

2016

Leslie D. Mower, an Individual; Ld Iii, LLC, a Utah Limited Liability Company; Ld Ranch, LLC, a Utah Limited Liability Company, Plaintiffs/Appellants, vs. David R. Simpson, an Individual; Landmark Real Estate, Inc., a Utah Corporation; Wood Springs, LLC, a Utah Limited Liability Company; Pheasant Meadows, LLC, a Utah Limited Liability Company; Kristin Mackey, an Individual; Dean Mackey, an Individual; And Does 1-10, Defendants/ Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

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LESLIE D. MOWER, an individual; LD	:	
III, LLC, a Utah limited liability	:	Utah Supreme Court No. 20150549-CA
company; LD RANCH, LLC, a Utah	:	
limited liability company,	:	District Court Civil No. 100403908
	:	
Plaintiffs/Appellants,	:	

vs.

DAVID R. SIMPSON, an individual;	:	PRIORITY NO.: 15
LANDMARK REAL ESTATE, INC., a	:	
Utah corporation; WOOD SPRINGS,	:	
LLC, a Utah limited liability company;	:	
PHEASANT MEADOWS, LLC, a Utah	:	
limited liability company; KRISTIN	:	
MACKEY, an individual; DEAN	:	
MACKEY, an individual; and DOES 1-	:	
10,	:	
	:	
Defendants/ Appellee.	:	

APPELLANTS' REPLY BRIEF

Appeal from the Final Judgment of the Fourth District Court, Utah County, Provo Division, The Honorable Judge Lynn W. Davis

FILED
UTAH APPELLATE COURTS

MAR 22 2016

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*** ORAL ARGUMENT REQUESTED**

IN THE UTAH COURT OF APPEALS

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III, LLC, a Utah limited liability : Utah Supreme Court No. 20150549-CA
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INTRODUCTION

This is an appeal from summary judgment dismissing Plaintiffs' claims against all Defendants. The trial court improperly struck the Mower Declaration. A Motion to Strike the Mower Declaration was abandoned, never fully briefed and not submitted for a decision. Yet the trial court struck the Mower Declaration without providing any reasoning to support its incorrect conclusion that the declaration was contradicted by prior deposition testimony. Each of the trial courts' subsequent rulings and orders were, therefore, tainted by the exclusion of the Mower Declaration.

The trial court found an agency relationship existed between Ms. Leslie Mower and her deceased husband, Kenneth Dolezsar. Defendants claim Leslie Mower is bound by the actions and decisions of her late husband but also claim any statement by him on which she relied is barred by Rules 601 and 802 of the Utah Rules of Evidence. The rule must be interpreted consistently and therefore would also exclude Defendants' reliance on statements of Dolezsar's intentions, statements, knowledge or role in their scheme. No one knows what Dolezsar said, did or knew. To the same extent Plaintiffs are unable to rely on conversations with Dolezsar, Defendants cannot rely on Dolezsar to support their defenses.

The Mackey Defendants have taken contradictory positions in the trial court and in their brief on appeal about the consideration they claim to have provided for the Storrs and Olsen parcels. Their contradiction creates a dispute that should have precluded summary judgment. On appeal, Mackeys contend the consideration for the Storrs and Olsen parcels was that the Mackeys gave the Reeb family an easement over 4½ acres. This was included

in a total of 10 acres demanded by Reeb to convey the Thornhill 98 acres (Mackey Brief on Appeal, page 2.) However, Mr. Mackey testified in his deposition the Storrs and Olsen parcels were conveyed to Mackeys as consideration for Mr. Mackey's efforts in putting together the subdivision proposals for the planned Hobble Creek canyon estate properties (which was never built). Those plans ended when Simpson sold the property to Mower.

The trial court incorrectly granted summary judgment to the Simpson Defendants based on the exclusion of the Mower Declaration, then relied on those rulings to dismiss the remaining claims. Like the fruit of the poisonous tree, every decision that followed the erroneous decision to strike the Mower Declaration is tainted. This matter should be returned to the trial court for a trial on the merits.

ARGUMENT

The trial court has the responsibility to consider all facts in the record before determining whether there are genuine issues of material fact on summary judgment. *See* Utah R. Civ. P. 56.

I. THE TRIAL COURT ERRED WHEN IT STRUCK THE DECLARATION OF LESLIE DEE MOWER.

The trial court erred when it adopted Defendants' argument to strike the Mower Declaration without analysis or explanation. The Mower and Reeb declarations establish genuine issues of material fact precluding summary judgment. If the trial court viewed the facts and inferences from the Mower and Reeb declarations in the light most favorable to the non-moving party, summary judgment was improper. *Suarez v. Grand County*, 2012 UT 72, ¶ 18, 296 P.3d 688. (Summary judgment is only appropriate "when, viewing all facts and

reasonable inferences therefrom in the light most favorable to the nonmoving party, there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law.")

The Mower Declaration puts at issue a fiduciary relationship owed by Defendant Simpson, the authority to convey to the Mackeys property paid for by Leslie Mower, and the time when Leslie Mower learned her property had been conveyed away as it affected the running of the statute of limitations. (R.485).

Simpson's Motion to Strike the Mower Declaration claimed a contradiction between the Mower Declaration and her deposition testimony, and argued it contained conclusory statements, opinion, or speculation. The abandoned motion failed to offer any specific examples of any of these claimed defects. Simpson's motion only raised factual disputes. When Plaintiffs pointed out this deficiency in their opposition, Simpson abandoned the motion. He did not reply, nor did he submit his motion for decision¹. However, in its Ruling and Order (R.808) the trial court struck the Mower Declaration, concluding that it was "disregarded by the Court as futile as the declaration is inadmissible because it consists of nothing but statements directly contradicted by her prior deposition testimony and unsubstantiated opinions and conclusions." (R.824)(emphasis omitted).

Rule 56 of the Utah Rules of Civil Procedure explains supporting or opposing affidavits (which includes declarations upon oath, under Utah Code Ann. § 78B-5-705(1))

¹ Rule 7(g), Ut. R. Civ. Pro. provides: "When briefing is complete or the time for briefing has expired, either party may file a "Request to Submit for Decision, but, **if no party files a request, the motion will not be submitted for decision.**" (Emphasis added).

are to be made on personal knowledge and shall set forth admissible facts. *See* Utah R. Civ. P. 56(c)(4). The Mower Declaration complies with Rule 56. Leslie Mower testified to specific facts showing a genuine issue for trial: that Simpson conveyed property to Mackeys that was paid for with Plaintiffs' money. The Declaration states: "Simpson represented to me and my lawyers, on or after July 17, 2007, that he had transferred all of the property to LD Ranch that he acquired in Hobble Creek Canyon with my personal funds or LD III's funds." (Mower Declaration ¶ 10 (R.487)). That is a statement of fact never contradicted by Defendants or by Leslie Mower's deposition.

Leslie Mower's declaration explains she "never authorized or instructed Ken Dolezsar to have David Simpson title property in David Simpson's name or in the name of an entity he owned or controlled." (Mower Declaration ¶ 5 (R.486)). This is not contradicted by her deposition testimony nor contrary to the subsequent "power of attorney" given Dolezsar the following year. Furthermore, the statement that Leslie "did not know about the underlying transactions and frauds committed by Simpson Defendants until informed of them by my attorneys after the death of my former Husband, Kenneth Dolezsar, which occurred on November 15, 2007", is likewise true and not contradicted by the power of attorney or the deposition testimony. Mower Deposition pages 85, 89 and 90. (R.884-888). The trial court failed to specifically show where in her deposition testimony Leslie contradicted the statements in the Mower Declaration, because no such contradiction exists.

This error was compounded when the trial court concluded there were no disputed issues of fact based on a technical reading of Rule 7(c)(3). Even though the reference to the

record for Plaintiffs' disputed facts were not included in the section setting forth a verbatim restatement of facts, Plaintiffs included a verbatim restatement of Defendants' facts and a concise statement of the disputed facts in their brief opposing summary judgment. It was included in the memorandum and ought to have been considered by the trial court. Furthermore, Plaintiffs submitted additional facts supported by materials in the court record to controvert Defendants' facts. By the time the trial court issues a ruling, the disputed issues of fact had been pled and re-pled in support of subsequent motions.

The trial court refused to consider all the facts in the Court Record and improperly found Defendants' facts unopposed. Based on the fiction of unopposed facts, the trial court proceeded to make findings and conclusions supporting summary judgment.

It was clear error for the trial court to have ignored Plaintiffs' statement of controverted facts and to have stricken the Mower Declaration without analysis or explanation. Because the Mower Declaration was stricken, the trial court improperly concluded there were no genuine issues of material fact. But striking the declaration was an error and the summary judgment ruling and order is likewise an error and should be reversed.

II. WHETHER DOLEZSAR WAS AN AGENT OF LESLIE MOWER IS A DISPUTED ISSUE OF FACT THAT SHOULD NOT HAVE BEEN RESOLVED ON SUMMARY JUDGMENT.

The trial court accepted Defendants' argument that Dolezsar was acting as Leslie's agent and therefore it imputed Dolezsar's knowledge to Leslie without giving due consideration to Plaintiffs' declarations to the contrary. Nothing in the proof before the trial court demonstrated Dolezsar was authorized to give away Plaintiffs' property. He was

authorized to *acquire* property for the formation of a horse ranch, not to gift it away. There is no evidence Dolezsar ever disclosed to Leslie that Simpson transferred property to the Mackeys for which Leslie paid in full to acquire. On the contrary, the Mower Declaration states she was not aware of the transfer to Mackeys (and corresponding failure to convey from Simpson to Plaintiffs "all of the subject property") until after Dolezsar's death, which was within three years of filing the Complaint.

The trial court relied solely on Defendants' version of the facts to determine whether Dolezsar was Leslie's agent, finding that Dolezsar was aware of the details of each of the transactions (R.820), and that his knowledge was imputed to Leslie. *Id.* These conclusions are fact intensive, disputed by the Mower Declaration and violate Rules 601 and 802 of the Utah Rules of Evidence concerning statements of a deceased person. Defendants use these rules as a shield against allowing the consideration of any statements made by Dolezsar that might injure their claims, but then use the rules as a sword for any statement or presumption that favors their claims.

The genuine issues of material fact relating to the purchase and conveyances of the Storrs and Olsen parcels to the Mackeys are evident from the record. The transaction deceived both Leslie and Dolezsar. The trial court cannot rely on Dolezsar giving authority to Simpson to undertake transactions that benefitted Mackeys any more than Plaintiffs can rely on Dolezsar's statements that he did not give authority for the Storrs and Olsen transactions.

The question of authority is disputed. Summary judgment should not have been granted on the issue of whether there was agency given to Dolezsar or to Simpson to undertake the transactions that benefitted the Mackeys to the detriment of Plaintiffs. That issue should be reversed and remanded to the trial court.

**III. THE CONTRADICTIONARY LEGAL POSITION TAKEN BY THE
MACKEY DEFENDANTS AS THE BASIS FOR THE
CONSIDERATION PAID FOR THE STORRS AND OLSEN PARCELS
SHOULD HAVE PRECLUDED SUMMARY JUDGMENT.**

In the Mackey Memorandum, Mackeys argue the summary judgment can be sustained on alternative grounds (Brief of Mackey Appellees, page 13). However, the Mackey argument is mistaken. First, the explanation of why the Mackeys ended up with the Storrs and Olsen parcels is contradicted in the record, which alone should prevent summary judgment. Second, the Mackeys were unjustly enriched in the real property transactions when they received valuable property for which they did not pay that transformed their property from a useless tract of land into a buildable lot, with excess acreage. The Mackeys ignore that Leslie never had the opportunity to have input into the transactions (other than to pay for the land the Mackeys got for free). Leslie never authorized the transactions.

The trial court failed to acknowledge the genuine issues of material fact relating to the Mackey property transactions. The Mackeys originally purchased two tracts totaling 49 acres of divided and unbuildable land. Mr. Mackey contacted Simpson to discuss the concept of a subdivision with 9 or 10 estate lots, each of 50 acres and began to put together a plan. However, when Simpson learned that Dolezsar was looking to buy land for Leslie Mower for a horse property, Simpson abandoned Mackey's subdivision concept and put together the

property transactions for Leslie that led to the dispute in this case. In Mr. Mackey's deposition, he said Simpson conveyed the Storrs and Olsen properties to him as consideration for the work he did putting together their abandoned subdivision concept. (R.676-727).

In their briefs in support of summary judgment (and repeated in this appeal) Mackeys changed their story. They now contend the consideration for conveying the Storrs and Olsen parcels was the deal with the Thornhills to give them an easement over 4½ acres so the Reeb family would convey the Thornhill property. (Brief of Mackey Appellees, page 2). Further, the Reeb declaration makes clear that such an easement was not required for the Reeb family to convey the Thornhill property.

This contradiction should have been enough to defeat summary judgment. However, because the trial court disregarded the Mower Declaration and the Reeb Declaration, the issue was not properly decided and the trial court erred.

This matter should be returned to the trial court for a decision on the merits. The Mackeys were unjustly enriched by taking property purchased by Leslie Mower for herself without giving any benefit to Leslie and certainly with no opportunity for her to participate in the negotiations associated with the transaction. The Mackeys received something (a buildable 60+ acre lot) for nothing. Before the Storrs and Olsen properties were purchased with Plaintiffs' money and conveyed into entities owned by Simpson, the Mackeys two parcels totaling 49 acres were bisected by Hobble Creek Canyon Road, unbuildable and useless.

Simpson devised the means to fix the Mackey's property concerns (which he created when he sold them useless property) when he learned about the Reeb's right of first refusal to the Thornhill parcel. He convinced the Reeb's to exercise their right of first refusal and buy the Thornhill parcel, then to sell the property to him. The Reeb's asked only one concession – the Reeb's wanted some additional land to be a buffer between their property and the adjoining property, which did not require the Mackey property, but could have all come from other property adjacent to the Thornhill parcel. (R.384). But in order to solve his problem with the Mackeys, Simpson arranged for the Mackeys to grant an easement to the Reeb's and in exchange the Mackeys received over thirty (30) acres of property paid for by Leslie and which allowed them to build on their property. The 30+ acres from these parcels added enough to one of their lots so they could build on it and own property they did not need.

To allow this transaction to take place without Leslie's knowledge, participation or input was fraudulent and a breach of duty by both Simpson and Mackeys. Summary Judgment on the issues involving the Mackey property transactions was in error and should be reversed and remanded back to the trial court for a decision on the merits.

IV. STATUTE OF LIMITATIONS.

It was error to find the statute of limitations had run on Plaintiffs' claims. The trial court's error in disregarding the Mower Declaration is material to the running of the statute of limitations. In the Mower Declaration, Leslie Mower testifies she was not aware of the

claims giving rise to the causes of action in the Complaint until the passing of her husband, Kenneth Dolezsar. (R.486).

Based on the Mower Declaration, there is a genuine issue of material fact as to whether Dolezsar was acting as Leslie's agent, and whether he was acting within the scope of any agency he may have held when he failed to tell Leslie that Simpson conveyed to the Mackeys the Storrs and Olsen parcels purchased with her funds. If Dolezsar was not Leslie's agent when Simpson gave the Storrs and Olsen property to Mackeys—or if he acted outside any authority granted him—then the statute of limitations did not begin to run on Plaintiffs' claims until after Dolezsar's death—when Plaintiffs became aware of the fraudulent transactions. Therefore summary judgment should not have been granted.

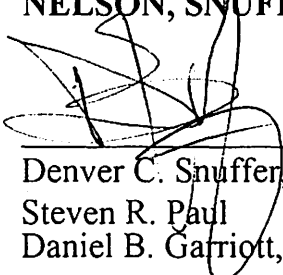
As the nonmoving party in summary judgment, Plaintiffs are "entitled to the benefit of having the court consider all of the facts presented, and every inference fairly arising therefrom in the light most favorable to [her]." *Uintah Basin Med. Ctr. v. Hardy*, 2008 UT 15, ¶ 19, 179 P.3d 786 (quoting *Morris v. Farnsworth Motel*, 259 P.2d 297, 298 (Utah 1953)). The lower court instead viewed matters in favor of Defendants and thereby erroneously decided summary judgment against Plaintiffs. The decision should be reversed and remanded to the trial court for additional proceedings.

CONCLUSION

Pursuant to the foregoing arguments and law, Appellant respectfully requests this Court reverse the error of the trial court and remand for resolution of the parties' claims on the merits.

DATED this 22nd day of March, 2016.

NELSON, SNUFFER, DAHLE & POULSEN

A handwritten signature in black ink, appearing to be "Denver C. Snuffer, Jr.", written over a horizontal line.

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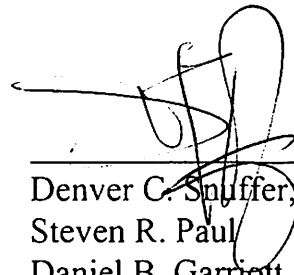
CERTIFICATE OF COMPLIANCE

As required by Utah Rules of Appellate Procedure Rule 24(f)(1)(C), I certify that **APPELLANT'S REPLY BRIEF ON APPEAL** contains 2,776 words (not to exceed 7,000 words), excluding the parts of the Opening Brief that are exempted by Utah Rules of Appellate Procedure Rule 24(f)(1)(B). And is less than 15 pages. URAP 24(f)(2).

I declare under penalty of perjury that the foregoing is true and correct.

Executed on March 22, 2016.

By:



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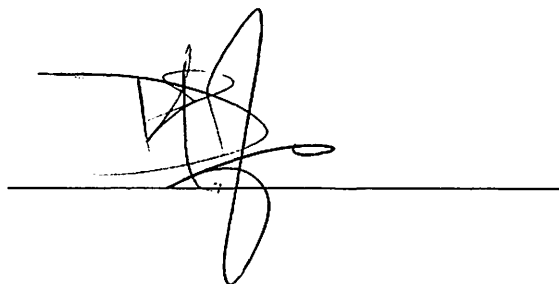
CERTIFICATE OF SERVICE

I hereby certify that I served two true and correct copies of the foregoing **APPELLANT'S REPLY BRIEF ON APPEAL**, via first class mail, postage prepaid, on the following:

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A handwritten signature in black ink, consisting of several overlapping loops and lines, positioned above a horizontal line that spans the width of the signature.