

1993

# Leon W. Robinson, et al. v. Kay Gneiting; Kerry Rick Hubble; and Wilderness Building Systems, Inc. : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS  
STATE OF UTAH

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DOCKET NO. 930668-CA

LEON W. ROBINSON, et al.

Plaintiffs,

vs.

KAY GNEITING; KERRY RICK  
HUBBLE; and WILDERNESS  
BUILDING SYSTEMS, INC.,

Defendants,

Case No. 930668-CA  
~~930668-CA~~

Priority No. 15

KAY GNEITING, et al.

Third Party Plaintiffs,

vs.

DENNIS VANCE,

Third Party Defendant.

REPLY BRIEF OF APPELLANTS - KERRY RICK HUBBLE  
AND WILDERNESS BUILDING SYSTEMS, INC., a Utah corporation

APPEAL FROM A JUDGMENT IN THE THIRD JUDICIAL  
DISTRICT COURT FOR SALT LAKE COUNTY, STATE OF UTAH  
THE HONORABLE HOMER F. WILKINSON, PRESIDING

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**FILED**  
Utah Court of Appeals

APR 12 1994

**IN THE UTAH COURT OF APPEALS**

**STATE OF UTAH**

LEON W. ROBINSON, et al.

**Plaintiffs,**

**vs.**

**KAY GNEITING; KERRY RICK  
HUBBLE; and WILDERNESS  
BUILDING SYSTEMS, INC.,**

**Defendants,**

**Case No. 930304-CA**

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## DETERMINATIVE STATUTES

### RULE 56(c) UTAH RULES OF CIVIL PROCEDURE

. . . the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law . . .

### 11 U.S.C. § 524(a)(1)

#### Effect of discharge.

(a) A discharge in a case under this title -

(1) voids any judgment at any time obtained, to the extent that such judgment is a determination of the personal liability of the debtor with respect to any debt discharged under section 727, 944, 1141, 1228 or 1328 of this title, whether or not discharge of such debt is waived.

### BANKRUPTCY RULE 4007

#### DETERMINATION OF DISCHARGEABILITY OF A DEBT

(a) Persons Entitled to File Complaint. A debtor or any creditor may file a complaint to obtain a determination of the dischargeability of any debt.

(b) Time for Commencing Proceeding Other than Under § 523(c) of the Code. A complaint other than under § 523(c) may be filed at any time. A case may be reopened without payment of an additional filing fee for the purpose of filing a complaint to obtain a determination under this rule.

. . . .

## ARGUMENT

### I.

#### **THERE ARE GENUINE ISSUES OF MATERIAL FACT IN DISPUTE WHICH PRECLUDE SUMMARY JUDGMENT**

In their brief, the Robinsons cite this court's recent decision in the case of Turner v. General Adjustment Bureau, 832 P.2d 62 (Utah App. 1992). In the Turner, supra, case, this court reiterated the mandate that for fraud to exist, the Plaintiff must prove, and the trial court must find by "clear and convincing" evidence each of the following elements:

- (1) a representation was made;
- (2) concerning a presently existing material fact;
- (3) which was false;
- (4) which the representor either
  - (a) knew to be false; or
  - (b) made recklessly, knowing that there was insufficient knowledge upon which to base such a representation;
- (5) for the purpose of inducing the other party to act upon it;
- (6) that the other party acting reasonably and in ignorance of its falsity;
- (7) did in fact rely upon it;
- (8) and was thereby induced to act;
- (9) to that party's injury and damage.

Id. 832 P.2d at 66; *also citing* Mikkelson v. Quail Valley Realty, 641 P.2d 124, 126 (Utah 1982); Pace v. Parrish, 122 Utah 141, 144-45, 247 P.2d 273, 274-75 (1952).

The only factual evidence presented to the trial court by the Robinsons in support of their Motion for Partial Summary Judgment was the December 2, 1992 deposition of Kevin K. Gneiting. No other testimony, no affidavits, and no other evidence was presented to the court to establish the requisite elements of a claim sounding in fraud.

Accordingly, the testimony in Mr. Gneiting's deposition must be established by "clear and convincing" evidence each of the elements of fraud set forth in Turner v. General Adjustment Bureau, supra, and its progeny.

In their brief, the Robinsons argue that the "representation" made by appellants was in essence the allegations contained in the Foreclosure Complaint prepared by attorney James T. Dunn dated January 27, 1992 (Appellee's Brief, p.10). Those allegations, among other things, sought reformation of a real estate mortgage on Lot 63 of the Summit Park Plat "J" property.

The Foreclosure Complaint shows Kay Gneiting as the sole plaintiff. Yet, when questioned about the Complaint in his deposition, Gneiting testified as follows:

On page 22, line 4 through 25:

Q. Did you hire Mr. Dunn to file this lawsuit for you?

A. Mr. who?

Q. Mr. Dunn, the attorney that represented you in this lawsuit?

A. The only thing I remember was Dennis was handling the procedure, and he had come back three or four times trying to get me to give Mr. Dunn a call. He either came or phoned by telephone, and I finally said okay. They said, Well, this is it. This is all you need to do. Give them a phone call and say go ahead for it so that's what I did. Whatever it is, go ahead. Whatever I'm supposed to do, that's what I told Mr. Dunn.

Q. Was it all arranged by Dennis?

A. Yes, it was.

Q. Did Rick Hubble have anything to do with it?

A. No, he didn't.

Q. Not a thing?

A. Not to my knowledge.

Page 27, line 20 through Page 28, line 2:

Q. Did you ever tell your attorney that Rick Hubble owed you \$37,000?

A. Did I ever do what?

Q. Did you ever tell Mr. Dunn that Rick Hubble owed you \$37,000?

A. I never talked to Mr. Dunn only on that phone call that said whatever it is, go ahead. That's the only time I ever talked to him.



There was no evidence presented to the trial court, which by a "clear and convincing" standard, shows Kerry Rick Hubble or Wilderness Building Systems, Inc. knowingly or recklessly made any false representation to the Robinsons. At best, the evidence shows that the Third Party Defendant, Dennis Vance, is the individual who contacted Mr. Dunn to file the Foreclosure Complaint, arguably without any knowledge whatsoever on the part of Gneiting, Hubble or Wilderness Building Systems, Inc. (Gneiting deposition p.22, lines 9-23; p.24 lines 16-21; p.27, lines 23-25, p.28, lines 1-2; p.30, lines 6-16.)

The Gneiting deposition also established that several months prior to the Foreclosure action, Gneiting and Hubble entered into some form of an agreement whereby Gneiting sought to purchase Lot 63 from Hubble. Indeed, Gneiting also testified that he commenced doing work on the property and making improvements thereon. Subsequently, Gneiting ran into financial problems and was forced to abandon his dream to finish a cabin or homesite on the Lot 63 property. Nonetheless, in an effort to compensate Gneiting for his contribution in labor and materials to the property, Gneiting and Hubble, at least verbally agreed that Hubble would repay Gneiting for the contribution he had made for value to the property both via his direct expenditure of labor and materials to the property, but also via his labor performed for Wilderness in lieu of the payments that came due during the period of the initial purchase agreement. Gneiting testified in his deposition at Page 14, lines 15 through 18 the following:

- Q. And you were supposed to pay Mr. Hubble \$370 commencing November 15, 1987, and quarterly thereafter?
- A. That's on here but what I did I exchanged it for labor.

On page 15, lines 24 and 25; Page 16, lines 1 through 10:

- Q. Let me see if I understand correctly. Originally under this mortgage you agreed to pay \$370 to Mr. Hubble quarterly in payment for the property, is that right?

- A. Yes, we did.  
Q. And later you couldn't make those payments, is that right?  
A. Right.  
Q. And so you and Mr. Hubble agreed orally that rather than pay that \$370, you would somehow work for him or put labor or something into--  
A. Yes.

Page 21, lines 17 through 24:

- Q. You've testified that you couldn't afford to pay that money so you did work for Mr. Hubble or Wilderness Building to satisfy that \$370 per quarter. Is that correct?  
A. Yes.  
Q. Okay. You made payments by doing work. That's correct?  
A. Correct.

No one ever intended that when Gneiting abandoned his desire to purchase Lot 63, that he would forfeit his expenditure of labor and materials toward that end. There was no evidence before the trial court that Hubble or Wilderness Building Systems had any knowledge of representations made by Gneiting or his attorney to the Robinsons. In fact, no evidence was even presented from the Robinson's perspective concerning what representations, if any, were made to them; who if anyone made such representation; and if in fact they relied on any such representation. We do know that the Robinsons entered into a Stipulation and Settlement Agreement in the foreclosure action, but no basis is cited in the Stipulation for that settlement. It is also interesting to note that the Stipulation at paragraph 4 specifically provides that:

4. It is understood and agreed that this payment of \$2,500.00 does not extinguish any obligation that Kerry Rick Hubble may owe to the Defendants Robinson, that it is a payment only by the Plaintiff (Gneiting) to clear title to the particular piece of property.

Despite the fact that the Robinsons entered into the Stipulation and Settlement Agreement, the obligation due pursuant to the judgment was not extinguished. The Robinsons still had every right to pursue collection of the judgment against all defendants. Without any

evidence whatsoever to the contrary, it can also be argued that because there was indeed an offer to purchase Lot 63, the Robinsons, desiring to receive an immediate \$2,500.00, agreed to release the lien they obtained by virtue of the judgment against Lot 63. Any other conclusion concerning the circumstances surrounding that settlement is simply not supported by the evidence.

Plaintiff's never bothered to submit their own affidavit or testimony concerning the motion for summary judgment, nor did they ever attempt to depose Mr. Hubble or any other representative of Wilderness Building Systems, Inc. In moving for summary judgment on a claim for fraud, actual fraud is never presumed, but instead must be established by clear and convincing evidence. Territorial Savings & Loan Ass'n. v. Baird, 781 P.2d 452, 462 (Utah App. 1989); Jensen v. Eames, 519 P.2d 236 (Utah 1974); In re Grooms, 13 B.R. 376, 379-83 (D.Utah 1981). Fraudulent intent is ordinarily considered a question of fact. Territorial Savings & Loan Ass'n. v. Baird, 781 P.2d 452, 462 (Utah App. 1989); Gabaig v. Gabaig, 717 P.2d 835, 838 (1986).

It was wholly improper for the trial court to grant Plaintiff's Motion for Partial Summary Judgment against Defendants on Plaintiff's claims. At a minimum, the respective intent of each of the Defendants as it relates to the fraud claims raised in the First Cause of Action, are genuine issues of material fact which cannot be resolved short of a presentation of all of the facts at trial. Because the Robinsons failed to establish by undisputed factual evidence each and every prerequisite element necessary to succeed on their claim for fraud, the trial court erred in granting their Motion for Partial Summary Judgment. The circumstances of the lawsuit for reformation of the parties' agreement presented numerous factual questions. Among such

questions of fact evolve issues concerning Third-Party Defendant Dennis Vance's relationship to Wilderness Building Systems, Inc., Kerry Hubble and Kay Gneiting. In addition, questions of fact related to the various actors' respective intentions, activity and interaction remain unanswered and in dispute. Appellants contend that without an opportunity to present those issues to the finder of fact at a trial on the merits, summary disposition was inappropriate and constitutes reversible error.

## **II.**

### **THE TRIAL ERRED IN GRANTING SUMMARY JUDGMENT AGAINST DEFENDANT HUBBLE FOR THE ROBINSON DEBT WHICH WAS PREVIOUSLY DISCHARGED IN BANKRUPTCY**

Appellees have argued in their brief that their judgment lien against Lot 63 "rode through" the Hubble bankruptcy. Of course, that argument assumes that the Stipulation and Settlement Agreement signed by the Robinsons was of no effect.

Regardless of whether or not the judgment lien "rode through" the Hubble bankruptcy, the judgment obtained by the Robinsons against Defendant Hubble was properly discharged in bankruptcy. It is undisputed that on March 25, 1988, Kerry Rick Hubble filed for protection under the laws of the United States Bankruptcy Code, United States Bankruptcy Court for the District of Utah, Case No. 88C-1741. Mr. Hubble properly listed the Robinson judgment in his bankruptcy statements and schedules in the amount of \$27,280.56, and the Robinsons were given notice of Hubble's bankruptcy. (*See* U.S. Bankruptcy Court's docket sheet, bankruptcy schedule

identifying the Robinson debt, and Notice of Filing Bankruptcy which was filed with the Third District Court, each of which are attached to Appellants Brief as Exhibit "E".)

The language of *11 U.S.C. § 524(a)(1)* voids the Robinsons' 1987 judgment to the extent that Kerry Rick Hubble has any personal liability therefor. The relevant portions of *11 U.S.C. § 524(a)(1)* provide:

**Effect of discharge.**

(a) A discharge in a case under this title -

(1) voids any judgment at any time obtained, to the extent that such judgment is a determination of the personal liability of the debtor with respect to any debt discharged under section 727, 944, 1141, 1228 or 1328 of this title, whether or not discharge of such debt is waived. Id.

The Robinsons' 1987 judgment was fully dischargeable as to Hubble's personal liability under the bankruptcy statute. It may be true that any judgment lien which attached to the real estate itself may have survived the bankruptcy, however, the property itself is not the subject of the Robinsons' lawsuit, nor do any of the Defendants in the case have any interest in said property.

The claim asserted by the Robinsons against Hubble is based upon the judgment they obtained against Hubble in 1987, which was discharged in bankruptcy. In order for the Robinsons to properly pursue their judgment against Hubble and seek to have the dischargeability of said debt denied, it would have been necessary for them to file a complaint objecting to discharge in the bankruptcy proceeding itself, which was never done. The determination by the United States Bankruptcy Court is binding upon the Robinsons as a determination of their rights and no appeal or any other action has been taken in the Bankruptcy Court by the Robinsons who are bound by that Court's determination of dischargeability.

The Robinsons' complaint for fraud against Defendant Hubble was not properly before the trial court. Sections 523 and 727 of the United States Bankruptcy Code require that a creditor who is owed a debt which he claims the debtor's personal liability is exempted from discharge must initiate proceedings in the bankruptcy court for an exception to discharge. Bankruptcy Rule 4007 sets forth the procedure for determination of the dischargeability of a debt. Bankruptcy Rule 4007(a) provides that a proceeding to determine dischargeability of a particular debt be initiated by a complaint to be filed with the [bankruptcy] court. Bankruptcy Rule 4007(e) provides that the proceeding commenced by the filing of a complaint under Rule 4007 is governed by the adversary rules in Part VII. 3 *Collier on Bankruptcy*, Section 523.11 (15th ed. 1989).

The Robinsons attempt to have the trial court override the effect of the bankruptcy discharge was totally improper. Because they failed to properly commence such an adversary proceeding objecting to dischargeability, their claims against Hubble should have been dismissed.

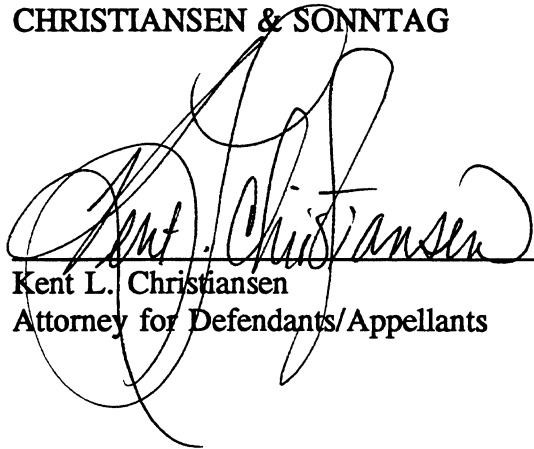
## CONCLUSION

The only evidence before the trial court in support of Plaintiff's Motion for Partial Summary Judgment was the December 2, 1992 deposition of Kay Gneiting. Clearly, Mr. Gneiting's testimony in the deposition, particularly if the facts and all evidence are construed, including reasonable inferences, in a light most favorable to Appellants, does not and cannot support such a finding. Based upon the foregoing authorities and argument, and given the existence of genuine issues of material fact which preclude the entry of summary judgment at the trial court, Appellants Wilderness Building Systems, Inc. and Kerry Rick Hubble respectfully

request that this Court reverse the decision of the lower court and remand the case thereto for trial on the merits.

Respectfully submitted this 12<sup>th</sup> day of April, 1994.

CHRISTIANSEN & SONNTAG

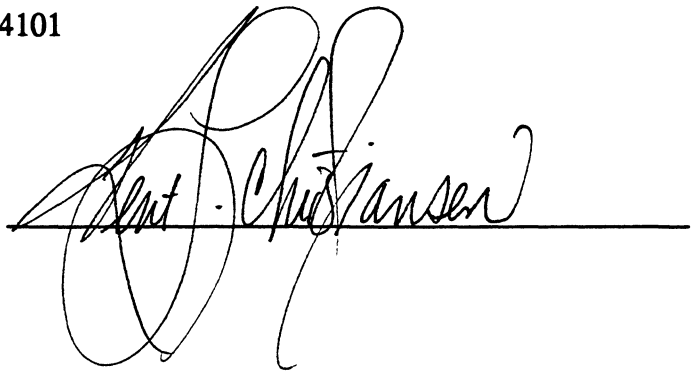


Kent L. Christiansen  
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CERTIFICATE OF SERVICE

I hereby certify that I delivered a true and correct copy of the foregoing Reply Brief of Appellants by depositing a copy thereof in the U.S. Mails, postage prepaid, this 12<sup>th</sup> day of April, 1994, and properly addressed as follows:

Scott B. Mitchell  
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A handwritten signature in cursive script, appearing to read "Scott B. Mitchell", is written over a horizontal line. The signature is fluid and stylized, with large loops and a long, sweeping tail.