208 P 2d 956.....	4

11/11/19

In The Supreme Court

of the State of Utah

**MAX E. BIRCH and FONTELLA :
BIRCH, his wife, Respondents,**

vs/

**FORREST W. FULLER and JUDITH : Case No.
HYDE FULLER, his wife, and KEN- : 8822
NETH W. JUDD AND RUBY F. JUDD,
Appellants. :**

R E P L Y B R I E F

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STATEMENT OF FACTS

The appellants do not choose to honor respondents' "Statement of Facts" by argument but rather, point out that such statement is impertinent, scandalous and irrelevant and does not pretend to be supported by the record. It can serve no legitimate purpose and is therefor in the most part the subject of appellants motion to strike. The staement of facts contained in respondents' brief is an insult to the intelligence of this court as well as an unjustified affront to appellants.

In paragraph 3, page 4, of said statement of facts respondents refer to appellants Fuller and Judd as partners and in support of such characterization respondents cite the Court to Page 62, line 16, of Judd's testimony in the transcript. To attribute such an inference to such testimony is so significantly erroneous that the appellants herewith set forth said testimony in full:

"QUESTION: Mr. Judd, what relationship do you have with Forrest W. Fuller in connection with

this property was to be conveyed in this contract? What relationship, are you partners or what is the relation?

ANSWER: We were partners or I had a contract with Ferry to another place. (Italics supplied by the writer)

QUESTION: You had the contract to another place?

ANSWER: Yes." Transcript, Judd d62, 12-19.

The only useful fact to be gained from this testimony is that Judd and Fuller either had a contract or were partners in another transaction concerning another and unrelated property.

Respondents in the first full paragraph to appear on page 6 of their brief apparently allude to a stipulation or pre-trial order restricting the trial to the amount of damages due the respondents. That no such order or stipulation exists should be manifest by the fact that the trial court consistently received evidence and testimony bearing upon liability. Appellants are aware of no such order and/or stipulation.

ARGUMENT, POINT I

THE COURT ERRED IN DENYING APPELLANTS' MOTION TO DISMISS RESPONDENTS' FIRST CAUSE OF ACTION AND IN GRANTING JUDGMENT THEREUNDER FOR SLANDER OF TITLE.

The citation appearing on pages 7 and 8 of respondents' brief should be corrected to

by the appellants. The last paragraph of this section is particularly in point:

"A bona fide claim of title on the part of the defendant is generally sufficient to rebut any implication of malice in making the utterance in question."

The rights arising from the document introduced as respondents' Exhibit "A" as assigned in Exhibit "I" create just such a bona fide claim of title and there is no evidence in the record that either Judd or Fuller released this claim or that it in any other manner was abrogated or became invalid.

CAWRSE v. SIGNAL OIL CO., 103 P 2d 729, cited by respondents is distinguishable from the instant case. In the former "Counsel concede that the defendant Co. had no valid lease...", Op Cite 731. No such concession has ever been made in the latter. In the Cawrse case evidence in the record indicated that the defendant admitted by its actions in removing certain advertising signs from the premises that it knew its claim was invalid. The facts disclosed by the record in the instant case give rise to no reasonable parallel inference.

To the contrary the record provides ample evidence that the appellants at all times prior to the trial aggressively asserted their claim, staunchly advocated that it was honest, and did not once, by their actions or otherwise, make any concessions to the contrary. Although the result in the Cawrse case is contrary to the result urged by the appellants herein it very aptly states the general principles relied upon by the appellants herein and is therefor adopted thereby, as distinguished.

The DOWSE v. DORIS TRUST COMPANY case, 208 P 2d 956, cited by respondents is similarly distinguishable from the present case. The defendant in the Dowse case also admitted that the documents recorded were false. Op Cite 957, 8.

- . "... Defendant admitted that plaintiff was not his agent for the purpose of purchasing the property.
- .. At the time be filed the instrument he knew that he had no rights or interest in the property."

No such admission has ever been made by the appellant herein. Other than as distinguished the Dowse case also restates the theory and principles relied upon by the appellants and is adopted thereby.

ing to prove that the contract set forth in exhibit "A" was in any way invalid as to the appellants Judd and Fuller. Even had the contract claim been completely invalid there was no direct evidence from which malice or lack of just cause could reasonably or otherwise be inferred. While as set forth in BEEZLEY v. BEEZLEY, 296 P 2d 274, the judgment will not be disturbed unless the evidence preponderates against the findings it is implicit therein that the judgment certainly will be set aside and reversed where the evidence does clearly preponderate against such judgment.

Having decided that the game was not worth the candle the decision of the appellants not to file a complaint although one was prepared and to relinquish their property rights by stipulation can certainly not be construed as an admission on their part that such rights never existed.

POINT II

THE COURT ERRED IN DENYING APPELLANTS' MOTION TO DISMISS AND IN GRANTING RESPONDENTS JUDGMENT UPON THE SECOND CAUSE OF ACTION FOR TRESPASS.

If respondents at this point accept as fact the ad-

missi

that said

appellants were in possession of the property nothing further need be argued herein for, "The gist of a trespass to realty lies in the disturbance of possession..." 52 AMERICAN JURISPRUDENCE 843, Section 11.

Once again the appellants deny the existence of a stipulation confining the trial to the sole issue of damages unless such restriction be sufficiently broad to include the question of whether or not the defendants were liable for same. The fact that such restriction would inherently include such ancillary issue was apparent to the trial court if not to the respondents. The true frame of mind of the trial court on this matter is to be found in the Transcript, D 4, 29-30, and D 5, 1-5.

The fact that counsel for respondents insisted that appellants were partners during the pre-trial is no more compelling an argument that they were such than is the admission of Fuller in exhibit "F" That he Sather and Judd purchased the property as tenants in

common - ~~AND THE COURT THEREFORE DECIDES IN FAVOR OF THE DEFENDANT~~ as defendant with any-
one under the option agreement contained in Exhibit "E"
which was entered into without his knowledge. The
connotation ascribed to the testimony found in the tran-
script at page D 62 is no less erroneous for its repiti-
tion at page ten of respondents brief than it was when
urged thereby at page four.

C O N C L U S I O N

The denial by the District Court of appellants' motion
to dismiss and the judgment granted were in error and
should be reversed.

Respectfully submitted,

Gordon I. Hyde and Forrest
W. Fuller, Attorneys for the
Appellants.