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IN THE SUPREME COURT OF THE STATE OF UTAH

JOHN D. DOVE, JR.,	)	
Plaintiff and Respondent,	)	
vs.	)	
HOWARD CUDE and ETTA MAY CUDE, his wife,	)	No. 19294
	)	
Defendants and Appellants.		

APPELLANTS' REPLY BRIEF

Appeal from the Judgment of the Seventh
Judicial District Court for Duchesne County
Honorable Richard C. Davidson

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IN THE SUPREME COURT OF THE STATE OF UTAH

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Plaintiff and Respondent,

vs.

HOWARD CUDE and ETTA MAY CUDE, his wife,

Defendants and Appellants.

No. 19294

APPELLANTS' REPLY BRIEF

Defendants respond to plaintiff's brief as follows:

POINT I. WAS AN APPEAL TAKEN TIMELY FROM ORDER ALLOWING PLAINTIFF TO AMEND HIS PLEADINGS?

Generally, appeals are only permitted to be taken from final orders and judgments. U.R.C.P. 72. An order permitting a party to amend the pleadings is not a final order from which an appeal may be taken. Vallera v. Vallera, 64 C.A. 2d 266, 148 P.2d 694 (1944), Federated Security Insurance Company v. Burton, 16 Utah 2d 194, 398 P.2d 200 (1965).

In this case the amendment also affected the default judgment entered against defendants. Upon entry of the order permitting the amendment on February 3, 1982, (Record, page 34) defendants immediately filed a motion to set aside the default judgment (Record, page 47), which motion was denied on March 3, 1981, (Record, page 59). Defendants then indicated that they

would file an appeal, at which time negotiations concerning the stipulation to set the default judgment aside were entered into. Before the time for defendants timely appeal of that order was past, plaintiff signed that stipulation (Record, page 60), and filed it on April 26, 1982. It was not until six months later that plaintiff sought to withdraw the stipulation, (Record, page 66). The order allowing plaintiff to amend the proceedings was not a final judgment. It is the default judgment which is the final order that is the basis for the appeal in this case. When defendants indicated they would proceed to file an appeal, plaintiff prepared and filed the stipulation setting aside the default. This stipulation eliminated the judgment from becoming "final " Defendants' answer was on file and of record. The case was then at issue. Plaintiff ought not to be allowed to play "Kings X" and withdraw the stipulation at his whims and pleasure. Equity would demand that plaintiff be estopped from withdrawing the stipulation.

POINT II. DOCTRINE OF LACHES

In any case, because of the stipulation filed by plaintiff, plaintiff should be precluded from asserting defendants' delay as a defense to defendants' appeal under the doctrine of laches. Laches is a defense founded in equity, based upon delay attended by some change in the condition or relations of the property or parties. Sharp v. Sharp, 54 Utah 262, 180 P. 580 (1919), Sibert v. Sibert, CA App., 245 P.2d 514 (1952), Kelley v. Tracy, 209

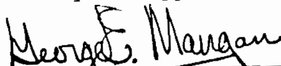
Ore. 153, 305 P.2d 411 (1956). Defendants reasonably believed, and in reliance upon that stipulation, that the default was set aside and they would be allowed their day in court, therefore, they did not file their appeal as planned. Any and all delays by defendants in filing their appeal are directly attributable to plaintiff filing that stipulation. Plaintiff ought to be barred from asserting the same because of Laches.

CONCLUSION

Defendants' appeal should be granted. Plaintiff ought <u>not</u> to be benefited by his "lulling" defendants to believe the stipulation would be sufficient to put the matter in issue, and then waiting several months to withdraw the stipulation and then allege that the passage of time is the reason defendants' appeal should be dismissed. Such a result is unjust, inequitable and a misuse of the judicial system.

DATED this 1st day of November, 1983.

GEORGE E. MANGAN, APC
Attorney for Appellants



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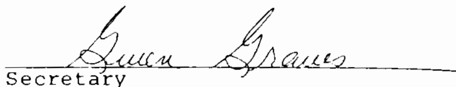
CERTIFICATE OF MAILING

I do hereby certify that on the 1st day of November, I mailed a true and correct copy of the foreging APPELLANTS' REPLY

BRIEF, postage prepaid, to JoAnn B. Stringham, McRae & DeLand, Attorney for Respondent, 1680 West Highway 40, Suite 1190, Vernal, Utah 84078, by depositing the same in the United States Post Office at Roosevelt, Utah.



Secretary