

1995

# Lynn Nielsen v. Ronald Mortensen : Brief of Appellant

Utah Court of Appeals

Follow this and additional works at: [https://digitalcommons.law.byu.edu/byu\\_ca1](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.

Brett G. Pearce; Richard K. Spratley & Associates.

Lynn Nielsen; Representing Self as Appellant.

---

## Recommended Citation

Brief of Appellant, *Nielsen v. Mortensen*, No. 950158 (Utah Court of Appeals, 1995).

[https://digitalcommons.law.byu.edu/byu\\_ca1/6506](https://digitalcommons.law.byu.edu/byu_ca1/6506)

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](http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html). Please contact the Repository Manager at [hunterlawlibrary@byu.edu](mailto:hunterlawlibrary@byu.edu) with questions or feedback.

UTAH SUPREME COURT  
DOCUMENT  
KFU  
45.9  
.S9  
DOCKET NO. 950158

IN THE UTAH SUPREME COURT

LYNN NIELSEN,

Appellant,

vs.

RONALD MORTENSEN and  
DEL RAE MORTENSEN,

Appellees.

95-0158-CA

BRIEF OF APPELLANT

Priority No.: 16

Supreme Court No.: 940496

District Case No.: 930904041PI

Brett G. Pearce, Attorney at Law  
Richard K. Spratley & Associates  
4021 South 700 East, Suite 250  
Salt Lake City UT 84107  
Attorney for Defendant/Appellee

LYNN NIELSEN, Pro Se  
P.O. Box 1944  
Sandy UT 84092  
For Appellant

FILED

MAR 13 1995

COURT OF APPEALS

**LYNN NIELSEN,**

**vs.**

**Appellees.**

**)District Case No.: 930904041PI**

LYNN NIELSEN, Pro Se  
P.O. Box 1944  
Sandy UT 84092  
For Appellant

## TABLE OF CONTENTS

	<u>Page</u>
TABLE OF CONTENTS . . . . .	i
TABLE OF AUTHORITIES . . . . .	ii
ISSUE FOR REVIEW AND STANDARD FOR REVIEW . . . . .	1
JURISDICTIONAL STATEMENT AND REFERENCE TO LOWER COURT DECISIONS . . . . .	1
DETERMINATIVE AUTHORITY . . . . .	2
STATEMENT OF CASE . . . . .	2
STATEMENT OF FACTS . . . . .	3
SUMMARY OF ARGUMENT . . . . .	5
ARGUMENT	
POINT I . . . . .	5
<u>DID THE TRIAL COURT ERR IN DISMISSING APPELLANT'S CLAIM WITH PREJUDICE ON THE BASIS THAT APPELLANT'S CLAIM FOR PERSONAL INJURIES WAS BARRED BY THE DOCTRINE OF RES JUDICATA BECAUSE APPELLANT HAD AN OPPORTUNITY TO LITIGATE THE PERSONAL INJURY CLAIM WITH THE PROPERTY DAMAGE CLAIM IN SMALL CLAIMS COURT?</u>	
CONCLUSION . . . . .	8
CERTIFICATE OF SERVICE . . . . .	9
ADDENDUM . . . . .	10

## TABLE OF AUTHORITIES

### AUTHORITIES CITED

### Page

1. 4 K. Davis, Administrative Law Treatise s.s. 21:3  
(2d ed. 1983) 6
2. Restatement 2d, Judgments s.s. 13, 24-26. 2, 6
3. Utah Code Ann. 78-6-10(1), (2) (1953, as amended). 5, 6

### CASES CITED

1. Clover v. Snowbird Ski Resort, 808 P.2d 1037 1  
(Utah 1991).
2. D'Aston v. Aston, 844 P.2d 345 (Utah App. 1992). 2
3. Fitzgerald v. Corbett, 793 P.2d 386 (Utah 1990). 5
4. Kirk v. Div. Of Occ. & Pro. Licensing, 815 P.2d 242 6, 7  
(Utah App. 1991)
5. Moss v. Taylor, 273 P 515 (1928) 6
6. Salt Lake City v. Piepenburg, 571 P.2d 1299 6

LYNN NIELSEN,  
Appellant,  
vs.  
RONALD MORTENSEN and  
DEL RAE MORTENSEN,  
Appellees.

BRIEF OF APPELLANT  
Priority No.: 16  
Supreme Court No.: 940496  
District Court No.: 930904041PI

---

BRIEF OF PLAINTIFF/APPELLANT

Did the trial court err in dismissing appellant's claim with prejudice on the basis that appellant's claim for personal injuries was barred by the doctrine of res judicata because appellant had an opportunity to litigate the personal injury claim with the property damage claim in small claims court?

The standard of review concerning conclusions of law grants the trial court "no deference, but reviews them for correctness." Clover v. Snowbird Ski Resort, 808 P.2d 1037 (Utah 1991).

### JURISDICTIONAL STATEMENT

The decision to be reviewed was filed by the Third Judicial District Court, Salt Lake County, State of Utah, on the 3rd day of June, 1994, case no. 930904041PI. The Appeal in this matter was filed on the 20th day of June, 1994. The Supreme Court has jurisdiction in this matter pursuant to Section 78-2-2(3)(j) Utah Code Ann. 1953, as amended.

#### **DETERMINATIVE AUTHORITY**

"a judgment otherwise final remains so despite the taking of an appeal unless what is called taking an appeal actually consists of a trial de novo." (Restatement 2d of Judgments, s.s. 13, as cited in D'Aston v. Aston, 844 P.2d 345 (Utah App. 1992))

#### **STATEMENT OF THE CASE**

The parties are residents of Salt Lake County, State of Utah. An action was brought in the Small Claims Division of the Third Judicial Circuit Court, Sandy Department, State of Utah, for recovery of property damages on a slip and fall accident which occurred on Defendant/Appellees' property on or around April 10, 1991. Hearing was had on May 6, 1992 and judgment was rendered in favor of the Defendant (see Addendum A-1). Plaintiff filed an appeal to the Third Circuit Court for a trial de novo, which was granted and scheduled for the 28th day of August, 1992 at the hour of 2:00 p.m. before the Hon. Roger A. Livingston, Judge of Third Circuit Court, Sandy Department. Plaintiff, for reasons stated in the Statement of Facts, below, did not appear at the August 28th hearing. Defendant did appear in person and

through counsel, and judgment was entered against the Plaintiff, with prejudice concerning the trial de novo on or around the 22nd day of February, 1993 (See Addendum A-2). On or around the 30th of December, 1993, a Complaint was filed in the Third Judicial District Court, Salt Lake County, for personal injury damages relating to the aforementioned accident, case no. 930904041PI. In an order dated the 3rd day of June, 1994, the Hon. John A. Rokich, Judge of the Third Judicial District, dismissed the case, again with prejudice, citing the doctrine of res judicata as the reason for dismissal (see Addendum A-3). An appeal was filed with the Supreme Court of the State of Utah on the 20th day of June, 1994 and is before the Court at this present time.

#### **STATEMENT OF FACTS**

This case stems from an accident that occurred on April 10, 1991. Appellant was employed by Newspaper Agency Corporation ("NAC") as a district manager. One of her responsibilities included ensuring home deliveries of the Deseret News, otherwise missed, were replaced and accounted for.

On the evening of April 10, 1991, appellant was dispatched by NAC to appellees' home to replace a wet newspaper. Appellant arrived at appellees' home as a business invitee. Upon arriving at appellees' home appellant noticed the sidewalks and driveway were icy as a result of a winter storm.

Appellant walked to the front door and delivered the paper. As she was returning to her vehicle, appellant slipped on the icy walk and fell. As a result of her fall, appellant suffered personal injury to her hand and property damage to a diamond ring



Appellant filed a small claims action against appellees for property damage arising out of the fall on appellees' property. A trial was held on May 6, 1992 with the small claims judge entering a judgment in appellees' favor (see Addendum p. A-1).

Appellant appealed the decision to the Circuit Court on May 13, 1992. A trial de novo was held on August 28, 1992. Appellant failed to appear because of a scheduling conflict that could not be resolved in time and because of some confusion in being able to determine the new address of opposing counsel for Defendants, who had recently moved, Plaintiff was not able to advise opposing counsel of a pending hearing in United States Bankruptcy Court which was being heard at approximately the same time and which precluded Plaintiff's being present at the Third Circuit Court hearing. In spite of the fact that Plaintiff sent a friend of hers to request a continuance, and who did not plead the case on it's merits, the circuit court entered a judgment with prejudice against her, but treated the judgment like a default judgment in that it also ordered that Appellant could not refile (which would only be done in a default situation, since a refiling after a hearing on the merits would obviously result in a res judicata situation) until she had paid costs and fees of the opposing party. (see Addendum p. A-2).

On December 30, 1993 appellant filed a Complaint for personal injuries arising from the fall on April 10, 1991. Appellees filed a Motion to Dismiss. After the parties submitted memoranda and a hearing by the court, the court dismissed appellant's claim with prejudice. In it's findings, the Court

held that applicable law prohibited appellant from splitting her personal injury claim from her property damage claim and that the bringing again of the former claim was barred by res judicata (see Addendum p. A-3)

#### SUMMARY OF ARGUMENTS

1. The Trial Court erred in so ruling against Appellant in this matter because, while countenancing the first two requirements of the three requirement test for Res Judicata, as cited in Fitzgerald v. Corbett, 793 P.2d 356 (Utah 1990), towit:

"In order for a claim to be barred by res judicata, the current claim and a prior claim must satisfy three requirements:

(1) both cases must involve the same parties, their privies or assignees; (2) the claim that is asserted to be barred must have been presented or be such that it could have been presented in the first case . . ."(@359)

it failed to take into account the third requirement, which states that

"the first suit must have resulted in a final judgment on the merits."(ibid.)

#### ARGUMENT

DID THE TRIAL COURT ERR IN DISMISSING APPELLANT'S CLAIM WITH PREJUDICE ON THE BASIS THAT APPELLANT'S CLAIM FOR PERSONAL INJURIES WAS BARRED BY THE DOCTRINE OF RES JUDICATA BECAUSE APPELLANT HAD AN OPPORTUNITY TO LITIGATE THE PERSONAL INJURY CLAIM WITH THE PROPERTY DAMAGE CLAIM IN SMALL CLAIMS COURT?

The nature of a judgment in Small Claims Court appears always to have been tempered by the following two paragraphs; first:

"(1) Either party may appeal the judgment of the small claims department of the circuit . . . court to the circuit court of the county . . ."

and

"(2) The appeal to the circuit court is a **trial de novo** and shall be tried in accordance with the procedures of the small claims department, except a record of the trial shall be maintained." (Ut. Code Annot., 78-6-10(1), (2))

The unique nature of the effect of a trial de novo on the general bar to rebringing an action under the doctrine of res judicata has rarely been addressed in a Utah Appeals Court since the days of Moss v. Taylor, 273 P 515 (1928) wherein the general principle under old law was articulated in this way:

"When an appeal is taken to the district court from a judgment rendered in the [lower] court, such judgment ceases to be in any sense a final judgment. Unless the appeal is dismissed, a trial de novo must be had in the district court."

After all is said and done, however, in the intervening period of nearly sixty seven years, the principle seems not to have changed appreciably. In more recent days, for example, Moss is cited in Restatement 2d as support for the general principle that

"the better view is that a judgment otherwise final remains so despite the taking of an appeal unless what is called an appeal actually consists of a trial de novo." (Judgments, s.s. 13, p. 135)

Utah Courts, in what little cases have made comment on this principle, have never waived from it. In his dissent from the majority opinion in Salt Lake City v. Piepenburg, 571 P.2d 1299,

Justice Maughn flatly states that

"A trial de novo is not an appeal." (@ 1315, emphasis added)

In expanding on the issue of when res judicata attaches, the clearly controlling case for this set of facts is a fairly recent one, Kirk v. Div. Of Occ. & Pro. Licensing, 815 P.2d 242 (Utah App. 1991) which first quotes a guiding principle for judges who consider such matters, as found in 4 K. Davis, Administrative Law Treatise s.s. 21:3 (2d ed. 1983) which states

"When an agency conducts a trial-type hearing, makes findings, and applies the law, the reasons for treating its decision as res judicata are the same as the reasons for applying res judicata to a decision of a court that has used the same procedure. But the formality may be diminished in any degree, and when it is sufficiently diminished, the administrative decision may not be res judicata. The starting point in drawing the line is the observation that res judicata applies when what the agency does resembles what a trial court does."

Kirk makes the key distinction, that in some cases, formality may be diminished when prior proceedings do not resemble true court proceedings in some important areas, and thus, when it is so diminished, a decision thereunder may well not be res judicata. That is clearly the case here. Like a justice court, in a small claims court no record of proceedings is made except for the terse order filled out at the end of the proceeding. This informality is one of the critical things that makes an appeal by trial de novo so necessary, so that the required formality of a record is present to accompany the proceedings in general. The lack of this in Kirk was fatal to the lower decision and resulted in reversal, for, as the Court said,

"There were no written findings of fact, no written conclusions of law, and the hearing itself was not recorded . . . [g]iven the informal nature in which this hearing was conducted, we cannot conclude that it

afforded Kirk the rights and procedural safeguards that must be present when an agency acts in a judicial capacity conducting a trial type hearing. For this reason, res judicata could not attach to the proceeding . . .".(0244)

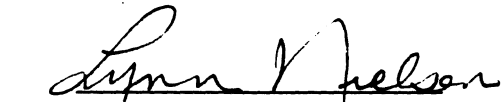
Clearly, the foregoing quote is strongly determinative in the present set of circumstances. In the case here, not only was the initial Small Claims hearing lacking in the necessities enunciated in Kirk that would have given rise to the use of res judicata at the District Court level, but for reasons that can only be guessed at, rather than a continuance being granted in the trial de novo at the circuit level, instead it was not held at all, and a prejudicial judgment (as if the case were decided meritoriously, which it clearly was not) entered against Plaintiff. This being the case, Plaintiff lacks still a meritorious determination of the issues, and therefore it was error for the District Court to apply res judicata in this particular case in the clear absence of any meritorious verdict; for again, and this cannot be stressed too much, it is obvious to any careful reader of the proceedings at the next level that, under the circumstances, no meritorious finding could possibly have been made about Plaintiff's claims, hence Plaintiff's right to such has been unquestionably been abrogated.

#### CONCLUSION

The cases cited are on point, determinative, and entirely controlling in the matter presently before the Court. Plaintiff was not only denied a meritorious determination in a court of record on her claims, but when she attempted to bring this matter

to the attention of the court of general jurisdiction in this state, the doctrine of res judicata was misapplied by a judge of that Court. To do anything but send this case back to a lower level for that trial de novo would work a clear injustice to the Plaintiff. Accordingly, the Court has no choice but to reverse and remand so that this claim can be adjudicated, one way or the other, meritoriously.

RESPECTFULLY SUBMITTED this 27<sup>th</sup> day of February, 1995.

  
LYNN NIELSEN, Appellant  
Pro Se.

**CERTIFICATION OF SERVICE**

I, the undersigned, do hereby certify that I served a copy of the foregoing on Defendant at the following address, and in the manner below indicated:

Brett G. Pearce, Attorney at Law  
Richard K. Spratley & Associates  
4021 South 700 East, Suite 250  
Salt Lake City UT 84107

U.S. Mail          x    
Express Mail  
Hand Delivery  
Telecopier

DATED this 27<sup>th</sup> day of February 1995.

## **ADDENDUM**

### **Index to Addendum**

	<b><u>Page</u></b>
1. Small Claims Judgment . . . . .	A-1
2. Circuit Court Judgment and Order . . . . .	A-2
3. District Court Judgment and Order . . . . .	A-3

## Third Circuit Court, State of Utah

SALT LAKE COUNTY, SANDY DEPARTMENT

440 East 8680 South, Sandy, Utah 84070

Name Lynn Nielsen, Plaintiff )

Agent &amp; Title \_\_\_\_\_ )

Street Address \_\_\_\_\_ )

City, State, Zip \_\_\_\_\_ Phone \_\_\_\_\_ )

SMALL CLAIMS  
JUDGMENTName Ronald F. DePae Motenson, Defendant )Case No. 92 8088337

Social Security Number \_\_\_\_\_ )

Agent &amp; Title \_\_\_\_\_ )

Street Address \_\_\_\_\_ )

City, State, Zip \_\_\_\_\_ Phone \_\_\_\_\_ )

Date of Trial 5/6/92Parties Appearing: ☒ Plaintiff ☒ Defendant

The Court Orders Judgment as Follows:

☐ For Plaintiff

\$ \_\_\_\_\_ Principal

\$ \_\_\_\_\_ Court Costs

\$ \_\_\_\_\_ Total Judgment, with interest at 12% per year until paid.

This judgment is effective for 8 years.

☒ For Defendant☒ No cause of Action☒ Dismissal with Prejudice (plaintiff may not refile case)☐ Dismissal without Prejudice (plaintiff may refile case)Dated 5/6, 19 92Judge T. R. B. J.I ☐ mailed ☒ delivered a copy of this judgment to☒ Plaintiff☒ DefendantDated 5/6, 19 92Signature of Plaintiff or Defendant D. M. J.



Brett G. Pearce [5220]  
RICHARD K. SPRATLEY & ASSOCIATES  
Attorney for Defendants  
4021 South 700 East, Suite 250  
Salt Lake City, Utah 84107  
Telephone: (801) 266-7007

IN THE THIRD CIRCUIT COURT, STATE OF UTAH  
SALT LAKE COUNTY, SANDY DEPARTMENT

..ooOoo..

LYNN NIELSEN	:	JUDGMENT AND ORDER
Plaintiff,	:	
vs.	:	
RONALD MORTENSEN and DEL RAE MORTENSEN	:	CIVIL NO. 920003815
Defendants.	:	Judge Roger A. Livingston
	:	

---

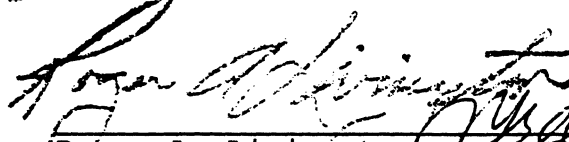
Came on for trial in the above-captioned matter on Friday, August 28, 1992 at 2:00 p.m. Defendants were represented by Brett G. Pearce of Richard K. Spratley & Associates. Plaintiff made no appearance either personally or through an attorney. A friend of plaintiff's appeared and requested a continuance. The Court was of the opinion that because plaintiff did not attend the scheduled trial either personally or through counsel, she failed to appear; therefore, no proper motion for continuance was before the Court. Also, even after considering the matters upon which the motion for continuance was based, the Court was of the opinion that plaintiff failed to show the requisite due diligence. After having fully considered the matter and being fully advised,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED: that plaintiff's

claims against defendants in the above-referenced case are hereby dismissed with prejudice. If plaintiff files any motion, petition or takes any action to set this judgment and order aside, plaintiff must, as a condition precedent, pay all reasonable attorneys fees and costs incurred by defendants in defending against the claims brought in the instant case.

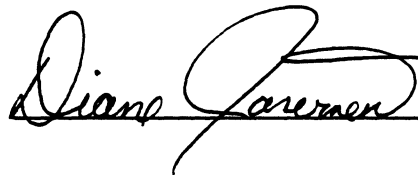
DATED this 22 day of ~~October~~ <sup>February</sup>, 1992.

BY THE COURT:

  
Roger A. Livingston  
Third Circuit Court Judge

**CERTIFICATE OF MAILING**

I hereby certify that I have mailed a true and correct copy of the foregoing Judgment and Order, postage prepaid, to Defendant Lynn Nielsen, P.O. Box 1944, Sandy, Utah 84091, this 7 day of October, 1992.

  
Diana Jaramen

JUN 03 1994

Brett G. Pearce [5220]  
RICHARD K. SPRATLEY & ASSOCIATES  
Attorney for Defendants  
4021 South 700 East, Suite 420  
Salt Lake City, Utah 84107  
Telephone: (801) 266-7007

By

  
Deputy Clerk

IN THE THIRD JUDICIAL DISTRICT COURT  
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

..ooOoo..

LYNN NIELSEN,

:

ORDER

Plaintiff,

:

v.

:

CIVIL NO. 930904041PI

RONALD MORTENSEN and DELRAE  
MORTENSEN,

:

Judge John A. Rokich

:

Defendants.

---

Came on for hearing in the above-captioned matter, defendants' motion to dismiss plaintiff's complaint, on May 9, 1994 at 9:00 a.m. Plaintiff was represented by her attorney, Lynn C. Spafford. Defendants were represented by their attorney of record, Brett G. Pearce. Of particular concern to the Court at the instant hearing was whether plaintiff knew she had been injured in the April 10, 1991 slip and fall when she filed her April 13, 1992 Small Claims Action against defendants.

After hearing sworn testimony of plaintiff and reviewing evidence proffered by defense counsel, the Court was persuaded that plaintiff knew of her alleged personal injuries long before the April 13, 1992 Small Claims Action against defendants was filed. Additionally, after reviewing the memoranda and arguments submitted by both plaintiff's and defendants' counsel, the Court was of the opinion

that applicable law prohibited plaintiff from splitting her cause of action and that plaintiff's complaint in the instant case is barred by operation of the doctrine of res judicata.

Therefore, it is hereby

ORDERED, ADJUDGED AND DECREED that plaintiff's complaint against defendants in the instant case is dismissed with prejudice, each party to bear their own costs.

DATED this 3 day of June, 1994.

  
\_\_\_\_\_  
John A. Rokich  
Third District Court Judge

CERTIFICATE OF MAILING

I do hereby certify that on this 19 day of May, 1994, I mailed a true and correct copy of the foregoing Order to, Earl S. Spafford, and Lynn C. Spafford, Attorneys for Plaintiff, SPAFFORD & SPAFFORD, 230 South 500 East, Suite 150, Salt Lake City, Utah 84102.

  
\_\_\_\_\_