

1960

# Agnes Lundberg v. Le Grand P. Backman : Brief of Appellant

Utah Supreme Court

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Richard C. Dibblee; Counsel for Appellant;

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Case No. 9212

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IN THE SUPREME COURT  
of the  
STATE OF UTAH

FILED

MAY 18 1960

AGNES LUNDBERG,

Clerk, Supreme Court, Utah

*Plaintiff and Appellant,*

—vs.—

LE GRAND P. BACKMAN,

*Defendant and Respondent.*

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BRIEF OF APPELLANT

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RICHARD C. DIBBLEE

*Counsel for Appellant*

530 Judge Building  
Salt Lake City, Utah

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AGNES LUNDBERG,

*Plaintiff and Appellant,*

—vs.—

LE GRAND P. BACKMAN,

*Defendant and Respondent.*

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BRIEF OF APPELLANT

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(The parties will be referred to as they appeared in the lower court. Numbers in parenthesis refer to pages of the record.)

PRELIMINARY STATEMENT

This is an appeal from a summary judgment (38) entered in favor of defendant and against plaintiff. This is the second appeal in this case.

The first appeal was from a summary judgment (11) entered against plaintiff before defendant answered. At that time defendant filed a motion (9) and a supporting affidavit. (3-6) Plaintiff filed a counter affidavit. (7-8) The trial court granted the motion for summary judgment and this court reversed the ruling. (21) *Lundberg v. Backman*, 9 Utah 2d 58, 337 P. 2d 433.

Before the remittitur was filed, defendant answered. (16-19) His deposition was taken. (23) At this stage of the proceeding, defendant, again filed a motion for summary judgment (24) and supporting affidavit. (25-28) Plaintiff filed a counter affidavit. (29-31) Plaintiff's motion to file an amendment to her complaint (34) was granted. Plaintiff filed an amendment setting forth a Third Cause of Action. (35-36). The trial court granted the motion for summary judgment and this appeal followed. (44)

## STATEMENT OF FACTS

Defendant is a practicing attorney and was employed by plaintiff in the defense of a quiet title action filed in the Third Judicial District Court in and for Salt Lake County, State of Utah, entitled, "Pearl J. Herridge, et. al., vs. Agnes Lundberg, File No. 100963.

The action involved the title to property located at 1215 South 8th East Street, Salt Lake City, Utah. This property had been purchased by Earnest J. Herridge and his wife. Mrs. Herridge was the mother of the plain-

tiff in the case at bar. Plaintiffs in the case were the heirs of Mr. Herridge.

Before Mr. and Mrs. Herridge purchased the above property, they had someone in Mr. Backman's office prepare for them a joint will. This will recited they were joint owners of real property in Salt Lake City and provided that upon the death of either, the deceased interest in this property would be devised one-half to the surviving spouse and the other one-half interest to the surviving children of their respective previous marriages.

After the execution of this joint will, the real property described therein was sold. The parties then purchased the property at 1215 South 8th Street, Salt Lake City, Utah, taking title in joint tenancy. The parties did not alter the provisions of their will.

Mr. Herridge died and defendant Backman represented Mrs. Herridge, the executrix of the estate. The joint will executed by Mr. and Mrs. Herridge was admitted to probate. In the probate proceedings, the property located at 1215 South 8th East Street, which was in joint tenancy was listed as an asset of the estate. In the decree of distribution the interest in this property was devised one-third to the widow and joint tennant, Mrs. Herridge, and the remaining two-thirds interest to the surviving heirs of Mr. Herridge.

Mrs. Herridge continued living in the home alone until the plaintiff herein and her family moved in with her. The defendant continued acting as attorney for the

widow. During this time Mrs. Herridge advised defendant of the joint tenancy deed, but nothing was done with respect to the matter. (Deposition, 3-4). Mr. Backman prepared a will for Mrs. Herridge wherein it was recited she was the sole owner of the home. On July 12, 1950, defendant after consulting with plaintiff and her mother, prepared a warranty deed to the property. This deed conveyed fee title to plaintiff with a life estate in her mother. The deed was recorded on July 13, 1950.

Mrs. Herridge died in 1953. Plaintiff recorded a death certificate and was advised by defendant she was the owner of the property. Plaintiff continued residing in the home and made certain improvements.

Shortly thereafter, plaintiff received a demand from the heirs of Ernest J. Herridge for a partition of the property. Plaintiff contacted defendant who advised her the claims were unfounded and she was the sole owner of the property. Subsequently, the heirs instituted the quiet title action. Defendant, on behalf of plaintiff, filed an answer and counterclaim.

Trial was held and judgment entered in favor of the heirs. The trial court quieted title in two-thirds of the property to the heirs, and the one-third interest to the plaintiff herein. The court assessed plaintiff herein rent for the time she occupied the premises.

Defendant filed a motion for new trial. This motion was denied by the trial court as not being filed within time prescribed by law. On January 24, 1955, defendant

filed with the clerk of the court a Notice of Withdrawal of counsel. This notice was dated December 1, 1954.

Before presenting the argument, I again wish to state that my participation in this case is by request of the commissioners of the Utah State Bar Association.

## STATEMENT OF POINTS

### POINT I.

TO JUSTIFY SUMMARY JUDGMENT THERE MUST BE NO GENUINE ISSUE OF FACT PRESENTED.

### POINT II.

THE ALLEGATIONS CONTAINED IN PLAINTIFF'S COMPLAINT RAISE FACTUAL ISSUES.

## ARGUMENT

### POINT I.

TO JUSTIFY SUMMARY JUDGMENT THERE MUST BE NO GENUINE ISSUE OF FACT PRESENTED.

The trial court, under the provisions of Rule 56, Utah Rules of Civil Procedure, granted defendant's motion for summary judgment. In so doing, he necessarily ruled that there was no genuine issue of fact. If any such issue existed, then the trial court committed error. See *Young v. Felornia*, 121 Utah 646, 244 P.2d 862; *Morris v. Farnsworth Motel*, 123 Utah 289, 59 P.2d 298; *Securities Credit Corporation v. Willey*, 1 Utah 2d 254, 265 P.2d 422;

In *Young v. Felornia*, supra, the Court stated as follows:

“In respect to a summary judgment Rule 56 (c), U.R.C.P. provides :

‘The judgment sought shall be rendered forthwith if the pleadings, deposition, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.’

“Under this rule, it is clear that if there is any genuine issue as to any material fact, the motion should be denied.”

In *Morris v. Farnsworth Motel*, supra, the court stated:

“Under such circumstances, the party against whom the summary judgment is granted, is 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 him; which we do in reviewing the incident.”

With these controlling rules in mind, we will move on to a consideration of the genuine issues which were raised by the pleadings and affidavits of the parties.

## POINT II.

THE ALLEGATIONS CONTAINED IN PLAINTIFF'S COMPLAINT RAISE FACTUAL ISSUES.

On the first appeal of this case, *Lundberg v. Backman*, supra, the record before the court consisted of plaintiff's complaint (1-3) and defendant's affidavit (3-6). In reversing the order granting the summary judgment, this court stated:

“\* \* \* We hold, therefore, that as against the general allegations of negligence contained in the complaint, the facts set out in the affidavits cannot be construed as totally superseding the pleading nor as containing such conclusive admissions of fact as to necessitate a summary judgment of dismissal.

By this holding we are not determining that this case must now be submitted to the trier of the facts on the merits. It may well be that after an answer is filed, and such other proceedings had as our Code contemplates, the trial court may conclude that no real controversy of fact, as to liability, remains. \* \* \*”

In view of this holding, plaintiff respectfully submits that unless defendant's answer or other pleadings filed by him presents any new or additional facts, the above ruling by the Court in the previous case would apply.

The answer (16-19) filed by defendant admits he is an attorney at law and was employed by plaintiff but denies each and every other allegation contained in plaintiff's first and second cause of action. Defendant alleges as an affirmative defense to plaintiff's complaint certain facts and conclusions of law. The allegations alleged in this affirmative defense are identical with the allegations alleged in defendant's first affidavit (3-6). This affirmative defense does set forth a new claim that defendant did not receive a copy of the entry of judgment as required by the rules. With respect to this one point, defendant, in his deposition, states

that he doesn't remember whether he received a copy or not, that he might be mistaken. (Deposition, 12). The affidavit (25-28) filed in support of his second motion for summary judgment is a recital of the facts alleged in the first affidavit.

Plaintiff respectfully submits that from an examination of these pleadings, it is obvious that defendant has failed to present any new or additional facts. That in view of this failure, the issues presented to this court on the previous appeal are identical with the issues presented on this appeal. We therefore contend that the ruling should be the same and the trial court erred in refusing to respect the previous decision.

Plaintiff further contends the trial court erred in ruling that plaintiff's third cause of action does not contain a genuine issue of fact.

In this cause of action plaintiff alleges defendant was negligent in failing to file the motion for new trial within the time prescribed by law. While defendant's affidavits are silent as to this matter, in his deposition he testified he filed the pleading to protect her. (Deposition 10, 11). In view of this statement, we submit a genuine issue of fact is raised as to whether his failure to file the motion in time violated any duty toward her.

The third cause of action alleges defendant was negligent in failing to file a notice of withdrawal within the time for appeal.

In the affidavits (5, 28) defendant consistently alleges he withdrew as her attorney on Dec. 1, 1954. Defendant claims this was within ample time for plaintiff to secure other counsel to perfect her appeal. In the affirmative defense he does not refer to any particular date, but that it was in time for her to secure other counsel (18).

Plaintiff denies these facts and claims in her affidavit (30-31) defendant did not withdraw from the case until January 24, 1955. That because of this fact she was unable to secure other counsel to perfect her appeal. Defendant did not file a counter affidavit denying these facts.

We contend this presents a genuine issue of fact. If defendant was instrumental in preventing plaintiff from securing other counsel to perfect her appeal he is liable because this court would obviously have reversed that erroneous decision.

## CONCLUSION

Plaintiff respectfully submits there are genuine issues of fact raised by the pleadings. This court has previously ruled the contentions of defendant do not support a summary judgment. Defendant has failed to present any new issues and the record is the same as on the previous appeal. Plaintiff further contends the amendment to the complaint presents additional genuine issues of fact.

We submit this court should reverse the ruling of the trial court and direct that this case should be presented to a trier of the fact to resolve the issues presented in the case.

Respectfully submitted,

RICHARD C. DIBBLEE

*Attorney for Plaintiff  
and Appellant*