

1993

# JJBAKD, a Utah General Partnership v. Howard F. Hatch : Brief of Appellant

Utah Court of Appeals

Follow this and additional works at: [https://digitalcommons.law.byu.edu/byu\\_ca1](https://digitalcommons.law.byu.edu/byu_ca1)



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Court of Appeals; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

James R. Boud; Bradley R. Jones; .

Howard F. Hatch, pro se.

---

## Recommended Citation

Brief of Appellant, *JJBAKD v. Hatch*, No. 930043 (Utah Court of Appeals, 1993).  
[https://digitalcommons.law.byu.edu/byu\\_ca1/4932](https://digitalcommons.law.byu.edu/byu_ca1/4932)

This Brief of Appellant is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Court of Appeals Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at [http://digitalcommons.law.byu.edu/utah\\_court\\_briefs/policies.html](http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html). Please contact the Repository Manager at [hunterlawlibrary@byu.edu](mailto:hunterlawlibrary@byu.edu) with questions or feedback.

UTAH COURT OF APPEALS

UTAH  
DOCUMENT  
KFU  
50  
.A10  
DOCKET NO. 930043

IN THE UTAH COURT OF APPEALS

JJBAKD, a Utah General Partnership,

Plaintiff and Appellee,

vs.

HOWARD F. HATCH,

Defendant and Appellant.

BRIEF OF APPELLANT

Case No. 930043-CA

Priority No. 29(b)(15)

Lower Court #920-2330 CV

APPEAL FROM THE SUMMARY JUDGMENT AND DISMISSAL OF THE  
FOURTH CIRCUIT COURT, PROVO DEPARTMENT, STATE OF UTAH,  
THE HONORABLE E. PATRICK MCGUIRE, PRESIDING.

Howard F. Hatch, pro se  
843 South 1150 East  
Pleasant Grove, UT  
Ph: 785-4818 / 227-6598

James R. Boud and  
Bradley R. Jones  
302 West 5400 South, #103  
Murray, Utah 84107

**FILED**

19 1993

**COURT OF APPEALS**

## TABLE OF CONTENTS

	<u>Page</u>
JURISDICTION .....	1
ISSUES AND STANDARD OF REVIEW	
Issues .....	1
Standard of Review .....	2
STATUTES AND RULES WHICH ARE DETERMINATIVE .....	2
STATEMENT OF THE CASE .....	2
A. Nature of the Case .....	2
B. Summary of Proceedings and Disposition .....	3
SUMMARY OF AGRUMENT .....	4
ARGUMENT .....	4
CONCLUSION .....	6
MAILING CERTIFICATE .....	6
ADDENDA:	
A. Order and Judgment.	
B. Canon 3, Code of Judicial Conduct.	
C. Rule 4-501. Code of Judicial Administration.	
D. Mobile Home Park Residency (§57-16-5, et seq.)	
E. Rule 41, Utah Rules of Civil Procedure	
F. Rule 56, " " " " "	
G. Untitled ruling by Judge McGuire filed 11/30/92.	
H. Ruling by Judge Sumsion, dated October 9, 1992.	

## TABLE OF AUTHORITIES

	<u>Page</u>
 <u>Cases Cited:</u>	
<u>Beehive Brick Co. v. Robinson Brick Co.</u> , 780 P.2d 827 .....	6
<u>Durham v. Margetts</u> , 571 P.2d 1332 (Utah 1977) .....	2
<u>Martin v. Stevens</u> , 121 Utah 484, 243 P.2d 747 (Utah 1952) ...	2
<u>Themy v. Seagull Enters. Inc.</u> , 595 P.2d 526 (Utah 1979) ....	2
 <u>Statutes and Rules Cited:</u>	
Canon 3, Code of Judicial Conduct .....	1,2,4
§57-16-4, Utah Code Ann., 1953, as amended .....	3
§57-16-5(1), Utah Code Ann., 1953, as amended .....	3
§57-16-6(5), Utah Code Ann., 1953, as amended .....	1,2,3,5
§57-16-8, " " " " " " .....	3
§78-2a-3(2)(d), Utah Judicial Code, Utah Code, .....	1
§78-36-8.5, " " " " " " .....	3,5
Rule 4-501(2), Utah Code of Judicial Administration .....	2,5
Rule 41, Utah Rules of Civil Procedure .....	2
Rule 56, Utah Rules of Civil Procedure .....	2

	)	
JJBAKD, a Utah General Partnership,	)	BRIEF OF APPELLANT
Plaintiff and Appellee,	)	
vs.	)	Case No. 930043-CA
	)	
HOWARD F. HATCH,	)	Lower Court #920-2330 CV
Defendant and Appellant.	)	
	)	

The Utah Court of Appeals has jurisdiction of this case as per §78-2a-3(2)(d) of the Utah Judicial Code.

Issues: (1) Whether the Judge Sumsion, the initial judge in the trial court, violated Canon 3, §(A) (1), (4) and (6), of the Code of Judicial Conduct prior to and as he was disqualifying himself.

(3) Whether Judge McGuire violated section of the Utah Code governing mobile home parks, §57-16-6(5).

(5) Whether Judge McGuire erred in not allowing the \$3,500 posted as a bond (since none should have been required) to be applied as interim rents and in declining the tender of the back rent when offered in court, thus constituting abuse of discretion.

1

### Standard of Review:

"Upon review of a grant of motion for summary judgment, the Supreme Court applies the same standard as that applied by the trial court." Durham v. Margetts, 571 P. 2d 1332 (Utah 1977).

Because disposition of a case on summary judgment denies the benefit of a trial on the merits, the appellate court must review the evidence in the light most favorable to the losing party, and affirms only where it appears there is no genuine dispute as to any material issues of fact, or where, even according to the facts as contended by the losing party, the moving party is entitled to judgment as a matter of law. Themy v. Seagull Enters. Inc., 595 P.2d 526 (Utah 1979)

In reviewing a dismissal which is granted against a plaintiff, the court must review all of the evidence, together with every logical inference which may fairly be drawn therefrom, in the light most favorable to the plaintiff. Martin v. Stevens, 121 Utah 484, 243 P.2d 747 (Utah 1952).

### **STATUTES AND RULES WHICH ARE DETERMINATIVE**

1. Canon 3, §(A) (1), (4) and (6), of the Code of Judicial Conduct requires impartiality of a judge and would preclude him from making prejudicial statements in court and filing gratuitous minute entries (see Addendum B & H).

2. Rule 4-501(2) of the Code of Judicial Administration allows the responding party 10 days in which to respond and contemplates a hearing on a motion for summary judgment (see Addendum C).

3. §57-16-6(5), et seq., of the Utah Code, 1953 as amended, governs eviction from mobile home parks (see Addendum D).

4. Rules 41 and 56, Utah Rules of Civil Procedure, govern the granting of summary judgments and dismissals (Addendum E & F).

### **STATEMENT OF THE CASE**

A. Nature of the Case. The plaintiff sought to evict the mobile home belonging to the defendant for alleged violations of the lease agreement under §57-16-5(1) of the Utah Code (R. 25).

B. Summary of Proceedings and Disposition in Trial Court.

The defendant answered and brought a counterclaim against the plaintiff for its violation of §57-16-4 of the Utah Statute and its own rules, saying that the demands made upon him were unreasonable, unduly burdensome and without a legal basis and that the mobile home park manager had been arbitrary and capricious in his application of the rules. Special damages of \$1600 were sought, as well as \$15,000 in exemplary damages (R. 30), and a jury trial requested (R. 39).

Rather than pursuing its claims under the mobile home statute (§57-16-6) as filed, the plaintiff posted a bond and sought to require a counterbond of the defendant as per the unlawful detainer statute, §78-36-8.5 of the Utah Code, which the court granted (R. 44).

After requiring the defendant to post \$3,500 in the form of a cash, the court required interim rents as well but without adequately communicating this to the defendant. When it became clear to the defendant that these were required in addition the bond amount, the defendant offered to pay them into court but the tender was refused (R. 145,146) and summary judgment given based on his failure to pay the rental amounts, which had previously been returned (R. 60-61).

The plaintiff's motion for summary judgment was based on its allegation that the defendant had failed to comply with the requirements of §57-16-8 of the Utah Code (Mobile Home Park Residency Statute) and judgment was entered by Judge McGuire within one day of the filing of a motion for summary judgment by the plaintiff (R. 83). Even though the defendant made a motion to set this aside (R. 94), Judge McGuire refused.

Because of a protest lodged, the court set a hearing to consider the motion for summary judgment which it had already granted (see

Addendum G). Without notice that the matter would be considered and without any opportunity provided to the defendant at the hearing to present evidence of the validity of his counterclaim, the court not only granted summary judgment on the plaintiff's claims but also dismissed out of hand the defendant's counterclaims (R. 111).

#### SUMMARY OF ARGUMENT

The defendant believes the court showed extreme prejudice and did not respect his legal rights, that even though the initial judge did disqualify himself, he attempted to influence the course of the proceedings by his gratuitous minute entry and influence within the local court system.

That Judge McGuire appeared just as prejudiced in his efforts to find judgment against the defendant by his premature granting of summary judgment and did deny him equity before the bar as evidenced by the many other statutes violated in the process.

#### ARGUMENT

Evidence of Judge Sumpsion's prejudice was manifest at the first hearing when he interrupted the plaintiff's opening comments that the case was a "simple" one by saying: "Anything Mr. Hatch is involved in is not simple and before you are through you will find that out." (R. 63, 64) I believe his gratuitous minute entry, a copy of which is attached as Addendum H, was completely uncalled for and was meant solely for the purpose of prejudicing further proceedings. Both of these actions constitute, I believe, a violation of Canon 3, §(A) (1), (4) and (6), of the Code of Judicial Conduct.

Administrative practice was further violated when the case was passed on immediately to Judge McGuire by Judge Sumsion without waiting to have it assigned out by the administrator's office.



When judgment was entered by Judge McGuire within one day of the filing of a motion for summary judgment by the plaintiff, in violation of Rule 4-501(2) of the Code of Judicial Administration, which allows an opposing party up to 10 days to respond, it seemed that he was just as prejudiced and eager to punish the defendant as Judge Sumsion, especially where he refused to set this aside after being requested to do so.

Under the Utah Code governing mobile home parks,

§57-16-6(5), provides that "eviction proceedings commenced under this chapter and based on causes set forth in Subsections 57-16-5(1), (2), and (5) shall be brought in accordance with the Utah Rules of Civil Procedure and shall not be treated as unlawful detainer actions under Chapter 36, Title 78."

Even though the requiring of a counterbond of the Defendant was contrary to the Code Section just cited, the court further violated the Defendant's rights by requiring that the bond be in cash only (§78-36-8.5(2)(b) allows other options).

After the very substantial amount set by the court was posted (\$3,500), the court further required interim rents to be kept current. This is discretionary. When it became clear to me that the court was requiring it, I offered the sum due but it was refused and summary judgment given based on my failure to pay these amounts.

At a hearing to consider a motion for summary judgment made by the plaintiff, and without any opportunity being given to me to present evidence of the validity of my counterclaim, the court not only granted summary judgment on the plaintiff's claims but also dismissed out of hand my contentions in the counterclaim. It is clearly the rule, which is supported by prior decisions of the appellate courts in this state, that all claims of plaintiff or counterclaimant shall be given a fair opportunity to be heard.

Because disposition of a case by summary judgment denies the benefit of a trial on the merits, any doubt concerning questions of fact, including evidence and reasonable inferences drawn from the evidence, should be resolved in favor of the party opposing the motion. Beehive Brick Co. v. Robinson Brick Co., 780 P.2d 827 (Utah Ct. App. 1989)

#### CONCLUSION

The defendant would respectfully request this court to reverse the judgment of the lower court and remand the matter back for a full and fair hearing before a jury as to the facts bearing on the case, and directing the court administrator to refer the matter to an impartial judge.

DATED: 4-17-93

  
Howard F. Hatch, pro se

#### MAILING CERTIFICATE

I certify that a true and correct copy of the above Appellant's Brief was mailed to the plaintiff's attorney this 17<sup>th</sup> day of April, 1993, as follows:

James R. Boud and Bradley R. Jones  
302 West 5400 South, Suite 103  
Murray, Utah 84107

  
Howard F. Hatch

# Addendum "A"

FILED  
CIRCUIT COURT  
NOV 18 1992 11 06

James R. Boud, USB #A0388  
Bradley R. Jones, USB #A4747  
ASHTON, BRAUNBERGER, POULSEN & BOUD, P.C.  
Attorneys for Plaintiff  
302 West 5400 South, Suite 103  
Murray, Utah 84107  
Telephone: (801) 263-0300

---

IN THE FOURTH CIRCUIT COURT, PROVO DEPARTMENT  
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

---

JJBAKD, a Utah General Partnership,	)	
	)	ORDER AND JUDGMENT
Plaintiff,	)	
	)	
vs.	)	Civil No. 920-2330CV
	)	Judge McGuire
HOWARD F. HATCH,	)	
	)	
Defendant.	)	

---

Plaintiff's Motion for Summary Judgment having come for oral argument before the above-entitled Court on November 18, 1992 at the hour of 3:00 p.m., James R. Boud appearing on behalf of Plaintiff and Howard F. Hatch appearing on his own behalf, the Court having reviewed the file, having heard argument of both parties and for good cause showing, hereby enters its order as follows:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that between the parties is hereby terminated and Plaintiff is entitled to restitution of the premises described in the Complaint as 920 South 340 West, #51, Provo, Utah. The Clerk is ordered to issue a Writ

of Restitution for the purpose of restoring said premises to Plaintiff. Plaintiff shall have the right to remove the subject mobile home from the leased premises should Defendant fail to do so after service of a properly executed Writ of Restitution and Defendant shall be liable for all of Plaintiff's costs in removing the mobile home from the leased premises.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Plaintiff shall have Judgment against the Defendant for \$1,020.00 representing rent due and owing through December, 1992 and \$1,261.25 attorneys fees and court costs of \$20.00 (filing fee) and \$28.00 (service fees) for a total of \$2,329.25 together with all after accruing rents, costs and reasonable attorneys fees incurred by Plaintiff in obtaining restitution of the premises or in responding to any other pleadings filed by the Defendant. After accruing costs will include costs in moving the subject mobile home from the leased premises.

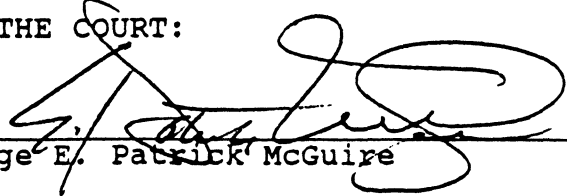
IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Judgment amount together with any after accruing costs and reasonable attorneys fees shall be paid to Plaintiff directly from Defendant's \$3,500.00 cash bond which has been filed with this Court and the Clerk is hereby authorized to disburse said sums as set forth in this Judgment to Plaintiff's attorney immediately. The balance of said bond shall be held until all costs and additional attorneys fees, if any, incurred by Plaintiff in obtaining restitution of the subject premises have been satisfied.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Defendant's Counterclaim is hereby dismissed with prejudice.

DATED this 17 day of December, 1992.

BY THE COURT:

*Entered 12-18-92 de*

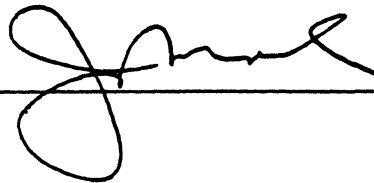
  
Judge E. Patrick McGuire

CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the foregoing Judgment and Order was mailed postage prepaid on the 9 day of December, 1992, to the following:

Howard F. Hatch  
843 South 1150 East  
Pleasant Grove, Utah 84062

ASHTON, BRAUNBERGER, POULSEN  
& BOUD, P.C.

  
\_\_\_\_\_

## CANON 3

A Judge Should Perform the Duties of the Office  
Impartially and Diligently.

The judicial duties of a full-time judge take precedence over all other activities. These judicial duties include all the duties of the office prescribed by law. In the performance of these duties, the following standards apply:

(A) **Adjudicative Responsibilities.**

(1) A judge should be faithful to the law and maintain professional competence in it. A judge should be unswayed by partisan interests, public clamor, or fear of criticism.

(2) A judge should maintain order and decorum in proceedings before the court.

(3) A judge should be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, and others who come before the court or the judge in the judge's official capacity, and should require similar conduct of lawyers, and of staff, court officials, and others subject to judicial direction and control.

(4) A judge should accord to every person who is legally interested in a proceeding, or his lawyer, full right to be heard according to law, and, except as authorized by law, neither initiate nor consider ex parte or other communications concerning a pending or impending proceeding. A judge may communicate with court staff and/or other judges about issues in a case without engaging in inappropriate ex parte communication provided that the judge does not abrogate the responsibility to personally decide the case pending before the court. A judge, however, may obtain the advice of a disinterested expert on the law applicable to a proceeding before the court if the judge gives notice to the parties of the person consulted and the substance of the advice, and affords the parties reasonable opportunity to respond.

(5) A judge should dispose promptly of the business of the court.

(6) A judge should abstain from public comment about a pending or impending proceeding in any court, and should require similar abstention on the part of court personnel subject to judicial direction and control. This subsection does not prohibit judges from making public statements in the course of their official duties or from explaining for public information the procedures of the court.

(7) A judge should prohibit broadcasting, televising, or recording in the courtroom and areas immediately adjacent thereto during sessions of court or recesses between sessions, except that a judge may authorize:

(a) the use of electronic or photographic means for the presentation of evidence, for the perpetuation of a record, or for other purposes of judicial administration; or

(b) the broadcasting, televising, recording, or photographing of investitive, ceremonial, or naturalization proceedings.

(8) A judge should prohibit taking photographs (including motion picture and videotape) in the courtroom and areas immediately adjacent thereto during sessions of court or recesses between sessions, except that still photographs of the judge and other court personnel, counsel, spectators, parties and witnesses are permissible, subject to restrictions specified by the court and subject, in the case of parties and witnesses, to their advance consent in writing, provided that the

Addendum B

court shall specifically forbid the taking of any photographs where it finds a substantial likelihood that such activity would jeopardize a fair hearing or trial in the matter at issue.

(B) **Administrative Responsibilities.**

(1) A judge should diligently discharge administrative responsibilities, maintain professional competence in judicial administration, and facilitate the performance of the administrative responsibilities of other judges and court officials.

(2) A judge should require staff and court officials subject to judicial direction and control to observe the relevant ethical standards of fidelity and diligence.

(3) A judge should take or initiate appropriate disciplinary measures against a judge or lawyer for unprofessional conduct of which the judge may become aware. However, this provision shall not apply to information which is generated and communicated under the policies of the Judicial Performance Evaluation Program.

(4) A judge should not make unnecessary appointments and should exercise the power of appointment only on the basis of merit, avoiding nepotism and favoritism. A judge should not approve compensation of appointees beyond the fair value of services rendered.

(C) **Disqualification.**

(1) Disqualification must be entered in a proceeding by any judge whose impartiality might reasonably be questioned, including but not limited to instances where:

(a) The judge has a personal bias or prejudice concerning a party, a strong personal bias involving an issue in a case, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(b) The judge had served as lawyer in the matter in controversy, had practiced law with a lawyer who had served in the matter at the time of their association, or the judge or such lawyer has been a material witness concerning it;

(c) The judge knows of a financial interest, including fiduciary interest, of either the judge personally or the judge's spouse and/or minor children residing in the household, in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;

(d) The judge or spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

(i) is a party to the proceeding, or an officer, director, or trustee of a party;

(ii) is acting as a lawyer in the proceeding;

(iii) is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;

(iv) is to the judge's knowledge likely to be a material witness in the proceeding.

(2) A judge should be informed about personal and fiduciary financial interests, and make a reasonable effort to be informed about the personal financial interests of the judge's spouse and minor children residing in the household.

(3) For the purposes of this section:

Addendum B

(G) A statement that the affiant(s) will advise the court, in advance, of any change which would reduce the surety's net worth during the year of qualification.

(H) A statement that the surety and its employees neither have nor will maintain any preferential relationship with jail personnel in areas where the surety is active. Such preferential relationship includes but is not limited to relationships by blood or marriage within the fourth degree of consanguinity, and personal friendship to a degree that would disqualify a juror.

(I) A statement that the surety will neither offer consideration nor gratuities to jail personnel or peace officers under any circumstances which would permit the inference that said consideration was offered to induce bonding referrals or recommendations.

(J) A statement that the affiant(s) submit themselves to the jurisdiction of the court, irrevocably appoint the clerk of the court as agent upon whom any papers affecting the surety's liability on the undertaking may be served and acknowledge that liability may be enforced on motion and upon such notice as the court may require without the necessity of an independent action.

(2) A copy of a current financial statement shall be attached to and made a part of the affidavit together with copies of deeds of conveyance to all real property owned by the affiants.

(3) The presiding judge may conduct such inquiry or investigation of the information contained in the affidavit and financial statement as is determined necessary.

(4) Any court of the state may give full faith and credit to the order qualifying a bail bond surety issued by any other court of the state and bail bonds posted by such surety unless otherwise ordered.

(5) The presiding judge of the court where the bond shall be posted shall issue an order authorizing the posting of bail bonds by sureties qualified pursuant to this rule as determined by a majority of judges in that court. The order may contain such restrictions, limitations or requirements as are determined appropriate by the court.

(6) After proper notice and a hearing, the court may reconsider an order qualifying a bail bond surety at any time and may vacate or amend the order as appropriate. The court shall set forth its reasons for disqualification on the record or in a written order.

(7) On or before February 28th of each year, the Court Executive shall provide the Administrative Office with a list of the qualified and disqualified sureties in that jurisdiction. On or before March 15th of each year, the Administrative Office shall publish a list of the qualified and disqualified sureties in the State of Utah based upon the information provided by the Court Executives.

#### **Rule 4-406. Qualifications for process servers for collection agencies.**

##### **Intent:**

To establish uniform criteria and procedures for the qualification of process servers for collection agencies.

##### **Applicability:**

This rule shall apply to the district, circuit and justice courts.

#### **Statement of the Rule:**

(1) On or before February 15th of each year, all private process servers who desire to be qualified by the court for the purpose of serving summons and complaints on behalf of collection agencies pursuant to Utah Code Ann. Section 12-1-8 shall provide the presiding judge of the jurisdiction with an affidavit. The affidavit shall be subscribed to by the person or the principal responsible party, if qualifying as a business and set forth the following:

(A) The name, address and telephone number of the individual, business or corporation.

(B) The name of the principal responsible person, if a business or corporation.

(C) A statement that the affiant(s) have complied with all state and local business regulations, including filing with the appropriate authority if doing business under an assumed name.

(D) A statement that the affiant(s) are over the age of 21 years and will not serve process in any action in which they are named as parties.

(E) A statement that the affiant(s) are not agents or employees of the collection agency for which they are hired to serve process.

(2) The presiding judge may conduct such inquiry or investigation of the information contained in the affidavit as is determined necessary.

(3) All process servers qualified under this rule shall be requalified annually.

(4) The presiding judge shall annually publish a list of those persons qualified as process servers under this rule as determined by a majority of judges in that jurisdiction.

(5) After proper notice and a hearing, the presiding judge may reconsider an order qualifying a process server at any time and may vacate or amend the order as appropriate. The court shall set forth its reasons for disqualification on the record or in a written order.

### **ARTICLE 5.**

### **CIVIL PRACTICE.**

#### **Rule 4-501. Motions.**

##### **Intent:**

To establish a uniform procedure for filing motions, supporting memoranda and documents with the court.

To establish a uniform procedure for providing courtesy copies of motions and supporting documentation to the court.

To establish a uniform procedure for ensuring timely and adequate notice of matters placed on the law and motion calendar and set for hearing.

##### **Applicability:**

This rule shall apply to all district and circuit courts.

##### **Statement of the Rule:**

(1) All motions, except uncontested or ex-parte matters, shall be accompanied by a brief statement of points and authorities and affidavits relied upon in support thereof. Points and authorities supporting or opposing a motion shall not exceed five (5) pages in length exclusive of the "statement of mate-

*Adrian Davis*

rial facts" as provided in paragraphs (4) and (5), except as waived by order of the court on ex-parte application. If an ex-parte application is made to file an over-length memorandum, the application shall state the length of the memorandum, and if the memorandum is in excess of ten pages, the application shall include a summary of the memorandum, not to exceed five pages. If a memorandum of points and authorities is filed in support of a motion, it must be served on the opposing party or counsel and filed with the court no later than ten (10) days before the date set for hearing.

(2) The responding party shall file and serve upon all parties within ten (10) days after service of a motion, but no later than five (5) days before the date of hearing, a statement answering points and authorities and counter-affidavits.

(3) The moving party may serve and file reply points and authorities within five (5) days after service of the responding party's points and authorities. Upon the expiration of the five (5) day period to file reply points and authorities, either party may notify the Clerk to submit the matter for decision.

(4) The points and authorities in support of a motion for summary judgment shall begin with a section that contains a concise statement of material facts as to which movant contends no genuine issue exists. The facts shall be stated in separate numbered sentences and shall refer with particularity to those portions of the record upon which the movant relies.

(5) The points and authorities in opposition to a motion for summary judgment shall begin with a section that contains a concise statement of material facts as to which the party contends a genuine issue exists. Each disputed fact shall be stated in separate numbered sentences and shall refer with particularity to those portions of the record upon which the opposing party relies, and, if applicable, shall state the numbered sentence or sentences of the movant's facts that are disputed. All material facts set forth in the movant's statement shall be deemed admitted for the purpose of summary judgment unless specifically controverted by the opposing party's statement.

(6) A copy of the motion, supporting memorandum and documents shall be filed with the clerk's office as provided in the Rules of Civil Procedure. Motions based upon depositions or supported thereby shall not be heard unless the depositions are filed in the clerk's office at least two working days before the hearing unless otherwise ordered by the court upon good cause shown.

(7) A courtesy copy of the motion, memorandum of points and authorities and documents supporting or opposing the motion shall be delivered to the judge hearing the matter at least two working days before the date set for hearing. Courtesy copies of all affidavits shall be given to the judge within the time limits required by the Rules of Civil Procedure. Copies shall be clearly marked as courtesy copies and indicate the hearing date. Courtesy copies shall not be filed with the clerk of the court.

(8) Decision on a motion shall be rendered without a hearing unless requested by the Court, in which event the Clerk shall schedule a date and time for such hearing. If a hearing is not requested by the Court, counsel shall notify the Clerk of the Court, in writing, to submit the motion to the Court for decision. The notification shall contain a certificate of mailing to opposing counsel and parties.

(9) In cases where the granting of a motion would dispose of the action or any issues therein on the merits with prejudice, the party resisting the motion may request a hearing and such request shall be granted unless the motion is summarily denied. If no request is made within ten (10) days of notifying the

clerk to submit the motion for decision, a hearing on the motion shall be deemed waived.

(10) All motions for summary judgment or other dispositive motions shall be heard at least thirty (30) days before the scheduled trial date. No dispositive motions shall be heard after that date without leave of the Court.

(11) The court on its own motion or at a party's request may direct arguments of any motion by telephone conference without court appearance. A verbatim record shall be made of all telephone arguments and the rulings thereon if requested by counsel.

## Rule 4-502. Discovery procedures in civil cases.

### Intent:

To establish a procedure for the filing of discovery documents.

To establish a limitation on discovery procedures within 30 days of trial.

### Applicability:

This rule shall apply to the District, Juvenile and Circuit courts.

### Statement of the Rule:

(1) Parties conducting discovery under Rules 33, 34 and 36 of the Utah Rules of Civil Procedure shall not file discovery requests with the clerk of the court, but shall file only a certificate of service stating that the discovery requests have been served on the other parties and the date of service. The responding party shall file a similar certificate with the clerk of the court.

(2) The party serving the discovery request shall retain the original with the original proof of service affixed to it and serve a copy of the discovery request and proof of service upon the opposing party or counsel. The party responding to the discovery request shall retain the original with the original proof of service affixed to it, and serve a copy of the responses and the proof of service upon the opposing party or counsel. The discovery requests and response shall not be filed with the clerk of the court unless the court on motion and notice and for good cause shown so orders.

(3) Any party filing a motion to compel compliance with a discovery request or a motion which relies upon the discovery response shall attach a copy of the discovery request or response which is at issue in the motion.

(4) Depositions taken pursuant to the Rules of Civil Procedure shall not be filed with the clerk of the court unless the court on motion and notice and for good cause shown so orders. The reporter before whom the deposition is taken shall deliver the original to the party conducting the deposition, and shall deliver copies to the other parties requesting the same. The reporter shall then file a certificate with the clerk of the court certifying to whom the original and copies were delivered and the dates they were delivered. Any party moving for the publication of a deposition shall provide the court with the original or copy in the party's possession at the time the motion to publish is made.

(5) All parties shall be entitled to conduct discovery proceedings in accordance with this rule. All discovery proceedings shall be completed, including all responses thereto, and all depositions and other documents filed with the court no later than thirty (30) days before the date set for trial of the case. The right to conduct discovery proceedings within thirty (30) days before trial shall be within the discretion of the court. Motions to conduct discovery within thirty (30) days before trial shall be presented to the judge assigned to the



## COLLATERAL REFERENCES

A.L.R. — Validity of zoning or building regulations restricting mobile homes or trailers to established mobile home or trailer parks, 17 A.L.R.4th 106.

Validity and construction of restrictive cove-

nant prohibiting or governing outside storage or parking of house trailers, motor homes, campers, vans, and the like, in residential neighborhoods, 32 A.L.R.4th 651.

**57-16-3. Definitions.**

As used in this chapter:

(1) "Mobile home" means a transportable structure in one or more sections with the plumbing, heating, and electrical systems contained within the unit, which when erected on a site, may be used with or without a permanent foundation as a family dwelling.

(2) "Mobile home park" means any tract of land on which two or more mobile home spaces leased, or offered for lease or rent, to accommodate mobile homes for residential purposes.

(3) "Resident" means an individual who leases or rents space in a mobile home park.

(4) "Mobile home space" means a specific area of land within a mobile home park designed to accommodate one mobile home.

(5) "Rent" means charges paid for the privilege of occupying a mobile home space, and may include service charges and fees.

(6) "Service charges" means separate charges paid for the use of electrical and gas service improvements which exist at a mobile home space, or for trash removal, sewage and water, or any combination of the above.

(7) "Fees" means other charges incidental to a resident's tenancy including, but not limited to, late fees, charges for pets, charges for storage of recreational vehicles, charges for the use of park facilities, and security deposits.

(8) "Change of use" means a change of the use of a mobile home park, or any part of it, for a purpose other than the rental of mobile home spaces.

History: L. 1981, ch. 178, § 3.

**57-16-4. Termination of lease or rental agreement — Required contents of lease — Increases in rents or fees — Sale of homes.**

(1) A mobile home park or its agents may not terminate a lease or rental agreement upon any ground other than as specified in this chapter.

(2) Each agreement for the lease of mobile home space shall be written and signed by the parties. Each lease shall contain at least the following information:

(a) the name and address of the mobile home park owner and any persons authorized to act for the owner, upon whom notice and service of process may be served;

(b) the type of the leasehold, and whether it be term or periodic;

(c) a full disclosure of all rent, service charges, and other fees presently being charged on a periodic basis;

(d) the date or dates on which the payment of rent, fees, and service charges are due; and

(e) all rules that pertain to the mobile home park which, if broken, may constitute grounds for eviction.

(3) Increases in rent or fees for periodic tenancies shall be unenforceable until 60 days after notice of the increase is mailed to the resident. If service charges are not included in the rent, service charges may be increased during the leasehold period after notice to the resident is given, and increases or decreases in electricity rates shall be passed through to the resident. Increases or decreases in the total cost of other service charges shall be passed through to the resident.

The mobile home park may not alter the date or dates on which rent, fees, and service charges are due unless a 60-day written notice precedes the alteration.

(4) Any rule or condition of a lease purporting to prevent or unreasonably limit the sale of a mobile home belonging to a resident is void and unenforceable. The mobile home park may, however, reserve the right to approve the prospective purchaser of a mobile home who intends to become a resident, but such approval may not be unreasonably withheld. The mobile home park may require proof of ownership as a condition of approval. The mobile home park may unconditionally refuse to approve any purchaser of a mobile home who does not register prior to purchase.

(5) A mobile home park may not restrict a resident's right to advertise for sale or sell his mobile home. However, the park may limit the size of a "for sale" sign affixed to the mobile home to not more than 144 square inches.

(6) A mobile home park may not compel a resident who desires to sell his mobile home, either directly or indirectly, to sell it through an agent designated by the mobile home park.

(7) In order to upgrade the quality of a mobile home park, it may require that a mobile home be removed from the park upon sale if:

- (a) the mobile home does not meet minimum size specifications; or
- (b) the mobile home is in rundown condition or in disrepair.

History: L. 1981, ch. 178, § 4; 1989, ch. 110, § 1.

Amendment Notes. — The 1989 amendment, effective April 24, 1989, substituted "increases or decreases in electricity rates shall be

passed through to the resident" for "decreases in utility rates shall be passed through to the resident" at the end of the second sentence and added the third sentence in Subsection (3) and made stylistic changes throughout the section.

**57-16-5. Grounds for terminating lease.**

An agreement for the lease of mobile home space in a mobile home park may be terminated during its term by mutual agreement or for any one or more of the following causes:

(1) Failure of a resident to comply with a mobile home park rule for a period of 15 days after receipt of notice of noncompliance from the mobile home park;

(2) Repeated failure of a resident to abide by a mobile home park rule, if the original notice of noncompliance states that another violation of the same or a different rule might result in forfeiture without any further period of cure;

*Added change "D"*

- (3) Behavior by a resident which substantially endangers the security and health of the other residents or threatens the property in the park;
- (4) Nonpayment of rent, fees, or service charges;
- (5) A change in the land use or condemnation of the mobile home park or any part of it.

**History:** L. 1981, ch. 178, § 5.

#### **57-16-6. Action for lease termination — Prerequisite procedure.**

A legal action to terminate a lease based upon a cause set forth in Section 57-16-5 may not be commenced except in accordance with the following procedure:

- (1) Before issuance of any summons and complaint, the mobile home park shall send or serve written notice to the resident or subtenant:
  - (a) by delivering a copy of the notice personally;
  - (b) by sending a copy of the notice through registered or certified mail addressed to the resident or subtenant at his place of residence;
  - (c) if the resident or subtenant is absent from his place of residence, by leaving a copy of the notice with some person of suitable age and discretion at his residence and sending a copy through the mail addressed to the resident or subtenant at his place of residence; or
  - (d) if a person of suitable age or discretion cannot be found, by affixing a copy of the notice in a conspicuous place on the resident's or subtenant's mobile home and also sending a copy through the mail addressed to the resident or subtenant at his place of residence.
- (2) The notice shall set forth the cause for the notice and, if the cause is one which can be cured, the time within which the resident has to cure. The notice shall also set forth the time after which the mobile home park may commence legal action against the resident if cure is not effected, as follows:
  - (a) In the event of failure to abide by a mobile home park rule, the notice shall provide for a 15-day cure period except in the case of repeated violations and, shall state that if a cure is not timely effected, or a written agreement made between the mobile home park and the resident allowing for a variation in the rule or cure period, eviction proceedings may be initiated immediately.
  - (b) If the resident commits repeated violations of a rule, a summons and complaint may be issued three days after a notice is served.
  - (c) If a resident behaves in a manner that substantially endangers the well-being or property of other residents, eviction proceedings may commence immediately.
  - (d) If a resident does not pay rent, fees, or service charges, the notice shall provide a three-day cure period and, that if cure is not timely effected, or a written agreement made between the mobile home park and the resident allowing for a variation in the rule or cure period, eviction proceedings may be initiated immediately.
  - (e) If there is a planned change in land use or condemnation of the park, the notice shall provide that the resident has 90 days after

receipt of the notice to vacate the mobile home park if no governmental approval or permits incident to the planned change are required, and if governmental approval and permits are required, that the resident has 90 days to vacate the mobile home park after all permits or approvals incident to the planned change are obtained.

(3) If the planned change in land use or condemnation requires the approval of a governmental agency, the mobile home park, in addition to the notice required by Subsection (2)(e), shall send written notice of the date set for the initial hearing to each resident at least seven days before the date scheduled for the initial hearing.

(4) Regardless of whether the change of use requires the approval of any governmental agency, if the resident was not a resident of the mobile home park at the time the initial change of use notice was issued to residents the owner shall give notice of the change of use to the resident before he occupies the mobile home space.

(5) Eviction proceedings commenced under this chapter and based on causes set forth in Subsections 57-16-5(1), (2), and (5) shall be brought in accordance with the Utah Rules of Civil Procedure and shall not be treated as unlawful detainer actions under Chapter 36, Title 78. Eviction proceedings commenced under this chapter and based on causes of action set forth in Subsections 57-16-5(3) and (4) may, at the election of the mobile home park, be treated as actions brought under this chapter and the unlawful detainer provisions of Chapter 36, Title 78, except, if unlawful detainer is charged, the court shall endorse on the summons the number of days within which the defendant is required to appear and defend the action, which shall not be less than five days or more than 20 days from the date of service.

**History:** L. 1981, ch. 178, § 6; 1987, ch. 92, § 81; 1989, ch. 110, § 2.

**Amendment Notes.** — The 1987 amendment redesignated the subsections, in Subsection (2) substituted "Subsection (1)(e)" for "Subsection (1)(a)(iii) of this section," and made minor phraseology and punctuation changes throughout the section.

The 1989 amendment, effective April 24, 1989, substituted "send or serve written notice to the resident or subtenant" for "send written notice as outlined in Section 78-36-6 to the resident affected" near the beginning of Subsection (1), added Subsections (1)(a) through (d), inserted subsection designation (2), redesignated former Subsections (1)(a) through (e) as Subsections (2)(a) through (e), rewrote Subsection (2)(b), which read "In the event of repeated

violations or behavior by a resident that endangers the well-being of persons or property, summons and complaint may be issued three days after a notice is served", redesignated former Subsections (2) and (3) as Subsections (3) and (4), substituted "Subsection (2)(e)" for "Subsection (1)" in Subsection (3), substituted "the owner shall give notice of the change of use to the resident before he occupies the mobile home" for "written notice of the change of use must have been given to the resident prior to the inception of residency" at the end of Subsection (4); added Subsection (5), and made numerous stylistic changes throughout the section.

**Cross-References.** — Utah Rules of Civil Procedure, Utah Court Rules Annotated

#### **57-16-7. Rules of parks.**

(1) A mobile home park may promulgate rules related to the health, safety, and appropriate conduct of residents and to the maintenance and upkeep of such park. No change in rule that is unconscionable is valid. No new or amended rule shall take effect, nor provide the basis for an eviction notice, until the expiration of at least 60 days after its promulgation. Each resident, as a condition precedent to such rule being in effect, shall be provided with a

copy of each new or amended rule that does not appear in their lease agreement.

(2) A mobile home park may specify the type of material used, and the methods used in the installation of, underskirting, awnings, porches, fences, or other additions or alterations to the exterior of a mobile home, and may also specify the tie-down equipment used in a mobile home space, in order to insure the safety and good appearance of the park; but under no circumstances may it require a resident to purchase such material or equipment from a supplier designated by the mobile home park.

(3) No mobile home park may charge an entrance fee, exit fee, nor installation fee, but reasonable landscaping and maintenance requirements may be included in the mobile home park rules. The resident is responsible for all costs incident to connection of the mobile home to existing mobile home park facilities and for the installation and maintenance of the mobile home on the mobile home space.

(4) Nothing in this section shall be construed to prohibit a mobile home park from requiring a reasonable initial security deposit.

History: L. 1981, ch. 178, § 7.

#### **57-16-8. Payment of rent and fees during pendency of eviction proceeding.**

If a resident elects to contest an eviction proceeding, all rents, fees, and service charges due and incurred during the pendency of the action shall be paid into court according to the current mobile home park payment schedule. Failure of the resident to pay such amounts may, in the discretion of the court, constitute grounds for granting summary judgment in favor of the mobile home park. Upon final termination of the issues between the parties, the court shall order all amounts paid into court paid to the mobile home park. The prevailing party is also entitled to court costs and reasonable attorney's fees.

History: L. 1981, ch. 178, § 8.

#### **COLLATERAL REFERENCES**

Utah Law Review. — Attorney's Fees in  
Utah, 1984 Utah L. Rev. 553.

#### **57-16-9. Lienholder's liability for rent and fees.**

Notwithstanding the provisions of Section 38-3-2 and Section 70A-9-317, the lienholder of record of a mobile home is primarily liable to the mobile home park owner or operator for rent and service charges if a mobile home is not removed within 10 days after receipt of written notice that a mobile home has been abandoned or that a writ of restitution has been issued. The lienholder, however, is only liable for rent that accrues after receipt of such notice.

History: L. 1981, ch. 178, § 9.

#### **57-16-10. Utility service to mobile home parks — Limitation on providers' charges.**

Local water, sewer, and sanitation entities, including those administered by municipalities and counties which provide water, sewer, or garbage collection services shall not receive a greater percentage net return from supplying a mobile home park than said entity receives from other residential customers. The net return is determined by taking into consideration the costs of maintenance and depreciation of the mobile home park facilities and all savings on administrative costs, including cost of billing residents.

History: L. 1981, ch. 178, § 10.

#### **57-16-11. Rights and remedies not exclusive.**

The rights and remedies granted by this chapter are cumulative and not exclusive.

History: L. 1981, ch. 178, § 11.

#### **57-16-12. Waiver of rights and duties prohibited.**

No park or resident may agree to waive any right, duty, or privilege conferred by this chapter.

History: L. 1981, ch. 178, § 12.

#### **57-16-15.1. Eviction proceeding.**

(1) Eviction proceedings commenced under this chapter and based on causes of action set forth in Subsections 57-16-5(1), (2), and (5), and eviction proceedings commenced under this chapter based on causes of action set forth in Subsections 57-16-5(3) and (4), where a landlord elects to bring an action under this chapter and not under the unlawful detainer provisions of Chapter 36, Title 78, shall provide for the following:

(a) A judgment may be entered upon the merits or upon default. A judgment entered in favor of the plaintiff may include an order of restitution of the premises. The judgment may also declare the forfeiture of the lease or agreement.

(b) The jury or the court, if the proceedings are tried without a jury or upon the defendant's default, shall also assess the damages resulting to the plaintiff from any of the following:

(i) waste of the premises during the resident's tenancy, if waste is alleged in the complaint and proved; and

(ii) the amount of rent due.

(c) The judgment shall also provide for reasonable attorneys' fees, if they are provided for in the lease or agreement.

(d) If the proceeding is contested, the prevailing party is entitled to court costs and attorneys' fees, regardless of whether the lease agreement provides for the same.

uance. *State v. Humpherys*, 707 P.2d 109 (Utah 1985).

Cited in *Thorley v. Thorley*, 579 P.2d 927 (Utah 1978).

## COLLATERAL REFERENCES

*Am. Jur. 2d.* — 17 *Am. Jur. 2d* Continuance § 1 et seq.; 75 *Am. Jur. 2d* Trial §§ 76, 80, 83, 84.

*C.J.S.* — 17 *C.J.S.* Continuances § 1 et seq.; 88 *C.J.S.* Trial §§ 18 to 35.

*A.L.R.* — Admissions to prevent contin-

uance sought to secure testimony of absent witness in civil case, 15 *A.L.R.3d* 1272.

Continuance of civil case as conditioned upon applicant's payment of costs or expenses incurred by other party, 9 *A.L.R.4th* 1144.

**Key Numbers.** — Continuance ⇐ 1 et seq.; Trial ⇐ 1 to 7.

## Rule 41. Dismissal of actions.

## (a) Voluntary dismissal; effect thereof.

(1) **By plaintiff; by stipulation.** Subject to the provisions of Rule 23(c), of Rule 66, and of any applicable statute, an action may be dismissed by the plaintiff without order of court (i) by filing a notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary judgment, or (ii) by filing a stipulation of dismissal signed by all parties who have appeared in the action. Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of the United States or of any state an action based on or including the same claim.

(2) **By order of court.** Except as provided in Paragraph (1) of this subdivision of this rule, an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper. If a counterclaim has been pleaded by a defendant prior to the service upon him of the plaintiff's motion to dismiss, the action shall not be dismissed against the defendant's objection unless the counterclaim can remain pending for independent adjudication by the court. Unless otherwise specified in the order, a dismissal under this paragraph is without prejudice.

(b) **Involuntary dismissal; effect thereof.** For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against him. After the plaintiff, in an action tried by the court without a jury, has completed the presentation of his evidence the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in Rule 52(a). Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction or for improper venue or for lack of an indispensable party, operates as an adjudication upon the merits.

(c) **Dismissal of counterclaim, cross-claim, or third-party claim.** The provisions of this rule apply to the dismissal of any counterclaim, cross-claim,

or third-party claim. A voluntary dismissal by the claimant alone pursuant to Paragraph (1) of Subdivision (a) of this rule shall be made before a responsive pleading is served or, if there is none, before the introduction of evidence at the trial or hearing.

(d) **Costs of previously-dismissed action.** If a plaintiff who has once dismissed an action in any court commences an action based upon or including the same claim against the same defendant, the court may make such order for the payment of costs of the action previously dismissed as it may deem proper and may stay the proceedings in the action until the plaintiff has complied with the order.

(e) **Bond or undertaking to be delivered to adverse party.** Should a party dismiss his complaint, counterclaim, cross-claim, or third-party claim, pursuant to Subdivision (a)(1)(i) above, after a provisional remedy has been allowed such party, the bond or undertaking filed in support of such provisional remedy must thereupon be delivered by the court to the adverse party against whom such provisional remedy was obtained.

**Compiler's Notes.** — Subdivisions (a) to (d) of this rule are substantially similar to Rule 41, F.R.C.P.

## NOTES TO DECISIONS

## ANALYSIS

## Costs of previously dismissed action.

- Attorney fees.
- Counterclaim.
- Lack of prosecution.
- Involuntary dismissal.
- Appeal.
- Standard of review.
- Time limits.
- Directed verdict distinguished.
- Findings and conclusions.
- Effect.
- Evidence to be considered.
- Federal rules.
- Grounds.
- Failure to establish prima facie case.
- Failure to join indispensable party.
- Failure to prosecute.
- Failure to replace counsel.
- Insufficient evidence.
- Lack of jurisdiction.
- Improper venue distinguished.
- Procedure.
- Reinstatement of dismissed count.
- Water appropriation cases.
- Voluntary dismissal.
- Action pending in another state.
- Conditions.
- Payment of attorney's fees.
- Court's discretion.
- Laches.
- Two-dismissal rule.
- Second dismissal.
- Quashing of previous summons.

## Cited.

## Costs of previously dismissed action.

—Attorney fees.  
Imposition of attorney fees as condition precedent to permitting filing of fourth amended complaint was not error. *Tebbs & Tebbs v. Oliveto*, 123 Utah 158, 256 P.2d 699 (1953).

## Counterclaim.

## —Lack of prosecution.

Where, in cause of action arising in 1956, the trial court's judgment was reversed by the Supreme Court in 1968 and the cause remanded for a new trial, but neither party filed any pleading after remand until 1975, at which time plaintiff filed a motion to dismiss defendant's counterclaim for lack of prosecution, the trial court acted within its discretion in granting the motion. *Reliance Nat'l Life Ins. Co. v. Caine*, 555 P.2d 276 (Utah 1976).

## Involuntary dismissal.

## —Appeal.

## —Standard of review.

In reviewing a dismissal which is granted against a plaintiff, the court must review all of the evidence, together with every logical inference which may fairly be drawn therefrom, in the light most favorable to the plaintiff. *Martin v. Stevens*, 121 Utah 444, 243 P.2d 747 (1952).

When a trial court has made findings and entered judgment thereon, it is the appellate court's duty to review the evidence in the light most favorable to the findings, which must be

Addendum E

was an abuse of discretion *Griffiths v. Hammon*, 560 P.2d 1375 (Utah 1977).

Cited in *Utah Sand & Gravel Prods. Corp. v. Tolbert*, 16 Utah 2d 407, 402 P.2d 703 (1965);

*J.P.W. Enters., Inc. v. Naef*, 604 P.2d 486 (Utah 1979); *Katz v. Pierce*, 732 P.2d 92 (Utah 1986).

## COLLATERAL REFERENCES

**Brigham Young Law Review.** — Reasonable Assurance of Actual Notice Required for In Personam Default Judgment in Utah: *Grham v. Sawaya*, 1981 B.Y.U. L. Rev. 937.

**Am. Jur. 2d.** — 47 Am. Jur. 2d Judgments §§ 1152 to 1213.

**C.J.S.** — 49 C.J.S. Judgments §§ 187 to 218.

**A.L.R.** — Necessity of taking proof as to liability against defaulting defendant, 8 A.L.R.3d 1070.

Appealability of order setting aside, or refusing to set aside, default judgment, 8 A.L.R.3d 1272.

Defaulting defendant's right to notice and hearing as to determination of amount of damages, 15 A.L.R.3d 586.

Opening default or default judgment claimed to have been obtained because of attorney's mistake as to time or place of appearance, trial, or filing of necessary papers, 21 A.L.R.3d 1255.

Failure to give notice of application for default judgment where notice is required only by custom, 28 A.L.R.3d 1383.

Failure of party or his attorney to appear at pretrial conference, 55 A.L.R.3d 303.

Default judgments against the United States under Rule 55(e) of the Federal Rules of Civil Procedure, 55 A.L.R. Fed. 190.

**Key Numbers.** — Judgment = 92 to 134.

## Rule 56. Summary judgment.

(a) **For claimant.** A party seeking to recover upon a claim, counterclaim or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.

(b) **For defending party.** A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought, may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) **Motion and proceedings thereon.** The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, 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. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) **Case not fully adjudicated on motion.** If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the

action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) **Form of affidavits; further testimony; defense required.** Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

(f) **When affidavits are unavailable.** Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) **Affidavits made in bad faith.** Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

**Compiler's Notes.** — This rule is similar to Rule 56, F.R.C.P.

**Cross-References.** — Contempt generally, §§ 78-7-18, 78-32-1 et seq.

## NOTES TO DECISIONS

## ANALYSIS

Affidavit.  
—Contents.  
—Corporation.  
—Experts.  
—Inconsistency with deposition.  
—Necessity of opposing affidavits.  
—Resting on pleadings.  
—Objection.  
—Sufficiency.  
—Hearsay and opinion testimony.  
—Superseding pleadings.  
—Unpleaded defenses.  
—Verified pleading.  
—Waiver of right to contest.  
—When unavailable.  
—Exclusive control of facts.  
—Who may make.  
Affirmative defense.  
Answers to interrogatories.

Appeal.  
—Adversely affected party.  
—Standard of review.  
Attorney's fees.  
Availability of motion.  
Cross-motions.  
Damages.  
Discovery.  
Disputed facts.  
Evidence.  
—Facts considered.  
—Improper evidence.  
—Proof.  
—Weight of testimony.  
Improper party plaintiff.  
Issue of fact.  
—Corporate existence.  
—Deeds.  
—Lease as security.  
Judicial attitude.  
Motion for new trial.

*Adverse party*  
*11/11*

# Addendum "G"

filed  
11/30/92

IN THE FOURTH CIRCUIT COURT  
UTAH COUNTY, STATE OF UTAH

\*\*\*\*\*

JJBAKD, a General Partnership,  
Plaintiff,

vs.

HOWARD F. HATCH,  
Defendant.

Case Number: 920-2330CV

\*\*\*\*\*

This matter came before the court with the following history.

The file was ~~assigned to~~ and came before Judge Robert Sumsion who entered an order on 9/24/92 requiring both parties to file a bond and further ordering by separate minute entry which is summarized in the docket sheet requiring defendant to pay the back rents and current rents. <sup>As the case does</sup> Noting, if he did <sup>not do</sup> so, the plaintiff had a right under U.C.A. 57-16-8 to have summary judgment.

Pursuant to that minute entry, the plaintiff's attorney filed a Motion for Summary Judgment based on his claim that the defendant had not paid the back rents or the current rents, but had merely posted a bond.

The court, by Judge E. Patrick McGuire, reviewed the file and found this to be the case, signing an order which was in the form of a judgment, doing so ex parte.

Mr. Hatch filed a motion to set this aside, requesting oral arguments.

The court set the matter down for oral argument and both Mr. Boud's motion for an order for summary judgment and Mr. Hatch's arguments were heard. The findings of the court are that defendant has posted the bond but had failed to pay any rent per the order of Judge Sumsion and per U.C.A. 57-16-8.

Based thereon, the court grants plaintiffs judgment for the following:

1. Rents due and owing;
2. Reasonable attorney's fees which to date have been claimed to be in the amount of \$881.25, plus court costs;
3. Restitution of the premises.

There was no evidence presented to justify defendant's counterclaim and further the above findings and ruling makes the same moot.

DATED this 30<sup>th</sup> day of November, 1992.

BY THE COURT:

  
JUDGE E. PATRICK MCGUIRE

#### MAILING CERTIFICATE

I hereby certify I mailed a true and correct copy of the foregoing postage prepaid on the \_\_\_\_\_ day of November, 1992 to:

James R. Boud, Esq.  
302 West 5400 South, #103  
Murray, Utah 84107

Howard F. Hatch  
843 South 1150 West  
Pl. Grove, Utah 84062

---

# Addendum "4"

## FOURTH CIRCUIT COURT, STATE OF UTAH UTAH COUNTY, PROVO DEPARTMENT

JJBAKD, a Utah General  
Partnership,

Plaintiff,

vs

HOWARD HATCH,

Defendant.

R U L I N G

CASE# 920002330 CV

I have recused myself for the additional reason that this case may never get before the Court for final disposition prior to my retirement date of December 15, 1992. It would seem advisable that it be assigned a judge who can take it to its final disposition. I thought we had sufficient time, but Mr. Hatch has convinced me otherwise.

DATED: October 9, 1992



Circuit Court Judge

I do hereby certify that copies of the foregoing RULING were mailed, postage prepaid, on this 14th day of October, 1992 to the following parties.

James R. Boud, 302 West 5400 South, Suite 103, Murray, Utah 84107  
Howard F Hatch, 843 South 1150 East, Pleasant Grove, Utah 84062

Davi Coombs  
Circuit Court Clerk