

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

LEA HUDSON,

Petitioner,

vs.

CLIFFORD and "JANE DOE"
HAPNER, individually, and as a
marital community composed thereof,
and MATTHEW NORTON, a
Washington corporation,

Respondents.

No. 82409-6

RESPONDENTS'
STATEMENT OF
ADDITIONAL AUTHORITY

Pursuant to RAP 10.8, respondents submit the following additional
authority:

In *Crispen v. Hannover*, 86 Mo. 160, 1885 WL 7335, *4 (1885),
the Missouri Supreme Court stated:

The judgment rendered in 1875, which was reversed on
defendants' appeal, was an entirety, and the only effect of
such reversal was to "restore the parties to the same
condition in which they were prior to the rendition of the
judgment. The judgment reversed becomes mere waste
paper, and the parties to it are allowed to proceed in the
court below to obtain a final determination of their rights in
the same manner and to the same extent as if the cause had
never been heard or decided by any court.

In *Hullett v. Baker*, 101 Tenn. 689, 49 S.W. 757, 758 (1899), the
Supreme Court of Tennessee stated:

If the judgment is reversed, the result is to vacate and set
aside the judgment below, and the cause of action is
restored to its original character; and the death of the
wrongdoer may then be pleaded in abatement, the judgment
having been vacated, and being no longer in existence. The

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action then becomes one upon the original demand, and is subject to abatement, as though no judgment had ever been rendered upon it.

In *Schofield v. Rankin*, 86 Ark. 86, 109 S.W. 1161, 1163 (1908), the Arkansas Supreme Court of stated: “The effect of the reversal is to annul, vacate, and set aside the judgment or decree-to completely wipe it out as if it had never been in existence.”

In *Marshall & Spencer v. People’s National Bank of Jacksonville*, 88 Fla. 190, 101 So. 358, 359 (1924), the Supreme Court of Florida stated:

The judgment of this court, reversing the decree of foreclosure and distribution (82 Fla. 479, 90 South. 458), *193 was not a partial reversal, but a reversal of the entire decree, and the cause after reversal stood as though no decree had been rendered.

In *Schleier v. Bonella*, 77 Colo. 603, 605, 237 P. 1113 (1925), the Supreme Court of Colorado stated:

A judgment of reversal is not a bar. It simply leaves the parties in the same position as they were before the judgment of the lower court was rendered.

In *Central Sav. Bank of Oakland v. Lake*, 201 Cal. 438, 257 P. 521, 523, *cert. denied*, 275 U.S. 571 (1927), the Supreme Court of California stated:

It has long been the law of this state that an unqualified reversal remands the cause for a new trial (*Falkner v. Hendy*, 107 Cal. 49, 54, 40 P. 21, 386) and places the parties in the trial court in the same position as if the cause had never been tried, with the exception that the opinion of the court on appeal must be followed so far as applicable

(*Sharp v. Miller*, 66 Cal. 98, 4 P. 1065; *Estate of Pusey*, 177 Cal. 367, 170 P. 846).

In *Monson v. Fischer*, 219 Cal. 290, 291, 26 P.2d 6 (1933), the Supreme Court of California stated:

The reversal of the judgment sets the case completely at large, except as restricted by the opinion of the appellate court. *Central Savings Bank v. Lake*, 201 Cal. 438, 443, 257 P. 521; *Estate of Pusey*, 177 Cal. 370, 371, 170 P. 846.

In *Taylor v. Burgus*, 221 Iowa 1232, 262 N.W. 808, 810 (1935), the Supreme Court of Iowa stated:

It is fundamental that a general order of reversal cancels the district court judgment and sends the case back for a full retrial of the entire case. *Landis v. Interurban Ry. Co.*, 173 Iowa, 466, 154 N. W. 607; *Owens v. Norwood-White Coal Co.*, 181 Iowa, 948, 165 N. W. 177; *Hawthorne v. Delano*, 183 Iowa, 444, 167 N. W. 196. Under such circumstances case stands for retrial the same as though there has been no former trial.

In *Phebus v. Dunford*, 114 Utah 292, 198 P.2d 973, 974 (1948), the Supreme Court of Utah stated:

A reversal of a judgment or decision of a lower court such as this places the case in the position it was before the lower court rendered that judgment or decision, and vacates all proceedings and orders dependent upon the decision which was reversed. 3 Am.Jur. 697, Sec. 1190; 3 Am.Jur. 690, Sec. 1184 (defining "to reverse"); 3 Am.Jur. 699, Sec. 1192 (as to dependent proceedings); *Larsen v. Gasberg*, 43 Utah 203, 134 P. 885 (this case not only reversed the lower court but granted a new trial which in effect removed the first trial from further consideration).

In *Doughty v. State Department of Public Welfare*, 233 Ind. 475, 477, 121 N.E.2d 645, 646 (1954), the Supreme Court of Indiana stated:

If the appellate tribunal finds the judgment was erroneous and reverses it, such judgment is forthwith vacated and set aside and no longer remains in existence. The parties are then restored to the position they held before the judgment was pronounced and must take their places in the trial court at the point *478 where the error occurred, and proceed to a decision.

In *Landy v. Lesavoy*, 20 N.J. 170, 119 A.2d 11, 14 (1955), the Supreme Court of New Jersey stated:

The reversal of a judgment by any competent authority restores the parties litigant to the same condition in which they were prior to its rendition, and the parties are allowed to proceed in the court below to obtain a final determination of their right in the same manner and to the same extent as if their cause had never been heard or decided by any court.

In *O'Brien v. Great Northern Railroad Company*, 148 Mont. 429, 421 P.2d 710, 716 (1966), *cert. denied*, 387 U.S. 920 (1967), the Supreme Court of Montana stated:

Reversing a judgment makes it void as if never rendered. *Central Montana Stockyards v. Fraser*, 133 Mont. 168, 320 P.2d 981. When a new trial is *441 granted the parties are returned to the position they occupied before the trial. *Waite v. Waite*, 143 Mont. 248, 389 P.2d 181.

In *Bergstrom v. Bergstrom*, 320 N.W.2d 119, 122 (N.D. 1982), the Supreme Court of North Dakota stated:

Generally, the effect of a reversal on appeal is that the judgment is vacated and the parties are put in the same posture as they were in before the judgment was entered.

In *Franklyn Gesner Fine Paintings, Inc. v. Ketcham*, 259 Ga. 3, 375 S.E.2d 848, 849 (1989), the Supreme Court of Georgia stated:

“The legal effect of the reversal of a judgment on appeal is to nullify the judgment below and place the parties in the same position in which they were before judgment.” *Kirkland v. Southern Discount Company*, 187 Ga.App. 453, 370 S.E.2d 640 (1988).

In *Moore v. North American Van Lines*, 319 S.C. 446, 462 S.E.2d 275, 276 (1995), the Supreme Court of South Carolina stated:

When the award of the Commission was reversed by the circuit court, it became of no effect and was no longer in existence.

In *Carpenter Realty Corporation v. Imbesi*, 369 Md. 549, 801 A.2d 1018, 1026 (2002), the Supreme Court of Maryland stated:

“It has been held that the effect of a general and unqualified reversal of a judgment, order or decree is to nullify it completely and to leave the case standing as if such judgment, order or decree had never been rendered, except as restricted by the opinion of the appellate court.” *Balducci*, 304 Md. at 671 n. 8, 500 A.2d at 1046 n. 8.

In *Iglehart v. Board of County Com'rs of Rogers County*, 60 P.3d 497, 504 n.34 (Okla. 2002), the Supreme Court of Oklahoma stated:

Where on the judgment's reversal a cause is remanded, it returns to the trial court as if it had never been decided, save only for the “settled law” of the case. *Seymour v. Swart*, 1985 OK 9, ¶¶ 8-9, 695 P.2d 509, 512-513; *Russell*,

supra note 8, at ¶ 35, at 504. By today's remand the parties are relegated to their prejudgment status.

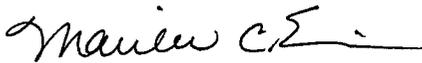
In *Jacobson v. Leisinger*, 746 N.W. 2d 739, 742 ¶ 11 (S.D. 2008),

the Supreme Court of South Dakota stated:

“[a] judgment vacated on appeal is of no further force and effect.” *Gluscic v. Avera St. Luke's*, 2002 SD 93, ¶ 18, 649 N.W.2d 916, 920 (citations omitted).

DATED this 15th day of March, 2010.

REED McCLURE

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86 Mo. 160, 1885 WL 7335 (Mo.)
(Cite as: 86 Mo. 160, 1885 WL 7335 (Mo.))

C

Supreme Court of Missouri.
CRISPEN
v.
HANNOVAN et al., Appellants.
No. 1753.

CRISPEN, Appellant,
v.
HANNOVAN et al.
No. 1465.

April Term, 1885.

West Headnotes

Appeal and Error 30 ↪1149

30 Appeal and Error
30XVII Determination and Disposition of Cause
30XVII(C) Modification
30k1149 k. Amendment of Defects and
Correction of Errors. Most Cited Cases
Error, if any, in rendering a judgment in favor of a
husband and wife jointly in an action which should
have been brought by the husband alone is not cause
for reversal, inasmuch as the judgment may be modi-
fied on appeal by striking out the name of the wife.

Appeal and Error 30 ↪1180(1)

30 Appeal and Error
30XVII Determination and Disposition of Cause
30XVII(D) Reversal
30k1180 Effect of Reversal
30k1180(1) k. In General. Most Cited
Cases
Where a judgment was reversed, and the only effect
of the reversal was to restore the parties to the same
condition in which they were prior to the rendition of
the judgment, the judgment reversed became mere
waste paper, and the parties could proceed in the
court below to obtain a final determination of their
rights in the same manner and the same extent as if
the cause had never been heard or decided by any
court.

Ejectment 142 ↪123

142 Ejectment
142IV Trial, Judgment, Enforcement of Judg-
ment, and Review
142k123 k. Costs. Most Cited Cases

Ejectment 142 ↪127

142 Ejectment
142V Damages, Mesne Profits, Improvements,
and Taxes
142k127 k. Recovery of Actual Damages or
Mesne Profits in Action of Ejectment. Most Cited
Cases
Where plaintiff comes into possession of land after
his ejectment has been commenced, and during its
pendency, he is nevertheless entitled to costs and
mesne profits.

Ejectment 142 ↪127

142 Ejectment
142V Damages, Mesne Profits, Improvements,
and Taxes
142k127 k. Recovery of Actual Damages or
Mesne Profits in Action of Ejectment. Most Cited
Cases
Under Rev.St. §§ 2253, 2256, 2257, providing that,
when the right of plaintiff to possession expires, after
the commencement of the action, the plaintiff is enti-
tled to damages and costs, and authorizing a judg-
ment in ejectment for possession and damages, or for
damages and costs only, where plaintiff had a right to
possession of land in controversy at the time the ac-
tion was commenced, and the defendants, or those
under whom they claim, were at that time in posses-
sion, it was sufficient to authorize a recovery for
damages.

**Appeal from Carroll Circuit Court.*--HON.
JAMES M. DAVIS, Judge.

AFFIRMED as to number 1753.

86 Mo. 160, 1885 WL 7335 (Mo.)
(Cite as: 86 Mo. 160, 1885 WL 7335 (Mo.))

REVERSED as to number 1465.

Prosser Ray, John L. Mirick and Hale & Sons for *Hannovan et al.*, appellants in cause number 1753.

(1) The defendants acquired title to the eleven acres either under the ten years' or the two years' limitation law. If their adverse possession began after the date of the judgment, in 1875, it being military bounty land, the defendants acquired title under the two years' limitation law. If it is held to commence with the possession of their ancestor, say in 1867, then they have acquired title under the ten years' limitation law. (2) The judgment rendered in 1875, being in favor of plaintiff for all the quarter in controversy, except the eleven acres on the west side, and that being the judgment appealed from by defendants, and no appeal taken by plaintiff, no land was in controversy on the trial in this cause, except that portion of the quarter involved in the judgment appealed from by the defendants, and which was reversed by the Supreme Court. (3) The instructions given for the plaintiff, and refused for the defendants, show clearly that the case was tried and determined by the court below on the theory that the whole quarter was in controversy on that trial, and yet the judgment is only for a part of the eleven acres on the west side of the quarter. The finding and judgment of the court, therefore, is contrary to the instructions given and refused, and does not accord therewith. If that part of the quarter, except the eleven acres on the west side, was not in issue, and plaintiff was not entitled to recover the same, then the court erred in giving the first instruction on that point. (4) The first duty of the court below after the reversal of the former judgment was to carry into effect the mandate of this court before any other proceedings in the ejectment suit. (5) The lower court rendered a judgment at law against Mary McKinney, a married woman, and it is clearly irregular as to her. *Hunt v. Thompson*, 61 Mo. 148. (6) The judgment for damages against the administrators could be recovered only in a separate action.

Botsford & Williams, L. H. Waters, and T. J. Whiteman, for Crispin, respondent in cause number 1753.

(1) The action of ejectment can be maintained in all cases where the plaintiff at its commencement is legally entitled to the possession of the premises against the defendant then in possession, and the fact that during the pendency of the action the possession has passed from defendant to plaintiff, and that at the time of the trial plaintiff is in possession of the prem-

ises sued for, or a part of the same, will not bar a recovery. R. S., secs. 2247, 2253, 2256-7; *Adams on Ejectment* (Ed. 1840) 390; *Clarkson v. Stanchfield*, 57 Mo. 573. (2) Damages for waste and injury to the freehold, by way of damages, mesne profits during the occupancy of the adverse holder are also awarded in this action, and a judgment in such case is a bar to any other action for such damages, rents, and profits. *Stewart v. Dent*, 24 Mo. 111; *Lee v. Bowman*, 55 Mo. 400. In this state, an action of trespass, without ejectment, cannot be maintained for mesne profits or damages for waste by a party out of possession holding the legal right of possession against one in the actual possession of lands without an actual disseizin of the true owners. *Cochran v. Whitesides*, 34 Mo. 417. But even if plaintiff could recover such rents and profits in a separate action, he still is entitled in this action to a judgment for them, as damages, and to his costs which have accrued in consequence of the wrongful withholding of defendants prior to the time of plaintiff's obtaining possession. This question has been before the courts of other states, and has been decided in accordance with the views here presented. *Price v. Sanderson*, 3 Harrison (N. J.) 426; *McChesney v. Wainright*, 5 Ham. (Ohio) 452; *Venner v. Underwood*, 1 Root (Conn.) 73; *Tyler v. Canaday*, 2 Barb. (N. Y.) 160. Mrs. McKinney was an unnecessary party, her possession being that of her husband. *Bledsoe v. Simms*, 53 Mo. 305; *Cooper v. Ord*, 60 Mo. 430. But the judgment, although a nullity as to her, was valid as to her co-defendants. *Wernecke v. Wood*, 58 Mo. 358. Besides, the judgment can be amended by striking out the name of Mrs. McKinney. *Weil v. Simmons*, 66 Mo. 619.

M. T. C. Williams, T. J. Whiteman, and L. H. Waters for appellant Crispin, in cause number 1465.

*2 (1) The decision of the court below was such a judgment as entitled plaintiff to appeal. R. S. 1879, sec. 3710, p. 632; *McCormack v. McClure*, 6 Blackf. (Ind.) 467; *Breading's Heirs v. Taylor*, 6 Dana (Ky.) 226; *Barry v. Briggs*, 22 Mich. 201; *Towle v. Smith*, 27 Wis. 268; *Wakely v. Delaplaine*, 15 Wis. 554; *Gale v. Michie*, 47 Mo. 327; *Bruce v. Vogel*, 38 Mo. 100. (2) The decision on the motion was the end of it as much as if the motion had been in the form of a petition. *James ex parte*, 59 Mo. 284. (3) The appellant had a right to a jury on the question of rents and profits. *Cummings v. Noves*, 10 Mass. 433. (4) The rights of third parties are not divested by restitution. *Gott v. Powell*, 41 Mo. 420; *Vogler v. Montgomery*, 54 Mo. 577. (5) There was no evidence to sustain the judg-

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ment rendered on defendants' motion in the court below. There was no attempt to prove the value of the rents and profits of the premises from the time plaintiff took possession, in October, 1875, until March, 1881. If defendants desired to recover rents and profits for the time plaintiff was in, they should have resorted to their action therefor. Hawley v. Brown, 43 How. Pr. 17; Gott v. Powell et al., 41 Mo. 420. *Prosser Ray, J. L. Mirick, and Hale & Sons* for respondents *Hannovan et al.*, in cause number 1465.

NORTON, J.

The plaintiff, Ephraim P. Crispen, brought an action of ejectment for the recovery of the southeast quarter of section seven, in township fifty-three, north, in range twenty-one, west, in Carroll county, Missouri, February 15, 1869, against the ancestor of the defendants, whose death was suggested, and the case properly revived. At the September term, 1875, said cause was tried, and plaintiff recovered all of said tract, except eleven acres off of the west side thereof. An appeal to the Supreme Court was allowed defendants at said term, but no appeal bond was given. On the twenty-sixth of October, 1875, the plaintiff, under a writ of possession of said Carroll circuit court, was put in possession of the premises so recovered, and still retains the same, except as hereinafter stated. Defendants thereafter prosecuted their appeal to the Supreme Court, and at the October term, 1880, of said court, said cause was reversed and remanded, and a mandate in the usual form was issued to the Carroll circuit court.

At the March term, 1881, of said circuit court, defendants filed in said court their motion asking that an execution issue against Crispen, requiring the sheriff to restore to defendants below the possession of the real estate which they had lost by virtue of the former judgment and execution thereunder; also, for costs, damages, rents, and profits, collected on said execution. Plaintiff filed objections to the hearing of this motion on the following grounds:

1. That said cause was placed upon the docket of the said March term, 1881, for trial on the twenty-fifth of March, and the fifth day of said term, and that said cause was called for trial, and plaintiff announced that he was ready for trial.

*3 2. That defendants' said motion was not filed until

March 29, being the eighth day of said term, and that no notice was given plaintiff of the filing of the same before the same was filed.

3. That said motion was filed for delay, and that the same has nothing to do with the merits of the case.

These objections were overruled, to which plaintiff excepted, and thereupon he filed an answer to the motion to the effect that in September, 1880, while the judgment rendered in his favor, in 1875, remained in full force and unreversed, leased ninety acres of the land recovered by him, to one Wilkerson, for one year from that date, who planted it in wheat, and was still in possession of the same under said lease. That no part of the damages recovered by him in said judgment were paid by, or collected from, defendants, and that he had repaid all costs collected of defendants. This answer was sworn to by plaintiff. On the hearing of the motion, the judgment, writ of possession, and mandate of this court were read in evidence, whereupon the court sustained the motion, and ordered an execution to issue restoring defendants to the possession, and rendering judgment in favor of defendants for nine hundred and fifty dollars, for rents and profits while plaintiff was in possession from October 26, 1875, to March, 1881. It is from this action of the court that plaintiff appeals.

This case was argued in connection with the case number 1753, of *Crispen v. Hannovan et al.*, which, upon the reversal by this court of the judgment rendered therein in 1875, was again tried at the July term, 1881, of the Carroll circuit court, and judgment rendered for plaintiff for six of the eleven acres not recovered by him in the former judgment, and from which defendants have appealed. Both these cases having been argued in this court together, and each being so dovetailed into the other that the consideration and determination of them separately would operate to the prejudice of one or both parties, we feel justified in considering them together. It seems to be conceded that the evidence adduced on the trial of the ejectment suit, had in July, 1881, showed a complete and perfect paper title to the lands sued for to be in the plaintiff, and that defendants, being without color of title, rested their claim to defeat plaintiff's recovery on the sole ground of an open, notorious, actual adverse possession for such length of time as, under the statute of limitations, barred plaintiff's right of action. It appears that by reason of the fact that Crispen,

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when he appealed from the order and judgment of the circuit court, made at its March term, 1881, directing the restoration to defendants of the possession of the land lost by the judgment in 1875, gave bond, which operated as a *supersedeas*; that at the trial of the ejectment suit in July, 1881, he, Crispen, was still in possession of all the land into which he had been put under the execution which issued on the judgment obtained by him in 1875, which judgment was afterwards reversed by this court in 1880. At the close of plaintiff's evidence the record shows that he waived any claim for damages as against the defendants for the time they occupied the land after their father's death up to the time of the trial. The court found for plaintiff, except as to five acres off the west end of the land, and gave judgment against the administrator of Bernard Hannovan, deceased, the ancestor of defendants, for five hundred dollars damages, and ascertained the monthly rental value of the additional six acres recovered in this suit to be one dollar.

*4 The chief error assigned by defendants, on their appeal from this judgment, is the alleged error of the court in giving and refusing instructions. The defendants asked three instructions, two of which were to the effect that if plaintiff recovered judgment, in 1875, for the possession of all the land in suit, except eleven acres off the west side thereof, and was put in possession under said judgment, which was subsequently reversed by this court, which issued its mandate to restore to defendants all things lost by said judgment, and that defendants had not been restored to the possession, but that plaintiff was still in possession, the finding should be for defendants.

The third instruction was to the effect that if the land in controversy was military bounty land, and that defendants, and those under whom they claim, had been in the actual, open, and adverse possession of eleven acres off the west side of said land for more than two years prior to the judgment of the Supreme Court, rendered in this cause, reversing the former judgment and remanding the cause, that then the defendants have acquired title to said eleven acres by limitation.

These instructions were refused. The first two were rightfully refused, if upon no other grounds than that if plaintiff had a right to the possession of the land in controversy at the time the action was commenced, and defendants, or those under whom they claim,

were at that time in possession, it is sufficient to authorize a recovery. R. S., sec. 2247. Besides this, sections 2256 and 2257, Revised Statutes, indicate that a judgment in ejectment may be for possession and damages, or for damages and costs only, and by section 2253 it is provided that when the right of plaintiff to possession expires after the commencement of the action, the plaintiff is entitled to damages and costs. These two instructions were also properly refused under the following authorities, which establish the proposition that, though a plaintiff may come into the possession of the land after his ejectment has been commenced, and during its pendency, he is nevertheless entitled to costs and mesne profits: *Price v. Sanderson*, 3 Harrison (N. J.) 426; *McChesney v. Wainwright*, 5 Hammond (Ohio) 452; *Venner v. Underwood*, 1 Root (Conn.) 73.

The third instruction was also properly refused. The judgment rendered in 1875, which was reversed on defendants' appeal, was an entirety, and the only effect of such reversal was to "restore the parties to the same condition in which they were prior to the rendition of the judgment. The judgment reversed becomes mere waste paper, and the parties to it are allowed to proceed in the court below to obtain a final determination of their rights in the same manner and to the same extent as if the cause had never been heard or decided by any court. Neither, in the subsequent prosecution of the cause, can suffer detriment nor receive assistance from the former adjudication." Freeman on Judgments, sec. 481.

*5 It is further insisted that the judgment is erroneous in this, that Mary McKinney, one of the defendants, who was joined with her husband as a party, and against whom it was rendered, was a married woman. While this is an error, it is not such an one as necessarily leads to a reversal of the judgment, inasmuch as, under the rulings of this court, in the cases of *Cooper v. Ord*, 60 Mo. 430, and *Bledsoe v. Simms*, 53 Mo. 305, she was not a necessary party, and inasmuch as it has been held in the cases of *Weil v. Simmons*, 66 Mo. 619, and *Cruchon v. Brown*, 57 Mo. 39, that this court may, and will, in furtherance of justice, correct the error by modifying the judgment and striking out the name of such party. In view of the length of time this litigation has lasted we do not believe the purposes of justice would be subserved by reversing the judgment and remanding the cause for the error above indicated, and we will modify it by

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striking out therefrom the name of Mary McKinney and affirm the judgment so modified, and, inasmuch as defendants were driven to an appeal to correct this error, the costs of the appeal are hereby adjudged against the plaintiff.

In case number 1465, the judgment of the circuit court, awarding execution for restitution of part of the premises to defendants, and for nine hundred and fifty dollars damages, will be reversed for the reason that there was no evidence before the court upon which to base the finding in respect to the damages, and for the further reason that in the trial of the ejectment suit, no claim for damages was made, and none were allowed against defendants for the time plaintiff had possession of part of the land under the reversed judgment. The judgment in said case number 1465 will be reversed and cause remanded with directions to the circuit court to enter up judgment against plaintiff only for such cost and damages as an investigation may show defendants actually paid on the execution which issued on the said judgment rendered in 1875, and which have not been paid by plaintiff Crispen.

All concur, except Judge Ray, who did not sit in the case.

Mo. 1885.
Crispen v. Hannovan
86 Mo. 160, 1885 WL 7335 (Mo.)

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Supreme Court of Tennessee.
HULLETT
v.
BAKER.
Feb. 1, 1899.

Appeal from circuit court, Sumner county; A. H. Munford, Judge.

Action by Mary Hullett against John B. Baker. From a judgment of dismissal, plaintiff appeals. Affirmed.

West Headnotes

Abatement and Revival 2 ⚡ 58(.5)

2 Abatement and Revival

2V Death of Party and Revival of Action

2V(A) Abatement or Survival of Action

2k58 Actions and Proceedings Which

Abate

2k58(.5) k. In General. Most Cited

Cases

(Formerly 2k58)

Breach of Marriage Promise 61 ⚡ 13

61 Breach of Marriage Promise

61k13 k. Defenses. Most Cited Cases

Under Shannon's Code, § 4569, providing that no civil action commenced, except for wrongs affecting the character of plaintiff, shall abate by the death of either party, an action for breach of a marriage contract, since it affects plaintiff's character, abates on the death of the defendant.

Abatement and Revival 2 ⚡ 58(1)

2 Abatement and Revival

2V Death of Party and Revival of Action

2V(A) Abatement or Survival of Action

2k58 Actions and Proceedings Which

Abate

2k58(1) k. Actions for Personal Inju-

ries. Most Cited Cases

The defendant's death abates an action for breach of promise to marry.

Abatement and Revival 2 ⚡ 69

2 Abatement and Revival

2V Death of Party and Revival of Action

2V(A) Abatement or Survival of Action

2k69 k. Death Pending Appeal or Other

Review. Most Cited Cases

Appeal and Error 30 ⚡ 1180(1)

30 Appeal and Error

30XVII Determination and Disposition of Cause

30XVII(D) Reversal

30k1180 Effect of Reversal

30k1180(1) k. In General. Most Cited

Cases

Where a judgment is reversed and remanded for a new trial, it is vacated, and the cause of action restored to its original character, and is subject to abatement by the death of defendant, as though no judgment had ever been rendered.

Abatement and Revival 2 ⚡ 69

2 Abatement and Revival

2V Death of Party and Revival of Action

2V(A) Abatement or Survival of Action

2k69 k. Death Pending Appeal or Other

Review. Most Cited Cases

Defendant's death, pending his appeal from an adverse judgment, operates to abate an action for breach of promise to marry when the judgment is subsequently reversed and the cause remanded. Upon reversal of the judgment, the action again becomes one for tort, and abatable.

Appeal and Error 30 ⚡ 662(2)

30 Appeal and Error

30X Record

30X(K) Conclusiveness and Effect

30k662 Conclusiveness of Record

30k662(2) k. Recitals. Most Cited

Cases

A motion to strike out a replication, made on behalf of the executor and by his attorneys, and so treated and acted on by the court, will be sustained in this court, although the record, by inadvertence, recites that the motion was made by the heirs, who were not parties to the cause.

Appeal and Error 30 ↪ 662(2)

30 Appeal and Error

30X Record

30X(K) Conclusiveness and Effect

30k662 Conclusiveness of Record

30k662(2) k. Recitals. Most Cited

Cases

Executors and Administrators 162 ↪ 455

162 Executors and Administrators

162X Actions

162k455 k. Appeal and Error. Most Cited

Cases

Where the record recites that a motion was made by heirs, an assignment of error that the heirs were not parties and could not make it is unavailable where it was made for executors, and there was merely a clerical error in entering the order.

Appeal and Error 30 ↪ 1210(1)

30 Appeal and Error

30XVII Determination and Disposition of Cause

30XVII(F) Mandate and Proceedings in

Lower Court

30k1209 New Trial

30k1210 In General

30k1210(1) k. Effect of Decision as

Granting New Trial. Most Cited Cases

An order remanding a cause for a new trial means the same thing as remanding it for further proceedings. It is not an adjudication that there shall be another trial on the merits, and does not preclude any proceedings by plea in abatement or otherwise, which may be lawfully interposed.

*757 J. J. Turner, T. C. Mulligan, and S. F. Wilson, for appellant. B. D. Bell and W. C. Dismukes, for appellee.

WILKES, J.

This is an action for breach of marriage contract. There was a judgment against the defendant for \$1,500. He appealed to this court, and after the appeal, while the cause was pending in this court, he died. At a former term the suit was revived against his executor, and heard upon its merits, and the judgment reversed, and cause remanded. The order remanding recites that it is for the purpose of a new trial. In the court below, after the cause was remanded, the defendant, as executor, pleaded in abatement the death of the defendant. There was a replication admitting the death and the other facts stated in the plea, but insisting that the suit did not abate. The trial judge sustained the plea in abatement, and dismissed the suit, and plaintiff has appealed and assigned errors.

It appears from the record that the plea in abatement was filed on behalf of the executor and heirs, and was sworn to by an attorney styling himself as attorney for both. As before stated, there was a replication to this plea, insisting that the question of revivor had already been adjudged by this court, and the suit revived and remanded for a new trial. There was a motion to strike this replication from the files, which was granted. The record recites that this motion was made on behalf of the heirs by attorney, and the error assigned is that the heirs were not parties, not interested, and could not make such motion. We think this is a mere clerical error or inadvertence in entering the motion. It was made by the attorney who was representing the executors, and was evidently on their behalf, and was so treated and acted on by the court.

It is further insisted that the plea was not sufficient, and that the suit could not be abated, but had been revived in this court, and remanded to the court below for a new trial. The entry remanding for a new trial means the same as remanding for such further proceedings as the parties might be entitled to, *758 and did not necessarily mean a retrial on the merits only; nor did this court adjudicate, or intend to do so, that the suit might not, in the court below, be abated. We are of opinion there is no error in the proceedings. It has been held that a recovery of a judgment for a tort merges the tort into the judgment, and thus it becomes a debt. If an appeal in the nature of a writ of error is taken to this court, the judgment of the court below is suspended, but not vacated during the appeal. A revivor may therefore be had in this court against the personal representative of the deceased

defendant in such case, in order to test the correctness of the judgment. If the judgment is reversed, the result is to vacate and set aside the judgment below, and the cause of action is restored to its original character; and the death of the wrongdoer may then be pleaded in abatement, the judgment having been vacated, and being no longer in existence. The action then becomes one upon the original demand, and is subject to abatement, as though no judgment had ever been rendered upon it. Akers v. Akers, 16 Lea, 7-12; Kimbrough v. Mitchell, 1 Head, 541; Baker v. Dansbee, 7 Heisk. 231.

The only question remaining is whether this is such an action as, under the statute, abates by the death of the defendant. This has been held in the affirmative in the case of Weeks v. Mays, 87 Tenn. 442, 10 S. W. 771, on the ground that it is an action which necessarily involves and affects the character of the plaintiff, and is therefore within the excepting clause of the statute (Shannon's Code, § 4569), which provides that "no civil action commenced whether founded on wrongs or contracts, except for wrongs affecting the character of the plaintiff, shall abate by the death of either party, but may be revived." This being a wrong which, under the case referred to, necessarily affects the character of the plaintiff, it abates by the death of the defendant. This is conclusive, and the judgment of the court below is affirmed, with costs.

Tenn. 1899.
Hullett v. Baker
101 Tenn. 689, 49 S.W. 757, 17 Pickle 689

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C

Supreme Court of Arkansas.
 SCHOFIELD
 v.
 RANKIN.
 April 20, 1908.

Appeal from Woodruff Chancery Court; John Fletcher, Special Chancellor.

Petition by Octavia Mitchell Schofield and others against Sallie Spott Rankin to amend by a nunc pro tunc entry the record of a final decree. From a decree denying the petition, petitioners appeal. Affirmed.

West Headnotes

Judgment 228 ↪ 301228 Judgment

228VIII Amendment, Correction, and Review in Same Court

228k301 k. Judgments Which May Be Amended or Corrected. Most Cited Cases

Where the Supreme Court adjudges that a decree entered as a consent decree is void on the ground that it could be entered only after hearing, the trial court has no jurisdiction to amend its record so as to show that the decree was in fact rendered after hearing.

Appeal and Error 30 ↪ 44030 Appeal and Error

30VIII Effect of Transfer of Cause or Proceedings Therefor

30VIII(A) Powers and Proceedings of Lower Court

30k440 k. Amendment of Proceedings. Most Cited Cases

A court of record has plenary and continuing powers over its own records for the purpose of amendment so as to make them speak the truth, and an appeal from a judgment does not deprive the court which rendered it of control over its records, or of jurisdiction to amend them.

Appeal and Error 30 ↪ 1180(1)30 Appeal and Error

30XVII Determination and Disposition of Cause

30XVII(D) Reversal

30k1180 Effect of Reversal

30k1180(1) k. In General. Most Cited

Cases

The reversal by the Supreme Court of a judgment operates to vacate the judgment and to wipe it out, so that there is nothing left for the court which rendered it to amend.

Appeal and Error 30 ↪ 1180(1)30 Appeal and Error

30XVII Determination and Disposition of Cause

30XVII(D) Reversal

30k1180 Effect of Reversal

30k1180(1) k. In General. Most Cited

Cases

A decree for the sale of realty was adjudged void, because it was entered as a consent decree in a cause to which an infant was a party. The heirs of the purchaser were made parties to the suit for restitution and for an accounting. The Supreme Court directed the entry of a decree for restitution. Held, that the judgment of the Supreme Court was a final adjudication of the rights of the parties, and the heirs were not entitled to amend the record so as to show that the decree, though entered as a consent decree, was rendered after hearing.

Appeal and Error 30 ↪ 1194(1)30 Appeal and Error

30XVII Determination and Disposition of Cause

30XVII(F) Mandate and Proceedings in

Lower Court

30k1193 Effect in Lower Court of Decision of Appellate Court

30k1194 Construction and Operation in General

30k1194(1) k. In General. Most Cited Cases

While a court of record has plenary and continuing powers to amend its records so as to make them

speak the truth, a trial court may not amend the record entry of a judgment after the Supreme Court reversed such judgment upon the ground that the trial court had no jurisdiction of the subject-matter.

*1162 Moore, Smith & Moore, for appellant.

Gustave Jones, Raleson & Woods, P. R. Andrews, N. W. Norton, and Rose, Hemingway, Cantrell & Loughborough, for appellee.

McCULLOCH, J.

This is the fourth appearance here of this case in different forms. 71 Ark. 168, 66 S. W. 197, 70 S. W. 306, 100 Am. St. Rep. 59; 81 Ark. 440, 98 S. W. 674; 84 Ark. 156, 104 S. W. 933. The case came here first on appeal by the Sallie Spott Rankin (present appellee) from a consent decree entered by the chancery court directing a sale of the lands in controversy and division of the proceeds. This court set aside and reversed the decree, and remanded the case for further proceedings. The lands had been sold under the decree, and after the case was remanded Mrs. Rankin filed a petition in the case against the heirs of the purchaser for restitution, and for an accounting and decree for all rents and profits of the land received by the purchaser while in possession thereof. The heirs (who are the present appellants) appeared and contested her right to restitution, on the ground that the sale was valid as to the purchaser, and also on the ground that the right to recover the land was barred by the statute of limitations. The chancery court held that the purchaser acquired a valid title to the lands, and gave a decree denying the right to restitution, from which Mrs. Rankin again appealed. A majority of the judges, on consideration of that appeal, held that the former decree of the chancery court ordering the sale of the land was absolutely void, because it was a consent decree (the guardian of Mrs. Rankin, who was then an infant, not having authority to consent), and the court entered it solely by reason of the consent of parties, and without consideration or judicial action on the part of the court, and because the decree was not within the issue raised by the pleadings; also that Mrs. Rankin's right to restitution was not barred by limitation. The court set aside and reversed the decree and remanded the case to the chancery court with directions to enter a decree in accordance with the opinion, and for further proceedings. After the case was remanded appellants, who are the heirs of said purchaser and the appellees in the last-

mentioned appeal, filed their petition in the court below, alleging that the first decree was not entered by the court without consideration or investigation of the issues and proof, but that the court did investigate the facts and pronounced a decree sanctioning and approving the compromise and agreement of the parties. They alleged that the entry of the decree was erroneous in failing to recite an investigation and consideration by the court, and they prayed that the record of the decree be amended nunc pro tunc so as to conform to the true findings of the court. The chancellor heard the petition upon oral testimony and depositions, and found that the allegations of the petition were sustained by the evidence, but decided that the judgment and mandate of the Supreme Court precluded the chancery court from amending the record of the former decree which had been set aside and reversed. The petitioners appealed.

It will be seen that, when this effort to have the record of the former decree of the chancery court was overruled, that decree had been set aside and reversed by this court on appeal; and also that it had been adjudged by this court on appeal in the proceedings for restitution that the decree was absolutely void, and that the sale under which appellants claimed title to the property in controversy was void. Can the record of the original decree at this time be amended? It cannot be regarded otherwise than as well settled now that a court of record has plenary and continuing powers over its own records for the purpose of amendment so as to make the record speak the truth concerning its proceedings. Bobe v. State, 40 Ark. 224; Ward v. Magness, 75 Ark. 12, 86 S. W. 822; Groton Bridge Co. v. Clark Pressed Brick Co., 136 Fed. 27, 68 C. C. A. 577. An appeal from a judgment or decree does not deprive the court which rendered it of control over its records or of jurisdiction to amend them. Arkadelphia Lumber Co. v. Asman, 72 Ark. 322, 79 S. W. 1060; Id., 79 Ark. 284, 95 S. W. 134. It is a common practice in this court to consider amendments made by lower courts of their records in cases pending here on appeals, and even to postpone the consideration of cases here until alleged errors in the record can be corrected below by amendment. But in the case now before us the decree sought to be amended had been set aside and reversed by the judgment of this court, and that judgment had become final. The record entry is merely the evidence of the decree pronounced by the court. That is the reason why the power remains in the court to amend *1163 the record so as to make it speak the truth.

Now, when a case comes here on appeal or writ of error, this court considers it upon the evidence brought before us on the record; but, when we reverse a judgment or decree, it is the judgment or decree pronounced by the court that is reversed, and not the mere entry of it on the record. The effect of the reversal is to annul, vacate, and set aside the judgment or decree-to completely wipe it out as if it had never been in existence. Nothing remains of it; it is gone. So, when this is so, there is nothing left for the court to amend. The record entry of a judgment or decree which has at that time no legal existence cannot be amended.

Schofield v. Rankin
86 Ark. 86, 109 S.W. 1161

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It may be urged, however, that inasmuch as appellants were not parties to the first appeal they were not bound by the judgment of this court. This contention is not without force, but we need not decide that question. Appellants were brought in as parties when the petition against them for restitution was filed, and this court on appeal adjudged that Mrs. Rankin was entitled to restitution, and remanded the case, with directions to enter a decree in her favor for restitution. That judgment of this court is final. We have no further control over it, and it must be accepted as an adjudication of the rights of the parties.

The only questions left open by this court for further adjudication were those concerning "the rights of the parties to return of the proceeds of sale of lands, *** rents of land, and improvements thereon, or other incidents consequent on the recovery of same." This court held, on the last appeal just referred to, that the original decree of the chancery court was void, and that no rights were acquired under it. This, on the ground that the court did not act judicially in pronouncing the decree, but merely recorded the agreement of the parties, and on the ground that the decree was not within the issues raised by the pleadings. The decree itself being void because the court had no jurisdiction of the subject-matter thereof, the record of its entry court not be amended. Gregory v. Bartlett, 55 Ark. 30, 17 S. W. 344.

We are of the opinion that the learned special chancellor was correct in his view of the law as to the power of the court to amend the record at that time, and his decree is therefore affirmed.

Ark. 1908.

C

Supreme Court of Florida, Division A.
 MARSHALL & SPENCER CO. et al.
 v.
 PEOPLE'S BANK OF JACKSONVILLE.
 Aug. 2, 1924.

Suit by the People's Bank of Jacksonville against the Marshall & Spencer Company and others. From a decree for plaintiff, defendants appeal.

Reversed and remanded, with directions.

West Headnotes

Appeal and Error 30 1180(1)

30 Appeal and Error

30XVII Determination and Disposition of Cause
30XVII(D) Reversal
30k1180 Effect of Reversal
30k1180(1) k. In General. Most Cited

Cases

Where all parties are before the court, a judgment of reversal reverses the entire decree, and thereafter the cause stands as though no decree had been rendered in the lower court.

Appeal and Error 30 1180(2)

30 Appeal and Error

30XVII Determination and Disposition of Cause
30XVII(D) Reversal
30k1180 Effect of Reversal
30k1180(2) k. Effect on Dependent
 Judgments or Proceedings. Most Cited Cases

Where there has been a master's sale of real estate involved in suit to foreclose mortgage, and decree of foreclosure and distribution is reversed, on going down of mandate, the sale under decree on petition of parties, where rights have been affected, will be vacated and set aside, and resale and accounting for rents and profits by mortgagee, who has been in possession of property under deed from special master, granted.

Syllabus by the Court

Where all parties before court, judgment of reversal reverses entire decree. Where all the parties are before the court, a judgment of reversal reverses the entire decree, and thereafter the cause stands as though no decree had been rendered in the lower court.

Sale under reversed foreclosure decree set aside, and resale and accounting for rents and profits by mortgagee in possession granted, on reversal. Where there has been, by order of court, a master's sale to the mortgagee of the real estate involved in a suit to foreclose a mortgage, and on appeal the decree of foreclosure and distribution is reversed, upon the going down of the mandate, the sale under the decree on petition of parties to the suit, where rights have been affected, will be vacated and set aside, and the court below should grant a petition for the resale of the property and an accounting for the rents and profits by the mortgagee, who has been in possession of the property under a deed from the special master.

****358*191** Appeal from Circuit Court, Duval County; George Couper Gibbs, judge. Axtell & Rinehart, of Jacksonville, for appellants.

Alexander & Martin, of Jacksonville, for appellee.

BROWNE, J.

The People's Bank of Jacksonville brought suit to foreclose a mortgage, against the mortgagors and other named defendants, claiming to have materialmen's liens on the mortgaged property.

The bill alleged that the mortgage was superior to the liens of the materialmen.

A decree of foreclosure was entered, in which the liens of the materialmen were held to be superior to the mortgage. This decree, on appeal, was reversed.

Pending the decision on appeal, the mortgaged property was sold by the master on order of the court, and bought for \$10,000 by the bank, which entered into

possession of it under a master's deed.

On the coming down of the mandate from this court, the Marshall & Spencer Company, a corporation, one of the defendants in the foreclosure suit, filed in the circuit court of Duval county its petition, setting up that it **359 had acquired by assignment the liens of all the other defendant lienholders, and thereby became entitled to all the rights, title, and interest of the defendants in and to the mortgaged property, and that the mortgagor, W. A. *192 Arbuckle, had departed from the jurisdiction of the court, and left no property out of which any claim against him could be satisfied, other than the mortgaged property, and that Arbuckle was insolvent.

The petition further alleges that the purchase price of \$10,000, paid by the People's Bank of Jacksonville, was deposited by the special master in the People's Bank, and no distribution has been made of the fund by the special master, but it is now in possession of the People's Bank, and that the bank, from the time it went into possession of the property, has been receiving the rents, which amount to not less than \$250 a month; that at the time of the sale of the property it was worth not less than \$13,000 or \$14,000, and was worth at the time of filing the petition at least \$15,000, and would bring that amount on resale.

The petitioner avers that he is able, ready, and willing to pay the People's Bank of Jacksonville any and all sums of money that upon an accounting may be found to be superior in dignity to his liens and claims, upon his being subrogated to all the rights, claims, and privileges of the People's Bank of Jacksonville.

The prayer is for an accounting; for the appointment of a receiver, to take charge of and manage the mortgaged premises until it can be sold under an order of court; that the petitioner be allowed to redeem, by paying the bank the amount found to be due it, and upon such payment the petitioner be subrogated to the rights of the bank; that the property be sold to pay the amounts found to be due.

The cause is now before this court on appeal from a decree of the chancellor sustaining a demurrer to the petition.

The judgment of this court, reversing the decree of foreclosure and distribution (82 Fla. 479.90 South.

458),*193 was not a partial reversal, but a reversal of the entire decree, and the cause after reversal stood as though no decree had been rendered.

In Schumann v. Helberg, 62 Ill. App. 218, the court held:

'Where a cause is reversed and remanded by the Supreme Court, with no specific directions, it is to be proceeded with in the court below as if the reversed decree had never been made. Having been reversed, such decree is in effect expunged from the record.'

See, also, Chickering v. Failes, 29 Ill. 294; Cowdery v. London & San Francisco Bank, 139 Cal. 298, 73 Pac. 196, 96 Am. St. Rep. 115; Laithe v. McDonald, 7 Kan. 254.

The effect of the contention of the appellee would be that, upon the going down of a mandate reversing a decree in chancery, with no specific instructions, the lower court could examine the record for the purpose of determining if the entire decree, or only certain portions, was reversed. If the reversed decree adjudicated various and sundry questions, the lower court could determine which ones were reversed and which affirmed by this court. Such a doctrine cannot prevail. When this court intends that a decree shall be reversed in part and affirmed in part, it will say so, and not leave it to future determination by the lower court.

In Capital City Bank v. Hilson, 64 Fla. 206, 60 South. 189, Ann. Cas. 1914B, 1211, it was held that:

'The reversal of a judgment in an action at law in favor of a plaintiff upon a written contract, on the ground that the declaration failed to state a cause of action and that the plaintiff could not recover against the defendant upon the contract as written, leaves the case as if there had been no judgment.'

It is true that was a suit at law, but in South Florida Lumber & Supply Co. v. Read, 65 Fla. 61, *19461 South. 125, this court cited and applied it to a chancery decree, in this language:

'If we had reversed the entire decree, it would have undoubtedly left the case as if there had been no decree, as the defendant in error contends. See our hold-

ing and reasoning in *Capital City Bank v. Hilson*,
supra.’

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The court then said:

‘But we did not reverse the entire decree, nor could we have done so, as the defendants other than Langford were not before us.’

No such condition exists in the instant case, as all the parties to the litigation are before us.

Where there has been, by order of court, a master's sale to the mortgagee of the real estate involved in a suit to foreclose a mortgage, and on appeal the decree of foreclosure and distribution is reversed, upon going down of the mandate, the sale under the decree, on petition of parties to the suit whose rights have been affected, will be vacated and set aside, and the court below should grant a petition for the resale of the property and an accounting for the rents and profits by the mortgagee, who has been in possession of the property under a deed from the special master.

This rule seems to have been settled in Maxwell v. Jacksonville Loan & Improvement Co., 45 Fla. 468, 34 South. 255. See, also, Johnson v. McKinnon, 54 Fla. 221, 45 South. 23, 13 L. R. A. (N. S.) 874, 127 Am. St. Rep. 135, 14 Ann. Cas. 180; Lehman-Durr Co. v. Folmer, 166 Ala. 325, 51 South. 954, 139 Am. St. Rep. 37; Ure v. Ure, 223 Ill. 454, 79 N. E. 153, 114 Am. St. Rep. 336; Singly v. Warren, 18 Wash. 434, 51 Pac. 1066, **36063 Am. St. Rep. 896; Leeds v. Gifford, 41 N. J. Eq. 464, 5 Atl. 795; Long v. Richards, 170 Mass. 120, 48 N. E. 1083, 64 Am. St. Rep. 281; 2 Jones on Mortgages, §§ 1114, 1118-1118a.

The decree is reversed, and the cause remanded, with *195 directions to the court below to grant the prayer of the petitioners.

TAYLOR, C. J., and ELLIS, J., concur.
WHITFIELD, P. J., and WEST and TERREL, JJ., concur in the opinion.

Fla. 1924
Marshall & Spencer Co. v. People's Bank of Jacksonville
88 Fla. 190, 101 So. 358

C

Supreme Court of Colorado.
 SCHLEIER et al.
 v.
 BONELLA.
 No. 11245.

June 29, 1925.

Department 3.

Error to District Court, Jefferson County; S. W. Johnson, Judge.

Action by Louis Bonella against Matilda E. Schleier and others. Judgment for plaintiff, and defendants bring error and apply for supersedeas.

Application denied, and judgment affirmed.

West Headnotes

[1] Appeal and Error 30 ↪ 1180(1)**30 Appeal and Error**

30XVII Determination and Disposition of Cause

30XVII(D) Reversal

30k1180 Effect of Reversal

30k1180(1) k. In General. Most Cited

Cases

A judgment of reversal is not a bar, but merely leaves the parties in the same position as they were before the judgment of the lower court was rendered.

[2] Judgment 228 ↪ 565**228 Judgment**

228XIII Merger and Bar of Causes of Action and Defenses

228XIII(A) Judgments Operative as Bar

228k565 k. Judgment Without Prejudice.

Most Cited Cases

Dismissal without prejudice is not a bar to institution of new action.

[3] Judgment 228 ↪ 587**228 Judgment**

228XIII Merger and Bar of Causes of Action and Defenses

228XIII(B) Causes of Action and Defenses Merged, Barred, or Concluded

228k587 k. Theory of Action or Recovery.

Most Cited Cases

Dismissal of plaintiff's cause of action upon contract for services, conceding it was on merits, held not to bar institution of new action upon implied contract or upon quantum meruit.

[5] Trial 388 ↪ 252(16)**388 Trial**

388VII Instructions to Jury

388VII(D) Applicability to Pleadings and Evidence

388k249 Application of Instructions to Case

388k252 Facts and Evidence

388k252(16) k. Actions for Personal Services and Commissions. Most Cited Cases
 Undisputed evidence that purchaser was ready, able, and willing to purchase on terms submitted by owner precluded necessity of giving instructions concerning purchasers.

[6] Labor and Employment 231H ↪ 36**231H Labor and Employment**

231HI In General

231Hk31 Contracts

231Hk36 k. Implied Contracts. Most Cited Cases

(Formerly 255k4 Master and Servant)
 Solicitation for one's services creates implied promise to pay reasonable worth of such services.
 **1113*604 Harry C. Riddle and Richard F. Ryan, both of Denver, for plaintiffs in error.

George B. Campbell, of Denver, for defendant in error.

ALLEN, J.

This is an action to recover compensation for services in finding a purchaser for a party desiring to sell real estate. Judgment for plaintiff. Defendant sued out this writ, and applies for a supersedeas.

This case arises out of the transactions involved in Schleier v. Bonella, 73 Colo. 222, 214 P. 537. As stated in the opinion in that case, plaintiff brought an action in the county court of Jefferson county to recover as upon a contract whereby defendant agreed to pay him all she received for her land above \$200 per acre. At the close of plaintiff's evidence, upon the first trial, plaintiff was permitted to amend his complaint by adding an allegation to the effect that his services were reasonably worth the sum of \$1,200. There was then a verdict and judgment for plaintiff, and defendant took an appeal to the district court, where again there was a verdict and judgment for plaintiff. Defendant then brought the cause to this court for review, and the judgment was reversed. It was held error to permit the amendment above mentioned. The case having been brought as upon a contract for services, an amendment setting up a cause of action as one upon a quantum meruit was an amendment setting up a new and different cause of action. When the judgment was reversed, it was not reversed with directions to dismiss, but reversed without directions, and other matters were passed upon 'in view of the probability' of another trial.

The action was then dismissed in the district court, and plaintiff instituted this, a new, action. The complaint contained*605 two causes of action. The first was upon a contract, and the second upon a quantum meruit. The first cause of action is no longer involved in this case, as the plaintiff elected to have the cause go to the jury upon the second cause of action. He obtained a verdict for \$860.

[1] Several assignments of error relate to the trial court's rulings involving the defense of res judicata. The answer pleads the judgment of reversal, rendered by this court in Schleier v. Bonella, supra, as a bar to the instant case. There was no error in striking that defense. There is nothing in our opinion in the former case which would make the judgment of reversal a bar to the present action. A judgment of reversal is not a bar. It simply leaves the parties in the same position as they were before the judgment of the lower court was rendered. 34 C. J. 774.

[2][3] There was a dismissal of the action after it was remanded by us. Nothing is disclosed in the record in the instant case, or in the argument, that the dismissal, at least so far as the cause of action based on a quantum meruit is concerned, was a dismissal on the merits. A dismissal without prejudice is not a bar. 34 C. J. 790. If there was a dismissal on the merits as to plaintiff's cause of action upon a contract, that would not, under the circumstances existing in the instant case, be a bar to the institution of a new action upon an implied **1114 contract or upon quantum meruit. In 34 C. J. 207, it is said:

'The general rule, that a judgment for defendant will not bar a subsequent action by plaintiff based on a new and more correct theory, applies where plaintiff, in an action to recover on an express contract for services to be rendered, * * * has been defeated on the ground that the contract * * * was not proved.'

There is no error in the record so far as the question of res judicata is concerned.

[5] The court refused to give certain instructions requested by defendant. The instructions given, however, were sufficient in this case. It is not disputed that the purchaser *606 was ready, able, and willing to purchase on terms submitted by the owner, the defendant Schleier. There was therefore no necessity for giving an instruction concerning purchasers.

[6] It is contended that the verdict is excessive because plaintiff, a farmer not engaged in the real estate business, was permitted to recover the same amount that a broker, regularly engaged in the business, would recover. Plaintiff recovered \$860. If that is what a regular broker would charge for his services, it still may be that it is also the reasonable value of plaintiff services. 9 C. J. 581, note 50(f).

We agree with plaintiffs in error that Mrs. Schleier did not promise to pay any definite amount, or to pay what a regular broker would ask as commission. She did, however, according to the evidence, promise to pay 'something.' The evidence warrants the conclusion that she solicited plaintiff's services. The law, in such cases, implies a promise to pay 'what such services are reasonably worth.' 40 Cyc. 2809; 9 C. J. 580. We cannot say from the record before us that plaintiff's services were not reasonably worth the amount named in the verdict. The verdict cannot be

held excessive.

There is no error in the record. The application for a
supersedeas is denied, and the judgment is affirmed.

CAMPBELL and SHEAFOR, JJ., concur.

Colo. 1925
Schleier v. Bonella
77 Colo. 603, 237 P. 1113

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▷

Supreme Court of California.
 CENTRAL SAV. BANK OF OAKLAND
 v.
 LAKE et al.
 S. F. 11359.^{FN*}

FN* Rehearing denied.

June 22, 1927.
 Rehearing Denied July 21, 1927.

In Bank.

Action in ejectment by the Central Savings Bank of Oakland against Fannie D. Lake and others. Judgment for plaintiff, and defendants appeal.

Affirmed.

West Headnotes

[1] Appeal and Error 30 ↪ 452

30 Appeal and Error

30VIII Effect of Transfer of Cause or Proceedings Therefor

30VIII(A) Powers and Proceedings of Lower Court

30k452 k. Irregular or Ineffectual Proceedings for Review. Most Cited Cases

Notice of appeal, filed in Supreme Court within 10 days from nonappealable order of trial court resetting cause for trial, held not to deprive trial court of jurisdiction.

[3] Appeal and Error 30 ↪ 1180(1)

30 Appeal and Error

30XVII Determination and Disposition of Cause

30XVII(D) Reversal

30k1180 Effect of Reversal

30k1180(1) k. In General. Most Cited Cases

Unqualified reversal places parties in trial court in same position as before trial, except opinion on ap-

peal must be followed.

[4] Judges 227 ↪ 43

227 Judges

227IV Disqualification to Act

227k41 Pecuniary Interest

227k43 k. Stockholder of Corporation.

Most Cited Cases

That judge is stockholder in title insurance company, not party to suit or insurer of property involved, held not to disqualify him.

[5] Judges 227 ↪ 45

227 Judges

227IV Disqualification to Act

227k45 k. Relationship to Party or Person

Interested. Most Cited Cases

That judge's son was stockholder in bank affiliated with plaintiff bank did not disqualify judge. West's Ann.Code Civ.Proc. § 170, subd. 2.

[6] Removal of Cases 334 ↪ 43

334 Removal of Cases

334III Citizenship or Alienage of Parties

334k43 k. Time of Existence of Ground of

Removal. Most Cited Cases

Suit held not removable on ground that by judgment of reversal resident defendants were eliminated, where judgment was not final. 28 U.S.C.A. §§ 1441, 1445, 1447.

[7] Removal of Cases 334 ↪ 18

334 Removal of Cases

334II Origin, Nature, and Subject of Controversy

334k18 k. Cases Arising Under Constitution

of United States. Most Cited Cases

Suit held not removable on ground of denial of civil rights where trust deed in suit was executed when relevant state law was in force. Const.U.S.Amend. 14; 28 U.S.C.A. §§ 1443, 1446, 1447.

[8] Removal of Cases 334 ↪ 18

334 Removal of Cases

334II Origin, Nature, and Subject of Controversy
334k18 k. Cases Arising Under Constitution of United States. Most Cited Cases
Constitution and statute may be invoked only against state legislation, constitutional or statutory. Const.U.S.Amend. 14; 28 U.S.C.A. §§ 1443, 1446, 1447.

[9] Removal of Cases 334 ⚡95

334 Removal of Cases

334VI Proceedings to Procure and Effect of Removal
334k95 k. Transfer of Jurisdiction and Effect of Removal in General. Most Cited Cases
Trial court may determine whether removal has been effected where petition for removal presents issues of law only. 28 U.S.C.A. §§ 1443, 1446, 1447.

[12] Mortgages 266 ⚡360

266 Mortgages

266IX Foreclosure by Exercise of Power of Sale
266k360 k. Execution of Power and Conduct of Sale in General. Most Cited Cases
Trustees' sale under trust deed after declaration of default and proper notice *held* valid.

[13] Mortgages 266 ⚡364

266 Mortgages

266IX Foreclosure by Exercise of Power of Sale
266k364 k. Payment of Bid. Most Cited Cases
Payment at sale to holder of indebtedness under trust deed need not be made in gold coin, as required by notice of sale.

[14] Frauds, Statute Of 185 ⚡139(5)

185 Frauds, Statute Of

185IX Operation and Effect of Statute
185k139 Contracts Completely Performed
185k139(5) k. Agreements to Convey Land. Most Cited Cases
Statute does not apply to sale of property under trust deed to holder of indebtedness in satisfaction of debt. West's Ann.Code Civ.Proc. § 1973.

[15] Mortgages 266 ⚡342

266 Mortgages

266IX Foreclosure by Exercise of Power of Sale
266k339 Persons Entitled to Execute Power
266k342 k. Appointment of New Trustee. Most Cited Cases
Substitution of new trustee, pursuant to authority in trust deed to replace one who died prior to sale *held* proper.

[16] Mortgages 266 ⚡374

266 Mortgages

266IX Foreclosure by Exercise of Power of Sale
266k374 k. Conveyance to Purchaser. Most Cited Cases
Trustees' deed at sale under trust deed passed fee and all incidents thereto, including right of possession.

[17] Costs 102 ⚡254(4)

102 Costs

102X On Appeal or Error
102k253 Expenses of Record, Abstract, or Transcript on Appeal or Error
102k254 In General
102k254(4) k. Manner of Preparing. Most Cited Cases
Item in appellants' bill of costs for printing portions of record as supplement to brief was properly disallowed. Code Civ.Proc. § 953c (repealed 1945), § 1027.

[18] Mortgages 266 ⚡374

266 Mortgages

266IX Foreclosure by Exercise of Power of Sale
266k374 k. Conveyance to Purchaser. Most Cited Cases
In ejectment by purchaser at sale under trust deed, defendants claiming under conveyances subsequent to deed were in no better position than trustors.

Appeal and Error 30 ⚡106

30 Appeal and Error

30III Decisions Reviewable
30III(E) Nature, Scope, and Effect of Decision

30k106 k. Relating to Place, Time, or Conduct of Trial. Most Cited Cases
Order resting case for trial after remittitur from Supreme Court held not appealable.

Removal of Cases 334 ↪95

334 Removal of Cases

334VI Proceedings to Procure and Effect of Removal

334k95 k. Transfer of Jurisdiction and Effect of Removal in General. Most Cited Cases
Filing petition for removal of cause not removable does not necessarily work transfer. 28 U.S.C.A. §§ 1443, 1446, 1447.

****522*441** Appeal from Superior Court, Alameda County; T. W. Harris, judge. Anson Hilton, of San Francisco, and Fred W. Lake, of Oakland, for appellants.

Fitzgerald, Abbott & Beardsley, of Oakland, for respondent.

SHENK, J.

This is an appeal from a judgment in favor of the plaintiff in an action in ejectment. The plaintiff asserts title and the right of possession to the property in question, consisting of a house and lot in the city of Oakland, under a deed issued by trustees pursuant to a sale under a deed of trust. In 1914 the plaintiff bank loaned to the defendants Fannie C. Lake and Fred W. Lake the sum of \$3,500, for which said defendants, on June 16, 1914, executed a promissory note and as security therefor executed a deed of trust covering said property. The plaintiff bank was named as beneficiary in the deed of ****523** trust, and J. F. Carlston and Arthur L. Harris were named as trustees. Prior to the sale Arthur L. Harris died, and the plaintiff, pursuant to the provisions of the trust deed, substituted J. F. Carlston and H. C. Sagehorn as such trustees. For ***442** failure of payment of the principal and interest default was declared and the property was sold. Thereafter the said trustees made, executed and delivered their deed to the plaintiff in due form. The defendants refused to surrender possession, and on July 12, 1919, this action was commenced. By their answers in that behalf the defendants denied the plaintiff's title and right of possession. Trial was had and judgment rendered for the

plaintiff. From this judgment in appeal was taken and the judgment was reversed on the ground that the recitals in the trustee's deed were not sufficient in themselves to prove the substitution of the trustees, and that there was no other evidence of the fact. Central Savings Bank of Oakland v. Lake, 62 Cal. App. 588, 217 P. 563. The remittitur was filed in the superior court on August 21, 1923. Thereupon, on motion of plaintiff, the court, on September 14, 1923, reset said cause for trial on November 19, 1923. On the date last mentioned the cause came on for trial. Findings of fact and conclusions of law and judgment in ejectment in favor of the plaintiff and against the defendants were signed and filed on May 22, 1924. It is from this judgment that the present appeal is prosecuted.

[1] Several jurisdictional questions are presented. On the 24th day of September, 1923, or within 10 days from the date the court made its order resetting the cause for trial, the defendants filed a notice of appeal in this court from said order. It is contended that this notice of appeal had the effect of depriving the trial court of the power to proceed further in the cause pending the purported appeal. Under all of the circumstances here shown, we think that such was not the case. The order from which the appeal was attempted to be taken was not an appealable order (see Sherman v. Standard Mines Co., 166 Cal. 524, 137 P. 249) and the notice of appeal on its face disclosed that such was the fact. Furthermore, on November 3, 1923, the defendants filed in this court an application to have the hand of the trial court stayed during the pendency of said appeal on the ground that the filing of said notice of appeal had ousted said court of the power to proceed with the trial. The application was denied on November 13, 1923. The said application and denial thus took place before the second trial of the cause on November ***443** 19, 1923, and must, therefore, be deemed a proceeding in which it was determined as against the present objection that the trial court retained jurisdiction to retry the cause. Following said proceeding this court, on August 12, 1924, cleared its records of the matter by dismissing said appeal on motion of the plaintiff on the ground that the said order was nonappealable.

[3] Notwithstanding the foregoing, the defendants insist that as the District Court of Appeal on the former appeal made its order in the following form: 'The judgment is reversed,' and did not in specific

words remand the cause for a new trial, the trial court could do nothing after the filing of the remittitur but enter a judgment in favor of the defendants on the theory now advanced by defendants that said judgment of reversal was a final judgment amounting to res judicata as between the parties for the reason that the court on appeal did not specifically order a new trial to be had. There is no merit in the contention. It has long been the law of this state that an unqualified reversal remands the cause for a new trial (Falkner v. Hendy, 107 Cal. 49, 54, 40 P. 21, 386) and places the parties in the trial court in the same position as if the cause had never been tried, with the exception that the opinion of the court on appeal must be followed so far as applicable (Sharp v. Miller, 66 Cal. 98, 4 P. 1065; Estate of Pusey, 177 Cal. 367, 170 P. 846). The court on the former appeal decided that on the record then presented a necessary link in plaintiff's chain of title was missing and the judgment was reversed for that reason. On the second trial the additional and necessary proof on this point was supplied.

[4] At the opening of the second trial the defendants moved the court for a change of venue. The motion was based on an affidavit made by one of the defendants charging the trial judge with bias and prejudice and with a disqualifying interest, under section 170 of the Code of Civil Procedure. A counter affidavit was filed, and the motion was denied. The alleged disqualification on the ground of bias and prejudice is not now and could not, in the light of the record before us, be seriously pressed. Estudillo v. Security Loan, etc., Co., 158 Cal. 66, 109 P. 884. On the question of the alleged disqualification on the ground of interest it is shown that the trial judge was a stockholder *444 and director in a title insurance company engaged in the business of issuing and theretofore having issued policies insuring the title to many parcels of land after the sale thereof under similar trust deeds. Said title insurance company was and is not a party to this action, nor was it shown that the said company had issued a policy of title insurance on the property in controversy. Notwithstanding these facts, the defendants contend that, if in the present proceeding it be declared that the said trust deed and the sale thereunder be unauthorized and void under the laws of this state, then such other trust deeds covering property, the title to which has been insured by said title company, would also be void and **524 the said judge would suffer a loss in proportion to his stock interest by reason of the policies of title insurance heretofore issued on such other properties. The con-

tentation is entirely unavailing. The interest so alleged is so indirect, incidental, remote, and contingent as not to bear the slightest resemblance to the direct, measurable, and pecuniary interest in the subject-matter of the action required to be shown in order to disqualify the judge. 14 Cal. Jur. 809-814.

[5] It is next contended that the trial judge was disqualified, under subdivision 2 of section 170 of the Code of Civil Procedure, by reason of the fact that his son is a stockholder in the Central National Bank, which is alleged to be an interlocking concern with the Central Savings Bank, the plaintiff in this action. It will be first noted that the Central National Bank is not a party to this action, but assuming that the alleged affiliation of the Central Savings Bank with the Central National Bank be of such a nature that the stockholders of the latter, for all practicable purposes, own and control the Central Savings Bank, it was not shown that the judge's son was or is an officer of either banking corporation, nor was it shown that said son was or is 'an attorney, counsel, or agent' of either corporation as required by the statute in order to show a disqualification. The proof of disqualification is thus entirely lacking. See Favorite v. Superior Court of Riverside County, 181 Cal. 261, 184 P. 15, 8 A. L. R. 290.

[6] On November 10, 1923, the defendant E. D. Lake filed in the trial court an application demanding the removal of said cause to the federal court, under section 28 *445 of the Federal Judicial Code (U. S. Comp. St. § 1010), on the ground that he was a citizen of the state of Nevada, that the cause had been reduced by the elimination of all the other defendants to a single cause between the plaintiff and himself, and that there thus remained a severable controversy between himself and the plaintiff for the reason, as claimed, that the judgment of reversal on the former appeal constituted a final judgment against the plaintiff and in favor of the defendants, including himself. Since the judgment of reversal, at the time the petition for removal was filed, did not amount to a final judgment between the parties under the law of this state, the grounds for the removal were insufficient.

[7] On the same day, to wit, November 10, 1923, the defendant E. D. Lake also filed a petition for removal to the federal court, under section 31 of the Federal Judicial Code (U. S. Comp. St. § 1013). That section provides that, when any civil suit is commenced in

any state court against any person who is denied or cannot enforce in the judicial tribunals of the state any right secured to him by any law providing for the equal civil rights of the citizens of the United States, said cause may be removed to the federal court. Said defendant alleged the right of protection under the Fourteenth Amendment to the Constitution of the United States and relief thereunder by reason of the fact that in this state the right to enforce the sale of real property mortgaged to secure a debt is barred when the debt is barred and the purchaser after the bar takes the property free of any incumbrance on account of the debt (Faxon v. All Persons, 166 Cal. 707, 137 P. 919, L. R. A. 1916B, 1209; Muhs v. Hibernia Sav. & Loan Society, 166 Cal. 760, 138 P. 352), while, on the other hand, the right of sale is not extinguished by the statute of limitations when the debt is secured by trust deed (Travelli v. Bowman, 150 Cal. 587, 89 P. 347; Sacramento Bank v. Murphy, 158 Cal. 390, 115 P. 232). By reason of this court's construction of the different effect of the statute of limitations as applied to these contractual obligations and the rights incidental thereto, it is claimed that said defendant is thereby denied the equal protection of the laws and that his petition for a removal was effectual to transfer the cause out of the trial court and oust it of jurisdiction to retry the same. At the time the trust deed here involved was executed the law of this state with reference*446 to the effect of the statute of limitations upon the question of the enforcement of said contract was in force. Such law therefore became a part of the contract entered into between the parties to the trust deed. In said application for removal it was thus sought to invoke the Fourteenth Amendment for relief as against the effect of the voluntary contractual obligation thus assumed.

[8][9] Protection was not sought as against any state legislation, either constitutional or statutory, and it is only as against such state action that the Fourteenth Amendment and section 31 of the Federal Judicial Code may be invoked. Corrigan v. Buckley, 271 U. S. 323, 46 S. Ct. 521, 70 L. Ed. 969; Kentucky v. Powers, 201 U. S. 1, 26 S. Ct. 387, 50 L. Ed. 633, 5 Ann. Cas. 692; Virginia v. Rives, 100 U. S. 313, 25 L. Ed. 667; Los Angeles Investment Co. v. Gary, 181 Cal. 680, 186 P. 596, 9 A. L. R. 115. The present case was therefore not properly removable to the federal court on the grounds stated in this second application. A third removal petition was filed by the defendants Fannie D. Lake, Fred W. Lake, and A. F. Lake on grounds alleged also to be within said sec-

tion 31 of the Federal Judicial Code. In their application these defendants likewise asserted that the judgment of the District Court of Appeal on the former appeal was a final judgment, and they sought the protection of the Constitution and laws of the United States under said alleged final judgment. As said judgment of reversal was not in law a final **525 judgment, this application on its face failed to state sufficient grounds for removal. The trial court declined to make an order of removal on any of the grounds stated in said applications. Issues of law only were thereby presented. In such case the said court was at liberty to determine for itself whether or not on the face of the record a removal had been effected. Burlington, etc., Ry. Co. v. Dunn, 122 U. S. 513, 7 S. Ct. 1262, 30 L. Ed. 1159. It was correctly decided that such removal had not taken place.

The mere filing of a petition for removal of a cause which is not removable does not necessarily work a transfer. To accomplish this result the action must be one that may be removed and the petition must present facts showing a right in the petitioner to demand the removal. Southern Pacific Co. v. Waite (D. C.) 279 F. 171, and cases therein cited. Not only *447 did the trial court correctly determine questions of law presented on the face of the petition, but the District Court of the United States for the Northern District of California, the very federal court which the defendants claim to have acquired jurisdiction by reason of said petitions, held, prior to the judgment from which the present appeal is taken, that no cause for removal was shown and granted a motion of the plaintiff remanding the said cause to the superior court, thus clearing its docket of the matters.

[12] The validity of the sale under the trust deed is challenged by the defendants. They contend that the power of sale was joint and that since trustee Sagehorn was the only trustee present at the sale the same was void. There is no merit in the point. The trust deed in terms provided that 'in conducting the sale, they, [the trustees] or either of them may act.' This was sufficient under section 2268 of the Civil Code, which provides:

'Where there are several cotrustees, all must unite in any act to bind the trust property, unless the declaration of trust otherwise provides.'

The trust deed contains the usual provisions for sale

by the trustees in case of default. Default was declared and the trustees gave notice of sale. The notice has been examined. It was found by the trial court to be sufficient and we are of the same opinion. An auctioneer assisted in conducting the sale. There can be no valid objection to the course thus pursued under the terms of the trust deed itself and under the law of this state. The trust deed provided that in conducting the sale the trustees or either of them 'may act, either in person or through the agency of an auctioneer.' This procedure has been approved. Kennedy v. Dunn, 58 Cal. 339.

[13][14] The notice of sale declared the intention of the trustees to sell 'at public auction to the highest bidder for cash, gold coin of the United States.' The auctioneer properly acted as a clear and the property was sold to the creditor bank. No cash was paid at the time and no written contract of sale was at that time executed. From these facts it is contended that the sale was void. It is well settled that, when the property is sold to the holder of the indebtedness, it is not necessary that the payment should be made in gold coin. The consideration for the property is the satisfaction of the debt (*448Portola Realty Co. v. Carlston, 32 Cal. App. 282, 162 P. 899; Davies v. Ramsdell, 40 Cal. App. 424, 181 P. 94), and thereupon the contract becomes an executed contract to which the statute of frauds (Code Civ. Proc. § 1973) is not applicable (12 Cal. Jur. 926, and cases cited; 27 Corp. Jur. 321).

[15][16] The defendants attack the substitution of trustee Sagehorn. The trust deed expressly covenanted that the bank might by a resolution of its board of directors from time to time appoint and substitute other trustee or trustees to execute the trust thereby created, and that upon such appointment, either with or without a conveyance to said substituted trustee or trustees by the grantees named therein or the survivor of them or their successors or assigns, such new trustee or trustees should be vested with all the title, interest, powers, duties, and trusts in the premises vested in or conferred upon the original trustees. It was also provided that a copy of such resolution, duly certified by the officers of the bank and recorded, should be conclusive proof of substitution. Such a resolution was duly passed and certified and was on the 4th day of January, 1918, recorded in the office of the county recorder of Alameda county. This resolution was the muniment of title held on the

former appeal to be the necessary proof of substitution, and it was received in evidence on the second trial. Upon examination it is found to be sufficient in all respects. Nor do we find any merit in the contention of the defendants that the trustees' deed transferred to the purchaser the naked fee only and not the right of possession. Upon the execution of the trust and the conveyance of title to the purchaser, the purchaser not only obtained the fee but all incidents thereto, including the right of possession, free from all claims on the part of the trustors. Bryant v. Hobert, 44 Cal. App. 315, 186 P. 379, and cases therein in referred to.

By citation of numerous authorities and by much argument the defendants seek to have it declared that trust deeds are or should be held to be invalid under the laws of this state. Reference to cases decided by this court recognizing the validity and sufficiency of such trust deeds are too numerous to require citation.

[17] Finally, we are asked to review the action of the trial court in striking out an item of \$104.60 included in *449 the defendants' bill of **526 costs filed after the going down of the remittitur on the former appeal. This item was for printing portions of the record as a supplement appended to the appellants' opening brief. Assuming that this matter is properly before us on this appeal, it is clear that the item was properly disallowed. The portion of the record thus printed was required, if the appellants deemed it necessary, by section 953c of the Code of Civil Procedure wherein the appellants are required to 'print in their briefs, or in a supplement appended thereto, such portions of the record as they desire to call to the attention of the court.' This supplement is deemed to have been a part of the briefs of the appellants on said appeal, and, as they included in their cost bill an item of \$100 on account of the cost of printing their briefs and as such item was allowed under the provisions of section 1027 of the Code of Civil Procedure, the defendants have no just cause for complaint. Other points discussed in the briefs do not require notice.

[18] After what has been said it is deemed appropriate to note that the defendants Fannie D. Lake and Fred W. Lake received the loan of \$3,500 from plaintiff and the same has never been repaid, notwithstanding repeated offers on the part of the plaintiff to accept the payment thereof with the interest and costs in full satisfaction of the debt. The equitable position

of the plaintiff is thus plainly apparent. The claims of the other defendants are predicated upon conveyances subsequent to the execution of the trust deed and such claims are in no better position than those of the original trustors.

The judgment is affirmed.

We concur: WASTE, C. J.; CURTIS, J.; LANGDON, J.; PRESTON, J.

Cal., 1927
Central Sav. Bank of Oakland v. Lake
201 Cal. 438, 257 P. 521

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Supreme Court of California.
 MONSON et al.
 v.
 FISCHER.
 S. F. 14889.

Oct. 27, 1933.

In Bank.

Action by Olof Monson and another, copartners, etc., against Martha W. Fischer. From an other taxing costs on appeal after reversal of judgment in favor of the plaintiffs, the plaintiffs appeal.

Order modified, and, as modified, affirmed.

For prior opinion, see 19 P.(2d) 269.

West Headnotes

[1] Appeal and Error 30 1180(1)

30 Appeal and Error
30XVII Determination and Disposition of Cause
30XVII(D) Reversal
30k1180 Effect of Reversal
30k1180(1) k. In General. Most Cited

Cases

Reversal of judgment sets case completely at large except as restricted by opinion of appellate court.

[2] Costs 102 247

102 Costs
102X On Appeal or Error
102k247 k. Amount and Items in General.

Most Cited Cases

Defendant, as part of costs on appeal after reversal of judgment for plaintiffs, held not entitled to allowance of item incurred as costs at trial. Code Civ.Proc. § 1024.

[3] Appeal and Error 30 82(4)

30 Appeal and Error

30III Decisions Reviewable

30III(D) Finality of Determination

30k82 Orders After Judgment

30k82(4) k. Relating to Costs. Most

Cited Cases

Order taxing costs on appeal after reversal of judgment is "special order made after final judgment" and, therefore, appealable. Code Civ.Proc. § 963.

Appeal and Error 30 1180(1)

30 Appeal and Error

30XVII Determination and Disposition of Cause

30XVII(D) Reversal

30k1180 Effect of Reversal

30k1180(1) k. In General. Most Cited

Cases

Unqualified reversal places parties in trial court in same position as before trial, except opinion on appeal must be followed.

****6*291** Appeal from Superior Court, City and County of San Francisco; George H. Cabaniss, Judge. Leicester & Leicester and Norman A. Eisner, all of San Francisco, for appellants.

Percy E. Towne, Richard tum Suden, and Peter A. Breen, all of San Francisco, for respondent.

PRESTON, Justice.

This is an appeal from so much of an order taxing costs on appeal as allows to defendant an item of \$116 incurred by her as costs on trial of the action in the court below.

The trial on its merits resulted in judgment for plaintiffs, which was reversed on appeal. Monson v. Fischer, 118 Cal. App. 503, 5 p.(2d) 628. Under section 1034 of the Code of Civil Procedure and within the time allowed, defendant filed a memorandum covering her costs on appeal and included therein the aforesaid item. Plaintiffs moved to retax said costs by striking from the bill said item. This motion was denied, and plaintiffs thereupon appealed from so much of the order as included the item.

[1][2][3] This item could properly be allowed only after a final judgment for defendant in the trial court (section 1024, Code Civ. Proc.); it was no part of her costs on appeal. The reversal of the judgment sets the case completely at large, except as restricted by the opinion of the appellate court. Central Savings Bank v. Lake, 201 Cal. 438, 443, 257 P. 521; Estate of Pusey, 177 Cal. 370, 371, 170 P. 846. An order taxing costs on appeal is a special order made after final judgment within the meaning of section 963 of the Code of Civil Procedure and is appealable. Markart v. Zeimer, 74 Cal. App. 152, 239 P. 856.

*292 The order taxing costs of appeal in this action is therefore modified by striking therefrom said item of \$116 and, as so modified, **7 the order is affirmed, appellants to recover their costs on this appeal.

We concur: WASTE, C. J.; LANGDON, J.; CURTIS, J.; IRA F. THOMPSON, J.; SEAWELL, J.
CA. 1933
Monson v. Fischer
219 Cal. 290, 26 P.2d 6

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C

Supreme Court of Iowa.
 TAYLOR
 v.
 BURGUS.
 No. 43077.

Oct. 23, 1935.

Appeal from District Court, Clarke County; Homer
 A. Fuller, Judge.

Personal injury action to recover for the death of the
 administrator's deceased caused by an automobile
 accident. From a verdict in favor of the plaintiff, the
 defendant appeals.

Affirmed.

West Headnotes

Appeal and Error 30 ↪ 281(1)

30 Appeal and Error
30V Presentation and Reservation in Lower Court
 of Grounds of Review
30V(D) Motions for New Trial
30k281 Necessity in General
30k281(1) k. In General. Most Cited

Cases

Purpose of motion for new trial is to bring before
 court errors which otherwise would not be called to
 its attention, and errors once pressed for correction
 may be reviewed, in absence of motion for new trial.

Appeal and Error 30 ↪ 291

30 Appeal and Error
30V Presentation and Reservation in Lower Court
 of Grounds of Review
30V(D) Motions for New Trial
30k287 Review of Proceedings at Trial
30k291 k. Rulings as to Submission of
 Case or Question to Jury. Most Cited Cases
 Where defendant moved to direct verdict and ex-
 cepted to ruling on motion, error in ruling could be

raised on appeal without filing of motion for new
 trial.

Appeal and Error 30 ↪ 843(3)

30 Appeal and Error
30XVI Review
30XVI(A) Scope, Standards, and Extent, in
 General
30k838 Questions Considered
30k843 Matters Not Necessary to Deci-
 sion on Review
30k843(3) k. Review of Evidence.

Most Cited Cases

On appeal of defendant from refusal of motion for
 directed verdict, where defendant asserted that under
 no circumstances did he want a new trial, Supreme
 Court, in view of usual practice of sending case back
 to district court for new trial on reversal, affirmed
 judgment without passing on refusal of motion for
 directed verdict.

Appeal and Error 30 ↪ 1177(7)

30 Appeal and Error
30XVII Determination and Disposition of Cause
30XVII(D) Reversal
30k1177 Necessity of New Trial
30k1177(7) k. Failure to Introduce Suf-
 ficient Evidence to Authorize Recovery or Establish
 Defense. Most Cited Cases

Supreme Court, in reversing case, usually does not
 enter judgment or send case back to district court
 with directions to enter judgment but returns case to
 district court for new trial, although judgment re-
 versed is judgment refusing to direct verdict for de-
 fendant.

Appeal and Error 30 ↪ 1180(1)

30 Appeal and Error
30XVII Determination and Disposition of Cause
30XVII(D) Reversal
30k1180 Effect of Reversal
30k1180(1) k. In General. Most Cited

Cases

General order of reversal cancels district court judg-

ment and sends case back for full retrial of entire case as though there had been no former trial.

New Trial 275 0.5

275 New Trial

275I Nature and Scope of Remedy

275k0.5 k. Nature and Scope of Remedy in General. Most Cited Cases
(Formerly 275k01/2)

Purpose of motion for new trial is to bring before court errors which otherwise would not be called to its attention.

*809 Gibson & Stewart, of Des Moines, and E. K. Jones, of Osceola, for appellants.

O. M. Slaymaker, R. E. Killmar, and D. D. Slaymaker, all of Osceola, for appellee.

ALBERT, Justice.

Under the contention of the defendant there is but one question for decision in this case.

The defendant made a motion to direct a verdict, at the close of all the testimony, which was overruled, and, to the action of the court in overruling this motion for a directed verdict, the defendant excepted. The correctness of this ruling is the only question raised in the case. It is suggested, however, that the defendant, not having filed a motion for a new trial, cannot be heard on the question he now raises.

The general rule governing motions for new trial, as set out in Stewart v. Equitable Mut. Life Ass'n, 110 Iowa, 528, 81 N. W. 782, is as follows: "The purpose of a motion for a new trial is to bring before the court errors which, without it, would not be called to its attention. [Citing cases.] Surely, filing a motion of this kind does not waive errors to which the court's attention has been previously directed and exceptions saved. Having been once pressed for correction, the duty of the litigant has been discharged, and he is under no obligation to demand reconsideration. This is the reason for the statute in authorizing review of such errors in the absence of any motion."

So, as applied to the facts before us, the question of the sustaining or overruling of the motion to direct was squarely called to the attention of the court and

passed upon by it and exceptions were taken from the ruling. A motion for a new trial, under such circumstances, is not required.

For reasons hereinafter set out, a summary of the facts in this case is all that is necessary.

The accident out of which this suit grew occurred on March 18, 1934, about 11 o'clock, or a little later, in the evening. On this Sunday evening these four young people, Marvin Burgus, Loren Taylor, Margery Abel, and Leona Morrow, were riding in the defendant's car. They drove west from Osceola to Creston, where they attended a picture show, and started to return home to Osceola about 10:30 or 11 o'clock at night. The car was a Chevrolet sedan owned by the defendant. When they left Creston, the defendant was driving and Leona Morrow was sitting beside him in the front seat. The deceased, Loren Taylor, was sitting on the right side in the back seat, and his company, Margery Abel, was sitting at his left. After they had driven some distance toward Osceola, the defendant changed places with Leona Morrow, and she thus drove the car to the scene of the accident. The road on which they were driving was known as highway No. 34. It is a paved highway, with pavement 18 feet wide, and dirt shoulders on either side. Near the city limits of Osceola there is a bend in the road to the right, and at the city limits there is a rise in the pavement which is referred to as a "hill." At or about the foot of this "hill" the curve ends, and the pavement continues thence practically straight east and becomes one of the streets of the said city. At the foot of the south shoulder, at or near the scene of the accident and running parallel to the pavement, is a ditch about 2 feet in depth. Running south from the pavement a little farther on is a north and south street, designated in the record as Twenty-Eighth street. To the north of the pavement, and about 75 feet therefrom, is a building belonging to the state highway commission. This building is at or near the foot of the "hill" and in the neighborhood of 100 feet west of Twenty-Eighth street.

At the time in question this car came over the "hill" at the rate of 45 or 50 *810 miles an hour. As it reached the point approximately opposite the highway commission building, the car ran off the paving and shoulder and into the ditch above referred to. It followed this ditch for something like 100 feet, to what is referred to in the record as a flume. This

flume is of concrete, and is a spillway constructed to the south of the pavement to let the water run off. It slopes to the south, and the water is dumped on a concrete slab at this point and flows from thence south in a ditch or depression. This ditch or depression is something like 18 inches to 2 feet deep. The spillway seems to be approximately on the west line of Twenty-Eighth street. As this car progressed to the east, it, at least partially, struck the said spillway and ran into the ditch below. It turned end over end, and threw all these young people from the car, and this resulted in the death of Loren Taylor. The car came to rest some 12 or 15 feet south of the pavement, on highway No. 34.

A jury might find from the record that, commencing at a point approximately at the top of the "hill," on the north side of the pavement, there was an automobile track extending to the east to a point opposite the west line of the highway commission building; that the shoulder was soft, and at the latter point the tracks veered abruptly to the right and crossed the pavement and went into the ditch on the south side of the pavement, and followed along the course of this car to the point of the accident. Where these tracks crossed the pavement, there were evidences of burned rubber and the skidding of wheels. Whatever car made this track from the point at the top of the hill to the place where it crossed the pavement, the track could have been made only by a car with the two north wheels off the pavement and the two south wheels on the pavement.

The only eyewitness to this accident, aside from the four occupants of the car, was a young man who had driven his car off the pavement near the highway commission building. His car was headed west, and he drove to this point about the time the defendant's car was coming over the hill. When he stopped his car, he shut off his lights, and his testimony as to what he saw is based wholly on what he saw of the lights of the defendant's car coming in his direction, and he testifies that he heard the car skid. There is testimony of two witnesses as to conversations with the defendant after the accident, and to one of them he said that the car was being driven "like hell," and to the other that the car was being driven "too fast."

Of course, it is to be remembered that this is what is known as a "guest case" and the defendant is liable, under the statute, only for "recklessness." The motion

to direct a verdict went alone to this question, to wit, that there was no evidence of recklessness shown, and therefore a verdict should be directed for the defendant.

At this point we take up the statements of the defendant in his brief and argument. He asserts that under no circumstances does he want a new trial. He asks this court to rule that the motion for a directed verdict should have been sustained, and then that this court enter judgment here dismissing the plaintiff's case, or that the case be reversed and remanded to the district court with directions to enter judgment for the defendant. This is the first time that this question has ever been raised in a case of this kind. There are some cases in which, after a second or third trial, we have made an order of this kind. There are one or two cases in which the record has been in such shape that it was conclusive that upon a retrial no other result could be reached, and therefore we have made the kind of an order asked for in this case. It is fundamental that a general order of reversal cancels the district court judgment and sends the case back for a full retrial of the entire case. Landis v. Interurban Ry. Co., 173 Iowa, 466, 154 N. W. 607; Owens v. Norwood-White Coal Co., 181 Iowa, 948, 165 N. W. 177; Hawthorne v. Delano, 183 Iowa, 444, 167 N. W. 196. Under such circumstances case stands for retrial the same as though there has been no former trial. In Holland Furnace Co. v. Pope, 204 Iowa, 737, 215 N. W. 943, it was held that, where the facts were stipulated and the court erroneously decided the law question, upon a reversal it was proper for this court to direct the trial court to enter judgment for the appellant; and also that, where there was a trial to the court without a jury and the court erred in its judgment, the case might be reversed, with directions to enter judgment for the appellant. McCarl v. Clarke County, 167 Iowa, 14, 148 N. W. 1015; First Presbyterian Church v. Dennis, 178 Iowa, 1352, 161 N. W. 183, L. R. A. 1917C, 1005. With certain exceptions not involved in the present case, it has *811 never been the rule or practice of this court, in reversing a case, to enter judgment here or to send the case back to the district court with directions to enter judgment; and, if we should rule in this case that the lower court should have directed a verdict for the defendant, under the usual course of practice the case would be returned to the district court for a new trial. This being the usual course of practice in such cases, we see no occasion for departing therefrom. But the defendant insists that under no circumstances does he want

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a new trial, and, this being his attitude and urgent request, we forego a ruling on the motion to direct, and hold that the case, under the circumstances here, should be affirmed.

Affirmed.

KINTZINGER, C. J., and PARSONS, DONEGAN,
and RICHARDS, JJ., concur.

Iowa 1935.
Taylor v. Burgus
221 Iowa 1232, 262 N.W. 808

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C

Supreme Court of Utah.
 PHEBUS et al.
 v.
 DUNFORD, Judge, et al.
 No. 7187.

Nov. 8, 1948.

Mandamus proceeding by Ray Phebus, Joe T. Juhan and Ashley Vally Oil Company against Hon. William Stanley Dunford, Judge of the Fourth Judicial District Court, Uintah County, and N. J. Meagher, for a decision directing trial court to decide affirmatively for petitioners on petitioners' motion to have trial court set aside its former decision in quiet title action to conform to direction of Supreme Court on appeal.

Petition denied.

FN1. Larsen v. Gasberg, 43 Utah 203, 134 P. 885; Madsen v. Madsen, 78 Utah 84, 1 P.2d 946; Warren v. Robinson, 21 Utah 429, 61 P. 28.

West Headnotes

[1] Appeal and Error 30 ↪ 1180(1)

30 Appeal and Error

30XVII Determination and Disposition of Cause

30XVII(D) Reversal

30k1180 Effect of Reversal

30k1180(1) k. In General. Most Cited

Cases

A reversal of judgment of a lower court places case in position it was before lower court rendered judgment, and vacates all proceedings and orders dependent upon the decision which was reversed.

[2] Appeal and Error 30 ↪ 1180(1)

30 Appeal and Error

30XVII Determination and Disposition of Cause

30XVII(D) Reversal

30k1180 Effect of Reversal

30k1180(1) k. In General. Most Cited

Cases

A decision of Supreme Court reversing judgment automatically set aside decision of trial court when decision of Supreme Court was filed in trial court, and nothing existed upon which a motion to have trial court set aside its decision could be predicated.

[3] Appeal and Error 30 ↪ 1199

30 Appeal and Error

30XVII Determination and Disposition of Cause

30XVII(F) Mandate and Proceedings in

Lower Court

30k1196 Powers and Duties of Lower

Court

30k1199 k. Opening, Vacating, Modification, or Amendment of Judgment or Order. Most Cited Cases

Where trial court erroneously undertook to grant affirmative relief upon motion by successful appellants to set aside decision in quiet title action, when decision of Supreme Court reversing judgment automatically set aside decision of trial court, and trial court created a flaw in record by excepting one of appellants from directive of Supreme Court, which might confuse examiner of titles as to status of excepted appellant, trial court had duty to enter an order setting aside its entire decision without limitation, in order to clear the record.

[4] Appeal and Error 30 ↪ 1197

30 Appeal and Error

30XVII Determination and Disposition of Cause

30XVII(F) Mandate and Proceedings in

Lower Court

30k1196 Powers and Duties of Lower

Court

30k1197 k. Jurisdiction of Lower Court After Remand. Most Cited Cases

Where Supreme Court reversed decision of trial court in its entirety, and remanded case for proceedings, conforming with opinion of Supreme Court, trial court had duty to proceed to a determination of the case as though no previous decision had been rendered by trial court, except that issues decided upon

appeal could not be acted upon contrary to way they were decided by Supreme Court.

[5] Appeal and Error 30 ↪ 1198

30 Appeal and Error

30XVII Determination and Disposition of Cause

30XVII(F) Mandate and Proceedings in Lower Court

30k1196 Powers and Duties of Lower Court

30k1198 k. Compliance with Mandate or Directions. Most Cited Cases

Where Supreme Court reversed decision of trial court in its entirety, and remanded case for proceedings conforming with opinion of Supreme Court, issues decided upon appeal could not be acted upon or decided contrary to way they were decided by Supreme Court.

***293**973** Gustin & Richards and Ingebretsen, Ray, Rawlins & Christensen, all of Salt Lake City, for appellant.

Herbert Van Dam and Katherine C. M. Ivers, both of Salt Lake City, for respondent.

PRATT, Justice.

This mandamus proceeding arises out of the action taken by the trial court ostensibly pursuant to our decision in the case of N. J. Meagher, Plaintiff and Respondent v. Uintah Gas Co. (Valley Fuel Supply Co., Defendants, and Ray Phebus, Ashley Valley Oil Co., and Joe T. Juhan, Defendants and Appellants), 185 P.2d 747, 754. In that appeal this court directed: 'The decision of the lower court is reversed, and the case remanded to that court for proceedings to conform to this opinion. Costs to appellant.'

For a foundation for that direction we merely invite attention to the citation above, and the two questions (issues) decided therein.

The controversy in the present proceeding arises over the lower court's ruling upon a motion of the appellants (the successful parties in the appeal) to have the lower court set aside its former decision to conform to the above quoted directions of this Supreme Court. Their motion was granted ****974** except as to appellant Ray Phebus, one of petitioners for this writ. The

lower court allowed its former judgment and decision to stand against that appellant.

[1]*294 A reversal of a judgment or decision of a lower court such as this places the case in the position it was before the lower court rendered that judgment or decision, and vacates all proceedings and orders dependent upon the decision which was reversed. 3 Am.Jur. 697, Sec. 1190; 3 Am.Jur. 690, Sec. 1184 (defining 'to reverse'); 3 Am.Jur. 699, Sec. 1192 (as to dependent proceedings); Larsen v. Gasberg, 43 Utah 203, 134 P. 885 (this case not only reversed the lower court but granted a new trial which in effect removed the first trial from further consideration); Madsen v. Madsen, 78 Utah 84, 1 P.2d 946; Warren v. Robinson, 21 Utah 429, 61 P. 28.

[2] The lower court should not have entertained the motion to set aside the former decision. The decision of this court when filed in the lower court automatically set the lower court's decision aside without further action by that court. Our decision did not direct the lower court to take action to vacate its former decision. It acted directly upon the lower court's decision and effectually vacated and set aside that decision. Our decision was without limitation as to how much of the lower court's decision was set aside. It set it all aside. After the filing of the remittitur from this court in the lower court, there was nothing upon which such a motion could properly have been predicated. If for any reason a feeling has grown up that a layman, examining an abstract of title of property involved in such an appellate decision would not understand the effect of the Supreme Court decision without the aid of an order of the lower court, that can be obviated by proper clerical entries in the judgment records of the lower court.

Logically, at least, if appellants were not entitled to a decision of the lower court upon such a motion, they are not entitled to a decision by this Supreme Court in this mandamus proceedings, directing the lower court to decide affirmatively for them upon that motion, as the lower court should not be compelled to take action needlessly. The ***295** lower court however having undertaken to grant affirmative relief upon that motion, has created a flaw in the record which appears to except the appellant Ray Phebus from this court's directive; and may confuse the examiner of titles as to the status of this appellant. Assuming it were proper for that court to act, it should

have set its entire decision aside for the reasons indicated above, and not limited its order to a part only of its former decision.

[3] Merely for the sake of clearing the record, the lower court should enter an order setting its entire decision aside without limitation. We see no necessity, however, of issuing the writ of mandate directing this, as we believe that the lower court will conform to this opinion upon its becoming a part of the record of the case in that court.

[4][5] The lower court's former decision, in its entirety, having been set aside, that court should proceed to a determination of the case the same as if no such previous decision by it had been rendered. The only restriction imposed upon it in accomplishing a final determination of the case lies in the issues decided upon the appeal to this Supreme Court (see citation). Those issues may not be acted upon or decided contrary to the way they were decided by this court. Other than that restriction, the lower court may act in this case as it may act in any case at a time prior to its final determination of the facts and law of the case.

The petition is denied, each party to bear its own costs.

McDONOUGH, C. J., and WADE and WOLFE, JJ.,
concur. LATIMER, Justice.
I concur.

I believe the trial court was misled by the qualifying phrase in the order reversing the cause. While I did not participate in the original decision, I interpret the order to apply with equal effect to all appellants.

Utah 1948
Phebus v. Dunford
114 Utah 292, 198 P.2d 973

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Supreme Court of Indiana.
 William R. DOUGHTY, Grace B. De Armond, Appellants,

v.

STATE DEPARTMENT OF PUBLIC WELFARE,
 County Department of Public Welfare of Madison
 County, Indiana, Appellees.

No. 29183.

Sept. 16, 1954.

Action by Department of Public Welfare to recover old age and medical benefits paid to defendant who received \$6,000 in settlement of claim for services rendered by him. The Circuit Court, Madison County, Russell E. Stewart, J., ordered defendant's attorney to return the \$2,312.20 which had been impounded by court's order of June 17, 1953 and which defendant's attorney withdrew on April 21, 1954, after the circuit court made an order vacating the judgment overruling an earlier demurrer and sustaining the demurrer and defendants appealed. The Supreme Court, Flanagan, C. J., held that the order of the circuit court entered June 17, 1953, was in full force and effect when defendant's attorney withdrew the funds since sustained demurrer did not take out the complaint but only ruled that the complaint as it stood was defective and the pleader had an absolute right to keep it there and amend it.

Judgment affirmed.

West Headnotes

[1] Appeal and Error 30 ↪ 1180(1)**30 Appeal and Error****30XVII Determination and Disposition of Cause****30XVII(D) Reversal****30k1180 Effect of Reversal****30k1180(1) k. In General. Most Cited****Cases**

Where an appellate tribunal finds a judgment was erroneous and reverses it, such judgment is forthwith vacated, the parties are restored to the position they held before the judgment was pronounced and must

take their places in the trial court at the point where the error occurred and proceed to decision.

[2] Appeal and Error 30 ↪ 1180(2)**30 Appeal and Error****30XVII Determination and Disposition of Cause****30XVII(D) Reversal****30k1180 Effect of Reversal****30k1180(2) k. Effect on Dependent****Judgments or Proceedings. Most Cited Cases**

Where position of parties before final judgment included existence of impounding order against defendants and an appellate tribunal reversed that final judgment, parties were returned to position they held before judgment was pronounced and impounding order against defendant was in full force and effect after the reversal of final judgment and withdrawal of fund was improper.

[3] Pleading 302 ↪ 360**302 Pleading****302XVI Motions****302k351 Striking Out Pleading or Defense****302k360 k. Application and Proceedings****Thereon. Most Cited Cases****(Formerly 302k360(17))**

A motion to strike, when sustained, takes out the complaint or parts thereof stricken.

[4] Pleading 302 ↪ 225(2)**302 Pleading****302V Demurrer or Exception****302k219 Operation and Effect of Decision on****Demurrer****302k225 Amendment or Further Pleading****After Demurrer Sustained****302k225(2) k. Authority and Discretion****of Court. Most Cited Cases**

A demurrer, sustained, does not take out the complaint, but rules that complaint as it stands is defective, and complaint stays and pleader has absolute right to amend it. Burns' Ann.St. § 2-1010.

[5] Pleading 302 ↪ 225(2)

302 Pleading

302V Demurrer or Exception

302k219 Operation and Effect of Decision on Demurrer

302k225 Amendment or Further Pleading After Demurrer Sustained

302k225(2) k. Authority and Discretion of Court. Most Cited Cases

Sequestration 351  13

351 Sequestration

351k13 k. Writ, Order, or Other Mandate. Most Cited Cases

Where demurrer to original complaint, upon which an impounding order was issued, was sustained, the demurrer did not take out complaint, plaintiff had absolute right to keep it and to amend it and impounding order continued to exist. Burns' Ann.St. § 2-1010.

*476**645 Lawrence Booram, Anderson, for appellants.

William L. Peck, Anderson, for Madison County Dept. of Public Welfare.

FLANAGAN, Chief Justice.

This is an appeal from an interlocutory order.

Appellees brought this action to recover from appellant, William R. Doughty, the sum of \$2,312.20, received by him as Old Age Assistance and Medical Aid, under provisions of the Public Welfare Act, §§ 52-1201 to 52-1220, Burns' 1951 Replacement.

By settlement of a claim in a certain estate then pending in the Madison Circuit Court, said appellant was allowed the sum of \$6,000. The complaint sought to have **646 attached or impounded \$2,312.20 of that allowance.

On June 17, 1953, the court issued its order to the clerk of its court, attaching and impounding the sum of \$2,312.20 as asked.

Thereafter appellant Doughty's demurrer to the complaint was overruled, he refused to plead further, judgment was rendered on the demurrer, and the

clerk was ordered to release to appellees the impounded sum of \$2,312.20.

*477 Said appellant appealed, and this court reversed the judgment, with instructions to sustain the demurrer. See Doughty v. State Department of Public Welfare, Ind.Sup.1954, 117 N.E.2d 651.

Petition for rehearing was denied on April 2, 1954, and the certified opinion of this court was spread of record on the order book of the Madison Circuit Court on April 21, 1954. On that day the court made an order vacating the judgment and sustaining the demurrer, and the appellees filed an amended complaint. On April 22, 1954, appellant herein, Grace B. De Armond, an attorney of record for appellant Doughty, withdrew the \$2,312.20 which had been impounded by the court's order of June 17, 1953.

On May 17, 1954, the Madison Circuit Court summarily issued an order that Grace B. De Armond return said money to the clerk. This order of May 17, 1954, is the one from which this appeal is taken.

The legal question is whether the order entered by the Madison Circuit Court on June 17, 1953, impounding the money, was still in effect on April 22, 1954, when appellant De Armond withdrew it.

Appellants contend that the order of June 17, 1953, ended with the final judgment, and that the reversal of the final judgment did not revive that order.

With this contention we cannot agree.

[1][2] The purpose of courts of appellate jurisdiction is to inquire as to whether or not the judgment of the trial court was erroneous when rendered. If the appellate tribunal finds the judgment was erroneous and reverses it, such judgment is forthwith vacated and set aside and no longer remains in existence. The parties are then restored to the position they held before the judgment was pronounced and must take their places in the trial court at the point *478 where the error occurred, and proceed to a decision. See discussions, 3 Am.Jur., Appeal and Error, pp. 690, 697, 698.

In this case, the position before the final judgment was pronounced included the existence of the im-

pounding order of June 17, 1953. To that position the parties returned when the final judgment was reversed.

[3][4][5] It is suggested, however, that on April 22, 1954, the date the money was withdrawn by appellant De Armond, the demurrer to the original complaint had been sustained, and therefore the complaint upon which the order of June 17, 1953, was issued no longer existed to support that order. The reasoning is that when the complaint went out, the order based upon it necessarily followed, and a new complaint would require a new order .

This reasoning is based upon a misunderstanding of the function of a demurrer. A demurrer and a motion to strike are two defferent things. A motion to strike, when sustained, takes out the complaint or the parts thereof stricken. A demurrer, sustained, does not take out the complaint. The ruling is only that the complaint as it stands is defective. The complaint stays, and the pleader has an absolute right to keep it there and amend it. Section 2-1010, Burns' 1946 Replacement; Ewing v. Patterson, 1871, 35 Ind. 326; Guthrie v. Howland, 1905, 164 Ind. 214, 224, 73 N.E. 259; Royal Ins. Co., Limited, of Liverpool, v. Stewart, 1921, 190 Ind. 444, 455, 129 N.E. 853.

We conclude that the order of the Madison Circuit Court, impounding the involved funds, entered June 17, 1953, was in full **647 force and effect on April 22, 1954, at the time appellant De Armond*479 withdrew them. Therefore the order appealed from was proper.

Judgment affirmed.

BOBBITT, DRAPER, GILKISON, and EMMERT,
JJ., concur.
Ind. 1954
Doughty v. State Dept. of Public Welfare
233 Ind. 475, 121 N.E.2d 645

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C

Supreme Court of New Jersey.
 Murray LANDY, Plaintiff-Appellant,
 v.

I. Lawrence LESAVOY, Defendant-Respondent.
 No. A-47.

Argued Nov. 14, 1955.
 Decided Dec. 19, 1955.

Attachment case. The Middlesex County Court quashed writ of attachment, and plaintiff appealed. The Superior Court, Appellate Division, dismissed appeal, and the Supreme Court granted certification. The Supreme Court, Oliphant, J., held that where trial court erred in quashing writ without notice to plaintiff, thus permitting defendant to remove property from State, removal of property did not render issues moot as between parties to suit.

Cause remanded.

West Headnotes

[1] Attachment 44  157

44 Attachment

44IV Writ or Warrant

44k157 k. Defects, Objections, and Waiver.

Most Cited Cases

That appraisal and valuation of property attached was, through inadvertence and clerical error, omitted from attachment writ did not, where matter was supplied by amended return, defeat attachment. R.R. 1:10-2(d), 4:55-1, 4:77-2; N.J.S. 2A:26-1 et seq., N.J.S.A.

[2] Attachment 44  276

44 Attachment

44VIII Quashing, Vacating, Dissolution, or Abandonment

44k276 k. Effect of Dissolution. **Most Cited**

Cases

Where a writ of attachment was used as original process, performing both office of summons and at-

tachment, effect of order quashing writ of attachment was to put an end to cause, and upon quashing lien became ineffectual in absence of a stay granted to permit plaintiff to appeal. R.R. 4:77-1, 4:77-2.

[3] Appeal and Error 30  78(1)

30 Appeal and Error

30III Decisions Reviewable

30III(D) Finality of Determination

30k75 Final Judgments or Decrees

30k78 Nature and Scope of Decision

30k78(1) k. In General. Most Cited

Cases

Appeal and Error 30  358

30 Appeal and Error

30VII Transfer of Cause

30VII(B) Petition or Prayer, Allowance, and Certificate or Affidavit

30k358 k. Necessity of Allowance or Leave. **Most Cited Cases**

Order quashing attachment writ was a final judgment from which appeal could be taken as a matter of right. R.R. 2:2-2, 4:77-1, 4:77-2; Const.1947, Art. VI, § V, par. 2.

[4] Appeal and Error 30  458(1)

30 Appeal and Error

30IX Supersedeas or Stay of Proceedings

30k458 Right to Supersedeas or Stay in General

30k458(1) k. In General. Most Cited Cases
 Opportunity to apply for a stay to preserve subject matter or res of suit is implicit in every appeal which can be taken as a matter of right.

[5] Attachment 44  244

44 Attachment

44VIII Quashing, Vacating, Dissolution, or Abandonment

44k242 Proceedings on Motion

44k244 k. Notice. **Most Cited Cases**
 Trial court in attachment proceeding erred in quash-

ing writ without notice to plaintiff, thus permitting defendant to remove property from State before plaintiff had opportunity to apply for stay pending appeal.

[6] Appeal and Error 30 ↪ 843(2)

30 Appeal and Error

30XVI Review

30XVI(A) Scope, Standards, and Extent, in General

30k838 Questions Considered

30k843 Matters Not Necessary to Decision on Review

30k843(2) k. Review of Specific

Questions in General. Most Cited Cases

Where trial court in attachment case erred in quashing writ without notice to plaintiff, thus permitting defendant to remove property from State, removal of property did not render issues moot as between parties to suit.

[7] Appeal and Error 30 ↪ 1180(1)

30 Appeal and Error

30XVII Determination and Disposition of Cause

30XVII(D) Reversal

30k1180 Effect of Reversal

30k1180(1) k. In General. Most Cited Cases

Reversal of a judgment by any competent authority restores parties litigant to same condition in which they were prior to its rendition, and parties are allowed to proceed in court below to obtain a final determination of their rights in same manner and to same extent as if their cause had never been heard or decided.

*172**12 Max L. Rosenstein, Newark, argued the cause for appellant (George H. Rosenstein, Newark, of counsel; Thomas A. O'Callaghan, Newark, on the brief).

The opinion of the court was delivered by OLIPHANT, J.

This is an appeal from a judgment of the Appellate Division dismissing an appeal by the plaintiff-appellant from an order of the Middlesex County Court quashing a writ of attachment. The Appellate Division stated it considered the question moot.

This court granted certification pursuant to R.R. 1:10-2(d). The respondent has filed no brief.

The action was instituted by attachment under N.J.S. 2A:26-1 et seq., N.J.S.A. Plaintiff-appellant alleged the defendant-respondent was indebted to him in the sum of \$199,490 arising out of certain contracts. On March 15, 1954 he secured a writ of attachment and a levy was made thereunder on life insurance policies of the defendant pledged with the National Bank of New Brunswick having a cash surrender value of about \$50,000. These were the only assets of the defendant in New Jersey. Attempts were made to serve notice of the attachment upon the defendant personally *173 in New York but when these appeared unavailing an order of publication was obtained on April 12, 1954. R.R. 4:77-2.

On May 27, 1954 the defendant moved to quash the writ of attachment on the ground that proceeds of the life insurance policies were not subject to attachment. Subsequently, on July 28, 1954, the notice of motion was amended to add an additional ground that the attachment was invalid inasmuch as the sheriff had omitted to state an appraisal and valuation of the property attached. Following the receipt of this amended notice, and before any argument on the motion, the sheriff filed an amended return setting forth the appraisal and valuation of the property, together with an affidavit stating that one of the clerks in his office by inadvertence and clerical error omitted to insert the amount representing the appraised value of the inventory in the space provided therefor in the writ, and this mistake was made by a substitute clerk during vacation period. The affidavit further stated that so far as could be ascertained the value of the property attached was \$50,000. There seems to be no question that this was a mere ministerial mistake on the part of the sheriff's Office. This amended motion to quash the writ was made returnable and argued on August 10, 1954.

On September 24, 1954 the county judge by letter advised counsel that the motion to **13 quash the writ was granted on the ground that the appraisal was not made in accordance with the rules and statute. An order quashing the writ was entered on September 27, 1954, and admittedly without notice to the plaintiff as required under R.R. 4:55-1.

The court's letter of September 24, 1954 was not received by appellant's attorney until September 27, 1954. On that day he was arguing a case before this court in Trenton and the following two days, September 28 and 29, 1954, were religious holidays which he observed. He states that this letter first came to his attention on the morning of September 30, 1954, and on the same day he moved for an order vacating the order quashing the writ and staying the proceedings pending an appeal to the Appellate Division. An Ad interim stay was signed on October 6, 1954, and an order *174 granting the stay pending appeal was signed November 13, 1954, but somehow in the interim between September 27 and October 6, 1954, defendant through his attorney secured the release of the insurance policies by the bank and they were removed from the State. Despite the fact the property was In custodia legis and constructively in the possession of the sheriff as attaching officer, Austin v. Wade, 3 N.J.L. 997 (Sup.Ct.1813); Melville v. Brown, 16 N.J.L. 363 (Sup.Ct.1838), the bank apparently released the property without consulting the sheriff, and the property was removed from this State.

With affairs in this posture on the appeal from the order quashing the writ the Appellate Division stated: 'It appears that on the quashing of the writ, the defendant removed from the State, the property attached. The appeal therefore raises an entirely moot question.' With this conclusion we are not in accord, nor are we likewise in accord with the reasons given by the County Court for quashing the writ of attachment.

Taking these latter reasons first, it should be pointed out that N.J.S. 2A:26-1, N.J.S.A., provides, 'This chapter shall be liberally construed, as a remedial law for the protection of resident and non-resident creditors and claimants.' It has been specifically held that the language of the act as to the appraisal to be annexed to the return is only directory, and if it is added within a reasonable time afterwards, and before an appearance by the defendant has been entered, or bond given by the garnishee or any right is prejudiced by the sheriff's delinquency, it furnishes no adequate ground for quashing the whole proceedings and perhaps defeating the ends of justice. Franklyn v. Taylor Hydraulic, etc., 68 N.J.L. 113, 52 A. 714 (Sup.Ct.1902). It has likewise been held that the return of the sheriff, if in error in any regard, may

be amended. Thompson v. Eastburn, 16 N.J.L. 100 (Sup.Ct.1837); Cord v. Newlin, 71 N.J.L. 438, 59 A. 22 (Sup.Ct.1904).

[1] Thus it is apparent that the reasons given by the trial court for quashing the writ were ill-founded in law and not *175 in accordance with the practice of this State. This error was further compounded by the entry of the order quashing the writ without notice to the plaintiff-appellant.

The writ was issued in this case as original process and the order allowing the writ was supported by affidavits which factually set forth good and sufficient reasons for the issuance thereof. R.R. 4:77-1. The issuance of the writ and the levy thereunder impressed a lien in favor of the plaintiff-appellant on the property of the debtor in the attached policies. The complaint subsequently filed in accordance with the practice states on its face a cause of action against the defendant. R.R. 4:77-2.

[2][3] Where a writ of attachment is used as original process and performs both the office of a summons and an attachment, the effect of an order quashing a writ of attachment is to put an end to the cause. Paul v. Bird, 25 N.J.L. 559 (Sup.Ct.1856). On the quashing of the writ the lien became ineffectual unless a stay was granted to permit the plaintiff to appeal. Thus an order quashing the writ obviously is such a final judgment from which an appeal can be taken as a matter of right. R.R. 2:2-1, **14 Art. VI, Sec. V, par. 2, Constitution of 1947.

[4][5] The opportunity to apply for a stay to preserve the subject matter or Res of the suit is implicit in every appeal which can be taken as a matter of right. While the provision as to notice in R.R. 4:55-1 on the settlement of an order or judgment is directory rather than mandatory, counsel for the defendant chose to ignore it and imposed on the trial judge by presenting the order quashing the writ. Immediately after the signing of the order, it was served on the garnishee bank which released the policies which were then removed from this state. These actions were a calculated attempt to deprive the courts of this State of jurisdiction of the Res, thus defeating the right of the appellant of an opportunity to apply for a stay to preserve the subject matter of the appeal until he could perfect and prosecute his appeal.

*176 The rules of practice and procedure aim to facilitate orderly judicial procedure and are intended to provide for 'the just determination of each cause.' Such purpose cannot be permitted to be thwarted or defeated by the sleight of hand of counsel or the fleetness of foot of an elusive defendant.

[6] The removal of the insurance policies from this State is merely the end result of such delusive tactics and does not render the issue of legal error committed by the trial court moot as between the parties to this suit. On this appeal, we are not concerned with rights of third parties which may arise or have arisen subsequent to the order quashing the writ, but only the rights of the parties to this suit *Inter sese* as established by the levy of the writ of attachment which we hold to have been validly issued and executed but erroneously quashed by the trial court.

[7] The quashing of the writ is reversed and vacated and the lien of attachment reinstated as against the defendant and the parties and the cause are restored to the same positions imposed by law prior to the entry of the order quashing the writ. The reversal of a judgment by any competent authority restores the parties litigant to the same condition in which they were prior to its rendition, and the parties are allowed to proceed in the court below to obtain a final determination of their right in the same manner and to the same extent as if their cause had never been heard or decided by any court. 2 Freeman on Judgments (5th ed.), sec. 1167, p. 2416; 3 Am.Jur., sec. 1191, p. 697.

The cause is remanded for further proceedings consistent herewith.

For reversal and remandment: Chief Justice VANDERBILT and Justices HEHER, OLIPHANT, WACHENFELD, BURLING, JACOBS and BRENNAN-7.

For affirmance: None.

N.J. 1956.
Landy v. Lesavoy
20 N.J. 170, 119 A.2d 11

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Supreme Court of Montana.

Terryayne O'BRIEN, a minor, Sherman O'Brien, a
 minor, Marlys O'Brien et al., Plaintiffs and Respon-
 dents,

v.

GREAT NORTHERN RAILROAD COMPANY et
 al., Defendants and Appellants.
 No. 11057.

Submitted Oct. 3, 1966.

Decided Dec. 29, 1966.

Rehearing Denied Jan. 17, 1967.

Damages for death of motorist who was killed in
 accident involving his automobile and railroad train
 at crossing. The Twelfth Judicial District Court,
 Blaine County, C. B. Elwell, J., entered a judgment
 for the plaintiff and the railroad appealed. The Su-
 preme Court, Castles, J., held that motorist who was
 travelling along highway at night and who ap-
 proached familiar spur railroad track crossing on
 which train, with lights on, was operating at about
 four miles per hour in approaching relatively unob-
 structed crossing on level ground and who ap-
 proached crossing without substantial change of
 speed until he put on the automobile's brakes about
 66 feet from crossing was negligent in failing to
 comply with statutory mandate governing motorist's
 duty of stopping before proceeding across railroad
 tracks when a moving train is within sight or hearing
 and that such negligence was proximate cause of mo-
 torist's death.

Reversed and dismissed with instruction.

John C. Harrison and Adair, JJ., dissented.

See also: 145 Mont. 13, 400 P.2d 634.

West Headnotes

[1] Trial 388 ↪ 178388 Trial388VI Taking Case or Question from Jury388VI(D) Direction of Verdict388k178 k. Hearing and Determination.Most Cited Cases

On motion for directed verdict, evidence must be
 viewed from a standpoint most favorable to prevail-
 ing party and every fact must be deemed proved
 which evidence tends to prove.

[2] Trial 388 ↪ 178388 Trial388VI Taking Case or Question from Jury388VI(D) Direction of Verdict388k178 k. Hearing and Determination.Most Cited Cases

On motion for directed verdict all substantial evi-
 dence disclosed by record which may be used to sus-
 tain jury verdict will be given its full probative effect.

[3] Railroads 320 ↪ 324(1)320 Railroads320X Operation320X(F) Accidents at Crossings320k323 Contributory Negligence320k324 Care in Going on or Near

Tracks in General

320k324(1) k. In General. MostCited Cases**Railroads 320 ↪ 324(2)**320 Railroads320X Operation320X(F) Accidents at Crossings320k323 Contributory Negligence320k324 Care in Going on or Near

Tracks in General

320k324(2) k. Construction and Ef-fect of Statutory Provisions. Most Cited Cases**Railroads 320 ↪ 335(5)**320 Railroads320X Operation320X(F) Accidents at Crossings320k323 Contributory Negligence320k335 Effect in General

320k335(5) k. Contributory Negligence as Proximate Cause of Injury. Most Cited Cases

Duty of every motorist approaching railroad crossing is to conduct himself as would a reasonably prudent man under similar circumstances and to comply with all statutory mandates, and failure to fulfill either of these duties constitutes negligence which, if shown to have been proximate cause of injury complained of, will operate as complete bar to any recovery thereon even though railroad is shown to have been negligent.

[4] Railroads 320 ↪ 327(4)

320 Railroads

320X Operation

320X(F) Accidents at Crossings

320k323 Contributory Negligence

320k327 Duty to Stop, Look, and Listen

320k327(4) k. Duty to Both Look and Listen. Most Cited Cases

A reasonably prudent man approaching railroad crossing would be expected to look and listen to determine what hazards may be present and to use diligence to make act of using his senses effective.

[5] Railroads 320 ↪ 327(1)

320 Railroads

320X Operation

320X(F) Accidents at Crossings

320k323 Contributory Negligence

320k327 Duty to Stop, Look, and Listen

320k327(1) k. In General. Most Cited Cases

Reasonably prudent man approaching a railroad crossing is charged with the duty of not only looking straight ahead but also keeping a lookout laterally as well.

[6] Railroads 320 ↪ 346(6)

320 Railroads

320X Operation

320X(F) Accidents at Crossings

320k341 Actions for Injuries

320k346 Presumptions and Burden of Proof

320k346(5) Contributory Negligence

320k346(6) k. Duty to Stop,

Look, and Listen. Most Cited Cases

A man approaching a railroad crossing is presumed to see that which he must have seen if he looked.

[7] Railroads 320 ↪ 327(2)

320 Railroads

320X Operation

320X(F) Accidents at Crossings

320k323 Contributory Negligence

320k327 Duty to Stop, Look, and Listen

320k327(2) k. Opportunity to See or Hear Train. Most Cited Cases

If a train is at a point within driver's vision while he was at a place of safety he is deemed to have seen it and to have either progressed regardless of danger or failed to make use of his senses.

[8] Railroads 320 ↪ 327(2)

320 Railroads

320X Operation

320X(F) Accidents at Crossings

320k323 Contributory Negligence

320k327 Duty to Stop, Look, and Listen

320k327(2) k. Opportunity to See or Hear Train. Most Cited Cases

Railroads 320 ↪ 335(5)

320 Railroads

320X Operation

320X(F) Accidents at Crossings

320k323 Contributory Negligence

320k335 Effect in General

320k335(5) k. Contributory Negligence as Proximate Cause of Injury. Most Cited Cases

Motorist who was travelling along highway at night and who approached familiar spur railroad track crossing on which train, with lights on, was operating at about four miles per hour in approaching relatively unobstructed crossing on level ground and who approached crossing without substantial change of speed until he put on automobile's brakes about 66 feet from crossing was negligent in failing to comply

with statutory mandate governing motorist's duty of stopping before proceeding across railroad tracks when a moving train is within sight or hearing, and such negligence was a proximate cause of motorist's death. R.C.M.1947, § 72-164.

[9] Railroads 320 ↪ 327(7)

320 Railroads

320X Operation

320X(F) Accidents at Crossings

320k323 Contributory Negligence

320k327 Duty to Stop, Look, and Listen

320k327(7) k. Duty to Stop Before Reaching Crossing. Most Cited Cases

Railroads 320 ↪ 328(2)

320 Railroads

320X Operation

320X(F) Accidents at Crossings

320k323 Contributory Negligence

320k328 Duty Where View or Hearing

Obstructed
320k328(2) k. Duty to Stop Before Reaching Crossing. Most Cited Cases
Motorist approaching a railroad crossing when train is within sight or hearing must bring vehicle to complete stop not less than ten nor more than 100 feet from crossing and the same stop is required if crossing and view is not clear. R.C.M.1947, § 72-164.

[10] Negligence 272 ↪ 1531

272 Negligence

272XVIII Actions

272XVIII(B) Pleading

272k1528 Answer

272k1531 k. Fault of Plaintiff or Third

Persons. Most Cited Cases
(Formerly 272k117, 272k17)

Negligence 272 ↪ 1717(1)

272 Negligence

272XVIII Actions

272XVIII(D) Questions for Jury and Directed

Verdicts
272k1715 Defenses and Mitigating Cir-

cumstances

272k1717 Fault of Plaintiff or Third

Persons

272k1717(1) k. In General. Most

Cited Cases

(Formerly 272k1717, 272k136(26.1), 272k136(26))

Generally, contributory negligence is a matter of defense and presents a question for the jury.

[11] Negligence 272 ↪ 1717(1)

272 Negligence

272XVIII Actions

272XVIII(D) Questions for Jury and Directed

Verdicts

272k1715 Defenses and Mitigating Cir-

cumstances

272k1717 Fault of Plaintiff or Third

Persons

272k1717(1) k. In General. Most

Cited Cases

(Formerly 272k1717, 272k136(9))

When evidence is of such character that it will support no other legitimate inference so that a reasonable man or jury following proper instructions could not come to a different conclusion, contributory negligence is not a jury question, but a matter of law to be determined by the court.

[12] Negligence 272 ↪ 1571

272 Negligence

272XVIII Actions

272XVIII(C) Evidence

272XVIII(C)1 Burden of Proof

272k1569 Defenses and Mitigating

Circumstances

272k1571 k. Fault of Plaintiff or

Third Persons. Most Cited Cases

(Formerly 272k122(2))

When plaintiff's own case presents evidence which is sufficient to raise issue of contributory negligence it is incumbent upon him to prove exculpatory evidence or be barred from recovery.

[13] Railroads 320 ↪ 348(8)

320 Railroads

320X Operation

320X(F) Accidents at Crossings
320k341 Actions for Injuries
320k348 Sufficiency of Evidence
320k348(6) Contributory Negligence
320k348(8) k. Failure to Stop,

Look, and Listen. Most Cited Cases

In view of evidence disclosing that the motorist when approaching spur track crossing was negligent in failing to use his senses to observe obvious danger and in failing to obey statutory requirement that motorist come to a complete stop before proceeding across crossing if a moving train is in hearing or view, motorist was contributorily negligent as a matter of law precluding recovery for his death. R.C.M.1947, § 72-164.

[14] Appeal and Error 30 ↪1097(1)

30 Appeal and Error
30XVI Review
30XVI(M) Subsequent Appeals
30k1097 Former Decision as Law of the Case in General
30k1097(1) k. In General. Most Cited Cases

Under doctrine of law of the case, the decision of the Supreme Court is binding upon all the parties, the district court and the Supreme Court upon a subsequent appeal, and doctrine is distinguishable from doctrines of res judicata and stare decisis in that not only must subject matter and parties be the same it must be the identical action which was appealed.

[15] Appeal and Error 30 ↪1097(1)

30 Appeal and Error
30XVI Review
30XVI(M) Subsequent Appeals
30k1097 Former Decision as Law of the Case in General
30k1097(1) k. In General. Most Cited Cases

Application of doctrine of law of the case is limited to those issues which were actually decided and were necessary to the decision, and doctrine does not extend so far as to include matter which was consequential, incidental, or not decided by the Supreme Court.

[16] Appeal and Error 30 ↪977(3)

30 Appeal and Error
30XVI Review
30XVI(H) Discretion of Lower Court
30k976 New Trial or Rehearing
30k977 In General
30k977(3) k. Grant of New Trial in General. Most Cited Cases

Appeal and Error 30 ↪977(5)

30 Appeal and Error
30XVI Review
30XVI(H) Discretion of Lower Court
30k976 New Trial or Rehearing
30k977 In General
30k977(5) k. Refusal of New Trial. Most Cited Cases

New Trial 275 ↪6

275 New Trial
275I Nature and Scope of Remedy
275k6 k. Discretion of Court. Most Cited Cases
Granting or refusing a new trial is largely discretionary with district court and is subject to control of Supreme Court.

[17] Appeal and Error 30 ↪1180(1)

30 Appeal and Error
30XVII Determination and Disposition of Cause
30XVII(D) Reversal
30k1180 Effect of Reversal
30k1180(1) k. In General. Most Cited Cases
(Formerly 30k80(1), 30k180(1))
Reversing a judgment makes it void as if never rendered.

[18] Appeal and Error 30 ↪516

30 Appeal and Error
30X Record
30X(B) Scope and Contents
30k516 k. Proceedings Included in General. Most Cited Cases
When a new trial was granted on appeal in action against railroad for death of motorist at crossing ac-

cident the parties were returned to the position they had occupied before the trial, and new record was made independently of old record except as affected by rules of evidence and old record became functus officio.

[19] Appeal and Error 30 ↪ 1212(3)

30 Appeal and Error

30XVII Determination and Disposition of Cause

30XVII(F) Mandate and Proceedings in Lower Court

30k1209 New Trial

30k1212 Scope of Issues

30k1212(3) k. Scope of Decision of Appellate Court. Most Cited Cases

If prior decision of Supreme Court does not expressly pass on sufficiency of evidence, on a new trial the district court is free to consider a motion for directed verdict as if there had been no prior proceedings.

[20] Appeal and Error 30 ↪ 1212(3)

30 Appeal and Error

30XVII Determination and Disposition of Cause

30XVII(F) Mandate and Proceedings in Lower Court

30k1209 New Trial

30k1212 Scope of Issues

30k1212(3) k. Scope of Decision of Appellate Court. Most Cited Cases

Where Supreme Court in rendering decision in prior appeal reversing judgment for plaintiff in action for death of motorist at railroad crossing accident did not pass upon sufficiency of evidence but only determined that error had been committed affecting both parties, issued instructions to correct that error and ordered a new trial to be conducted in conformity with those instructions, Supreme Court had not passed on sufficiency of evidence and did not determine for purposes of new trial that there had been no contributory negligence as a matter of law.

***432**712** Weir, Gough & Booth, Edwin S. Booth (argued), Cordell Johnson (argued), Helena, Harry L. Burns (appeared), Chinook, for appellants.

D. J. Sias, Oscar Hendrickson (argued), Chinook, Baxter Larson (argued), Wolf Point, for respondents.

CASTLES, Justice.

This is an appeal from a judgment awarding the plaintiffs \$204,000 damages for the death of Eugene J. O'Brien which resulted when an automobile he was driving collided with a Great Northern Railway locomotive.

The accident occurred October 20, 1958, sometime after 7:00 P.M. at a point where U. S. Highway 2 crosses a Great Northern Railway beet spur near Chinook, Montana. The spur track leads northeast from a sugar beet loading facility, crosses east-west Highway 2 at about a 45 degree angle and connects to the mainline tracks which run parallel to Highway 2 and about 150 feet north. At the point where the spur connects, the mainline consists of a double set of tracks; the main track to the north and a passing track to the south.

O'Brien approached the crossing from the east while traveling west on Highway 2. The sun had set and he approached *433 against the lights of the City of Chinook which is a little less than a mile from the beet spur crossing. As he approached he passed a 'slow' sign and a railroad crossing or common 'cross buck' sign. Engine 231 had been sitting 15 car lengths or about 750 feet from the crossing waiting for the crew to finish coupling the cars they had been sent to pick up. The defendant-engineer, Johnson, testified that he gave the customary two short blasts on the whistle to indicate that the train was about to move and started the bell ringing. Engine 231 was then started forward toward the crossing at about 8 miles per hour and decelerated to about 4 miles per hour before reaching the crossing. The engineer observed the oncoming O'Brien automobile at some distance but did not at first see a need to stop the train. At approximately the same time, an east bound freight, extra 410D, was accelerating from a stop on the mainline track so that it passed Engine 231 north of the spur track crossing near the time of the accident.

At this point, the testimony comes into serious dispute. The appellants, hereinafter called the defendants, attempted to prove that head brakeman D'Hooze was at the spur crossing prior to the arrival of Engine 231 and was facing the approaching O'Brien car flagging with a lighted fusee and was forced to jump out of the way to avoid being struck. There was also testimony by persons who had heard

one or more whistles blow, but this was met with testimony of others who had either not heard any whistles or could not tell if the whistle heard was that of Engine 231 on the beet spur or that of Extra 410D on the mainline track. The testimony of the crew of train 231 was that the O'Brien automobile continued to approach at a rate faster than the other traffic in the area and that Engine 231 continued toward the crossing at about 4 miles per hour. The engineer further testified that he applied the full emergency braking system when he determined that the O'Brien car was not going to stop.

The O'Brien car struck the right front portion of Engine *434 231 imbedding itself into a ladder and 'pilot' beam. Testimony from several witnesses indicated that there was 66 1/2 feet of skid marks left by the O'Brien car and that the force of the impact was such that a wrecker experienced some difficulty in separating the locomotive and the car.

It was completely dark at the time of the collision but there were no significant obstructions to visibility. A sign welcoming travelers to Chinook might have obscured the locomotive for a short period as the **713 O'Brien car approached, but it would have ceased to have been a fact long before it would have been necessary for O'Brien to begin decelerating for the crossing. There seems to be no question that the lights of the City of Chinook on the side of the crossing opposite the O'Brien car and the lights of an oil refinery to the side of the crossing would have provided some undetermined amount of distraction. The land where the tracks run in this area is level except for a bridge over the West Fork of the Milk River which runs less than a hundred feet from the crossing. Engine 231 had its bright beam illuminated in the front of the train as well as the 'number' light and several smaller 'ground' lights on the side. O'Brien had the headlights on his automobile illuminated and the warning signs he passed as he approached the crossing were claimed to have been reflectorized. Several witnesses testified that they were able to observe traffic on both sides of the tracks at distances of several hundred feet.

The testimony of persons who were eyewitnesses to the collision or viewed the scene within a very few moments thereafter were limited to the crew of trains 231 and 410D; the passengers from a car which approached the crossing from the west and walked

around the front of Engine 231 immediately after they heard the collision, and; the passengers of a car which approached behind the O'Brien car shortly after the collision.

The widow of O'Brien and his three dependent children brought an action sounding in negligence against the railroad *435 corporation, the engineer and the head brakeman of train 231. The answer alleged contributory negligence which was in turn answered by allegations invoking the doctrine of last clear chance. Plaintiffs had judgment for \$170,000. Defendants appealed and this court reversed and remanded for a new trial in its decision, O'Brien v. Great Northern Ry. Co., 145 Mont. 13, 400 P.2d 634. Upon the second trial, plaintiffs had judgment for \$204,000 from which the defendants bring this appeal.

Defendants base their appeal on the grounds that there is insufficient evidence to find any primary negligence on the part of the defendants; that the defendants' motion for a directed verdict should have been granted because the plaintiffs' decedent was contributorily negligent as a matter of law, and; that the verdict was excessive. We find that the issue of contributory negligence and the court's refusal to grant a directed verdict thereon to be determinative of this appeal, and therefore this will be the only specification of error considered in this appeal.

[1][2] Upon a motion for a directed verdict the evidence must be viewed from a standpoint most favorable to the prevailing party and every fact must be deemed proved which the evidence tends to prove. Hernandez v. Chicago, B. & O. Ry. Co., 144 Mont. 585, 398 P.2d 953. All substantial evidence disclosed by the record which may be used to sustain the jury verdict will be given its full probative effect. Estate of Dillenburg, 136 Mont. 542, 349 P.2d 573. Therefore, this opinion is rendered under the assumptions that there was no flagman at the crossing; that no fusee was used prior to the collision, and; that the deceased was traveling a legal and reasonable rate of speed. (This assumption in spite of strong physical evidence to the contrary.)

[3] It is the duty of every motorist approaching a railroad crossing to conduct himself as would a reasonably prudent man under similar circumstances and to comply with all statutory mandates. Failure to fulfill

either of these duties constitutes *436 negligence which, if shown to have been the proximate cause of the injury complained of, will operate as a complete bar to any recovery thereon even though the defendant is shown to have been negligent. Tiddy v. City of Butte, 104 Mont. 202, 65 P.2d 605.

[4][5][6][7] A reasonably prudent man approaching a railroad crossing would be expected**714 to look and listen to determine what hazards may be present and to use diligence to make the act of using his senses effective. Hannigan v. Northern Pacific Ry. Co., 142 Mont. 335, 344, 384 P.2d 493, 498. He is charged not only with the duty of looking straight ahead but he must keep a lookout laterally as well. It is presumed that he will see that which he must have seen if he looked. Montforton v. Northern Pacific Ry. Co., 138 Mont. 191, 355 P.2d 501; Autio v. Miller, 92 Mont. 150, 11 P.2d 1039. Where the evidence raises this presumption and it is not later rebutted by other evidence it has the effect of placing a driver in the position of having seen the danger and he will not be heard to deny it. If a train is at a point within the driver's vision while he was at a place of safety he is deemed to have seen it and progressed regardless of the danger or he did not make use of his senses. Feely v. Northern Pacific Ry. Co., 9 Cir., 230 F.2d 316.

[8] Applying the plaintiffs' own evidence to the rules just set forth we conclude that O'Brien was not acting as a reasonably prudent man when he was approaching the crossing. The physical facts of the beet spur crossing coupled with a judgment of the relative speeds of the engine and the O'Brien car which is the most favorable possible to the plaintiffs' case make it impossible for us to reach any conclusion other than that O'Brien could have seen Engine 231 and reacted to the danger if he had tried to do so. The very slight degree of obstruction to O'Brien's visibility is particularly impressive. Proceeding as he did, he overlooked not one but two complete trains. There seems to be no reason to doubt that O'Brien knew of the existence of the crossing. It would even be fair *437 to infer that he was familiar with the beet spur crossing. In spite of his familiarity with the crossing he proceeded forward without any substantial change of speed until at a point a little more than 66 1/2 feet from the crossing where his brakes became effective with sufficient force to leave skid marks. It appears that O'Brien did absolutely nothing in deference to the

crossing he knew or should have known lay directly in his path. The inference most favorable to the plaintiffs will not go further than to establish that O'Brien was driving at night on Highway 2 at a speed that was lawful and reasonable under the existing conditions but as he approached a railroad crossing which he knew or should have known lay in his path he did not materially vary that driving posture until at a point a little more than 66 1/2 feet prior to the fatal collision. Therefore, we conclude that Eugene O'Brien was negligent in that he did not use his senses to detect danger which would have become obvious if he had used proper diligence or that he was negligent in not taking measures to avoid the detected danger and that this negligence was the proximate cause of his death.

[9] We are further of the opinion that O'Brien was negligent in that he did not comply with a statutory mandate governing motorists passing over railroad crossings. Section 72-164, R.C.M.1947, provides in material part: '* * * all persons driving motor vehicles upon the public highways of this state, outside of corporate limits of incorporated cities or towns, where the view is obscure, or when a moving train is within sight or hearing, shall bring said vehicle to a full stop not less than ten (10) nor more than one hundred (100) feet from where said highway intersects railroad tracks within this state, before crossing the same, at all crossings where a flagman or mechanical device is not maintained to warn the traveling public of approaching trains or cars.' As was noted in the Montforton case, *supra*, at 138 Mont. 207, 355 P.2d 501, this 1919 enactment effected a change in the law which until that time had been expressed by *438 Walters v. Chicago, Milwaukee & Puget Sound Ry. Co., 47 Mont. 501, 133 P. 357, 46 L.R.A.,N.S., 702. In the Walters case the court had refused the 'stop, look and listen' rule which had been urged upon them, and had allowed the issue of contributory negligence **715 to rest on the traditional test of the 'reasonably prudent man' standard of care. The legal effect of this statute is clear. Drivers approaching a railroad crossing where a train is within sight or hearing must bring their vehicles to a complete stop not less than 10 nor more than 100 feet from the crossing. The same stop is required if the crossing and the view is not clear, full and distinct. Broberg v. Northern Pacific Ry. Co., 120 Mont. 280, 182 P.2d 851. Since we have concluded that O'Brien could have seen Engine 231 if he had looked he was negligent in not stopping as re-

quired by section 72-164. If it were conceded that the view was obscured so that O'Brien could not have seen the train the result is the same under section 72-164 since we have concluded that he knew or should have known that the crossing lay ahead.

[10][11][12][13] As a general rule contributory negligence is a matter of defense and presents a question for the jury. Everett v. Hines, 64 Mont. 244, 208 P. 1063; Puckett v. Sherman & Reed, 62 Mont. 395, 205 P. 250. The exception to this rule arises when the evidence is of such a character that it will support no other legitimate inference so that a reasonable man or a jury following proper instructions could not come to a different conclusion. Fulton v. Chouteau County Farmers' Co., 98 Mont. 48, 37 P.2d 1025; Boepple v. Mohalt, 101 Mont. 417, 54 P.2d 857. If this exception arises the issue of contributory negligence becomes a matter of law to be determined by the court. We hold that the plaintiffs' case-in-chief is sufficient for a finding of contributory negligence as a matter of law. Where the plaintiffs' own case presents evidence which is sufficient to raise the issue of contributory negligence it is incumbent on the plaintiffs to produce exculpatory evidence or be barred from recovery. *439 Grant v. Chicago, Milwaukee & St. Paul Ry. Co., 78 Mont. 97, 252 P. 382. In so holding we are not unmindful of the fact that there have been two jury verdicts in favor of the plaintiffs. The first verdict can be disregarded on the ground that it was rendered on erroneous instruction, as this court held in the first appeal. We do not find any prejudicial error in the second trial and therefore conclude that the jury acted out of passion or prejudice or simply disregarded the instructions on contributory negligence. This court has, on several occasions in the past, found contributory negligence as a matter of law in personal injury actions presenting similar factual situations. Sztaba v. Great Northern Ry. v. Co., 147 Mont. 185, 411 P.2d 379; Montforton v. Northern Pacific Ry. Co., supra; Haney v. Mutual Creamery Co., 67 Mont. 278, 215 P. 656; Keith v. Great Northern Ry. Co., 60 Mont. 505, 199 P. 718.

Respondents assert in their brief that the decision rendered as a result of the first appeal became 'the law of the case', and, that since this court ordered a new trial, it necessarily decided that there was no contributory negligence as a matter of law. The district court appears to have adopted the same logic when it denied the defendants' motion for a new trial

at the end of the plaintiffs' case-in-chief.

[14] The doctrine of 'the law of the case' has long been recognized by this court. The doctrine establishes the principle that the decision of the supreme court upon a former appeal of the same cause is binding upon a subsequent appeal whether right or wrong. The former appeal is binding upon all of the parties, the district court and the supreme court upon a subsequent appeal. Libin v. Huffine, 124 Mont. 361, 224 P.2d 144; Apple v. Edwards, 123 Mont. 135, 211 P.2d 138. The doctrine is distinguished from the doctrines of res judicata and stare decisis in that not only must the subject matter and the parties be the same it must be the identical action which was appealed. See annotation in 87 A.L.R.2d 271. The sound policy of providing uniformity and predictability to decisions rendered by this court requires strict enforcement of the doctrine *440 of 'the law of the case'. However, the development **716 made in the respondents' brief requires some additional explanation concerning the application of the doctrine.

[15] The application of the doctrine of 'the law of the case' is limited to those issues which were actually decided and were necessary to the decision. The doctrine does not extend so far as to include matter which was consequential, incidental, or not decided by the court. Wastl v. Montana Union Ry. Co., 24 Mont. 159, 61 P. 9. This court, in rendering its decision on the first appeal of this case did not pass upon the sufficiency of the evidence. It only determined that error had been committed affecting both plaintiffs and defendants, issued instructions to correct that error and ordered a new trial to be conducted in conformity with those instructions.

[16] Granting or refusing to grant a new trial is largely discretionary with the district court and is subject to the control of the supreme court. Hinton v. Peterson, 118 Mont. 574, 169 P.2d 333. The circumstances under which this case was tried confirm the wisdom of this court's exercise of its discretionary power to grant a new trial in lieu of some other relief. As already observed there was error affecting both the plaintiffs and the defendants. We think this error was magnified by the fact that the plaintiffs were obliged to rely almost exclusively on the testimony of the defendant railroad's employees to establish their case-in-chief. Under these circumstances a court will allow the plaintiffs additional latitude before relying

upon such a record to dismiss the action on legal issues alone.

[17][18][19][20] We do not agree with the trial court's statement that it was precluded from granting the defendants' motion for a directed verdict because the new trial granted by this court amounted to a legal determination that there a jury issue on contributory negligence. Reversing a judgment makes it void as if never rendered. Central Montana Stockyards v. Fraser, 133 Mont. 168, 320 P.2d 981. When a new trial is *441 granted the parties are returned to the position they occupied before the trial. Waite v. Waite, 143 Mont. 248, 389 P.2d 181. A motion for a directed verdict requires that the record of the current trial be examined to determine if the evidence viewed in the light most favorable to the resisting party is sufficient to grant such motion. The supreme court may not be bound in advance to a record which was not in existence at the time the decision was rendered. The new record is made independently of the old record except as affected by the rules of evidence and the old record becomes functus officio. If the prior decision of the supreme court does not expressly pass on the sufficiency of the evidence, the district court is free to consider a motion for a directed verdict as if there had been no prior proceedings.

Carlson v. Northern Pac. Ry. Co., 86 Mont. 78, 281 P. 913, relied upon heavily by the respondents, is distinguishable from this case. The court in the Carlson case did expressly pass on a motion for a directed verdict and further decided upon the second appeal that there was no substantial difference in the evidence in the second record.

Reversed and dismissed with instruction that the clerk enter judgment for the defendants.

JAMES T. HARRISON, C. J., and DOYLE, J., concur.

JOHN C. HARRISON, Justice.

I dissent. Having concurred in the result in the majority opinion of the first appeal of this case, O'Brien v. Great Northern Railroad Company, 145 Mont. 13, 400 P.2d 634, I feel that I must now register my dissent to the action of the majority holding. Having carefully reviewed the majority opinion I cannot but feel that they have substituted their opinion of the facts in the case for what the jury found to be the

facts. While my personal opinion of the facts, had I been a juror, might have differed with what they found, as an appellate *442 matter I feel that having been properly instructed**717 as to their duties as the triers of the facts that we should not set their judgment aside. For this reason I must dissent.

ADAIR, Justice (dissenting):

In my opinion the judgment entered in the District Court upon the second trial of this cause, which was in conformity with the verdict returned by the jury is right and just and that such verdict should be respected and that the judgment entered thereon by the trial judge should be affirmed by this, the appellate court. I therefore respectfully register my dissent to the foregoing majority opinion in this cause, which for the second time disregards the verdict of a jury.

Mont. 1966.

O'Brien v. Great Northern R. Co.
148 Mont. 429, 421 P.2d 710

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▷

Supreme Court of North Dakota.
Alan BERGSTROM, Plaintiff and Appellee,
v.
Astrid BERGSTROM, Defendant and Appellant,
and
Ida Bergstrom, a minor child, by her Guardian Ad
Litem, Cameron L. Clemens, Defendant.
Civ. No. 10094.

May 27, 1982.

Mother sought modification of custody and visitation order. The District Court, Morton County, South Central Judicial District, Norbert J. Muggli, J., denied modification, and mother appealed. The Supreme Court, Paulson, J., held that: (1) evidence supported trial court's decision to restrict mother's custody of child to visitation only within confines of United States, notwithstanding mother's remarriage and move to Dubai, one of the United Arab Emirates, and (2) decision to limit mother's custody and visitation of child to United States did not unduly deprive her of her parental rights.

Affirmed.

VandeWalle, J., concurred in part and dissented in part with opinion.

West Headnotes

[1] Contempt 93 ↪ 66(2)

93 Contempt
93II Power to Punish, and Proceedings Therefor
93k66 Appeal or Error
93k66(2) k. Decisions Reviewable. Most Cited Cases
Appeal will lie to the Supreme Court from order finding defendant not guilty of civil contempt.

[2] Contempt 93 ↪ 20

93 Contempt
93I Acts or Conduct Constituting Contempt of

Court

93k19 Disobedience to Mandate, Order, or Judgment

93k20 k. In General. Most Cited Cases
Contempt is committed only when evidence shows willful and inexcusable intent to violate order of court.

[3] Contempt 93 ↪ 61(1)

93 Contempt
93II Power to Punish, and Proceedings Therefor
93k61 Hearing and Determination
93k61(1) k. In General; Counsel. Most Cited Cases

Contempt 93 ↪ 66(7)

93 Contempt
93II Power to Punish, and Proceedings Therefor
93k66 Appeal or Error
93k66(7) k. Review. Most Cited Cases
Matter of determining whether or not contempt has been committed is within sound discretion of trial judge and his decision should not be disturbed unless there is plain abuse of discretion.

[4] Child Custody 76D ↪ 853

76D Child Custody
76DXII Enforcement
76Dk851 Contempt
76Dk853 k. Excuses and Defenses. Most Cited Cases
(Formerly 134k305)
In modification of divorce proceedings, trial court did not abuse discretion in determining that father should not be held in contempt for his alleged noncompliance with court's order granting mother right to designate two-week period of visitation for vacationing with child where mother sought to take child to Norway and father was given only 48 hours' prior notice of planned trip.

[5] Appeal and Error 30 ↪ 1180(1)

30 Appeal and Error

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30XVII Determination and Disposition of Cause
30XVII(D) Reversal
30k1180 Effect of Reversal
30k1180(1) k. In General. Most Cited

Cases

Appeal and Error 30 ↪ 1180(2)

30 Appeal and Error

30XVII Determination and Disposition of Cause
30XVII(D) Reversal
30k1180 Effect of Reversal
30k1180(2) k. Effect on Dependent

Judgments or Proceedings. Most Cited Cases
Generally, effect of reversal on appeal is that judgment is vacated and parties are put in same posture as they were in before judgment was entered; dependent orders and proceedings fall within reversal of judgment.

[6] Appeal and Error 30 ↪ 1180(2)

30 Appeal and Error

30XVII Determination and Disposition of Cause
30XVII(D) Reversal
30k1180 Effect of Reversal
30k1180(2) k. Effect on Dependent

Judgments or Proceedings. Most Cited Cases
Where judgment awarding attorney fees and costs was reversed on appeal, said reversal necessarily reversed trial court's award of attorney fees and costs.

[7] Child Custody 76D ↪ 642

76D Child Custody

76DIX Modification
76DIX(C) Proceedings
76DIX(C)2 Evidence
76Dk636 Weight and Sufficiency
76Dk642 k. Geographical Matters.

Most Cited Cases

(Formerly 134k299)

In modification of divorce proceedings, evidence supported trial court's decision to restrict mother's custody of child to visitation only within confines of United States, notwithstanding mother's remarriage and move to Dubai, one of the United Arab Emirates.

[8] Child Custody 76D ↪ 554

76D Child Custody

76DIX Modification

76DIX(B) Grounds and Factors

76Dk554 k. Welfare and Best Interest of

Child. Most Cited Cases

(Formerly 211k19.3(5))

Best interests of child govern modification of custody decree.

[9] Child Custody 76D ↪ 922(5)

76D Child Custody

76DXIII Appeal or Judicial Review

76Dk913 Review

76Dk922 Questions of Fact and Findings of

Court

76Dk922(5) k. Modification. Most

Cited Cases

(Formerly 211k19.3(7))

"Clearly erroneous" standard governs review of trial court's decision modifying custody decree.

[10] Child Custody 76D ↪ 568

76D Child Custody

76DIX Modification

76DIX(B) Grounds and Factors

76Dk568 k. Parent or Custodian's Reloca-

tion of Home. Most Cited Cases

(Formerly 134k300)

Child Custody 76D ↪ 577

76D Child Custody

76DIX Modification

76DIX(B) Grounds and Factors

76Dk577 k. Visitation. Most Cited Cases

(Formerly 134k300)

In modification of divorce proceedings, decision to limit mother's custody and visitation of child to United States did not unduly deprive her of her parental rights.

***119** Chapman & Chapman, Bismarck, for defendant and appellant Astrid Bergstrom; argued by Daniel J. Chapman, Bismarck.

***120** Lundberg, Conmy, Nodland, Lucas & Schulz, Bismarck, for plaintiff and appellee Alan Bergstrom; argued by Irvin B. Nodland, Bismarck.

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Carma Christensen, Bismarck, for defendant Ida Bergstrom, a minor child, by her guardian ad litem, Cameron L. Clemens; not argued or briefed on appeal.

PAULSON, Justice.

Astrid Slettemoen, formerly Astrid Bergstrom, appeals from a modification order dated July 29, 1981, of the District Court of Morton County. We affirm.

This case marks another episode in the custody dispute over Ida Marie Bergstrom between her parents Alan Bergstrom and Astrid Slettemoen. Our court's most recent opinion involving these parties, *i.e.*, *Bergstrom v. Bergstrom*, 296 N.W.2d 490 (N.D.1980), states the facts as they occurred through December of 1979.

In *Bergstrom, supra* 296 N.W.2d 490, we reversed a judgment of the District Court of Morton County which had awarded total custody of Ida to Astrid and which had granted limited visitation to Alan. Instead, we awarded split custody to Astrid and Alan, conditioned, in part, on Astrid's maintenance for Ida of a residence within the United States. Following the issuance of our opinion which directed a remand hearing, the District Court of Morton County, on remand, issued an order on September 17, 1980, granting custody of Ida to Astrid during the school year and to Alan during the summer vacation months. A detailed visitation schedule was formulated and incorporated within the trial court's September 17, 1980, order. In this order the trial court also ruled that Astrid "shall be entitled to designate a two week period of visitation during the summer months of each year for purposes of vacationing with the child".

Subsequently, Ida and her mother, Astrid, established residence in Washington, D.C. Alan also moved to the Nation's capital. Astrid later determined to marry Frank Heller, a man who lives and works in Dubai, one of the United Arab Emirates. On July 9, 1981, Astrid made a motion for an order in which she sought a transfer of custody to Alan during the school year and that she have custody of Ida during the summer vacation months. Astrid further requested that she have the right to take the child to "wherever she [Astrid] is then living, whether or not that is within the United States". Astrid also moved that Alan be held in contempt for failure to comply with

the order of September 17, 1980, relating to Astrid's two-week summer vacation with Ida. The motion also contained a request for the costs and attorney fees which had been awarded to Astrid by the trial court in the December 5, 1979, trial. Astrid married Frank Heller on July 16, 1981.

In response to Astrid's motion, Alan sought an order granting him permanent custody of Ida, with reasonable visitation restricted to the continental United States, to Astrid. After a hearing, the trial court issued a modification order dated July 29, 1981, granting custody of Ida to Alan during the school year and to Astrid during the summer vacation months. Astrid's "request to be permitted to remove Ida ... from the United States for purposes of visitation ... [was] denied. The trial court granted Astrid "additional periods of visitation" with Ida during the school year upon reasonable notice to Alan. Astrid's motion that Alan be held in contempt and for the payment of attorney fees and costs previously awarded was denied.

The first question for consideration is whether or not the trial court erred in denying Astrid's motion to hold Alan in contempt for an alleged failure to comply with the court order of September 17, 1980, granting Astrid the right to designate a two-week summer vacation with Ida.

As noted above, the provision at issue contained in the order of September 17, 1980, stated:

"Astrid Bergstrom ... shall be entitled to designate a two week period of visitation during the summer months of each year for purposes of vacationing with the child."

*121 From the record, it appears that the first mention of Astrid's desire to take a two-week vacation out of the United States with Ida was at a hearing which was held in the Superior Court of Washington, D.C., on June 8, 1981. At that time Astrid's attorney requested that Astrid be allowed to take Ida to Norway on June 19, 1981. The Superior Court of Washington, D.C., denied this request. In his affidavit, Alan states that the first time that he was notified of Astrid's plan to leave for Norway on June 19, 1981, with Ida was on June 17, 1981, only two days prior to Astrid's and Ida's scheduled departure for the trip to Norway. Alan stated that:

"Astrid refused to assure ... [him that] she would not

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remove Ida to Dubai”;

and that she informed him that it was her intention: “to return Ida at the end of two weeks without accompaniment [*sic*] on an international airplane flight.”

In a letter to Astrid dated June 17, 1981, Alan explained his reasons for opposing Ida's trip to Norway: (1) the need for a new custody arrangement due to Astrid's impending move from the United States; (2) his view that the trip would be against the decision in Bergstrom, supra 296 N.W.2d 490; (3) a dispute over his school year visitation rights; and, (4) the fact that he was given only 48 hours' prior notice of Astrid's planned trip with Ida to Norway. Alan and Ida left Washington, D. C., for North Dakota as soon as Ida's school recessed for the summer vacation months.

[1][2][3][4] An appeal will lie to the Supreme Court from an order finding a defendant not guilty of civil contempt. Red River Valley Brick Corp. v. City of Grand Forks, 27 N.D. 431, 146 N.W. 876 (1914). Contempt is committed only when the evidence shows willful and inexcusable intent to violate the order of the court. Raszler v. Raszler, 80 N.W.2d 535, 539 (N.D.1957). The matter of determining whether or not a contempt has been committed is within the sound discretion of the trial judge and his decision should not be disturbed unless there is a plain abuse of discretion. *See generally Brierly v. Brierly*, 431 A.2d 410 (R.I.1981); 17 C.J.S. Contempt § 57 (1958). Under the particular circumstances of this case, we cannot say that the court abused its discretion in determining that Alan should not be held in contempt for his alleged noncompliance with the court's order.

A further issue raised concerns the trial court's denial of Astrid's request for attorney fees and costs. The award ^{FN1} of attorney fees and costs in the amount of \$12,552.90 was incorporated in the February 14, 1980, judgment, which judgment was subsequently reversed in Bergstrom, supra 296 N.W.2d 490 (N.D.1980).

FN1. The provision awarding costs contained in the February 14, 1980, judgment states, in pertinent part:

“X

“That the father is required to pay all of the mother's costs of defending this action, including her attorney's fee, witness fees and her costs of travel and subsistence for the hearing and for her costs incurred in delivery of custody of the child to the mother”

As was noted in Bergstrom, supra 296 N.W.2d 490, 493 n.1, the appeal was erroneously taken from the order instead of from the district court judgment. The notice of appeal did provide that the appeal of the order was from “each and every part thereof”. The dispositional language in the Bergstrom opinion states that “The judgment is reversed and the case is remanded for such action as may be necessary to comply herewith.” Bergstrom, supra 296 N.W.2d at 497.

On appeal, Astrid contends that that portion of the district court's February 14, 1980, judgment awarding attorney fees and costs was not canceled by our reversal of the judgment. To support her view, Astrid relies on Hoster v. Hoster, 216 N.W.2d 698 (N.D.1974). In Hoster, supra 216 N.W.2d at 703, the North Dakota Supreme Court upheld an award of attorney fees to the former wife despite such court's reversal of the trial court's order denying the former husband's motion to modify the divorce decree. The case is inapposite to the point in issue. In Hoster, supra, the question of the propriety of the award was before this court on direct appeal by the losing party. In the instant case, the judgment awarding *122 attorney fees and costs was reversed on appeal (Bergstrom, supra 296 N.W.2d 490), and a motion seeking these attorney fees and costs was made subsequent to this court's reversal of the February 14, 1980, judgment which included such award.

[5][6] Generally, the effect of a reversal on appeal is that the judgment is vacated and the parties are put in the same posture as they were in before the judgment was entered. Dependent orders and proceedings fall with the reversal of the judgment. *See generally* 5 Am.Jur.2d Appeal and Error § 956 (1962); 5B C.J.S. Appeal and Error § 1951 (1958); *cf. Samuel v. White Shield Public Sch. Dist.*, 297 N.W.2d 421, 425 (N.D.1980) (costs taxed in conjunction with the

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judgment were set aside because the judgment was set aside). The Supreme Court's reversal of the judgment necessarily reversed the trial court's award of attorney fees and costs. Lerdall v. Lerdall, 199 N.W. 1016 (Iowa 1924). We conclude that the trial court did not err in denying Astrid's request for attorney fees and costs.

[7] The heart of this appeal is the trial court's decision to restrict Astrid's custody of Ida and visitation only within the confines of the United States. Our decision in Bergstrom, supra 296 N.W.2d 490, conditioned the award of custody to Astrid on her maintenance of a residence for Ida in the United States. The impetus for Astrid's motion to modify the judgment was her decision to remarry and leave the United States.

A hearing on Astrid's motion for a modification order was held in the Morton County District Court on July 23, 1981. Ida's guardian ad litem had discussed the possibility of visits to Norway, to Dubai, and to England with Ida and conveyed the child's reactions to the court, when he testified:

"A Ida was very strong in stating that she did not want to leave the United States. Her concern was whether she would be returned to the [this] country not that she was adverse to travel or to visiting other friends or relatives or other countries, but she was concerned that if she did leave the country she would not be returned."

The guardian reported that Ida "did not feel she could trust the [her] mother to bring her back". According to her guardian, Ida's mistrust of her mother extends only to matters involving travel and finances. The guardian testified that Ida expressed "a great deal of love" and trust for her mother in other areas.

Astrid testified that she had told Ida that "it was impossible for me to live and maintain a good home for her in the States". In Astrid's view, Dubai posed no threat to Ida. Astrid testified that the government there had imposed no restrictions on leaving the country. Astrid related Ida's thoughts, "[Ida] has said that she doesn't know who she should believe, me, who say I will return her, or her father, who says she won't be returned. She said, 'I have no way of knowing who I should trust'."

Alan, who stated that he is a specialist on Middle

Eastern affairs, considers Dubai an unsafe place for a child to visit. The instability in the region, certain principles of Islamic and Saudi law that govern in Dubai, and exit restrictions often imposed in Middle Eastern countries, were the reasons advanced in support of his conclusion.

In spite of the requirement that Rule 52(a) of the North Dakota Rules of Civil Procedure applies to a motion to modify a divorce decree [Keator v. Keator, 276 N.W.2d 135, 138 (N.D.1979)], the trial court in the instant case did not prepare findings of fact and conclusions of law. In Becker v. Becker, 262 N.W.2d 478, 481 (N.D.1978), however, we found adequate findings of fact and conclusions of law in the trial court's oral opinion delivered at the conclusion of the hearing. Similarly, in this case, we are able to determine the basis for the trial judge's decision from his oral opinion. The trial judge found as a fact that Ida "does not wish to leave the United States". As a matter of law, the trial judge ruled that he was bound by Bergstrom, supra 296 N.W.2d 490, to conclude that "the child, under no circumstances, be permitted outside of the United States". The trial judge also noted:

*123 "I've read that Supreme Court decision [Bergstrom, supra 296 N.W.2d 490] ... several times ... and the emphasis there is on the best interests of the child as determined more or less by the wish ... of the child."

In evident response to Alan's indication that he would not oppose a Norwegian sojourn for Ida in the future, the trial court included the following provision in his order:

"9. Nothing contained herein shall prohibit the parties from entering into such additions, amendments, deletions or changes to this Order as the parties themselves may agree to in writing...."

The singular question we must decide is whether or not Astrid's remarriage and move to Dubai create changed circumstances under which the best interests of the child dictate that the custody order be modified to allow Astrid to remove the child from the United States.

[8][9] The best interests of the child govern the modification of a custody decree. Jordana v. Corley, 220

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N.W.2d 515 (N.D.1974). The “clearly erroneous” standard of Rule 52(a), N.D.R.Civ.P., governs our review of the trial court's decision. Miller v. Miller, 305 N.W.2d 666 (N.D.1981).

Our decision in Bergstrom, supra 296 N.W.2d 490, conditioning the award of custody upon Astrid's maintenance of a residence for Ida in this country, was based on the best interests of the child. The trial court in Bergstrom had awarded total custody of Ida to her mother, wherever she might reside, despite its own finding that Ida preferred to live in the United States with her father. The trial court had also discounted the expert testimony regarding Ida's greater sense of belonging with her father. Bergstrom, supra 296 N.W.2d at 495. We held in Bergstrom, supra 296 N.W.2d at 497, that the

“... view and preference of a citizen-child who is capable of intelligently exercising a choice of residence is a significant factor to be considered in determining the best interests of the child”

We, therefore, concluded that the portion of the custody award permitting Astrid to take Ida to Norway was, in the light of Ida's expressed preference, against the best interests of the child. Bergstrom, supra.

The critical new facts or changed circumstances before the trial court in the case at bar were Astrid's recent remarriage and move to Dubai, and Ida's wish to remain in the United States. In view of this evidence, we do not believe that the trial court's decision to limit Astrid's custody and visitation to the United States was clearly erroneous.

[10] Astrid, however, contends that the restriction on the award of custody unduly deprives her of her parental rights. We do not agree. A parent has a basic fundamental right to his or her children, but this right is not absolute. C. B. D. v. W. E. B., 298 N.W.2d 493, 499 (N.D.1980). We have said repeatedly that the interests of a child's parents, in a custody dispute, are important only to the extent that they bear on the question of what is best for the child. Muraskin v. Muraskin, 283 N.W.2d 140, 142 (N.D.1979), citing Vetter v. Vetter, 267 N.W.2d 790, 792 (N.D.1978). As noted above, Ida's best interests dictate that she remain in the United States. Astrid's decision to remarry and leave the United States was made with knowledge that the award of custody of Ida was de-

pendent upon Astrid's residence in this country.

Finally, Astrid contends that the trial court's restriction to this country of her visitation with Ida was not required by the decision in Bergstrom, supra 296 N.W.2d 490. Astrid correctly recognizes that Bergstrom was not concerned chiefly with overseas visitation; the issue considered was whether or not the district court's decision of February 14, 1980, that Astrid have total custody of Ida with no restriction placed on Astrid's right to choose Ida's place of residence, and with limited visitation granted to Alan, was in Ida's best interests. While the trial judge may have read Bergstrom, supra 296 N.W.2d 490, too broadly, it is clear that his decision to restrict visitation to the United States was *124 based on the evidence of Ida's reluctance to leave this country. This decision appears to be in the best interests of the child and is not clearly erroneous.

The July 29, 1981, modification order is affirmed. There will be no costs awarded on this appeal.

ERICKSTAD, C. J., and PEDERSON and SAND, JJ., concur. VANDE WALLE, Justice, concurring in part and dissenting in part.

I agree with the majority opinion except that portion which discusses Astrid's overseas visitation with Ida. As the majority opinion recognizes, our previous decision in Bergstrom v. Bergstrom, 296 N.W.2d 490 (N.D.1980), was not concerned chiefly with overseas visitation but rather whether or not Astrid had the right to choose Ida's place of residence without regard to Ida's best interests. To me there is a vast difference between a permanent place of residence and a few weeks' visitation overseas during the summer. Ida's reluctance to leave this country for a permanent residence overseas is more significant and entitled to more consideration than her reluctance to visit overseas for a few weeks during the summer.

As the majority opinion concedes, the trial judge apparently read our previous decision in Bergstrom, supra, to prohibit any overseas travel. Because our decision was concerned with a permanent overseas residence for Ida, I do not believe the decision is applicable to the issue of overseas visitation. This appeal arose out of Astrid's desire to take Ida to Norway to visit her grandparents. I believe Astrid should be permitted to take Ida to Norway for a few weeks' visit during the summer under proper restrictions. I realize

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that once Ida and Astrid are beyond the jurisdiction of the courts of this country difficulties could arise should Astrid not voluntarily return Ida to the United States. However, there has been no indication whatsoever of Astrid's refusal to abide by the orders of the courts of this State and other jurisdictions within this country during the long and painful saga of this family dispute. If Astrid intends to violate the orders of the courts of this country she could as well spirit Ida out of the country during the visitations already permitted between herself and Ida in this country. Absent any evidence of such an intent on the part of Astrid I believe she should be permitted to take Ida to Norway to see her grandparents for a few weeks during the summer.

I would remand to the trial court with directions that it permit Astrid to take Ida overseas for a few weeks during the summer. The trial court may place restrictions on that travel such as requiring that Ida be accompanied by an adult, including Astrid, while flying international routes, and prohibiting travel to Dubai if that part of the world appears to be unsafe for travel.

N.D., 1982.
Bergstrom v. Bergstrom
320 N.W.2d 119

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Supreme Court of Georgia.
 FRANKLYN GESNER FINE PAINTINGS, INC.
 v.
 KETCHAM.
 No. 45795.

Feb. 8, 1989.

Reconsideration Denied March 1, 1989.

Following appellate reversal of jury verdict in favor of painting purchaser, on claim of fraud, 181 Ga.App. 549, 353 S.E.2d 44, purchaser moved to set aside remittitur or for new trial on breach of contract claim. The Fulton State Court, Frank M. Hull, J., denied motions, and purchaser appealed. The Court of Appeals, Deen, P.J., 186 Ga.App. 853, 368 S.E.2d 774, dismissed appeal, and purchaser petitioned for certiorari. The Supreme Court, Weltner, J., held that trial court was not required, as matter of law, to enter final judgment in favor of defendant, after appellate court had reversed jury finding on issue of fraud, where jury had also been charged on breach of contract theory but had made no findings on that issue.

Reversed and remanded.

West Headnotes

[1] Appeal and Error 30 ↪ 1180(1)**30 Appeal and Error**

30XVII Determination and Disposition of Cause

30XVII(D) Reversal

30k1180 Effect of Reversal

30k1180(1) k. In General. Most Cited

Cases

Legal effect of reversal of judgment on appeal is to nullify judgment below and place parties in same position in which they were before judgment.

[2] Appeal and Error 30 ↪ 1203(1)**30 Appeal and Error**

30XVII Determination and Disposition of Cause

30XVII(F) Mandate and Proceedings in

Lower Court

30k1203 Proceedings After Remand

30k1203(1) k. In General. Most Cited

Cases

Trial court was not required, as matter of law, to enter final judgment in favor of defendant, after appellate court had reversed jury finding on issue of fraud, where jury had also been charged on breach of contract theory but had made no findings on that issue; plaintiff was entitled to move for relief based on breach of contract evidence, or for new trial on breach of contract claim.

**848*6 Wade H. Watson III, Harry W. MacDougald, Johnson & Montgomery, Atlanta, for Franklin Gesner Fine Paintings, Inc.

John K. Dunlap, Atlanta, for Ray Ketcham, Jr.

*3 WELTNER, Justice.

In 1980 Ketcham sold Gesner a painting for \$32,500. The painting was a forgery. Gesner filed suit against Ketcham in 1981.

History of the Case

1. Ketcham moved to dismiss the suit because the purchaser was not Gesner, individually, but "Franklyn Gesner Fine Paintings, Inc." The trial court denied Ketcham's motion and granted Gesner's motion to substitute the named corporation as the plaintiff. Ketcham sought interlocutory appeal, and the Court of Appeals reversed the trial court. Ketcham v. Franklyn Gesner Fine Paintings, Inc., 169 Ga.App. 329, 312 S.E.2d 639 (1983). We granted certiorari and reversed, Franklyn Gesner Fine Paintings, Inc. v. Ketcham, 252 Ga. 537, 314 S.E.2d 903 (1984), whereupon the Court of Appeals vacated its earlier opinion. Ketcham v. Franklyn Gesner Fine Paintings, Inc., 171 Ga.App. 377, 320 S.E.2d 640 (1984).

2. In 1986, a jury returned a verdict in Gesner's favor on a fraud count for \$32,500 in special damages, \$31,337 in attorney's fees, and \$6,263 in punitive damages. The jury was charged on a breach of contract theory but made no findings on that issue.^{FNI}

FN1. The following colloquy transpired:

“The Court: What is the verdict under the breach of contract claim?”

Foreperson: We did not go into that. We figured that fraud was the one-

The Court: All right. So you did not make any determination on the breach of contract claim?

Foreperson: No, we didn't.

The Court: You did not have deliberations on the breach of contract claim?

The Foreperson: We thought we were supposed to choose one.”

After the jury left, the judge asked both parties if they thought there needed to be any findings on the breach of contract count. Gesner's attorney stated “I think they did the right thing when they said one or the other.”

In this connection, see Stone v. Stone, 258 Ga. 716, 373 S.E.2d 627 (1988), specifically n. 1, as follows: “We have suggested on several occasions that jury verdicts that include inappropriate terms or ambiguities be resubmitted for amendment or clarification.”

**849 3. Ketcham appealed the denial of his motion for a directed verdict as to fraud. On appeal the Court of Appeals reversed, finding that there was no evidence of specified essential elements of fraud. *4Ketcham v. Franklyn Gesner Fine Paintings, Inc., 181 Ga.App. 549, 353 S.E.2d 44 (1987). Application for certiorari filed with this court was denied.

4. Upon receipt of the remittitur, the trial court made the order of the Court of Appeals the order of the trial court and entered judgment for Ketcham. FN2 The court later denied Gesner's motions for a new trial.

FN2. Although the court ordered Gesner to pay the costs of preparing the record, the or-

der upon remittitur shows that Ketcham's attorney paid the costs. Gesner asserts that he assumed that the case would be retried on the breach of contract claim, but the trial court apparently considered the case at an end. Gesner claims that he did not receive notice of the trial court's final order until after the expiration of 30 days.

5. Gesner's appeal from this last order was dismissed by the Court of Appeals. Franklyn Gesner Fine Paintings, Inc. v. Ketcham, 186 Ga.App. 853, 368 S.E.2d 774 (1988). On July 8, 1988, we again granted certiorari.

Effect of Reversal

[1] 6. (a) When the Court of Appeals reversed the denial of the motion for directed verdict as to fraud without direction, the case was not terminated. The Court stated, “Inasmuch as the jury did not reach a verdict on the breach of contract count, we need not address that issue.” 181 Ga.App. at 554. “The legal effect of the reversal of a judgment on appeal is to nullify the judgment below and place the parties in the same position in which they were before judgment.” Kirkland v. Southern Discount Company, 187 Ga.App. 453, 370 S.E.2d 640 (1988) (reversing trial court's dismissal of amended complaint under circumstances such that a prior appellate reversal of denial of motion for directed verdict was not dispositive of all issues). FN3

FN3. See also Schley v. Schofield, 61 Ga. 528, 530 (1878): “As a general rule, where the writ of error is founded upon a trial below in which both law and fact were involved, and where the complaint is that the plaintiff in error lost his case when he was entitled to gain it, and where this court is of opinion that he was entitled to gain it, and where, for that reason, the judgment of the court below is reversed, a new trial follows unless this court, by way of direction, dictates something else.... [A] judgment of this court, as well as that of any other, ought to be clear and certain. When more than a mere reversal is intended, the additional matter should not be stated simply by way of a reason for the reversal ..., but there should be a mandatory direction to do or to adjudge

whatever this court intends shall be done or adjudged.”

(b) OCGA § 9-11-50(e) provides:

Where error is enumerated upon an order denying a motion for directed verdict and the appellate court determines that the motion was erroneously denied, it may direct that judgment be entered below in accordance with the motion or may order that a new trial be had, as the court may determine necessary to meet the ends of justice under the facts of the *5 case.

[2] (c) The trial court was not required as a matter of law to enter final judgment in favor of Ketcham.

Conclusion

7. (a) Gesner's contract claim is summarized in the charge given by the trial court, as follows:

As to the breach of contract claim, the plaintiff makes several different contentions. For example, the plaintiff contends that the defendant represented the painting was by Martin Johnson Heade, that the defendant thereby warranted that the painting was by Martin Johnson Heade, and has breached that warranty. In response, the defendant denies those allegations. Also, in the alternative, the plaintiff contends that he contracted with the defendant to buy a Heade painting, that the painting was not a Heade painting, and that therefore the defendant breached his contract. Again, in response**850 the defendant denies those allegations and contentions.

(b) The Court of Appeals made this assessment of the evidence as to the contract claim: “We are satisfied from the transcript that Ketcham represented the painting as an authentic Heade and that Gesner sustained loss because the painting was not an authentic Heade.” 181 Ga.App. at 553, 353 S.E.2d 44.

(c) Although all of the elements of the breach of contract claim were proved at trial, that claim was not passed upon by the jury. Hence, and regrettably, ^{FN4} this case must be returned, once again, to the trial court. Gesner shall have the opportunity to file, in the trial court, such motions for relief as shall be appropriate, based upon the evidence of the case. If a

proper disposition of any such motions shall not conclude the case, then a new trial must be granted.

FN4. This controversy stems from the plain fact that Ketcham sold to Gesner a forged painting. At the time, Gesner wrote to Ketcham: “I would much prefer to settle this matter in a gentlemanly fashion and what I need from you is your check for \$10,000 representing the commission you made on the transaction and I need the name and address of the man from whom you acquired the painting. It is my intention to go after him for the remaining \$22,500.” Gesner received neither a check nor the identity and location of Ketcham's supplier, although he made additional requests for information during discovery. Had Ketcham been willing to “settle this matter in a gentlemanly fashion” and repaid the \$10,000 that Gesner requested of him *nine years ago*, the prodigious quantum of personal and public resources wasted by this tortured case would have been avoided.

Justice should not be so illusive a goal for so plain a claim of right.

JUDGMENT REVERSED AND REMANDED.

All the Justices concur.
Ga., 1989.
Franklyn Gesner Fine Paintings, Inc. v. Ketcham
259 Ga. 3, 375 S.E.2d 848

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Supreme Court of South Carolina.
 William H. MOORE, Employee, Appellant,
 v.
 NORTH AMERICAN VAN LINES, Employer, and
 National Union Fire Insurance Company, Carrier,
 Respondents.
 No. 24320.

Heard May 4, 1995.
 Decided Sept. 18, 1995.

Workers' Compensation Commission awarded benefits to worker. After reversal of Commission's award was affirmed, 310 S.C. 236, 423 S.E.2d 116, employer and its insurance carrier moved for judgment of restitution of benefits paid to worker prior to reversal. The Circuit Court, Spartanburg County, J. Derham Cole, J., granted motion. Worker appealed. The Supreme Court, Finney, C.J., held that: (1) circuit court had jurisdiction to hear motion for restitution, and (2) worker was not entitled to offset restitution amount with benefits ultimately determined to be owed under law of another state.

Affirmed.

West Headnotes

[1] Workers' Compensation 413 ↪1828

413 Workers' Compensation
413XVI Proceedings to Secure Compensation
413XVI(T) Review by Court
413XVI(T)1 In General
413k1827 Jurisdiction
413k1828 k. In General. Most Cited

Cases

After Workers' Compensation Commission's award of benefits was reversed, circuit court had jurisdiction to hear employer's motion for restitution of benefits paid to worker prior to reversal, though circuit court ordinarily acted as appellate tribunal in workers' compensation cases, where remittitur was returned to circuit court following Supreme Court's affirmance of decision to reverse Commission's award, and basis for reversal was Commission's lack of jurisdiction, so

original award was of no effect and was no longer in existence.

[2] Appeal and Error 30 ↪1180(1)

30 Appeal and Error
30XVII Determination and Disposition of Cause
30XVII(D) Reversal
30k1180 Effect of Reversal
30k1180(1) k. In General. Most Cited

Cases

Reversal of judgment on appeal has effect of vacating judgment and leaving case standing as if no judgment had been rendered.

[3] Workers' Compensation 413 ↪1946

413 Workers' Compensation
413XVI Proceedings to Secure Compensation
413XVI(T) Review by Court
413XVI(T)13 Determination and Disposition of Proceeding
413k1946 k. Reversal. Most Cited

Cases

When award of Workers' Compensation Commission is reversed by trial court, it becomes of no effect and is no longer in existence.

[4] Workers' Compensation 413 ↪904

413 Workers' Compensation
413IX Amount and Period of Compensation
413IX(B) Compensation for Disability
413IX(B)6 Deductions and Offsets
413k904 k. Payments in Discharge of Obligation to Make Compensation. Most Cited Cases

Workers' Compensation 413 ↪1044

413 Workers' Compensation
413X Payment of Compensation and Compliance with Award
413X(D) Effect of Payment
413k1044 k. Recovery Back of Payments. Most Cited Cases

Worker was not entitled to offset trial court's award of restitution to employer and its insurance carrier,

for benefits paid to worker prior to judicial reversal of Workers' Compensation Commission's award, by amount of any benefits ultimately awarded to worker in other state which had proper jurisdiction over claim.

[5] Workers' Compensation 413 ↩️ 1044

413 Workers' Compensation

413X Payment of Compensation and Compliance with Award

413X(D) Effect of Payment

413k1044 k. Recovery Back of Payments.

Most Cited Cases

Upon reversal of judgment awarding workers' compensation benefits, employer's right to reimbursement of benefits paid to worker is not restricted.

****275*447J. Marvin Mullis, Jr. and Frank A. Barton,** Columbia, for appellant.

James W. Hudgens and Ladson F. Howell, Jr., The Ward Law Firm, of Spartanburg, for respondents.

FINNEY, Chief Justice:

In this workers' compensation case, appellant seeks a reversal of the order requiring him to make restitution for benefits paid but subsequently set aside on appeal.

Appellant was injured in a motor vehicle accident in Georgia while employed by respondents, headquartered in Indiana. Appellant resided in Spartanburg, South Carolina. Appellant applied for benefits through the Indiana Industrial Board and the S.C. Workers' Compensation Commission. The single commissioner affirmed by the Full Commission found that since appellant was hired in South Carolina, this state had jurisdiction over the claim and he was entitled to benefits. The circuit court reversed, finding the Commission did not have jurisdiction over the case because appellant was not hired in South Carolina. Accordingly, appellant was not entitled to benefits under State law. We affirmed the circuit court in ****276Moore** <http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=711&FindType=Y&SerialNum=1992167721> *v. North American Van Lines*, 310 S.C. 236, 423 S.E.2d 116 (1992).

***448** Respondents paid benefits to appellant pursuant

to the Commission's order until the circuit court reversed. Respondents moved in circuit court for a judgment in the amount of \$6,783.85 for restitution of benefits paid prior to the reversal, and for appellate costs approved by this Court. The circuit court granted respondents' motion and awarded judgment in respondents' favor based on unjust enrichment. Appellant appeals the circuit court order. We affirm.

[1] Appellant asserts the circuit court did not have jurisdiction to hear respondents' motion for restitution. Appellant contends S.C.Code Ann. § 42-3-180 (1985) provides that all workers' compensation questions must be determined initially by the Commission. Appellant maintains the circuit court acts as an appellate court and does not conduct a de novo trial on the issues. Therefore, he reasons the circuit court does not have authority to retain jurisdiction to hear a motion for restitution once a decision awarding benefits has been reversed. We disagree.

Following our affirmance in *Moore v. North American Van Lines*, the remittitur was returned to the circuit court. While we did not expressly "remand" the case, the remittitur was sent to the circuit court where it regained jurisdiction. *State v. Wise*, 33 S.C. 582, 12 S.E. 556 (1891). Accordingly, the circuit court had jurisdiction to hear respondents' motion.

[2][3] Furthermore, the benefit award was reversed because the Commission did not have jurisdiction over the workers' compensation claim since appellant was not hired in South Carolina. Generally, reversal of a judgment on appeal has the effect of vacating the judgment and leaving the case standing as if no judgment had been rendered. *Brown v. Brown*, 286 S.C. 56, 331 S.E.2d 793 (Ct.App.1985). When the award of the Commission was reversed by the circuit court, it became of no effect and was no longer in existence. *Miller v. Springs Cotton Mills*, 225 S.C. 326, 82 S.E.2d 458 (1954). Given that the Commission did not have jurisdiction over this matter it was appropriate for the circuit court to hear the motion for restitution based on unjust enrichment. Accordingly, the circuit court had jurisdiction to hear respondents' motion.

[4][5] Next, appellant contends the court erred in awarding restitution without allowing an offset of any benefits ultimately determined to be owed under Indiana law. ***449** The circuit court judge stated in

his order that it would be improper for him to order an offset or deduction of benefits paid in Indiana since the South Carolina court has no jurisdiction over the Indiana claim. We agree. The employer's right to reimbursement when a judgment has subsequently been reversed is not restricted. See Case v. Hermitage Cotton Mills, 236 S.C. 515, 115 S.E.2d 57 (1960); and Miller, supra. Therefore, the circuit court did not err in ordering restitution.

The judgment below is

AFFIRMED.

TOAL, MOORE, WALLER and BURNETT, JJ.,
concur.

S.C., 1995.

Moore v. North American Van Lines

319 S.C. 446, 462 S.E.2d 275

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Court of Appeals of Maryland.
 CARPENTER REALTY CORPORATION, et al.
 v.
 Dennis Michael IMBESI, Personal Representative of
 the Estate of Thomas L. Imbesi.
 No. 117, September Term, 2001.

June 20, 2002.

Stock seller's estate brought action against corporations to recover payment on stock redemption agreement. The corporations counterclaimed for set-off as assignees of promissory note. The Circuit Court, Baltimore County, Thomas J. Bollinger, J., ruled in favor of estate without reaching set-off issue. Assignees appealed. The Court of Special Appeals reversed and remanded for further proceedings, including consideration of set-off issue. On remand, the Circuit Court permitted set-off. Estate appealed. The Court of Special Appeals, 125 Md.App. 676, 726 A.2d 854, affirmed. Estate petitioned for certiorari. The Court of Appeals, Rodowsky, J., 357 Md. 375, 744 A.2d 549, reversed and remanded. On remand, the estate petitioned for entry of judgment and pre-judgment and post-judgment interest. The Circuit Court denied claims for interest. Estate appealed. The Court of Special Appeals affirmed in part and reversed in part without published opinion. Certiorari was granted. The Court of Appeals, Battaglia, J., held that estate was not entitled to post-judgment interest from date of original judgment reversed by the Court of Special Appeals.

Reversed and remanded.

West Headnotes

[1] Interest 219 ↪ 39(3)

219 Interest

219III Time and Computation

219k39 Time from Which Interest Runs in General

219k39(3) k. Interest from Date of Judgment or Decree. Most Cited Cases
 Judgment creditor was not entitled to post-judgment

interest from date of original judgment reversed by the Court of Special Appeals; that Court's opinion and mandate did not contain any language restricting the effect of the reversal, so as to leave the original judgment in place after remand, and thus eliminated the original judgment. West's Ann. Md.Code. Courts and Judicial Proceedings, § 11-107(a); Md.Rule 2-604(b).

[2] Appeal and Error 30 ↪ 1194(1)

30 Appeal and Error

30XVII Determination and Disposition of Cause

30XVII(F) Mandate and Proceedings in

Lower Court

30k1193 Effect in Lower Court of Decision of Appellate Court

30k1194 Construction and Operation in General

30k1194(1) k. In General. Most

Cited Cases

Where a mandate is ambiguous, one must look to the opinion and other surrounding circumstances to determine the intent of the court.

[3] Appeal and Error 30 ↪ 1167

30 Appeal and Error

30XVII Determination and Disposition of Cause

30XVII(D) Reversal

30k1167 k. Nature and Form of Remedy.

Most Cited Cases

A "reversal" is the annulling or setting aside by an appellate court of a decision of a lower court.

[4] Appeal and Error 30 ↪ 1180(1)

30 Appeal and Error

30XVII Determination and Disposition of Cause

30XVII(D) Reversal

30k1180 Effect of Reversal

30k1180(1) k. In General. Most Cited Cases

The effect of a general and unqualified reversal of a judgment, order, or decree is to nullify it completely and to leave the case standing as if such judgment, order or decree had never been rendered, except as

restricted by the opinion of the appellate court.

[5] Judgment 228  294

228 Judgment

228VIII Amendment, Correction, and Review in Same Court

228k294 k. Nature and Scope of Remedy.

Most Cited Cases

Any party can clarify the scope of a mandate or order by filing a motion to alter, amend, or revise the judgment. Md.Rule 2-534.

[6] Interest 219  39(3)

219 Interest

219III Time and Computation

219k39 Time from Which Interest Runs in General

219k39(3) k. Interest from Date of Judgment or Decree. Most Cited Cases

Judgment creditor was not entitled to post-judgment interest on judgment that was immediately satisfied through payment from an escrow account upon entry of the judgment. West's Ann. Md.Code, Courts and Judicial Proceedings, § 11-107(a); Md.Rule 2-604(b). ****1019*551** John H. Zink, III (Venable, Baetjer and Howard, LLP, on brief) Towson, for petitioners.

Marc Seldin Rosen (Shar, Rosen & Warshaw, LLC, on brief) Baltimore, for respondent.

Argued before BELL, C.J., and ELDRIDGE, RAKER, WILNER, CATHELL, HARRELL and BATTAGLIA, JJ.

BATTAGLIA, J.

This case has had a long and circuitous history in the Maryland judicial system. At the conclusion of the motions hearing in the Circuit Court for Baltimore County, on the last leg of the case's journey, the trial judge aptly mused, "Why do I think regardless [of] how I decide this, Rowe Boulevard [has] not seen the last of [the] Imbesi case?" In this appeal, we must put to rest the question of whether the respondent, the Estate of Thomas L. Imbesi (hereinafter "the Estate") is entitled to post-judgment interest on a judgment entered against petitioners, Carpenter Realty Corporation (hereinafter "Carpenter Realty") and 7UP Bot-

tlng Company of Baltimore, Inc. (hereinafter "7UP/Baltimore"), on a claim brought by the Personal Representative of the Estate against the corporations for the unpaid balance of money owed on a stock transaction between Mr. Imbesi and the petitioners.

I. Facts

On June 1, 1982, Thomas L. Imbesi entered into a Stock Redemption Agreement with Carpenter Realty and 7UP/Baltimore, as well as several other 7UP entities (7UP Bottling Company of Philadelphia, Inc., 7UP Bottling Company of Bridgeton, Inc., 7UP Bottling Co. of Camden, Inc., 7UP Bottling Company of Salisbury, Inc., and 7UP Wilmington Company). Pursuant to this agreement, the corporations redeemed Imbesi's shares of stock in the corporations for *552 \$500,000.00 plus 5 1/4% interest over a 120 month period and forgiveness of a \$137,158.00 debt owed by Imbesi to the corporations. The payments to Imbesi were made according to the Stock Redemption Agreement through April of 1991, at which time, a corporate officer of 7UP/Baltimore requested an extension of the time for payment because of financial ****1020** difficulties. After a payment in July, 1991, the corporation failed to make any additional payments under the Stock Redemption Agreement.

Thomas L. Imbesi died on March 10, 1992. On March 7, 1994, Dennis Michael Imbesi, who had been appointed as the Personal Representative of the Estate of Thomas L. Imbesi, filed a lawsuit in the Circuit Court for Baltimore County on behalf of the Estate against Carpenter Realty and 7UP/Baltimore seeking recovery of the outstanding debt owed to the Estate under the Stock Redemption Agreement. On the same day, the Circuit Court issued a Writ of Attachment Before Judgment upon the real property of Carpenter Realty at 6159 Edmondson Avenue, Baltimore County, Maryland 21228. The Circuit Court also ordered Carpenter Realty to set aside \$78,263.23 in an escrow account with the Clerk of the Circuit Court as security to satisfy any potential judgment in favor of the Estate.^{FN1}

^{FN1}. When Carpenter Realty initially set aside the funds on March 10, 1994, the money was deposited into a non-interest bearing escrow account. The money was subsequently transferred to an interest bear-

ing account on March 6, 1997.

Thereafter, Carpenter Realty and 7UP/Baltimore filed a Counterclaim against the Estate asserting that they had been assigned a Note under seal from the 7UP Bottling Company of Philadelphia, Inc. The Counterclaim alleged that the Note evidenced the indebtedness of Thomas L. Imbesi to the companies, the assignees of the Note, in the amount of \$80,000.00 plus 6% interest.^{FN2} The Note had become due and payable on *553 October 23, 1989, although the Counterclaim alleged that neither Imbesi nor his Estate had made any payments under the Note.

FN2. Maryland Rule 2-331(a), concerning counterclaims filed against opposing parties provides:

A party may assert as a counterclaim any claim that party has against any opposing party, whether or not arising out of the transaction or occurrence that is the subject matter of the opposing party's claim. A counterclaim may or may not diminish or defeat the recovery sought by the opposing party. It may claim relief exceeding in amount or different in kind from that sought in the pleading of the opposing party.

A bench trial commenced on March 22, 1995. On April 10, 1995, the Circuit Court issued its Opinion and Order entering a judgment for the Estate in the amount of \$57,447.67, the amount the parties had stipulated was the appropriate amount should the court enter a judgment in the Estate's favor. The judgment did not include an award of pre-judgment interest.

The Circuit Court also concluded that Carpenter Realty had not met its burden of proof to establish a right to set-off^{FN3} its liability to the Estate through its Counterclaim concerning the Estate's failure to make payments on the Note because the corporations did not file a timely claim for payment against the Estate pursuant to Maryland Code (1974, 1991 Repl. Vol.) Section 8-103 of the Estates and Trusts Article.^{FN4} Carpenter Realty and 7UP/Baltimore appealed the Circuit Court's decision **1021 on the Counterclaim to the Court of Special Appeals, asserting that the court erred in finding that they had not met their bur-

den of proof on the counterclaim. In an unreported decision, the Court of Special Appeals held that Carpenter Realty and 7UP/Baltimore established a *prima facie* case for entitlement to set-off their liability to the Estate with the *554 claim against the Estate on the Note by producing the instrument to the trial court. The court declined to determine whether the statute of limitations period set forth in Section 8-103 of the Estates and Trusts Article barred the petitioner's claim for set-off. Thus, the Court of Special Appeals reversed the Circuit Court's judgment in favor of the Estate and remanded the case to the Circuit Court for a rehearing on whether the \$80,000 Note could be used to set-off the amount owed to the Estate under the Stock Redemption Agreement. In providing guidance to the Circuit Court on remand, the Court of Special Appeals stated in dicta:

FN3. We have previously explained that "setoff means a diminution or a complete counterbalancing of the adversary's claim based upon circumstances arising out of a transaction other than that on which the adversary's claim is based; and counterclaim means the assertion of a right to have an affirmative judgment against the adversary based upon a setoff or a recoupment." Imbesi v. Carpenter Realty Corp. et al, 357 Md. 375, 380, 744 A.2d 549, 552 (2000)(internal quotations omitted).

FN4. The 1991 Replacement Volume of the Estates and Trusts Article was the relevant version of the statute in effect at the time this litigation commenced.

By its terms, the nonclaim statute, ET § 8-103, would prevent appellants from recovering any monies from the Estate, because they failed to assert the Note as a claim against the Estate within the statutory period. However, whether appellants can utilize the Note to recover monies from the Estate at this juncture is a far different issue than whether they can now assert the Note to prevent the Estate from recovering from them under the Agreement. We note, in passing, that allowing a debt to be used as a setoff will not thwart the chief purpose behind the nonclaim statute—the prompt administration and closing of estates—in that a setoff will only be asserted, as here, as a defense or in response to a claim made by an estate, and not in a separate pro-

ceeding.

On November 18, 1996 the Circuit Court held a hearing on the merits of Carpenter Realty and 7UP/Baltimore's claim for set-off. On January 14, 1998, the court entered an order, stating:

This matter comes before the Court on remand from the Court of Special Appeals pursuant to Maryland Rule 8-604(d)(1). The Court of Special Appeals has asked this Court to determine whether the indebtedness to the Defendant evidenced by the existence of an Eighty Thousand Dollar (\$80,000) Note may be allowed to be used as a defensive set-off to the amount owed to the Estate by the Defendants under a Stock Redemption Agreement, thereby extinguishing the Plaintiff's Complaint for Fifty-Seven *555 Thousand, Four Hundred and Seventy-Seven Dollars and Sixty Seven Cents (\$57,477.67).

Noting the issue to be one of first impression in Maryland, the Court of Special Appeals makes clear that under Maryland's Non-claim Statute (Estates and Trusts § 8-103), the Appellant would be precluded from recovering monies from the Estate because they failed to assert the claim within the statute of limitations. If the Note in question may not be utilized as a "sword," may it be utilized as a "shield" despite the running of limitations? This Court believes that it may indeed.

The Court of Special Appeals made it a point to specifically mention that using the Note as a set-off does not offend the chief purpose behind the Non-claim Statute—the prompt administration and closing of estates. Additionally, the Defendants refer to numerous cases from other jurisdictions that deem it proper and equitable to allow the defensive set-off. This Court is persuaded by the reasoning contained in those cases and the direction provided by the Court of Special Appeals that the set-off should be permitted.

****1022** Therefore, the court ordered the entry of judgment in favor of Carpenter Realty and 7UP/Baltimore, with costs to be paid by the Estate.

The Estate appealed the Circuit Court's decision to the Court of Special Appeals, emphasizing that the set-off against Carpenter's \$57,447.67 obligation was invalid because the Note was stale when assigned. On

April 2, 1999, however, the Court of Special Appeals affirmed the Circuit Court's judgment permitting the set-off. See Imbesi v. Carpenter Realty Corp., 125 Md.App. 676, 682, 726 A.2d 854, 857 (1999) (stating that, "[t]he operative language of the nonclaim statute does not expressly prevent a defendant from using an unasserted claim as a defensive set-off to a claim asserted affirmatively by an estate") (emphasis in original).

On January 19, 2000, this Court reversed the judgment of the Court of Special Appeals. See Imbesi v. Carpenter Realty Corp. et al., 357 Md. 375, 391, 744 A.2d 549, 558 (2000) (construing Section 8-103(a) of the Estates and Trusts Article as *556 barring "a claim that has not been timely presented and that arises out of a transaction separate from that on which the estate claims"). We remanded the case to the Court of Special Appeals with instructions to reverse the decision of the Circuit Court and remand the matter for further proceedings consistent with our opinion.

On March 1, 2000, the Estate petitioned the Circuit Court for entry of judgment in the Estate's favor in the amount of \$57,447.67, seeking pre-judgment interest in the amount of \$3,588.51, at the rate of 6% from the date of the filing of the original Complaint through the original trial on March 22, 1995, and post-judgment interest at the rate of 10% in the amount of \$30,518.09 for the period of March 22, 1995 through March 22, 2000.^{FN5} Carpenter Realty and 7UP/Baltimore responded to the Estate's Petition for Costs and filed a Cross Petition for Release of Funds, wherein they conceded that the Estate was entitled to entry of judgment in the amount of \$57,477.67 plus the costs of the second appeal to the Court of *557 Special Appeals reduced by the costs owed by the Estate for the first appeal for a judgment totaling \$57,971.27. The corporations asserted, however, that the Estate was not entitled to any pre-judgment or post-judgment **1023 interest and that the balance of the amount of money held in the interest bearing account by the Clerk of the Circuit Court after satisfaction of the \$57,971.27 judgment for the Estate should be returned to them.

FN5. The Estate's Petition for Costs, Interest, and Release of Funds Held in Escrow to Plaintiff requested fees and awards as follows:

9. Plaintiff [Estate] herein requests that the award of costs be incorporated and added to the Judgment in this case. The Plaintiff also requests that this Court calculate the pre-judgment and post-judgment interest due for incorporation into the final judgment. Finally, the Plaintiff requests that all sums held in this Court's interest bearing escrow account be released to Plaintiff to satisfy part of the judgment due and owing to Plaintiff.

10. Plaintiff calculates the pre-judgment interest due as follows:

6% for 1 year and 15 days = \$3588.51, which sum should be added to the principal judgment due for a total of \$61,036.18, before calculation of post-judgment interest and costs. I.W. Berman Prop. v. Porter Bros., Inc., 276 Md. 1, 344 A.2d 65, 79 (1975).

11. Plaintiff calculates the post-judgment interest due as follows:

10% per year (simple interest) on \$61,036.18 = \$6103.62 per year from March 22, 1995 to date. Through March 22, 2000, the post-judgment interest will be \$30,518.09. The per diem rate thereafter will be \$16.722246. Brown v. Medical Mut. Liab. Ins. Soc., 90 Md.App. 18, 599 A.2d 1201, cert. denied, 326 Md. 366, 605 A.2d 101 (1992).

The Estate also sought to recover the costs of the appeal to this Court in the amount of \$335.60 and the costs of the second appeal to the Court of Special Appeals in the amount of \$1,323.60. The costs of the first appeal to the Court of Special Appeals had been charged to the Estate.

The Circuit Court held a motions hearing on September 5, 2000, to consider the parties' contentions. On September 13, 2000, the court issued an opinion which stated, in part:

The interest on the judgment in this case is interesting. The Plaintiff's averments are intellectually stimulating but must fail on the basis of legal logic. This Court notes that the Defendants originally deposited a stipulated amount of \$57,477.67 with the Registry of the Clerk's Office. These funds were deposited in a non-interest bearing account.... Several years later, upon the request of counsel as the appeal in this case progressed, the funds were transferred to an interest bearing account paying a meager 2% interest per annum.

This Court does not feel, in light of the litigation track of this controversy, that the Plaintiff should receive pre-judgment interest in excess of the interest accumulated by the Clerk's Office on the original \$57,477.67.

Although the issue had been raised and argued by both parties, the opinion made no mention of an award of post-judgment interest. The court noted that as of August 30, 2000, the money held in the escrow account, which had accrued interest, totaled \$84,238.92. Thus, the Circuit Court awarded costs to the Estate in the amount of \$523.60,^{FN6} damages in the amount of \$57,477.67 plus accrued interest of \$4,356.16, and ordered that a judgment in keeping therewith be entered. The balance of the escrow account funds plus the *558 interest accrued on the account through August 30, 2000 was ordered to be paid to the corporations. The remaining balance of interest earned on the account from August 30, 2000 through October 19, 2000 was to be paid 73.4% to the Estate and 26.6% to the corporations.

^{FN6}. This figure represents the difference between the costs in subsequent proceeding offset by the amount of costs awarded to Carpenter Realty in the prior action and appeal to the Court of Special Appeals.

The Estate appealed to the Court of Special Appeals asserting that the Circuit Court erred in concluding that the Estate was not entitled to pre-judgment or post-judgment interest. In an unreported decision, the Court of Special Appeals concluded that the Circuit Court did not abuse its discretion by not awarding pre-judgment interest to the Estate. The Court of Special Appeals concluded that the Estate was entitled to receive 10% post-judgment interest on the damages award of \$57,447.67 commencing on April

4, 1995, which was the date of the judgment entered in favor of the Estate after the first trial.

[1] Carpenter Realty filed a Petition for Writ of Certiorari, which we granted, *Carpenter Realty Corp. v. Imbesi*, 367 Md. 722, 790 A.2d 673 (2002), to consider the following question:

After a judgment in favor of a plaintiff is reversed and the action remanded for rehearing, is that plaintiff entitled to post-judgment interest on a subsequent judgment in his favor, dating from the original judgment?

For the reasons set forth below, we answer that question in the negative.

II. Discussion

As a preliminary matter, we consider the statutory provisions governing post-judgment interest. Maryland Code (1974, 1999 Repl. Vol.) **1024 Section 11-107(a) of the Courts and Judicial Proceedings Article provides as follows:

(a) *Legal rate of interest on judgments.*- Except as provided in § 11-106 of this article, the legal rate of interest on a judgment shall be at the rate of 10 percent per annum on the amount of judgment.

Maryland Rule 2-604(b), further provides that “[a] money judgment shall bear interest at the rate prescribed by law *559 from the date of entry.” Pursuant to Maryland Rule 2-601(b), the effective date of entry of a judgment is the date on which the clerk of the court prepares a written record of the judgment. See *Medical Mut. Liab. Ins. Soc’y. of Maryland v. Davis*, 365 Md. 477, 481, 781 A.2d 781, 783 (2001); *Maxima Corp. v. 6933 Arlington Dev. Ltd. Partnership*, 100 Md.App. 441, 464, 641 A.2d 977, 988 (1994)(stating that “a judgment is not entered until the ministerial act of entering judgment on a file jacket, a docket, or docket sheet, according to the court’s practice, is complete”); see also Md. Rule 8-202(f)(For actions appealed to the Court of Special Appeals, entry of the judgment “occurs on the day when the clerk of the lower court first makes a record in writing of the judgment, notice, or order on the file jacket, on a docket within the file, or in a docket book, according to the practice of that court, and re-

ords the actual date of the entry.”); Md. Rule 8-302(d)(For actions before the Court of Appeals, entry of the judgment “occurs on the day when the clerk of the lower court first makes a record in writing of the judgment, notice, or order on the file jacket, on a docket within the file, or in a docket book, according to the practice of that court, and records the actual date of the entry.”)

We have explained the purpose of post-judgment interest as follows:

The purpose of post-judgment interest is obviously to compensate the successful suitor for the same loss of the use of the monies represented by the judgment in its favor, and the loss of income thereon, between the time of the entry of the judgment ...- when there is a judicial determination of the monies owed it- and the satisfaction of the judgment by payment.

I.W. Berman Prop. v. Porter Bros., Inc., 276 Md. 1, 24, 344 A.2d 65, 79 (1975); see *King v. State Roads Comm’n of the State Highway Admin.*, 298 Md. 80, 85, 467 A.2d 1032, 1034 (1983)(explaining that in a condemnation action, the property owner “is entitled to receive post-judgment interest on the award at the legal rate from the date of entry of the judgment *560 ... [until] the date the award is actually paid”). Just when was there a judicial determination of monies owed to the Estate in this circuitous legal scenario?

In the present matter, we must discern what constitutes the date of entry of a judgment where the first judgment in the action was reversed and remanded by the Court of Special Appeals, and subsequent judgments were entered on the record. Petitioners argue that the Court of Special Appeals’s reversal of the Circuit Court judgment in its first unreported decision in this case vitiated the original judgment in favor of the Estate. The Estate asserts, however, that the Court of Special Appeals correctly held that it should receive post-judgment interest retroactive to April 4, 1995, which was the date of the first judgment in favor of the Estate. Thus, we must determine when a legal liability attached against Carpenter Realty and 7UP/Baltimore in the form of a judgment which would trigger the accrual of post-judgment interest.

Both this Court and the Court of Special Appeals have the ability to dispose of an **1025 appeal by

dismissing the action, affirming the judgment, vacating or reversing the judgment, modifying the judgment, remanding the action to a lower court for further consideration, or any combination thereof. See Md. Rule 8-604(a). Furthermore, Maryland Rule 8-604(e) states, “[i]n reversing or modifying a judgment in whole or in part, the Court may enter an appropriate judgment directly or may order the lower court to do so.”^{FN7} We have held that where our mandate specifically directs the entry of a judgment after remand, post-judgment interest on the award runs *561 from the date of the issuance of the mandate. See *Andrulis v. Levin Construction Corp.*, 331 Md. 354, 378, 628 A.2d 197, 209 (1993)(increasing the circuit court’s judgment by \$27,812 and specifying that post-judgment interest on this additional amount would run only from the date the mandate issued). In the absence of a specific instruction from this Court to the trial court that the court *must* award post-judgment interest dating back to the entry of the original judgment, such an award should rest with the sound discretion of the trial court. Thus, we must trace the path of this case from the entry of the original judgment through the subsequent mandates issued on appeal to ascertain when a judgment was entered against the corporations from which post-judgment interest would accrue.

FN7. Maryland Rule 8-606 concerning the force and effect of mandates provides:

(a) To evidence order of the Court. Any disposition of an appeal, including a voluntary dismissal, shall be evidenced by the mandate of the Court, which shall be certified by the Clerk under the seal of the Court and shall constitute the judgment of the Court.

(b) Issuance of mandate. Upon a voluntary dismissal, the Clerk shall issue the mandate immediately. In all other cases, unless a motion for reconsideration has been filed or the Court orders otherwise, the Clerk shall issue the mandate upon the expiration of 30 days after the filing of the Court’s opinion or entry of the Court’s order.

(c) To contain statement of costs. The mandate shall contain a statement of the

order of the Court assessing costs and the amount of the costs taxable to each party.

(d) Transmission-Mandate and record. Upon issuance of the mandate, the Clerk shall transmit it to the appropriate lower court. Unless the appellate court orders otherwise, the original papers comprising the record shall be transmitted with the mandate.

(e) Effect of mandate. Upon receipt of the mandate, the clerk of the lower court shall enter it promptly on the docket and the lower court shall proceed in accordance with its terms. Except as otherwise provided in Rule 8-611(b), the assessment of costs in the mandate shall not be recorded and indexed as provided by Rule 2-601(c).

The Circuit Court’s order dated April 10, 1995 entering judgment in favor of the Estate was a final judgment for purposes of appellate review. See *Montgomery County v. Revere Nat’l Corp.*, 341 Md. 366, 378, 671 A.2d 1, 7 (1996)(explaining that “an order entered on the docket pursuant to [Maryland] Rule 2-601, and having the effect of terminating the case in the circuit court, is a final judgment”). In the first appeal, the Court of Special Appeals reversed the judgment of the Circuit Court and remanded the matter. The mandate expressly did not limit the reversal solely to the issue of the corporations’ claim for set-off against the Estate.

[2][3] We have explained that “[w]here a mandate is ambiguous, one must look to the opinion and other surrounding *562 circumstances to determine the intent of the court.” *Balducci v. Eberly*, 304 Md. 664, 670, 500 A.2d 1042, 1045 (1985). A reversal is defined as “the annulling or setting aside by an appellate court of a decision of a lower court,” *Litman v. Massachusetts Mut. Life Ins. Co.*, 825 F.2d 1506, 1514 n. **1026 11 (11th Cir.1987), while the provision governing the remand of civil cases from an appellate court states:

If the Court concludes that the substantial merits of a case will not be determined by affirming, reversing or modifying the judgment, or that justice will be served by permitting further proceedings, the Court may remand the case to a lower court. In the order

remanding a case, the appellate court shall state the purpose for the remand. *The order of remand and the opinion upon which the order is based are conclusive as to the points decided.* Upon remand, the lower court shall conduct any further proceedings necessary to determine the action in accordance with the opinion and order of the appellate court.

Md. Rule 8-604(d)(1) (emphasis added).

[4] “It has been held that the effect of a general and unqualified reversal of a judgment, order or decree is to nullify it completely and to leave the case standing as if such judgment, order or decree had never been rendered, except as restricted by the opinion of the appellate court.” *Balducci*, 304 Md. at 671 n. 8, 500 A.2d at 1046 n. 8. The Court of Special Appeals’s opinion and mandate of August 6, 1996 which reversed the original judgment and remanded the case to the Circuit Court did not contain any language restricting the effect of the reversal so as to leave the original judgment in place. Accordingly, when this matter made its earlier appearance before us, Judge Rodowsky described the path of the case as follows:

This action was *tried twice* in the circuit court. A bench trial in March 1995 resulted in a judgment in favor of the Estate for \$57,447.67 on the complaint and a judgment for the Estate as counterclaim defendant. On appeal to the Court of Special Appeals *those judgements were reversed*, in *563 an unreported opinion, on grounds relating to the burden of proving the authenticity of the 1979 note.

Imbesi, 357 Md. at 379, 744 A.2d at 551 (emphasis added). Neither our mandate disposing of that appeal, nor the text of the opinion as a secondary source specified any intention to have post-judgment interest accrue from the date of the original judgment. Therefore, the first judgment entered in favor of the Estate on April 10, 1995 was eliminated by the Court of Special Appeals’s reversal.

[5] Any party can clarify the scope of a mandate or order by filing a motion to alter, amend, or revise the judgment. *See* Md. Rule 2-534 (motions to alter or amend judgments); ^{FN8} Md. Rule 2-535 (motions to revise judgments); ^{FN9} Md. Rule 8-431 (general motions to the Court of Appeals or **1027 Court of Special Appeals). ^{FN10} In the present matter, neither party took such an action.

FN8.Rule 2-534 provides:

In an action decided by the court, on motion of any party filed within ten days after entry of judgment, the court may open the judgment to receive additional evidence, may amend its findings or its statement of reasons for the decision, may set forth additional findings or reasons, may enter new findings or new reasons, may amend the judgment, or may enter a new judgment. A motion to alter or amend a judgment may be joined with a motion for new trial.

FN9.Rule 2-535 provides, in relevant part:

(a) Generally. On motion of any party filed within 30 days after entry of judgment, the court may exercise revisory power and control over the judgment and, if the action was tried before the court, may take any action that it could have taken under Rule-534.

(b) Fraud, mistake, irregularity. On motion of any party filed at any time, the court may exercise revisory power and control over the judgment in case of fraud, mistake, or irregularity.

* * *

(d) Clerical mistakes. Clerical mistakes in judgments, orders, or other parts of the record may be corrected by the court at any time on its own initiative, or on motion of any party after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed by the appellate court, and thereafter with leave of the appellate court.

FN10.Maryland Rule 8-431 concerning motions made to the Court of Appeals or Court of Special Appeals provides:

(a) Generally. An application to the Court

for an order shall be by motion. The motion shall state briefly and clearly the facts upon which it is based, and if other parties to the appeal have agreed not to oppose the motion, it shall so state. The motion shall be accompanied by a proposed order.

(b) **Response.** Except as provided in Rule 8-605(a), any party may file a response to the motion. Unless a different time is fixed by order of the Court, the response shall be filed within five days after service of the motion.

(c) **Affidavit.** A motion or a response to a motion that is based on facts not contained in the record or papers on file in the proceeding shall be supported by affidavit and accompanied by any papers on which it is based.

(d) **Statement of grounds and authorities.** A motion and any response shall state with particularity the grounds and the authorities in support of each ground.

(e) **Filing; copies.** The original of a motion and any response shall be filed with the Clerk. It shall be accompanied by (1) seven copies when filed in the Court of Appeals and (2) four copies when filed in the Court of Special Appeals, except as otherwise provided in these rules.

(f) **Emergency order.** In an emergency, the Court may rule on a party's motion before expiration of the time for a response. The party requesting emergency relief shall file the certification required by Rule 1-351.

(g) **Hearing.** Except as otherwise provided in these rules, a motion may be acted on without a hearing or may be set for hearing at the time and place and on the notice the Court prescribes.

*564 In reaching its determination that the Estate should receive post-judgment interest from the entry of the original judgment on April 4, 1995, the Court

of Special Appeals misconstrued our decision in *Medical Mut. Liability Ins. Soc. v. Davis*, *supra*. Indeed, the facts and circumstances in the case at bar are distinguishable from those at issue in *Davis*, where our consideration was limited to determining “when post-judgment interest begins to accrue on a money judgment for tort damages, based on a jury verdict, when the judgment is subsequently reduced, via a remittitur, by the trial court.” *Id.* at 478, 781 A.2d at 781. In *Davis*, we held that the plaintiffs were entitled to post-judgment interest from the date of the original judgment in the action. *Id.* at 485, 781 A.2d at 785. We reasoned that although the original judgment lost its finality for purposes of appeal by virtue of the defendant's filing of post-judgment motions, the original judgment had not *565 disappeared. *Id.* Furthermore, the defendant in *Davis* had the benefit of the use of the money owed to the plaintiff during the pendency of the remittitur proceedings and presumably earned interest on that sum during the ten-month period which elapsed between entry of the original judgment and entry of the judgment after the plaintiff's acceptance of the remittitur, whereas the corporations in the instant case did not. *Id.* It is important to note, however, that we explicitly limited the scope of the *Davis* decision:

We do not, however, intend to suggest that post-judgment interest always begins to accrue whenever a money judgment is entered and is final at the time of entry. Rule 2-604(b) must be applied to various situations in accordance with the purpose of post-judgment interest and the considerable case-law governing the running of post-judgment interest.

Id. at 484, 781 A.2d at 785.

Furthermore, the post trial proceedings at issue in *Davis* are readily distinguishable**1028 from the appellate procedure and rehearings involved in the instant case. A remittitur simply reduces the amount of an award owed pursuant to a jury verdict which is determined by the court to be excessive although the judgment remains in force. While a counterclaim for set-off may also reduce the amount of damages owed from one party to another, the viability of a set-off claim involves a separate and distinct determination of liability *before* adjusting the amount of the judgment. See *Imbesi*, 357 Md. at 382, 744 A.2d at 553 (explaining that resolution of the counterclaim for

set-off requires “consideration of the facts and circumstances of a separate transaction and consideration of any defenses that an estate might have against a finding of indebtedness by the estate arising out of that separate transaction”). Therefore, our holding in *Davis* simply cannot be interposed to resolve this matter in favor of the Estate.

The Estate also relies on the Court of Special Appeals's decision in *Brown v. Medical Mut. Liab. Ins. Soc'y*, 90 Md.App. 18, 599 A.2d 1201, cert. denied, 566326 Md. 366, 605 A.2d 101 (1992), in support of its proposition that the post-judgment interest must be calculated from the date of the original judgment. In *Brown*, the Court of Special Appeals held that where the plaintiffs had been successful at trial, and where the trial court's grant of j.n.o.v. in favor of the defendant had been reversed on appeal, the plaintiffs were entitled to receive post-judgment interest dating from the entry of the original judgment on the verdict to the date that the defendant satisfied the underlying judgment. *Id.* at 21, 599 A.2d at 1202. The court explained that “[a] reversal on appeal of a j.n.o.v. is, in effect, a finding that plaintiff's original judgment always existed.” *Id.* at 25, 599 A.2d at 1204.

In reaching this conclusion, the Court of Special Appeals emphasized in its earlier mandate which reversed the grant of j.n.o.v. and remanded the case to the circuit court, that it specifically stated that the judgment was entered for the Browns “on the verdict of the jury.” *Id.* at 26, 599 A.2d at 1205. In the present matter, the mandate issuing from our opinion dated January 19, 2000 contained no express provision granting post-judgment interest from the date of the original judgment. Thus, the reasoning applied by the Court of Special Appeals in its decision in *Brown* is inapplicable to the case at bar.

Petitioners assert that our decision in *Cook v. Toney*, 245 Md. 42, 224 A.2d 857 (1966) is dispositive of the issue before us. The procedural history of *Cook* is similar, albeit not identical, to the lengthy procedural history of the case *sub judice*. The case involved a lawsuit brought by Cook against Toney and his co-defendants, the Perrys, for personal injuries caused in an automobile accident. *Id.* at 44, 224 A.2d at 858. At the original trial held in March of 1960, the trial court directed a verdict in favor of Mrs. Perry. *Id.* at 45, 224 A.2d at 858. The jury rendered a verdict against

Mr. Perry and Toney in the amount of \$5,000; however, the trial court granted Toney a new trial. *Id.* At the second trial, the court entered a directed verdict in favor of Toney. *Id.* Cook appealed the trial court's decision to this Court, and we reversed and remanded the case for a new trial. See *567 *Tates v. Toney*, 231 Md. 9, 14, 188 A.2d 283, 286 (1963). At the conclusion of the third trial, the jury rendered a verdict in favor of Toney, but the trial court granted a new trial in favor of Cook. See *Cook*, 245 Md. at 45-46, 224 A.2d at 859. At the fourth and final trial, the jury rendered a verdict in favor of Cook and on September 23, 1965, the trial court entered judgment against Toney. *Id.* at 46, 224 A.2d at 859. A few days later, Toney paid **1029 the \$5,000 damage award into the registry of the trial court pending a decision as to whether Cook was entitled to an award of post-judgment interest dating back to the entry of the original judgment on April 2, 1960. *Id.* at 46, 224 A.2d at 859.

The predecessor post-judgment interest rule effective at the time of our decision in *Cook* provided in relevant part, “[a] judgment on verdict shall be so entered as to carry interest from the date on which the verdict was rendered.” Md. Rule 642 (1965). We reasoned that because Toney had been granted a new trial, the original jury verdict rendered on March 29, 1960 and the judgment therefrom had been eliminated “as if they had never been entered.” 245 Md. at 50, 224 A.2d at 861. Therefore, we concluded that because “the first and only verdict in legal contemplation against Toney” had not been rendered until September 20, 1965, Toney's payment obligation did not attach until that date. *Id.* at 51, 224 A.2d at 862.

Similarly, the first judgment entered in favor of the Estate in the present case was eliminated by the Court of Special Appeals's first mandate ordering the reversal of the judgment. Petitioners cannot be expected to pay interest retroactive to the date of the first judgment just because the amount of the award entered in the final judgment which triggered the corporations' liability for payment is the same amount which had been entered in favor of the Estate in the first judgment.

We conclude, therefore, that for purposes of calculating post-judgment interest, Carpenter Realty and 7UP/Baltimore were not under any obligation to the Estate until the Circuit Court entered its judgment on

October 19, 2000.

*568[6] We further agree with the corporations' assertion that post-judgment interest need not be awarded at all in this matter because the judgment in favor of the Estate was immediately satisfied through payment from the escrow account upon entry of the judgment on October 19, 2000. Thus, the corporations' prompt payment of the judgment alleviated the need for an award of post-judgment interest.^{FN11} Therefore, we conclude that the Circuit Court for Baltimore County properly denied**1030 the Estate's request for post-judgment interest.

^{FN11}. The Estate poses the equitable argument that it should receive post-judgment interest on the \$ 57,477.67 award dating back to April 4, 1995, because it was deprived of the use and benefit of that money during the pendency of the various and assorted appeals. What the Estate overlooks, however, is that in this case *both parties* were deprived of the use of the \$78,263.23 which Carpenter Realty and 7UP/Baltimore had been ordered to set aside with the Clerk of the Circuit Court for Baltimore County to satisfy any potential judgment. In *Bailey v. Chattem, Inc.*, 838 F.2d 149 (6th Cir.), *cert. denied*, 486 U.S. 1059, 108 S.Ct. 2831, 100 L.Ed.2d 931 (1988), the Court of Appeals for the Sixth Circuit applied equitable principles to determine whether post-judgment interest ran from the date of the first judgment in a trial or on a subsequent judgment following a retrial limited to the issue of damages. *Id.* at 154. The court examined several factors, including "the nature of the initial judgment, the action of the appellate court, the subsequent events upon remand, and the relationship between the first judgment and the modified judgment." *Id.* Thus, under equitable principles, and in the absence of a specific instruction to the contrary as explicated in the mandate issuing from the appellate court, the trial court may exercise its discretion to award post-judgment interest from the date of the original judgment. See *Boyd v. Bulala*, 751 F.Supp. 576, 579-80 (W.D.Va.1990). In the present matter, the transcript of the hearing before the Circuit Court held on September 5, 2000 and

the trial court's subsequent order denying pre-judgment and post-judgment interest reflects that the trial court balanced the respective interests of the parties, weighed the nuances of the protracted litigation and appeals process, and arrived at an equitable conclusion.

JUDGMENT OF THE COURT OF SPECIAL APPEALS REVERSED. CASE REMANDED TO THE COURT OF SPECIAL APPEALS WITH DIRECTIONS TO AFFIRM THE JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE COUNTY. COSTS IN THIS COURT AND IN *569 THE COURT OF SPECIAL APPEALS TO BE PAID BY RESPONDENT.

Md.,2002.
Carpenter Realty Corp. v. Imbesi
369 Md. 549, 801 A.2d 1018

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60 P.3d 497
(Cite as: 60 P.3d 497)

H

Supreme Court of Oklahoma.
Tom IGLEHART and Brenda Iglehart, husband and
wife, Plaintiffs/Appellants,

v.

BOARD OF COUNTY COMMISSIONERS OF
ROGERS COUNTY, Oklahoma, and Verdigris Val-
ley Electric Cooperative, Defendants/Appellees,
Ed Hutchinson and Shirley Hutchinson, husband and
wife, Defendants.
No. 95,585.

Oct. 1, 2002.

Motorist and her husband filed negligence claim against electric utility company and board of county commissioners, after motorist was injured in collision in controlled intersection, claiming that the company's negligent maintenance of a tree obstructed her view of a stop sign. The District Court, Rogers County, Jack K. Mayberry, J., entered summary judgment for defendants. Plaintiffs filed separate appeals. On consolidation, The Court of Civil Appeals reversed summary judgment for board but affirmed that given utility company. On plaintiffs' petition for certiorari, the Supreme Court, Opala, J., held that: (1) a utility company owes a duty of care to traveling motorists on adjoining roads when its substandard maintenance of trees could foreseeably cause danger to the public, and (2) genuine issue of material fact existed as to whether the company exercised a proper degree of care vis-a-vis motorist in the maintenance of the "topped" tree whose condition in obstructing motorist's view of stop sign should have been anticipated.

Affirmed in part, reversed in part, and remanded.

Winchester, J., dissented.

West Headnotes

[1] Automobiles 48A ↪ 269**48A Automobiles**

48AVI Injuries from Defects or Obstructions in
Highways and Other Public Places

48AVI(A) Nature and Grounds of Liability**48Ak269 k. Property Adjacent to Highway.****Most Cited Cases**

Tree that allegedly obscured motorist's view of stop sign was not a "natural condition of the land" within the meaning of Restatement of Torts, so as to absolve electric utility company that maintained the area of liability for motorist's accident, where tree in question was planted by the landowners and then topped by the utility company. Restatement (Second) of Torts §§ 363, 840.

[2] Judgment 228 ↪ 178**228 Judgment****228V On Motion or Summary Proceeding****228k178 k. Nature of Summary Judgment.****Most Cited Cases**

Summary process-a special pretrial procedural track pursued with the aid of acceptable probative substitutes -is a search for undisputed material facts which, sans forensic combat, may be utilized in the judicial decision-making process.

[3] Judgment 228 ↪ 181(2)**228 Judgment****228V On Motion or Summary Proceeding****228k181 Grounds for Summary Judgment****228k181(2) k. Absence of Issue of Fact.****Most Cited Cases****Judgment 228 ↪ 185(1)****228 Judgment****228V On Motion or Summary Proceeding****228k182 Motion or Other Application****228k185 Evidence in General****228k185(1) k. In General. Most Cited****Cases**

Summary process is applied where neither the material facts nor any inferences that may be drawn from undisputed facts are in dispute, and the law favors the movant's claim or liability-defeating defense; to that end, the court may consider, in addition to the pleadings, items such as depositions, affidavits, admissions, answers to interrogatories, as well as other

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evidentiary materials which are offered by the parties in acceptable form.

[4] Judgment 228 ↪ 185(5)

228 Judgment
228V On Motion or Summary Proceeding
228k182 Motion or Other Application
228k185 Evidence in General
228k185(5) k. Weight and Sufficiency.

Most Cited Cases

Only those evidentiary materials which eliminate from trial some or all fact issues on the merits of the claim or defense afford legitimate support for nisi prius resort to summary adjudication.

[5] Judgment 228 ↪ 185(5)

228 Judgment
228V On Motion or Summary Proceeding
228k182 Motion or Other Application
228k185 Evidence in General
228k185(5) k. Weight and Sufficiency.

Most Cited Cases

The focus in summary process is not on the facts which might be proven at trial, but rather on whether the tendered proof in the record reveals only undisputed material facts supporting but a single inference that favors the movant's quest for relief.

[6] Judgment 228 ↪ 185(5)

228 Judgment
228V On Motion or Summary Proceeding
228k182 Motion or Other Application
228k185 Evidence in General
228k185(5) k. Weight and Sufficiency.

Most Cited Cases

Oklahoma's summary adjudication process is similar, but not identical, to that followed in the federal judicial system; in Oklahoma, the focus of summary process is not on facts a plaintiff might be able to prove at trial (i.e., the legal sufficiency of evidence that could be adduced), but rather on whether the evidentiary material, viewed as a whole, shows undisputed facts on some or all material issues and whether such facts support but a single inference that favors the movant's quest for relief.

[7] Appeal and Error 30 ↪ 893(1)

30 Appeal and Error
30XVI Review
30XVI(F) Trial De Novo
30k892 Trial De Novo
30k893 Cases Triable in Appellate Court
30k893(1) k. In General. Most Cited Cases

Appeal and Error 30 ↪ 895(2)

30 Appeal and Error
30XVI Review
30XVI(F) Trial De Novo
30k892 Trial De Novo
30k895 Scope of Inquiry
30k895(2) k. Effect of Findings Below. Most Cited Cases
 Summary relief issues stand before the Supreme Court for de novo examination; all facts and inferences must be viewed in the light most favorable to the nonmovant.

[8] Appeal and Error 30 ↪ 863

30 Appeal and Error
30XVI Review
30XVI(A) Scope, Standards, and Extent, in General
30k862 Extent of Review Dependent on Nature of Decision Appealed from
30k863 k. In General. Most Cited Cases
 Just as nisi prius courts are called upon to do, so also appellate tribunals bear an affirmative duty to test all evidentiary material tendered in summary process for its legal sufficiency to support the relief sought by the movant; only if the court should conclude that there is no material fact in dispute and the law favors the movant's claim or liability-defeating defense is the moving party entitled to summary judgment in its favor.

[9] Judgment 228 ↪ 178

228 Judgment
228V On Motion or Summary Proceeding
228k178 k. Nature of Summary Judgment. Most Cited Cases
 It is not the purpose of summary process to substitute

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a trial by affidavit for one by jury, but rather to afford a method of summarily terminating a case, or eliminating from trial some of its issues, when only questions of law remain.

[10] Negligence 272 ⚡ 202

272 Negligence

272I In General

272k202 k. Elements in General. Most Cited Cases

To establish negligence liability for an injury, plaintiffs must prove that: (1) defendants owed them a duty to protect them from injury; (2) defendants breached that duty; and (3) defendants' breach was a proximate cause of plaintiffs' injuries.

[11] Judgment 228 ⚡ 185(2)

228 Judgment

228V On Motion or Summary Proceeding

228k182 Motion or Other Application

228k185 Evidence in General

228k185(2) k. Presumptions and Burden of Proof. Most Cited Cases

The burden is not cast upon plaintiffs to establish that defendants were negligent in order to escape defendants' motion for summary judgment; rather, to avoid trial for negligence, defendants must establish through unchallenged evidentiary materials that, even when viewed in a light most favorable to plaintiffs, no disputed material facts exist as to any material issues and that the law favors defendants.

[12] Negligence 272 ⚡ 211

272 Negligence

272II Necessity and Existence of Duty

272k211 k. Public Policy Concerns. Most Cited Cases

Duty is not sacrosanct in itself, but only an expression of the sum total of those considerations of policy which lead the law to say that the particular plaintiff is entitled to protection from defendant's negligence.

[13] Negligence 272 ⚡ 213

272 Negligence

272II Necessity and Existence of Duty

272k213 k. Foreseeability. Most Cited Cases

Where a defendant's conduct creates a foreseeable zone of risk, the law generally will recognize a duty placed upon defendant either to lessen the risk or see that sufficient precautions are taken to protect others from the harm that the risk poses.

[14] Negligence 272 ⚡ 210

272 Negligence

272II Necessity and Existence of Duty

272k210 k. In General. Most Cited Cases

The threshold question for negligence suits is whether a defendant owes a plaintiff a duty of care.

[15] Negligence 272 ⚡ 210

272 Negligence

272II Necessity and Existence of Duty

272k210 k. In General. Most Cited Cases

Negligence 272 ⚡ 232

272 Negligence

272III Standard of Care

272k232 k. Ordinary Care. Most Cited Cases

Whenever one person is by circumstances placed in a position in that, if he did not use ordinary care and skill in his own conduct, he would cause danger of injury to the person or property of the other, a duty arises to use ordinary care and skill to avoid such danger.

[16] Negligence 272 ⚡ 213

272 Negligence

272II Necessity and Existence of Duty

272k213 k. Foreseeability. Most Cited Cases

Among a number of factors used to determine the existence of a duty of care, the most important consideration is foreseeability.

[17] Negligence 272 ⚡ 213

272 Negligence

272II Necessity and Existence of Duty

272k213 k. Foreseeability. Most Cited Cases

Generally a defendant owes a duty of care to all persons who are foreseeably endangered by his conduct with respect to all risks which make the conduct un-

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reasonably dangerous; foreseeability establishes a "zone of risk," which is to say that it forms a basis for assessing whether the conduct "creates a generalized and foreseeable risk of harming others."

[18] Automobiles 48A ↪ 269

48A Automobiles

48AVI Injuries from Defects or Obstructions in Highways and Other Public Places

48AVI(A) Nature and Grounds of Liability

48Ak269 k. Property Adjacent to Highway.

Most Cited Cases

A utility company owes a duty of care to traveling motorists on adjoining roads when its substandard maintenance of trees could foreseeably cause danger to the public.

[19] Public Utilities 317A ↪ 103

317A Public Utilities

317AI In General

317Ak103 k. Public Utilities in General. Most

Cited Cases

A public utility is liable for negligence toward others in performing or failing to perform work that is part and parcel of the utility's duty to maintain its facilities. Restatement (Second) of Torts § 428.

[20] Negligence 272 ↪ 1692

272 Negligence

272XVIII Actions

272XVIII(D) Questions for Jury and Directed Verdicts

272k1692 k. Duty as Question of Fact or Law Generally. Most Cited Cases

Negligence 272 ↪ 1693

272 Negligence

272XVIII Actions

272XVIII(D) Questions for Jury and Directed Verdicts

272k1693 k. Negligence as Question of Fact or Law Generally. Most Cited Cases

The question of whether a duty is owed by a defendant is one of law; a breach of that duty is a question of fact for the trier.

[21] Judgment 228 ↪ 181(33)

228 Judgment

228V On Motion or Summary Proceeding

228k181 Grounds for Summary Judgment

228k181(15) Particular Cases

228k181(33) k. Tort Cases in General.

Most Cited Cases

Genuine issue of material fact existed as to whether electric utility company, which maintained power lines next to roadway, exercised a proper degree of care vis-a-vis motorist in the maintenance of the "topped" tree whose condition in obstructing motorist's view of stop sign should have been anticipated, and whether company's maintenance was proximate cause for motorist's accident, precluding summary judgment in negligence action.

[22] Judgment 228 ↪ 185.1(8)

228 Judgment

228V On Motion or Summary Proceeding

228k182 Motion or Other Application

228k185.1 Affidavits, Form, Requisites and Execution of

228k185.1(8) k. Defects and Objections. Most Cited Cases

Electric utility company's objection to summary judgment affidavit of injured motorist's expert witness concerning foreseeability that topped tree next to roadway would grow laterally, so as to obstruct motorist's view of a stop sign, was waived where company failed to challenge the affidavit.

[23] Judgment 228 ↪ 185.1(8)

228 Judgment

228V On Motion or Summary Proceeding

228k182 Motion or Other Application

228k185.1 Affidavits, Form, Requisites and Execution of

228k185.1(8) k. Defects and Objections. Most Cited Cases

Judgment 228 ↪ 189

228 Judgment

228V On Motion or Summary Proceeding

228k189 k. Defects and Objections. Most Cited Cases

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When one fails in summary process timely to challenge any aspect of an evidentiary substitute, one's objection is waived and the unobjected-to materials will be deemed to have been properly included for the court's consideration.

[24] Appeal and Error 30 ↪ 1180(1)

30 Appeal and Error

30XVII Determination and Disposition of Cause

30XVII(D) Reversal

30k1180 Effect of Reversal

30k1180(1) k. In General. Most Cited

Cases

Where on the judgment's reversal a cause is remanded, it returns to the trial court as if it had never been decided, save only for the "settled law" of the case.

[25] Automobiles 48A ↪ 282

48A Automobiles

48AVI Injuries from Defects or Obstructions in Highways and Other Public Places

48AVI(A) Nature and Grounds of Liability

48Ak282 k. Proximate Cause. Most Cited

Cases

Automobiles 48A ↪ 284

48A Automobiles

48AVI Injuries from Defects or Obstructions in Highways and Other Public Places

48AVI(A) Nature and Grounds of Liability

48Ak283 Contributory Negligence

48Ak284 k. In General. Most Cited

Cases

Statute requiring a motorist to yield right of way to oncoming traffic when entering an intersection was inapplicable to shield electric utility company from liability if it negligently maintained a "topped" tree adjoining the roadway, and its negligence was proximate cause of motorist's accident, where intersection in question consisted of two county roads, and thus, the roads were of equal class. 47 O.S.Supp.1997, § 11-401, subd. A.

[26] Judgment 228 ↪ 181(2)

228 Judgment

228V On Motion or Summary Proceeding

228k181 Grounds for Summary Judgment

228k181(2) k. Absence of Issue of Fact.

Most Cited Cases

Where material facts are disputed, summary adjudication is improper and cannot stand.

***499 On Certiorari to the Court of Civil Appeals, Div. 1.**

¶ 0 The plaintiff driver was injured in an automobile accident allegedly caused by the negligent maintenance of a tree by defendant Utility Company. The driver alleges that because the tree obstructed her view of a stop sign, she entered an intersection without stopping and collided with another vehicle. The District Court, Rogers County, Jack K. Mayberry, trial judge, gave summary judgment to Utility Company and to Board of County Commissioners. Plaintiffs (the driver and her husband) brought separate appeals from the two summary judgments. The Court of Civil Appeals consolidated the appeals, reversed summary judgment for Board (95,585) but affirmed that given Utility Company (95,586). On certiorari granted on plaintiffs' petition,

THE OPINION OF THE COURT OF CIVIL APPEALS IS VACATED ONLY INSOFAR AS IT RELATES TO THE NOW-REVERSED SUMMARY JUDGMENT FOR UTILITY COMPANY; THE TRIAL COURT'S SUMMARY JUDGMENT FOR UTILITY COMPANY IS REVERSED AND THE CAUSE REMANDED FOR FURTHER PROCEEDINGS TO BE CONSISTENT WITH TODAY'S PRONOUNCEMENT. Larry L. Oliver, Larry L. Oliver & Associates, P.C., Tulsa, OK, for Appellant Brenda Iglehart.

Bill Shaw, Shaw, Crutchfield & Shaw, Claremore, OK, for Appellant Tom Iglehart.

Brian E. Dittrich, Karla M. Rogers, Whitten, Nelson, McGuire, Wood, Terry, Roselius & Dittrich, Tulsa, OK, for Appellee Verdigris Valley Electric Cooperative.^{FN1}

^{FN1}. Identified herein are only those counsel for the parties whose names appear on the certiorari briefs.

***500OPALA, J.**

¶ 1 The dispositive issue presented on certiorari is

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whether a utility company owes a duty of care to motorists on roadways adjacent to the utility company's power lines when it is foreseeable that negligently maintaining trees underneath its lines could pose a road hazard to traveling motorists. We answer the question in the affirmative and hold that the Court of Civil Appeals erred in affirming the trial court's summary judgment for Utility Company.

I

THE ANATOMY OF LITIGATION

¶ 2 This is a negligence action arising from an automobile accident. On 5 April 1997 Brenda Iglehart (plaintiff or Mrs. Iglehart) was driving east in Rogers County on county road EW 39 and failed to stop where that road intersected county road NS 418. Traffic on NS 418 had the right-of-way. As she crossed the intersection, she was broadsided by a car traveling south on NS 418. Mrs. Iglehart and her husband, who joined her to press his own claim for loss of consortium (collectively called plaintiffs), allege that a large white pine tree located approximately thirty-three (33) feet west of a stop sign on the southwest corner of the intersection obstructed Mrs. Iglehart's view of the sign, and that a proximate cause of the accident was her inability to see the sign.

¶ 3 Among the other defendants, plaintiffs sued the Verdigris Valley Electric Cooperative (Utility Company) which owns the easement where the tree is located. Plaintiffs contend Utility Company negligently maintained the tree by "topping" it (cutting off the top) in order to keep the tree limbs from interfering with Utility Company's electric lines passing above the tree. By so doing, plaintiffs allege, Utility Company caused the tree to grow laterally and more densely, obscuring the stop sign in a foreseeable fashion. According to plaintiffs, Utility Company owes a duty of care to motorists traveling on the adjoining roadway, or, in the alternative, at least a duty to warn of a hazardous condition within its control, and that its breach of this duty directly caused plaintiffs' injuries.

[1] ¶ 4 The trial court gave summary judgment to Utility Company as well as to Board of County Commissioners of Rogers County (Board). Plaintiffs brought separate appeals from the adverse summary judgments. The Court of Civil Appeals (COCA) con-

solidated the appeals and reversed the summary judgment for Board, but upheld that given in favor of Utility Company. COCA held that a utility company does not owe a duty of care to travelers on roads adjacent to its power lines which are under its maintenance. For this view COCA relies on cases from the Oregon^{FN2} and Texas^{FN3} appellate courts and on the Restatement (Second) of Torts § 363(1).^{FN4}

FN2. COCA relied on the *Court of Appeals opinion* in *Slogowski v. Lyness*, 131 Or.App. 213, 884 P.2d 566 (1994), which the Oregon Supreme Court vacated (~~324 Or. 436, 927 P.2d 587 (1996)~~). For a discussion of the Supreme Court's pronouncement, see Part III(A) ¶ 11, *infra*.

FN3. *Felts v. Bluebonnet Electric Cooperative, Inc.*, 972 S.W.2d 166 (Tx.App.-Austin 1998). COCA cites *Felts* for the view that (a) utility companies owe only the duty to keep trees and vegetation from interfering with the electric lines and that (b) the right to trim or clear trees to protect the power lines does not create a broader duty to maintain trees within the easement for the protection of the general public traveling on an adjacent road or highway. *Felts* is factually distinguishable from this case. There, the court decided in favor of the electric utility company because the tree in question was outside the company's easement, not because of a lack of a duty of care.

FN4. The terms of § 363(1) of the Restatement (Second) of Torts state that possessors of land in non-urban areas bear no liability for injuries resulting from a "natural condition of the land." Comment (a) to § 840 of the Restatement (Second) of Torts defines "natural condition" as "a condition that is not in any way the result of human activity." While the area surrounding the accident site was admittedly not urban in character, it is undisputed that the tree in question was planted by the landowners and then topped by the utility company. The harm-dealing tree would hence not be considered a "natural condition of the land" within the meaning of §§ 363 and 840.

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¶ 5 We granted certiorari on plaintiffs' petition for review of the summary judgment for Utility Company (95,586).

*501II

SUMMARY JUDGMENT AND THE STANDARD FOR ITS REVIEW

[2][3][4][5] ¶ 6 Summary process—a special pretrial procedural track pursued with the aid of acceptable probative substitutes^{FN5}—is a search for undisputed material facts which, *sans* forensic combat, may be utilized in the judicial decision-making process.^{FN6} Summary process is applied where neither the material facts nor any inferences that may be drawn from undisputed facts are in dispute, *and* the law favors the movant's claim or liability-defeating defense. To that end, the court may consider, in addition to the pleadings, items such as depositions, affidavits, admissions, answers to interrogatories, as well as other evidentiary materials which are offered by the parties in acceptable form.^{FN7} Only those evidentiary materials which eliminate from trial some or all fact issues on the merits of the claim or defense afford legitimate support for nisi prius resort to summary adjudication.^{FN8}

FN5. “ ‘Acceptable probative substitutes’ are those which may be used as ‘evidentiary materials’ in the summary process of adjudication.” *Jackson v. Oklahoma Memorial Hosp.*, 1995 OK 112, ¶ 15 n. 35, 909 P.2d 765, 773 n. 35. See also *Seitsinger v. Dockum Pontiac Inc.*, 1995 OK 29, ¶ 18, 894 P.2d 1077, 1080-81; *Davis v. Leitner*, 1989 OK 146, ¶ 15, 782 P.2d 924, 926-27.

FN6. The focus in summary process is not on the facts which might be proven at trial, but rather on whether the tendered proof in the record reveals only undisputed material facts *supporting but a single inference* that favors the movant's quest for relief. *Polymer Fabricating, Inc. v. Employers Workers' Compensation Ass'n.*, 1998 OK 113, ¶ 7, 980 P.2d 109, 112; *Hulsey v. Mid-America Preferred Ins. Co.*, 1989 OK 107, ¶ 8 n. 15, 777 P.2d 932, 936 n. 15.

FN7. *Polymer*, *supra* note 6 at ¶ 8, at 113.

FN8. *Russell v. Bd. of County Comm'rs.*, 1997 OK 80, ¶ 7, 952 P.2d 492, 497. See also *Gray v. Holman*, 1995 OK 118, ¶ 11, 909 P.2d 776, 781.

[6] ¶ 7 Oklahoma's summary adjudication process is similar, but not identical, to that followed in the federal judicial system.^{FN9} In Oklahoma, the focus of summary process is not on facts a plaintiff might be able to prove at trial (*i.e.*, the legal sufficiency of evidence that could be adduced), but rather on whether the evidentiary material, viewed as a whole, (a) shows undisputed facts on some or all material issues and whether such facts (b) support but a single inference that favors the movant's quest for relief.^{FN10}

FN9. *Russell*, *supra* note 8, at ¶ 7, n. 7, at 497, 111 S.Ct. 1217; compare *Salve Regina College v. Russell*, 499 U.S. 225, 231, 111 S.Ct. 1217, 1221, 113 L.Ed.2d 190 (1991); *Celotex Corp. v. Catrett*, 477 U.S. 317, 321, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986); *Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986).

FN10. *Polymer*, *supra* note 6, at ¶ 7, at 112; *Hulsey*, *supra* note 6 at ¶ 8 n. 15, at 936 n. 15.

[7][8][9] ¶ 8 Summary relief issues stand before us for *de novo* examination.^{FN11} All facts and inferences must be viewed in the light most favorable to the nonmovant.^{FN12} Just as nisi prius courts are called upon to do, so also appellate tribunals bear an affirmative duty to test all evidentiary material tendered in summary process for its legal sufficiency to support the relief sought by the movant.^{FN13} Only if the court should conclude that there is no material fact in dispute and the law favors the movant's claim or liability-defeating defense is the moving party entitled to summary judgment in its favor.^{FN14}

FN11. An order that grants summary relief, in whole or in part, disposes solely of law questions. It is thus reviewable by a *de novo* standard. *Brown v. Nicholson*, 1997 OK 32, ¶ 5, 935 P.2d 319, 321. See also *Kluver v.*

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Weatherford Hosp. Auth., 1993 OK 85, ¶ 14, 859 P.2d 1081, 1083 (“Issues of law are reviewable by a *de novo* standard and an appellate court claims for itself plenary, independent and non-deferential authority to re-examine a trial court's legal rulings.”).

FN12.Carmichael v. Beller, 1996 OK 48, ¶ 2, 914 P.2d 1051, 1053.

FN13.Spirgis v. Circle K Stores, Inc., 1987 OK CIV APP 45, ¶ 10, 743 P.2d 682, 685 (approved for publication by the Oklahoma Supreme Court).

FN14. It is not the purpose of summary process to substitute a trial by affidavit for one by jury, but rather to afford a method of summarily terminating a case (or eliminating from trial some of its issues) when only questions of law remain. Russell, *supra* note 8, at 503; Bowers v. Wimberly, 1997 OK 24, ¶ 18, 933 P.2d 312, 316; Stuckey v. Young Exploration Co., 1978 OK 128, ¶ 15, 586 P.2d 726, 730.

*502III

UTILITY COMPANIES OWE A DUTY OF CARE TO TRAVELING MOTORISTS WHO FORESEEABLY MAY BE INJURED BY NEGLIGENCE IN MAINTAINING THEIR UTILITY LINES

[10][11] ¶ 9 To establish negligence liability for an injury, plaintiffs must prove that (1) defendants owed them a *duty to protect* them from injury, (2) defendants *breached that duty*, and (3) defendants' *breach was a proximate cause* of plaintiffs' injuries.^{FN15} The burden is not cast upon plaintiffs to establish that defendants were negligent in order to escape defendants' motion for summary judgment. Rather, to avoid trial for negligence, *defendants must establish through unchallenged evidentiary materials* that, even when viewed in a light most favorable to plaintiffs, *no disputed material facts exist* as to any material issues and that the law favors defendants.^{FN16} Utility Company contends that (1) no duty existed and that (2) if a duty existed, the company did not breach it, and that (3) its actions were not a proximate cause of plaintiffs' injuries.

FN15.Dirickson v. Mings, 1996 OK 2, ¶ 7, 910 P.2d 1015, 1018-19.

FN16.Malson v. Palmer Broadcasting Group, 1997 OK 42, ¶ 12, 936 P.2d 940, 943, citing White v. Wynn, 1985 OK 89, ¶ 10, 708 P.2d 1126, 1129.

A.

The Utility's Duty of Care

[12][13][14][15][16][17] ¶ 10 The *threshold question* for negligence suits is whether a defendant owes a plaintiff a duty of care.^{FN17} We recognize the traditional common-law rule that whenever one person is by circumstances placed in such a position with regard to another, that, if he (she) did not use ordinary care and skill in his (her) own conduct, he would cause danger of injury to the person or property of the other, a duty arises to use ordinary care and skill to avoid such danger.^{FN18} Among a number of factors used to determine the existence of a duty of care, *the most important consideration is foreseeability*.^{FN19} Generally a “defendant owes a duty of care to all persons who are foreseeably endangered by his conduct with respect to all risks which make the conduct unreasonably dangerous.”^{FN20} *Foreseeability establishes a “zone of risk,”* which is to say that it forms a basis for assessing whether the conduct “creates a generalized and foreseeable risk of harming others.”^{FN21}

FN17.Wofford v. Eastern State Hosp., 1990 OK 77, ¶ 8, 795 P.2d 516, 518. We note that “[Duty] is not sacrosanct in itself, but only an expression of the sum total of those considerations of policy which lead the law to say that the particular plaintiff is entitled to protection.” (Prosser, *Law on Torts* (3d ed.1964) at pp. 332-333),” *quoted in Tarasoff v. Regents of Univ. of Cal.*, 17 Cal.3d 425, 131 Cal.Rptr. 14, 551 P.2d 334, 342 (1976).

FN18.See Heaven v. Pender, 11 Q.B.D. 503, 509, 1883 WL 19069 (1883).

FN19.Wofford, *supra* note 17, at ¶ 11, at 519

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(quoting *Tarasoff v. Regents of Univ. of Cal.*, 17 Cal.3d 425, 131 Cal.Rptr. 14, 551 P.2d 334, 342 (1976).)

FN20. *Wofford*, *supra* note 17, ¶ 11, at 519.

FN21. *Delbrel v. Doenges Bros. Ford, Inc.*, 1996 OK 36, ¶ 8, 913 P.2d 1318, 1321. See also *McCain v. Florida Power Corp.*, 593 So.2d 500, 502-03 (Fla.1992). "Where a defendant's conduct creates a foreseeable zone of risk, the law generally will recognize a duty placed upon defendant either to lessen the risk or see that sufficient precautions are taken to protect others from the harm that the risk poses." *Id.* at 503.

[18][19][20] ¶ 11 The question of whether a duty is owed by a defendant is one of law; a breach of that duty is a question of fact for the trier.^{FN22} We hold that a utility company indeed owes a duty of care to traveling motorists on adjoining roads when its substandard maintenance of trees could foreseeably cause danger to the public. The reasoning expressed by the Oregon Supreme Court in *Slogowski v. Lyness*^{FN23} (as well as by the Pennsylvania Superior Court in *Beury v. *503 Hicks*)^{FN24} is persuasive here. In *Slogowski* the court recognized that it was potentially foreseeable to a utility company that a tree it maintained could cause a hazardous condition to motorists on an adjacent roadway.^{FN25} The court reasoned that *once having undertaken the task of trimming and inspecting trees within its easement*, a party must act reasonably in the exercise of that task.^{FN26} In *Beury*^{FN27} the court upheld liability imposed upon a power company for failing reasonably to maintain trees along a highway next to the company's power lines.^{FN28}

FN22. *Wofford*, *supra* note 17, at ¶ 22, 795 P.2d at 520.

FN23. *Supra* note 2.

FN24. 227 Pa.Super. 476, 323 A.2d 788 (1974).

FN25. *Slogowski*, *supra* note 2 at 590.

FN26. *Id.* at 590, 884 P.2d 566. While

Slogowski is not precisely on point (because it deals with a tree that created a hazard by falling onto a roadway rather than obstructing a view of a stop sign) it lends support to the view that electric utility companies owe a duty to persons traveling on roads adjacent to electrical lines reasonably to maintain trees in their care.

FN27. *Supra* note 24, at 790. In *Beury* the plaintiff's decedent was killed when a tree limb fell upon his automobile. A wrongful death action was brought against the property owners and a utility company based upon negligent inspection. The latter had performed highway maintenance and inspection services on the owners' trees adjoining the power lines for a quarter of a century.

FN28. Our rationale for imposition of liability is *also* supported by the common-law rule that a public utility is liable for negligence toward others in performing (or failing to perform) work that is part and parcel of the utility's duty to maintain its facilities. *Restatement (Second) of Torts* § 428. This duty is *nondelegable*. In *Bouziden v. Alfalfa Coop., Inc.*, 2000 OK 50, 16 P.3d 450, the court refused to extend *nondelegable liability* to "all other third parties," *id.* at ¶ 22, at 457-58. Today's pronouncement does not contradict *Bouziden*, but merely notes that, consistently with the terms of *Restatement (Second) of Torts* § 428, this *nondelegable duty* extends to *foreseeably injured third parties*.

IV

THERE ARE DISPUTED ISSUES OF MATERIAL FACT AS TO UTILITY COMPANY'S BREACH OF ITS DUTY OF CARE TO TRAVELING MOTORISTS WHO FORESEEABLY MAY BE INJURED AND THE PROXIMATE CAUSATION OF THE ACCIDENT; WHENEVER DISPUTED FACTS STAND TENDERED, SUMMARY ADJUDICATION IS INAPPROPRIATE

A.

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Disputed Issue of Fact As To Foreseeability Of The Injuries

[21] ¶ 12 Plaintiffs have *raised a disputed issue of fact as to the foreseeability of the injuries* suffered by them in a manner sufficient to avoid summary process. According to the affidavit of plaintiffs' expert witness, James R. Morgan, the white pine tree in question

“has been ‘topped.’ The main tree trunk has been cutoff [sic] in the upper quadrant of the tree. Once this occurs, the upward growth is halted. The tree growth then occurs (a) by increasing density; and (b) by increased limb growth.”

Mr. Morgan's affidavit goes on to state that these consequences are

“particularly true for this type of pine tree. This information is commonly known to those who cut trees. The ‘topped’ tree must grow somehow as it matures with age. If it cannot grow upward, it grows outward and in density. It is common knowledge that Pine [sic] trees, when topped, increase in density.”

[22][23] ¶ 13 Utility Company challenges the certainty with which Mr. Morgan may make such statements as to this particular tree, noting that he had not seen the tree before it was topped. The record reveals no Utility Company's challenge to this affidavit. When one fails in summary process timely to challenge any aspect of an evidentiary substitute, one's objection is waived and the unobjected-to materials will be deemed to have been properly included for the court's consideration.^{FN29} Plaintiffs direct us to another expert witness, William Pickhart, whose affidavit*504 makes essentially the same causal linkage between topping a tree and its increased density, noting that such growth is a foreseeable consequence of the topping. *While withholding ultimate judgment on the probative effect of these expert witnesses' materials, at this stage of summary process review, we must view facts in the light most favorable to plaintiffs.*^{FN30} Mindful of this rule, we hold that-given the *proximity of the tree to the stop sign* and the common-sense notion that *without a visible stop sign, an intersection, such as that here in question, poses an obvious hazard*-plaintiffs raise a disputed issue of material fact as to the foreseeability of the accident arising from the action and/or inaction of Utility Company.

Foreseeability must hence be left for a jury evaluation.

^{FN29}*Seitsinger, supra* note 5 at ¶ 14, at 1080. There is here no properly and timely submitted record-supported objection to either the affiant's qualification for the expert opinion given or to the admissibility of that opinion at trial.

^{FN30}*Carmichael, supra* note 12 at ¶ 2, at 1053.

¶ 14 In sum, it is undisputed that defendant Utility Company “topped” the tree in question, but did not otherwise trim it, and that no warning was given to traveling motorists. The *extent to which the tree obscured or obstructed the stop sign* from the view of motorists on EW 39 tenders a disputed issue for the trier's determination. It is for a jury to decide whether *topping, but failing to trim the tree laterally or to warn motorists* of the obstruction caused by the tree in issue, is a breach of the duty to which we hold the defending Utility Company.

B.

A Disputed Issue Of Material Fact Exists As To Proximate Causation

¶ 15 Oklahoma law defines proximate cause as “the efficient cause which sets in motion the chain of circumstances leading to the injury.”^{FN31} Generally, the proximate cause of an injury in a negligence case is an issue of fact for the jury.^{FN32} It becomes a question of law for the court *only when* there is no evidence from which a jury could reasonably find a causal nexus between the act and the injury.^{FN33} According to plaintiffs' expert witnesses, the defendant's actions reasonably may be found to provide a direct causal link to blocking the view of the stop sign and, thus, to the accident causing plaintiffs' injuries. We hence hold that proximate cause presents here a disputed issue for the trier of fact.

^{FN31}*Dirickson, supra* note 15, at ¶ 9, at 1018, quoting *Thur v. Dunkley*, 1970 OK 157, 474 P.2d 403, 405. Proximate cause has also been called “direct cause.” It has been defined in the Oklahoma Uniform Jury In-

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structions as “a cause which, in the natural and continuous sequence, produces injury and without which the injury would not have happened.” Tomlinson v. Love's Country Stores, Inc., 1993 OK 83, n. 6, 854 P.2d 910, 916.

FN32. Akin v. Missouri Pacific R. Co., 1998 OK 102, ¶ 37, 977 P.2d 1040, 1054; Dirickson, *supra* note 15, citing Tomlinson, *supra* note 31.

FN33. Dirickson, *supra* note 15 at ¶ 9, at 1018, citing Tomlinson, *supra* note 31 at 916.

[24] ¶ 16 Because these disputed issues of fact remain unresolved, the summary adjudication for Utility Company was in error. It must now stand reversed.^{FN34}

FN34. Where on the judgment's reversal a cause is remanded, it returns to the trial court as if it had never been decided, save only for the “settled law” of the case. Seymour v. Swart, 1985 OK 9, ¶¶ 8-9, 695 P.2d 509, 512-513; Russell, *supra* note 8, at ¶ 35, at 504. By today's remand the parties are relegated to their prejudgment status.

V

UTILITY COMPANY'S RELIANCE ON § 11-401(A) OF THE HIGHWAY SAFETY CODE IS MISPLACED

[25] ¶ 17 Utility Company attempts to avoid trial by arguing that the terms of § 11-401(A) of the Highway Safety Code^{FN35} required plaintiff to yield the right-of-way to *505 oncoming traffic, *regardless of whether “a stop sign is present or visible.”* According to Utility Company, Mrs. Iglehart's act of negligently entering the intersection without yielding the right of way, **as required by § 11-401(A)**, constitutes a “supervening act of negligence” which insulates it from the legal consequences of topping the tree in question. In other words, because Mrs. Iglehart was negligent in her driving, Utility Company could not be answerable in law for the accident.

FN35. The provisions of 47 O.S.Supp.1997 § 11-401(A) (effective 1 November 1997) were:

A. The driver of a vehicle on a county road approaching an intersection with a state or federal highway shall, ***whether a stop sign is present or visible***, stop and yield the right-of-way to a vehicle which has entered the intersection or *which is so close thereto as to constitute an immediate hazard*. The driver of a vehicle on a private drive or any road not maintained by the county or state approaching an intersection with a county road designated as a thoroughfare, as established by resolution of the board of county commissioners, *shall stop and yield the right-of-way to a vehicle which has entered the intersection or which is so close to the intersection as to constitute an immediate hazard*.

(emphasis added).

¶ 18 **This argument fails to negate** the existence of a material fact issue as to the proximate cause of plaintiffs' injuries. First, Utility Company relies on statutory text not in force on the date of the **5 April 1997** accident. The pertinent language, “***whether a stop sign is present or visible***,” was added to § 11-401 by a 1997 amendment that became effective **1 November 1997**. Second, although both the 1997 version of § 11-401(A) and that in force on **April 5 (47 O.S.Supp.1996 § 11-401(A))**^{FN36} required drivers to yield the right of way, their terms addressed solely those circumstances where drivers are crossing roads of *higher class order*—for example, where a **county road** intersects a state or federal highway or where a **private drive** (or a **road not maintained** by the county or state) intersects a county road.^{FN37} The accident in question occurred at the intersection of roads of *equal class order*—two county roads.

FN36. The pertinent terms of 47 O.S.Supp.1996 § 11-401(A), the version in effect at the time of the April 5 accident, were:

A. The driver of a vehicle on a **county road approaching an intersection with a**

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state or federal highway shall stop and yield the right-of-way to a vehicle which has entered the intersection or which is so close thereto as to constitute an immediate hazard. The driver of a vehicle on a private drive or any road not maintained by the county or state approaching an intersection with a county road designated as a thoroughfare, as established by resolution of the board of county commissioners, shall stop and yield the right-of-way to a vehicle which has entered the intersection or which is so close to the intersection as to constitute an immediate hazard....

(emphasis added).

The provisions of § 11-401 were amended in 1997, 1999 and 2002. None of these amendments affects the controversy before the court.

FN37. Even if the 1997 version of § 11-401(A) had been in force on the day of the collision in suit, Utility Company's argument fails to recognize that under the comparative negligence law more than one party could be negligent concurrently. It does not follow that because Mrs. Iglehart failed to stop at an essentially unmarked intersection she would not have stopped at one that was visibly marked.

VI

SUMMARY

[26] ¶ 19 A utility company owes a duty of care to traveling motorists who foreseeably may be injured by its act or omission. Whether the utility exercised a proper degree of care vis-a-vis plaintiffs in the maintenance of the "topped" tree whose dangerous condition should have been anticipated *presents a disputed issue of fact*. Where material facts are disputed, summary adjudication is improper and cannot stand. The cause must be remanded for a nisi prius resolution of all untried issues tendered (or to be tendered).

¶ 20 On certiorari granted on plaintiffs' petition, the

opinion of the Court of Civil Appeals is vacated only insofar as it relates to the now-reversed summary judgment for Utility Company; the trial court's summary judgment for Utility Company is reversed and the cause remanded for further proceedings to be consistent with today's pronouncement.

¶ 21 HARGRAVE, C.J., WATT, V.C.J., HODGES, LAVENDER, KAUGER, SUMMERS and BOUDREAU, JJ., concur.

¶ 22 WINCHESTER, J., dissents.

Okla.,2002.

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H

Supreme Court of South Dakota.
Cheryl D. JACOBSON, Plaintiff and Appellant,
v.
Kevin LEISINGER, Defendant and Appellee.
Cheryl D. Jacobson, Plaintiff and Appellee,
v.
Kevin Leisinger, Defendant and Appellant.
Nos. 24491, 24492, 24498.

Argued Jan. 8, 2008.
Decided March 12, 2008.

Background: Defendant in prior malicious prosecution action moved for order requiring return of punitive damages award in favor of plaintiff that had been vacated on appeal, 651 N.W.2d 693, after plaintiff rejected reduced offer and failed to seek retrial on damages issue within one year of remand. The Second Judicial Circuit Court, Minnehaha County, Severson, J., entered order in favor of defendant. When plaintiff failed to comply with order, she brought action for conversion. Plaintiff counter-claimed for defamation. The Second Judicial Circuit Court, Minnehaha County, entered summary judgment in favor of defendant on plaintiff's defamation claim on limitations grounds. Plaintiff appealed. In separate action, defendant filed action seeking attorney fees incurred in recovering punitive damages award. The Circuit Court, Stuart L. Tiede, J., denied award of fees, and defendant appealed.

Holdings: On consolidated appeal, the Supreme Court, Miller, Retired Justice, held that:

- (1) defendant was entitled to award of attorney fees incurred in recovering punitive damages award that was vacated on appeal after plaintiff's wrongful refusal to return monies;
- (2) plaintiff's defamation action accrued when alleged defamatory statement to police was made; and
- (3) plaintiff's defamation claim was untimely filed.

Judgment denying defendant's request for attorney fees reversed and remanded; dismissal of plaintiff's defamation claim affirmed.

West Headnotes

[1] Costs 102 ↪ 194.25102 Costs102VIII Attorney Fees

102k194.24 Particular Actions or Proceedings
102k194.25 k. In General. Most Cited

Cases

Defendant in prior malicious prosecution action was entitled to award of attorney fees incurred in recovering prior award of punitive damages paid to plaintiff that was subsequently overturned on appeal, which fees were incurred due to plaintiff's unlawful refusal to release funds after having rejected offer of reduced award and failure to seek retrial on issue of damages within one year of remand.

[2] Appeal and Error 30 ↪ 1180(1)30 Appeal and Error30XVII Determination and Disposition of Cause30XVII(D) Reversal30k1180 Effect of Reversal

30k1180(1) k. In General. Most Cited

Cases

A judgment vacated on appeal is of no further force and effect.

[3] Costs 102 ↪ 194.16102 Costs102VIII Attorney Fees

102k194.16 k. American Rule; Necessity of Contractual or Statutory Authorization or Grounds in Equity. Most Cited Cases

Generally, without specific authority to the contrary, attorney fees are not recoverable in civil actions.

[4] Trover and Conversion 389 ↪ 72389 Trover and Conversion389II Actions389II(G) Costs

389k72 k. In General. Most Cited Cases

In conversion cases, the reasonable and necessary expenses incurred in recovering the property are a proper element of damages, and in such cases, the

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expense of recovery is a “further pecuniary loss” recoverable under the Restatement; the damages must be bifurcated between attorney fees incurred as a result of the conversion litigation as compared to attorney fees incurred in recovering possession of the property, in that the former are not compensable, but the latter are. Restatement (Second) of Torts § 927(2)(b).

[5] Costs 102 ↪ 194.25

102 Costs

102VIII Attorney Fees

102k194.24 Particular Actions or Proceedings

102k194.25 k. In General. Most Cited

Cases

Attorney fees are not generally recoverable in actions sounding in tort except those fees incurred in other litigation which is necessitated by the act of the party sought to be charged.

[6] Appeal and Error 30 ↪ 78(1)

30 Appeal and Error

30III Decisions Reviewable

30III(D) Finality of Determination

30k75 Final Judgments or Decrees

30k78 Nature and Scope of Decision

30k78(1) k. In General. Most Cited

Cases

Denials of summary judgment motions do not constitute final judgments, and therefore are not reviewable without good cause.

[7] Appeal and Error 30 ↪ 863

30 Appeal and Error

30XVI Review

30XVI(A) Scope, Standards, and Extent, in General

30k862 Extent of Review Dependent on Nature of Decision Appealed from

30k863 k. In General. Most Cited Cases

On appeal from summary judgment, the reviewing court must determine whether the moving party demonstrated the absence of any genuine issue of material fact and showed entitlement to judgment on the merits as a matter of law.

[8] Judgment 228 ↪ 185(2)

228 Judgment

228V On Motion or Summary Proceeding

228k182 Motion or Other Application

228k185 Evidence in General

228k185(2) k. Presumptions and Bur-

den of Proof. Most Cited Cases

The evidence on summary judgment must be viewed most favorably to the nonmoving party, and reasonable doubts should be resolved against the moving party.

[9] Judgment 228 ↪ 185(2)

228 Judgment

228V On Motion or Summary Proceeding

228k182 Motion or Other Application

228k185 Evidence in General

228k185(2) k. Presumptions and Bur-

den of Proof. Most Cited Cases

In order to survive summary judgment, the nonmoving party must present specific facts showing that a genuine, material issue for trial exists.

[10] Appeal and Error 30 ↪ 863

30 Appeal and Error

30XVI Review

30XVI(A) Scope, Standards, and Extent, in General

30k862 Extent of Review Dependent on Nature of Decision Appealed from

30k863 k. In General. Most Cited Cases

The reviewing court's task on appeal from summary judgment is to determine only whether a genuine issue of material fact exists and whether the law was correctly applied.

[11] Appeal and Error 30 ↪ 854(1)

30 Appeal and Error

30XVI Review

30XVI(A) Scope, Standards, and Extent, in General

30k851 Theory and Grounds of Decision of Lower Court

30k854 Reasons for Decision

30k854(1) k. In General. Most Cited

Cases

If there exists any basis which supports the ruling of

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the trial court, affirmance of a summary judgment is proper.

[12] Judgment 228 ↪ 185.3(2)

228 Judgment

228V On Motion or Summary Proceeding

228k182 Motion or Other Application

228k185.3 Evidence and Affidavits in Particular Cases

228k185.3(2) k. Particular Defenses.

Most Cited Cases

When faced with a summary judgment motion where the defendant asserts the statute of limitations as a bar to the action and presumptively establishes the defense by showing the case was brought beyond the statutory period, the burden shifts to the plaintiff to establish the existence of material facts in avoidance of the statute of limitations.

[13] Limitation of Actions 241 ↪ 55(1)

241 Limitation of Actions

241II Computation of Period of Limitation

241II(A) Accrual of Right of Action or Defense

241k55 Torts

241k55(1) k. In General. Most Cited

Cases

Plaintiff's defamation action accrued, and two-year limitations period began to run, when alleged defamatory statement was made. SDCL § 15-2-15.

[14] Limitation of Actions 241 ↪ 55(1)

241 Limitation of Actions

241II Computation of Period of Limitation

241II(A) Accrual of Right of Action or Defense

241k55 Torts

241k55(1) k. In General. Most Cited

Cases

Generally the accrual date for a defamation action, for the purposes of the applicable two-year limitations period, begins on the publication of the defamatory act. SDCL § 15-2-15.

[15] Limitation of Actions 241 ↪ 95(6)

241 Limitation of Actions

241II Computation of Period of Limitation

241II(F) Ignorance, Mistake, Trust, Fraud, and Concealment or Discovery of Cause of Action

241k95 Ignorance of Cause of Action

241k95(4) Injuries to the Person

241k95(6) k. Libel and Slander. Most

Cited Cases

Even assuming that two-year limitations period began to run when plaintiff had actual knowledge of alleged defamatory statement to police about alleged assault by plaintiff, defamation action was untimely filed, where complaint was not filed within two years of when plaintiff learned that defamatory statement had been made. SDCL § 15-2-15.

[16] Limitation of Actions 241 ↪ 129

241 Limitation of Actions

241II Computation of Period of Limitation

241II(H) Commencement of Proceeding; Relation Back

241k129 k. Set-Offs, Counterclaims, and Cross-Actions. Most Cited Cases

Permissive counterclaims are not permitted to benefit from the relation back doctrine.

*741 Patricia A. Meyers of Costello, Porter, Hill, Heisterkamp, Bushnell & Carpenter, LLP, Rapid City, South Dakota, Attorneys for appellant (# 24491), Attorneys for appellee (# 24492).

David M. Hosmer Yankton, South Dakota, Attorney for appellant (# 24492), Attorney for appellee (# 24491).

MILLER, Retired Justice.

[¶ 1.] This opinion encompasses two separate appeals dealing with the same parties but involving independent issues and facts. Each will be addressed separately. In # 24991, Cheryl Jacobson appeals the circuit court's decision denying her request for attorney fees, and in # 24492 & # 24498, Kevin Leisinger appeals the circuit court's dismissal of his defamation action against Jacobson.

JACOBSON'S APPEAL FOR ATTORNEY FEES

[¶ 2.] This dispute flows from our holding in Leisinger v. Jacobson, 2002 SD 108, 651 N.W.2d 693 (Leisinger I). In that case, this Court rejected a

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punitive damage award in the amount of \$120,000 in favor of Leisinger and against Jacobson. We held that the punitive damage award should either be reduced to \$25,000, or alternatively, should Leisinger reject the reduced award, a new trial could be conducted solely on the issue of punitive damages. *Id.* ¶ 25. Leisinger rejected the reduced award and thereafter failed to retry his case within one year of the remand, as required by SDCL 15-30-16. Therefore, he forfeited any right to the punitive damages which had previously been paid by Jacobson.

[¶ 3.] Despite our decision in *Leisinger I*, Leisinger did not return the \$120,000 to Jacobson. She therefore moved the circuit court for an order requiring the return of the money. In a memorandum opinion of December 20, 2002, Circuit Judge Severson held that “on August 21, 2002[, the date of the decision of *Leisinger I*], [Leisinger] had an obligation to return the benefits he had received from the prior Judgment-\$120,000-to [Jacobson].” Judge Severson entered a formal order to that effect on February 24, 2003. Leisinger did not comply with nor did he appeal that order requiring him to return the money. (Apparently, no formal notice of entry of the order was served upon Leisinger.)

[¶ 4.] Jacobson then sought a contempt order against Leisinger for his failure to comply with the February 24, 2003 order, but the circuit court did not rule on that motion. Jacobson later filed a formal notice of entry of the February 24, 2003 repayment order. Leisinger then appealed that order, however, therein he merely contested the award of interest. This Court summarily affirmed the order holding that Leisinger's appeal was “without merit.” (Appeal No. 23287).

[¶ 5.] On November 24, 2003, Jacobson filed a conversion action against Leisinger basing her claim on Leisinger's failure to comply with the February 24, 2003 order to return the \$120,000. Leisinger counter-sued alleging many causes of actions, all independent of the money issues. The circuit court ultimately granted Jacobson's summary judgment motion holding that Leisinger's failure to return the money amounted to conversion as a matter of law.

[¶ 6.] While the foregoing conversion action was pending, Leisinger petitioned this Court for a rehearing of *Leisinger I*, and also sought to have Jacobson held in “contempt.” He contended that *Leisinger I*

was founded on Jacobson's perjured testimony. We denied the motion.

[¶ 7.] On December 21, 2004, Jacobson moved the circuit court for an order requiring*742 Leisinger to show cause for his failure to comply with the February 24, 2003 order. At the hearing, the circuit court (Judge Zell) converted the order to a judgment. As a result of failing to be served with process, rather than for lack of notice,^{FN1} neither Leisinger nor his attorney attended the hearing. Jacobson, however, later filed a formal written motion requesting an amendment of the “order” to a “judgment.” That motion was granted on February 24, 2005. Leisinger appealed such judgment which was ultimately summarily affirmed by this Court wherein we held the appeal was “without merit.” (Appeal No. 23618). Jacobson ultimately recovered the \$120,000 on October 28, 2005.^{FN2}

FN1. Leisinger's attorney had actual notice of the hearing, and the record reflects that a woman who attended the hearing was determined to have been sent by Leisinger.

FN2. On July 1, 2005, the money was deposited with the Minnehaha County Clerk pending an appeal of Judge Zell's order amending the original February 23, 2003 “order” to a “judgment.” This Court summarily affirmed Judge Zell's order. Jacobson did not recover the money until after the summary affirmance of the appeal.

[¶ 8.] Jacobson then sought recovery of the attorney fees she incurred in the various court proceedings required to recover the \$120,000. The circuit court rejected her request, citing *Schuldies v. Millar*, 1996 SD 120, 555 N.W.2d 90. Jacobson appeals. We reverse and remand.

[¶ 9.] **Whether the circuit court erred by failing to award attorney fees.**

[1] [¶ 10.] Jacobson argues that she has a right to recover the reasonable cost of attorney fees she specifically incurred in unwarranted legal proceedings to recover her wrongfully withheld property. We agree.

[2] [¶ 11.] It is clear and undisputed that Leisinger

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wrongfully withheld Jacobson's \$120,000. Subsequent to Leisinger's rejection of the reduced punitive damages award, in Leisinger I, the portion of the trial court judgment regarding punitive damages was vacated. 2002 SD 108, ¶ 25, 651 N.W.2d at 701. Accordingly, "[a] judgment vacated on appeal is of no further force and effect." Gluscic v. Avera St. Luke's, 2002 SD 93, ¶ 18, 649 N.W.2d 916, 920 (citations omitted); see also Hasse v. Fraternal Order of Eagles No. 2421 of Vermillion, 2003 SD 23, ¶ 9, 658 N.W.2d 410, 413 (citations omitted); Aune v. B-Y Water Dist., 505 N.W.2d 761, 764-65 (S.D.1993) (quoting Pendergast v. Muns, 59 S.D. 135, 142, 238 N.W. 344, 347 (1931)). Therefore, Leisinger's rejection of the reduced award represented a simultaneous forfeiture of any rights in the previously acquired punitive damage award.

[¶ 12.] We conclude that Leisinger indefensibly and unlawfully withheld the \$120,000. Judge Severson's decision of December 20, 2002, granting Jacobson's request for an order requiring Leisinger to return the \$120,000 with interest, unequivocally informed Leisinger that his retention of the funds was unlawful. Moreover, Leisinger cannot argue in good faith that he believed the money could legally remain in his possession pending any appeals; indeed, in the original suit Leisinger acquired the \$120,000, constituting the punitive damage award, via a writ of execution prior to Leisinger I reversing the same award. Leisinger may not now complain of being harmed by the forced repayment as he bore the risk by taking the money prior to completion of the appellate process. Hasse, 2003 SD 23, ¶ 11, 658 N.W.2d at 413-14.

[¶ 13.] Jacobson contends that although Schuldies v. Millar, *supra*, does not permit recovery of attorney fees for the actual *743 litigation of the conversion lawsuit, reasonable attorney fees expended in pursuit of the money, unrelated to the conversion action, are separable and recoverable. We agree.

[3][4] [¶ 14.] Generally, without specific authority to the contrary, attorney fees are not recoverable in civil actions. However, we agree with and now adopt the rationale that: "... in conversion cases, the reasonable and necessary expenses incurred in recovering the property are a proper element of damage. In such cases, the expense of recovery is a 'further pecuniary loss' recoverable under the Restatement rule." State v. Taylor, 506 N.W.2d 767, 768 (Iowa 1993) (citing

RESTATEMENT (SECOND) OF TORTS § 927(2)(b) (1977) (other citations omitted) (emphasis added)). In this case, and as is the practice in other states, the damages must be bifurcated between "attorney fees incurred as a result of the conversion litigation as compared to attorney fees incurred in recovering possession of the property. The former are not compensable, the latter are." Motors Ins. Corp. v. Singleton, 677 S.W.2d 309, 315 (Ky.Ct.App.1984).

[5] [¶ 15.] Attorney fees are not generally recoverable in actions sounding in tort "except those fees incurred in other litigation which is necessitated by the act of the party sought to be charged." Grand State Property, Inc. v. Woods, Fuller, Shultz, & Smith, P.C., 1996 SD 139, ¶ 19, 556 N.W.2d 84, 88 (emphasis added) (noting that separate litigation necessitated by the misconduct of the other party may permit recovery of attorney fees); Isaac v. State Farm Mut. Auto. Ins. Co., 522 N.W.2d 752, 763 (S.D.1994). Moreover, Leisinger, by his intentional and calculated action, left Jacobson with only one course of action, *i.e.*, further litigation. See Rorvig v. Douglas, 123 Wash.2d 854, 862, 873 P.2d 492, 497 (1994); RESTATEMENT (SECOND) OF TORTS § 914 cmt a (1977); Liles v. Liles, 289 Ark. 159, 177, 711 S.W.2d 447, 456 (1986).

[¶ 16.] Recovery of attorney fees expended by Jacobson to force Leisinger to release her money may be analogized with the case of Foster v. Dischner, 51 S.D. 102, 212 N.W. 506 (1927). In Foster, the plaintiff sued for attorney fees incurred in releasing an unlawful levy of his property. Although the property remained in the possession of the plaintiff, he was still entitled to attorney fees as damages incurred in releasing the levy. *Id.* at 507; see also Baird v. Liepelt, 62 Ill.App.2d 154, 156-57, 210 N.E.2d 1, 2 (1965). Here, Jacobson seeks similar damages, which resulted from her attempt to recover her property. Like the unlawful paper levy attached in Foster, Leisinger's unlawful possession of Jacobson's money amounted to a *de facto* levy/pledge. See RAY D. HENSON, SECURED TRANSACTIONS: UNDER THE UNIFORM COMMERCIAL CODE § 4-26 (West 1978). Indeed, Leisinger argued that if he "were to give said funds to [Jacobson], and [Leisinger] is later successful in a damage award against [Jacobson], then [Leisinger] will never recover said damages." Similar to the unlawful levy in Foster, Leisinger's argument demonstrates his desire to

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unlawfully withhold Jacobson's money as security for a future lawsuit that may never be allowed (and in fact never was allowed). Therefore, as in *Foster*, Jacobson is entitled to reasonable attorney fees incurred in recovering the release of her property. (However, as conceded at oral argument, Jacobson is not entitled to any attorney fees incurred after the February 24, 2003 order was converted into a judgment.)

[¶ 17.] Additionally, although Jacobson's action may have been pleaded in conversion, the lawsuit is more complicated than the typical conversion pleadings. Here, Leisinger defied multiple court orders*744 requiring him to repay the \$120,000. Instead of asserting his right to possess the money, Leisinger conjured up other legal arguments which did not proffer a genuine defense to his unlawful possession of the money. Moreover, all of Leisinger's legal arguments regarding the \$120,000, or the interest accruing on the same, failed as meritless before the circuit court and this Court. Even after we rejected Leisinger's motion for a rehearing regarding the reversal of punitive damages, he still refused and failed to repay the money. We find that Leisinger "has not merely refused to pay a judgment, he has refused to obey an affirmative court order." DAN B. DOBBS, LAW OF REMEDIES: DAMAGES-EQUITY-RESTITUTION § 3.10(3) (West 2nd ed. 1993). Therefore, attorney fees may be appropriately awarded at the discretion of the trial court upon a determination that the failure to comply with the order rose to the level of contempt. Although no contempt of court sanction was specifically implemented in this case, courts have inherent authority to act *sua sponte* and order the payment of opposing party's reasonable attorney fees if the party's actions rise to the level of litigation misconduct. *See id.*

[¶ 18.] We reverse and remand to the circuit court for proceedings consistent herewith.

LEISINGER'S APPEAL OF DISMISSAL OF DEFAMATION CLAIM

[¶ 19.] Leisinger initially sued Jacobson for malicious prosecution. The lawsuit was based on false information Jacobson allegedly provided to police which led to Leisinger being falsely arrested nine times. He prevailed in that action. In the summer of 2001, approximately thirty hours after the jury found for Leisinger in the malicious prosecution lawsuit, a 911

emergency call was placed from Jacobson's residence. When the police arrived they were unable to locate her. Eventually, the sound of "moaning" led the officers to Jacobson who was laying face down in calf-high grass about thirty to forty yards from her residence.

[¶ 20.] Jacobson told the police that she heard an "alarm" alert and then was struck in the back of her head. She claimed to not know how she ended up face down in the grass. Detective Balfe examined Jacobson's head and saw no signs of an assault: "there was no redness or swelling or bleeding or anything at the back of her head." Therefore, no pictures were taken of the alleged injury.

[¶ 21.] An ambulance transported Jacobson to the hospital where Detective Balfe interviewed her. She allegedly accused Leisinger of attacking her, stating: "Kevin had something to do with this. I don't have anything to prove it, but he had something to do with it." After further questioning, she allegedly continued to accuse Leisinger of being responsible for the purported attack. (No criminal charges flowed from this claimed attack.)

[6] [¶ 22.] In December 2003, based on these and other accusations related to the alleged 2001 attack, Leisinger sued Jacobson for defamation. This claim was contained in a permissive counter-claim to Jacobson's unrelated conversion lawsuit filed against Leisinger. Jacobson moved for summary judgment based on Leisinger's failure to bring the suit within the two-year statute of limitations.^{FN3} The circuit*745 court granted Jacobson's motion, holding that the alleged act occurred over two years prior to Leisinger filing the lawsuit and that Leisinger had actual knowledge of the defamatory act over two years prior to the lawsuit being filed. Therefore, the circuit court granted Jacobson's motion for summary judgment and dismissed Leisinger's counter-claim. Leisinger appeals and we affirm.

^{FN3.} Jacobson also moved for summary judgment contending that no claim for defamation may be based on any communication made "[i]n any legislative or judicial proceeding, or in any other official proceeding authorized by law." SDCL 20-11-5(2). The circuit court denied this motion. Although Jacobson filed a notice of review on

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the denial, we do not reach this issue for two reasons. First, denials of summary judgment motions do not constitute final judgments, and therefore are not reviewable without good cause. Big Sioux Twp. v. Streeter, 272 N.W.2d 924, 926 n. 1 (SD 1978) (noting unless a trial court indicates there is good cause to appeal we will not review orders that do not amount to a final judgment). Second, based on our holding, below, we need not address Jacobson's issue.

[¶ 23.] Whether the circuit court erred when it dismissed Leisinger's defamation claim.

STANDARD OF REVIEW

[7][8][9][10][11][12] [¶ 24.] Our standard of review regarding summary judgment is well established:

[W]e must determine whether the moving party demonstrated the absence of any genuine issue of material fact and showed entitlement to judgment on the merits as a matter of law. The evidence must be viewed most favorably to the nonmoving party and reasonable doubts should be resolved against the moving party. The nonmoving party, however, must present specific facts showing that a genuine, material issue for trial exists. Our task on appeal is to determine only whether a genuine issue of material fact exists and whether the law was correctly applied. If there exists any basis which supports the ruling of the trial court, affirmance of a summary judgment is proper.

Cooper v. James, 2001 SD 59, ¶ 6, 627 N.W.2d 784, 787 (citation omitted). When summary judgment is granted on a statute of limitations defense:

The burden of proof is upon the movant to show clearly that there is no genuine issue of material fact and that he is entitled to judgment as a matter of law. When faced with “ ‘a summary judgment motion where the defendant asserts the statute of limitations as a bar to the action and presumptively establishes the defense by showing the case was brought beyond the statutory period, the burden shifts to the plaintiff to establish the existence of material facts in avoidance of the statute of limitations[.]’ ” It is well settled that “ ‘[s]ummary judgment is proper on statute of limitations issues only when application of the law is in question, and

not when there are remaining issues of material fact.’ ” Generally, a statute of limitations question is left for the jury; however, deciding what constitutes accrual of a cause of action is a question of law and reviewed de novo.

Id. ¶ 7, 627 N.W.2d at 787 (citations omitted).

ANALYSIS AND DECISION

[¶ 25.] Leisinger argues that the circuit court erred when it interpreted the statute of limitations for defamation actions as accruing on occurrence of the tort rather than his discovery. Moreover, he claims that application of the “discovery rule” would position his pursuit of this action within the statute of limitations.

[¶ 26.] The statute of limitation for a defamation action is provided in SDCL 15-2-15.^{FN4} Thereunder, a defamation lawsuit *746 must be commenced within two years from the accrual of the cause of action.

FN4. Pertinent portion of SDCL 15-2-15 reads:

Except where, in special cases, a different limitation is prescribed by statute, the following civil actions other than for the recovery of real property can be commenced only within two years after the cause of action shall have accrued:

(1) An action for libel, slander, ...

[13] [¶ 27.] Leisinger first argues that the “accrual” date of his cause of action for defamation, under SDCL 15-2-15, relates to the date when he, the victim, had actual or constructive notice of the defamation, citing Strassburg v. Citizens State Bank, 1998 SD 72, ¶ 10, 581 N.W.2d 510, 514 (stating “statute of limitations ordinarily begins to run when the plaintiff either has actual notice of a cause of action or is charged with notice”) and other similar cases as authority. However, none of the cases cited specifically interpret SDCL 15-2-15, nor do they discuss defamation. See Strassburg, 1998 SD 72, ¶ 10, 581 N.W.2d at 514 (conversion claim accruing under SDCL 15-2-13); Wissink v. Van De Stroet, 1999 SD 92, ¶¶ 8, 12, 598 N.W.2d 213, 215-16 (breach of contract, conver-

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sion, unjust enrichment (constructive trust), accruing under SDCL 15-2-13); Huron Center, Inc. v. Henry Carlson Co., 2002 SD 103, ¶¶ 5, 11, 650 N.W.2d 544, 546-47 (breach of contract accruing under SDCL 15-2-13).

[14] [¶ 28.] As noted earlier, Leisinger's cause of action for defamation is governed by SDCL 15-2-15. Generally the accrual date for a defamation action begins on the publication^{FN5} of the defamatory act. Davenport v. City of Corning, 2007 WL 3085797, at *6 (Iowa Ct.App.2007); Hayes v. Blue Cross Blue Shield of Minnesota, Inc., 21 F.Supp.2d 960, 978 (D.Minn.1998); LaPan v. Myers, 241 Neb. 790, 792, 491 N.W.2d 46, 49 (1992); White v. Fawcett Publications, 324 F.Supp. 403, 404-05 (D.C.Mo.1971); see also Francis M. Dougherty, Limitation of Actions: Time of Discovery of Defamation as Determining Accrual of Action, 35 A.L.R.4th 1002, § 2 (1985).

FN5. Black's Law Dictionary defines publication, in the defamation context, as: “[t]he communication of defamatory words to someone other than the person defamed.” 1242 (7th ed.1999).

[¶ 29.] Alternatively Leisinger argues for the adoption of the “inherently undiscoverable” doctrine. He asserts that because the alleged defamatory material was statutorily confidential^{FN6} he cannot be charged with having knowledge of the acts until he had actual or constructive notice of the defamation, claiming that where the defamatory act is “secretive or inherently undiscoverable [due to the] nature of the publication” courts have permitted the more relaxed “discovery rule” for defamation. Staheli v. Smith, 548 So.2d 1299, 1303 (Miss.1989) (adopting the “discovery rule” for libel in the limited occasions when the publication is “secretive or inherently undiscoverable”). Although it is persuasive, we need not reach this limited application of the so-called “discovery rule.”

FN6. SDCL 23-5-11 states that information related to ongoing investigation may be withheld from the public. SDCL 23A-28B-36 plainly states that information provided to the Crime Victims' Compensation Program is confidential. Jacobson's alleged defamatory statements were made to the police and to the Crime Victims Compensation

Program.

[15][16] [¶ 30.] Leisinger's appeal must fail because of the following. In Leisinger's own affidavit he stated: “A Minnehaha deputy sheriff mentioned to me sometime during the *Summer of 2001* that Jacobson had alleged to law enforcement that I assaulted her at her home. I had nothing to do with this I did not assault her.” (Emphasis added). By Leisinger's own admission he knew of the alleged defamation in the summer of 2001, yet failed *747 to commence any action until December 11, 2003, well over two years after he clearly had actual knowledge of the defamatory statements. This Court has stated:

when a party testifies to positive and definite facts which, if true, would defeat his right to recover or conclusively show his liability, and such statements are not subsequently modified or explained by him so as to show that he was mistaken although testifying in good faith, it has generally been held that he is conclusively bound by his own testimony, and cannot successfully complain if he is nonsuited or the court directs a verdict against him.

Miller v. Stevens, 63 S.D. 10, 16, 256 N.W. 152, 155 (1934) (citation omitted). Moreover, during oral arguments Leisinger's attorney conceded that Leisinger had constructive knowledge of the alleged defamation on December 10, 2001, over two years prior to filing the lawsuit.^{FN7}

FN7. Although Leisinger claims his permissive counterclaim relates back to the filing of Jacobson's conversion claim, effectively tolling the statute of limitations, this argument is without merit. Only compulsory counterclaims benefit from the relation back doctrine. See WRIGHT, MILLER & KANE, FEDERAL PRACTICE AND PROCEDURE: CIVIL 2d § 1425 at 189-90 (West 1990). Indeed, even in the cases cited to this Court by Leisinger, Aramony v. United Way of America and MacDonald v. Riggs, permissive counterclaims are not permitted to benefit from the relation back doctrine. Aramony v. United Way of America, 969 F.Supp. 226, 231 (S.D.N.Y.1997) (stating “counterclaim tolls its limitations period at the filing of the initial complaint if it is compulsory, but not until the service of

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the counterclaim if it is permissive”) (citations omitted); MacDonald v. Riggs, 166 P.3d 12, 18 (Alaska 2007) (stating that the counterclaim is compulsory and relates back “if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim”) (citation omitted).

[¶ 31.] The defamation claim was untimely and must fail. Leisinger failed to bring suit before the tolling of the statute of limitations.

[¶ 32.] We reverse and remand Jacobson's request for attorney fees (# 24991) and affirm the dismissal of Leisinger's defamation claim (# 24492 & # 24498).

[¶ 33.] GILBERTSON, Chief Justice, and SABERS, KONENKAMP and ZINTER, Justices, concur.

[¶ 34.] MILLER, Retired Justice, sitting for MEIERHENRY, Justice, disqualified.
S.D.,2008.

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