

1993

Woods Cross, a municipal corporation v. Craig Kirk : Reply Brief

Utah Court of Appeals

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DUCKET NO. 930262

IN THE UTAH COURT OF APPEALS

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WOODS CROSS, a municipal
corporation,

Plaintiff,

vs.

CRAIG KIRK,

Defendant.

:

REPLY BRIEF OF APPELLANT

:

: Civil No. 920000780CV

: Judge: S. Mark Johnson

: Appellate No. ~~930626~~-CA *930262-CA*

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This is an appeal to this Court from the trial court's grant of summary judgment, entered on March 24, 1993, in favor of the Appellee on Appellee's claims that the Appellee is entitled to a permanent injunction prohibiting the Appellant from using the property located at 1450 West 500 South, Woods Cross City, Utah for industrial and/or commercial uses, and that the Appellee is entitled to a permanent injunction prohibiting the Appellant from conducting a business on the property located at 1450 West 500 South, Woods Cross City, Utah.

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Priority of Argument: 14

FILED
Utah Court of Appeals

AUG 05 1994

Marilyn M. Branch
Clerk of the Court

IN THE UTAH COURT OF APPEALS

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WOODS CROSS, a municipal corporation,	:	<i>REPLY BRIEF OF APPELLANT</i>
	:	
Plaintiff,	:	Civil No. 920000780CV
vs.	:	Judge: S. Mark Johnson
CRAIG KIRK,	:	Appellate No. 930626-CA
Defendant.		

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This is an appeal to this Court from the trial court's grant of summary judgment, entered on March 24, 1993, in favor of the Appellee on Appellee's claims that the Appellee is entitled to a permanent injunction prohibiting the Appellant from using the property located at 1450 West 500 South, Woods Cross City, Utah for industrial and/or commercial uses, and that the Appellee is entitled to a permanent injunction prohibiting the Appellant from conducting a business on the property located at 1450 West 500 South, Woods Cross City, Utah.

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Priority of Argument: 14

I
PARTIES TO THE APPEAL

The parties to this Appeal are the Plaintiff/Appellee Woods Cross, a municipal corporation, and the Defendant/Appellant Craig Kirk.

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***DETERMINATIVE CONSTITUTIONAL PROVISIONS, STATUTES,
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All determinative constitutional provisions, statutes, ordinances, rules, and other authorities are reproduced in their entirety in the Appendix.

V
PRELIMINARY STATEMENT

Craig Kirk objects to the Woods Cross' Statement of facts, paragraphs 1-19, for the reason that the alleged "Statement of Facts does not comply with the provisions of Rule 24 (a)(7), 24(e) and 11(b) in that the alleged Statement of Facts does not cite to the pages of the original record as required. Furthermore, Mr. Kirk objects to paragraphs 18 through 27 of Woods Cross' Brief for the reason that the alleged items referred to in those paragraphs are not a part of the record for this matter and, therefore, are not properly a part of this appeal proceeding.

VI
ARGUMENT

THE TRIAL COURT ERRED BOTH AS A MATTER OF FACT AND AS A MATTER OF LAW WHEN IT GRANTED WOODS CROSS' MOTION FOR SUMMARY JUDGMENT.

POINT I

THE TRIAL COURT ERRED AS A MATTER OF FACT AND LAW IN GRANTING WOODS CROSS' MOTION FOR SUMMARY JUDGMENT ON ITS CAUSE OF ACTION FOR A PERMANENT INJUNCTION.

Woods Cross asserts that it is undisputed that Craig Kirk

owns property located at approximately 1450 West 500 South, Woods Cross, Utah. What is approximately? One block? Two blocks? One mile? Two miles?

It is, however, an undisputed fact that Craig Kirk does not own the property located at 1450 West 500 South, Woods Cross, Utah, and that 1450 West 500 South is on the opposite side of the street from the property Mr. Kirk owns on West 500 South, Woods Cross. To which wrong piece of property does the trial court's order apply?

Woods Cross asks this Court to rule that Mr. Kirk owns the property located at 1450 West 500 South Woods Cross, Utah because someone obtaining a building permit put the address 1450 West 500 South on the building permit. Woods Cross claims that person was Mr. Kirk's agent. However, there is no evidence in the record showing that any such person was Mr. Kirk's "agent," or that Mr. Kirk authorized the use of any specific address. Furthermore, Mr. Kirk was not the owner of the property at the time the structure was built the property was owned jointly by a number of individuals. However, even assuming, arguendo, that Mr. Kirk owned the property at the time the structure was built, and even assuming, arguendo, that the person who filled out the building permit application was Mr. Kirk's agent, those facts still do not make Mr. Kirk's property the property located at 1450 South 500 West, Woods Cross, Utah.

Woods Cross asserts that the trial court's order does not

specify 1450 South 500 West but rather simply refers to "property which is located on the south side of 500 South and west of 1400 West" and therefore the trial court's Judgment is sufficiently descriptive. If Mr. Kirk exchanges some of the property he owns on the south side of 500 South for other property on the south side of 500 south, does the trial court's order apply to that property as well? Is the trial court's order an order designed to enforce a "zoning ordinance" against a certain piece of property or is it an order directed at Mr. Kirk personally. If Mr. Kirk exchanges some of the property he owns on the south side of 500 South for property on the north side of 500 South will he still be subject to the trial court's order. That property may then actually be located at 1450 West 500 South. Is Woods Cross enforcing a zoning ordinance or harassing Mr. Kirk who is doing nothing different from nearly all other owners of property along 500 South?

Woods Cross asserts that the trial court found that property at issue was properly identified. Where is that statement found in the record? Woods Cross says that Judge Johnson specifically asked Mr. Kirk's attorney if Kirk owned property in the area to which the pleading refereed and that Mr. Kirk's attorney answered in the affirmative. Where are those statements in the record? Woods Cross further asserts that Judge Johnson explained that he did not want any misunderstanding or issue regarding the property that was the subject of the case and that Mr. Kirk's attorney

agreed thereby consenting to the fact he knows what property the case involves and that such property is zoned A-1 and that the property is being used for parking and storing of large vehicles and equipment. Where are those statements in the record?

Woods Cross is asking this Court to take as fact assertions that do not appear anywhere in the record. These statements are particularly interesting as they are made by Ms. Romney who was not present at the hearing. Mr. Kirk and his counsel, who was present at the hearing, specifically dispute those assertions.

Contrary to Woods Cross' assertions' Mr. Kirk's affidavit specifically disputes that he is the owner of the property located at 1450 West 500 South, Woods Cross, Utah and specifically disputes that he is using the property in violation of Woods Cross City zoning ordinances. Mr. Kirk's affidavit and the other documentation filed with the trial court is legally sufficient to defeat Woods Cross' Summary Judgment Motion. It takes only one sworn statement to dispute averments on the other side of a controversy and create an issue of fact, precluding summary judgment. Holbrook Co. V. Adams, 542 P.2d 191 (Utah 1975).

However, even if the trial court did make the statements with respect to the property alleged by Ms. Romney, it was legally improper and impermissible for the trial court to make such determination on a motion for Summary Judgment. On a motion for summary judgment it is not appropriate for a court to weigh

disputed evidence the court is simply to determine if there are issues of fact to be decided. W. M. Barnes Co. V. Sohio Natural Resources Co., 627 P.2d 56 (Utah 1981); Spor v. Crested Butte Silver Mining, Inc., 740 P.2d 1304 (Utah 1987). On summary judgment motion a court may only consider facts that are not in dispute. Sorenson v. Beers, 585 P.2d 827 (Utah Ct. App. 1989). A court may not consider the weight of testimony or credibility of a witness on a motion for summary judgment. The court simply determines that there are no issues of material fact and that one party is entitled summary judgment as a matter of law. Singleton v. Alexander, 19 Utah 2d 292, 431 P.2d 126 (1967); Sandberg v. Klein, 576 P.2d 1291 (Utah 1987).

In the instant matter the trial court clearly chose to accept the assertions contained in Woods Cross' statement of facts and the affidavits it filed in support of its Motion for Summary Judgment and to ignore the affidavit filed by Mr. Kirk and the documents filed in support of his Memorandum in Opposition to Woods Cross' Motion for Summary Judgment. That decision was improper and constituted prejudicial and reversible error.

Woods Cross next asserts that Mr. Kirk's affidavit saying that he is not conducting any business on the property located at 1450 West 500 South, Woods Cross is a specious argument because Mr. Kirk claims that he does not own the property located at 1450 West 500 South, Woods Cross. Woods Cross asserts that Mr. Kirk's

affidavit does not create an issue of fact because he does not specifically assert that is not conducting business on any of the property that he does own along 500 South in Woods Cross. Woods Cross asks this Court to ignore the fact that Mr. Kirk was never accused of conducting business on any of the property that he owns along 500 South in Woods Cross. If Woods Cross had asserted that Mr. Kirk was conducting business on any of the property that he actually owns, Mr. Kirk would have filed an affidavit asserting that he is not conducting any such business. However, Mr. Kirk cannot be expected to disclaim that which is not asserted. The only thing specious in this case is Woods Cross' violation of Mr. Kirk's rights and Woods Cross' immoral prosecution of this case.

On a motion for summary judgment the adverse party is entitled to have the court survey the evidence and all reasonable inferences fairly drawn therefrom in the light most favorable to him. Bowen v. Riverton City, 656 P.2d 434 (Utah 1982); Thompson v. Ford Motor Co., 16 Utah 2d 30, 395 P.2d 62 (1964); Morris v. Farnsworth Motel, 123 Utah 289, 259 P.2d 297 (1953). In ruling on a motion for summary judgment, the court may only consider facts that are not in dispute. Sorenson v. Beers, supra. The trial court violated the standard for summary judgment. In doing so it committed prejudicial and reversible error in granting Woods Cross' Motion for Summary Judgment. Therefore, the grant

of Summary Judgment entered in favor of Woods Cross must be reversed.

POINT II

THE TRIAL COURT ERRED IN CONCLUDING THAT WOODS CROSS WAS ENTITLED TO SUMMARY JUDGMENT AS A MATTER OF LAW.

In order for Woods Cross to prevail on its Motion for Summary Judgment at the trial court level, Woods Cross had to demonstrate that: 1) there were no issues of material fact present in this matter which precluded the trial court from granting Summary Judgment in favor of Woods Cross, and 2) that Woods Cross was entitled to Summary Judgment as a matter of law. As established in by Appellant's Memorandum in Opposition to Appellee's Motion for Summary Judgment, genuine issues of material fact are present which preclude the trial court from granting Woods Cross' Motion for Summary Judgment. Furthermore, Woods Cross did not, and could not, establish that it was entitled to Summary Judgment as a matter of law.

It is an indisputable principal of law that on a summary judgment motion, the trial court must review the facts and law in the light most favorable to the party against whom Summary Judgment is sought. See Judkins v. Toone, 27, Utah 2d 17, 492 P.2d 980 (1972). A summary judgment must be supported by evidence, admissions and inferences which, when viewed in the light most favorable to the loser, show that "there is no genuine issue as to any material fact and that the moving party is entitled to summary judgment as a matter of law" such showing

must preclude all reasonable possibility that the loser could, if given a trial, produce evidence which reasonably sustain a judgment in his favor. Bullock v. Desert Dodge Truck Ctr., Inc., 11 Utah 2d 1, 354 P.2d 559 (1960). Therefore, because Woods Cross did not, and cannot, demonstrate that Mr. Kirk has engaged in any prohibited activity, on the property located at 1450 West 500 South, Woods Cross City, Utah, Woods Cross was not entitled to Summary Judgment as a matter of law. Even if there is no genuine issue of material fact, summary judgment is proper only if the pleadings and other documents demonstrate that the moving party is entitled to summary judgment as a matter of law. Lockhart v. Anderson, 646 P.2d 678 (Utah 1982).

In order for Woods Cross to assert that it is legally entitled to a permanent injunction against Mr. Kirk, Woods Cross must first establish that Mr. Kirk has engaged in some prohibited action sought to be enjoined. Woods Cross did not establish that Mr. Kirk is engaging any such prohibited activities on the property located at 1450 West 500 South, Woods Cross City, Utah. Nor did Woods Cross establish that any of the alleged actions, even if committed by Mr. Kirk, are a violation of the Woods Cross City zoning ordinances. Therefore, Woods Cross did not establish that it is entitled to Summary Judgment as a matter of law. The trial court committed prejudicial and reversible error when it granted Woods Cross' Motion for Summary Judgment. Consequently, the trial court's decision must be reversed and remanded.

POINT III

THE TRIAL COURT ERRED AS A MATTER OF LAW IN GRANTING WOODS CROSS' MOTION FOR SUMMARY JUDGMENT ON MR. KIRK'S COUNTERCLAIM AND/OR AFFIRMATIVE DEFENSES.

Woods Cross asserts that it was proper for the trial court to grant Summary Judgment on Mr. Kirk's affirmative defenses and Counterclaim for the reason that Mr. Kirk had not exhausted his administrative remedies. Woods Cross cites this Court to two cases and to the Utah Code wherein it is stated that a person must exhaust his administrative remedies before he challenges land use decisions in the district court. Neither of the cases cited by Woods Cross, nor the provision of the Utah Code, are applicable in this situation.

In the instant matter, Mr. Kirk did not seek judicial relief. Mr. Kirk was sued by Woods Cross. Mr. Kirk did not file a complaint asking the trial court to rule that Woods Cross' capricious and arbitrary land use decisions were invalid. Mr. Kirk simply responded to a law suit filed against him.

Rule 12(h) of the Utah Rules of Civil Procedure (hereinafter, Rule 12") states that a party to a law suit waives all defenses not presented by motion or in his answer. Mr. Kirk as a defendant in this law suit had the obligation to raise all affirmative defenses in either his Answer or in his Counterclaim, or he would have been barred from ever raising those defenses. See Tygesen v. Magna Water Co., 13 Utah 2d 397, 375 P.2d 456

(1962); Bezner v. Continental Dry Cleaners, Inc., 548 P.2d 898 (Utah 1976).

Woods Cross is asking this Court to put Mr. Kirk in a no win situation. Woods Cross files a complaint against Mr. Kirk and then asserts that Mr. Kirk cannot raise any defenses because he has failed to exhaust his administrative remedies. Mr. Kirk cannot exhaust his administrative remedies because Woods Cross has filed a complaint and then a summary judgment motion, which is granted before Mr. Kirk can exhaust his administrative remedies.

Mr. Kirk must assert his affirmative defenses and file his compulsory counterclaim or be forever barred from asserting those defenses and filing the counterclaim; yet, Woods Cross asserts he cannot raise any affirmative defenses or file a counterclaim because Mr. Kirk has not exhausted his administrative remedies. If this Court buys into Woods Cross' argument, Woods Cross can preclude Mr. Kirk from ever obtaining due process.

If Mr. Kirk had filed this action, Woods Cross' argument would be a valid argument. If Woods Cross had served Mr. Kirk with cease and desist orders which Mr. Kirk had ignored, Woods Cross' argument would make more sense. If Woods Cross had given Mr. Kirk written notice that he was allegedly violating Woods Cross zoning ordinances and given him instructions to comply with Woods Cross' zoning ordinances or follow the appropriate administrative remedies to challenge the zoning ordinances and

their alleged violation, Woods Cross' argument would be valid. However, the record does not even remotely imply that any such actions took place.

Woods Cross simply filed a complaint against Mr. Kirk, moved for summary judgment and said to the trial court, and now to this Court, that Rule 12 be damned, Mr. Kirk cannot raise any affirmative defenses or file a counterclaim because he has not exhausted his administrative remedies. Precluding Mr. Kirk from raising affirmative defenses and filing a compulsory counterclaim in a case in which he is a defendant is a per se violation of Mr. Kirk's due process rights. Therefore, the trial court committed prejudicial and reversible error when it granted Woods Cross' Motion for Summary Judgment, and the trial court's decision must be reversed and remanded.

POINT IV

THE TRIAL COURT ERRED, AS A MATTER OF LAW, IN RULING ON APPELLEE'S MOTION FOR SUMMARY JUDGMENT BEFORE MR. KIRK HAD THE OPPORTUNITY TO CONDUCT DISCOVERY AND SUBMIT EVIDENCE ON HIS COUNTERCLAIM AND AFFIRMATIVE DEFENSES.

Woods Cross does not dispute Mr. Kirk's assertion that it is improper to entry summary judgment before discovery is incomplete. Woods Cross, however, asserts that Mr. Kirk is estopped to raise this point of law on appeal, arguing that it is an issue raised for the first time on appeal.

Woods Cross also does not dispute Mr. Kirk's assertion that he never had the opportunity to conduct any discovery or that Mr.

Kirk is entitled to conduct discovery or that discovery should be liberally permitted. Woods Cross simply asserts that Mr. Kirk is estopped from raising the discovery issue on appeal.

Mr. Kirk admits that issues may not be raised for the first time on appeal. However, Mr. Kirk is not raising discovery as an issue on appeal. Mr. Kirk is simply stating a legal precedent to demonstrate that Woods Cross was not entitled to summary judgment as a matter of law.

If Mr. Kirk had had a trial in the lower court and failed to raise the issue of discovery, admittedly, he could not raise that claim on appeal for the first time. However, in this matter, Mr. Kirk was not given a trial and the trial court ruled that there were no issues of fact and that Woods Cross was entitled to summary judgment as a matter of law. Therefore, Mr. is not estopped from raising any legal argument to demonstrate that Woods Cross was not entitled to summary judgment as a matter of law. Therefore, the trial court committed prejudicial and reversible error when it granted Woods Cross' Motion for Summary Judgment, and the trial court's decision must be reversed and remanded.

POINT V

THE TRIAL COURT ERRED AS A MATTER OF LAW IN GRANTING WOODS CROSS' MOTION FOR SUMMARY JUDGMENT WITHOUT FIRST RULING ON MR. KIRK'S MOTION TO DISMISS APPELLEE'S COMPLAINT AND WITHOUT FIRST RULING ON APPELLANT'S MOTIONS TO STRIKE THE AFFIDAVITS SUBMITTED IN SUPPORT OF APPELLEE'S MOTION FOR SUMMARY JUDGMENT.

Woods Cross asserts that because its counsel prepared a

judgment that stated "Defendant's counterclaim in its entirety is dismissed" and "Defendant's Motion to Dismiss, Motions to Strike Affidavits, and Motion to Stay Proceedings are denied," that the Judgment establishes as a matter of fact that the trial court entertained argument on those motions. Again Ms. Romney, who wasn't at the hearing, testifies as to what transpired at the hearing. She asserts that both parties addressed these motions at oral argument. Once again, where is the record to support that assertion. If Mr. Kirk's assertion that the motions were never entertained on oral argument is false, then the record will show that the motions were argued. Mr. Kirk, however, cannot prove a negative, i.e., that the motions were never argued or addressed by the trial court. Woods Cross, however, can prove that oral argument was had on the motions, if any such argument had take place.

Woods Cross has failed to do so because it cannot do so. The self serving Judgment prepared by Woods Cross' counsel which was never reviewed or approved by Mr. Kirk's counsel prior to signing by Judge Johnson does not establish that any oral argument was ever entertained on Mr. Kirk's Motion. Nor does the Judgment establish that the trial court ever considered the Motions. All the Judgment proves is that Judge Johnson signed a judgment that Mr. Kirk's counsel did not approve as to form.

Woods Cross' Summary Judgment Motion was based on the affidavits of Brent Stephenson, Gayle Stephenson, Leslie Gertsch,

Duro Gertsch, and Tim Stephens. Those affidavits were a principal part of Woods Cross' Motion for Summary Judgment. The Affidavits allegedly established Mr. Kirk's violations complained of in Appellee's Complaint.

The Affidavits of Brent Stephenson, Gayle Stephenson, Leslie Gertsch, Duro Gertsch, and Tim Stephens were based on hearsay, speculation, conclusion, and opinion, and therefore, were not admissible under the provisions of Rule 56(e) of the Utah Rules of Civil Procedure. Hearsay and opinion testimony that would not be admissible if testified to at the trial may not properly be set forth in an affidavit supporting a motion for summary judgment. Walker v. Rockey Mt. Recreation Corp., 29 Utah 2d 274, 508 P.2d 538 (1973); Western States Thrift & Loan Co. v. Blomquist, 29 Utah 2d 58, 504 P.2d 1019 (Utah 1972). The hearsay affidavits should not have been allowed. Therefore, the trial court committed prejudicial and reversible error when it failed to consider or rule on Mr. Kirk's Motions to Strike the Affidavits of Brent Stephenson, Gayle Stephenson, Leslie Gertsch, Duro Gertsch, and Tim Stephens prior to granting Woods Cross' Motion for Summary Judgment. Because the trial court committed prejudicial and reversible error in failing to rule on Appellant's Motions to Strike the Affidavits of Brent Stephenson, Gayle Stephenson, Leslie Gertsch, Duro Gertsch, and Tim Stephens prior to granting Woods Cross' Motion for Summary Judgment, the trial court's decision must be reversed and remanded.

POINT VI
(MR. KIRK'S APPEAL IS NOT FRIVOLOUS)

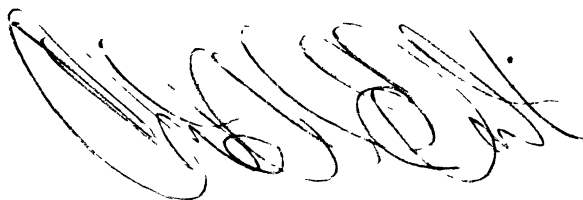
Mr. Kirk's appeal is based on hard facts and well-established law, and it supported by the record. There is nothing frivolous about it. If Mr. Kirk's Appeal were frivolous, this Court would have granted Woods Cross' Motion for Summary Disposition. What is frivolous is Woods Cross' asking this Court for sanctions under Rule 33 of the Utah Rules of Appellate Procedure.

VII
CONCLUSION AND REQUEST FOR RELIEF

The trial court committed reversible and prejudicial error when it granted Woods Cross' Motion for Summary Judgement. Therefore, the trial court's grant of Summary Judgment must be reversed and the case remanded for further proceedings.

WHEREFORE, Mr. Kirk respectfully request that the Summary Judgment entered by the trial court be reversed and this matter be remanded to the trial court for further proceedings.

Respectfully submitted this 17th day of August 1994.

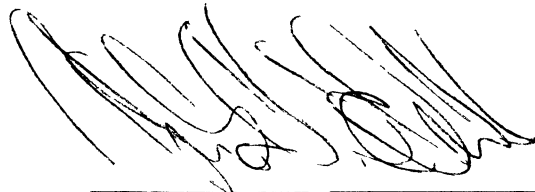


Charles A. Schultz
Attorney for Defendant/Appellant

CERTIFICATE OF SERVICE

I hereby certify that on the 5th day of August 1994, I served a true and correct copy of the foregoing Brief to the persons at the addresses listed below by depositing a copy in the United States Mail, postage prepaid.

Michael Z. Hayes
MAZURAN & HAYES P.C.
1245 East Brickyard Road Suite 250
SLC, UT 84106

A handwritten signature in black ink, appearing to read 'Charles A. Schultz', written over a horizontal line.

Charles A. Schultz

ADDENDUM

Utah Rules of Civil Procedure Rule 12(h)

Utah Rules of Civil Procedure, Rule 56(e)

Utah Rules of Appellate Procedure Rule 11(b)

Utah Rules of Appellate Procedure Rule 24 (a)(7)

Utah Rules or Appellate Procedure Rule 24(e)

raised by motion, he shall not thereafter make a motion based on any of the defenses or objections so omitted, except as provided in subdivision (h) of this rule.

(h) **Waiver of defenses.** A party waives all defenses and objections which he does not present either by motion as hereinbefore provided or, if he has made no motion, in his answer or reply, except (1) that the defense of failure to state a claim upon which relief can be granted, the defense of failure to join an indispensable party, and the objection of failure to state a legal defense to a claim may also be made by a later pleading, if one is permitted, or by motion for judgment on the pleadings or at the trial on the merits, and except (2) that, whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action. The objection or defense, if made at the trial, shall be disposed of as provided in Rule 15(b) in the light of any evidence that may have been received.

(i) **Pleading after denial of a motion.** The filing of a responsive pleading after the denial of any motion made pursuant to these rules shall not be deemed a waiver of such motion.

(j) **Security for costs of a nonresident plaintiff.** When the plaintiff in an action resides out of this state, or is a foreign corporation, the defendant may file a motion to require the plaintiff to furnish security for costs and charges which may be awarded against such plaintiff. Upon hearing and determination by the court of the reasonable necessity therefor, the court shall order the plaintiff to file a \$300.00 undertaking with sufficient sureties as security for payment of such costs and charges as may be awarded against such plaintiff. No security shall be required of any officer, instrumentality, or agency of the United States.

(k) **Effect of failure to file undertaking.** If the plaintiff fails to file the undertaking as ordered within 30 days of the service of the order, the court shall, upon motion of the defendant, enter an order dismissing the action. (Amended effective Sept. 4, 1985; April 1, 1990.)

Amendment Notes. — The 1990 amendment inserted "and complaint" in the first sentence.

Compiler's Notes. — This rule is substantially similar to Rule 12, F.R.C.P.

Cross-References. — Motions generally, U.R.C.P. 7.

NOTES TO DECISIONS

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 —Defenses.
 —Opportunity to present pertinent material.
 —Preclusion.
 —Issues of fact.
 Waiver of defenses.
 —Defect of parties.
 —Defective service of process.
 —Exceptions.
 —Subject matter jurisdiction.
 —When issues raised.
 —Failure to join indispensable party.
 —Failure to pay consideration.
 —Mutual mistake.
 —Statute of frauds.
 —Statute of limitations.
 —Waiver.

scheduled appearance in another court on that date, but due to fact that there were no law or motion days between time objection was filed and trial date, objection was never heard, refusal to set aside default judgment entered when appellants failed to appear on trial date was an abuse of discretion *Griffiths v Hammon*, 560 P 2d 1375 (Utah 1977).

Time for appeal.

Under former Rule 73(h) the time for appeal from a default judgment in a city court ran

from the date of notice of entry of such judgment, rather than from the date of judgment *Buckner v Main Realty & Ins. Co.*, 4 Utah 2d 124, 288 P 2d 786 (1955) (but see *Central Bank & Trust Co v Jensen*, supra, and Rule 58A(d)).

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 *Graham 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.
 Compliance with rule.
 Cross-motions.
 Damages.
 Discovery.
 Disputed facts.
 Evidence
 —Facts considered.
 —Improper evidence.
 —Proof.
 —Weight of testimony.
 Implicit rulings.

Improper party plaintiff.
 Issue of fact.
 —Notice.
 —Corporate existence.
 —Deeds.
 —Lease as security.
 Judicial attitude.
 Motion for new trial.
 Motion to dismiss.
 Motion to reconsider.
 Notice.
 —Provision not jurisdictional.
 —Waiver of defect.
 Procedural due process.
 Purpose.
 Scope.
 Summary judgment improper.
 —Damage to insured vehicle.
 —Dispersal of interest.
 —Findings by court.
 —Foreclosure of trust deeds.
 —Fraud or duress.
 —Guardianship.
 —Mortgage note.
 —Negligence.
 —Nonspecific denial of requests for admission.
 —Note.
 —Recovery for goods and services.
 —Stock ownership.
 —Wrongful possession.
 Summary judgment proper.
 —Contract action.
 —Contract terms.
 —Deceit.
 —Jurisdiction.
 —Negligence.

(f) **Deferral of ruling.** As to any issue raised by a motion for summary disposition, the court may defer its ruling until plenary presentation and consideration of the case.

NOTES TO DECISIONS

ANALYSIS

Dismissal by court.
Summary affirmance.
Time for filing.
Cited.

Dismissal by court.

Appeal appropriate for summary disposition (i.e., dismissal) on court's own motion. See *Thompson v. Jackson*, 743 P.2d 1230 (Utah Ct. App. 1987).

Summary affirmance.

Summary affirmance under this rule is a determination of the appeal on its merits, after the parties have been afforded a full and adequate opportunity to present relevant argu-

ments and authorities. An appellate court's rejection of appellant's contentions as unmeritorious does not deny him his right of appeal. *Hernandez v. Hayward*, 764 P.2d 993 (Utah Ct. App. 1988); *State v. Palmer*, 786 P.2d 248 (Utah Ct. App. 1990) (decided under former Rule 10, Utah R. Ct. App.).

Time for filing.

A motion for summary disposition that is clearly meritorious supports a suspension of the time limitation contained in this rule. *Bailey v. Adams*, 798 P.2d 1142 (Utah Ct. App. 1990).

Cited in *Benchmark, Inc. v. Salt Lake Valley Mental Health Bd., Inc.*, 830 P.2d 218 (Utah 1991).

Rule 11. The record on appeal.

(a) **Composition of the record on appeal.** The original papers and exhibits filed in the trial court, the transcript of proceedings, if any, the index prepared by the clerk of the trial court, and where available the docket sheet, shall constitute the record on appeal in all cases. A copy of the record certified by the clerk of the trial court to conform to the original may be substituted for the original as the record on appeal. Only those papers prescribed under paragraph (d) of this rule shall be transmitted to the appellate court.

(b) **Pagination and indexing of record.** Immediately upon filing of the notice of appeal, the clerk of the trial court shall paginate all of the original papers and any transcript filed in that court in chronological order and shall prepare a chronological index of those papers. The index shall contain a reference to the date on which the paper was filed in the trial court and the starting page of the record on which the paper will be found. Clerks of the trial and appellate courts shall establish rules and procedures for checking out the record after pagination for use by the parties in preparing briefs for an appeal or in preparing or briefing a petition for writ of certiorari.

(c) **Duty of appellant.** After filing the notice of appeal, the appellant, or in the event that more than one appeal is taken, each appellant, shall comply with the provisions of paragraphs (d) and (e) of this rule and shall take any other action necessary to enable the clerk of the trial court to assemble and transmit the record. A single record shall be transmitted.

(d) Papers on appeal.

(1) **Criminal cases.** All of the papers in a criminal case shall be included by the clerk of the trial court as part of the record on appeal.

(2) **Civil cases.** In all civil cases, the papers to be transmitted shall consist of the following.

(A) **Civil cases with short records.** In civil cases where all the papers total fewer than 300 pages, all of the papers will be transmitted to the appellate court upon completion of the filing of briefs. In such cases, the appellant shall serve upon the clerk of the trial court, simultaneously with the filing of appellant's reply brief, notice of the date on which appellant's reply brief was filed. If appellant does not intend to file a reply brief, appellant shall notify the clerk of the trial court of that fact within 30 days of the filing of appellee's brief.

(B) **All other civil cases.** In all other civil cases where the papers are or exceed 300 pages, all parties shall file with the clerk of the trial court, within 10 days after briefing is completed, a joint or sepa-

same standards as the review of findings of fact in other appeals.
(Added effective October 1, 1992.)

NOTES TO DECISIONS

Allegation of facts required.

Because defendant did not allege any facts in support of his ineffective assistance claim, the appellate court would not remand the case for an evidentiary hearing. It would be improper

to remand a claim under this rule for a fishing expedition. *State v. Garrett*, 849 P.2d 578 (Utah Ct. App.), cert. denied, 860 P.2d 943 (Utah 1993).

Rule 24. Briefs.

(a) **Brief of the appellant.** The brief of the appellant shall contain under appropriate headings and in the order indicated:

(1) A complete list of all parties to the proceeding in the court or agency whose judgment or order is sought to be reviewed, except where the caption of the case on appeal contains the names of all such parties. The list should be set out on a separate page which appears immediately inside the cover.

(2) A table of contents, with page references.

(3) A table of authorities with cases alphabetically arranged and with parallel citations, rules, statutes and other authorities cited, with references to the pages of the brief where they are cited.

(4) A brief statement showing the jurisdiction of the appellate court.

(5) A statement of the issues presented for review and the standard of appellate review with supporting authority for each issue.

(6) Constitutional provisions, statutes, ordinances, rules, and regulations whose interpretation is determinative shall be set out verbatim with the appropriate citation. If the pertinent part of the provision is lengthy, the citation alone will suffice, and in that event, the provision shall be set forth as provided in paragraph (f) of this rule.

(7) A statement of the case. The statement shall first indicate briefly the nature of the case, the course of proceedings, and its disposition in the court below. A statement of the facts relevant to the issues presented for review shall follow. All statements of fact and references to the proceedings below shall be supported by citations to the record in accordance with paragraph (e) of this rule.

(8) Summary of arguments. The summary of arguments, suitably paragraphed, shall be a succinct condensation of the arguments actually made in the body of the brief. It shall not be a mere repetition of the heading under which the argument is arranged.

(9) An argument. The argument shall contain the contentions and reasons of the appellant with respect to the issues presented, with citations to the authorities, statutes, and parts of the record relied on.

(10) A short conclusion stating the precise relief sought.

(b) **Brief of the appellee.** The brief of the appellee shall conform to the requirements of paragraph (a) of this rule, except that a statement of the issues or of the case need not be made unless the appellee is dissatisfied with the statement of the appellant.

(c) **Reply brief.** The appellant may file a brief in reply to the brief of the appellee, and if the appellee has cross-appealed, the appellee may file a brief in reply to the response of the appellant to the issues presented by the cross-appeal. Reply briefs shall be limited to answering any new matter set forth in the opposing brief. The content of the reply brief shall conform to the requirements of paragraph (a)(2), (3), (6), (9), and (10) of this rule. No further briefs may be filed except with leave of the appellate court.

(d) **References in briefs to parties.** Counsel will be expected in their briefs and oral arguments to keep to a minimum references to parties by such designations as "appellant" and "appellee." It promotes clarity to use the designations used in the lower court or in the agency proceedings, or the

actual names of parties, or descriptive terms such as "the employee," "the injured person," "the taxpayer," etc.

(e) **References in briefs to the record.** References shall be made to the pages of the original record as paginated pursuant to Rule 11(b), to pages of the reporter's transcript, or to pages of any statement of the evidence or proceedings or agreed statement prepared pursuant to Rule 11(f) or 11(g). References to exhibits shall include exhibit numbers. If reference is made to evidence the admissibility of which is in controversy, reference shall be made to the pages of the transcript at which the evidence was identified, offered, and received or rejected.

(f) **Reproduction of statutes, rules, regulations, documents, etc.** If determination of the issues presented requires the study of statutes, rules, regulations, etc., or relevant parts thereof, to the extent not set forth under subparagraph (a)(6) of this rule, they shall be reproduced in the brief or in an addendum at the end, or they may be supplied to the court in pamphlet form. Copies of those parts of the record on appeal that are of central importance to the determination of the appeal (e.g., the challenged instructions, findings of fact and conclusions of law, memorandum decision, the contract or document subject to construction, etc.) shall also be included in the addendum.

(g) **Length of briefs.** Except by permission of the court, principal briefs shall not exceed 50 pages, and reply briefs shall not exceed 25 pages, exclusive of pages containing the table of contents, tables of citations and any addendum containing statutes, rules, regulations, or portions of the record as required by paragraph (f) of this rule.

(h) **Briefs in cases involving cross-appeals.** If a cross-appeal is filed, the party first filing a notice of appeal shall be deemed the appellant for the purposes of this rule and Rule 26, unless the parties otherwise agree or the court otherwise orders. The brief of the appellee shall contain the issues and arguments involved in the cross-appeal as well as the answer to the brief of the appellant.

(i) **Briefs in cases involving multiple appellants or appellees.** In cases involving more than one appellant or appellee, including cases consolidated for purposes of the appeal, any number of either may join in a single brief, and any appellant or appellee may adopt by reference any part of the brief of another. Parties may similarly join in reply briefs.

(j) **Citation of supplemental authorities.** When pertinent and significant authorities come to the attention of a party after that party's brief has been filed, or after oral argument but before decision, a party may promptly advise the clerk of the appellate court, by letter setting forth the citations. An original letter and nine copies shall be filed in the Supreme Court. An original letter and seven copies shall be filed in the Court of Appeals. There shall be a reference either to the page of the brief or to a point argued orally to which the citations pertain, but the letter shall without argument state the reasons for the supplemental citations. Any response shall be made within 7 days of filing and shall be similarly limited.

(k) **Requirements and sanctions.** All briefs under this rule must be concise, presented with accuracy, logically arranged with proper headings and free from burdensome, irrelevant, immaterial or scandalous matters. Briefs which are not in compliance may be disregarded or stricken, on motion or sua sponte by the court, and the court may assess attorney fees against the offending lawyer.

(l) **Brief covers.** The covers of all briefs shall be of heavy cover stock and shall comply with Rule 27.

(Amended effective October 1, 1992.)

Advisory Committee Note. — The brief must now contain for each issue raised on appeal, a statement of the applicable standard of review and citation of supporting authority

Amendment Notes. — The 1992 amendment, effective October 1, 1992, added the third sentence in Subdivision (c) and made stylistic changes in Subdivisions (a)(5) and (7).