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Clark Properties, Inc. v. JDW-CM, LLC : Brief of Appellant

Utah Court of Appeals

IN THE UTAH COURT OF APPEALS

CLARK PROPERTIES, INC., Petitioner and Appellant, v. JDW-CM, LLC, Respondent and Appellee.	Case No. 20100~~416~~-CA 851-CA
JDW-CM, LLC, Counterclaim Petitioner and Appellee, v. CLARK PROPERTIES, INC., Counterclaim Respondent and Appellant, and DEER RUN AT MAPLE HILLS, LLC, and JOHN DOES 1-100, Appellant.	

BRIEF OF APPELLANTS

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STATEMENT OF JURISDICTION

The Court of Appeals has appellate jurisdiction over this appeal pursuant to Utah Code Ann. § 78A-4-103(2)(j).

STATEMENT OF ISSUES AND STANDARD OF REVIEW

1. Did the trial court err in ruling that JDW-CM, LLC ("JDW") was entitled to quiet title of the Highland Oaks Property when it failed to receive any evidence through testimony or otherwise at trial, had no motions pending before it, and based its Ruling on trial briefs which contained no evidence sufficient under a trial or summary judgment standard? (Preserved in the Record at R. 856-858; R. 859-864).

This issue is a question of law that will be reviewed for correctness. Dowling v. Bullen, 2004 UT 50, ¶ 7, 94 P.3d 915.

2. Did the trial court err in denying the Motion for New Trial of Appellants, Clark Properties, Inc., Clark LHS, LLC, Deer Run at Maple Hills, LLC, and Sherlene Clark, individually and as Trustee of the Clark Charitable Grantor Trust (sic) (the "Clark Appellants"), when it failed to receive any evidence at trial to support its Findings of Fact, Conclusions of Law and Judgment, had no motions pending before it and based its Ruling on trial briefs, which contained no evidence sufficient under a trial or summary judgment standard? (Preserved in the Record at R. 856-858; R. 859-864).

The granting or refusal to grant a new trial is largely a matter of discretion with the trial judge. The trial court's ruling will be reversed on appeal only for an

abuse of discretion. Smith v. Fairfax Realty, Inc., 2003 UT 41, ¶ 25, 82 P.3d 1064.

DETERMINATIVE RULES

Interpretation of the following is determinative, at least in part, of the issues presented on appeal:

> *Grounds*. Subject to the provisions of Rule 61, a new trial may be granted to all or any of the parties and on all or part of the issues, for any of the following causes; provided, however, that on a motion for new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment:
>
> * * *
>
> (a)(6) insufficiency of the evidence to justify the verdict or other decision, or that it is against law.

Rule 59(a)(6), Utah R. Civ. P.

> A memorandum supporting a motion for summary judgment shall contain a statement of material facts as to which the moving party contends no genuine issue exists. Each fact shall be separately stated and numbered and supported by citation to relevant materials, such as affidavits or discovery materials...

Rule 7(c)(3)(A), Utah R. Civ. P.

STATEMENT OF THE CASE

A. NATURE OF THE CASE.

This is an action concerning whether or not the Clark Appellants breached a contract and thus whether JDW, as successor in interest to the contract, was entitled to quiet title of two lots, Lot 307, Highland Oaks Subdivision ("Highland Oaks") and Lot 3, Deer Run at Maple Hills Subdivision ("Deer Run"), which were conditionally quitclaimed to JDW's predecessor in interest.

B. COURSE OF PROCEEDINGS.

The Clark Appellants made a Combined Motion to Dismiss and Motion for Summary Judgment ("MSJ") seeking dismissal of JDW's related breach of contract, quiet title and declaratory relief actions, as well as several unrelated claims. After written and oral arguments, the trial court granted dismissal of certain claims unrelated to the breach of contract, quiet title and declaratory relief actions. Citing disputed material facts, the trial court denied the Clark Appellants' Motion concerning the breach of contract, quiet title and declaratory relief actions. On November 5, 2009, the parties appeared at trial to try these claims. However, following JDW's opening statement the trial court informed the parties that based on its review of trial briefs and the previously filed MSJ it was prepared to rule without receiving any evidence. Following the Clark Appellants opening statement the trial court informed the parties that it was likely that no evidence would change the ruling it was prepared to make. The trial court then announced that it would

grant quiet title to the Highland Oaks Property to JDW and rule that the one action rule precluded JDW from obtaining title to the Deer Run Property without hearing or receiving any evidence. After trial, JDW filed Findings of Fact, Conclusions of Law and Judgment ("Findings and Conclusions") with the trial court without serving them upon the Clark Appellants or giving them an opportunity to object thereto at the time of filing. Following Judge Memmott's entry of the Findings and Conclusions, the Clark Appellant's filed a Motion for New Trial. After written and oral arguments, the trial court denied the Clark Appellants' Motion holding that the Clark Appellants had waived their rights. The Clark Appellants' appealed that decision to the Utah Supreme Court, which pursuant to Utah Code Ann. § 78A-3-102(4), transferred the appeal to this Court.

C. STATEMENT OF FACTS.[1]

1. On or about January 7, 1997, Clark Properties, Inc. borrowed money from Vance Cook and Mark Merrill ("Cook and Merrill") and executed a promissory note evidencing the same, secured by a Trust Deed (the "Cook/Merrill Note") executed by some of the Clark Appellants and recorded against the following property:

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[1] Because no facts were offered or received at trial, certain contextual facts necessary for understanding the underlying action are not available for citation from the Record and are thus not included herein. Further underlying contextual facts are contained in the Clark Appellants' Docketing Statement.

> Parcel 1: All of Lots 3 and 5, Deer Run at Maple Hills, Subdivision Plat A, Bountiful City, Davis County; and
>
> Parcel 2: A 14 acre piece of property located in Kaysville (the ("14 acre parcel").

(R. 189).

2. The 14 acre parcel was also encumbered by a Barnes Bank Trust Deed Note in first position. (Id.)

3. Clark Properties, Inc. had a Trust Deed on the 14 acre parcel in third position. (Id.)

4. In the fall of 1998 John Clark sold property adjacent to the 14 acre parcel, including its underlying debts, to Scott Turville for $1,000,000.00. That adjacent property was also encumbered by the same Barnes Bank Trust Deed that encumbered the 14 acre parcel in first position. (R. 355, 428).

5. Sometime prior to August 1999, Barnes Bank began foreclosure proceedings on the 14 acre parcel; the scheduled date of the trust deed sale was August 17, 1999. (Id.)

6. On August 17, 1999 John Clark entered into the Foreclosure and Redemption Agreement ("FRA") with Cook and Merrill to protect their second position interest in the 14 acres. (R. 138-145).

7. The FRA provided that John Clark would sign a quitclaim deed to Highland Oaks as a guarantee of performance. If Clark was unable to stop the Barnes Bank Foreclosure, Cook and Merrill were entitled to record the quitclaim

deed and take title to Highland Oaks in substitute satisfaction of the Cook/Merrill Note. (Id.)

8. The FRA also provided that Clark would deliver a quitclaim deed to Deer Run to Cook and Merrill. In the event that Cook and Merrill were forced to bid any portion of the Cook/Merrill Note at the Barnes Bank Foreclosure, Cook and Merrill could then record the Deer Run quitclaim deed as further substitute satisfaction of the Cook/Merrill Note. (Id.)

9. Prior to the Barnes Bank Foreclosure, Scott Turville arranged to payoff the Barnes Bank Note and the foreclosure sale never occurred. (R. 192-193, 356, 430).

10. As a result, Cook and Merrill did not bid the Cook/Merrill Note on the 14 acre parcel at the sale and their collateral moved into first position against the 14 acre parcel when the Barnes Bank Note was retired. (R. 374).

11. On September 14, 1999 Cook and Merrill entered into an agreement with JDW and Brian Steffensen (the "Successor in Interest Agreement") in which Cook and Merrill agreed to transfer their rights, if any, under the Cook/Merrill Note and FRA to JDW. (R. 374-377).

12. On September 16, 1999 JDW filed a Notice of Interest/Intent to File Action in the Davis County Recorder's Office concerning Deer Run and Highland Oaks. (R. 2).

13. On November 6, 2000 Clark Properties, Inc. Filed its Verified Petition to Nullify Wrongful Lien. (R. 1-11).

14. Following several attempted default judgments, on July 11, 2002 JDW filed its Second Amended Answer to Petitioner's Verified Petition to Nullify Wrongful Lien an Counterclaim Petitioner JDW-CM, LLC's Second Amended Counterclaim and Third-Party Complaint, the operative complaint at the trial of this matter. (R. 181-200).

15. On July 9, 2008 the Clark Appellants filed their Combined Motion to Dismiss and Motion for Summary Judgment of Clark Properties, Inc. and Deer Run at Maple Hills, LLC ("MSJ") and Memorandum in Support. (R. 349-415).

16. JDW purported to file its Memorandum in Opposition on August 15, 2008.[2] (R. 425-438).

17. The Clark Appellants filed their Reply Memorandum on September 26, 2008. (R. 466-514).

18. On March 25, 2009 the trial court granted summary judgment dismissing JDW's alter ego, fraud and civil conspiracy claims with prejudice. (R. 617-625).

19. The trial court denied the Clark Appellants' MSJ with respect to JDW's claim for breach of the FRA and related quiet title and declaratory relief claims. (R. 617-620).

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[2] The Court's receipt stamp shows the actual filing date of August 20, 2008.

20. In its Ruling, the trial court noted that it denied the MSJ on JDW's breach of contract and related quiet title and declaratory relief claims due to disputed issues of material fact. (R. 542-543).

21. Following the Court's ruling on the Combined Motion to Dismiss and Motion for Summary Judgment, significant discovery took place in this matter. (*eg*. R. 630-643, 775-778, 790-791).

22. JDW's breach of contract, quiet title and declaratory relief claims proceeded to trial on November 5, 2009. (R. 780, 830; see also Transcriber's Transcript of Bench Trial.[3] (Cited herein as "Tr. p. ___").

23. Prior to trial, the parties submitted trial briefs to the Court which contained narratives only of what the parties believed the evidence would show. (R. 798-811, 812-823).

24. No motions for summary judgment were pending before the Court at the time of trial. (R. 793).

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[3] For some reason, the clerk for the Court of Appeals did not include the Trial Transcript in the Record of this matter. On May 27, 2010 the Clark Appellants filed a Certificate of Appellants that Transcript is not Required, but specifically noted in it that they had already ordered and received a transcript of the bench trial and identified the name, address and phone number of the transcriber who prepared it. The Clark Appellants then noted that no other transcript was necessary for the Appellate Court's consideration of this appeal. Because the transcript was not included in the record, the parties have stipulated to supplement the Record and add the Trial Transcript for the Court's review.

25. JDW served the Estate of John Clark with a Summons and the Second Amended Counterclaim and Third-Party Complaint one day before trial on November 4, 2009. (R. 826-827).

26. The Clark Appellants filed a Motion to Quash the service of summons and a Memorandum in Support on November 5, 2009. (R. 831-841).

27. At trial, the Court reserved a ruling on the Motion to Quash. (R. 830).

28. Following the Court's reservation concerning the Motion to Quash, JDW gave its opening statement. (R. 830; Tr. pp. 16-29).

29. After JDW's opening statement, the trial court informed the parties that it was able to resolve the matter. (Tr. p. 29).

30. The Clark Appellants asked if they could speak first and then gave their opening statement. (R. 830; Tr. pp. 29-40).

31. Following opening statements, the trial court informed the parties that it was prepared to rule on JDW's claims. (Tr. pp. 44-45).

32. The trial court also informed the parties that no presentations of evidence would change its mind as to its ruling. (Tr. p. 61).

33. The trial court then proceeded to rule that the one action rule barred plaintiff's claims against the Deer Run property. (Tr. pp. 46-48, 62).

34. The trial court also ruled that John Clark breached the FRA and thus JDW was entitled to quiet title of the Highland Oaks property. (Tr. pp. 49-50, 63-65).

35. The trial court acknowledged that it obtained facts used in its ruling from the trial briefs submitted by the parties. (Tr. pp. 54-55).

36. The trial court also stated that had the additional facts developed during discovery and identified in the trial briefs been available to it in the MSJ, it could have granted summary judgment. (Tr. pp. 54-55).

37. No facts or exhibits were presented or received by the trial court at trial. (R. 830; Tr. pp. 1-66).

38. After the Court had announced its Ruling, counsel for the Clark Appellants acknowledged that the FRA spoke for itself. (Tr. p. 61).

39. The Clark Appellants then asked to clarify what the trial court had done and after the court's explanation, announced that they understood. (Tr. pp. 62-65).

40. Following trial, JDW filed its Findings of Fact, Conclusions of Law and Judgment ("Findings and Conclusions") with the Court. (R. 844-855).

41. The Findings and Conclusions represented that the parties agreed that the "findings and rulings resolved all matters in this case." (R. 854).

42. Despite purporting to do so, JDW did not serve the Findings and Conclusions on the Clark Appellants at the time it was filed with the trial court and thus the Clark Appellants did not have the opportunity to object. (R. 876).[4]

43. The Clark Appellants moved for a new trial on January 15, 2010. (R. 856-864).

44. JDW filed its Memorandum in Opposition on January 29, 2010. (R. 865-873).

45. The Clark Appellants filed their Reply Memorandum on February 11, 2010. (R. 874-880).

46. Following briefing, the trial court denied the Clark Appellants' Motion for New Trial on April 19, 2010 on the grounds of waiver and stated that it received facts from the previously filed MSJ and Memorandum in Opposition. (R. 884-890).

47. The Order Denying Motion for New Trial was entered on September 20, 2010. (R. 911-912).

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[4] Though referred to in the Reply Memorandum in Support of Motion for New Trial, the referenced letters discussing JDW's failure to serve the Findings and Conclusions at the time of filing were mistakenly not attached to the Clark Appellants' Memorandum when it was filed with the trial court. The letters are also the subject of a stipulation to supplement the Record and attached hereto in the Appendix.

SUMMARY OF ARGUMENT

The trial court erred in granting title to Highland Oaks to JDW and in denying the Clark Appellants' Motion for New Trial after it failed to receive any evidence at the purported trial of this matter. Because no evidence was presented or received, the Findings and Conclusions entered in this matter are unsupported, adopted outside the accepted practices of the courts thus violate the fundamental principles of due process as well as Utah statutory law. Because no evidence was presented or received by the Court to sustain its Ruling, the court abused its discretion in denying the Clark Appellants' Motion for New Trial and its Ruling granting quiet title to Highland Oaks must be vacated.

ARGUMENT

I.

THE TRIAL COURT ERRED IN DENYING THE CLARK APPELLANTS' MOTION FOR NEW TRIAL BECAUSE NO EVIDENCE WAS PRESENTED AT TRIAL OR OTHERWISE UPON WHICH THE TRIAL COURT COULD BASE ANY FINDINGS OF FACT, CONCLUSIONS OF LAW OR JUDGMENT.

The trial court erred in denying the Clark Appellants' Motion for New Trial because no evidence was presented by the parties or received by the court at the trial of this matter. Under well settled Utah law, the Findings and Fact, Conclusions of Law and Judgment entered in this matter are unsupported and the trial court's Judgment is void. The trial court therefore abused its discretion in

denying the Motion for New Trial. The Findings and Conclusions should be vacated and a new trial should be ordered.

It is well settled that a trial court may order a new trial when there is insufficient evidence to justify a court's judgment. Crookston v. Fire Ins. Exch., 817 P.2d 789, 799 (Utah 1991); Utah Rules of Civil Procedure, Rule 59(a)(6). Moreover, it is fundamental that a judgment is sustainable only when it has a proper basis in evidence. Rosenthyne v. Matthews-McColloch Co., 168 P. 957, 960 (Utah 1917); In re Evans, et al., 130 P. 217, 225 (Utah 1913). To withstand summary judgment, a trial court must take into account "the substantive evidentiary standard of proof that would apply at a trial on the merits." Christiansen v. Union Pac. R.R. Co., 2006 UT App. 180, ¶ 6, 136 P.3d 1266. Conversely, for a trial court to rule at trial, it must at least have been presented evidence sufficient under a summary judgment standard. Failing to receive such evidence violates fundamental principles of due process:

> We have previously held that under the due process clause, individuals cannot be deprived of their right to pursue legal claims... without due process of law.
>
> * * *
>
> The open courts provision guarantees at the very least, that courts shall be open, affording a day in court to all parties. Similarly, the due process clause, at the very least, requires that every claimant be afforded his "day in court"...
>
> At a minimum, a day in court means that each party shall be afforded the opportunity to present claims and

> defenses, **and have them properly adjudicated on the merits according to the facts and the law.**
>
> * * *
>
> "On the merits" is a term of art that means that a judgment is rendered **only after a court has evaluated the relevant evidence** and the parties substantive arguments. **To be on the merits... the district court [must have] rendered judgment based upon a proper application of the relevant law to the facts of the case.**

Miller v. USAA Cas. Ins. Co., 2002 UT 6, ¶¶ 39, 41-42, n. 6, 44 P.3d 663 (emphasis added) (internal citations and quotations omitted).

Likewise, adopting evidence outside traditional means and accepted practices violates the fundamental principles and practices of the court required by due process. Thus, long since settled Utah law makes plain that any judgment so obtained is void for all purposes:

> [A] judgment which is beyond or not supported by pleadings must fall. **So too must a judgment... fall for other errors of law apparent on the face of the mandatory record, such as showing the judgment obtained to be at variance with the practice of the court or contrary to well-recognized principles and fundamentals of the law. A fact apparent from the mandatory record, showing that fundamental law was disregarded in the establishment of the judgment, will render it null and void for all purposes.** ...In other words, all proceedings must appear to be coram judice.

Stockyards Nat'l Bank of South Omaha v. Bragg, 245 P. 966 (Utah 1925) (emphasis added); see also, In re Evans, et al. 130 P. at 225-226.

"It is an elemental principle of justice that a party seeking adjudication of his rights should be neither prevented nor dissuaded from presenting any evidence he

desires which is competent and material to the issues. Cooper v. Indus. Comm'n of Utah, 387 P.2d 689, 690 (Utah 1963). Moreover, "when ensuring litigants have received due process of law, our policy is to resolve doubts in favor of permitting parties to have their day in court on the merits of a controversy." Miller at ¶ 41.

In this matter, the trial court expressly discouraged the presentation of evidence and thus expressly violated due process. Judge Memmott attempted to rule before the Clark Appellants ever gave their opening statement. (Tr. p. 29). Following opening statements, Judge Memmott expressly told the parties that any presentation of evidence was futile:

> I don't want to jump in prematurely, but I don't see anything and I didn't hear anything in argument that would change my mind as to what you are going to present today or what you are going to do that would change my mind as to how I read the law, how I read the [one action rule] statute, how I read this agreement.

(Tr. p. 61).

Indeed, the trial judge announced that he was satisfied that he could make a ruling as a matter of law based on his review of trial briefs and previously filed summary judgment briefs. (Tr. pp. 29, 40-45). No evidence was set forth in the trial briefs, however, that would have been sufficient to satisfy summary judgment standards and the requirements of Rule 7(c)(3) of the Utah Rules of Civil Procedure. (R. 798-811, 812-823). Moreover, the evidence contained in the summary judgment briefs upon which the trial judge purportedly relied had already been ruled upon as

containing disputed facts. (R. 542-543). Judge Memmott expressly admitted at trial, however, that he could not rule upon the MSJ without the additional discovery identified in the trial briefs. (Tr. 54-55).

Thus no evidence was presented to the trial court upon which it could make any findings of fact, conclusions of law or judgment, much less support the findings that were actually entered.[5] Under well settled Utah law, the trial court's Judgment can therefore not be sustained. The trial court should be required to either reopen the judgment or order a new trial because the court abused its discretion in denying the Clark Appellants' Motion for New Trial. As noted by the Utah Supreme Court in State v. Beck, 2007 UT 60, ¶ 13, 165 P.3d 1225, 1228:

> "The very essence of our judicial system is the right of every citizen to have his case heard by a neutral and impartial judge. Our constitutional system is designed to assure fairness to those who stand in jeopardy of life and property, even to the disadvantage of others."

In this case, the judge had made up his mind before the trial started. He announced as much from his own mouth before opening statements were completed and then ruled without evidence in a quiet title case. This is plain error.

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[5] In a quiet title action, the court "in all cases shall require evidence of plaintiff's title and possession and hear the evidence offered respecting the claims and title of any of the defendants." Utah Code Ann. § 78B-6-1315(3).

II.

THE TOTALITY OF THE CIRCUMSTANCES SHOWS THAT THE CLARK DEFENDANTS DID NOT WAIVE THEIR RIGHT TO TRIAL BECAUSE ANY IMPLIED "WAIVER" OCCURRED AFTER THE TRIAL COURT'S VIOLATION OF DUE PROCESS

Despite JDW's argument and the trial court's Ruling to the contrary, the Clark Appellants made no waiver of their right to trial. Rather, the totality of the circumstances shows that the Clark Appellants' intended to exercise their right at all times. Equally important to this analysis is that the Clark Appellants' alleged "waiver" was made after the trial court judge had already announced his Ruling and informed the parties that evidence would not change his mind.

Under Utah law, waiver requires three elements: (1) An existing right, benefit or advantage; (2) knowledge of its existence; and (3) an intention to relinquish the right. Soter's Inv. v. Desert Fed. Sav. and Loan Assoc., 857 P.2d 935, 940 (Utah 1993). For a party to show an intention to relinquish its rights, the waiver "must be distinctly made." Id. Waiver may "not be found from any particular set of facts unless it was clearly intended," and thus, "mere silence is not a waiver unless there is some duty or obligation to speak." Id. Rather, in order for a party to have waived its rights, it must be determined that the "totality of the circumstances warrants the inference of relinquishment." Id. at 942 (internal quotations omitted).

It is important to note that neither JDW in its Memorandum in Opposition to Clark Properties Motion for New Trial (R. 865-873), nor the Court in its

Ruling on Motion for New Trial (R. 884-889), cite to any specific instance of waiver by the Clark Appellants. In fact, there are no instances in the Record that show a distinct waiver. Rather, there are only three instances where, at best, a waiver could be implied by the Clark Appellants' counsel. The first is when the Clark Appellants acknowledged that the FRA had to speak for itself (Tr. p. 61). The second was when the Clark Appellants asked to clarify what the Court was doing, and following the Court's clarification, acknowledged that they understood the Court's Ruling (Tr. pp. 62-65). The final possible instance occurred in the Findings and Conclusions at ¶ 55, entered after trial. (R. 854).[6] Each of these "instances" of "waiver," however, occurred after the trial court expressly stated that it was prepared to rule and would not be persuaded by the presentation of evidence. (Tr. p. 61).

Rather, the totality of the circumstances shows that the Clark Appellants had, at all times, the distinct intention of exercising their right to trial. The Clark Appellants arrived at trial on November 5, 2009 having submitted a trial brief and prepared to present evidence and make their case. (R. 780, 830, 789-811; Tr. 1-66). After the Judge initially informed the parties he intended to rule on the

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[6] As noted briefly in the Statement of Facts, when JDW filed its Findings and Conclusions with the Court, it failed to serve a copy or otherwise notify the Clark Appellants who did not become aware that the document had been filed until the day it was entered by the Court. Once the Clark Appellants learned that the document had been filed and entered, they immediately filed their Motion for New Trial. (R. 876).

matter, the Clark Appellants requested to be able to give their opening statement. (Tr. p. 29). After "trial", the Clark Appellants expressly notified JDW of their intent to seek a new trial. (R. 876). On January 8, 2010 they filed their Motion. (R. 856-859). And on October 18, 2010 the Clark Appellants filed their Notice of Appeal. (R. 917-919). Clearly, the Clark Appellants did not intend to waive their right to trial. Indeed, the Clark Appellants' decision to leave the trial without presenting evidence further shows their intention to preserve their rights because they had determined that any attempt to present evidence at "trial" would be futile once the court had expressly advised the parties that it had already formed a judgment and so ruled. At that point, any presentation of evidence was useless to overcome the court's pre-judgment of the case, denial of due process and wide variance with the forms and practices of the courts. For these reasons, the totality of the circumstances does not support waiver. The trial court's denial of the Clark Appellants' Motion for a New Trial should therefore be reversed and the case remanded for further proceedings.

III.

JUST AS NO FACTS WERE RECEIVED BY THE TRIAL COURT TO SUSTAIN ITS FINDINGS AND CONCLUSIONS, NO FACTS WERE RECEIVED TO SUSTAIN ITS RULING GRANTING JDW TITLE TO THE HIGHLAND OAKS PROPERTY.

As argued above, the trial court violated fundamental principles of due process, the accepted practices of the courts and Utah Code Ann. § 78B-6-1315(3) when it failed to receive evidence at trial and instead, despite no motions pending

before it, issued its Ruling based on a review of trial briefs. For the same reasons that the court's Findings and Conclusions must be vacated, so too must the court's Ruling that JDW is entitled to quiet title of the Highland Oaks property.

> It is fundamental that... what is not juridically presented can not be judicially considered or decided. A judgment not supported by sufficient pleadings must fall. So must, also, a judgment which is beyond the pleadings and the findings. **So, too, must a judgment fall for other errors of law apparent on the face of the record, such as showing that the judgment or the methods by which it was obtained to be at variance with the forms and practice of the court, or contrary to well recognized principles and fundamentals of the law. A fact apparent from the mandatory record showing that fundamental law was disregarded in the establishment of the judgment will render it null and void for all purposes.**

In re Evans, et al. 130 P. at 225-226 (emphasis added).

As argued in detail above, the trial court's Ruling is at variance with due process, the forms and practices of the court and Utah statute. It is also contrary to well recognized principles and fundamentals of the law. The trial court's Ruling granting quiet title to the Highland Oaks property to JDW is not supported by any evidence and void under Utah law. It should therefore be overturned and the matter remanded to the trial court for new trial.

CONCLUSION

This case should be reversed because the Clark Appellants were denied two very fundamental rights, *viz*: a trial and an impartial finder of fact. The case was pre-judged and the judgment is not supported by any evidence because none was

adduced. Due process was denied. This Court should respectfully reverse and vacate the trial court's Ruling and remand the matter for new (sic) trial.

DATED this 25 day of February, 2011.

WILLIAMS & HUNT

By _____

GEORGE A. HUNT
MARK R. ANDERSON
Attorneys for Appellants

206721

CERTIFICATE OF MAILING

I hereby certify that on the 25th day of February, 2011, I caused one true and correct copy of the foregoing **Brief of the Appellants** to be mailed through the United States Mail, via First Class, with postage prepaid thereon, to the following:

Brian W. Steffensen
STEFFENSEN LAW OFFICE
448 East 400 South, Suite 100
Salt Lake City, Utah 84111

Jaci M. Johns

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December 7, 2009

Brian W. Steffensen
2159 South 700 East, #240
Salt Lake City, Utah 84106

Re: *Clark v. JDW*
Our File No.: 1109.0009

Dear Brian:

We have recently had the opportunity to review your proposed Findings of Fact and Conclusions of Law. We appreciate your efforts on this, but after having the opportunity to discuss the "trial" with our clients we have decided that we are going to seek a new trial in this matter. We believe that the manner in which Judge Memmott resolved the case is legally unsustainable under any standard. We therefore intend to move for a new trial in the near future, which will obviate the need to spend time and effort arguing over the Finding and Conclusions and Judgment.

Feel free to call if you have any questions or wish to discuss this matter further.

Sincerely,

WILLIAMS & HUNT

Mark R. Anderson
George A. Hunt

MRA/shs

173428

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December 29, 2009

Brian W. Steffensen
2159 South 700 East, #240
Salt Lake City, Utah 84106

Re: *Clark v. JDW*
Our File No.: 1109.0009

Dear Brian:

I left a message with your assistant to have you call me yesterday but have not heard back from you. George and I have reviewed the docket in the JDW matter and observed that a Judgment had been delivered to Judge Memmott on December 11, 2009, but has not yet been filed. We were never served a copy of that Judgement. As you know, we received proposed Findings and Conclusions from you via e-mail but no Judgement was attached. Please provide us copies of all documents submitted to Judge Memmott as soon as possible so we may review them. This is not the first time documents have been delivered to the court that have not been served upon us. Please take whatever precautions necessary to see that this stops happening.

Thank you for your anticipated cooperation.

Sincerely,

WILLIAMS & HUNT

Mark R. Anderson

MRA/shs

174799.1