

1993

Leon W. Robinson and Arlene Robinson v. Kay
Gneiting; Kerry Rick Hubble; and Wilderness
Building Systems, Inc., a Utah corporation : Brief of
Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

50

DOCKET NO. 930668-CA

* * * *

LEON W. ROBINSON and ARLENE
ROBINSON,

Plaintiffs/Appellees,

vs.

KAY GNEITING; KERRY RICK
HUBBLE; and WILDERNESS BUILD-
ING SYSTEMS, INC., a Utah
corporation,

Defendants/Appellants,

APPELLEES' BRIEF

Appeal No. ~~930668-CA~~

Priority 15

* * * *

KAY GNEITING, et al.,

Third-Party Plaintiffs,

vs.

DENNIS VANCE,

Third-Party Defendant.

* * * *

DEFENDANTS KERRY RICK HUBBLE'S AND WILDERNESS BUILDING SYSTEMS,
INC.'S APPEAL FROM A FINAL JUDGMENT OF THE THIRD JUDICIAL
DISTRICT COURT, THE HONORABLE HOMER F. WILKINSON PRESIDING

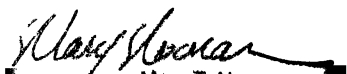
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FILED
Utah Court of Appeals

MAR 11 1994


Mary T. Noonan

IN THE UTAH COURT OF APPEALS

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LEON W. ROBINSON and ARLENE
ROBINSON,

Plaintiffs/Appellees,

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* APPELLEES' BRIEF
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KAY GNEITING, et al.,

Third-Party Plaintiffs,

vs.

DENNIS VANCE,

Third-Party Defendant.

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DEFENDANTS KERRY RICK HUBBLE'S AND WILDERNESS BUILDING SYSTEMS,
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LIST OF ALL PARTIES

Plaintiffs

Leon W. Robinson
Arlene Robinson

Defendants/Third-Party Plaintiffs

Kay Gneiting
Kerry Rick Hubble
Wilderness Building Systems, Inc.

Third-Party Defendant

Dennis Vance

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STATEMENT OF JURISDICTION

The Utah Court of Appeals has jurisdiction to hear and determine this appeal pursuant to Utah Code Annotated Section 78-2a-3(2)(j).

STATEMENT OF ISSUE AND STANDARD OF REVIEW

The sole issue presented for review is whether the trial court properly granted summary judgment with respect to the First Cause of Action asserted in Plaintiffs' Complaint. On appeal from the entry of summary judgment, the only determinations required are "whether the trial court erred in applying the governing law and whether the trial court correctly held that there were no disputed issues of material fact." Ferree v. State, 784 P.2d 149, 151 (Utah 1989).

DETERMINATIVE STATUTES AND RULES

Rule 56, Utah Rules of Civil Procedure

Rule 52(a), Utah Rules of Civil Procedure

STATEMENT OF THE CASE

A. Nature of Case, Course of Proceedings, and Disposition

This is an action for damages in which Plaintiffs Leon W. Robinson and Arlene Robinson (the "Robinsons") have asserted causes of action alleging fraud, conversion and fraudulent conveyance. The Complaint commencing this action was filed on May 15, 1992. Defendants filed their Answer and Third Party Complaint on May 29, 1992.

On February 12, 1993, the Robinsons filed a Motion for Partial Summary Judgment and supporting memorandum of points and authorities. Defendants filed their Memorandum of Points and

Authorities in Opposition to Plaintiffs' Motion for Partial Summary Judgment on February 24, 1993, and the Robinsons filed their Reply in Support of Motion for Summary Judgment on March 8, 1993.

A hearing on the Motion for Partial Summary Judgment was held before the trial court on April 16, 1993. On April 29, 1993, the trial court entered its Order Granting Motion for Partial Summary Judgment. On that same date, the trial court entered Judgment against Defendants Kerry Rick Hubble (hereinafter "Hubble") and Wilderness Building Systems, Inc. (hereinafter "WBS"), jointly and severally, in the principal amount of \$24,780.56.

Defendants Hubble and WBS timely filed their Notice of Appeal on May 5, 1993.

B. Statement of Facts

1. Approximately four years prior to the commencement of the case at bar, on February 22, 1988, an Amended Judgment was entered in favor of the Robinsons and against Hubble in Third Judicial District Court in and for Salt Lake County, State of Utah, case number C-87-3023. The total principal amount of the Judgment was \$27,280.56. (R. 164).

2. At the time of the entry of the Amended Judgment, Hubble was the record owner of certain real property located in Summit County, Utah, more particularly described as: Lot 63, Summit Park Plat "J" (Lot 63) (hereinafter referred to as the "Summit County Property"). (R. 003, paragraph 8; and R. 014, paragraph 9).

3. On March 4, 1988, the Robinsons properly filed and recorded a transcript of the Amended Judgment with the Clerk of the Third Judicial District Court in and for Summit County, State of Utah. (R. 105). Pursuant to Utah Code Annotated § 78-22-1, the Amended Judgment became a lien on the Summit County Property.

4. On or about December 24, 1991, Hubble entered into an Earnest Money Sales Agreement (the "First Earnest Money Agreement") with one Glen Hanson pursuant to which Hubble agreed to sell the Summit County Property to Hanson for the purchase price of \$60,000.00. (R. 106).

5. Sometime between Hubble's execution of the First Earnest Money Agreement on December 24, 1991, and January 27, 1992, Hubble discovered the Robinsons' judgment lien. (R. 109, lines 2-23).

6. On or about January 27, 1992, a Complaint purporting to be filed on behalf of Defendant Kay Gneiting ("Gneiting"), as plaintiff, was filed in the Third Judicial District Court in and for Summit County, State of Utah, civil no. 92-11322 (hereinafter referred to as the "Foreclosure Action"), in which the named Defendants were Hubble, the Robinsons, and a person claiming an equitable lien on the Summit County Property by the name of Jim Quinn. (R. 120). Gneiting was an employee of WBS. Hubble is the General Manager and a shareholder of WBS. (R. 118, lines 24-25; and R. 013, paragraph 4).

7. Attached as an Exhibit to the Complaint in the Foreclosure Action was a "Mortgage" which had been filed of

record in the Summit County Recorder's Office on November 13, 1987, and in which Gneiting, as Mortgagor, purports to grant Hubble, as Mortgagee, a mortgage on the Summit County Property in the amount of \$37,000.00 payable as follows:

Quarterly interest payments in the amount of \$370.00 commencing November 15, 1987 ... The total unpaid principal balance together with accrued interest will be due in full on or before August 15, 1989.

(R. 126).

8. In the First Cause of Action in the Foreclosure Action, Gneiting asserted a claim for "Reformation", alleging the existence of the above referenced Mortgage, and further alleging that:

Neither [Gneiting] nor [Hubble] were represented by counsel or a title company and the mortgage is prepared incorrectly. Kerry R. Hubble should show as the mortgagor and **the person obligated to make payment** and Kay Gneiting should show as the mortgagee **to whom money is owed**.

(R. 122, paragraph 11)(emphasis added).

9. In the Second Cause of Action in the Foreclosure Action, Gneiting asserted a claim for "Mortgage Foreclosure", alleging the existence of the Mortgage, that Gneiting should be the Mortgagee and Hubble the Mortgagor, and that:

The Defendant Hubble has failed to make payment of the \$37,000.00, together with interest at the pre-judgment rate of 10% per annum, and there is now due and owing ... the sum of \$53,421.92.

(R. 122, paragraph 14).

10. In the Third Cause of Action in the Foreclosure Action, Gneiting asserted a claim for "Quiet Title", alleging that:

All of the right title and interest of [Gneiting] to the [Summit County Property] is superior to the claim of all other parties Defendant [including the Robinsons]...

(R. 123, paragraph 21).

11. ***In his deposition taken in the case at bar on December 2, 1992, Gneiting testified that all of the material allegations asserted in the Foreclosure Action Complaint were false.*** Specifically, Gneiting testified that:

a. the Mortgage was prepared to memorialize an agreement between Gneiting and Hubble whereby Gneiting (*not* Hubble) was going to purchase the property for the sum of \$37,000.00. (R. 110, lines 15-19).

b. However, Gneiting was never able to make the payments called for under the Mortgage and, therefore, Gneiting had lost any interest he might have had in the Summit County Property prior to 1990 when he filed for relief in bankruptcy court and failed to list the Summit County Property on his bankruptcy schedules. (R. 117, lines 19-25; R. 115, line 17 through R. 116, line 8).

c. Hubble never owed Gneiting \$37,000.00 as alleged in the Complaint. Further, Gneiting never told the attorney who filed the Foreclosure Action that Hubble owed him any money. (R. 111, lines 9-10; R. 112, line 23 through R. 113, line 2). The only money that Hubble ever owed Gneiting in connection with the Summit County Property was the \$2,000.00 Gneiting was paid by

Hubble and/or WBS to go along with Hubble's scheme to defraud the Robinsons. (R. 111, lines 12-25; R. 113, lines 15-18; R. 114, lines 17-21; R. 118, line 2 through R. 119, line 25).

12. After filing the Foreclosure Action, Gneiting's counsel contacted the Robinsons, falsely represented to them that Gneiting's interest in the property was superior to theirs, and offered to pay the Robinsons \$2,500.00 to release their judgment lien against the Summit County Property. In reliance upon Gneiting's counsel's misrepresentation, the Robinsons released their judgment lien. (R. 127-133).

13. Notwithstanding the fact that Gneiting had no interest in the Summit County Property and the fact that Hubble never owed Gneiting any money with respect to the property, Gneiting obtained the District Court's Judgment And Order reforming the subject Mortgage "to substitute the Plaintiff, Kay Gneiting, as the mortgagee and Kerry R. Hubble as the mortgagor." (R. 135-136).

14. Gneiting also filed a second Stipulation And Settlement Agreement in the Foreclosure Action in which Hubble professed to stipulate that he would not contest the Foreclosure Action "and that a judgment and order of foreclosure may be entered against [Hubble] reforming the mortgage ... and allowing [Gneiting] to foreclose the mortgage ..." (R. 138-139).

15. After fraudulently obtaining the District Court's Judgment And Order reforming the Mortgage and quieting title in Gneiting, a second Earnest Money Sales Agreement was prepared in

connection with the Summit County Property, this time identifying Gneiting as the owner/seller, but containing the same material terms as those contained in the First Earnest Money Sales Agreement which had identified Hubble as the owner/seller. (R. 141).

16. On or about March 3, 1992, Gneiting's sale of the Summit County Property closed and a check (No. 3689) in the amount of \$47,139.60 drawn on Park City Title Company's trust account was issued to Gneiting. (R. 143). Gneiting immediately purchased a cashier's check made payable to WBS and handed the check over to Hubble. (R. 114, lines 17-21). In his deposition, Gneiting explained as follows:

Q. What did you do with the cashier's check?

A. Gave it to Wilderness Building Systems.

Q. Why?

A. Because it wasn't mine.

...

Q. So this \$47,000 was never yours?

A. No.

(R. 114, line 17 through R. 115, line 5). Gneiting further testified that the reason he turned the sales proceeds over to WBS was that Hubble owned the property:

Q. Is that correct, to your knowledge, that Mr. Hubble owned the property?

A. Yes...

Q. How did you know that?

A. Well, it was just why I turned the check over to them.
(R. 118, lines 13-21).

SUMMARY OF ARGUMENTS

A. There is no genuine dispute with respect to the facts necessary to establish the Robinsons' fraud claim.

In support of their Motion for Partial Summary Judgment, the Robinsons relied on the above referenced admissions contained in Gneiting's deposition testimony and upon certain documentary evidence the truth and accuracy of which were admitted by Defendants. The evidence presented clearly established the elements of the Robinsons' fraud claim.

Defendants, however, failed to file affidavits or other materials in opposition to the Robinsons' motion. Instead, they relied upon the allegations contained in their pleadings and upon select portions of Gneiting's deposition testimony.

As a matter of law, the allegations set forth in Defendants' pleadings were not sufficient to raise a factual issue, and the excerpts from Gneiting's deposition testimony upon which Defendants rely do not raise any material issues of fact.

B. The trial court correctly applied the governing law.

In order to prevail on their fraud claim, the Robinsons were required to establish each of the nine elements set forth in Turner v. General Adjustment Bureau, 832 P.2d 62 (Utah App. 1992). The undisputed facts of this case clearly and convincingly establish each of these nine elements.

C. The Robinsons' judgment lien rode through Hubble's bankruptcy proceedings unaffected.

Although Hubble's personal liability to the Robinsons was extinguished by his bankruptcy filing, the Robinsons' judgment lien rode through the bankruptcy proceedings unaffected. Accordingly, Hubble's bankruptcy filing is irrelevant with respect to the question of the propriety of the entry of summary judgment in the case at bar.

D. Defendants' "accord and satisfaction" and "estoppel" defenses do not create issues of fact precluding summary judgment.

The facts which form the basis for Defendants' "accord and satisfaction" and "estoppel" defenses are undisputed. The application of those defenses to the undisputed facts of this case was a matter of law. The trial court properly concluded that accord and satisfaction and estoppel were not valid defenses with respect to the Robinsons' fraud claim.

E. The trial court complied with Rule 52(a).

The Robinsons' motion for partial summary judgment was based on only one ground: their fraud claim. Accordingly, pursuant to Rule 52(a), U.R.C.P., the trial court was not required to enter findings of fact, conclusions of law, or a brief written statement.

ARGUMENT

A. There is no genuine dispute with respect to the facts necessary to establish the Robinsons' fraud claim.

Defendants attempt to create an issue of fact by asserting that there is a question with respect to the ownership of the

Summit County Property at the time of the filing of the Foreclosure Action. Specifically, Defendants rely on paragraph 9 of their Answer to the Robinsons' Complaint in which they admit that Hubble was the record owner of the property, but allege that "said lot was sold to Kevin Kay Gneiting in approximately August of 1987." (R. 014).

Defendants' reliance is misplaced. The allegations contained in their pleadings may not be relied upon by Defendants to create an issue of fact. Hall v. Fitzgerald, 671 P.2d 224 (Utah 1983).

Defendants also rely on Gneiting's deposition testimony to the effect that Gneiting and Hubble had entered into an agreement in or around 1987 whereby Gneiting was to purchase the Summit County Property from Hubble, first by making quarterly installment payments of \$370.00 and later, after Gneiting was unable to afford the payments, by providing labor to Hubble.

Defendants' bad faith is transparent. In the Complaint filed in the Foreclosure Action, Gneiting alleged that "Kerry R. Hubble should show as the mortgagor and the person obligated to make payment and Kay Gneiting should show as the mortgagee to whom money is owed." (R. 122, paragraph 11). In other words, in the Foreclosure Action Gneiting alleged that it was Hubble who bought the property from him, not he who bought the property from Hubble. In order to establish his right to foreclosure, Gneiting further alleged that:

"The Defendant Hubble has failed to make payment of the \$37,000.00 [which he allegedly owed to Gneiting] ...

and there is now due and owing ... the sum of \$53,421.92.

(R. 122, paragraph 14).

In his deposition, however, Gneiting admitted that the allegations of the Complaint in the Foreclosure Action were lies; that Hubble never owed him any money and that he had lost any interest which he might have had in the property long before the Foreclosure Action was filed. (R. 111, lines 9-10; R. 117, lines 119-25). Gneiting also testified that the reason why he gave Hubble the \$47,139.60 net proceeds from the sale of the property was because Hubble owned the property:

Q. What did you do with the [\$47,000] cashier's check?

A. Gave it to Wilderness Building Systems.

Q. Why?

A. Because it wasn't mine.

...

Q. So this \$47,000 was never yours?

A. No.

...

Q. Is that correct to your knowledge, that Mr. Hubble owned the property?

A. Yes...

Q. How did you know that?

A. Well, it was just why I turned the check over to them.

(R. 114, line 17 through R. 115, line 5; and R. 118, lines 13-21).

For Defendants to argue now that Gneiting's testimony supports their contention that there is an issue of fact with respect to the ownership of the property is preposterous and merely serves to demonstrate Defendants' repeated willingness to misrepresent the ownership of the property to suit their particular purpose at the time. Gneiting has admitted (and neither of the other Defendants has disputed) that he was unable to follow through on his agreement to purchase the property and that he had lost any interest he might have had in the property long before the filing of the Foreclosure Action.

B. The trial court correctly applied the governing law.

As demonstrated above, in December of 1991, Hubble was the record owner of the Summit County Property. When Hubble attempted to sell the property in December of 1991, however, he discovered that the Robinsons' judgment lien encumbered the property to the tune of approximately \$40,000.00. In order to avoid having to satisfy the Robinsons' judgment lien out of the sales proceeds, Hubble had his employee, Gneiting, file the Foreclosure Action fraudulently misrepresenting that Gneiting, not Hubble, was the mortgagee under a recorded Mortgage instrument; further fraudulently misrepresenting that Hubble owed Gneiting in excess of \$53,000.00 under the Mortgage; and further fraudulently misrepresenting that Hubble had failed and refused to pay Gneiting the \$53,000.00 plus owed to Gneiting.

Based upon these admittedly false representations, Gneiting obtained the District Court's Judgment And Order reforming the

Mortgage to allow him to foreclose on the property, title to which was also quieted in Gneiting's name. Gneiting then sold the property for \$60,000.00, receiving a check from Park City Title Company's trust account for the net sales proceeds in the sum of \$47,139.60, ***with which he immediately purchased a cashier's check payable to WBS, which he then immediately turned over to Hubble.*** Hubble paid Gneiting \$2,000.00 for his participation in Hubble's scheme to defraud the Robinsons, or, as Gneiting described the plan:

"I didn't sell [the Summit County Property]. What it was was the paperwork was made backwards. The [Summit County Property] was in my name to where the check was made out to me when it was sold."

(R. 113, lines 16-18).

The admitted and obvious purpose of Defendants' scheme was to avoid having to satisfy the Robinsons' judgment lien out of the proceeds from the sale of the Summit County Property by fraudulently misrepresenting Gneiting's interest in the property.

Thus, the undisputed facts before the trial court clearly and convincingly established each of the nine elements of fraud set forth in Turner v. General Adjustment Bureau, 832 P.2d 62, 66 (Utah App. 1992): (1) Defendants represented that Gneiting was the owner of the Summit County Property; (2) Defendants' representation concerned a then presently existing material fact; (3) Defendants' representation was false; (4) Defendants knew their representation was false; (5) Defendants' misrepresentation was made for the purpose of inducing the Robinsons to execute the Stipulation and Settlement Agreement (R. 127) and Partial

Releases of Judgment Liens (R. 130-132); (6) the Robinsons, acting reasonably and in ignorance of its falsity; (7) did in fact rely upon Defendants' misrepresentation; (8) in executing the Stipulation and Settlement Agreement and the Partial Releases of Liens; (9) to their injury and damage.

Accordingly, the trial court properly applied the law in granting the Robinsons' summary judgment with respect to their fraud claim.

C. The Robinsons' judgment lien rode through Hubble's bankruptcy proceedings unaffected.

Before the trial court, Defendants argued that the Robinsons' judgment lien had been extinguished by Hubble's bankruptcy. (R. 155). Defendants have apparently abandoned that argument and now contend that "[i]n 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."¹ Defendants' contention is without merit.

It is well recognized that "liens pass through bankruptcy unaffected." Dewsnup v. Timm, 112 S.Ct. 773, 778 (1992); see also Farrey v. Sanderfoot, 111 S.Ct. 1825, 1829 (1991)("Ordinarily, liens and other secured interests survive bankruptcy"); and Johnson v. Home, 111 S.Ct. 2150, 2154 (1991)("... a bankruptcy discharge extinguishes only one mode of enforcing a claim --

¹Brief of Appellants - Kerry Rick Hubble and Wilderness Building Systems, Inc., at pp. 22-23.

namely, an action against the debtor in personam -- while leaving intact another -- namely, an action against the debtor in rem").

It was, therefore, not necessary for the Robinsons to file a non-dischargeability action in the bankruptcy court in order to preserve their judgment lien.

D. Defendants' "accord and satisfaction" and "estoppel" defenses do not create issues of fact precluding summary judgment.

Defendants' contention that their "accord and satisfaction" and "estoppel" defenses created an issue of fact precluding summary judgment is meritless. The facts upon which Defendants base their defenses are undisputed. The application of the doctrines of estoppel and accord and satisfaction to the undisputed facts is a matter of law. The trial court properly rejected Defendants' argument that estoppel and accord and satisfaction constitute valid defenses to the Robinsons' fraud claim.

E. The trial court complied with Rule 52(a).

Although not explicitly stated in their moving papers, the Robinsons' motion for partial summary judgment was based upon only one ground: the fraud claim set forth in the First Cause of Action alleged in the Complaint. (R. 102). No argument was made and no authority was cited which would have supported the entry of judgment on the Robinsons' conversion and fraudulent conveyance claims. The trial court understood that the Robinsons were seeking summary judgment only in connection with their fraud claim. (R. 342, lines 1 through 19). Likewise, Defendants

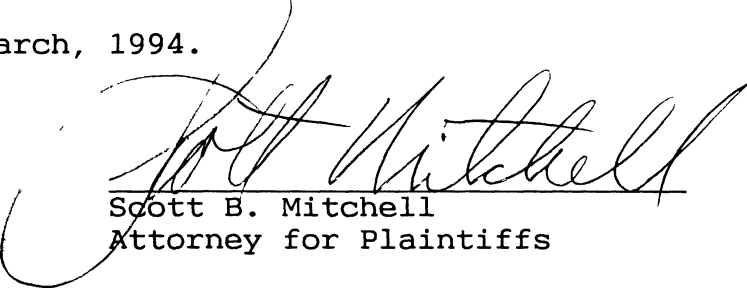
understood that the Robinsons were seeking summary judgment only in connection with their fraud claim. (R. 330, lines 20-24).

Accordingly, because the Robinsons' motion was based upon only one ground, the trial court was not required to enter findings of fact, conclusions of law, or a brief written statement of the grounds for its decision. Rule 52(a), Utah R. Civ. P.

CONCLUSION

Based upon the foregoing, the Robinsons respectfully request that the Judgment entered by the trial court be affirmed.

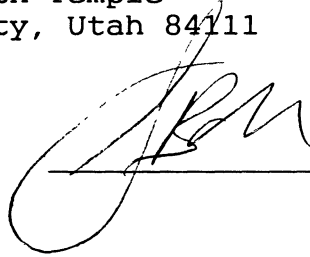
DATED this 5th day of March, 1994.


Scott B. Mitchell
Attorney for Plaintiffs

MAILING CERTIFICATE

Undersigned certifies that a copy of the foregoing was mailed this 10th day of March, 1994, via first class U.S. Mail, postage prepaid, to the following:

Kent L. Christiansen, Esq.
300 IBM Plaza
420 East South Temple
Salt Lake City, Utah 84111



Written instructions.**—Failure to tender.****—Waiver.**

Where plaintiff had failed to tender a written instruction on burden of proof he could not claim error in the lack of such instruction. *Fuller v. Zinik Sporting Goods Co.*, 538 P.2d 1036 (Utah 1975).

Cited in *Wellman v. Noble*, 12 Utah 2d 350, 366 P.2d 701 (1961); *Hill v. Cloward*, 14 Utah 2d 55, 377 P.2d 186 (1962); *Ortega v. Thomas*, 14 Utah 2d 296, 383 P.2d 406 (1963); *Meier v. Christensen*, 15 Utah 2d 182, 389 P.2d 734 (1964); *Memmott v. U.S. Fuel Co.*, 22 Utah 2d 356, 453 P.2d 155 (1969); *Telford v. Newell J. Olsen & Sons Constr. Co.*, 25 Utah 2d 270, 480 P.2d 462 (1971); *Flynn v. W.P. Harlin Constr.*

Co., 29 Utah 2d 327, 509 P.2d 356 (1973); *McGinn v. Utah Power & Light Co.*, 529 P.2d 423 (Utah 1974); *Henderson v. Meyer*, 533 P.2d 290 (Utah 1975); *Lamkin v. Lynch*, 600 P.2d 530 (Utah 1979); *State v. Hall*, 671 P.2d 201 (Utah 1983); *Highland Constr. Co. v. Union Pac. R.R.*, 683 P.2d 1042 (Utah 1984); *Gill v. Timm*, 720 P.2d 1352 (Utah 1986); *Penrod v. Carter*, 737 P.2d 199 (Utah 1987); *King v. Fereday*, 739 P.2d 618 (Utah 1987); *State v. Cox*, 751 P.2d 1152 (Utah Ct. App. 1988); *Ramon ex rel. Ramon v. Farf*, 770 P.2d 131 (Utah 1989); *Anton v. Thomas*, 806 P.2d 744 (Utah Ct. App. 1991); *Reeves v. Gentile*, 813 P.2d 111 (Utah 1991); *Hodges v. Gibson Prods. Co.*, 811 P.2d 151 (Utah 1991); *Home Sav. & Loan v. Aetna Cas. & Sur. Co.*, 817 P.2d 341 (Utah Ct. App. 1991).

COLLATERAL REFERENCES

Am. Jur. 2d. — 75A Am. Jur. 2d Trial § 1077 et seq.

C.J.S. — 88 C.J.S. Trial §§ 266 to 448.

A.L.R. — Propriety and prejudicial effect of instructions in civil case as affected by the manner in which they are written. 10 A.L.R.3d 501.

Sufficiency of evidence, in personal injury action, to prove future pain and suffering and to warrant instructions to jury thereon, 18 A.L.R.3d 10.

Sufficiency of evidence, in personal injury action, to prove impairment of earning capacity and to warrant instructions to jury thereon, 18 A.L.R.3d 88.

Sufficiency of evidence, in personal injury action, to prove permanence of injuries and to warrant instructions to jury thereon, 18 A.L.R.3d 170.

Propriety and effect, in eminent domain proceeding, of instruction to the jury as to landowner's unwillingness to sell property, 20 A.L.R.3d 1081.

Verdict-urging instructions in civil case

stressing desirability and importance of agreement, 38 A.L.R.3d 1281.

Verdict-urging instructions in civil case commenting on weight of majority view or authorizing compromise. 41 A.L.R.3d 845.

Verdict-urging instructions in civil case admonishing jurors to refrain from intransigence or reflecting on integrity or intelligence of jurors, 41 A.L.R.3d 1154.

Construction of statutes or rules making mandatory the use of pattern or uniform approved jury instructions, 49 A.L.R.3d 128.

Necessity and propriety of instructing on alternative theories of negligence or breach of warranty, where instruction on strict liability in tort is given in products liability case, 52 A.L.R.3d 101.

Federal Rules of Civil Procedure, construction and effect of provision in Rule 51, and similar state rules, that counsel be given opportunity to make objections to instructions out of hearing of jury, 1 A.L.R. Fed. 310.

Key Numbers. — Trial ⇨ 182 to 296.

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 find-

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Rule 52.

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ings 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.

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.
- Caption.
- 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.
- Criminal contempt.
- Effect.
- Preclusion of summary judgment.
- Relation to pleadings.
- Failure to object to findings.
- How findings entered.
- Judgments upon multiple claims or parties.
- Judicial review.
- Equity cases.
- Standard of review.
- Conclusions of law.
- Criminal cases.
- Criminal trials.
- Findings of facts by jury.
- Intent.

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.
- Ultimate facts.
- Summary judgment.
- Statement of grounds.
- Waiver.
- Failure of court.
- When filed.
- Tardy filing.
- Cited.

Adoption.

—Abandonment of contract.

In a contract action by a real estate broker for his commission, where the defendant raises the issue of abandonment of the contract by his answer, the court should make findings on the issue of abandonment. Failure of the trial court to make findings of fact on all material issues is reversible error where it is prejudicial. *Gaddis Inv. Co. v. Morrison*, 3 Utah 2d 43, 278 P.2d 284 (1954).

—Advisory verdict.

The trial court has the responsibility to make findings of fact and conclusions of law, notwithstanding the advisory verdict of a jury. *Romrell v. Zions First Nat'l Bank*, 611 P.2d 392 (Utah 1980).

—Breach of contract.

Where plaintiffs, in action for breach of contract, requested finding by court on material issue as to whether the foundation of their house had been located in accordance with zoning ordinances and restrictive covenants, it was the duty of the court to make such a finding. *Quagliana v. Exquisite Home Bldrs., Inc.*, 538 P.2d 301 (Utah 1975).

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.