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## Klans D. Gurgel v. D. Wayne Nichol : Appellant's Brief

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# IN THE SUPREME COURT OF THE STATE OF UTAH

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KLANS D. GURGEL,  
*Plaintiff and Respondent,*

vs.

D. WAYNE NICHOL,  
*Defendant and Appellant.*

Case No.  
10793

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## APPELLANT'S BRIEF

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Appeal of D. Wayne Nichol from the Judgment of the  
District Court of Salt Lake County, State of Utah  
Honorable Stewart M. Hanson, Presiding

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# IN THE SUPREME COURT OF THE STATE OF UTAH

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KLANS D. GURGEL,

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*Defendant and Appellant.*

} Case No.  
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## APPELLANT'S BRIEF

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### KIND OF CASE

The plaintiff brought an action against the defendant for conversion of personal property, the defendant entered a general denial as to all material facts including the amount of damages. The defendant counter-claimed to replevy personal property and the plaintiff entered a general denial.

## DISPOSITION IN THE LOWER COURT

The plaintiff filed a Motion for Summary Judgment which was granted. The court granted the motion and awarded plaintiff a money judgment of \$1,500.00 and punitive damages of \$1.00 and dismissed the defendant's counterclaim.

## RELIEF SOUGHT ON APPEAL

Defendant seeks reversal of the granting of the Summary Judgment awarding plaintiff judgment and the dismissing of defendant's counterclaim.

## STATEMENT OF FACTS

The defendant resided at a home in Holladay, Utah, which he had mortgaged to Tracy Collins Savings and Trust Company. He operated his business of constructing swimming pools from his home. He kept all his equipment and inventory at his place of residence.

The defendant was unable to meet his mortgage payments and a foreclosure of the real estate mortgage was brought to a conclusion. The mortgage covered only the real property consisting of the home and lot of the defendant.

At the Sheriff's sale of the property it was bought in by one D. L. Holt and thereafter a Sheriff's Deed was delivered to D. L. Holt (record page 19). The Sheriff's Deed covers only the real property covered by the mortgage and is in the usual form. Thereafter

Holt sold the property to the plaintiff (record page 15).

At the time of the sale the defendant had chattels, consisting mainly of swimming pool equipment, stored on the property. None of the chattels were attached to the property and there is no allegation that they were fixtures. Defendant went upon the property and removed those chattels listed in plaintiff's complaint. He employed the man living next door to the premises to remove the rest of the property, but the plaintiff restrained him and still has possession of those chattels listed in defendant's counterclaim.

## ARGUMENT

### Title

The defendant is at a loss to determine on what grounds the trial court rendered his decision. The only holding we can surmise is that the Sheriff's Deed not only conveyed the real property, but also the defendant's chattels. The deed given by the Sheriff to Holt says nothing about personal property, it recites the description of the property and some shares of water stock which went with the property and were included in the mortgage.

There is nothing in the record which would indicate that the Sheriff in making the sale, executed and delivered a certificate of sale of personal property to Holt as required by Rule 69(e) of the Utah Rules of Civil

Procedure. The Uniform Real Estate Contract (Record page 15) from Holt to the plaintiff does not purport to convey anything but the real property. There is no record that Holt executed any instrument but the contract.

The plaintiff has made an argument that the property was abandoned by the defendant. The definition of abandoned property is very definite.

1 American Jurisprudence 2nd Section Number 1, at page 3 defines it as follows:

“The term ‘abandonment’ as applied to property and property rights has acquired a well-defined and technical meaning which is not to be confused with the doctrine of laches or estoppel. In its general sense, abandonment means the act of intentionally relinquishing a known right absolutely and without reference to any particular person or for any particular purpose. Abandoned property is that to which the owner has voluntarily relinquished all right, title, claim, and possession, with the intention of terminating his ownership, but without vesting it in any other person and with the intention of not reclaiming future possession or resuming its ownership, possession, or enjoyment. In this connection, ‘abandonment’ symbolizes a concept which is *suive generis* in the law, and means that all hope, expectation, and intention of recovering the property is utterly and entirely relinquished.”

Certainly from this record no finding as a matter of law could be made that this defendant had abandoned

the property and even if he had the title would not vest in the plaintiff.

We can think of no other grounds upon which plaintiff could base a claim of title to the chattels. The defendant claims title and is confident that given an opportunity, he can prove his title and his right by reason of title, to possession both as to the personal property he took from the premises and the chattels he seeks to recover by reason of his Counterclaim.

## DAMAGES

The plaintiff in his complaint says that the property taken by the defendant was worth \$1,500.00. The defendant denied that this was the value of the property. It is a new concept to the defendant that an allegation of value establishes the value without proof, when the allegation is contested. Again the defendant, who was the person best qualified to know the value, was denied the right to establish the real value of the property. This court is well aware that in the matter of pleading values and damages they are dealt with rather loosely.

The court also awarded \$1.00 punitive damages as a matter of law. How this sum was arrived at and upon what facts appearing in the record it was based, is a complete mystery to this defendant.

## SUMMARY JUDGMENT

This court has on numerous occasions passed on the fundamental rules to guide the courts in passing on Motions for Summary Judgment. Rule 56 Utah Rules of Civil Procedure.

The rule is laid down in *Bridge vs. Backman*, 10 Utah 2nd 366, 353 Pacific 2nd 909. In this case the court said:

“A summary judgment is supported only by a showing 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. In determining the sufficiency of such showing we must view the evidence and inferences therefrom in a light most favorable to the party against whom such judgment is sought. So, unless there is a showing that the disfavored parties cannot produce evidence which would reasonably support a finding in their favor on a material determinative issue of fact, a summary judgment is erroneous.”

For other authorities authored by this Court we offer the following:

*In re Williams Estate*, 10 Utah 2nd, 367-375 P2nd 170

*Morris vs. Farnsworth Motel*, 123 Utah 289-250 P 2nd 298

*Young vs. Felornia*, 121 Utah 646-244 P 2nd 862

*R. J. Daun Construction vs. Child*, 122 Utah 194-247 P 2nd 817

Dupler vs. Yates, 10 Utah 2nd 251-351 P 2nd 624

Brandt vs. Springville Banking Co., 10 Utah 2nd  
350-353 P 2nd 460

Bullock vs. Desert Dodge Truck Center, Inc., 11  
U 2nd 1-354 P 2nd 559

Frederick May & Co., Inc. vs. Dunn, 13 Utah 2nd 40-  
368 P 2nd 266

Christensen vs. Financial Service Co., 14 Utah 2nd  
101-377 P 2nd 1010.

## SUMMARY

This case is replete with questions of disputed facts. The plaintiff alleges he is the owner and entitled to the possession of the chattels. The only possible basis for such a claim in this record is the Sheriff's Deed to Holt and the Uniform Real Estate Contract from Holt to the plaintiff, neither of which establish title. The defendant says he can prove title in himself if given an opportunity to all the chattels including those now in the possession of the plaintiff.

The plaintiff says the chattels in defendant's possession are worth \$1,500.00. The defendant says they are not and given the chance, he can prove the real value.

The court says that the plaintiff is entitled to punitive damages without any background of evidence of malice or wilfull wrongdoing.

All of these matters present questions of fact and we submit that the court in ruling as it did fell into error and should be reversed.

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