

1994

Harold N. Boone, Janis L. Boone, Brent Larson,
Linda Cahoon, Howard Jones, Marion Jones, and
Heino Kleen v. Sports Haven International, Inc. :
Brief of Appellant

Utah Court of Appeals

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_ca1



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Court of Appeals; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

Kent L. Christiansen; Attorneys for Appellee.

Stephen J. Hill; Korey D. Rasmussen; Attorneys for Appellant.

Recommended Citation

Brief of Appellant, *Boone v. Sports Haven International, Inc.*, No. 940482 (Utah Court of Appeals, 1994).
https://digitalcommons.law.byu.edu/byu_ca1/6128

This Brief of Appellant is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Court of Appeals Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

940482

IN THE UTAH COURT OF APPEALS

HAROLD N. BOONE, JANIS L.)
BOONE, BRENT LARSON, LINDA)
CAHOON, HOWARD JONES, MARION)
JONES AND HEINO KLEEN)

Case No. 940482-CA

Plaintiff-Appellant,)

Oral Argument
Priority 15

vs.)

SPORTS HAVEN INTERNATIONAL,)
INC., dba SKYLINE MOUNTAIN)
RESORT)

Defendant-Appellee.)

BRIEF OF THE APPELLANTS

Appeal from the Judgment of the Sixth Judicial District Court
for Sanpete County, Utah, Honorable Don V. Tibbs.

STEPHEN J. HILL (A1492)
KOREY D. RASMUSSEN (A6129)
SNOW, CHRISTENSEN & MARTINEAU
10 Exchange Place, Eleventh Floor
Post Office Box 45000
Salt Lake City, Utah 84145
Telephone: (801) 521-9000
Attorneys for Appellants

KENT L. CHRISTIANSEN (A4207)
CHRISTIANSEN & SONNTAG
420 East South Temple, #345
Salt Lake City, UT 84111
Telephone: (801) 359-3762
Attorney for Appellee

FILED
Utah Court of Appeals

SEP 12 1994

Marilyn M. Branch
Clerk of the Court

IN THE UTAH COURT OF APPEALS

HAROLD N. BOONE, JANIS L.)	
BOONE, BRENT LARSON, LINDA)	
CAHOON, HOWARD JONES, MARION)	Case No. 940482-CA
JONES AND HEINO KLEEN)	
)	
Plaintiff-Appellant,)	Oral Argument
)	Priority 15
vs.)	
)	
SPORTS HAVEN INTERNATIONAL,)	
INC., dba SKYLINE MOUNTAIN)	
RESORT)	
)	
Defendant-Appellee.	

BRIEF OF THE APPELLANTS

Appeal from the Judgment of the Sixth Judicial District Court
for Sanpete County, Utah, Honorable Don V. Tibbs.

STEPHEN J. HILL (A1492)
KOREY D. RASMUSSEN (A6129)
SNOW, CHRISTENSEN & MARTINEAU
10 Exchange Place, Eleventh Floor
Post Office Box 45000
Salt Lake City, Utah 84145
Telephone: (801) 521-9000
Attorneys for Appellants

KENT L. CHRISTIANSEN (A4207)
CHRISTIANSEN & SONNTAG
420 East South Temple, #345
Salt Lake City, UT 84111
Telephone: (801) 359-3762
Attorney for Appellee

TABLE OF CONTENTS

STATEMENT OF JURISDICTION	1
STATEMENT OF ISSUES PRESENTED FOR REVIEW AND STANDARDS OF REVIEW	1
<u>Standard of Review</u>	1
STATEMENT OF THE CASE	2
A. <u>Nature of the Case</u>	2
B. <u>Course of Proceedings and Disposition of the Case Below</u>	2
C. <u>Statement of Facts</u>	3
SUMMARY OF ARGUMENTS	7
ARGUMENT	8
I. <u>THE GARNISHEE JUDGMENT AGAINST SKYLINE IS VALID FOR EIGHT YEARS AND APPELLANTS HAVE A LEGAL RIGHT TO ENFORCE THE JUDGMENT</u>	8
II. <u>THE DOCTRINE OF LACHES SHOULD NOT BE USED TO BENEFIT SKYLINE BECAUSE SKYLINE HAS NOT BEEN PREJUDICED</u>	9
III. <u>EQUITABLE FACTORS MANDATE THAT APPELLANTS ARE ENTITLED TO EXECUTE PURSUANT TO THE GARNISHEE JUDGMENT</u>	13
CONCLUSION	14

TABLE OF AUTHORITIES

Page

Cases

<u>Leaver v. Grose</u> , 610 P.2d 1262 (Utah 1980)	10
<u>Papanikolas Bros. Enterprises v. Sugar House Shopping Center Associates</u> , 535 P.2d 1256 (Utah 1975)	10, 11
<u>Remington Rand, Inc. v. O'Neil</u> , 6 Utah 2d 182, 309 P.2d 368 (1957)	8
<u>Scharf v. BMG Corp.</u> , 700 P.2d 1068 (Utah 1985)	1, 2
<u>Schindler v. Schindler</u> , 776 P.2d 84 (Utah Ct. App. 1989)	2
<u>Von Hake v. Thomas</u> , 858 P.2d 193 (Utah Ct. App. 1993)	9

Statutes

Utah Code Ann. § 78-2-2	1
Utah Code Ann. § 78-22-1	7, 8
Utah Code Ann. § 78-22-1(1)	7, 8

Utah Code Ann. § 78-22-1:

(1) Judgments shall continue for eight years unless previously satisfied or unless enforcement of the judgment is stayed in accordance with law.

(2) Except as limited by Subsection (4), the entry of judgment by a district court is a lien upon the real property of the judgment debtor, not exempt from execution, owned or acquired during the existence of the judgment, located in the county in which the judgment is entered.

(3) An abstract of judgment issued by the court in which the judgment is entered may be filed and docketed in any court of this state and shall have the same force and effect as a judgment entered in that court.

(4) A judgment entered in the small claims division of any court shall not qualify as a lien upon real property unless filed and docketed in accordance with Subsection (3). This subsection shall apply to all small claims judgments entered on or after April 27, 1992.

STATEMENT OF JURISDICTION

The Utah Supreme Court had appellate jurisdiction over this appeal pursuant to Utah Code Ann. § 78-2-2(3)(j); this Court has jurisdiction to adjudicate the appeal pursuant to Utah Code Ann. § 78-2-2(4).

STATEMENT OF ISSUES PRESENTED FOR REVIEW AND STANDARDS OF REVIEW

1. Statement of Issue

Whether bringing a Motion to Compel and Execute pursuant to a Garnishee Judgment, three or four months after all the relevant information is gathered, is a dilatory action permitting the lower court to dismiss the Garnishee Judgment which would otherwise be valid for eight years.

Standard of Review

The Appellate Court accords conclusions of law no particular deference, but reviews them for correctness. Scharf v. BMG Corp., 700 P.2d 1068, 1070 (Utah 1985).

2. Statement of Issue

Whether the lower court erred in dismissing a valid Garnishee Judgment, on the basis of laches, when the garnishee suffered no prejudice pursuant to any delay caused by appellant.

Standard of Review

To successfully attack the lower court's findings of fact, an appellant must demonstrate that when viewed "in the light most favorable to the findings, the evidence is insufficient to support the findings . . . or that its findings are otherwise clearly

erroneous." Schindler v. Schindler, 776 P.2d 84, 88 (Utah Ct. App. 1989).

The Appellate Court accords conclusions of law no particular deference, but reviews them for correctness. Scharf v. BMG Corp., 700 P.2d 1068, 1070 (Utah 1985).

STATEMENT OF THE CASE

A. Nature of the Case.

This is an appeal from the judgment entered by the lower court on May 2, 1994, wherein The Honorable Don V. Tibbs concluded that although appellants were attempting to execute a valid Garnishee Judgment, and although Sports Haven International, Inc., dba Skyline Mountain Resort ("Skyline") had knowingly violated a court order and refused to pay appellants the amount owed to them pursuant to the Garnishee Judgment, appellants' right to execute pursuant to the Garnishee Judgment was forfeited due to the doctrine of laches because appellants failed to speedily execute upon the Garnishee Judgment. (R. 760 at 12-21.)

B. Course of Proceedings and Disposition of the Case Below.

This action stems from a quiet title action that was commenced by appellants on January 7, 1987 by filing a Complaint. (R. 1-8.) On February 24, 1989, the quiet title action was resolved by the Quiet Title Judgment entered in the Sixth Judicial District Court. (R. 442-44.) On July 14, 1989, the court entered a Garnishee Judgment in the amount of \$12,133.29 in favor of appellants against Skyline. (R. 545-46.) Due to Skyline's failure to pay pursuant to

the Garnishee Judgment, a motion for an order to show cause was brought by appellants on February 17, 1993. (R. 557.) By an order dated March 29, 1993, the court denied appellants' motion for an order to show cause. (R. 617-18.)

After conducting relevant and necessary additional discovery, appellants again filed a motion for an order to show cause on March 21, 1993. Based on the doctrine of laches, the court denied appellants' motion and ruled that the Garnishee Judgment against Skyline was no longer valid. (R. 745-46, 760 at 20.)

C. Statement of Facts.

Pursuant to a quiet title action filed against Willard M. Tucker ("Tucker"), a Judgment was entered on February 27, 1989 by the Honorable Don V. Tibbs in the Sixth Judicial District Court awarding damages in the amount of \$14,419.64 and attorneys' fees of \$5,000.00 in favor of appellants against Tucker. (R. 442-44.)

On July 14, 1989, the Court also entered a Garnishee Judgment in the amount of \$12,133.29 in favor of appellants against Skyline. The Garnishee Judgment was based on Skyline's Answers to Interrogatories dated June 28, 1989. (R. 545-46.) Skyline's answer to Interrogatory No. 3 stated that it was indebted to Tucker in the amount of \$12,133.29 on the sale of certain memberships. (R. 646-47.)

From November 29, 1989, through July 31, 1992, Skyline made payments to appellants of principal and interest totaling

\$9,865.68, leaving an unpaid balance on the Garnishee Judgment of \$6,153.41, with interest accruing at the rate of 12%. (R. 637.)

On July 31, 1992, nearly three years after the Garnishee Judgment was entered against Skyline, David Lake ("Mr. Lake"), an accountant employed by Skyline, informed Stephen J. Hill ("Mr. Hill"), appellants' attorney, that Skyline would make no further payments. Mr. Lake stated that, contrary to what was stated in the Answers to Interrogatories, no certain amount was owed to Tucker. (R. 560.)

Thereafter, in direct violation of the court's Order and without requesting the court to modify the Garnishee Judgment or deem that the Garnishee Judgment had been paid in full, Skyline ceased making payments to appellants. (R. 561.)

On February 4, 1993, Skyline filed Amended Answers to appellants' interrogatories and claimed that, in spite of its answer three and a half years earlier that Skyline owed Tucker \$12,133.29, Skyline alleged it actually owed \$4,289.71. (R. 553-54).

Appellants then filed a Motion for an Order to Show Cause on February 12, 1993, requesting execution against Skyline. (R. 557-58.) However, because appellants' counsel was under the impression that Skyline was to show cause in writing and was not aware that a hearing was to be held on the Motion for an Order to Show Cause, appellants failed to appear at the hearing. (R. 588-89, 716, 724-25.) Accordingly, this Court dismissed appellants' request for

execution against Skyline. (R. 617-18.) On April 1, 1993, Mr. Hill wrote a letter to the court apologizing for his non-appearance and explaining his failure to appear as follows:

I also wish to personally apologize for my non-appearance at the show cause hearing on March 23. I prepared the proposed show cause order. As I had written it, it provided for an appearance by garnishee in writing. When I received the signed order from the court, I did not note that the words "in writing" had been stricken. I was out of town all last week and was unaware of the hearing until I received word of garnishee's proposed order.

On April 1, 1993, along with a letter explaining why Mr. Hill did not attend the hearing on the Motion for the Order to Show Cause, Mr. Hill also submitted an Objection to the Proposed Order ("Objection to Proposed Order"). (R. 613-15.)

In the Objection to Proposed Order, Mr. Hill explained that Mr. Lake, an accountant for Skyline, needed to be deposed in order to determine whether sales had been made recently on which commissions were owed to Tucker. (R. 614.)

Mr. Hill then scheduled the deposition of Mr. Lake for September 2, 1993. (R. 620-21.) However, due to a conflict in Skyline's attorney's schedule, the deposition was postponed. (R. 620-21, 717, 726.) The deposition of Mr. Lake was rescheduled for September 15, 1993. (R. 623-24.) Again, conflicts arose and the deposition was ultimately scheduled for a mutually convenient time and was finally conducted on October 6, 1993. (R. 628-29, 717.)

During the deposition, Mr. Lake admitted that in spite of the Writ of Garnishment's order to refrain from paying or transferring

property to Tucker, Skyline had conveyed two lots to Tucker in return for Tucker's release of Skyline's obligation to pay him \$8,180.00. (R. 759 at 14) Mr. Lake also informed Mr. Hill that Tucker had conveyed the lots to a third party. (R. 759 at 15.)

During the deposition, Mr. Christiansen informed Mr. Hill that he would provide Mr. Hill with the name of the individual to whom Tucker had assigned the lots which had been deeded to Tucker in satisfaction of the \$8,180.00 debt. (R. 759 at 18.)

Although Mr. Christiansen did eventually send the documents formalizing the conveyance of property, Mr. Christiansen took several weeks to do so. (R. 729.)

Appellants' counsel then filed a Motion for an Order to Show Cause on March 21, 1994. (R. 634.) A hearing was held on the Motion on April 20, 1994. (R. 707.) At the hearing, the Court denied appellants' Motion on the ground that appellants had delayed too long in filing the Motion for an Order to Show Cause. (R. 760 at 19-20.) The Court stated that it would probably have ruled in appellants' favor if they had brought the motion more quickly. (R. 760 at 19.) However, because the court felt that appellants delay might somehow cause some unfairness to Skyline, the court stated that it would not rule in appellants' favor. (R. 760 at 19-20.) The Court ruled that appellants' Motion was, therefore, barred pursuant to the doctrine of laches. (R. 760 at 20.)

On April 28, 1994, appellants filed a Motion to Reconsider the Court's ruling which denied appellants' Motion for an Order to Show

Cause. (R. 711-12.) On May 2, 1994, Judge Don V. Tibbs signed the Order denying appellants' Motion for an Order to Show Cause. (R. 745-46.)

SUMMARY OF ARGUMENTS

Garnishee judgments are final orders of the court. Utah Code Ann. § 78-22-1(1) establishes that such judgments are valid and continue to be valid for a period of eight years. Utah case law also holds that such judgments may be renewed before the expiration of the eight year period. Therefore, appellants have a legal right to execute upon the Garnishee Judgment even though the lower court felt that appellants should have executed upon the Garnishee Judgment more quickly.

The doctrine of laches is not applicable in this case because Skyline has not been prejudiced. In order for appellants to be deprived of their right to enforce the Garnishee Judgment, they must have caused Skyline some injury through being excessively dilatory. However, Skyline has suffered no injury and no prejudice due to appellants' actions. The only injury or prejudice in this case has been suffered by appellants due to Skyline's knowing violation of the Court's order. Moreover, appellants were not dilatory. They brought the motion to compel within three or four months of receiving all the relevant information relating to their right to execute upon Skyline pursuant to the Garnishee Judgment.

The equitable factors involved in this case also clearly favor appellants. Appellants will be damaged in the amount of approxi-

mately \$8,000.00 if they are not permitted to execute upon the Garnishee Judgment. Conversely, Skyline will suffer no damage, other than being required to satisfy the Garnishee Judgment which it was already legally required to pay.

ARGUMENT

I. THE GARNISHEE JUDGMENT AGAINST SKYLINE IS VALID FOR EIGHT YEARS AND APPELLANTS HAVE A LEGAL RIGHT TO ENFORCE THE JUDGMENT.

Garnishee judgments are final orders of the court and are given the same deference as any other ruling or order of a court. As a final judgment, the Garnishee Judgment entered against Skyline is valid and may be executed upon for a period of eight years. Utah Code Ann. § 78-22-1(1) establishes the duration of a valid judgment as follows: "judgments shall continue for eight years unless previously satisfied or unless enforcement of the judgment is stayed in accordance with law."

Accordingly, appellants have eight years in which to execute the Garnishee Judgment against Skyline. Moreover, Utah law requires that the rules and statutory procedures, including garnishment proceedings, be construed liberally "with the object of promoting justice" so that both sides to a controversy have a "fair opportunity to present their claims on the merits." Remington-Rand, Inc. v. O'Neil, 6 Utah 2d 182, 309 P.2d 368, 370 (1957). Justice will certainly not be promoted if appellants are deprived of their legal right to enforce a valid judgment. Thus, this Court's objective is to liberally construe the rules to allow

appellants to pursue the remedies to which they are legally entitled. Id.

By allowing judgments to remain valid for eight years, the legislature has declared its intent that parties who obtain judgments be allowed to execute such judgments. Moreover, judgments are not only valid for a period of eight years, they may also be renewed if the eight year period expires. See Von Hake v. Thomas, 858 P.2d 193, 196 (Utah Ct. App. 1993).

Therefore, appellants have a legal right to execute upon the Garnishee Judgment even if appellants' actions were slower than the lower court would have preferred. Indeed, even if appellants had waited three or four years, or even longer, instead of three or four months to bring the Motion to Show Cause, appellants should still be entitled to execute upon the assets of Skyline pursuant to the Garnishee Judgment. Appellants do not know of any cases which hold that the right to execute in accordance with a Garnishee Judgment is forfeited if the garnishor fails to speedily execute thereon. Accordingly, this Court should allow appellants to act in accordance with their legal right to execute pursuant to the Garnishee Judgment against Skyline.

II. THE DOCTRINE OF LACHES SHOULD NOT BE USED TO BENEFIT SKYLINE BECAUSE SKYLINE HAS NOT BEEN PREJUDICED.

The general rule regarding the availability of the doctrine of laches is that laches only applies when the following two elements are established: "(1) The lack of diligence on the part of

plaintiff; and (2) an injury to defendant owing to such lack of diligence." Leaver v. Grose, 610 P.2d 1262, 1264 (Utah 1980). In order for appellants to be deprived of their right to enforce the Garnishee Judgment, they must have been excessively dilatory and caused Skyline some injury. However, Skyline has suffered no prejudice owing to any actions of appellants in this case. "Laches is not mere delay, but delay that works a disadvantage to another." Papanikolas Bros. Enterprises v. Sugarhouse Shopping Ctr. Assocs., 535 P.2d 1256, 1260 (Utah 1975).

In the lower court, the motion requesting a hearing for an Order to Show Cause was filed three to four months after the parties decided upon a time that was mutually acceptable for the deposition of Mr. Lake, and after appellants waited several weeks to receive the documents which Skyline's counsel agreed to send during the course of Mr. Lake's deposition. Certainly a three to four month delay is not unreasonable when enforcing a judgment that is valid for eight years.

Regarding prejudicial effect of the parties' actions, the only actions in this case which have caused any prejudicial delay were Skyline's. By alleging that it made an accounting error nearly four years after the fact, then refusing to make any further payment without being relieved by the court of its legal duty to pay appellants, Skyline has injured, and continues to injure, appellants. Appellants should not have to suffer the consequences of Skyline's alleged accounting error; particularly where Skyline

failed to bring the miscalculation error to the court's attention. Rather than seeking judicial relief, Skyline simply refused to make any further payments to appellant.

In addition to delay, several other factors are also considered by courts when determining the applicability of laches. These factors are as follows: (1) relative harm to defendant; (2) relative harm to plaintiff; and (3) defendant's good faith, or the absence thereof. Papanikolas, 535 P.2d at 1260. Clearly, all of these factors mandate that the doctrine of laches should not be applied to benefit Skyline.

In assessing the forementioned factors to determine whether laches applies, it is clear that the doctrine of laches should not be invoked to benefit Skyline for the following reasons: First, there was no relative harm to Skyline. The burden on Skyline is no greater at this point in time than it was a year ago; the passage of time has not prejudiced Skyline's case in any way. The evidence is still the same, the principal owed is still the same, and there are no necessary witnesses which were available a year ago that are unavailable today.

Secondly, in contrast to the lack of harm that Skyline will suffer if appellants are permitted to enforce the Garnishee Judgment, appellants will undeniably be prejudiced and monetarily damaged in the amount of approximately \$8,000.00 if this Court does not allow them to enforce the Garnishee Judgment. Therefore, the second factor which requires the Court to examine the relative harm

to the plaintiff also requires that laches must not be applied in this case.

The third factor in determining the applicability of laches requires the Court to examine Skyline's good faith, or absence thereof. In this case, Skyline knowingly violated a court order requiring it to refrain from disbursing any money or personal property to Tucker. Therefore, Skyline's actions in contravention of the court's order cannot be characterized as good faith. Thus, using the doctrine of laches to benefit Skyline would be improper in this case.

Appellants, rather than Skyline, should be protected by the doctrine of laches. Skyline should not be permitted to claim that it made an accounting mistake nearly four years after the alleged mistake and then be excused from making any further payments. Also detrimental to Skyline's case is the fact that Skyline never brought the alleged error to the court's attention; but instead, merely refused to make the payments to appellants. Indeed, if the lower court felt that appellants had prejudiced Skyline by waiting a few months to bring a Motion to Show Cause, then it should have been outraged at Skyline's actions that included waiting four years to allege an accounting error and knowingly refusing to pay appellants in violation of the Garnishee Judgment.

The prejudice caused to appellants by the lower court's ruling is obvious. By requiring appellants to now attempt to recover the rest of the amount owed to appellants by Tucker five years after

appellants believed they had substantially secured money and Skyline's future payments to satisfy Tucker's debt, appellants are placed at an extreme disadvantage. Thus, appellants have little or no chance of recovering any additional money from other sources.

In fact, at the hearing, Skyline's counsel informed the court and appellants that Tucker had recently passed away. Subsequently, in pursuing collection efforts against Tucker's estate, appellants have learned that Tucker's estate will be unable to satisfy any of the judgment because it purportedly has liabilities of approximately \$50,000.00 against assets of only \$4,000.00. (A copy of a letter explaining the poor financial condition of Tucker's estate from the attorney representing Tucker's personal representative is included in the Addendum.)

Thus, if the doctrine of laches is to be applied at all, it should be applied to protect appellants, who will be substantially prejudiced if the lower court's ruling is allowed to stand.

III. EQUITABLE FACTORS MANDATE THAT APPELLANTS ARE ENTITLED TO EXECUTE PURSUANT TO THE GARNISHEE JUDGMENT.

Pursuant to the Garnishee Judgment entered by this Court, appellants have a legal right to receive \$6,153.41 plus interest from Skyline. Appellants should not be denied this amount merely because the lower court felt they should have filed a motion to compel more quickly; particularly in light of the fact that Skyline caused the dispute by knowingly violating a court order, delayed the deposition of Mr. Lake and delayed sending to appellants'

counsel the documents detailing to whom Tucker conveyed the two lots from Skyline.


Appellants will be irreparably damaged if they are not permitted to execute in accordance with the Garnishee Judgment. If this Court denies appellants their right to enforce the Garnishee Judgment, it will be essentially holding that appellants' actions of taking three or four months to request an Order to show cause was more egregious than the bad faith actions of Skyline involving a knowing violation of a court order and failure to pay appellants \$6,153.41, which they were legally required to pay. Clearly, the equities of this case do not allow the doctrine of laches to be asserted by Skyline.

CONCLUSION

Principles of fairness and equity require that appellants be allowed to execute pursuant to the Garnishee Judgment. This Court should not invoke the fundamental principles of equity to benefit a party such as Skyline which was not damaged by any action of appellants and who has acted in bad faith by knowingly disobeying a court order and refusing to pay plaintiffs the amount which they are owed. The only appropriate use of laches in this case, would be to prevent Skyline from alleging an accounting error four years after the error allegedly took place. Therefore, this Court should reverse the lower court's order and rule that appellants are entitled to execute immediately pursuant to the Garnishee Judgment in the amount of \$7,718.84.00 plus interest of 12 percent.

DATED this 12th day of September, 1994.

SNOW, CHRISTENSEN & MARTINEAU

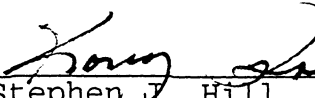
By 
Stephen J. Hill
Korey D. Rasmussen
Attorneys for Appellants

CERTIFICATE OF SERVICE

I hereby certify that on the 27th day of July, 1994, a true and correct copy of the foregoing BRIEF OF THE APPELLANTS was served upon the parties listed below by placing a copy thereof in an envelope addressed to:

KENT L. CHRISTIANSEN
CHRISTIANSEN & SONNTAG
420 East South Temple, #345
Salt Lake City, UT 84111

and causing the same to be mailed first class mail, postage prepaid.



Stephen J. Hill
Korey D. Rasmussen

ADDENDUM

Kent L. Christiansen, of
CHRISTIENSEN & SONNTAG
345 IBM Plaza
420 East South Temple
Salt Lake City, Utah 84111
Telephone: (801) 359-3762

Attorneys for Garnishee

FILED
SANPETE COUNTY, UTAH
APR 2 20 1 51
CLERK
BY C. Barsen DEPUTY

IN THE SIXTH JUDICIAL DISTRICT COURT FOR
SANPETE COUNTY, STATE OF UTAH

HAROLD N. BOONE, et al.,)	
)	
Plaintiff,)	ORDER ON PLAINTIFF'S
)	MARCH 23, 1994
vs.)	ORDER TO SHOW CAUSE
)	
WILLARD M. TUCKER, et al.,)	
)	Civil No. 9248
)	
Defendants.)	
)	
)	
SPORTS HAVEN INTERNATIONAL,)	Judge Don V. Tibbs
INC., dba SKYLINE MOUNTAIN)	
RESORT,)	
)	
Garnishee.)	

Plaintiff's March 23, 1994 Order to Show Cause came on regularly for hearing before the Honorable Don V. Tibbs, Judge of the above-entitled Court on the 20th day of April, 1994. A representative of Garnishee Sports Haven International, Inc., dba Skyline Mountain Resort was present in Court and represented by their attorney, Kent L. Christiansen of Christiansen &

Sonntag. The Plaintiff was represented by Korey D. Rasmussen of the law firm of Snow, Christensen & Martineau.

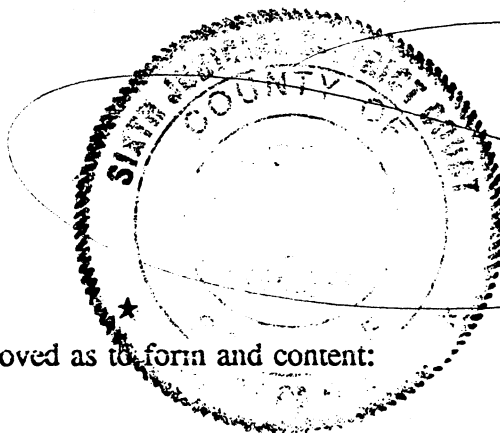
The Court having reviewed the various memoranda, affidavits, pleadings on file with the court, and other submissions made by the parties, and having heard argument of counsel, now being fully advised in the premises makes and enters the following Order:

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that Plaintiff's request for execution against Garnishee and their request for costs and attorney's fees relative to the May 15, 1989 Writ of Garnishment, and subsequent Garnishee Judgment dated July 14, 1989, are denied and dismissed with prejudice.

IT IS FURTHER ORDERED that both parties shall bear their respective attorney's fees and costs.

DATED this 2nd day of May, 1994.

BY THE COURT:



Don V. Tibbs
DON V. TIBBS
DISTRICT COURT JUDGE

Approved as to form and content:

Korey D. Rasmussen
Attorney for Plaintiff

County of Salt Lake, State of Utah, do
certify that the within copy of Garnishment was
served on the within named Garnishee

at 12 o'clock P.M., on the 15 day of May, A.D. 1989
 At 1106 County Court
 Day of May, County of Washoe, State of U.S.
N. D. "Deputy"
 By Don Fletcher Deputy

Sports Haven International, Inc. dba Skyline Mountain Resort Garnishee

YOU ARE COMMANDED not to pay any debt due or to become due to Defendant(s) and to retain possession and control of all personal property, effects and choses in action of Defendant(s) until further order of this Court.

In the event you fail to answer, the Plaintiff may apply to the Court for relief against you. Also, you are requested to mail a copy of your verified answers to plaintiff's counsel in the attached self-addressed envelope.

By Richard L. Johnson Clerk of the Court
Richard L. Johnson Deputy Clerk

[illegible]

Interrogatories to Garnishee

(Give your answers in the spaces provided and attach additional sheets if necessary.)

1. Are you indebted to the Defendant(s) either in property or money?

ANSWER: YES

2. What is the nature of the indebtedness?

ANSWER: 2/3 OF THE NEXT 13 MEMBERSHIP SALES

3. What is the total amount of the indebtedness?

ANSWER: 12,133.29

4. Is the SAME NOW DUE?

ANSWER: NO

5. If not, when is it to become due?

ANSWER: DUE AT THE TIME OF SALE

6. Have you in your possession, in your charge or under your control any property, effects, goods, chattels, rights, credits or choses in action of Defendant(s) or in which Defendant(s) is (are) interested other than as set forth in your answers above?

ANSWER: NO

7. If so, state the identification or description and the value of each of the same.

ANSWER:

Identification or Description

Amount or Value

8. Do you know of any debts owing or which may be owing from any other person to Defendant(s), whether due or not, or of any property, effects, goods, chattels, rights, credits or choses of Defendant(s) or in which Defendant(s) is (are) interested in any other person's possession or control?

ANSWER: DO NOT KNOW

9. If so, state the full particulars thereof:

*Identification or
Description of Debt,
Right or Item*

Location

*Third Party
Debtor, Holder
or Custodian*

*Amount or
Value*

STATE OF UTAH)

) ss.

COUNTY OF _____)

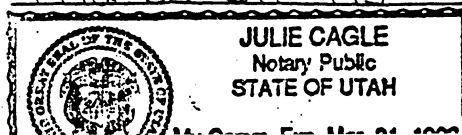
I do swear or affirm that I am the garnishee or person authorized to execute this document and make this verification on behalf of garnishee and that the answers to the foregoing interrogatories are true.

[Signature]
Signature of Garnishee or Authorized Signature on Behalf of Garnishee

Subscribed and sworn to before me this 28 day of June, 1989.

Notary Public Residing at 404 East 4500 South

My commission expires: March 31, 1993





A PROFESSIONAL LAW CORPORATION

RICHARDS
BRANDT
MILLER
NELSON

ROBERT W. BRANDT
P. KEITH NELSON
GARY D. STOTT*
ROBERT L. STEVENS
DAVID L. BARCLAY†
JOHN L. YOUNG
BRETT F. PAULSEN**
DAVID K. LAURITZEN**
LYNN S. DAVIES
ROBERT G. GILCHRIST

MICHAEL E. DYER
RUSSELL C. FERICKS
MICHAEL K. MOHRMAN
MICHAEL N. EMERY
MICHAEL P. ZACCHEO
GARY L. JOHNSON
CURTIS J. DRAKE
MICHAEL L. SCHWAB
GEORGE T. NAEGLER
CRAIG C. COBURN

LLOYD A. HARDCASTLE
BRAD C. BETEBENNER
JOANN E. CARNAHAN
ROBERT G. WRIGHT*
BARBARA K. BERRETT
NATHAN R. HYDE
JOHN C. MCKINLEY*
CHRISTIAN W. NELSON††
GERALD J. LALLATIN††
CRAIG ARAMAKI
ELIZABETH A. HRUBY-MILLS

OF COUNSEL:
WILLIAM S. RICHARDS
WALLACE R. LAUCHNOR
ROBERT W. MILLER (1940-1983)

ALSO ADMITTED IN:
**ARIZONA
†CALIFORNIA
††IDAHO
‡MONTANA
*WYOMING

KEY BANK TOWER
50 SOUTH MAIN 7TH FLOOR
POST OFFICE BOX 2465
SALT LAKE CITY, UTAH 84110-2465
(801) 531-2000 FAX (801) 532-5506

August 3, 1994

Korey D. Rasmussen
SNOW, CHRISTENSEN & MARTINEAU
10 Exchange Place, Eleventh Floor
P.O. Box 45000
Salt Lake City, Utah 84145-5000

RE: Tucker v. Anderson
File No. 12706-001

Dear Korey:

I apologize for the delay in getting back to you on this matter. When we last talked, I indicated to you that regardless of the merits of the Boones' case, it was my understanding that the estate had a negative net worth and that there really did not appear to be value in pursuing this matter.

I have now received the enclosed accounting sheets from Mr. Anderson who is the personal representative of the estate and a CPA. As you can see, Mr. Tucker died with assets of less than \$4,000.00 against liabilities of approximately \$50,000.00. Some of those liabilities including the Boone claim are listed as being of questionable validity, however, in any event it is obvious that simply the cost of burying Mr. Tucker exceeded the value of his assets at death.

You have suggested that the assets in Mr. Tucker's trust might be reachable by the Boone plaintiffs. Mr. Anderson advises me that the primary asset of that trust, some water rights, were put into trust by Tommy Tucker in 1976 and later transferred to a successor trust in 1984, so all of that took place many years before the Boone judgment.

Even if the assets in the trust were reachable by the estate creditors, the net value of the estate and the trust taken together is still negative.

As you know, Cleon Tucker has filed a lawsuit against the trust which asserts a right to rescind the transfer of almost half of the water rights to the trust. He wants those rights returned to

August 3, 1994
Page 2

him. If Mr. Tucker has any success in that lawsuit, the net worth of the trust will drop precipitously making the net value of the estate and the trust even worse.

From a practical point of view, it is obvious that the estate cannot pay the Boone claim. Even if you reach the trust, it does not have liquid assets to pay the amount of your claim. The bulk of all it has is some water rights in an area where the market has been slow and the net worth is still negative.

Under these circumstances, it really doesn't appear to make economic sense for the Boone plaintiffs to pursue their claim. The estate is also in no financial position to litigate. It appears that legal fees on either side would exceed the expectation of any recovery.

Please let me know how you want to proceed.

Sincerely yours,

RICHARDS, BRANDT, MILLER & NELSON


ROBERT L. STEVENS

RLS/jn
Encls.
cc: LeRoy Anderson

Debts (Continued)

Page 2

PREPARED BY			
CHECKED BY			
APPROVED BY			

FORM P-456 (GREEN) P-556-B (BUFF) (5-88)

Walter Service Inc. LITHO IN U.S.A.

L
I
N
E
N
o.

CURRENT DEBTS AT TIME OF DEATH:

1					
2	Farmers Insurance - auto & 5 th Wheel			\$	25133
3	P.K. propane, Inc.				120.00
4	Nevada Bell				230.34
5	Cablevision of Nevada				8.64
6	Siena Pacific Power				109.75
7					
8				\$	<u>720.06</u>

OTHER DEBTS:

10					
11	Homedco Collections			\$	414.00
12	James E. Jones, DDS				325.00
13	Mental Health Medical				24.16
14	Nevada Hearing Specialists				339.59
15	Nevada Pathologists				29.67
16	Thomas P. Myself, DDS				32.00
17	Anderson & Selow, CPAs				
18	(Services Nov. Dec. 1991, Jan 1992 in				
19	settling partnership matter in St George				
20	including \$105.00 paid out to				
21	Savage & Esplin, CPAs in St George)				924.00
22				\$	<u>2088.42</u>

DEBTS OF QUESTIONABLE LEGITIMACY:

26	Y-Ruf-IT-RV (note 1)			\$	555.58
27	Waters Edge Apts (note 2)				117.66
28	David S. Cook (note 3)				12724.03
29	Internal Revenue Service (note 4)				
30	assessment 7/15/86			\$	6851.99
31	Interest				6000.80
32	Judgment: Harold N. Boone et al				12851.99
33	(note 5)				9867.68

Total

\$ 36116.94

TOTAL DEBTS OF ESTATE
12/20/93 - 7/21/94

\$ 50649.70

(Deceased December 20, 1993)

ASSETS and LIABILITIES

FORM P-556 (GREEN) P-556-B (BUFF) (5-88)

BY	
CHECKED	
BY	
APPROVED	
BY	

winner service line LITHO IN U.S.A.

LINE
No.

ASSETS:

Cash in wallet
Carmelita Court - refund
Sierra RV - Sale of 5th Wheel
Sale of 2 Jackets
Old Buick

\$ 127.00
231.51
2,684.00
40.00
300.00

Total

\$ 3,387.51

LIABILITIES: (Per attached Debt Schedules)

Expenses of Administration
Expenses of last illness and burial
Current debts at death
Other debts
Debts of questionable legitimacy

\$ 7,043.45
4,680.83
7,006
2,088.42
36,116.94

Total

\$ 50,649.70

(DEFICIENCY)

(\$ 4,726.19)