

2001

Jose S. Salazar, Mildred O. Salazar v. Thrifty Nickel  
of Orem, Inc., Want Ads of Salt Lake City, Inc.,  
Southern Cross, Inc., Robert L. Christensen,  
Norman Wilkinson : Petitioner's Reply Brief

Utah Court of Appeals

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### Recommended Citation

Reply Brief, *Salazar v. Thrifty Nickel Inc.*, No. 20010297 (Utah Court of Appeals, 2001).

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IN THE COURT OF APPEALS OF THE STATE OF UTAH

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JOSE S. SALAZAR and MILDRED O.  
SALAZAR,

Plaintiffs and Appellants,

vs.

THRIFTY NICKEL OF OREM, INC., a  
Utah Corporation; WANT ADS OF SALT  
LAKE CITY, INC., a Utah Corporation;  
SOUTHERN CROSS, INC., a Utah corporation;  
ROBERT L. CHRISTENSEN, an individual; and  
NORMAN WILKINSON, an individual,

Case No. 20010297-CA

(Priority No.15)

Defendants and Appellee,

---

**PETITIONER'S REPLY BRIEF**

---

Appeal from the Order of Dismissal of Defendant Robert L. Christensen  
By the Honorable J. Dennis Frederick  
Third Judicial District Court of Salt Lake County, State of Utah

---

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## CLARIFICATION OF THE ISSUES AND FACTS

Previously submitted briefs of the parties have described the setting of this case.

A few erroneous points brought out by Appellee Christensen require clarification.

2. The subject of this case is an Employment Agreement between **Thrifty Nickel** and Jose and Mildred Salazar. As such it is not a contract specifically with any particular one of the many Thrifty Nickel companies. See Addendum C to Appellant's initial Brief.
3. Salazar's plead facts to support Christensen's individual liability as the alter ego of Thrifty Nickel. The Salazar's alleged in their Complaint that the transfer of assets between the three corporate defendants is fraudulent under an action currently in process in the United States Bankruptcy Court for the District of Utah, Central Division, Case No. 99C-31762 (Complaint ¶ 35) It was further alleged that transfers of assets occurred at the direction of defendants Christensen and/or Wilkinson. (Complaint ¶ 36).
4. The Brief of Appellee on pages 5 and 6 states some of the many allegations against Mr. Christensen very specifically.
5. Plaintiff's Complaint states "there should be no corporate veil distinguishing or protecting the assets of" Mr. Christensen. (Complaint ¶ 37)
6. The only viable defendant remaining in this matter is Robert L.

Christensen. The remainder of the defendants are either bankrupt corporations controlled by Mr. Christensen or previously dismissed persons or corporations.

Appellants encourage the Court to read and consider the cases cited by Mr. Christensen's counsel very carefully. Several positions taken by Christensen seem plausible if one did not actually read the quoted and referenced authorities. Examination of the underlying rationale may surprise the Court. Many cases are represented as the opposite of the actual holding. If Christensen had pulled these stunts in a debate meet, he would have been disqualified. In a hockey game he would be in the penalty box. There are many blatant misrepresentations intended to mislead the Court. Much of the time, the authorities cited by Christensen shockingly support the Salazars viewpoint and not Christensen's position at all. Meaningful sanctions may be appropriate for misrepresenting to this court the holding of numerous legal authorities and fabrication of cited authorities to this court.

## ARGUMENTS

### I. THE TRIAL COURT ERRONEOUSLY DETERMINED THAT THE SALAZARS COULD NOT STATE A CLAIM AGAINST ROBERT CHRISTENSEN

Christensen's first cite, Whipple v. American Fork Irrigation Co., 910 P.2d 1218, 1220 (Utah 1996) is a great case for the Salazars and not Christensen who cites the case. In Whipple, Id., the trial court incorrectly dismissed the plaintiff's complaint for failing to state a cause of action. The Utah Supreme Court had no difficulty reversing the trial court for erroneously dismissing the complaint. The Supreme Court held that the complaint did state a cause of action and should not be dismissed. That is the position the Salazars take on appeal.

The second case Christensen cites to the court, Harmon City, Inc. v. Nelson & Senior, 907 P.2d 1162, 1167 (Utah 1995), another Judge Frederick case, is again a super case for the Salazars and not Christensen. Judge Frederick entered summary judgment for the defendants and tossed the plaintiffs out of court, ruling that the plaintiffs had failed to state a cause of action for which relief could be granted. The Utah Supreme Court had no problem reversing Judge Frederick's abuse of discretion in dismissing the lawsuit. The Utah Supreme Court held that material issues of fact existed and ordered Judge Frederick to allow the plaintiffs to have their day in court for a determination of what happened, just as we ask this court to rule as well. We commend opposing counsel



for bringing this very Salazar-favorable case to the court's attention but we condemn them for arguing that this case supports their position when it is hard to imagine a case more adverse to their position and more in favor of allowing the Salazars an opportunity to have their day in court.

Next, Christensen quotes a United States Supreme Court case entitled Conley v. Gibson, 355 U.S. 41 (1957). This case, again, supports the Salazars' position. In Conley, Id. Justice Black wrote an opinion that is on all fours with the Salazar's position. The U.S. Supreme Court held that the plaintiff's complaint did in fact adequately set forth a complaint upon which relief can be granted and that the failure of the complaint to set forth specific facts to support its general allegations was not a sufficient ground for a dismissal of the case.

Justice Black explains with great insight why the Salazars should win this appeal, writing:

"The respondents also argue that the complaint failed to set forth specific facts to support its general allegations of discrimination and that its dismissal is therefore proper. The decisive answer to this is that the Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim. To the contrary, all the Rules require is a "short and plain statement of the claim that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests. The illustrative forms appended to the Rules plainly demonstrate this. Such simplified "notice pleading" is made possible by the liberal opportunity for discovery and

other pretrial prcedures. . . (For which the Salazars' were wrongfully denied by Judge Frederick in this case). 355 U.S. 41 at page 47. [emphasis added, comments inserted.]

Justice Black sums up his opinion with the very thing that should be awarded in this case: the Salazars should get to have their day in court and should not be tossed out of court on clever arguments to which sympathetic trial judges listen because doing so will reduce their case load. Justice Black writes further:

“Following the simple guide of Rule 8 (f) that “all pleadings shall be construed as to do substantial justice,” we have no doubt that petitioners’ complaint adequately set forth a claim and gave the respondents fair notice of its basis. The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits.” See also Maty v. Graselli Chemical Co., 303 U.S.197.

Utah law, in complete agreement with this passage, is set forth in Gill v. Timm, 720 P.2d 1332, 1353 (Utah 1986).

Mr.Christensen cites DeBry v. Valley Mortgage Co., 835 P.2d 1000, 1008, to support his argument that dismissal of a cause of action is proper when there are no facts to support it. This case is not on point because in Debry the case went to a jury and the parties had their day in court. This is something the Salazars seek but have not yet received.

In Boisjoly v. Morton Thiokol, 706 F. Suppl. 795 (D. Utah 1983) a case was

dismissed because the court held that a violation of criminal statute did not provide a civil cause of action. This case has no bearing on the present case which involves no criminal activity. The standards for a complaint in criminal matters are generally higher than in criminal affairs.

Ledesma v. Dillard Department Stores, 818 F. Supp. 983 (N.D. Tex. 1993), is another criminal case where a person was charged with shoplifting and the court found that this did not form the basis for a civil complaint. No shoplifting is involved in our instant case and again no criminal conduct forms the basis for the Salazars' action.

The first legal treatise Christensen cites to the court is Charles A. Wright and Arthur Miller, Fed. Practice and Procedure, Section 1356 (1990). Mr. Christensen left out the thrust of the article which states:

“The purpose of a motion under Rule 12 (b) (6) is to test the formal sufficiency of the claim for relief, it is not a procedure for resolving a contest about the facts or the merits of the case (a point Christensen conveniently leave out that flattens their position). Thus, the provision **must** be read in conjunction with Rule 8 (1) which sets forth the requirements for pleading a claim in federal court and calls for “a short and plain statement of the claim showing that the pleader is entitled to relief.

**“Only when the pleading fails to meet this liberal standard is it subject to dismissal under Rule 12 (b) (6). . . .If the complaint is ambiguous or does not contain sufficient information to allow a responsive pleading to be framed, the proper remedy is a motion for a more definite statement under Rule 12 (e). Wright and Miller pages 296, 297, 298. [emphasis added, comments inserted.]**

Mr. Christensen quoted another learned treatise, Moore's Federal Practice, Section 12.34 (1) (a) page 12-56, but they left out the part where Moore states: "Under Rule 12 (b) (6), the party moving for dismissal has the burden of proving that no claim has been stated. To prevail, the movant must show beyond doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief." **This language emphasizes the limited applicability of Rule 12 (b) (6).** Not only did Christensen not prove beyond a doubt that the Salazar's could not have proven an alter ego claim against Christensen, the Court denied the Salazars any opportunity to conduct discovery or take the deposition of Mr. Christensen to fully illuminate and clarify the alter ego nature of Mr. Christensen's operations.

In summary, the Salazars have a strong case against Christensen. They plead it in their complaint, they alleged that the sham Thrifty Nickel newspaper was the alter ego of Christensen, noticed up the deposition, and sent out discovery to Christensen in an effort to substantiate their claims. The Salazar's initial brief in this matter highlighted those issues.

Mr. Christensen never appeared for depositions and never answered discovery. In order for there to be justice in this case, the discovery that Salazars propounded should be answered and Christensen should not be allowed to avoid having his deposition taken by hiding in Florida under the cover of his some 73 other Thrifty Nickel Newspapers. Christensen should be ordered to have his deposition taken in this case. The Salazars

will then be able to provide additional fodder to their alter ego claim.

## **II. CHRISTENSEN CAN AND SHOULD BE HELD LIABLE FOR HIS EMPLOYMENT AGREEMENT**

### **A. CHRISTENSEN IS PERSONALLY LIABLE FOR THE AGREEMENT**

Counsel for Christensen took the simplistic position that if someone does not sign a contract then they cannot be held liable under a contract. This may be good law for the first few weeks of a law school contracts course but certainly changes in the second semester. Individuals who did not sign a contract clearly can be held liable under a number of different theories including, but not limited to, the following:

1. **Fraud.** If Christensen arranged for the presentation of the employment contract to the Salazars representing to them that he would provide for their regular compensation, benefits, and eventual retirement though he had no intention of doing so, fraud would form the basis for payment under the terms of the contract. See Calamari and Perillo, *The Law of Contracts*, Fourth Edition, pp. 325,343-344, which states:

“Whenever a party has fraudulently induced another to enter into a transaction under circumstances giving the latter the right to bring a tort action for deceit, the deceived party may instead elect to avoid the transaction and claim restitution (under contract theory.) Misrepresentation or non-disclosure may render a transaction voidable even if there would be no tort cause of action for fraud.”

2. **Unjust Enrichment, Restitution, Quantum Meruit claims.** It is common to learn in the second semester of Contract Law courses that if someone is unjustly enriched, as Christensen was unjustly enriched by receiving some \$542,000.00 (Five Hundred Forty Two Thousand Dollars) in earned services for benefits, he is held to terms of an underlying agreement.

Calamari and Perillo, Id, p. 600, 601 has a section entitled “What is meant by Restitution? The Concept of Unjust Enrichment.” This section provides great insight into the remedies that should be available to Christensen but for the trial court’s dismissal of their case. Calamari on page 600 writes:

“Restitution encompasses recovery in quasi contract in which form of action the plaintiff recovers a money judgment. It is also used to encompass equitable remedies for specific relief such as decrees which cancel deeds, or impose constructive trusts or equitable liens, as well as some recoveries in equity for the sums of money. The common thread which draws these actions together is that ‘one person is accountable to another on the ground that otherwise he would unjustly benefit **or the other would unjustly suffer loss.**’ (emphasis added). A person who has been unjustly enriched at the expense of another is required to make restitution to the other.”

In Farnsworth, Contracts, Third Edition, Aspen Law and Business, p. 101 we learn that one of the goals of contract law is to avoid unjust enrichment to people affected by contracts. Farnsworth writes:

“Finally, we turn to the possibility of a claim by one party often dignified by a fiction as one based on contract implied in law. . . Money claims based on restitutionary notions continued to be pressed, however, in many other situations in which a party would arguably be enriched if allowed to retain without paying for it some benefit that had been conferred . . . Recognizing that such claims are not based on the apparent intention of the parties, the Supreme Court of Pennsylvania explained that liability may be found in the absence of any expression or assent to the parties to be charged and may indeed be found in spite of the party’s contrary intention” See Schott v. Westinghouse Elec. Corp., 259 A.2d 443, 449 (Pa. 1969)

**3. Quasi Contract & Restitution.** Farnsworth, Supra, p. 102, defines quasi contract which refers to any money claim for the redress of unjust enrichment. Restitution is still a broader term, propagated by American scholars in the twentieth century to embrace all the remedies having that function, not only claims to money (“quasi-contractual” claims), but equitable relief involving specific restitution, the constructive trust, the equitable lien, and subrogation.

The Restatement of Restitution Section 1 lays down the broad principle that a ‘person who has been unjustly enriched at the expense of another is required to make restitution.” See Restatement of Restitution Section 1 and Farnsworth, supra, p. 103.

Mr. Christensen took the position that since he did not sign the contract he cannot be held liable. Corbin on Contracts, One Volume Edition, West Publishing, 1952, p. 27 discusses implied-in-fact contracts stating: “Something very different is meant by the

term ‘implied in law’, it is an obligation that is created by the law without regard to expressions of assent by either words or acts.”

Thus, Christensen, by motivating the creation of the contract, helping draft the contract, being involved in discussions about what should be included in the contract and, for many years benefitting from the contract is a party to the contract. The contract can be enforced against Christensen.

**B. CHRISTENSEN CAN BE HELD LIABLE FOR THE DEBTS OF HIS  
ALTER EGO CORPORATION.**

Christensen cites law and statutes to support their proposition that a shareholder cannot be held liable “solely by reason that he is a shareholder.” See Utah Code Ann. Section 16-10(1)-622(2).

However, Salazars do not seek to hold Christensen liable just because he is the shareholder, likely the dominant if not sole shareholder of the bankrupt corporations and the Thrifty Nickel companies in general. We seek to hold him liable because he is the alter ego of many corporations he has developed to insulate him for paying just debts.

Salazars have, in their initial Brief, quoted at length extensive Utah law that holds a person liable for the debts of his alter ego corporations. See Salazar’s brief page 25 through p. 38.

Salazars sent out very specific discovery interrogatories, requests for production



of documents and most importantly a notice of deposition of Mr. Christensen. Judge Frederick's ruling denied the Salazars any discovery by dismissing the case. This is in direct contrast to the reasoned opinion of Justice Black in: Conley v. Gibson, 355 U.S. 46 (1957), quoted above on pages 4 and 5, which clearly mandates that full discovery should be had in these cases, that the pleading is only required to give notice of the general claim and that the law strongly favors providing a party his day in court.

We ask this Court to keep in mind that the Salazars were not privvy to what Christensen was doing with regard to his sham corporations as the Salazars were not shareholders or on the Board of Directors. Since Judge Frederick prevented discovery from occurring, the Salazars were denied access to critical information.

Clearly, the Salazars likely be able to established both prongs of the test in Norman v. Murray First Thrift, 896 P.2d 1028 (Utah 1979). The Salazars believe that Christensen had set up some 74 other sham thrifty newspapers across the country and that he was most likely the controlling shareholder or "kingpin" receiving benefits in all of these alter ego operations. Christensen had a habit and custom of routinely bankrupting these corporations to avoid creditors which is prong one. Prong two calls for fraud or injustice. The Salazars were cheated out of over \$542,000.00 by the fraudulent actions of Christensen.

### **III. JUDGE FREDERICK'S ERRONEOUS RULING PREVENTED THE SALAZARS FROM FILING AN AMENDED COMPLAINT.**

Mr. Christensen cleverly misstated the posture of what happened in the lower court. The defendant made a motion to dismiss. The plaintiffs filed not one but two opposition memos against the Motion to Dismiss and very clearly asked the court for Leave to Amend.

In plaintiffs' original Opposition Memo at page 8, counsel wrote: **"Plaintiff's Move to Amend Their Complaint." If, for whatever reason, the court finds that Plaintiff has not adequately alleged facts or causes of action, Plaintiff reserves the right and hereby moves the Court to Amend his Complaint.**" (emphasis added).

Clearly, under the rationale of the U.S. Supreme Court in Conley v. Gibson, 355 U.S. 46 (1957) and the Utah Supreme Court in Gill v. Timm, 720 P.2d (1986) the District Court should have allowed the plaintiff the right to amend the complaint. Plaintiffs' counsel clearly believed their complaint was proper. The complaint was proper without discovery being conducted and Judge Frederick committed a reversible error by dismissing the plaintiffs' complaint.

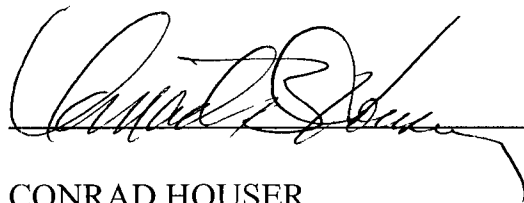
It would be patently wasteful for a plaintiff to amend a complaint if the complaint is adequate. Christensen's arguments, when reduced to their intent, say that if a court points out that a complaint is inadequate, it is then too late for plaintiffs to amend the complaint. This is simply not correct legal logic. Further, a complaint cannot properly

stretch the facts beyond what is known at the time of filing. The Salazars had, and continue to have, no way of knowing details of Mr. Christensen's corporate activities.

The courts have provided an alternative mechanism for creating equity by dismissing a complaint without prejudice. This mechanism allows plaintiff to amend a complaint the trial judge finds defective. See Fox v. MCI Communications. Corp., 931 P.2d 857 (Utah 1997). There was no reason for Judge Frederick to dismiss the current action with prejudice.

### CONCLUSION

Mr. Christensen was unjustly enriched if the Salazars' retirement plan and other benefits are denied them by dismissal of Christensen. This would be gross injustice. We ask this Court to right this terrible wrong by remanding the case back to the district court for continuation of discovery and related proceedings.

A handwritten signature in black ink, appearing to read "Conrad Houser", with a long horizontal line extending to the right.

CONRAD HOUSER

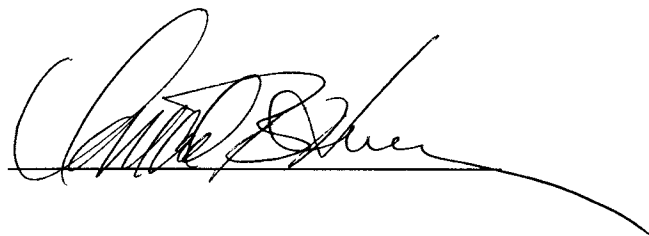
Attorney for the Salazars

Dated: November 17, 2001

## CERTIFICATE OF SERVICE

I hereby certify that on the 17<sup>th</sup> day of November 2001, I caused two true and correct copies of the foregoing **REPLY BRIEF** to be mailed, via first class mail postage prepaid to the following:

ANDERSON & KARRENBURG  
Scott A. Call (#0544)  
James H. Tily (#8809)  
50 West Broadway, #700  
Salt Lake City, Utah 84101-2006

A handwritten signature in black ink, appearing to read "Scott A. Call", written over a horizontal line.