

1995

Victor Ogden, Angie Ogden v. IB Printing Company : Reply Brief

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.

Randy Ludlow, Esq.; Attorney for Appellees/Defendants.

Julian D. Jensen, Esq.; Jensen, Duffin, Carman, Dibb & Jackson; Counsel for Appellants/Plaintiffs.

Recommended Citation

Reply Brief, *Victor Ogden, Angie Ogden v. IB Printing Company*, No. 950725 (Utah Court of Appeals, 1995).
https://digitalcommons.law.byu.edu/byu_ca1/6947

This Reply Brief 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.

DOCKET NO. 950725 CA

IN THE SUPREME COURT OF THE STATE OF UTAH

VICTOR OGDEN and ANGIE OGDEN,
husband and wife,

Appellants/Plaintiffs,

vs.

IB PRINTING COMPANY, a Utah Joint
Venture, and Gary Richards, Mary
Richards, Michelle Richards, and
Ronald Richards, and related parties,

Appellees/Defendants.

95-0725-CA

Supreme Ct. Case No. 950126

Priority No. 15

[Dis. Ct. No. 940300038]

REPLY BRIEF OF APPELLANTS

**Appeal from Final Order of Dismissal and Order
Affirming Dismissal as Entered by the Honorable John A. Rokich
a Judge of the Third District Court, Tooele County.**

Julian D. Jensen, Esq. (1679)
JENSEN, DUFFIN, CARMAN, DIBB & JACKSON
Counsel for Appellants/Plaintiffs
311 South State, Suite 380
Salt Lake City, UT 84111
Telephone: (801) 531-6600

Attorneys for Ogdens

Randy Ludlow, Esq.
311 South State Street, Suite 280
Salt Lake City, UT 84111
Telephone: (801) 531-1300

Attorney for Appellees/Defendants

FILED

AUG 31 1995

CLERK SUPREME COURT
UTAH

IN THE SUPREME COURT OF THE STATE OF UTAH

VICTOR OGDEN and ANGIE OGDEN,	:	
husband and wife,)	
	:	
Appellants/Plaintiffs,)	
	:	
vs.)	Supreme Ct. Case No. 950126
	:	
IB PRINTING COMPANY, a Utah Joint)	Priority No. 15
Venture, and Gary Richards, Mary	:	
Richards, Michelle Richards, and)	
Ronald Richards, and related parties,	:	
)	[Dis. Ct. No. 940300038]
Appellees/Defendants.	:	

REPLY BRIEF OF APPELLANTS

**Appeal from Final Order of Dismissal and Order
Affirming Dismissal as Entered by the Honorable John A. Rokich
a Judge of the Third District Court, Tooele County.**

Julian D. Jensen, Esq. (1679)
JENSEN, DUFFIN, CARMAN, DIBB & JACKSON
Counsel for Appellants/Plaintiffs
311 South State, Suite 380
Salt Lake City, UT 84111
Telephone: (801) 531-6600

Attorneys for Ogdens

Randy Ludlow, Esq.
311 South State Street, Suite 280
Salt Lake City, UT 84111
Telephone: (801) 531-1300

Attorney for Appellees/Defendants

TABLE OF CONTENTS

	<u>PAGE</u>
Table of Contents	2
Table of Authorities	3
a. Cases Cited	
b. Statutes	
ARGUMENT	5
a. SUGGESTED ANALYSIS	6
b. ESSENTIAL JURISDICTIONAL FACTS, EITHER UNDISPUTED OR REQUIRED TO BE CONSTRUED IN FAVOR OF APPELLANTS	9
CONCLUSION	14

TABLE OF AUTHORITIES

CASES CITED

		Pages
1.	<u>Kamdar & Co. v. Laray Co., Inc., 815 P.2d 245, 248 (Ut. App. 1991)</u>	7
2.	<u>Anderson v. American Society of Plastic Surgeons, 807 P.2d 825 (Utah 1990)</u>	7
3.	<u>Demond v. FHA, 849 P.2d 598, 599 (Utah 1995)</u>	7
4.	<u>St. Benedict's Dev. Co. v. St. Benedict's Hospital, 811 P.2d 194, 196 (Utah 1991)</u>	7
5.	<u>Lynch v. Lynch, 655 P.2d 1276, 1278 (Utah 1983)</u>	7
6.	<u>Abbott G.M. Diesel, Inc. v. Piper Aircraft Corp., 578 P.2d 850, 853 (Utah 1978)</u>	8
7.	<u>Mallory Engineering v. Ted R. Brown & Assoc., 618 P.2d 1004, 1006 f.n. 4 (Utah 1980)</u>	8

STATUTES

Page No.

UCA 78-27-24 (1987)

8

IN THE SUPREME COURT OF THE STATE OF UTAH

VICTOR OGDEN and ANGIE OGDEN,
husband and wife,

Appellants/Plaintiffs,

vs.

IB PRINTING COMPANY, a Utah Joint
Venture, and Gary Richards, Mary
Richards, Michelle Richards, and
Ronald Richards, and related parties,

Appellees/Defendants:

**REPLY
BRIEF OF APPELLANT**

Supreme Ct. Case No. 950126

Priority No.

[Dis. Ct. No. 940300038]

ARGUMENT

The Appellees, IB Printing Company and the Richards Family (hereinafter sometimes "IB Printing" or the "Richards") apparently argue in their Appellee Brief that there is really only one issue to be decided in this case and the Court need not examine the multiple issues raised by the Appellants, the Ogdens.

On one level, the Ogdens agree with the position of the Appellees in that the Ogdens have first and foremost argued the trial court inadvertently committed manifest and reversible error by refusing to regard undisputed issues of material fact in reaching its ruling in this case. If this Court agrees with the analysis raised by Appellants, then further detailed analysis and determination of the proper legal application of jurisdiction by the courts of the State of Utah over non-resident defendants need not, and should not, be resolved at this juncture. It is sufficient to determine that the Court erroneously

disregarded material essential facts which were deemed admitted before it for the purposes of a Motion to Dismiss, or for a Motion to Dismiss treated as a Summary Judgment proceeding, and could not have properly reached its conclusions except by disregarding such essential jurisdictional facts. If the foregoing properly states the case, as contended by the Ogdens, then this Court without further analysis should simply remand this matter *summarily* to the District Court for further proceedings pursuant to the presently pending Motion of the Ogdens for Summary Disposition.

Other collateral issues raised by the Ogdens were thought necessarily included, so that if, for any reason this Court did not believe it could summarily reach the foregoing conclusion, then an actual analysis of the alleged jurisdiction over the non-resident defendants and the potential interface of standard jurisdictional standards with the doctrine of forum non conveniens could be considered by this Court. In no way did Appellants wish to suggest to this Court that it needed to reach this level of analysis, but merely thought it necessary to argue the same if the Court did not determine this case was appropriate for summary disposition as previously urged by the Ogdens. As this Court will recall, it has not yet ruled on Appellants' Motion for Summary Disposition, but has such Motion under advisement.

While the Ogdens do not wish to reargue or restate the positions which they have previously presented to this Court in their Brief on Appeal, it did seem clear from a reading of Appellees' Brief that it may be useful to this Court's understanding for Appellants to outline an alternative method of analysis of the points previously presented in order to clarify the issues. Appellants also believe it is necessary to restate certain

jurisdictional facts which they believe are incontrovertibly before this Court. Appellants also assert that some of the "summary facts": advanced by Appellees have never been made by any party and are merely conclusionary or argumentative statements by counsel and should, therefore, be excluded from consideration in this Appellate review.

SUGGESTED ANALYSIS

The Ogdens believe this case presents essentially a three (3) part analysis which this Court may embrace in addressing the issues previously presented:

First, did the original Order of Dismissal and subsequent Order Affirming Dismissal entered by the trial court rely upon sufficient jurisdictional facts to allow the trial court to enter these Orders?

The Ogdens contend that the Dismissal Order of the trial court not only disregards essential jurisdictional facts which would defeat the application of the Motion to Dismiss, but even misstates a material jurisdictional fact; i.e., that the business was at all times conducted within the State of Nevada. Based upon this state of the record, Appellants contend that the ruling was manifestly contrary to the facts before the Court; and, therefore, cannot meet the stringent standards of a trial court summary disposition which requires that there be **no disputed material issue of fact or law**. This standard includes all reasonable inferences drawn from those facts, which, likewise, must be construed in favor of the party moved against. Further, proper application of facts is reviewed pursuant to a correctness standard with the Appellate Court giving no deference to the trial court's fact finding. See particularly Demond v. FHA, 849 P.2d 598, 599 (Utah 1995);

St. Benedict's Dev. Co. v. St. Benedict's Hospital, 811 P.2d 194, 196 (Utah 1991); and, Lynch v. Lynch, 655 P.2d 1276, 1278 (Utah 1983).

If this Court is satisfied with the foregoing analysis, then it must determine that the Motion to Dismiss ruling of the trial court is incorrect and this matter **should be** handled as a summary disposition without further legal analysis.

Secondly, only if this Court does not agree with the Ogden's position that the ruling of Judge Rokich cannot be sustained on its face from the facts before this Court, need this Court enter into an analysis of the proper requirements of jurisdiction over non-resident defendants.

In this regard, the Richards have primarily limited their Brief and argument to the two-part analysis required under the Utah Long Arm Statute. See particularly Kamdar & Co. v. Laray Co., Inc., 815 P.2d 245, 248 (Ut. App. 1991); and, Anderson v. American Society of Plastic Surgeons, 807 P.2d 825 (Utah 1990) wherein this Court and the Utah Court of Appeals held the first step of the analysis is to determine whether the contacts are related to the specific elements of the Utah Long Arm Statute (Utah Code Annotated §78-27-24 [1987]) and then, if found, whether the alleged violations of the criteria are sufficient that due process would not be violated by making the defendants appear and defend their position and claims before the Courts of this State.

Excluded from this analysis, as proposed by the Richards, is the threshold issue of whether the actions of the Richards constitute a general jurisdiction case arising out of a continuous business presence in this state, as contrasted to a Long Arm Statute case arising out of the minimum contacts test. The legal distinction between *general* and

long arm or *special* jurisdiction was treated in detail by this Court in Abbott G.M. Diesel, Inc. v. Piper Aircraft Corp., 578 P.2d 850, 853 (Utah 1978). See also Mallory Engineering v. Ted R. Brown & Assoc., 618 P.2d 1004, 1006 f.n. 4 (Utah 1980).

Appellants have made their contention of general jurisdiction from the fact that there was more than *minimal* contacts with the State of Utah, consisting of the **full fledged conduct of business, leasing and improvements to a business establishment, obtaining a business license from the City of Wendover, Utah, and all other incidences of full participation in Utah** from at least the period of November 1993 through May 1994 by the IB Printing business and its principals. Even if this Court were to proceed with the two-part analysis required by the *Long Arm* statute, Appellants believe the facts amply demonstrate the satisfaction of minimum contacts and the due process requirements required by our case law; and, particularly, as articulated in the Kamdar decision, *supra*.

Appellants would further urge that the second aspect under part two of this proposed analysis would require this Court to make a further determination of whether the doctrine of forum non conveniens has not been essentially subsumed and incorporated into the due process analysis required by the developing application of the Utah Long Arm Statute. Appellants further contend forum non conveniens is never available as a defense when defendants have submitted to general jurisdiction by their acts within this state. This Court has decided in the Long Arm Statute cases previously cited to this Court, that the second part of the analysis is whether application of Long Arm Jurisdiction would offend traditional notions of "fair play" and "due process".

In recognizing this due process analysis, this Court has, nonetheless, stated that the legislative mandate to extend jurisdiction to the maximum extent possible under the due process clause must be recognized and applied.

Within this matrix, it seems that there really is no room or necessity for a further extension of the fairness doctrine to determine forum non conveniens. Forum non conveniens, it would appear, becomes merely a subset or part of the analysis of fairness and due process under the Long Arm Statute. In all events, this issue seems to be a matter of "first impression" before this Court, should it determine that jurisdiction is otherwise applicable under either the *Long Arm* or *General* jurisdiction concepts from the facts.

Thirdly, the third and final leg of the analysis which this Court may wish to employ in determining the issues presented would be the **evidentiary standard** to be applied in a forum non conveniens determination.

Since the result of an adverse forum non conveniens determination is dismissal of the action, not a change of venue, then it would appear to Appellants that the same case law previously cited to the Court requiring that all disputed and uncontroverted facts, as well as reasonable inferences drawn from those facts be construed in favor of the party moved against, as in other dismissal actions, would apply with equal validity to this proceeding. Likewise, the trial court's determination of those facts would be reviewed under the correctness factual standard.

Appellants hope that the foregoing analysis may be somewhat useful for the Court in tying together the legal issues previously presented by the Ogdens, and in addressing the arguments of the Richards.

ESSENTIAL JURISDICTIONAL FACTS, EITHER UNDISPUTED OR
REQUIRED TO BE CONSTRUED IN FAVOR OF APPELLANTS

Since this case is essentially a "fact sensitive" case based upon those facts before the trial court at the time of its dismissal ruling, Appellants believe that the proper articulation of those facts in the context of a Motion to Dismiss proceeding is essential to a determination by this Court and are properly included as a portion of the ARGUMENT section.

In this regard, the Ogdens are still of the view that the Appellees continue to base their argument and case upon statements of fact or law which are in some essential particulars: (i) either disputed and, therefore, to be construed in favor of the Ogdens; (ii) uncontroverted; (iii) argument of counsel asserted as facts having no basis in an Affidavit or other statement of a party defendant; (iv) improper legal conclusions; (v) statements or assertions improperly raised for the first time on appeal. In outlining these challenged statements of fact or law, the Ogdens will attempt to set-out their basis for objection with reference to the preceding factors. The Ogdens also wish to briefly outline the uncontroverted or admitted facts in their favor; or, which, apparently, are still being controverted by Appellees in this proceeding:

1. It is uncontroverted, the IB Printing business operated in UTAH from, at least, late 1993 through approximately May 1994. See Record on Appeal (hereinafter "ROA") pgs. 89 and 95; Ogden Affidavit (hereinafter "OA") ¶'s 4 and 28.

2. It is uncontroverted, the business license for the operation of the IB Printing business was issued by the City of Wendover, **UTAH**, and the lease was directly entered between IB Printing and Wendover, **UTAH**. ROA pg. 95; OA ¶ 6.

3. Though argued by Richards' counsel, no original statement or Affidavit of the Appellees indicate that any of the business assets at issue in this proceeding were ever transferred to IB Printing Corporation, nor has there ever been any Affidavit or other factual statement of an actual party or document controverting the statements of Victor Ogden that the IB Printing business was organized solely as an "operating entity" for the day-to-day business, and was never intended to own or to hold the printing assets as previously agreed between the parties. See ROA pgs. 92 - 92; OA ¶'s 20, 21 and 22.

4. The record remains uncontroverted that the original organizational discussions, leasehold improvements and efforts were all directed and occurred in Wendover, **UTAH**. See ROA pgs. 93 - 95; OA ¶'s 4, 5, 7, 9, 10, 12 and 13.

5. Not only was the original leasehold established in **UTAH**, the business conducted in **UTAH**, and a business license obtained in **UTAH**, but it is uncontroverted that the original printing occurred in **UTAH**. See ROA pgs. 95; OA ¶ 4, supra.

6. While contested, this Court and the trial court should, for the purposes of a summary proceeding, indulge as a correct factual statement the contention of Victor Ogden that the corporation was never properly organized, that no business assets were ever transferred to the corporation, and that the corporation was to exist merely as an "operating entity" as requested by the Richards Family. See ROA pgs. 90 and 92; OA ¶'s 20 and 16.

7. While most likely controverted, this Court should give presumption to the Ogdens in their statement that the corporation was not properly organized, that there were no organizational meetings attended by Victor Ogden as a director, and that he received no notice of any organizational meeting(s), issuance of stock, or other subsequent meetings by the Board of Directors. See ROA pg. 90; OA ¶ 24.

8. The original accountant for the business was to be located in Salt Lake City, **UTAH**. See ROA pg. 90; OA ¶ 24.

9. The Appellees/Defendants have never, at any time in this proceeding, produced any records or minutes to show the organization of the corporation, any transfer of assets, or to controvert any of the statements of the Appellants as to the nature of the IB Printing corporation and the reason for its formation, nor were any such minutes supplied as part of any addendum to Appellees' Brief. See ROA pg. 91; OA ¶ 22.

10. No Affidavit or any other factual statement of any of the Richards was submitted at the trial level showing that a Mr. Ed Walters was elected as President, nor was there any Affidavit or statement by Ed Walters as to the facts now asserted in the Appellees' Brief presented to the trial court. Such statements should not be considered as a statement asserted for the first time on appeal, and unsupported by a party statement of record. It is, however, indicative of the fact that Mr. Victor Ogden, as a director, has never received notices related to corporate matters.

11. Counsel for Appellees continually states in his Memorandum to the trial court and Briefs before this Court that the leasehold business, while technically located

within the jurisdiction of Utah, is not subject to Utah jurisdiction because it is a federal enclave. No case authority or actual factual proof as to this claim have been asserted or tendered to the Court by the Appellees. Moreover, the fact, even if true, should be of little significance and disregarded because the City of Wendover, **UTAH**, was the lessor to the business as well as the Utah municipal entity issuing a business license which clearly creates a prima facie showing of jurisdiction

12. While the Ogdens have never denied that the physical assets of the business were adversely removed to the State of Nevada after problems arose between the parties in approximately May of 1994, they assert that such adverse removal of the business equipment and property should certainly not create a "boot strap" argument in favor of jurisdiction being exercised by the State of Nevada, but more fully supports the contention of the Ogdens that jurisdiction could properly be asserted in the trial courts of Utah when the Richards adversely entered into the State of Utah and adversely and wrongfully removed equipment belonging to the Appellants from this jurisdiction. Do not the Courts of the State of Utah have a vested interest in protecting its citizens from the wrongful taking of property in this State? Do Appellees seriously contend the wrongful appropriator can only be sued in his own jurisdiction? See ROA pg. 67; Richards Affidavit ¶ 8.

13. Counsel for the Richards raises for the first time in his Brief on Appeal the argument that, because gambling is not legal in Utah, the printing of advertising and promotional brochures for Nevada gambling establishments in Utah is illegal. This argument should not be considered because it was not raised at any time at the trial

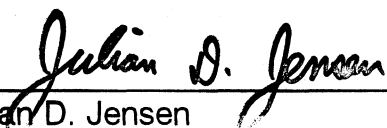
level, nor is it supported by any factual statements of the Richards. Moreover, the validity of this position would startle the numerous Utah residents who service casinos in Nevada as employees or vendors. Clearly, the printing of brochures for casinos is not an illegal act.

14. Finally, no statement of the actual defendants has challenged or controverted the specific factual statements of the Ogdens wherein the Richards have submitted themselves and IB Printing to *General* jurisdiction within the State of Utah by continuously conducting business in this State.

CONCLUSION

This Court should reconsider the prior Motion of the Appellants for Summary Disposition and grant the same upon the basis that the finding of the trial court are not consistent with the uncontroverted facts which must be construed in favor of the Ogdens/Appellants in this proceeding. Alternatively, and only if this Court is not inclined to enter Summary Disposition on Appeal, should this Court consider the forum non conveniens doctrine as applied in this proceeding, and whether there are sufficient facts to support this doctrine. Finally, the sufficient application of the due process requirements under the Utah Long Arm Statute would satisfy any forum non conveniens defense.

DATED this 31st day of August, 1995.



Julian D. Jensen
Attorney for Appellants/Plaintiffs

Counsel for appellants affirms that he caused to be hand delivered on this 31st day of August, 1995 two (2) copies of the Reply Brief of Appellants to the office of counsel for appellees addressed as follows:

Mr. Randy Ludlow, Esq.
Attorney for Appellees
311 South State Street, Suite 280
Salt Lake City, UT 84111



Julian D. Jensen
Attorney for Appellants

APPELLATE/REPBRIEF.OGD