

1994

Marion Cahoon, Guardian and Conservator of the Estate of Glen B. Cahoon, an incapacitated person v. David Cahoon : Brief of Appellee

Utah Court of Appeals

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Robert Macri; Attorney for Appellant.

Kent B. Alderman; J. Michael Bailey; Parsons Behle & Latimer.

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UTAH COURT OF APPEALS

DOCKET NO. 940100

UTAH COURT OF APPEALS

* * * * *

MARION CAHOON, Guardian and
Conservator of the Estate of
Glen B. Cahoon, an incapacitated person,

Plaintiff and Appellee,

vs.

DAVID CAHOON,

Defendant and Appellant.

BRIEF OF APPELLEE

Trial No. 910908141CV

Appeal No. 940100-CA

Priority No. 15

* * * * *

APPEAL FROM THE JUDGMENT OF THE THIRD JUDICIAL DISTRICT
COURT OF SALT LAKE COUNTY, THE HONORABLE LESLIE A. LEWIS

* * * * *

ROBERT MACRI (2043)
Attorney for Appellant
211 East 300 South, #209
Salt Lake City, Utah 84111
Telephone: (801) 364-3018

KENT B. ALDERMAN (0034)
J. MICHAEL BAILEY (4965)
PARSONS BEHLE & LATIMER
201 South Main Street,
Suite 1800
P.O. Box 45838
Salt Lake City, Utah 84145-0898
Telephone: (801) 532-1234

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JURISDICTION AND NATURE OF CASE

Jurisdiction of this case is proper under Utah Code Ann. § 78-2-2(4).

ISSUES PRESENTED FOR REVIEW

1. Did the District Court properly grant Appellee's Motion for Summary Judgment where Appellant failed to provide any support for his claim that the Krugerrands were a gift to him?

2. Did the District Court properly grant Appellee's Motion for Summary Judgment where Appellant failed to provide support for his claim that he was entitled to deduct from rents due repairs he claimed to be making on a duplex rented to him?

3. Did the trial court judge abuse her discretion in denying Appellant's motion to amend his Answer to plead the affirmative defense of statute of limitations?

4. Did the trial court judge abused her discretion in denying Appellant's Motion for a jury or advisory jury?

STANDARD OF APPELLATE REVIEW

Summary judgment is proper when the pleadings, testimony, depositions, answers to interrogatories and admissions on file, together with the affidavits, show that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law. Utah Rule Civ. Pro. 56(c). Where no material facts remain unresolved, the Appeals Court will examine the trial court's conclusions of law and review them for correctness. Bonham v. Morgan, 788 P.2d 497 (Utah 1989).

The standard of review of a denial to amend pleadings is abuse of discretion. Granting or denying leave to amend a pleading is within the broad discretion of the trial court and an appeals court will not disturb such a ruling absent a showing of an abuse of discretion. Girard v. Appelby, 660 P.2d 245 (1983).

DETERMINATIVE STATUTORY PROVISIONS

Rule 8(c), Utah Rules of Civil Procedure.

Rule 12(h), Utah Rules of Civil Procedure.

Rule 38(d), Utah Rules of Civil Procedure.

STATEMENT OF CASE

This is an appeal from the lower court's ruling that David Cahoon, the Appellant, had converted 159 gold Krugerrand coins belonging to Glen Cahoon and had failed to pay rents due on a duplex rented to him.

A. Course of Proceedings

1. On September 23, 1991, Marion Cahoon filed a Petition for Guardianship of her husband Glen Cahoon.

2. On October 14, 1991, David Cahoon, Glen Cahoon's son from a prior marriage, filed an objection to Marion Cahoon's petition for guardianship.

3. On December 11, 1991, a hearing was held before the Honorable Homer Wilkinson at which time Glen Cahoon, Marion Cahoon and David Cahoon all testified. Judge Wilkinson held that while Glen Cahoon was competent to testify he needed assistance to

protect his interests, and appointed Marion Cahoon as his guardian. Record at 583.

4. Based upon the testimony at the guardianship hearing, Marion Cahoon filed a complaint against David Cahoon for the conversion of 159 gold Krugerrand coins and for the non-payment of rent on property (hereinafter referred to as the "Duplex") which Glen Cahoon owned and rented to David Cahoon. Record at 2-6.

5. On February 14, 1992, David Cahoon filed his answer and a counterclaim which is not part of this appeal. Record at 27-29.

6. On April 15, 1992, Marion Cahoon filed a motion to consolidate for purposes of discovery and taking of evidence, so that the evidence and testimony taken in the guardianship hearing on December 11, 1991 would be made part of the civil action record. The motion was granted on May 13, 1992. Record at 38-40 and 47.

7. On July 30, 1992, Marion Cahoon filed a motion for summary judgment based in large part upon the testimony taken at the December 11, 1991 hearing before Judge Wilkinson. The motion for summary judgment was set for hearing on October 21, 1992 and then rescheduled for on November 13. Record at 53-54 and 142-144.

8. On October 29, 1992, David Cahoon filed a motion to amend his answer to the complaint to include a statute of

limitations defense. No arguments or memorandum in support of this motion were filed. Record at 150.

9. On November 13, 1992, a hearing was held before Judge Leslie A. Lewis on the Appellee's motion for summary judgment. At the conclusion of the hearing, the court granted Marion Cahoon's motion for summary judgment with respect to the back rent and took under advisement the conversation of the Krugerrands. Record at 163.

10. On December 2, 1992, the court ruled that David Cahoon had failed to carry his burden of proof that the Krugerrand coins were a gift to him and that he had converted the coins. The court also ruled that the number of coins converted was at issue and scheduled an evidentiary hearing to take testimony with regard to the number of coins converted. Record at 197, 247-252.

11. On December 10, 1992 the court entered an order denying David Cahoon's motion to amend his answer to include a statute of limitations defense. Record at 202.

12. On December 24, 1992, David Cahoon filed a motion requesting a jury trial or an advisory jury. Record at 242.

13. On December 30, 1992, a hearing was held before Judge Leslie Lewis on David Cahoon's request for a jury trial and his objections to findings of fact and conclusions of law from the November 13 hearing. At that time, the court entered modified findings of fact and conclusions of law, denied defendant's request for a jury trial and scheduled the hearing to take evidence on the

number and value of Krugerrands for February 11, 1993. Record at 246-251.

14. On February 11, 1993, the evidentiary hearing regarding the number and value of the converted Krugerrands began. The hearing continued to February 24, 1993. The court found that the defendant had converted 159 Krugerrands and ordered him to return the Krugerrands or to pay the plaintiff their value determined to be \$73,580.22 plus statutory interest. Record at 272-280.

B. Disposition in the Court Below

The trial court, based upon the testimony at the evidentiary hearing before Judge Wilkinson and the hearing on the Motion for Summary Judgment, and David Cahoon's failure to support his claims of a gift, granted summary judgment with regard to the conversion of the Krugerrand coins, and the non-payment of rents on the Duplex. The trial court held another evidentiary hearing to determine the issue of the number of coins and their value at which time both Appellee and Appellant submitted additional evidence. After testimony and argument from both parties, the trial court found that the number of coins converted was 159 coins (the Appellee having returned seven coins) and that the value of the converted coins was \$73,580.22 plus statutory interest from the date of conversion.

STATEMENT OF FACTS

1. In May, 1979, Glen Cahoon purchased 166 gold Krugerrand coins. Record at 56, 62, 558.

2. In December, 1979, Glen Cahoon delivered possession of the coins to his son David Cahoon and instructed David to bury the coins underneath the Duplex owned by Glen Cahoon and rented to David Cahoon. Record at 57-60, 530-531, 570, 574.

3. On December 3, 1979, Glen Cahoon married Marion Cahoon.

4. In approximately 1981, David Cahoon, without Glen Cahoon's knowledge or consent, dug up the coins (Record at 62-65, 70-71, 572-574) and used them for his own needs. Record at 62-65, 70-71, 574-575.

5. In January, 1985, Glen Cahoon informed Marion Cahoon, his wife, of the coins buried under the Duplex. Record at 60-62, 547, 550.

6. On September 23, 1991, Marion Cahoon petitioned for appointment as guardian of Glen B. Cahoon. On October 14, 1991, David Cahoon filed an objection to Marion Cahoon's appointment. On December 11, 1991 a hearing was held before Judge Wilkinson at which time Glen Cahoon testified that all of the Krugerrands were buried under the Duplex in three five gallon plastic boxes. Record at 58, 530-531. Glen also testified that he had not given the Krugerrands to David. Record at 59, 531. Glen testified that he believed that the Krugerrands were still buried underneath the

Duplex and that he was saving them for his old age. Record at 59, 531, 534. David Cahoon testified that he buried the Krugerrands under the Duplex at his father's instruction and he subsequently dug them up and used them for his own purposes. Record at 62-65, 570. David claimed that the coins were given to him as a gift. Record at 65, 574.

7. On December 11, 1991, Judge Wilkinson found that Glen Cahoon was competent to give testimony but needed a conservator/guardian to protect his interests and appointed Marion Cahoon as his guardian/conservator. Record at 583.

SUMMARY OF ARGUMENT

1. The district court was correct in granting Marion Cahoon's motion for summary judgment with respect to the question of a gift where the uncontradicted evidence and testimony of the donor, Glen Cahoon was that no gift was intended. Record at 59, 531. There was no testimony by David Cahoon which would support his claim that the coins were a "gift" to him. David testified that he was instructed by Glen Cahoon to "hold these". Record at 64, 574.

2. The district court was correct in granting Marion Cahoon's motion for summary judgment with respect to the rents due on the Duplex because David Cahoon failed, prior to the hearing on the motion for summary judgment, to produce any evidence or support for his claim that he was entitled to make improvements or repairs to the property and offset his rents due against such improvement

or repairs without the prior approval of Glen Cahoon or the Conservator. The only evidence before the Court was that David Cahoon had not paid the rents due and neither Glen Cahoon nor Marion Cahoon had authorized him to make improvements or repairs. Record at 78-79.

3. The district court's denial of Appellant's motion to amend his complaint to include a statute of limitations defense was not an abuse of discretion where the motion was filed after the motion for summary judgment had been filed and just days before the hearing on the motion for summary judgment. The Appellant did not file a proposed amended answer nor did Appellant present any testimony or any evidence in support of his motion to amend. All of the facts which were before the court were known to the Appellant for eight months prior to the hearing date. Further, based upon the evidence before the trial court, it was unlikely that the statute of limitations defense could be successfully argued where the protected person and guardian both believed that Appellant, David Cahoon still had possession of the coins and did not discover that he had converted them to his own use until the December 11, 1991 guardianship hearing. Record at 59, 531, 575, 578. Upon discovering that David Cahoon had converted the Krugerrands to his own use, the guardian promptly instituted this action for conversion.

4. The district court under Rule 38(d) properly denied Appellant's motion for a jury trial on an advisory jury where the

motion was not made until after the court had already ruled on several of the primary issues and had scheduled a hearing date to try the issue of the number of coins and their value, which is tantamount to asking for a jury in the middle of the trial.

5. Appellant has failed to marshal the evidence based upon the record below and attempted to support his appeal by citing evidence which is not a part of the record below and was not before the trial court. Throughout his brief the Appellant cites as facts deposition testimony of Marion Cahoon which is not a part of the record below nor was it part of the testimony before the trial court. He states as fact findings of the court which are contrary to the record.

ARGUMENT

I. THE TRIAL COURT PROPERLY GRANTED SUMMARY JUDGMENT BECAUSE APPELLANT FAILED TO PRODUCE EVIDENCE THAT RAISED A GENUINE ISSUE OF MATERIAL FACT.

The uncontroverted evidence before the court was that Glen Cahoon had purchased the gold coins and hid them away for his old age. Record at 59-60, 531, 534, 550. When asked if he had given the Krugerrands to David Cahoon, he answered "No, I did not give them to David. They belong to me. And anytime I need them I can get them. If I need them I can go over and get them." Record at 59, 531.

When David Cahoon testified with regard to his claim that the coins were given to him, there was no testimony given which would support a clear and unequivocal gift. He testified "They were given to me. He (Glen) said 'Hold these' and I did." Record at 64, 574. In addition, when pressed the following exchange took place:

Q Let's define "give them". He gave possession of them to you, but did he give title of them to you? Did he give you title to the coins? Did he make a gift to you? Isn't that what you told me that they were yours?

A Well there wasn't any dispute, you know. I didn't give him a receipt, he didn't give me any condition of sale or any kind of thing. There were no papers exchanged. All there was was the goods were handed to me.

Q Any instructions? Did your father tell you to bury them?

A Right. And that's what I did.

Id.

This exchange clearly indicates that there was no clear and unequivocal expression of a gift.

Under Utah law a donee has a burden of proving an inter vivos gift by "clear and convincing evidence." Sims v. George, 466 P.2d 831, 835 (1970) ("one so claiming a gift from another must demonstrate by clear and convincing evidence"). In this case, where the donor was still alive and testifies that no gift was made or intended and the donee does not present any testimony or other evidence of the intent to make a present gift, the trial court was

correct in granting summary judgment as a matter of law. It is plain that the Appellant has failed to meet his burden under rule 56(e), Utah Rules of Civil Procedure, to produce evidence that raises any genuine issue of material fact. Rule 56(e) is quite clear concerning this burden:

When a motion for summary judgment is made and supported as provided in this rule an adverse party may not rest upon its mere allegations or denials of his pleadings but his response, by affidavits or otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so response, summary judgment, if appropriate, shall be entered against him.

Utah R. Civ. Proc. 56(e).

This rule is also explicit that "opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show that the affiant is competent to testify to the matters stated therein." These requirements are well recognized and emphasize in Utah decisions. See A.P. Winter v. Northwest Pipeline Corporation, 820 P.2d 916, 919 (Utah 1991) ("allegations of a pleading or factual conclusion of an affidavit are insufficient to raise a genuine issue of material fact."); Hunt v. Hurst, 785 P.2d 414, 415 (Utah 1990) ("bear allegations unsupported by any facts are not sufficient to withstand a motion for summary judgment"); Massey v. Utah Power & Light, 609 P.2d 937 (Utah 1980) (same).

Appellant's response to Appellee's motion for summary judgment failed to meet these standards. Despite Appellee's

memorandum of law and supporting affidavits (Record at 55-80), Appellant produced no affidavit or other evidence that raised any issue of material fact. All that Appellant can marshal to oppose the facts established by Appellee are unsupported allegations.

The court properly granted summary judgment with respect to the unpaid back rents because David Cahoon failed to support his claim that he was entitled to make improvements or repairs to the Duplex and deduct the cost of those repairs including his time which he charged at \$10 an hour against rents due. These repair charges were not authorized by Glen Cahoon or Marion Cahoon after she was appointed guardian. Record at 78-79.

II. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHERE IT REFUSED TO ALLOW AN AMENDMENT OF THE PLEADINGS WHEN NOTHING NEW OR OF SUBSTANCE WAS CONTAINED IN THE PROPOSED AMENDMENT.

Appellant's motion to amend his answer to the complaint to include a statute of limitations defense was a two-sentence motion without any supporting affidavits, memoranda, law or testimony nor did the Appellant submit a copy of the proposed amended answer with the motion. Record at 150. Appellant does not cite to any deposition or other testimony to prove his point nor does he cite any case law to support the proposition that he should be allowed to amend his answer. Under the Utah Rules of Civil Procedure, David Cahoon had already waived his opportunity to assert such a defense. Rule 8(c), Utah Rules of Civil Procedure, states as follows:

(c) Affirmative defenses. In pleading to a proceeding pleading a party may set forth affirmative accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharged in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servants, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, waiver, and any other matter constituting an avoidance for affirmative defense.

If a party does not assert such defenses then they are deemed waived under Rule 12(h), Utah Rules of Civil Procedure, which states:

(h) Waiver of defenses. A party waives all defenses and objections which he does not present either by motion as hereinbefore provided or, if he has made no motion, in his answer or reply.

In this case Appellant was aware of all of the evidence which would allow him to plead a statute of limitations defense eight months before the filing of his motion. In his brief, Appellant argues that the statute of limitations began to run in 1985 when Marion Cahoon was told by her husband Glen that he had buried \$48,000 worth of gold Krugerrands under the Duplex. Appellant's Brief p. 21-22. Utah Code Ann. § 78-12-26(5) provides: ". . . that the cause of action does not accrue until the aggrieved party knows or reasonably should have known of harm suffered." Under this statute, an aggrieved party must know of the facts giving rise to the claim before the statute of limitation begins to run. In this case, Marion Cahoon and Glen Cahoon both believed

that the gold Krugerrands were still buried underneath the Duplex. Record at 59-60, 531. It was not until David Cahoon testified that he had dug the Krugerrands up and had begun spending them that they discovered that a conversion had taken place. Record at 64-65, 574-575. This evidence was presented at the hearing on December 11, 1991, before Judge Wilkinson. Prior to that date, neither Glen Cahoon nor Marion Cahoon had any knowledge of David Cahoon's wrongful acts. Based upon this evidence which was before the trial Court and David Cahoon's failure to support his motion to amend, the court did not abuse its discretion in denying Appellant's motion.

**III. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION
IN DENYING APPELLANT'S MOTION FOR A JURY
TRIAL.**

Appellant David Cahoon filed his answer to Appellee's complaint on February 11, 1992. Appellant did not request a jury trial in that pleading and accordingly did not pay the statutory jury fee. On November 13, 1992, Marion Cahoon's motion for summary judgment on all issues was heard by the court. At that time the court could have decided all the issues raised by this case. Even though the court could have ruled as to all issues, defendant still did not file a jury demand and still had not paid any requisite jury fee.

On December 2, 1992, the court entered its order which, along with the court's previous ruling, decided the entire case except for determining the value and number of the Krugerrands

converted by the defendant. A hearing was set to hear the evidence on that issue.

On December 24, 1992, more than ten months after defendant filed his answer and less than one week before the scheduled hearing on the final issue, defendant requested a jury trial by way of a one sentence pleading filed with the court. Record at 242.

Rule 38(b), Utah Rules of Civil Procedure, states:

Any party may demand a trial by jury of any issue triable of right of a jury by paying the statutory jury fee and serving upon the other parties a demand therefor in writing at any time after the commencement of the action but not later than ten days after the service of the last pleading directed to such issue. Such demand may be endorsed upon a pleading of the party.

Under Rule 38(b), defendant was required to pay the statutory jury fee of \$50.00 and serve upon plaintiff a jury demand not later than ten days after the service of defendant's answer which occurred on February 11, 1992. Therefore, defendant had not complied with Rule 38(b). By not complying with Rule 38(b), the defendant is subject to Rule 38(d) which states, "The failure of a party to pay the statutory fee, to serve the demand as required by this rule and to file it as required by Rule 5(d) constitutes a waiver by him of trial by jury."

Pursuant to the applicable rules, Appellant waived his right to a trial by jury and his motion was properly denied by the trial court.

The Appellant's one-sentence request for a jury trial also appears to offer the Court the alternative of providing an advisory jury for the purpose of ruling on the one remaining issue in this matter. Because Appellant chose not to provide any citations to his motion, Appellee must assume that the type of advisory jury which Appellant refers is provided in Rule 39(c), Utah Rules of Civil Procedure, which states: "In all actions not triable of right by a jury, the court upon motion or of its own initiative may try any issue with an advisory jury or the consent of both parties, may order a trial with a jury whose verdict has the same effect as if trial by jury had been a matter of right."

Under the rule, an advisory jury may be utilized in actions not triable of right by jury. In this case, the remaining issue is one which was triable by right so long as Appellant had properly complied with the applicable rule. See Rule 38, Utah Rules of Civil Procedure. Advisory juries are generally used to advise on questions of equity which are not triable by right. There was no equitable issue outstanding. See e.g., Romrell v. Zions First National Bank, 611 P.2d 392 (Utah 1980). If a jury may properly sit in a case, as in this case if the defendant had complied with the applicable rules, there is no need for an advisory jury.

In sum, the trial judge did not abuse her discretion in refusing to grant Appellant's motion for a jury trial. The motion was made long after the evidence was presented to the court, the

court had ruled on several of the issues and the court had scheduled a hearing ten days hence to consider the final issues.

**IV. APPELLANT HAS FAILED TO MARSHALL THE EVIDENCE
BASED UPON THE RECORD BELOW AND MADE
ASSERTIONS NOT SUPPORTED BY THE EVIDENCE.**

Throughout his brief Appellant cites portions of Marion Cahoon's deposition which were not a part of the pleadings, were not before the trial court, and were not made a part of the record below. See Appellant's Brief at page 4, Statement of Facts.

In addition, Appellant states as fact that the Court found Glen Cahoon incompetent when in fact the Court found Glen Cahoon incapacitated but competent to give testimony and that he was able to give truthful answers and understood the questions. Record at 583.

The Utah Rules of Appellate Procedure, Rule 11(a)(2), provides that if Appellant intends to urge on appeal that a finding or conclusion is unsupported by or is contrary to the evidence Appellant shall include in the record a transcript of all evidence relevant to such finding or conclusion. In essence, Rule 11 directs the appellant to provide the Appeals Court with all evidence relevant to the issues raised on appeal. Where the record before the Court of Appeals is incomplete, the Court is unable to review the evidence as a whole and must therefore presume that the verdict was supported by admissible and competent evidence. Sampson v. Richins, 770 P.2d 998 (Utah Ct. App.).


There is ample support in the record before the trial court which includes the pleadings, affidavits and the testimony at the hearings to support the Judge's findings of fact and conclusions of law. Nowhere in Appellant's brief does he demonstrate that the evidence in the record below does not support the Court's findings and conclusions. Appellant merely argues that his testimony should have been more credible to the Court.

CONCLUSION

Based upon the foregoing, the trial court's granting summary judgment with respect to Appellant's claim of a gift of the Krugerrand coins to him and the non-payment of rent due, was proper as no issue of disputed material fact was produced by the Appellant in support of such claim.

The trial court did not abuse its discretion in denying plaintiff's motion to amend since such motion which, even if granted, would not have materially changed the result. Appellant's motion for a jury trial was properly denied in that Appellant failed to comply with statutory requirements and request a jury trial in a timely fashion.

DATED this 10 day of November, 1994.



KENT B. ALDERMAN
J. MICHAEL BAILEY
JOHN E. DIAZ
PARSONS BEHLE & LATIMER
Attorneys for Appellee

CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of November, 1994,
I caused to be mailed, first class, postage prepaid, four true and
correct copies of the foregoing BRIEF OF APPELLEE to:

Robert Macri
Attorney for Appellant
211 East 300 South, #209
Salt Lake City, Utah 84111

