

1995

# Evelyn Muir v. Apache Nitrogen Products, WH Burt Explosives v. Douglas Bailey : Response to Petition for Certiorari

Utah Court of Appeals

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Roger P. Christensen; Shawn E. Draney.

Robert H. Copier.

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IN THE UTAH SUPREME COURT

EVELYN MUIR, )  
 )  
 ) Plaintiff and Appellant, )  
 )  
 vs. )  
 )  
 APACHE NITROGEN PRODUCTS )  
 and W.H. BURT EXPLOSIVES, )  
 )  
 ) Defendants and Appellees, )  
 )  
 vs. )  
 )  
 DOUGLAS BAILEY, )  
 )  
 ) Third-party Defendant )

REPLY BRIEF IN SUPPORT  
OF PETITION FOR A  
WRIT OF CERTIORARI

950473

District Court Case  
Nos. 880705719 and  
890705873

Court of Appeals  
Case No. 94-0553-CA

APPEAL FROM THE SEVENTH DISTRICT COURT, GRAND COUNTY  
JUDGE ANDERSON

UTAH  
DOCUMENT  
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DOCKET NO. 950473

UTAH SUPREME COURT  
BRIEF

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DEC 27 1995

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UTAH



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## DETERMINATIVE RULE

### U.R.C.P. 15(a):

(a) Amendments. A party may amend his pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it at any time within 20 days after it is served. Otherwise, a party may amend his pleadings only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 20 days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders.

## ARGUMENT

### **I. NO APPELLATE COURT HAS YET RULED UPON THE TRIAL COURT'S FAILURE TO GRANT EVELYN MUIR'S FIRST MOTION FOR A CHANGE OF VENUE.**

The venue change in this case was sought by the plaintiff, not by any defendant. Since it is the plaintiff who has the right to designate venue in the complaint under U.C.A. §78-13-7, designation of a new county for trial by a plaintiff is governed by U.C.R.P. 15(a). The change to Davis County should have been made as a "matter of course" when plaintiff designated that county immediately after remand to the trial court by the Utah Supreme Court after her appeal of the earlier dismissals. Even if the "freely given when justice so requires" standard of review is applied to the record of this case, the trial should have been held in Davis County as a matter of right and as a matter of law.

### **II. THE FAILURE OF THE TRIAL COURT TO GRANT EVELYN MUIR'S FIRST MOTION FOR A CHANGE OF VENUE AS A MATTER OF RIGHT WAS BEYOND THE SCOPE OF JUSTICE STEWART'S INTERLOCUTORY HEARING.**

Defendants appear to argue that the interlocutory hearing before Justice Stewart was somehow an evidentiary hearing. This was not the case.

As the highest court in the state, the Utah Supreme Court does not take evidence, except in the limited cases where the Utah Supreme Court has original jurisdiction. Plaintiff's counsel had the interesting

experience of successfully defending the respondent in one of those cases, an election contest, Griffiths, et. al. v. Richards, #920445, regular October term, 1992.

There is no comparable provision that would have allowed Justice Stewart to sit as an individual justice and hold an evidentiary hearing in this case.

Justice Stewart did not hold any evidentiary hearing in this case. The first petition for permission to appeal interlocutory order had already been denied and was beyond the scope of Justice Stewart's jurisdiction.

Justice Stewart did not decide the issues now on appeal, Justice Stewart would have lacked jurisdiction to do so, and an appellate decision as to first motion for change of venue has yet to be rendered.

**III. THE FAILURE OF THE COURT OF APPEALS TO RULE UPON THE TRIAL COURT'S DENIAL OF EVELYN MUIR'S FIRST MOTION FOR A CHANGE OF VENUE AS A MATTER OF RIGHT WAS A SIGNIFICANT DEPARTURE FROM THE USUAL COURSE OF JUDICIAL PROCEEDINGS.**

It is a departure from the usual course of judicial proceedings for an appellate court to wholly disregard a major issue that has been raised on appeal.

Evelyn Muir filed a petition for reconsideration pointing this omission out to the Court of Appeals. That petition was denied. A copy of that petition is annexed hereto.

This departure from the usual course of judicial proceedings is sufficient to have the Utah Supreme Court exercise its powers of supervision.

**IV. HAVING OPPOSED INTERLOCUTORY REVIEW OF THE TRIAL COURT'S FAILURE TO MOVE THE TRIAL TO DAVIS COUNTY, DEFENDANTS CANNOT NOW COMPLAIN ABOUT HAVING THE MATTER NOW ADDRESSED FOR THE FIRST TIME ON APPEAL.**

Evelyn Muir and Douglas Bailey were two of the plaintiffs when this case was originally filed. The Seventh District Court erroneously dismissed that case.

Since Douglas Bailey's case was for injuries, not wrongful death, the statute of limitations had not yet run on his case. He simply refiled his lawsuit. He did so in the Third District Court in Salt Lake County because defendant W. H. Burt had asserted in the earlier case that Grand County was not its county of residence.

When W. H. Burt later changed positions and asserted in Douglas Bailey's case that its corporate residence was in Grand County, venue was changed to Grand County, which is also Douglas Bailey's home.

The trial of his case in Grand County resulted in a 6 to 2 jury verdict that was appealed. His case was compromised and settled on appeal.

Unlike Douglas Bailey, Evelyn Muir could not refile her case, because the statute of limitations for a wrongful death case had run. She therefore successfully appealed. When the Utah Supreme Court reversed and remanded, she immediately designated Davis County as the



venue for trial. The Court of Appeals declined to address the trial court's denial of this initial motion for a change of venue. Her Petition for a Writ of Certiorari should be granted so that this issue can now be addressed on appeal for the first time.

Having opposed Evelyn Muir's efforts to have the trial held in Davis County (thereby achieving their tactical objective of excluding a widow from being at the trial and having her day in court in a wrongful death case), and having opposed Evelyn Muir's efforts to have the matter of venue considered on appeal on an interlocutory basis prior to trial rather than after trial, defendants should not now be heard to complain about having the matter properly addressed for the first time on appeal at this point.

#### CONCLUSION

Unless the Utah Supreme Court grants the Petition for a Writ of Certiorari, Evelyn Muir will have never personally had her day in court and no appellate court will have ever ruled upon the trial court's failure to honor Evelyn Muir's designation of Davis County as the place for trial as a matter of right.

DATED this 22 day of December, 1995.

  
\_\_\_\_\_  
ROBERT H. COPIER  
Attorney for Evelyn Muir

## **ADDENDUM**

**A**

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**IN THE UTAH COURT OF APPEALS**

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EVELYN MUIR,  
                    Plaintiff and Appellant,

vs.

APACHE NITROGEN PRODUCTS  
and W.H. BURT EXPLOSIVES,  
                    Defendants and Appellees,

vs.

DOUGLAS BAILEY,  
                    Third-party Defendant

---

**PETITION FOR REHEARING**

Appeal No. 940553-CA

APPEAL FROM THE SEVENTH DISTRICT COURT, GRAND COUNTY  
JUDGE ANDERSON

---

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## PETITION

Plaintiff/Appellant, Evelyn Muir, through her attorney, Robert H. Copier, pursuant to U.R.A.P 35, respectfully petitions the Court for rehearing. The ground for this Petition is that the decision handed down on September 14, 1995 addressed only two of the three issues before the Court. Counsel certifies that this petition is presented in good faith and not for delay.

The decision of the Court of Appeals addressed Evelyn Muir's second and superseding Motion for Change of Venue which was filed because she was unable to attend the trial of her case in Grand County due to health reasons.

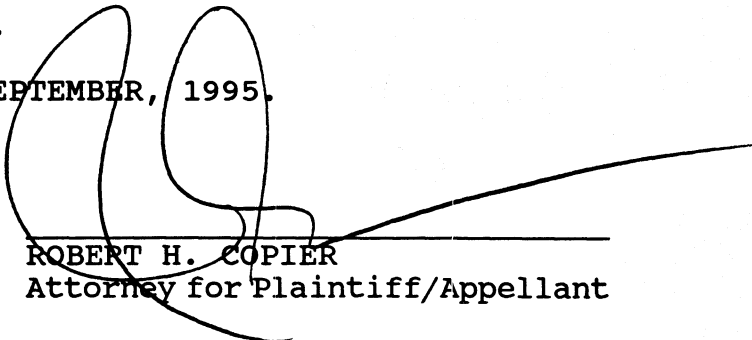
The Court of Appeals did not address, in its decision, the first and initial Motion for Change of Venue in which Evelyn Muir sought to change venue to Davis County as the place for trial as a matter of right after the Court in Grand County dismissed her first case there without prejudice and dismissed her second case there with prejudice. The designation of Grand County as the place for trial in the initial complaints was no longer effective, because both complaints were dismissed.

Both dismissals were reversed by the Utah Supreme Court, and Evelyn Muir promptly designated Davis County as the place for trial as a matter of right as plaintiff, and immediately moved for change of venue to Davis County as a matter of right. The question of law presented for review to the Court of Appeals is whether Judge Anderson was bound by plaintiff's designation of Davis County as a matter of right, an issue of first impression.

**CONCLUSION**

This matter should be reheard so that the Court can address Evelyn Muir's appeal of the denial of her first and initial Motion for Change of Venue to Davis County as the venue designated by plaintiff as a matter of right.

DATED THIS 26 DAY OF SEPTEMBER, 1995.

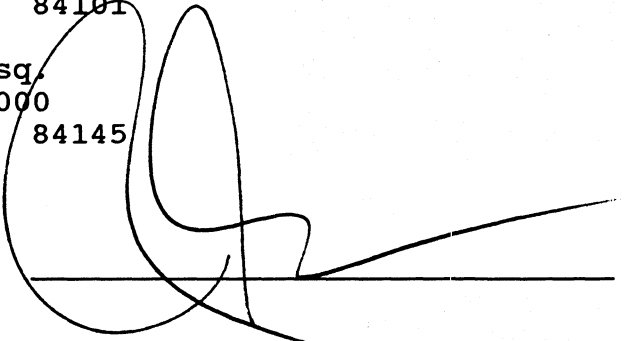
  
\_\_\_\_\_  
ROBERT H. COPIER  
Attorney for Plaintiff/Appellant

**MAILING CERTIFICATE**

On this 26 day of September, 1995, a true and correct copy of the foregoing **PETITION FOR REHEARING** was mailed, postage prepaid, to:

Roger P. Christensen, Esq.  
175 South West Temple, Suite 510  
Salt Lake City, UT 84101

Shawn E. Draney, Esq.  
Post Office Box 45000  
Salt Lake City, UT 84145

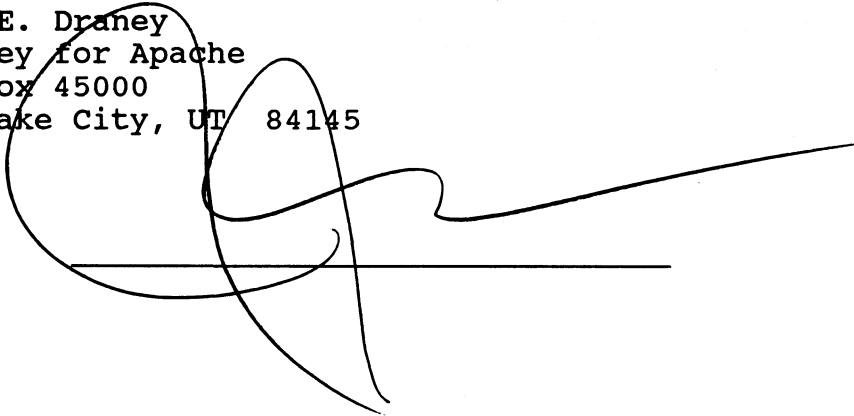
  
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**CERTIFICATE OF SERVICE**

On this 22 day of December, 1995, I did cause to be served, via U.S. mail, true and correct copies of the foregoing **REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI** to:

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