

1993

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

Utah Court of Appeals

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Michael Z. Hayes; Mazuran and Hayes; Attorney for Appellee.

Charles A. Schultz; Attorney for Appellant.

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930262

IN THE UTAH COURT OF APPEALS

DUCKET NO. _____

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WOODS CROSS, a municipal
corporation,

Plaintiff,

vs.

CRAIG KIRK,

Defendant.

:

BRIEF OF APPELLANT

:

: Civil No. 920000780CV

: Judge: S. Mark Johnson

: Appellate No. ~~930626-CA~~

---0000000---

930262-CA

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.

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

Charles A. Schultz, (4760)
Attorney for Appellant
P.O. Box 1516
Sandy, Utah 84092

FILED
Utah Court of Appeals

Priority of Argument: 14

MAY 20 1994

IN THE UTAH COURT OF APPEALS

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

Charles A. Schultz, (4760)
Attorney for Appellant
P.O. Box 1516
Sandy, Utah 84092

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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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IV

JURISDICTION

The Utah Court of Appeals has original jurisdiction of this matter pursuant to the provisions of Utah Code Annotated 1953, as amended, Section 78-2a-3(d).

V

ISSUES FOR REVIEW ON APPEAL AND STANDARD OF REVIEW

The issues on appeal are as follows:

Issues of Fact:

a) did the trial court err in concluding that the Appellant owned the property located at 1450 West 500 South, Woods Cross, Utah?

b) did the trial court err in concluding that the property located at 1450 West 500 South, Woods Cross, Utah is zoned A-1?

c) did the trial court err in concluding that the Appellant was violating the Zoning Ordinances of Woods Cross in the Appellant's use of the property located at 1450 West 500 South, Woods Cross, Utah?

d) did the trial court err in concluding that the Affidavits of Brent Stephenson, Gayle Stephenson, Leslie Gertsch, Duro Gertsch, and Tim Stephens made on personal knowledge and ,therefore, admissible in support of Appellee's Summary Judgment Motion?

Standard of review for issues of fact:

Issues of fact may be reversed on appeal only if they are

found to be clearly erroneous. Cornish Town v. Koller, 758 P.2d 919 (Utah 1988).

Issues of Law:

a) did the trial court err as a matter of law in granting the Appellee's Motion for Summary Judgment?

b) did the trial court err as a matter of law in concluding that there were no genuine issues of material fact present which precluded the trial court from granting the Appellee's Motion for Summary Judgment?

c) did the trial court err as a matter of law in failing to grant the Appellant's Motion to Dismiss?

d) did the trial court err as a matter of law in failing to hear and rule on the Appellant's Motion to Dismiss prior to ruling on the Appellee's Motion for Summary Judgment?

e) did the trial court err as a matter of law in failing to hear or rule on the Appellant's Motions to Strike the Affidavits of Brent Stephenson, Gayle Stephenson, Leslie Gertsch, Duro Gertsch, and Tim Stephens before granting the Appellee's Motion for Summary Judgment?

f) did the trial court err as a matter of law in concluding that Brent Stephenson, Gayle Stephenson, Leslie Gertsch, Duro Gertsch, and Tim Stephens were competent to testify to the alleged facts set forth in their Affidavits?

g) did the trial court err as a matter of law in

Singelton v. Alexander, 19 Utah 2d 292, 431 P.2d 126 (1967)

Sorenson v. Beers, 585 P.2d 485 (Utah 1978)

State ex rel. Rd. Comm'n v. Petty, 17 Utah 2d 382, 412 P.2d 914 (Utah 1966)

Thompson v. Ford Motor Co., 16 Utah 2d 30, 395 P.2d 62 (1964)

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)

Rules:

Utah Rules of Civil Procedure, Rule 56

Statutes:

Code Annotated 1953, as amended, Section 78-2a-3(d)

VII
STATEMENT OF THE CASE

(A)
NATURE OF THE CASE

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 and against the Appellant 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

concluding that the Appellee's Motion for Summary Judgment was timely?

Standard of review for issues of law:

Issues of law are subject to de novo review by an appellate court, and the court gives no deference to the trial court's conclusions of law. Blue Cross & Blue Shield v. State, 779 P.2d 634 (Utah 1989).

VI

***DETERMINATIVE CONSTITUTIONAL PROVISIONS, STATUTES,
ORDINANCES, RULES, AND OTHER AUTHORITIES***

Cases:

Bowen v. Riverton City, 656 P.2d 434 (Utah 1982)

Blue Cross & Blue Shield v. State,
779 P.2d 634 (Utah 1989)

Bullock v. Desert Dodge Truck Ctr., Inc.,
11 Utah 2d 1, 354 P.2d 559 (1960)

Cornish Town v. Koller, 758 P.2d 919 (1988)

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Freed Fin Co. v. Stoker Motor Co., 537 P.2d 1039
(Utah 1975)

Holbrook Co. V. Adams, 542 P.2d 191 (Utah 1975)

Judkins v. Toone, 27, Utah 2d 17, 492 P.2d 980 (1972)

Lockhart v. Anderson, 646 P.2d 678 (Utah 1982)

Morris v. Farnsworth Motel, 123 Utah 289, 259 P.2d
297 (1953)

Sandberg v. Klein, 576 P.2d 1291 (Utah 1978)

8. The trial court never entertained any argument on the Appellant's Motion to Dismiss.

9. The trial court never entertained any argument on the Appellant's Motions to Strike the Affidavits of Brent Stephenson, Gayle Stephenson, Leslie Gertsch, Duro Gertsch, and Tim Stephens.

10. On March 9, 1993, the trial court granted the Appellee's Motion for Summary Judgment.

11. The Summary Judgment Motion was entered on March 24, 1993.

12. The Appellant filed his Notice of Appeal on April 23, 1993.

(C)
DISPOSITION OF CASE AT TRIAL COURT

The trial court granted the Appellee's Summary Judgment Motion on April 9, 1993, without entertaining argument on or addressing the Appellant's Motion to Dismiss or his Motion to Strike or the Appellant's Counterclaim.

(D)
STATEMENT OF FACTS

1. The Appellant is the owner of real property located in Woods Cross City, Utah. (Record at page 141, ¶ 4).

2. On August 12, 1992, the Appellee served the Appellant with a Summons and Complaint alleging that the Appellant was the owner of real property located at 1450 West 500 South, Woods Cross City, Utah. (Record at page 6).

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.

(B)
COURSE OF PROCEEDINGS AT TRIAL COURT LEVEL

1. On August 12, 1992, the Appellee served the Appellant with a Summons and Complaint alleging that the Appellant was the owner of real property located at 1450 West 500 South, Woods Cross City, Utah. The Appellant filed an Amended Answer, on or about, October 19, 1992.

2. The Appellee filed a Motion for Summary Judgment, on or about, November 2, 1992.

3. The Appellant filed Motions to Strike the Affidavits of Brent Stephenson, Gayle Stephenson, Leslie Gertsch, Duro Gertsch, and Tim Stephens, which were submitted in support of Appellee's Motion for Summary Judgment, on or about December 8, 1992.

4. The Appellant filed a Motion to Dismiss on or about December 18, 1992.

5. The Appellee filed a Notice to Submit its Summary Judgment Motion for decision on, or about, December 2, 1992.

6. The Appellant filed a Motion to Stay Proceedings on, or about, January 14, 1993.

7. The Appellee's Motion for Summary Judgment was heard on or about February 11, 1993.

3. In its Complaint, the Appellee alleged that the property located at 1450 West 500 South, Woods Cross City, Utah is zoned A-1 Agricultural. (Record at page 1-2).

4. In paragraph No. 4 of its Complaint, the Appellee asserts that the Appellant applied for a building permit to build a barn on the property located at 1450 West 500 South, Woods Cross City, Utah. (Record at page 2).

5. In paragraph No. 6 of its Complaint, the Appellee alleges that the Appellant is using the property located at 1450 West 500 South, Woods Cross City, Utah, for industrial purposes in violation of the Woods Cross City zoning ordinances. (Record at page 2-3).

6. In paragraphs 9-10, the Appellee asserts that it 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. (Record at page 3).

7. In paragraphs 12-13, the Appellee asserts that it 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. (Record at page 4).

8. The Appellant is not the owner of the property located at 1450 West 500 South, Woods Cross City, Utah. (Record at page 141, ¶ 2).

9. The Appellant has never claimed to own the property

located at 1450 West 500 South, Woods Cross City, Utah. (Record at page 141, ¶ 2).

10. The property located at 1450 West 500 South, Woods Cross City, Utah, is on the opposite side of the street from the property owned by the Appellant that is located on 500 South in Woods Cross City, Utah. (Record at page 141, ¶ 3).

11. The Appellant does not conduct any business on the property located at 1450 West 500 South, Woods Cross City, Utah. (Record at page 141, ¶ 5).

12. The Appellant does not park any of his vehicles or equipment on the property located at 1450 West 500 South, Woods Cross City, Utah. (Record at page 141, ¶ 7).

13. The property located at 1450 West 500 South, Woods Cross City, Utah, is not zoned A-1, but rather is zoned I-1. (Record at page 60).

14. The Appellant filed an Answer on, or about, September 1, 1992. (Record at page 10-23).

15. The Appellant filed an Amended Answer on, or about, October 19, 1992. (Record at page 30-36).

16. The Appellee filed a Motion for Summary Judgment on, or about, November 2, 1992. (Record at page 38).

17. The Appellant filed Motions to Strike the Affidavits of Brent Stephenson, Gayle Stephenson, Leslie Gertsch, Duro Gertsch, and Tim Stephens, which were submitted in support of Appellee's

Motion for Summary Judgment, on or about, December 8, 1992.
(Record at page 85-109).

18. The Appellant filed a Motion to Dismiss on, or about, December 18, 1992. (Record at page 129-143).

19. The Appellee filed a Notice to Submit its Summary Judgment Motion for decision on, or about, December 22, 1993. (Record at page 173).

20. The Appellant filed a Motion to Stay Proceedings on, or about, January 14, 1993. (Record at page 184).

21. The Appellee's Motion for Summary Judgment was heard on, or about, February 11, 1993. (Record at page 217).

22. The trial court never entertained argument on the Appellant's Motion to Dismiss. (Record at page 213-214).

23. The trial court never entertained argument on the Appellant's Motions to Strike the Affidavits of Brent Stephenson, Gayle Stephenson, Leslie Gertsch, Duro Gertsch, and Tim Stephens. (Record at page 213-214).

24. The trial court never entertained argument on the Appellant's Counterclaim or Affirmative Defenses. (Record at page 213-214).

25. On March 24, 1993, the trial court granted the Appellee's Motion for Summary Judgment. (Record at page 217-218).

26. Summary Judgment in favor of the Appellee was entered on March 24, 1993. (Record at page 217).

27. The Appellant filed his Notice of Appeal on April 23, 1993. (Record at page 221-222).

28. On October 14, 1993 the trial Court granted Appellant's Motion for a Stay Pending Appeal. (Record at page 231).

VIII *SUMMARY OF ARGUMENT*

The trial court erred, both as a matter of fact and as a matter of law, in granting the Appellee's Motion for Summary Judgment. The trial court erred, both as a matter of fact and as a matter of law, in concluding that the Appellee was entitled to summary judgment on its cause of action against the Appellant for conducting business without a license. The trial court erred, as a matter of law, in granting the Appellee's Motion for Summary Judgment on the Appellant's Counterclaim and/or affirmative defenses. The trial court erred, as a matter of law, in granting the Appellee's Motion for Summary Judgment without first ruling on the Appellant'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. The trial court erred, as a matter of law, in ruling on Appellee's Motion for Summary Judgment before the Appellant had the opportunity to conduct discovery and submit evidence on his Counterclaim and affirmative defenses.

IX
ARGUMENT

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

POINT I

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

With respect to Appellee's cause of action for a "Permanent Injunction", the trial court erred both as a matter of fact and as a matter of law in concluding that there was no a genuine issue of fact with respect to whether or not the Appellant is violating any Woods Cross City zoning ordinances. Because the Appellant is not the owner of the property located at 1450 West 500 South, Woods Cross City, Utah, has never conducted any business on that property nor ever parked any vehicles on that property, the trial court erred both as a matter of fact and as a matter of law in concluding that the Appellant is violating any Woods Cross City zoning ordinances.

Additionally a genuine issue of fact exists as to the actual zoning of the property located at 1450 West 500 South, Woods Cross City, Utah. The Appellee asserts that the property is zoned A-1; however, the Woods Cross City Zoning Map shows the property located at 1450 West 500 South, Woods Cross City, Utah is zoned I-1 rather than A-1.

Because there are genuine issues of fact present in this case, the Appellee was not entitled to Summary Judgment as a matter of law. 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). The Affidavit filed by the Appellant disputed the Appellee's statement of facts in support of its Motion for Summary Judgment and created genuine issues of material fact in 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, 585 P.2d 485 (Utah 1978).

In this case the trial court ignored the disputed facts and weighed the evidence. On summary judgment a court cannot consider the weight of testimony or credibility of witnesses; the court simply determines whether or not a material issue of facts is present in the case and whether or not one party should prevail as a matter of law. Sandberg v. Klein, 576 P.2d 1291 (Utah 1978); Singelton v. Alexander, 19 Utah 2d 292, 431 P.2d 126

(1967). Therefore, the trial court committed prejudicial and reversible error, both as a matter of fact and as a matter of law in granting the Appellee's Motion for Summary Judgment. Consequently, the trial court's decision must be reversed and remanded.

POINT II

THE TRIAL COURT BOTH AS A MATTER OF FACT AND AS A MATTER OF LAW IN CONCLUDING THAT THE APPELLEE WAS ENTITLED TO SUMMARY JUDGMENT ON ITS CAUSE OF ACTION FOR CONDUCTING BUSINESS WITHOUT A LICENSE.

At the trial court level, the Appellee did not produced one iota of evidence which supported its assertion that the Appellant is conducting business on the property located at 1450 West 500 South, Woods Cross City, Utah, with or without a business license. The only evidence before the trial court with respect to the Appellant's alleged use of the property located at 1450 West 500 South, Woods Cross City, Utah, are statements from several individuals wherein they state that they have seen large trucks enter and leave the property and seen trucks and/or equipment parked on the property.

Trucks entering and leaving property located at 1450 West 500 South, Woods Cross City, Utah, or trucks parked on the property does not establish the existence of a business on the property. Furthermore, the Appellant does not own the property located at 1450 West 500 South, Woods Cross City, Utah, and, therefore, the Appellant is not liable nor responsible for the

activities which might occur on the property. Additionally, the Appellant stated in his uncontested Affidavit that he is not conducting any business activity on the property, that he has no telephone on the property and that he stores no material on the property. A party may not rely on allegations in the pleadings to counter affidavits made upon personal knowledge stating facts contrary to those alleged in pleadings. Freed Fin Co. v. Stoker Motor Co., 537 P.2d 1039 (Utah 1975).

Because the Appellee did not produce, and cannot produce, any evidence supporting its assertion that the Appellant is conducting any business on the property located at 1450 West 500 South, Woods Cross City, Utah, and because the Appellee did not file any affidavits contradicting the Appellant's Affidavit specifically declaring that he is not conducting business on the property located at 1450 West 500 South, Woods Cross City, Utah, the trial court committed prejudicial and reversible error, both as a matter of fact and as a matter of law, in granting the Appellee's Motion for Summary Judgment. Consequently, the trial court's decision must be reversed and remanded.

POINT III

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

In order for the Appellee to prevail on its Motion for Summary Judgment at the trial court level, the Appellee 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 the Appellee, and 2) that the Appellee 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 the Appellee's Motion for Summary Judgment. Furthermore, the Appellee 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 the Appellee did not, and cannot, demonstrate that the Appellant has engaged in any prohibited activity, on the property located at

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

POINT IV

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

At the trial court level, the Appellee asserted that it was

entitled to Summary Judgment on the Appellant's Counterclaim for the reason that the Appellant had not exhausted his administrative remedies. The Appellee then cited the trial court to a number of cases wherein a party was precluded from asserting certain causes of action or raising certain defenses because that party failed to exhaust their administrative remedies by failing to request any relief from the appropriate administrative agency. Those cases were not applicable to the facts of this case for the reason that the Appellant was attempting to exhaust his administrative remedies while the Appellee was seeking to preclude the Appellant from exhausting those remedies through this litigation.

In the cases cited by the Appellee, the parties were only precluded from asserting defenses or claims for the reason that they had not attempted to solve their dilemmas through appropriate administrative procedures. In the instant matter, unlike the parties in the cases cited by the Appellee, the Appellant attempted to follow the appropriate administrative procedure with respect to his property located at 1473 West 500 South, Woods Cross City, Utah.

The Appellant timely and properly petitioned Woods Cross City for a change in the zoning of his property. The Woods Cross Zoning Commission granted that petition. The Woods Cross City Council, however, subsequently denied the Appellant's petition

for no specified reason, and the Appellant filed an appeal of that denial with the Second District Court.

The Appellant complied with his administrative remedies prior to the time the trial court granted Appellee's Motion for Summary Judgment. Therefore, the trial court committed prejudicial and reversible error in summarily granting summary judgment on the Appellee's Counterclaim and affirmative defenses. Consequently, the trial court's decision must be reversed and remanded.

POINT V

THE TRIAL COURT ERRED AS A MATTER OF LAW IN GRANTING THE APPELLEE'S MOTION FOR SUMMARY JUDGMENT WITHOUT FIRST RULING ON THE APPELLANT'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.

It is an undisputed fact that the trial court never ruled on Appellant's Motion to dismiss Appellee's Complaint or on Appellant's Motions to Strike the Affidavits of Brent Stephenson, Gayle Stephenson, Leslie Gertsch, Duro Gertsch, and Tim Stephens, which were submitted in support of Appellee's Motion for Summary Judgment. The Affidavits of Brent Stephenson, Gayle Stephenson, Leslie Gertsch, Duro Gertsch, and Tim Stephens were submitted in support of Appellee's Motion for Summary Judgment and were a principal part of the Appellee's Motion for Summary Judgment. The Affidavits allegedly established the Appellant'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). Therefore, the trial court committed prejudicial and reversible error when it failed to consider or rule on the Appellant's Motions to Strike the Affidavits of Brent Stephenson, Gayle Stephenson, Leslie Gertsch, Duro Gertsch, and Tim Stephens prior to granting the Appellee's Motion for Summary Judgment. 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 the Appellee's Motion for Summary Judgment. Consequently, the trial court's decision must be reversed and remanded.

POINT VI

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

Generally if discovery is incomplete summary judgment should not be granted, because information ascertained through discovery may reveal information that would create issues of fact, thus precluding summary judgment. Downtown Athletic Club v. Horman, 740 P.2d 275 (Utah Ct. App.), cert denied, 65 P.2d 1277 (1987). In the instant matter, the Appellant never had the opportunity to conduct any discovery. The Appellant was entitled to conduct discovery. Discovery should be liberally permitted. State ex rel. Rd. Comm'n v. Petty, 17 Utah 2d 382, 412 P.2d 914 (Utah 1966).

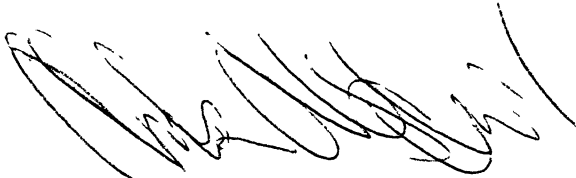
In this matter, the trial court simply entertained and granted the Appellee's Motion for Summary Judgment without permitting the Appellant to conduct discovery and without permitting the Appellant to develop his Counterclaim or affirmative defenses. The trial court committed prejudicial and reversible error by entertaining and ruling on Appellee's Motion for Summary Judgment before discovery was complete and the Appellant had the opportunity to develop and present information supporting his Counterclaim and affirmative defenses. Consequently, the trial court's decision must be reversed and remanded.

X
CONCLUSION AND REQUEST FOR RELIEF

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

WHEREFORE, the Appellant 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 22nd day of May 1994.



Charles A. Schultz
Attorney for Defendant/Appellant

CERTIFICATE OF SERVICE

I hereby certify that on the 20th day of May 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 56

Utah Code Annotated 1953, as amended, §78-2a-3(d)

set aside must proffer some defense of at least sufficient ostensible merit to justify a trial on that issue. *Downey State Bank v. Major-Blakeney Corp.*, 545 P.2d 507 (Utah 1976).

—**Setting aside proper.**

Where plaintiff served defendant with a summons, and left a copy with the defendant which was not the same as the original, the court had jurisdiction but sufficient confusion was created so that a motion to set aside the default judgment should have been granted and the defendant allowed to plead consistent with our declared policy that in case of uncertainty, default judgments should be set aside to allow trial on the merits. *Locke v. Peterson*, 3 Utah 2d 415, 285 P.2d 1111 (1955).

Default judgment and writ of garnishment were properly set aside where trial court failed to obtain jurisdiction over defendant because summons was not timely issued. *Fibreboard Paper Prods. Corp. v. Dietrich*, 25 Utah 2d 65, 475 P.2d 1005 (1970).

Where appellants, plaintiffs in a civil action,

promptly objected to date set for trial on the ground that their counsel had an already 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.
 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.
 Motion to dismiss.
 Motion to reconsider.
 Notice.
 —Provision not jurisdictional.
 —Waiver of defect.
 Procedural due process.
 Purpose.

a successor is appointed and qualified. The presiding judge of the Court of Appeals shall receive as additional compensation \$1,000 per annum or fraction thereof for the period served.

(2) The Court of Appeals shall sit and render judgment in panels of three judges. Assignment to panels shall be by random rotation of all judges of the Court of Appeals. The Court of Appeals by rule shall provide for the selection of a chair for each panel. The Court of Appeals may not sit en banc.

(3) The judges of the Court of Appeals shall elect a presiding judge from among the members of the court by majority vote of all judges. The term of office of the presiding judge is two years and until a successor is elected. A presiding judge of the Court of Appeals may serve in that office no more than two successive terms. The Court of Appeals may by rule provide for an acting presiding judge to serve in the absence or incapacity of the presiding judge.

(4) The presiding judge may be removed from the office of presiding judge by majority vote of all judges of the Court of Appeals. In addition to the duties of a judge of the Court of Appeals, the presiding judge shall

(a) administer the rotation and scheduling of panels,

(b) act as liaison with the Supreme Court,

(c) call and preside over the meetings of the Court of Appeals, and

(d) carry out duties prescribed by the Supreme Court and the Judicial Council.

(5) Filing fees for the Court of Appeals are the same as for the Supreme Court. 1988

78-2a-3. Court of Appeals jurisdiction.

(1) The Court of Appeals has jurisdiction to issue all extraordinary writs and to issue all writs and process necessary

(a) to carry into effect its judgments, orders, and decrees, or

(b) in aid of its jurisdiction.

(2) The Court of Appeals has appellate jurisdiction, including jurisdiction of interlocutory appeals, over

(a) the final orders and decrees resulting from formal adjudicative proceedings of state agencies or appeals from the district court review of informal adjudicative proceedings of the agencies, except the Public Service Commission, State Tax Commission, Board of State Lands, Board of Oil, Gas, and Mining, and the state engineer,

(b) appeals from the district court review of

(i) adjudicative proceedings of agencies of political subdivisions of the state or other local agencies, and

(ii) a challenge to agency action under Section 63-46a-12 1,

(c) appeals from the juvenile courts,

(d) appeals from the circuit courts, except those from the small claims department of a circuit court,

(e) interlocutory appeals from any court of record in criminal cases, except those involving a charge of a first degree or capital felony,

(f) appeals from a court of record in criminal cases, except those involving a conviction of a first degree or capital felony,

(g) appeals from orders on petitions for extraordinary writs sought by persons who are incarcerated or serving any other criminal sentence, except petitions constituting a challenge to a conviction of or the sentence for a first degree or capital felony,

(h) appeals from the orders on petitions for extraordinary writs challenging the decisions of the Board of Pardons except in cases involving a first degree or capital felony,

(i) appeals from district court involving domestic relations cases, including, but not limited to divorce, annulment, property division, child custody, support, visitation, adoption and paternity.

(j) appeals from the Utah Military Court, and

(k) cases transferred to the Court of Appeals from the Supreme Court.

(3) The Court of Appeals upon its own motion only and by the vote of four judges of the court may certify to the Supreme Court for original appellate review and determination any matter over which the Court of Appeals has original appellate jurisdiction.

(4) The Court of Appeals shall comply with the requirements of Title 63, Chapter 46b, in its review of agency adjudicative proceedings. 1988

78-2a-4. Review of actions by Supreme Court.

Review of the judgments, orders, and decrees of the Court of Appeals shall be by petition for writ of certiorari to the Supreme Court. 1988

78-2a-5. Location of Court of Appeals.

The Court of Appeals has its principal location in Salt Lake City. The Court of Appeals may perform any of its functions in any location within the state. 1988

CHAPTER 3

DISTRICT COURTS

Section

78-3-1 to 78-3-2 Repealed

78-3-3 Term of judges — Vacancy

78-3-4 Jurisdiction — Transfer of cases to circuit court — Appeals — Jurisdiction when circuit and district court merged

78-3-5 Repealed

78-3-6 Terms — Minimum of once quarterly

78-3-7 to 78-3-11 Repealed

78-3-11 5 State District Court Administrative System

78-3-12 Repealed

78-3-12 5 Costs of system

78-3-13 Repealed

78-3-13 4 Counties joining court system — Procedure — Facilities — Salaries.

78-3-13 5, 78-3-14 Repealed

78-3-14 5 Allocation of district court fees and fines

78-3-15 to 78-3-17 Repealed

78-3-17 5 Application of savings accruing to counties

78-3-18 Judicial Administration Act — Short title

78-3-19 Purpose of act

78-3-20 Definitions

78-3-21 Judicial Council — Creation — Members — Terms and election — Responsibilities — Reports

78-3-21 5 Data bases for judicial boards

78-3-22 Presiding officer — Compensation — Duties

78-3-23 Administrator of the courts — Appointment — Qualifications — Salary

78-3-24 Court administrator — Powers, duties, and responsibilities