

1993

# William Christopulos & Elvira Christopulos v. Cory Curtis & Arwella Curtis : Brief of Appellee

Utah Court of Appeals

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Cory & Arwell Curtis; Pro Se; Appellants.

Kyle W. Jones; Attorney for Appellees.

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## Recommended Citation

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BRIEF

UTAH  
COURT  
OF APPEALS  
DOCKET NO.

930340

THE UTAH COURT OF APPEALS

WILLIAM CHRISTOPULOS &  
ELVIRA CHRISTOPULOS,

Plaintiffs and Appellees,

v.

CORY CURTIS &  
ARWELLA CURTIS,

Defendants and Appellants.

BRIEF OF APPELLEES

Case No. 930340-CA

Priority No. 15

Appeal from a Summary judgment in the Third Judicial  
District Court in and for Salt Lake County, State of Utah, the  
Honorable, James Sawaya, Judge Presiding. District Court No.  
910900664CN

Cory & Arwell Curtis  
312 North 2000 N #D  
Layton, Utah 84041

Pro Se defendants-  
Appellants

Kyle W. Jones 1744  
Beneficial Life Tower #2650  
36 South State Street  
Salt Lake City, Utah 84111

Attorney for plaintiff-  
Appellees

**FILED**

Utah Court of Appeals

JUL 7 1993

  
Mary T. Noonan  
Clerk of the Court

WILLIAM CHRISTOPULOS &  
ELVIRA CHRISTOPULOS,  
  
Plaintiffs and Appellees,  
  
v.  
CORY CURTIS &  
ARWELLA CURTIS,  
  
Defendants and Appellants.

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BRIEF OF APPELLEES  
  
Case No. 930340-CA

Cory & Arwell Curtis 312 North 2000 N #D Layton, Utah 84041  Pro Se defendants- Appellants	Kyle W. Jones 1744 Beneficial Life Tower #2650 36 South State Street Salt Lake City, Utah 84111  Attorney for plaintiff- Appellees
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IN THE UTAH COURT OF APPEALS

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WILLIAM CHRISTOPULOS &	)	
ELVIRA CHRISTOPULOS,	)	
	)	BRIEF OF APPELLEES
Plaintiffs and Appellees,	)	
	)	
vs.	)	Case No. 930340-CA
CORY CURTIS &	)	
ARWELLA CURTIS,	)	Priority 15
	)	
Defendants and Appellants.	)	

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JURISDICTION OF COURT

This is an appeal by the Defendants/Appellants (hereinafter Appellants) to the Utah Supreme Court pursuant to Article VIII, Section 3 of the Constitution of the State of Utah and Section 78-2-2, Utah Code Annotated from the Summary Judgment rendered by the Honorable James S. Sawaya of the Third Judicial District Court of Salt Lake County, State of Utah, Civil No. 910900664. The Utah Supreme Court referred the matter to The Utah Court of Appeals pursuant to Section 78-2a-3(j), Utah Code Annotated.

References to pleadings in the record are given by the pleading title. No transcript numbers are given as no transcript was ordered only record pages.

## STATEMENT OF ISSUES AND STANDARD OF REVIEW

1. Was the Summary Judgment granted by the Honorable Judge, James S. Sawaya in favor of the appellees and against the appellants proper?

The standard of review for this Court from a grant of Summary Judgment is that the appellate court will view the facts in a light most favorable to the losing party and will determine whether those facts require, as a matter of law, the entry of judgment. The appellate court will give no deference to the trial court's conclusions of law, which are reviewed for correctness. Schurtz v BMW of N. Am., Inc., 814 P.2d 1108 (Utah 1991). But when it appears from the pleadings on file, the affidavits in support and in opposition to the motion for Summary Judgment and having heard counsel for both sides and there appears to be no genuine issue of material fact, then summary is not only proper, but required. Burningham v. Ott, 525 P.2d 620, (Utah 1974).

2. Are the Findings of Fact and Conclusions of Law determined and entered by the trial court correct?

The standard of review of the appellate court relating to the Findings of Fact and Conclusions of Law, (Addendum iv) is fully set forth in Rule 52 (a), Utah Rules of Civil Procedure wherein it states:

"....Findings of Fact, whether based upon oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall



be given to the opportunity of the trial court to judge the credibility of the witnesses."

As stated by the Utah Supreme Court in Grayson Roper LTD. v. Finlinson, 782 P.2d 467, (Utah 1989), page 470;

"...On the other hand, a trial court's findings of fact are given deferential review.... To successfully attack a trial court's findings of fact, an appellant must first marshal all the evidence in support of the findings and then demonstrate that the evidence, including all reasonable inferences drawn therefrom, is insufficient to support the findings against an attack under Rule 52(a) standard. [citations omitted]..."

#### STATEMENT OF CASE

##### Nature of case:

This appeal is taken from the final Summary Judgment entered by the Honorable James S. Sawaya in the Third Judicial District Court against Cory Curtis and Arwella Curtis, Appellants, and in favor of William Christopulos & Elvira Christopulos, Appellees.

The action involved the breach and default of a trust deed note by the appellants. The trust deed note was entered into by the appellants on February 1, 1987 with a Mr. Darrell B. Hicks. (Addendum i) This trust deed note was assigned to the Appellees on February 20, 1987. (Addendum ii) This trust deed note was subordinate to other notes covering a piece of real property and a prior lien holder foreclosed on the real

property. The Appellees commenced this suit on the trust deed note to recover sums that were past due and owing.

Course of Proceedings and Disposition:

1. Appellees commenced suit against the appellants on January 30, 1991. (R.2)

2. Appellants were served the summons and complaint on February 14, 1991 and the return of service was filed with the court. (R.8)

3. Appellant's counsel filed an answer and counterclaim to Appellees complaint on March 6, 1991. (R.9). No jury was requested.

4. Appellee's counsel filed a motion to dismiss the counterclaim on March 13, 1991. (R.16)

5. Appellant's counsel filed a reply to appellees motion to dismiss (R.20) and the matter was submitted to the court for decision. (R.23)

6. On April 9, 1991 the Court denied appellees motion to dismiss. (R.25)

7. On April 17, 1991 appellees served upon the appellants their first set of Requests for Admissions, Interrogatories and Requests for Production of Documents (R.25A) and replied to appellants counterclaim. (R.26)

8. On May 17, 1991 counsel for appellants withdrew as counsel. (R.28)

9. On May 21, 1991 appellees filed a Request to Appear in Person or Appoint New Counsel and then on May 30, 1991 (R.31) appellants filed an appearance pro se. (R.32)

10. In a document dated May 15, 1991, appellants attempted to answer appellees discovery requests.(Addendum iii).

11. On January 10, 1992 appellees filed a Motion for Summary Judgment against the appellants together with affidavits. (R.35)

12. On January 29, 1992 appellees' counsel filed a Notice to Submit it's Motion for Summary Judgment to the court. (R.51)

13. On February 4, 1992 appellants filed a document, dated January 20, 1992, in opposition to appellees' Motion for Summary Judgment entitled "Final Response and Motion to dismiss plaintiff's claim and award defendants appropriate damages as heretofore mentioned in the defendants counterclaim." (R.52) Appellants never filed any documents under oath or affidavits in response to appellees' Motion for Summary Judgment.

14. On February 10, 1992 appellees filed their response to the document filed by the appellants on February 4, 1992. (R.62)

15. On February 13, 1992 the court denied appellees Motion for Summary Judgment stating no reasons for the denial. (R.64)

16. On June 16, 1992 appellees requested a trial setting (R.65) and a non jury trial was set in this matter on September 22, 1992 with a pre trial conference set for September 14, 1992 in the Third District Court before the Honorable Judge James S. Sawaya. (R.66, R.68)

17. On September 14, 1992 the Appellees with their counsel and the appellant, Cory Curtis, appeared at the pre trial conference. Appellant, Arwella Curtis did not appear. At the pretrial conference matters were discussed and settlement was encouraged. Also, at the pretrial conference the court on it's own motion continued the trial date as there was a conflict with another matter. No new trial date was set.

18. On September 16, 1992 appellees filed a Motion with the court to Reconsider Their Motion for Summary Judgment. (R.69)

19. On September 21, 1992 appellants filed a letter with the court. (R.71)

20. On September 30, 1992 appellants filed a response to appellees' Motion to Reconsider Their Motion for Summary Judgment entitled "Motion to Deny Plaintiffs Motion for a Reconsideration for a Summary Judgment and Request for Jury Trial." (R.77)

21. On September 30, 1992 appellees asked the court to submit for decision their Motion to Reconsider and Motion for Summary Judgment. (R.72)

22. On October 22, 1992 the court granted appellees' Motion for Summary Judgment. (R.82)

23. On October 26, 1992 the appellees counsel, prepared, filed and mailed to the appellants their proposed Findings of Fact and Conclusions of Law and Judgment. (R.83, Addendum iv, v) Judgment was signed on October 27, 1992. (Addendum v)

24. On November 6, 1992 an attorney for the appellants (the same attorney that withdrew earlier) filed a Motion to Amend Judgment. (R.90). No objections to the Findings of Fact, Conclusions of Law or the Judgment was filed by the appellants or their counsel.

25. On November 12, 1992 appellees filed their response to the appellants' Motion to Amend Judgment. (R.102)

26. On November 23, 1992 appellees counsel filed a notice to Submit for Decision appellants' Motion to Amend Judgment. (R.112)

27. On November 23, 1992 the court denied appellants' Motion to Amend judgment. (R.114) Appellees counsel prepared the Order and the Order was signed on December 7, 1992. (R.115)

28. Notice of Appeal was filed by the appellants on December 18, 1992. (R.127) Defendants again filed a second

notice to appear pro se on December 18, 1992. (R.126). There has been no withdrawal of counsel by defendants counsel.

#### **STATEMENT OF FACTS**

1. Appellees and appellants have admitted to the jurisdiction of the person and the subject matter by the Third District Court of Salt Lake County and have further admitted that venue is proper (Finding of Fact, paragraph 1 R.84;)

1. Appellants entered into a written trust deed and trust deed note (hereinafter the trust deed note will be referred to as the "promissory note") with a Mr. Darrell B. Hicks on or about February 1, 1987. A true and exact copy of the promissory note is attached hereto as part of the addendum and incorporated herein by this reference. (Defendants answer to plaintiff's complaint, paragraph 2, (R.9); Findings of Fact, paragraph 2 (R.84)).

2. On or about March 6, 1987 the trust deed and trust deed note (promissory note) was assigned to appellees. A true and exact copy of which is in the addendum and incorporated herein by his reference. (Findings of Fact, paragraph 3, (R.84))

3. Under the terms of the promissory note, exhibit A, appellants were to pay to the appellees the sum of \$13,500.00 which was to also collect interest on the unpaid sums at the

rate of 5.7% per annum. (Findings of Fact, paragraph 4, (R.84)).

4. Under the terms of the promissory note, appellants were to make payments of "principal and interest payable as follows:

Semi-annual interest payments representing 5.7% per annum of the unpaid balance were to commence on August 1, 1987 and continue through the term of the contract. Lump sum principal payments of \$4,000.00 were due on February 1, 1992; and \$4,000.00 due on February 1, 1997; and \$5,500.00 plus any accrued interest, representing the last semi-annual interest payment, as a final payment was to be due on February 1, 2002. (Findings of Fact paragraph 5, (R.84)).

5. The three lump sum payments total only \$13,500.00.

6. The promissory note allows for "semi annual payments" on the "principal and interest" commencing August 1, 1987. (Findings of Fact, paragraph 5, (R.84)).

7. The interest accumulated on \$13,500.00 at the rate of 5.7% per annum is \$64.125 per month or \$384.75 semi-annually. (Findings of Fact, paragraph 6, (R.85)).

8. Appellants made four payments, semi-annually of \$384.75. (See docketing statement of appellants, page 3; Finding of Fact, paragraph 7, (R. 85)).

9. No other payments have been made on the principal or interest on the promissory note and appellants are in default. (Findings of Fact, paragraph 8, (R.85)).

10. The amount owing under the terms of the promissory note is \$16,767.66 as of October 27, 1992. (Findings of Fact, paragraph 9, (R.85)).

11. Appellees retained an attorney to help them collect under the terms of the promissory note and the amount claimed to be owing to the attorney as of October 27, 1992, in the amount of \$1,601.00, is reasonable. (Findings of Fact, paragraph 10, (R.85)).

12. Appellees have made no misrepresentations to the appellants. (Findings of Fact, paragraph 11, (R.85)).

13. Appellees filed suit against the appellants in January, 1991, due to default in payment under the promissory note and the appellees acted properly in commencing the lawsuit at that time. (Findings of Fact, Paragraph 12, (R.85)).

14. Appellants' attorney filed an answer and counterclaim to this lawsuit in March, 1991. Appellants did not request a jury trial. The district judge was the trier of fact.

15. Appellees filed discovery requests of the appellants and after the discovery was due the attorneys for the appellants withdrew as counsel for the appellants. (R.28).



16. Appellees requested a trial in this matter. A pretrial conference was set for September 14, 1992 and non jury trial was set for September 22, 1992. The appellant, Cory Curtis appeared at the pre-trial conference, appellant, Arwella Curtis, did not. Appellees appeared and were represented by counsel. The matter was discussed and settlement was encouraged. The court on it's own motion, due to a conflict with another matter, struck the trial date in this matter.

17. In September, 1992, after the pretrial conference and the trial being continued, appellees asked the court to reconsider their Motion for Summary Judgment. The Summary Judgment was granted. (Addendum v)

18. Appellees filed the Judgment together with Findings of Fact and Conclusions of Law with the court which were accepted and signed by the Court on October 27, 1992. Appellants did not objected to the Findings of Fact or Conclusions of Law. (A true and exact copy of said Findings of Fact and Conclusion of Law and said judgment is part of the addendum iv, v). Appellants counsel did file a Motion to Amend Judgment which was denied. (R.90).

19. Appellants did attempt to make payment after the lawsuit was filed to the appellees for the sum of \$2,076.25 which check was not negotiated and returned to the appellants immediately. Appellants were informed that this was not a

proper payment under the terms of the promissory note and the payment was being returned.

16. Attached in the addendum are the pro se responses by the Appellees to appellants Requests for Admissions, Interrogatories and Requests for Production of Documents. (Addendum iii)

#### **SUMMARY OF ARGUMENT**

The court in granting the summary judgment after allowing the appellants over twenty two months to prove there claims was proper. There are no material questions of fact to be considered to prevent the granting the Summary Judgment as the contract is clear on it's face. Even if the contract is questioned as to clarity, then the only competent extrinsic evidence properly before the court would still allow the Summary Judgment. The Judge in this matter is the trier of fact as no jury was requested.

There was no judgment rendered at the pretrial conference and the effort to introduce new evidence at the appellate court level is improper.

There was not objection to the Findings of Fact or Conclusions of Law and therefore should not be disturbed.

This is just and effort by the appellants to delay this matter and prevent the appellees from collecting their money.

Appellants should be awarded their attorneys fees in defending this appeal.

## ARGUMENT

### Point I

#### The Judgment is Proper

##### A. The Summary Judgment is proper.

Rule 56(c) of the Utah Rules of Civil Procedure states:

"...The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file (emphasis added) 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 judgment as a matter of law."

The purpose of Summary Judgment is to look beyond the mere allegations in the pleadings to see if there exists any genuine issue as to any material fact. If there appears to be none, then the trial court should then award judgment to the moving party when adequate proof is submitted in support of the motion. Pleadings alone are not sufficient to raise an issue of fact. Dupler v. Yates, 351 P.2d 624, 10 Utah2d 250 (1960).

The opposing party should at a minimum produce some evidence to contradict the movant's case and raise a question of fact. Summary Judgment is not a harsh rule. When it appears from the pleadings on file, the affidavits in support of and in opposition to (if any) the motion for Summary Judgment, and any arguments of counsel for parties, that there

appears to be no genuine issue of fact, summary judgment is the only proper procedure the courts should use. Burningham v. Ott, 525 P.2d 620, (Utah 1974). Defendants have had ample time, over twenty-two months, to present their evidence in support of their alleged defenses and claims and they have failed to do so.

The appellants, both by their pro se pleadings and by the pleadings filed by their counsel state that "[t]he essential facts of this case are undisputed" and that "[t]he only issue in this case is regarding the effect, if any, of the words, 'Semi-annual payments commencing August 1 and February 1 semi-annually'. Appellants stated in their pleadings that the only issue is a legal question. This is in conflict with the claims made in appellants brief. They say there are remaining questions of fact. Never has appellants set forth what these "questions of fact" are or how they may be material. In appellants pleading entitled "Motion to Deny Plaintiffs Motion for a Reconsideration for a Summary Judgment and Request for Jury Trial" they state that "the legal dispute [emphasis added] has always been based on WHEN interest is to be paid, not if interest is due on the note." (R.77) Appellants do not dispute the amounts in the promissory note, that the note was signed by them, that the note as assigned to the appellees, that interest is owing on the note and that here has been no payments on this note since 1989 and the note requires

payments semi-annually. In fact, appellants admit that they made payments of exactly an amount that would be owing as interest on the note (\$384.75) for at least two years semi-annually before they ceased making payments on the note and thus became in default. Appellants have never objected to or disputed these facts and in fact admitted them in their pleading and brief.

Appellants have had ample time to support their allegations, present evidence, respond to evidence, examine witnesses and do discovery contrary to the statements in their brief. They have repeatedly failed, either by their counsel or by themselves, to present any facts, documents or affidavits to controvert the evidence of the appellees or to change the conclusions of the trial court.

Appellants have a burden to present some evidence in the trial court to establish their allegations and defenses. This is their burden of proof. The Utah Supreme Court stated in Koesling v. Basamakis, 539 P.2d 1043, 1046 (Utah 1975) that:

"The proponent of a proposition has two burdens relative to his proof: to produce evidence which proves or tends to prove the proposition asserted; and to persuade the trier of fact that his evidence is more credible or entitled to the greater weight. (footnote omitted)"

Appellants failed to produce any competent evidence at the trial court level and was thus unable to persuade the trier of

fact, here the judge, that their evidence was more credible than the evidence produced by the appellees. The trial court is under an obligation to only look at the evidence which is properly before it.

The standard of review in this matter regarding Summary Judgment is clear. In reviewing a Summary Judgment the appellate court must look at the fact in the light favorable to the losing party, here the appellants, and determine if the facts are still sufficient to support a motion for Summary Judgment. (Winegar v. Froerer Corp. 813 P.2d 104 (Utah 1991)). If it appears from the pleadings on file, the affidavits filed in support and in opposition to the motion for Summary Judgment and having heard the statements of counsel, or the parties, from both sides and there appears to be no genuine issues as to material fact, then Summary Judgment is not only proper, but required. Burningham v. Ott, 525 P.2d 620, (Utah 1974). The facts are clearly sufficient to support the Summary Judgment. In viewing the facts before the court in this matter, there is only one legal conclusion, which is the one arrived at by the trial court in it's rulings and judgment. The Findings of Fact by the trial court found that appellants promised to make payment of money to the appellees, including interest being paid semi-annually. Appellants failed to make said payments when due and are therefore in default of the promissory note. Inasmuch as a

challenge to summary judgment presents for review conclusions of law only, the appellate court reviews those conclusions for correctness based upon the undisputed facts.

A decision by a trial court is completely discretionary on the part of the trial judge and it is not improper just because "reasonable men could draw different conclusions from conflicting evidence. (Pollesche v. Transamerica Ins. Co. 27 Utah 2d 430, 497 P.2d 236 (1972)). There has been no abuse of discretion on the part of the trial court in rendering this judgment.

#### B. Contract Interpretation:

The appellants claim that the contract has not been interpreted correctly. In interpreting a contract, a court shall determine what the parties intended by examining the entire contract and all of its parts in connection with each other. The court will give an objective and reasonable construction to the contract as a whole. Sears v. Riemersma, 655 P.2d 1105, 1107-1108 (Utah 1982); Atlas Corp. v. Clovis Nat. Bank, 737 P.2d 225 (Utah 1987). In interpreting a contract, the court should act so as to harmonize all of its terms and provisions, and all of its terms and provisions be given effect if possible. The contract ( here the promissory note) is clear. It states that appellants will pay the sum of "Thirteen Thousand, Five hundred and no/100 Dollars

(\$13,500.00) together with interest from date (emphasis added) at the rate of Five & 07/100 per cent (5.7%) per annum on the unpaid principal, said principal and interest payable as follows; (emphasis added)

Semi-annual payments commencing August 1, and February 1, semi-annually."

It is clear that appellants were to make a payment every six months. The interest on \$13,500.00 at 5.7% for six months is \$384.75. Appellants did pay at four (4) payments of \$384.75 at six month intervals on or near August 1 and February 1. Clearly they chose to keep current on the interest only, with no payments being made to the principal. At this rate, appellants were to make the full lump sum payments according to the terms of the note at the times they were due. Appellants argument asks the question of how were the appellants going to calculate the interest on the sums prior to each lump sum payment? It appears that no interest was owing. Appellants did attempt to make a payment in April, 1992 of a sum less than \$4,000.00 and it did not include any payments toward interest. (see appellants brief, addendum). What was the interest going to be at the end of the note based upon the calculations of the appellants in making this first payment?. It appears that it would be some great sum or none at all. This is clearly contrary to the terms of the promissory note. It would be wise to note here that



appellants failed to make any payments "semi-annually" under the terms of the note after 1989 which is why it was declared in default and suit was commenced.

Contracts must receive a reasonable construction according to the intentions of the parties and the terms of the agreements. An interpretation which will bring about an equitable result will be preferred over a harsh or inequitable one. An interpretation of the contract should be adopted which under all the circumstances of the case, ascribes the most reasonable, equitable, probable reading of the contract. The court must accord commonly accepted meanings to the words or phrases to a contract wherever possible. Gordon v. CRS Consulting Engineers, Inc., 820 P.2d 492 (Utah App. 1991).

The interpretation offered by the appellants is not reasonable, probable or equitable. They claim that interest, if any, would only be due at the end of the note. They can pay what they wish, when they wish and deduct the sum from the principal due and owing without incurring interest. This would be an improbable and an inequitable result.

#### C. Is the Contract Ambiguous?

Appellants also claim that the promissory note is ambiguous. Appellees deny that the trust deed note is ambiguous. "The language of a contract is not necessarily ambiguous merely because a party urges a different meaning

that is more in accordance with its own interests." Larson v. Overland Thrift & Loan, 818 P.2d 1316, 1319 (Utah App.1991), cert. denied, 832 P.2d 476 (Utah 1992). Appellants hope the contract is ambiguous in order to justify the default and limit their liability. This should not succeed.

If a contract is ambiguous, parole evidence or extrinsic is admissible to explain the parties intent. When ambiguity exists, the interest of the parties is a question of fact to be determined by the finder of fact. Plateau Min. v. Utah Div. of State Lands, 802 P.2d 720, 725 (Utah 1990). In this matter the finder of fact was the trial court judge as no jury was requested. The trial court judge had the opportunity to review the documents, talk to the appellant Cory Curtis, and hear the arguments of both sides before making any ruling.

The parol and extrinsic evidence before the court was provided by the appellees, under oath, and admitted as fact by the appellants. (R.10, R.52, Brief Pg. 8)) Appellants presented NO evidence to contradict to the statements and affidavits of the appellants in spite of having over twenty-two months to provide contrary evidence. The actions by the appellants of making the \$384.75 payments semi-annually on the promissory note exactly in accordance with appellees interpretation of the terms of the promissory note and in an amount exactly equal to interest on \$13,500.00 at 5.7% per annum would indicate that the appellants understood that the

payments were for interest and were due semi-annually. This is admitted in appellants brief (Brief pg. 8). Why else were the payments made? Appellants never explained the reasons for the payments being made.

D. Judgment at pretrial conference:

Appellants also claim that a judgment was rendered at the pretrial conference. The facts do not support this claim. Settlement was encouraged by Judge Sawaya, in a manner similar to all other judges at their pretrial conference in my experience. The judgment was rendered on appellees Motion for Summary Judgment days after the pretrial conference. The appellants claim that the action by Judge Sawaya prejudiced them in obtaining a settlement, to their satisfaction, of the matter. Why was it prejudicial? Could it be that appellants knew they were in default and they hoped to "rewrite" the terms of the contract to better suit their circumstances? The appellants know that they owe the money and are just attempting to change the terms of the contract.

E: Did the court rewrite the contract?

Appellants further rely upon Dalton v. Jerico Construction Company, 642 P.2d 748, (Utah 1982) for the proposition that " a court cannot improvidently rewrite a contract entered into at arms length between parties." This

is true. The Utah Supreme Court stated in Dalton, *infra*, at 750, "...the contract between the parties control." The contract controls in this matter and the contract is clear on its face the intent of the parties with regards to the payment of principal and interest. This contract is not being rewritten. It is the court's responsibility to make a ruling based upon the facts before it and this is why the Summary Judgment was granted.

F. Presentation of new evidence.

Appellants claim they have discovered new evidence that may change the outcome of this matter. First, New evidence cannot be presented at this time, it would be improper. Second, appellants did not say when the new evidence was discovered and no motion was made in the trial court to reconsider the matter based upon the alleged new evidence. Third, the alleged new evidence is not relevant to this issues between these parties and would not change the judgment or appellants liability in this matter.

Point II

The Finding of Fact and Conclusions of Law are Proper

The Findings of Fact and Conclusions of Law accepted and signed by the trial court are not erroneous and should not be

disturbed pursuant to the standard found in Rule 52(a) of the Utah Rules of Civil Procedure and supporting case law, supra.

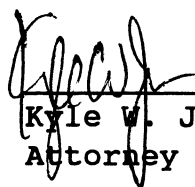
### Point III

Appellees ask the court for their costs and attorneys fees in this matter under Rule 33 and 34 of the Utah Rules of Appellate Procedure. This appeal is meant for delay and is a frivolous appeal.

### CONCLUSION

Appellees ask the court to dismiss this appeal, affirm the lower courts judgment and award Appellees their costs and attorneys fees. To do otherwise would do an injustice to the Appellees. They have not received any payments on a admitted to promissory note for over four years.

Dated this 6th day of July, 1993.




---

Kyle W. Jones  
Attorney for Plaintiffs/Appellees

CERTIFICATE OF MAILING

I hereby certify that I mailed two true and exact copy of  
the forgoing Appellants Brief, postage prepaid by U.S. ,Mail  
this ~~6th~~<sup>7th</sup> day of July, 1993 to Appellants at:

Cory Curtis & Arwella Curtis  
312 West 2000 North #D  
Salt Lake City, Utah 84041

  
\_\_\_\_\_  
Kyle W. Jones  
Attorney for plaintiffs/Appellees

## **ADDENDUM**

Trust Deed Note.....	i
Assignment of Trust Deed Note.....	ii
Responses by Appellants to Appellees Requests for Admissions, Interrogatories and Requests for Production of Documents..	iii
Findings of Fact and Conclusions of Law.....	iv
Judgment.....	v
Rule 52(a), Utah Rules of Civil Procedure.....	vi
Rule 56, Utah Rules of Civil Procedure.....	vii

Salt Lake City, Utah 84115

Space Above This Line for Recorder's Use

**T-112753**

## Trust Needs

4407697

[illegible]

Trustor hereby CONVEYS AND WARRANTS TO TRUSTEE IN TRUST, WITH POWER OF SALE, the following described property situated in Salt Lake County, Utah:

**All of Lot 3, VEGAS SUBDIVISION, according to the official plat thereof, recorded in the office of the County Recorder of Salt Lake County, Utah.**

THE BENEFICIARY AGREES TO SUBORDINATE THIS TRUST DEED (ONE TIME ONLY, EITHER FOR A SECOND CR IF PROPERTY IS REFINANCED) TO A RELIABLE LENDER IN THE AREA, PER AGREEMENT OF BOTH PARTIES.

Together with all buildings, fixtures and improvements thereon and all water rights, rights of way, easements, rents, issues, profits, income, tenements, hereditaments, privileges and appurtenances thereunto now or hereafter used or enjoyed with said property, or any part thereof;

FOR THE PURPOSE OF SECURING payment of the indebtedness evidenced by a promissory note of even date herewith, in the principal sum of \$13,500.00, payable to the order of Beneficiary at the times, in the manner and with interest as therein set forth, and payment of any sums expended or advanced by Beneficiary to protect the security hereof.

Trustor agrees to pay all taxes and assessments on the above property, to pay all charges and assessments on water or water stock used on or with said property, not to commit waste, to maintain adequate fire insurance on improvements on said property, to pay all costs and expenses of collection (including Trustee's and attorney's fees in event of default in payment of the indebtedness secured hereby and to pay reasonable Trustee's fees for any of the services performed by Trustee hereunder, including a reconveyance hereof.

The undersigned Trustor requests that a copy of any notice of default and of any notice of sale hereunder be mailed to him at the address hereinbefore set forth.

STATE OF UTAH

COUNTY OF SALT LAKE

8.

On the 18 day of February, 1987, personally appeared before me  
CORY CURTIS and ARVELLA CURTIS, his wife

of the foregoing instrument, who duly acknowledged to me that L. H. executed the same.

**My Commission Expires:**

### Residing at:

\*NOTE: Trustee must be a member of the Utah State Bar, a bank, building and loan association or savings and loan association authorized to do such business in Utah; a corporation authorized to do a trust business in Utah; or a title insurance or abstract company authorized to do such business in Utah.

**Utah Title and Abstract Company**

Salt Lake 264-7633

Tanda 002-2611

ENTER 806-6418

Summit 336-6079 Zurich 864

Wheat 2015-2021

5881 115: 2803



WHEN RECORDED, MAIL TO:  
WILLIAM CHRISTOPULOS

1742 Dearborn Street

Salt Lake City, Utah 84103

Space Above This Line for Recorder's Use

4412866

T-112733

## Assignment of Trust Deed

FOR VALUABLE CONSIDERATION, the receipt of which is hereby acknowledged,

DARRELL B. HINCKS

hereby assigns to WILLIAM CHRISTOPULOS and ELVIRA CHRISTOPULOS, his wife  
as joint tenants with full rights of survivorship  
all the beneficial interest and rights accrued or to accrue under that certain Trust Deed, together  
with the indebtedness secured thereby, which Trust Deed is dated February 18, 1987  
was executed by CORY CURTIS and ARVELLA CURTIS, his wife, as Trustor,  
to UTAH TITLE AND ABSTRACT COMPANY, as Trustee,  
was recorded on February 26, 1987, as Entry No. 4407697, in Book 5881  
Page(s) 2808 of the records of the County Recorder of Salt Lake County,  
Utah, and covers real property situated in said county described as follows:

All of Lot 5, VEGAS SUBDIVISION, according to the official plat thereof,  
recorded in the office of the County Recorder of Salt Lake County, Utah.

KATIE L. DIXON  
RECORDER  
SALT LAKE COUNTY,  
UTAH

MAR 6 12 30 PM '87

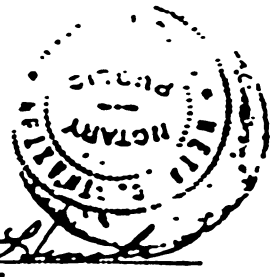
UTAH TITLE  
DEP  
Call Englehardt  
and Associates

75.00

Dated this 20th day of February

, 1987

  
Darrell B. Hincks



STATE OF UTAH }  
COUNTY OF SALT LAKE } ss.

On the 20th day of February, 1987, personally appeared before me

DARRELL B. HINCKS

, the signer

of the foregoing instrument, who duly acknowledged to me that he executed the same.

  
Notary Public

My Commission Expires

11-1-88

Residing at

Sandy, Utah

4412866 REC 1987

Cory Curtis  
Arwella P. Curtis  
168 West Center St.  
North Salt Lake City, Utah 84054

Defendants(s) Cory Curtis and Arwella Curtis response to Plaintiff(s) William Christopulos and Elvira Christopulos regarding requests for admissions, interrogatories and requests for production of documents- Civil No. 910900664 CN- Judge James S. Sawaya

Due to financial hardship, We, Cory and Arwella Curtis the defendant(s) will personally respond to said requests for admissions, interrogatories and requests for production of documents from the plaintiff(s). At the time of trial we intend to once again acquire the services of the Law offices of Kirton, McConkie and Poleman.

#### REQUESTS FOR ADMISSIONS- RESPONSE

Request No. 1: Allegations denied. Interest payments have not been on the trust deed note. Semi annual partial payments of \$384.75 have been made towards the first principle payment of \$4,000.00. which is due on 2/1/92.

Request No. 2: Allegations denied. We are not aware of any specific semi-annual interest payment amount that was agreed upon at the time the agreement was made. No specific semi-annual interest payments are set forth in the trust deed note.

Request No. 3: Allegations denied. Partial payments of \$384.75 towards the first principle payment of \$4,000.00 were made on or about the four dates listed.

Request No. 4: Allegations denied. Other partial payments towards the first principle payment were made to the plaintiff(s). Documentation of such will be forthcoming in 30-90 days.

#### INTERROGATORIES-RESPONSE

1. Cory and Arwella Curtis, the defendants

2. Already incorporated in response to said requests.

3a- The question is unclear. What is the difference between "purchasing" and "receiving" said property? Admission is made that defendants purchased said property.

3b- Enclosed please find the following documents;

a) Trust Deed Note

b) Assignment of Trust Deed

c) Trust Deed

d) Assignment of Mortgage paperwork forthcoming in 30-90 days.

Ex E

4. In August of 1987 I received the enclosed letter from William and

when the original purchase agreement was made, and despite the fact that no specific semi-annual payment amounts were agreed upon or listed in the legal agreements, they stated in the letter that semi-annual payments were to be made in the amount of \$384.75. This was the first time, six months after the trust deed note was signed, that the amount of \$384.75 was ever mentioned to us as a semi-annual payment amount by anyone. Please note that the letter does not refer to the payment as an "interest" payment. Although the payment schedule that the Plaintiff sent us was not accurate or representative of the agreement that we had made, we wanted to make semi-annual payments towards the principle payment of \$4,000.00 that would be due 2/1/92.

5. We the defendants do not remember having any written or oral communication directly with the plaintiff(s) at the time of the transaction. Likewise we do not remember having any written or oral communication directly with Mr. Darrel Hicks at or during the time of the transaction. All communication was with Mr. Hicks agent, Mr. Eric Glenn. Except for the documents provided, all communication with Mr. Glenn was oral. Since the transaction took place over four years ago it is difficult to remember in detail all communications referring to said transaction. We are not aware of any default of the trust deed note relating to the subject matter of the lawsuit.

a,b,c) We are currently making an attempt to document discussions that took place with Mr. Glenn. Due to our current employment-travel obligations we require additional time in responding to this reply-30-90 days.

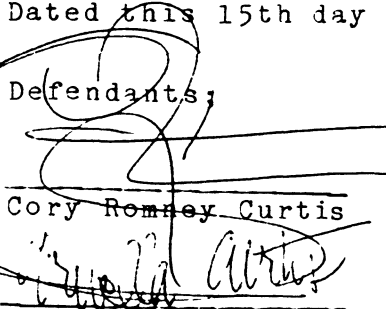
6,7,8,9,10,11 & 12. These interrogatories are premature and therefore inappropriate at this time. We the defendant are under no obligation to defend our position regarding the fraud, intentional misrepresentation, negligence, etc. that took place at the time of the transaction until the trust deed note has gone into default.


13. We, the defendant(s) are currently working with our bank and other bookkeeping entities to collect and verify said documentation of payments that have been made pertaining to said lawsuit. We require 30-90 days to provide you with this information.

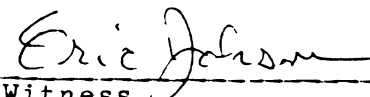
Sincerely,

Dated this 15th day of May 1991

Defendants;

  
Cory Romney Curtis

  
Arwella Curtis

  
Eric Johnson  
Witness

Kyle W. Jones 1744  
Attorney for Plaintiff  
Beneficial Life Tower, Suite 2650  
36 South State Street  
Salt Lake City, Utah 84111  
Telephone: (801) 359-7771

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

---

WILLIAM CHRISTOPULOS &	)	
ELVIRA CHRISTOPULOS,	)	JUDGMENT
	)	
Plaintiffs,	)	
	)	
vs.	)	Civil No. 910900664CN
CORY CURTIS &	)	
ARWELLA CURTIS,	)	Judge: James Sawaya
	)	
Defendants.	)	

---

The above entitled matter came on properly before the above entitled court pursuant to Rule 56 of the Utah Rules of Civil Procedure and Rule 4-501 of the Utah Code of Judicial Administration. The Court having read the pleadings on file in this matter and having heard the statements of defendant Cory Curtis at pretrial on September 22, 1992 and being fully advised in the premises;

IT IS HEREBY ORDERED, ADJUDGED AND DECREED THAT:

1. Plaintiffs motion for Summary Judgment be granted.
2. That defendants counterclaim be dismissed with prejudice.

3. That Plaintiff have judgment against the defendants,  
Cory Curtis and Arwella Curtis as follows:

\$16,767.66 principal and interest to date;

\$ 1,601.00 Attorneys fees to date; and

\$ 91.50 accrued costs to date; and

\$18,460.16 TOTAL JUDGMENT,

with interest thereon at the judgment rate of twelve percent  
(12%) per annum until paid, plus after accruing costs and  
attorneys fees.

DATED: Nov 21, 1992

BY THE COURT:

JS

Honorable James Sawaya  
District Judge

Kyle W. Jones 1744  
Attorney for Plaintiffs  
Beneficial Life Tower, Suite 2650  
36 South State Street  
Salt Lake City, Utah 84111  
Telephone: (801) 359-7771

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

---

WILLIAM CHRISTOPULOS &	)	
ELVIRA CHRISTOPULOS,	)	
	)	FINDINGS OF FACT
	)	AND
Plaintiffs,	)	CONCLUSIONS OF LAW
	)	
vs.	)	Civil No. 910900664CN
	)	
CORY CURTIS &	)	Judge: James Sawaya
ARWELLA CURTIS,	)	
Defendants.	)	

---

This matter came on properly before the above entitled court pursuant Rule 56 of the Utah Rules of Civil Procedure and Rule 4-501 of the Utah Code of Judicial Administration for a decision on plaintiffs' Motion to reconsider plaintiffs' Motion for Summary Judgment and Plaintiff's Motion for Summary Judgment. The court has reviewed the pleadings in this matter and has talked to the defendant Cory Curtis and counsel for the plaintiff at the pretrial on September 22, 1992. The Court being fully informed granted plaintiff's Motion for Summary Judgment by minute entry on October 22, 1992.

### FINDINGS OF FACT

1. Plaintiffs and defendants are both residents of Salt Lake County, State of Utah and have admitted to jurisdiction of this Court over the person and the subject matter and has admitted venue is proper.

2. Defendants, Cory Curtis and Arwella Curtis entered into a written Trust Deed and Trust Deed Note on February 1, 1987 with a Mr. Darrell B. Hicks which is a valid and proper contract.

3. On March 6, 1987 the Trust Deed and Trust Deed Note mentioned infra was assigned to the plaintiffs.

4. The terms of the Trust Deed Note required defendants to pay to the holder of the note, here the plaintiffs, the sum of \$13,500.00 plus interest over time.

5. The defendants were to make payments of principal and interest under the terms of the Trust Deed Note as follows:

Semi-annual interest payments representing 5.7% per annum of the unpaid balance were to commence on August 1, 1987 and continue through the term of the contract. Lump sum principal payments of \$4,000.00 were due on February 1, 1992; \$4,000.00 was to be due on February 1, 1997; and \$5,500.00 plus any accrued interest, representing the last semi-annual interest payment, as a final payment was to be due on February 1, 2002.

6. The interest accumulated on \$13,500.00 at the rate of 5.7% per annum is \$64.125 per month or \$384.75 semi annually.

7. Defendants made four (4) interest payments, semi-annually of \$384.75. The payments were received on August 1, 1987; February 1, 1988; August 1, 1989 and February 1, 1989.

8. No payments have been made on the principal of the Trust Deed Note and Defendants are in default under the terms of the subject Trust Deed Note.

9. The amount due and owing under the terms of the Trust Deed Note due to the default of the defendants is \$16,767.66 and said amount is reasonable.

10. Plaintiffs' retained an attorney to help them collect under the terms of the trust deed note and the amount claimed to be owing to the attorney in the amount of \$1,601.00 is reasonable.

11. Plaintiffs have made no misrepresentations to the defendants.

12. Defendants were acting properly in commencing this action at the time the lawsuit was commenced.

Having entered its Findings of Fact, the Court now enters its

#### CONCLUSIONS OF LAW

1. The Court has jurisdiction over the parties and the subject matter and venue is proper.

2. The defendants are both liable for the sums due and owing under the subject Trust Deed Note to the plaintiffs.



3. The Trust Deed Note is an enforceable contract between the defendants and the plaintiffs and the defendants have not established any facts to any alleged defenses.

4. The defendants have not established their right to any recovery under their counterclaim and the counterclaim should be dismissed. The claim by the plaintiffs was meritorious as presented and alleged by the plaintiffs and their counsel.

5. Defendants are responsible to pay plaintiffs reasonable attorneys fees in this matter pursuant to the terms of the Trust Deed Note.

6. Plaintiffs are entitled to recover their costs in this matter and interest in this matter.

7. The Court shall entered judgment accordingly.

DATED:

BY THE COURT:

151  
Honorable James Sawaya  
District Court Judge

## Rule 52. Findings by the court.

(a) **Effect.** In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58A; in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. It will be sufficient if the findings of fact and conclusions of law are stated orally and recorded in open court following the close of the evidence or appear in an opinion or memorandum of decision filed by the court. The trial court need not enter findings of fact and conclusions of law in rulings on motions, except as provided in Rule 41(b). The court shall, however, issue a brief written statement of the ground for its decision on all motions granted under Rules 12(b), 50(a) and (b), 56, and 59 when the motion is based on more than one ground.

(b) **Amendment.** Upon motion of a party made not later than 10 days after entry of judgment the court may amend its findings or make additional findings and may amend the judgment accordingly. The motion may be made with a motion for a new trial pursuant to Rule 59. When findings of fact are made in actions tried by the court without a jury, the question of the sufficiency of the evidence to support the findings may thereafter be raised whether or not the party raising the question has made in the district court an objection to such findings or has made either a motion to amend them, a motion for judgment, or a motion for a new trial.

(c) **Waiver of findings of fact and conclusions of law.** Except in actions for divorce, findings of fact and conclusions of law may be waived by the parties to an issue of fact:

- (1) by default or by failing to appear at the trial;
- (2) by consent in writing, filed in the cause;
- (3) by oral consent in open court, entered in the minutes.

(Amended effective Jan. 1, 1987.)

**Compiler's Notes.** — This rule is similar to Rule 52, F.R.C.P.

**Cross-References.** — Masters, Rule 53.

### NOTES TO DECISIONS

#### ANALYSIS

##### Adoption.

- Abandonment of contract.
- Advisory verdict.
- Breach of contract.
- Child custody.
- Contempt.
- Credibility of witnesses.
- Denial of motion.
- Divorce decree modifications.
- Easement.
- Evidentiary disputes.
- Juvenile action.
- Material issues.
- Harmless error.
- Submission by prevailing party.
- Court's discretion.
- Water dispute.
- Findings of state engineer.

##### Amendment.

- Motion.
- Conformance with original findings.
- New trial.
- Notice of appeal.
- Time.
- Tolling of appeal period.
- When made.

- Overruling or vacation.
- Another district judge.
- Lack of notice.

##### Child custody awards.

##### Criminal cases.

##### Effect.

- Preclusion of summary judgment.

- Relation to pleadings.

##### Failure to object to findings.

##### How findings entered.

##### Judicial review.

- Standard of review.

- Conclusions of law.

- Criminal cases.

- Criminal trials.

- Findings of facts by jury.

##### Juvenile proceedings.

##### Purpose of rule.

##### Stipulations.

##### Sufficiency.

- Allegations of pleadings.

- Burden on appeal.

- Found insufficient.

- Vacation of judgment.

- Found sufficient.

- Opinion or memorandum of decision.

- Recitals of procedures.

- Technical error.

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,

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

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.  
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—Sufficiency.  
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—Unpleaded defenses.  
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—Standard of review.  
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