

1984

Kae Smith v. Dan M. Vuicich : Petition For Rehearing

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IN THE SUPREME COURT OF THE
STATE OF UTAH

KAE SMITH, :
Plaintiff/Appellant, :
vs. : Case No. 19382
DAN M. VUICICH, :
Defendant/Respondent. :

PETITION FOR REHEARING

APPEAL FROM JUDGMENT OF DISTRICT COURT OF
SALT LAKE COUNTY

HONORABLE KENNETH RIGTRUP, JUDGE

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Clerk, Supreme Court

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TABLE OF CONTENTS

	Page
STATEMENT OF POINT I	3
IT WAS ERROR FOR THE COURT TO "PRESUME" THAT THE VERDICT WAS SUPPORTED BY ADMISSIBLE AND COMPETENT EVIDENCE RATHER THAN TO REVIEW THE EVIDENCE IN THE RECORD.	
STATEMENT OF POINT II	4
THE OPINION OF APRIL 11, 1985 WAS IN ERROR IN STATING THAT THE RECORD "DOES NOT REFLECT A REQUEST FOR AND A DENIAL OF STATUTORY FEES" AND THUS THE COURT DID NOT ADDRESS THE ISSUE STATUTORY FEES CLAIMS BEING MUTUALLY EXCLUSIVE WITH ABUSE OF PROCESS CLAIMS WHERE THE LATTER RELATES TO ATTORNEYS FEES ONLY.	
STATUTE CITED	2 -4
Section 78-27-56, 1953	
CASE CITED	
Bundy v. Century Equipment Company	2
ADDENDUM	6

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IN THE SUPREME COURT OF THE
STATE OF UTAH

KAE SMITH,	:	
Plaintiff/Appellant,	:	PETITION FOR REHEARING
vs.	:	Case No. 19392
DAN M. VUICICH,	:	
Defendant/Respondent	:	

Comes now the Appellant and Petitions for rehearing pursuant to Rule 35 of the Utah Rules of Appellate Procedure.

The per curiam opinion in this case was issued on April 11, 1985 without oral argument pursuant to Rule 29 (a) (3) of the above rules.

Petitioner respectfully submits that the determination that "the decisional process would not be significantly aided by oral argument" was erroneous because the above opinion overlooked or misapprehended two critical facts, namely (1) all the evidence on the issue of defendants counterclaim in chief is in the record (2) there

was in fact in the record a request for statutory attorneys fees allowable pursuant to Sec. 78-27-56, 1953 and a denial thereof. It also misapplied the rule of law that it cites namely that the appellant court will not upset a jury verdict unless there is a showing that the evidence so clearly preponderates against the prevailing party that reasonable people would not differ on the outcome of the case. Bundy v. Century Equipment Company, slip op. 18270 filed November 2, 1984. This case is cited just after the Court's opinion notes "we have none of plaintiff's evidence before us" (P.2). The reason no such evidence is in the record is because the plaintiff appellant wanted it to be crystal clear that she knew she could not prevail on the relative strength of the parties evidence but only if defendant had no evidence to support his counterclaim. The contention that there was no such evidence was the heart of this appeal and that issue has yet to be addressed.

Not only does defendant's evidence fail to provide any legal basis for an abuse of process claim, it affirmatively negates the improper purpose required for such a claim. Defendant testified that the only reason plaintiff sued was to obtain money. (R 135). The critical question of law then is whether such a purpose can be the improper basis for an abuse of process claim.

It should be noted that the evidence in the record consisted not only of what the appellant designated but also what the respondent designated (see addendum for the latter). If additional

testimony would have supported the respondent's verdict it would surely have been in the records and that would be particularly true if the testimony of plaintiff would have supported defendant.

I

IT WAS ERROR FOR THE COURT TO "PRESUME" THAT THE VERDICT WAS SUPPORTED BY ADMISSIBLE AND COMPETENT EVIDENCE RATHER THAN TO REVIEW THE EVIDENCE IN THE RECORD

The per curiam opinion states "where the record before us is incomplete we are unable to review the evidence as a whole and must therefore presume that the verdict was supported by admissible and competent evidence" (underscoring added) P.2

Plaintiff's complaint alleged a wrongful and damaging trespass. Almost all of the testimony of the many witnesses dealt with that issue. Only the parties themselves testified as to the defendant's counterclaim for abuse of process. Since this Court must review the evidence in the light most favorable to the prevailing party, the judgment in favor of defendant on that issue could not be overruled no matter how much this Court believed that the weight of plaintiff's testimony exceeded that of the defendant's. Hence no purpose would be served by adding her testimony to the record. The legal issue with respect to the sufficiency of the evidence is whether or not the evidence adduced by defendant (all of defendant's testimony on this issue is in the record - put there by plaintiff on September 27, 1983 - plus the additional evidence contained in the supplemental

record filed by defendant on April 5, 1984) was adequate to support such a claim. The opinion of this Court did not address that issue. It also deprived the Plaintiff of the benefit of oral argument on this issue.

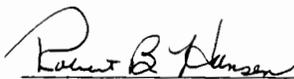
II

THE OPINION OF APRIL 11, 1985 WAS IN ERROR IN STATING THAT THE RECORD "DOES NOT REFLECT A REQUEST FOR AND A DENIAL OF STATUTORY FEES" AND THUS THE COURT DID NOT ADDRESS THE ISSUE STATUTORY FEES CLAIMS BEING MUTUALLY EXCLUSIVE WITH ABUSE OF PROCESS CLAIMS WHERE THE LATTER RELATES TO ATTORNEYS FEES ONLY.

In paragraph No. 8 at Page 10 of the record defendant alleges "Defendant is entitled to attorneys fees against plaintiff pursuant to Utah Code Annotated Sec. 78-27-56 (Supp. 1981), inasmuch as plaintiff's action is without merit and was not brought in good faith." Likewise the record shows that no such claim was granted (R106 and 107).

The issue of the relationship between the common law cause of action of abuse of process and statutory attorneys fees is one of great importance to the bench, bar and public and should be considered after full oral argument.

Respectfully submitted this 25th day of April, 1985.

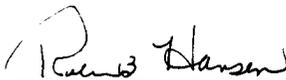


Robert B. Hansen
Attorney for Petitioner

CERTIFICATION OF GOOD FAITH

Comes now the undersigned counsel for petitioner pursuant to Rule 35 (a) of the Utah Rules of Appellate Procedure and certifies that this Petition is presented in good faith and not for delay.

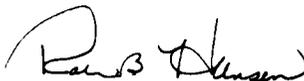
Dated this 25th day of April, 1985.



ROBERT B. HANSEN
Attorney for Petitioner

MAILING CERTIFICATE

I certify that I mailed two and correct copies of the foregoing Petition for Rehearing to Lynn S. Davies, Attorney, P.O. Box 2465, Salt Lake City, Utah 84110, this 25th day of April, 1985.



ROBERT B. HANSEN

IN THE SUPREME COURT OF THE STATE OF UTAH

-----oo0oo-----

Kae Smith,
Plaintiff and Appellant,

v.

Dan M. Vuicich,
Defendant and Respondent.

No. 19392

F I L E D
April 11, 1985

Geoffrey J. Butler, Clerk

PER CURIAM:

Plaintiff appeals from a judgment in the amount of \$3,300 entered on a special verdict in favor of defendant on his counterclaim against plaintiff for abuse of process. We affirm.

Plaintiff sued defendant for trespass on her unimproved land. Defendant answered that he crossed the land with a backhoe and tractor in order to reach his backyard to build a swimming pool and that no other approach was feasible. He also claimed that he had plaintiff's oral consent to do so and denied that plaintiff suffered any damages. Defendant counterclaimed against plaintiff for malicious prosecution and abuse of process. Plaintiff successfully moved to dismiss defendant's cause of action for malicious prosecution, but the claim of abuse of process remained at issue. The case was tried before a jury which was instructed on plaintiff's and defendant's theories. The jury in a special verdict found that defendant had not trespassed on plaintiff's land and that plaintiff had committed abuse of process. The jury awarded defendant "\$3,300 in compensation, including attorney fees, for defending the lawsuit."

In this appeal, plaintiff claims that defendant's counterclaim does not state a claim and that there was insufficient evidence of any improper purpose on her part to sustain a judgment for abuse of process.

Defendant's counterclaim stated inter alia that plaintiff "has commenced this meritless action against defendant maliciously and with intent to defraud defendant." The prayer of the counterclaim asked for "judgment against plaintiff in the amount of \$10,000 for her malicious prosecution of this action, and her abuse of process in commencing this action," as well as for costs and attorney fees incurred in defending the action.

Plaintiff's contention that defendant's counterclaim fails to state a claim comes too late. Plaintiff claims that Rule 12(h) of the Utah Rules of Civil Procedure allows her to raise that defense at this time, inasmuch as the defense of failure to state a claim upon which relief can be granted is excepted from the general rule stated there. Issues brought under the exception of Rule 12(h) may be raised before or during trial, Lignell v. Berg, Utah, 593 P.2d 800 (1979) (addressing lack of legal capacity). However, Rule 12(h) certainly does not mean that failure to state a claim can be raised for the first time on appeal. The record before us does not disclose that plaintiff either pleaded or argued this issue at trial, and we therefore decline to address the merits of her argument. Almon Inc. v. Utah Liquor Control Commission, slip op. 18637, filed February 7, 1985; Bundy v. Century Equipment Company, Inc., slip op. 18270, filed November 2, 1984.

Plaintiff claims that there was insufficient evidence for the jury to arrive at its verdict that she abused legal process. The designated record on appeal contains only a partial transcript of the trial which deals exclusively with defendant's testimony and that of his witnesses. We have none of plaintiff's evidence before us. This Court will not upset a jury verdict unless there is a showing that the evidence so clearly preponderates against the prevailing party that reasonable people would not differ on the outcome of the case. Bundy v. Century Equipment Company, *supra* (citations omitted). The jury was properly instructed on the elements of abuse of process in language similar to that found in Crease v. Pleasant Grove City, 30 Utah 2d 451, 519 P.2d 888 (1974), and on the need to arrive at its verdict by a preponderance of the evidence. Where the record before us is incomplete, we are unable to review the evidence as a whole and must therefore presume that the verdict was supported by admissible and competent evidence. Stephens v. Schwendiman, Utah, 688 P.2d 466 (1984) (citations omitted).

Finally, plaintiff attacks the verdict on the ground that it included an amount for defendant's attorney fees although the trial court had determined that an award of attorney fees pursuant to U.C.A., 1953, 78-27-56 (Supp. 1981) (actions brought without merit and not in good faith) should not be made. Again, the record furnished us by plaintiff does not reflect a request for and denial of statutory fees, so we cannot review plaintiff's allegation.

The judgment on the verdict is affirmed. Costs are awarded to defendant.

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IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
IN AND FOR COUNTY OF SALT LAKE, STATE OF UTAH

KAE SMITH,	‡	
Plaintiff,	:	COUNTER-DESIGNATION
		OF
vs.	‡	RECORD ON APPEAL
DAN M. VUICICH,	:	Civil No. C-82-319
Defendant.	‡	Supreme Court Case No. <u>1939</u>

Pursuant to Rule 75(a) of the Utah Rules of Civil Procedure, respondent Dan Vuicich, by and through his counsel of record hereby designates the following portions of the trial transcript for inclusion in the record on appeal in the above-captioned action:

1. Testimony of Larry Paneck, direct examination;
2. Testimony of Karen Holton, direct examination;
3. Testimony of Ron Wilkins, direct examination;
4. Testimony of Robert Cushing, direct examination;
5. Testimony of Dan Vuicich, cross-examination by Mr. Davies; and subsequent direct examination by Mr. Davies from defendant's case in chief.

DATED this 15th day of March, 1984.

RICHARDS, BRANDT, MILLER & NELSON



LYNN S. DAVIES
Attorneys for Defendant
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CERTIFICATE OF MAILING

I hereby certify that I mailed, postage prepaid, a true and correct copy of the foregoing to Robert B. Hansen, attorney for plaintiff, 965 East 4800 South, Suite 2, Salt Lake City, UT, 84117, on this 16th day of March, 1984.

