

2007

Horton V. Bourne Partnership Ltd., a Utah limited partnership v. STC Holdings, a Utah general partnership, Steve Glezos, an individual, and Glen Pettit, an individual : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

HORTON V. BOURNE PARTNERSHIP, LTD., a
Utah limited partnership,

Plaintiff and Appellee,

v.

STC HOLDINGS, a Utah general partnership;
STEVE GLEZOS, an individual; and GLEN
PETTIT, an individual,

Defendants and
Appellants.

Docket No. 20070326-CA

BRIEF OF APPELLEE

APPEAL FROM THE ORDERS OF THE SECOND JUDICIAL DISTRICT COURT, DAVIS COUNTY,
HONORABLE THOMAS L. KAY, DATED SEPTEMBER 8, 2006 AND APRIL 3, 2007

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LIST OF PARTIES

HORTON V. BOURNE PARTNERSHIP, LTD.

PLAINTIFF AND APPELLEE

STC HOLDINGS

DEFENDANT AND APPELLANT

LAND SOLUTIONS, L.C.

DEFENDANT AND APPELLANT

STEVE GLEZOS

DEFENDANT AND APPELLANT

GLEN PETTIT

DEFENDANT AND APPELLANT

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STATEMENT OF JURISDICTION

This is an appeal from a final judgment of the Second Judicial District Court in and for Davis County, State of Utah. The Utah Supreme Court has jurisdiction under Utah Code Ann. § 78-2-2(3)(j). This appeal is subject to transfer by the Supreme Court to this Court pursuant to Utah Code Ann. § 78-2-2(4). The Supreme Court transferred this appeal to the Court of Appeals by Order dated April 23, 2007. (R. at 750). This Court has jurisdiction pursuant to Utah Code Ann. § 78-2a-3(2)(j).

DETERMINATIVE STATUTES AND RULES

The statutes and rules whose interpretation is determinative of the appeal or are of central importance to the appeal are as follows:

Utah Code Ann. § 38-9-1

Utah Code Ann. § 38-9-4

Utah Code Ann. § 38-9-7

Utah Code Ann. § 78-33-2

Utah Code Ann. § 78-33-11

Utah Code Ann. § 78-33-12

Utah Code Ann. § 78-40-1

Utah R. Civ. P. 7(c)

Utah R. Civ. P. 19

Utah R. Civ. P. 56

Utah R. Civ. P. 59

Utah R. Civ. P. 60

These statutes and rules are set out verbatim in Addendum A to this brief.

STATEMENT OF THE CASE

A. Nature of the Case.

1. This is an appeal, ostensibly from an order entered September 25, 2006,¹ granting summary judgment in favor of the plaintiff Horton V. Bourne Partnership, Ltd., (“Bourne”), and from a judgment, entered September 25, 2006, which implements that order. However, the asserted grounds for appeal were either not raised in the trial court in connection with the order and judgment appealed from, or not raised at all.

B. Course of Proceedings and Disposition in the Trial Court.

2. Bourne filed its Complaint in this matter on September 20, 2005. (R. at 1.) The Complaint named as defendants two individuals, Steve Glezos (“Glezos”) and Glen Pettit (“Pettit”). (*Id.*) It also named an entity called “STC Holdings,” which it alleged was a partnership between Glezos and Pettit. (*Id.*)

3. The Complaint alleged that Bourne was the owner of some 16.19 acres of real property located in Davis County, Utah (the “Property”), which it had contracted to sell to defendants by means of a “Purchase Agreement” it entered with “STC Holdings or assigns.” (R. at 23.) The Purchase Agreement provided that STC Holdings was to pay Bourne “\$600,000 or \$37,060 per net useable acre” on a Closing date (*i.e.*, on or before July 13, 2005) in exchange for the Property. (R. at 4, 9.)

¹ Appellants Notice of Appeal states that they are appealing from an order dated March 3, 2007. There is no such order. Adding to the confusion, Appellants’ caption indicates that the case is on appeal from orders dated September 8, 2006 and April 3, 2007. There is no September 8, 2006 order. Bourne assumes Appellants meant to refer to the trial court’s summary judgment order entered September 25, 2006.

4. The Complaint alleged that the defendants had failed in several respects to comply with their obligations under the Purchase Agreement (R. at 4-14), and that the Closing date had come and gone without proper performance by defendants. (R. at 9.) As a result, the Complaint alleged that the Purchase Agreement “expired by its terms and any beneficial interest STC had in the property was extinguished by operation of law.” (R. at 10.)

5. The Complaint further alleged that after the failed Closing, defendants had wrongfully filed a “Notice of Interest” on the Property, when they knew they had breached the Purchase Agreement, and had no rights beneficial or otherwise in the Property. (R. at 11-13.)

6. On the basis of these allegations, the Complaint pled six causes of action: (1) a declaratory judgment claim, under Utah Code Ann. § 78-33-1 *et seq.*, pursuant to which Bourne sought a declaration regarding the meaning of certain provisions of the Purchase Agreement, and a declaration that defendants had failed to comply with those provisions; (2) a claim seeking to have title quieted in Bourne against claims and interests adverse to Bourne; (3) a claim for breach of the Purchase Agreement; (4) a claim seeking to have a “Notice of Interest” filed by defendants declared a wrongful lien, and null and void; (5) a claim for slander of title; and (6) a claim for interference with economic relations. (R. at 10-14.)

7. STC Holdings and Glezos served an Answer to the Complaint on October 14, 2005. (R. at 34.) Pettit served an Answer on February 9, 2006. (R. at 104.) The Answers asserted, among other defenses, that Bourne had failed to join an indispensable

party, Land Solutions, L.C. (R. at 25, 101.) The Answers then cryptically claimed Land Solutions was a Utah limited liability company “which holds the ‘doing business as’ name registration for ‘STC Holdings,’ which is an artificial name and/or which is the assignee of the enforceable contractual rights to acquire the parcel pursuant to the enforceable sale-purchase agreement.” (R. at 25.)

Land Solutions’ Intervention

8. On October 14, 2005, Land Solutions, represented by the same counsel as all the other defendants, filed a motion to intervene. (R. at 35-37.) Bourne did not oppose intervention, and on November 23, 2005 the trial court orally granted Land Solutions’ motion and instructed Land Solutions’ counsel to prepare a written order. (R. at 41-42.)

9. Bourne objected to Land Solutions’ proposed written order because, in addition to allowing Land Solutions’ intervention, it purported to dismiss STC Holdings from the case. Bourne’s counsel prepared a revised version of the order, which clarified that STC Holdings was not dismissed, approved it as to form, and transmitted it to defendants’ counsel. (R. at 685, 770:7.)

10. Defendants’ counsel apparently failed to submit any proposed written order to the court regarding Land Solutions’ intervention, and no written order was ever entered. (R. at 770: 7-8.)

11. However, after filing the motion to intervene, Land Solutions participated in virtually all proceedings before the trial court, without any objection from Bourne. Defendants’ counsel thereafter appeared as “Attorney for Defendants STEVE GLEZOS,

STC HOLDINGS, ***LAND SOLUTIONS, L.C.*** and GLEN PETTIT,” (R. at 90, 97, 100, 105, 345, 380, 399, 467, 470, 584, 587, 597, 600, 655 and 657 (emphasis added)).

Virtually every paper defendants filed was filed on behalf of Land Solutions. (R. at 90, 97, 100, 105, 110, 345, 380, 399, 467, 587, 597, 600 and 655.)

Motion to Dismiss Glen Pettit

12. On February 10, 2006, concurrently with Pettit’s Answer, defendants filed a “Motion to Dismiss Glen Pettit From Litigation.” (R. at 110.) In the motion (presumably filed under Rule 12), defendants contended that Pettit should be dismissed because “alleged co-defendant GLEN PETTIT has no involvement in the said purchase-sale transaction.” (R. at 106.) Relying on an affidavit from Glezos, the motion further contended that Pettit was not “associated with LAND SOLUTIONS, L.C. as a member, manager, investor, employee or agent of any kind,” (*id.*), that the Purchase Agreement was negotiated by Glezos “for business purposes and not in any kind of ‘agency’ or ‘partnership’ relation for or in behalf of Mr. PETTIT.” (*Id.*)

13. Bourne filed a memorandum in opposition to the motion on February 27, 2006, (R. at 162, 168), pointing out that under Rule 12 defendant’s motion could challenge only the legal sufficiency of the allegations of Bourne’s Complaint, not their truth. (R. at 163.) Bourne’s memorandum further pointed out that, despite defendants claim that Pettit had “no involvement” in the sale, defendants had produced documents which showed the opposite. (R. at 166.) In particular, as part of their initial disclosures defendants had produced a “Settlement Statement” for the Bourne Property signed by Pettit pursuant to which defendants were claiming they had properly closed under the

Purchase Agreement. On this basis, Bourne urged there was “evidence that Mr. Pettit was involved in the Purchase Agreement, and [that] Mr. Glezos and Mr. Pettit operate as partners.” (R. at 167.)

14. Thereafter the motion laid dormant. A “Request to Submit” for decision was finally filed on August 10, 2006, just four days before the previously scheduled hearing on Bourne’s motion for summary judgment. (R. at 470.) No request for hearing was filed until after Bourne’s summary judgment motion has been granted. (R. at 655-56.)

Bourne’s Motion for Summary Judgment

15. On April 17, 2006, Bourne filed its Motion for Summary Judgment against defendants (“Summary Judgment Motion”). (R. at 342-344.) The motion sought an order “(1) granting this Motion for Summary Judgment on all causes of action alleged by Plaintiff in this action; (2) awarding damages; and (3) requiring Defendants to pay costs and fees incurred by Plaintiff in bringing this lawsuit.” (*Id.*)

16. On May 2, 2006, defendants (including Land Solutions and Pettit) filed a consolidated response to Bourne’s motion. (R. at 345-377.) The response failed to comply with Utah R. Civ. P. 7(c)(3)(B) in that it did not include a “verbatim restatement of each of the moving party’s facts that is controverted.” In the few places it did take issue with the undisputed facts, it also failed to comply with Rule 56(e)’s requirement that a party opposing a summary judgment motion “not rest upon the mere allegations or denial of the pleadings,” but “set forth specific facts showing that there is a genuine issue for trial.” Utah R. Civ. P. 56(e); *see* (R. at 345-377, 574). In fact, in several places in

their brief defendants specifically stated “the Defendants believe and assert that the ‘material facts’ are not in ‘genuine dispute.’” (R. at 345-346.)

17. Defendants argued that Bourne was advancing an erroneous interpretation of the Purchase Agreement, (R. at 349-52), and that they had complied with the Purchase Agreement, (R. at 353-57).

18. But they were silent on the arguments they now urge as grounds for appeal. In particular, defendants did not argue either (i) that they had performed all relevant acts in a “corporate capacity,” or (ii) that Bourne had failed to join an indispensable party. (R. at 345-377.)

19. The Summary Judgment Motion arguments were heard by the trial court on August 14, 2006. (R. at 472.) The court granted the Summary Judgment Motion. (*Id.*)

20. Bourne prepared the order granting Plaintiff’s Motion for Summary Judgment and hand-delivered it to defendants for their review on September 8, 2006. (R. at 573-583.) Defendants did not make any objection to the form or content of the proposed Summary Judgment Order. Accordingly, after the time specified in Rule 7(f)(2) of the Utah Rules of Civil Procedure had passed, Bourne submitted the proposed Summary Judgment Order to the court and the defendants on September 19, 2006. (R. at 583.)

21. The court entered the Order Granting Summary Judgment on September 25, 2006. (R. at 573-583.) The Judgment was entered the same day. (R. at 568-572.)

Defendants' Post-Judgment Motions

22. On October 10, 2006, defendants filed a motion styled “Motion to Set Aside Judgment, Motion for Relief from Judgment, Motion for New Trial and for Other Relief” (“Motion to Set Aside”). (R. at 584.) No supporting memorandum was filed with the motion. (*Id.*)

23. Defendants’ two-and-a-half page Motion to Set Aside set forth three grounds for the requested relief: (1) the judgment was entered prematurely; (2) the judgment improperly “implicated” defendant Pettit personally; and (3) the judgment improperly “implicated” defendant Glezos personally. (R. at 584-586.) The motion did not cite to any facts or legal authority to support its requests. (*Id.*)

24. Then, on December 26, 2006, defendants filed a “Rule 60(b) *U.R.C.P.* Motion.” (R. at 661-663.) There, defendants argued that (1) it was a “mistake” to hold Glezos and Pettit personally liable, and for Land Solutions not to have intervened; and (2) it was a mistake for defendants not to have more strenuously and effectively argued against Bourne’s motion for summary judgment. (R. at 666-78.) Defendants asked the trial court correct these “mistakes,” under Rule 60(b), by: (1) dismissing Glezos and Pettit, (2) allowing Land Solutions L.C. to intervene, (3) setting aside the Judgment, (4) nullifying plaintiff’s motion for summary judgment and (5) granting defendants 30 days to file a counterclaim. (R. at 677.)

25. Bourne timely opposed both the Motion to Set Aside (R. at 605-611), and the Rule 60(b) Motion (R. at 679-691).

January 25, 2007 Hearing

26. On January 25, 2007, the trial court heard arguments on all pending matters, including defendants' post trial motions and defendants' objections to Bourne's claimed attorneys' fees. (R. at 770.)

27. The defendants admitted that through all of their motions they were essentially looking for a "do-over." (R. at 770:9.) Even as defendants admitted their ultimate goal, they also admitted that they, the defendants, were at fault for the alleged "mistakes" made by the trial court, including: (1) the failure to submit an order granting Land Solutions, L.C. intervention (R. at 770:7-8), (2) the failure to raise the issue of individual liability during the motion for summary judgment briefing (R. at 770:8), (3) the failure to join indispensable parties (R. at 770:14) and (4) the failure to make a counterclaim (R. at 770:11).

28. At the hearing, defendants withdrew their "Objections" to Proposed Award of Plaintiff's Attorney's Fees and Demand for Trial on Attorney's Fees Issue/Claims. (R. at 770:29-30.) The trial court denied all of the remaining motions before it. (R. at 770:35-39.)

29. Defendants filed notice of appeal on April 13, 2007. (R. at 732.) This appeal is subject to transfer by the Supreme Court to this Court pursuant to Utah Code Ann. § 78-2-2(4). The Supreme Court transferred this appeal to this Court by Order dated April 23, 2007. (R. at 750.)

C. Statement of Facts

30. Because defendants did not properly oppose the statement of undisputed facts in Bourne’s summary judgment motion, the court deemed them admitted. (R. at 574.) However, since the personal liability of Glezos and Pettit was not contested in connection with the summary judgment motion, it was not a focus of the statement of undisputed facts. Notwithstanding that, the record reflects substantial evidence which shows that Glezos and Pettit conducted business in a remarkably casual and flexible manner; one that allowed them change their story depending on the expediencies of the moment.

31. In his pleadings and other court papers, Glezos treats himself, STC Holdings, and Land Solutions as one and the same. For instance, in defendants’ Initial Disclosures, Glezos claims that he “and/or STC HOLDINGS and/or LAND SOLUTIONS, LC” claim entitlement to specific performance as “Buyer” of the Property. (R. at 92.)

32. In his responses to Bourne’s interrogatories, Glezos similarly treats himself, STC Holdings, and Land Solutions as one and the same. For instance, he notes “[t]he answers herein, although written in the first person pronouns (i.e., “I” or “my”) should be deemed to apply also to the business entities.” (R. at 313-314). Thereafter, Glezos describes how he treated the Purchase Agreement:

I signed the Real Estate Purchase Agreement, with addenda, for the Property’s acquisition from the Bourne entity. . . . I thereafter made arrangements for the sale of the Property to Fieldstone Homes. When the “Fieldstone” transaction did not

materialize, I made arrangements to effect the sale to Mr. PETTIT, acting through his business entity.”

(R. at 315.)

33. The May 3, 2006 Affidavit of Steve Glezos, which defendants filed in connection with their opposition to Bourne’s summary judgment motion, similarly reflects either that Glezos (and not Land Solutions or STC Holdings) was the “buyer” of the Property, or that Glezos and Land Solutions and STC Holdings are one and the same:

In 2004 I contacted my real estate agent Patrick Bodnar and requested that he contact Mr. Peter Hanlon . . . for purpose of making inquiry concerning the sale of the subject parcel. . . . He presented to the Mr Hanlon the 9-page “PURCHASE AGREEMENT” . . . which had been prepared by me.

* * * *

I directed Mr. Bodnar to tell Mr. Hanlon the “closing” was to occur at Merrill Title Company offices in Midvale, Utah on 8 July 2005. I caused to be deposited with Merrill Title (as designated “escrow”) the sum of \$430,062.96, which represented the \$37,060 per acre sales price, times the 11.5998 “net useable acres. . . .”

(R. at 380-382).

34. The original documents Glezos used to document his transactions similarly reflect a unity of interest and ownership between Glezos and Land Solutions and STC Holdings. For instance, on March 14, 2005, *Land Solutions* entered an “Option and Purchase Agreement” with Pettit’s 90th South Joint Venture, which purported to give them an option to purchase the Property. (R. at 337-338). However, Land Solutions, STC Holdings and Steve Glezos all separately signed as “Seller.” (R. at 339)

35. Then, on July 7, 2005, another “Purchase Agreement” was signed, wherein “Land Solutions, L.C. or STC Holdings, or Steve Glezos” assign and transfer the same property to “90th South Joint Venture, L.C., or Assigns.” (R. at 339).

36. Notwithstanding the purported option and assignment, on July 15, 2005, after the transaction failed to close, STC Holdings filed a Notice of Interest on the Property. (R. at 229)

37. Similarly, in his deposition Pettit provides substantial evidence that there is a unity of interest and ownership between himself and 90th South Joint Venture. First, he testifies that he “came up with the name 90th South Joint Venture” because it owns a piece of land on 90th South.” (R. at 701.) Second, he testified that 90th South Joint Venture is wholly owned by Glen Pettit. Third, Pettit consistently described the interest in the Agreement and the Property as his personally, saying that it was his interest to trade. (R. at 609, 705.)

SUMMARY OF THE ARGUMENTS

I. The trial court properly entered summary judgment against defendants Steve Glezos and Glen Pettit. Bourne's Motion for Summary Judgment plainly sought judgment against Glezos and Pettit, personally. Yet neither Glezos nor Pettit argued that personal liability was inappropriate because they were acting exclusively in a "corporate capacity" in their dealings with Bourne. Indeed, the identity of the "Buyer" in the context of the Purchase Agreement was fluid, depending on the exigencies of the moment. During the proceedings, defendants made no attempt to distinguish any separate rights or liabilities of each defendant under the Purchase Contract.

It was not until after the Judgment had been entered that defendants argued, for the first time, that Glezos and Pettit had no personal liability in this matter. Defendants' failure to raise this issue before the trial court in the context of the summary judgment motion precludes them from raising the issue on appeal. Defendants' post-trial motions are ineffective to preserve the issue because issues raised in motions filed after entry of a summary judgment order are not properly considered in reviewing a challenge to the trial court's summary judgment order. Further, defendants have not properly challenged the trial court's denial of their post-trial motions. Defendants are therefore foreclosed from pursuing on appeal the arguments rejected by the trial court.

Different legal principles govern Glezos' and Pettit's personal liability under each of the causes of action pled in this case. Under Counts I and II of the Complaint, Bourne sought a declaratory judgment regarding the Purchase Agreement and an order quieting title in the Property in Bourne against all adverse claims, including those of Glezos and

Pettit. In determining whether the declaratory judgment and quiet title order were properly entered against Glezos and Pettit, the salient question is whether Glezos or Pettit has or claims an interest in the Purchase Agreement or Property which would be affected by the declaration and quiet title order. Based upon the undisputed facts, the answer is plainly “yes.” Accordingly, the trial court could properly enter a declaration regarding Glezos’ and Pettit’s respective rights, if any, in the Purchase Agreement, and could quiet title to the Property in Bourne against their adverse claims, whatever the nature of their claims or interest.

Count III of the Complaint asserted a claim against all defendants for breach of the Purchase Agreement. While Glezos and Pettit seek to be shielded from personal liability on the ground that they acted on behalf of their respective entities, they acknowledge that a trial court may disregard the corporate form under the equitable “alter ego” doctrine. Glezos and Pettit never asserted the bona fides of their purported limited liability companies in opposing Bourne’s motion for summary judgment. Conversely, Bourne presented substantial evidence that Glezos and Pettit conducted their private and corporate business on an interchangeable basis and that there was such a unity of interest and ownership that the separate personalities of Glezos and Pettit and their various entities ceased to exist. Based upon this substantial undisputed evidence, the trial court properly disregarded the form of Glezos’ and Pettit’s entities and imposed personal liability upon Glezos and Pettit, including liability for Bourne’s attorneys’ fees.

Counts V and VI of the Complaint asserted tort claims for slander of title and interference with economic relations against all defendants, including Glezos and Pettit

individually. Utah law is clear that a corporate officer may be held personally liable for corporate torts in which they participate without piercing the corporate veil. Even assuming, *arguendo*, that Glezos and Pettit were acting in “corporate capacities,” the undisputed facts show that both Glezos and Pettit personally participated in conduct which the trial court held slandered Bourne’s title and interfered with Bourne’s economic relations. Consequently, the trial court could properly enter judgment against Glezos and Pettit, individually, on these tort claims.

II. The trial court did not err in not requiring formal joinder of Land Solutions, L.C. as a party to this action because Land Solutions was a *de facto* party. Defendants contend, and therefore concede, that “STC Holdings” is only a fictitious name for Land Solutions, not a separate entity. Accordingly, when Bourne sued STC, it effectively sued Land Solutions. Furthermore, notwithstanding the failure of its formal attempt to intervene, Land Solutions nevertheless fully participated in all proceedings before the trial court without any objection from Bourne. Indeed, Defendants’ counsel appeared as “Attorney for ... Defendant Land Solutions, L.C.” and filed numerous substantive papers on Land Solutions’ behalf. In view of Land Solutions’ substantial, active participation in this litigation, both in its own name and in its fictitious name, no reversible error may be predicated on the lack of formal joinder.

Similarly, the trial court did not abuse its discretion by not ordering the joinder of 90th South Joint Venture as an indispensable party. Defendants failed to raise this issue in the trial court, thus depriving the trial court of the opportunity to rule on the issue in the first instance. While it is true that failure to join an indispensable party may be raised

for the first time on appeal, defendants must still address from an appellate perspective the competing interests suggested by Rule 19(b), which are: (1) whether 90th South has an interest greater than Bourne's interest in preserving its fully litigated judgment; (2) whether 90th South will be subject to multiple litigation or inconsistent relief; (3) the nature of 90th South's interest, if any; and (4) the interest of the court in a complete, consistent and efficient settlement of the case, including the fact that the time and expense of a trial have already been spent.

Defendants wholly ignore these competing interests and argue only that the trial court should have *sua sponte* joined 90th South when Pettit's relationship with 90th South became apparent. Defendants further fault Bourne for not joining 90th South as a party. However, defendants fail to acknowledge their own culpability in the matter. If, as defendants allege, 90th South had an interest in the transaction, it could have easily sought intervention, thus avoiding the convoluted process of taking "steps" to address the issue of nonjoinder. 90th South's failure to intervene belies defendants' argument that failure to join 90th South was an abuse of the trial court's discretion. Where 90th South was plainly aware of this action, but chose not to claim an interest by failing to seek intervention, it cannot be considered a necessary or indispensable party.

Even if this Court were inclined to consider whether joinder of 90th South is necessary or appropriate, defendants have made no effort to present evidence from the record to demonstrate that 90th South is a necessary party under Utah R. Civ. P. 19(a). In fact, the record plainly shows that 90th South is not a necessary party. Complete relief in the form of the declaratory judgment and quiet title order could be, and was, accorded

among those who were already parties, 90th South's interests were more than adequately protected by the presence of its manager, sole member, and privy Glen Pettit, and none of the parties are subject to a substantial risk of incurring multiple or inconsistent obligations. 90th South is not a "necessary" party and the trial court did not abuse its discretion but not ordering its joinder.

ARGUMENT

I. THE TRIAL COURT DID NOT ERR IN ENTERING JUDGMENT AGAINST STEVE GLEZOS AND GLEN PETTIT.

Defendants claim that the trial court erred by entering summary judgment against Steve Glezos and Glen Pettit “personally.” (Appellants Br. 13-15.) Defendants claim that this ruling was error because – according to defendants – the trial court found that “Glezos and Pettit were acting on behalf of limited liability companies”², and “Utah law protects organizers, members, managers and employees from personal liability for actions taken while acting for the limited liability company.” (*Id.* at 14.)

As we show in the sections below, this claim of error should be rejected for two reasons: (1) defendants did not, in opposition to Bourne’s motion for summary judgment, timely raise the “corporate capacity” argument they now urge. Accordingly, they may not claim it as a basis to appeal the summary judgment order; (2) the trial court’s entry of judgment against Glezos and Pettit personally was, in any event, correct under the undisputed facts and applicable law.

² This assertion overreads the trial court’s order. With respect to Glezos, the order stated only that “the Bourne Partnership and Steve Glezos, acting as STC Holdings, entered a contract for the purchase and sale of the Burke Lane Property.” (R. at 575.) But “acting as” Land Solutions does not address – much less foreclose – Glezos from being found to be Land Solutions’ alter ego. Nor does it address or foreclose Glezos’ personal participation in tortious conduct. Similarly, with respect to Pettit, the order stated only that he “executed the Assignment of Purchase Agreement as the authorized agent and sole member of 90th South Joint Venture, L.C., a Utah limited liability company.” (R. at 578.) This language also does not address whether Pettit is 90th South Joint Venture, or whether Pettit personally participated in tortious conduct.

A. Defendants Failed To Timely Raise “Corporate Capacity” As An Objection To Bourne’s Motion For Summary Judgment And Are Barred From Doing So Here.

The first problem with defendants’ “corporate capacity” argument is that they did not raise it in the trial court when they opposed Bourne’s motion for summary judgment. Bourne filed its summary judgment motion on April 17, 2006. (R. at 342.) The motion clearly sought judgment in Bourne’s favor on all claims for relief, (R. at 342), and clearly sought judgment against all defendants. (*Id.*) In opposition, all defendants (*i.e.*, “Steve Glezos, STC Holdings, Land Solutions, L.C. and Glen Pettit”) filed one consolidated memorandum. (R. at 345.) These defendants asserted that Bourne was advancing an erroneous interpretation of the Purchase Agreement. (R. at 349-52.)³ They further argued, based on their own interpretation of the Purchase Agreement, that Bourne’s claims about the requirements of the contract were unfounded. According to the defendants, (i) the Purchase Agreement did not require *defendants* “to make objection to the usability of the property” (R. at 353-54); (ii) defendants’ calculation of the amount of “net usable acres,” and not Bourne’s, was in accordance with the requirements of the Purchase Agreement (R. at 355-56); (iii) defendants were not required to “tender the full

³ Defendants conceded that the case could appropriately be decided on a motion for summary judgment. (R. at 345-46 (“Defendant is not, per se, opposed to the Court’s adjudicating this case on a ‘summary judgment’ basis. . . . Indeed, the Defendants believe and assert that the ‘material facts’ are not ‘in genuine dispute’”), 348 (“the Defendants welcome and invite the Court’s exercise of the ‘declaratory judgment’”), 349 (“The Defendants do not necessarily oppose the ‘declaratory judgment’ portions of Plaintiff’s ‘motion’; in fact, the Defendants welcome and invite the Court’s insight and definitive ruling as to the parties’ rights and obligations”).)

purchase price of \$600,000” at closing (R. at 356); and (iv) the Purchase Agreement did not expire on July 13, 2005 (R. at 357).⁴ But nowhere in defendants’ opposition did they suggest that Glezos or Pettit should be shielded from individual liability because, in dealing with Bourne, they had been acting solely in a bona fide “corporate capacity” rather than as individuals. Nor did they suggest that the court treat them separately in considering Bourne’s motion.

It is axiomatic that this Court does not entertain on appeal claims that were not raised below. *See, e.g., Chapman v. Uintah County*, 81 P.3d 761, 765 (Utah App. 2003); *State v. Hodges*, 2002 UT 117, ¶5, 63 P.3d 66; *see also James v. Preston*, 746 P.2d 799, 801 (Utah Ct. App. 1987) (“matters not raised in the pleadings nor put in issue at the trial may not be raised for the first time on appeal”); *Bundy v. Century Equip. Co.*, 692 P.2d 754, 758 (Utah 1984); *see Dikeou v. Osborn*, 881 P.2d 943, (Utah App. 1994); *U.P.C., Inc., v. R.O.A. General, Inc.*, 1999 UT App 303, ¶ 33, 990 P.2d 945; *Myrah v. Campbell*, 2007 UT App. 168, ¶ 18, 163 P.3d 679.⁵

⁴ In its September 25, 2006, Judgment, the trial court specifically rejected each of these contentions. (R. at 569.) Oddly, in this appeal defendants do not contest these, or any of the trial court's other substantive summary judgment rulings. Instead, defendants apparently object only to the fact that the rulings were made against them individually, as opposed to the limited liability companies they own. (Appellants’ Docketing Statement 2-3 (summarizing the issue on appeal as whether personal liability may be imposed); Appellants’ Br. 1-2 (listing the issues on appeal as whether personal liability may be imposed and whether additional parties should be held liable).)

⁵ Utah courts recognize a limited exception to this rule where the claimed error constitutes "plain error," or where there are "exceptional circumstances." *See Duke v. Graham*, 2007 UT 31, ¶¶ 26-28, 158 P.3d 540 (internal citations omitted). “To

Here, defendants admit that they did not raise their “corporate capacity” argument in connection with plaintiff’s summary judgment motion. Indeed, their brief’s “Citation to Record Showing Issue was Preserved” cites not to their opposition to the motion for summary judgment, or to the summary judgment hearing, but to their “Motion to Set Aside The Judgment, For Relief From The Judgment And For A New Trial.” (Appellants Br. 1.)

A proper and timely-filed Rule 59 motion may toll the time for filing a Notice of Appeal, but that does not make the Rule 59 motion a part of the summary judgment record. Indeed, this Court has made very clear that issues raised in a Rule 59 motion filed after the entry of a summary judgment order are not properly considered in reviewing a challenge to the summary judgment order itself. For instance, in *Dikeou v. Osborn*, 881 P.2d 943, 945 (Utah App.1994), this Court refused to address an argument that a party had improperly “bolstered” the record after summary judgment had been entered, stating “this court is well aware of its responsibility to review a trial court’s grant of summary judgment using only the information on file at the time the trial court granted the motion.” Similarly, in *U.P.C., Inc., v. R.O.A. General, Inc.*, 1999 UT App 303, ¶ 33,

demonstrate plain error, a defendant must establish that ‘(i) an error exists; (ii) the error should have been obvious to the trial court; and (iii) the error is harmful, *i.e.*, absent error, there is a reasonable likelihood of a more favorable outcome for the appellant.’” *Berkshires, L.L.C. v. Sykes*, 2005 UT App 536, ¶ 21, 127 P.3d 1243 (internal citations omitted). But, to raise a claim of “plain error” the appellant must affirmatively assert it in its opening brief. *Id.* at ¶ 20 (internal citations omitted). Here the defendants have not claimed either plain error or exceptional circumstances, and so these doctrines are inapplicable. Even if defendants had so claimed, there is no plain error in this case for the reasons stated in Section 1B below.

990 P.2d 945, in the context of a summary judgment order that was not fully dispositive, this Court refused to consider an argument because it “was not before the trial court until [Appellant’s] Reply Memorandum in support of its [Rule 54(b)] motion to revise.”

Even if defendants’ post-judgment motion were part of the summary judgment record, the defendants have failed to preserve for review any issues raised therein because they have failed to properly challenge the trial court’s denial of that motion. While defendants have appended the “Order On Post-Trial Motions” to their Brief, defendants have failed to set forth any factual or legal argument for reversal of that Order.⁶ (*See* Appellants Br., 1-2 (Statement of Issues Presented on Appeal).)

Defendants’ “Motion To Set Aside” claims to be filed “pursuant to the provisions of Rule 59, Rule 60 and/or other applicable rules of the Utah Rules of Civil Procedure. . . .” (R. at 584), but it failed even to attempt to show any circumstance specified in either rule. It simply set forth three grounds for the requested relief, (1) the judgment was entered prematurely; (2) the judgment improperly “implicated” defendant Pettit personally; and (3) the judgment improperly “implicated” defendant Glezos personally, without providing any action to facts or supporting authority.

It is well settled that “[a] trial court has no discretion to grant a new trial absent a showing of at least one of the circumstances specified in Utah R.Civ.P. 59(a).” *Moon*

⁶ Defendants STC Holdings, Steve Glezos and Glen Pettit subsequently served “Defendants’ Rule 60(b), U.R.C.P., Motion” and supporting memorandum on December 26, 2006. The trial court denied this motion by order filed April 3, 2007. (R. 728-730.) Defendants do not even reference this Rule 60(b) motion or contest the trial court’s denial of the motion.

Lake Electric Assoc. v. Ultrasystems Western Constructors, Inc., 767 P.2d 125, 128 (Utah Ct. App. 1988). Further, even if such a showing is made, “the trial court’s ruling on a motion for a new trial will be disturbed on appeal only for an abuse of discretion.” *Id.*; *see also Lange v. Eby*, 2006 UT App 118, ¶ 6, 133 P.3d 451 (“[a] trial court has discretion in determining whether a movant has shown [Rule 60(b) grounds], and this Court will reverse the trial court’s ruling only when there has been an abuse of discretion”). Defendants have made no effort on appeal to demonstrate that their purported Rule 59 motion showed any of the circumstances specified in Rule 59, nor have they made any effort to show how the trial court’s denial of the motion was an abuse of the trial court’s discretion.

The arguments urged in defendants’ post-trial motion were rejected by the trial court and the trial court’s denial of defendants’ post-trial motion is unchallenged on appeal. Accordingly, defendants’ post-trial motion arguments cannot form the basis for their appeal of the trial court’s summary judgment ruling.

B. The Trial Court Properly Entered Judgment Against Glezos and Pettit Personally.

Even if defendants had preserved their “corporate capacity” argument, it would not provide a ground to reverse the trial court’s summary judgment order. Defendants have painted with a broad brush in making their argument, dealing collectively with all of the claims asserted in the Bourne Complaint. But to properly analyze whether judgment could correctly be entered against Glezos and Pettit, the Court must consider each of the

causes of action pled in the Bourne Complaint separately. Different legal principles govern individual liability under each of the causes of action pled.

1. Bourne’s Declaratory Judgment and Quiet Title Claims.

In Counts I and II of the Complaint, Bourne asked the trial court for a declaratory judgment regarding the meaning of the Purchase Agreement, and to quiet title to the Property in Bourne, against adverse claims (including those of the defendants).⁷

These causes of action are, essentially, creatures of statute. Utah statutes describe who may be named as a defendant in such actions, and what the effect is of any judgment entered on such claims. For instance, the Utah Declaratory Judgments Act, Utah Code Ann. §§ 78-33-1 through -13 allows “[a]ny person interested under a deed, will or written contract . . . [to] have determined any question of construction or validity arising under the instrument . . . [or] contract . . . and obtain a declaration of rights, status or other legal relations thereunder,” (Utah Code Ann. § 78-33-2 (2007)), and it provides Utah courts with the power to make such declarations “whether or not further relief is or could be claimed.” *Id.* § 78-33-1. The statute further provides that proper defendants to a declaratory judgment action include parties “who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceeding.” *Id.* § 78-33-11.⁸ Similarly, under § 78-40-1 of the Utah

⁷ In Count IV, Bourne also sought to have defendants’ “Notice of Interest” on the Property, declared null and void based on the declaration. (R. at 12-13, 15.)

⁸ Despite this language, it is clear that matters litigated and determined by a declaratory judgment are subject to the res judicata rules. 18A CHARLES ALAN WRIGHT, ARTHUR

Code, “[a]n action may be brought by any person against another who claims an estate or interest in real property or an interest or claim to personal property adverse to him, for the purpose of determining such adverse claim.”

Accordingly, in determining whether judgment was properly entered against Glezos and Pettit on the declaratory judgment and quiet title causes of action, the question is, “do Glezos or Pettit ‘have or claim any interest which would be affected by the declaration,’ (*id.* §78-33-11), or do they claim an estate or interest in the Property adverse to Bourne?” The answer is “yes.”⁹

1. Glezos has from the beginning through to today maintained that he has an interest in the Purchase Agreement and the Property, although the way he describes it has changed.

a. Glezos and STC Holdings filed a joint “Answer,” to Bourne’s Complaint. The Answer did not differentiate between the two entities or specify that one maintained an interest in the Property to the exclusion of the other. (Indeed, it defined the term “Defendants” to mean “[t]he Defendants STC HOLDINGS *and* STEVE GLEZOS.” (R. at 24 (emphasis added).) In response to Bourne’s allegation that it was and is “the owner of fee title to and is in possession of the Property. . . .”, (R. at 12),

R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 4446 (2d ed. 2007); *Fidelity Nat’l Bank & Trust Co. of Kansas City v. Swope*, 274 U.S. 123 (1927); *see also Gillmor v. Gillmor*, 2001 UT App. 25, ¶ 4, (unpublished) (stating that a declaratory judgment may have *res judicata* effects).

⁹ Indeed, if they do not have or claim a direct or indirect interest in the real property, it is hard to see why they have gone to the bother of appealing the judgment in this regard.

Glezos' Answer claimed that he and STC Holdings "assert an equitable interest in the subject real estate, pursuant to the aforementioned real estate sale-purchase agreement" (R. at 31). In the Answer's prayer, Glezos asked the trial court for a judgment "that the real estate purchase contract is enforceable according to its terms, that the same should be enforced, and that the Plaintiff should be ordered to specifically comply with the sale requirement and should be judicially ordered to sell to Defendants [i.e., Glezos and STC Holdings] the subject parcel." (R. at 33.)

b. Glezos, STC Holdings, Land Solutions, L.C., and Pettit similarly filed a joint set of "Initial Disclosures." (R. at 90.) There Glezos also claimed an interest in the property:

Defendants (notably, GLEZOS and/or STC HOLDINGS and/or LAND SOLUTIONS, L.C.) claim entitlement to specific performance under the real estate purchase agreement. Alternatively, Defendants – without waiving their claim for specific performance – assert entitlement to compensatory damages based upon the profits they would have realized, had the Plaintiff actually conveyed the parcel to the Defendants, in a timely manner, at the anticipated closing, and the Defendants thereafter been able to develop and/or market the parcel.

(R. at 92.)

2. The record reflects that Pettit also has claimed he has an interest in the Purchase Agreement and the Property, either directly in his own name, or indirectly through 90th South Joint Venture, LLC – a purported limited liability company of which he is the manager and sole member. On March 14, 2005, Pettit purportedly obtained the "exclusive right and privilege to purchase [the Property]," by means of an "Option." (R.

at 337.) The option was prepared with the name of the buyer in blank. (*Id.*) Pettit filled in the name of 90th South Joint Venture, and signed. (*Id.*) On July 7, 2005, Pettit executed another agreement wherein “Land Solution, L.C., or STC Holdings or Steve Glezos” purported to assign to “90th South Joint Venture, L.C. or Assigns,” their interest in the Purchase Agreement. (R. at 339.) At his deposition, Pettit consistently described the interest in the Agreement and the Property as his personally, saying that it was his interest to trade. (R. at 609.) Notwithstanding this assertion, defendants moved to dismiss Pettit from this action on the ground that he had no involvement in the transaction, and he has at various times maintained this as well. (R. at 110-111, 600-604.).¹⁰

¹⁰ Mr. Pettit’s claim of an interest is more apparent in materials that were cited in briefs filed with the trial court, but apparently erroneously were not themselves attached as exhibits. (R. at 609.) For instance, in Bourne’s Opposition to Defendants’ Motion to Set Aside, Bourne cites to pages 24 and 25 of Pettit’s deposition. *Id.* There Pettit testifies as follows:

Q: And then am I right that later, on July 7th, 2005, you and Mr. Glezos executed an Assignment of Purchase Agreement, that’s page three of Exhibit 22?

A: That is the date this paper is signed, but we had always intended that deal be part of that. I don’t know why that date of signature would be different.

Q: It could be earlier, but at least by July 7th of 2005, Land Solutions, by means of this page three, had assigned all of its right, title and interest in that purchase agreement with the Bournes to you?

A: Right.

3. Perhaps most telling in determining whether Glezos and Pettit claim an interest in the Property is the position they are taking in this appeal. While they both want to be dismissed from the case, it is not because they disclaim any interest in the Property. Both want to be dismissed in order to relitigate the summary judgment. Disclaiming an interest in the Property is something both individuals easily could have done, but did not do, in the court below. To the contrary, although defendants have not attacked *the substance* of the trial court's declaratory judgment, in this Court they "seek to have the summary judgment order and judgment *vacated*," and further seek "to have this case remanded with instructions to allow Land Solutions, L.C. [the LLC which Glezos owns and manages] and 90th South Joint Venture LLC [the LLC of which Pettit is the sole member] to intervene, assert counterclaims, conduct discovery, and join third-parties." As defendants' counsel frankly admitted at the hearing on post-trial motions, they "are – basically, Your Honor, for lack of a better term, it's a do-over," (R. at 770 at 9). In other words, Glezos and Pettit are seeking to be dismissed so they can relitigate in the name of their single-member LLCs the summary judgment that they lost as individuals.

Q: And so as of July 7th, whatever purchase or interest there was in that contract with the Horton Bourne Partnership, that was your interest now, correct?

A: Yes.

Deposition of Glen Pettit, at 24-25.

The Utah Declaratory Judgment Act explicitly states that it is to be liberally construed to effect its remedial purpose:

This chapter is declared to be remedial; its purpose is to settle and to afford relief from uncertainty and insecurity with respect to rights, status and other legal relations; and is to be liberally construed and administered.

Utah Code Ann. § 78-33-12. Following this directive, Utah courts have broadly allowed declaratory judgment actions. *See Salt Lake County Comm'n v. Salt Lake County Attorney*, 1999 UT 73, ¶ 12, 985 P.2d 899; *Salt Lake County v. Salt Lake City*, 570 P.2d 119, (Utah 1977). Indeed, Utah courts have, at least tacitly, approved quiet title and declaratory judgment involving portion with interests similar to those presented here. For instance, in *Gray v. Defa*, 135 P.2d 251 (Utah 1943) the plaintiff brought a declaratory judgment action regarding real property, and named as defendants certain individuals who “claimed certain rights in and to the lands through some claim of interest in a contract of sale and certain leasehold agreements, the exact nature of which were unknown to the plaintiff, but were adverse to her title.” *Id.* at 252.

In their Answers and Counterclaims, the *Gray* defendants asserted various interests in the real property arising out of, variously, “a contract to purchase the land,” “separate lease agreements,” and “various assignments of the contract of sale and the leasehold agreements.” *Id.* The Utah Supreme Court held it was error for the trial court to refuse to allow counterclaims in such an action, but apparently had no concern over whether the interests defendants asserted were appropriate to support declaratory judgment or quiet title action. *Id.* Similarly, in *Kelly v. Hard Money Funding, Inc.*, 2004

UT App. 44, ¶ 20, 87 P.3d 734, this court expressed no concern over the fact that an individual sought to prosecute a quiet title action involving real property owned by a limited liability company of which he was a member.

Because Glezos and Pettit claim an interest in the property, the trial court's judgment against them on Counts I and II was correct.

2. Bourne's Slander of Title and Interference With Economic Relations Claims

In Counts V and VI of the Complaint, Bourne asserted a slander of title claim and an interference with economic relations claim against all defendants. (R. at 13-14.) These are tort claims.

In *Armed Forces Insurance Exchange v. Harrison*, 2003 UT 14, ¶ 19, 70 P.3d 35, the Utah Supreme Court explained that officers and directors of corporations could be held personally liable for corporate torts, if they participated in the wrongful conduct. *Id.* (citing 3A William Meade Fletcher, *Fletcher Cyclopedia of the Law of Private Corporations* § 1137, at 209 (rev. ed. 2002)).

In *D'Elia v. Rice Development, Inc.*, 2006 UT App 416, ¶ 43, 147 P.3d 515, this Court explicitly extended these rules to members and managers of limited liability companies:

We are persuaded by those authorities that hold that both limited liability members and corporate officers should be treated in a similar manner when they engage in tortious conduct. We therefore conclude that *Harrison's* imposition of personal liability on corporate officers who participate in a corporation's tortious acts, also applies to limited liability company members or managers.

Id. (citations omitted). In so ruling, this Court made clear that “holding an officer or director personally liable for corporate torts in which they participate is distinct from the piercing the veil doctrine.” *Id.* at ¶ 39 (citing *L.C.L. Theatres, Inc., v. Columbia Pictures Indus., Inc.*, 619 F.2d 455, 457 (5th Cir. 1980)(corporate officer “may be personally as responsible as the corporation itself for tortious acts when participating in the wrongdoing” and “[i]n these circumstances, it is not necessary that the corporate veil be pierced or even discussed”).

Here, defendants’ sole defense is that their limited liability companies shield them. But it is undisputed that Land Solutions, L.C. and 90th South Joint Venture are (i) single member limited liability companies, (R. at 575, 221); (ii) managed respectively by Glezos and Pettit, (R. at 313, 221); and (iii) are not claimed to have any employees, managers, or agents other than Glezos and Pettit (R. at 313, 575, 221). In these circumstances, courts have held individuals liable in tort because the company could only act through the owner. For instance, in *McDonald v. Frontier Lanes, Inc.*, 272 N.E.2d 369, 377 (Ill. App. Ct. 1971) the court stated:

In this case Ceresa was the president, sole shareholder and manager of Frontier. He owned and operated the business and its corporate acts or omissions could only be those participated in by him. The acts and omissions of Frontier giving rise to the negligence charged in this case were not isolated incidents brought about by conduct of an employee, for example, but were a part of the general mode of operation of the corporate business under Ceresa's sole power of direction and control. We find, as a matter of law, that defendant Ceresa is personally liable for the negligence of the corporate defendant, Frontier, in this case.

3. Bourne's Breach of Contract Claim.

Although defendants are loath to admit it, the breach of contract claim (and its concomitant attorneys' fees award) is the only claim to which their "corporate capacity" argument is even relevant. Defendants seek to be shielded from personal liability for the trial court's award of attorney fees on the ground that they acted "on behalf of their respective limited liability companies." Appellants Br. at 14. But even the defendants recognize that a court may disregard the corporate form under the equitable "alter ego" doctrine.

"For purposes of appellate review, the trial court's decision to pierce the corporate veil will be upheld if there is substantial evidence in favor of the judgment." *Colman v. Colman*, 743 P.2d 782, 787 (Utah App. 1987). To disregard the corporate entity under the equitable alter ego doctrine, "two circumstances must be shown: (1) Such a unity of interest and ownership that the separate personalities of the corporation and the individual no longer exist, but the corporation is, instead, the alter ego of one or a few individuals; and (2) if observed, the corporate form would sanction a fraud, promote injustice, or result in an inequity." *Id.* at 786 (citing *Norman v. Murray First Thrift & Loan Co.*, 596 P.2d 1028, 1030 (Utah 1979)).

As this Court has explained, "[t]he rationale used by courts in permitting the corporate veil to be pierced is that if a principal shareholder or owner conducts his private and corporate business on an interchangeable or joint basis as if they were one, he is without standing to complain when an injured party does the same." *Id.* (citing *Bone*

Constr. Co. v. Lewis, 148 Ga.App. 61, 250 S.E.2d 851, 853 (1978)); *see also Lyons v. Lyons*, 340 So.2d 450, 451 (Ala.Civ.App.1976)(“[a] court of equity looks through form to substance and has often disregarded the corporate form when it was fiction in fact and deed and was merely serving the personal use and convenience of the owner”).

Here, defendants did not assert the bona fides of their purported limited liability companies in opposing summary judgment at the trial court. (R. at 375-377.) And, as shown in the Statement of Facts (*infra*, p. 9) the record contains substantial evidence showing that that the separate personalities of the limited liability companies and their owners, Glezos and Pettit, do not exist.

II. THE TRIAL COURT DID NOT ERR IN ITS HANDLING OF LAND SOLUTIONS, L.C. AND 90TH SOUTH JOINT VENTURE, LLC.

Defendants also claim the trial court erred in failing to order the joinder of Land Solutions, L.C. and 90th South Joint Venture, LLC. (Appellant’s Br. at 18.) Defendants admit that this Court’s review of this issue is limited to determining whether the trial court abused its discretion. *Id.* at 16 (citing *Green v. Louder*, 2001 UT 62, ¶ 40, 29 P.2d 638). Defendants have again painted with a broad brush – not differentiating between Land Solutions and 90th South Joint Venture in making this argument. This claim of error should be rejected as well, but the reasons are different for the two entities.

A. Land Solutions Was “De Facto” A Party To This Lawsuit.

With respect to Land Solutions, defendants simply misstate the proceedings in the trial court. First, there is no question that “STC Holdings” was properly served, and that it participated as a defendant throughout these proceedings. (R. at 18-20 (Proof of

Service and Summons), 24-34 (Answer of STC Holdings).) Defendants claim that “STC Holdings” is nothing more than an assumed name for Land Solutions, L.C. Indeed, that was the basis of Land Solutions’ motion to intervene. (R. at 35-36.)

It is well-settled that [a] corporation’s use of a fictitious or assumed business name does not create a separate legal entity, and the designation ‘d/b/a’ is merely descriptive of a corporation that does business under some other name.” 18 C.J.S. *Corporations* § 133 (2007); *see also* 6 William Meade Fletcher, et al., *Fletcher Cyclopedic of the Law of Corporations* § 2442 (2007) (use of a fictitious business name does not create a separate legal entity); *Utah Valley v. Tanner*, 636 P.2d 1060, 1062 (Utah 1981) (“Paul Tanner Homes is not a legal entity, it being only a ‘dba’ of Paul Tanner”); *Pinkerton’s, Inc. v. Superior Court*, 40 Cal.App.4th 1342, 1348 (1996). Accordingly, when Bourne sued STC Holdings it effectively sued Land Solutions.

Second, Land Solutions did intervene and participate in this case on a *de facto* basis. On October 14, 2005, Land Solutions filed a motion to intervene in this action. (R. at 35-37.) Bourne did not object to the addition of Land Solutions as a party, and the trial court instructed movant’s counsel to prepare an order and submit it to Bourne’s counsel for approval as to form. (R. at 41-42.) Bourne objected to defendants’ form of order, and sent defendants’ counsel a revised version, approved as to form. (R. at 679-706.) Defendants’ counsel, apparently, never submitted the approved order to the trial court for execution. (R. at 770: 7-14.)

Notwithstanding this, the fact is that after moving to intervene, Land Solutions participated in all proceedings before the trial court, without any objection from Bourne. Indeed, after making the intervention motion, defendants' counsel appeared as "Attorney for Defendants STEVE GLEZOS, STC HOLDINGS, **LAND SOLUTIONS, L.C.** and GLEN PETTIT," (R. at 90, 97, 100, 105, 345, 380, 399, 467, 470, 584, 587, 597, 600, 655 and 657 (emphasis added)), and virtually every paper defendants filed was filed on behalf of Land Solutions (R. at 90, 97, 100, 105, 110, 345, 380, 399, 467, 587, 597, 600 and 655). Indeed, defendants' "Memorandum of Law in Response to Plaintiff's Motion for Partial Summary Judgment" was filed on behalf of "[t]he Defendants STEVE GLEZOS, STC HOLDINGS, **LAND SOLUTIONS, L.C.** and GLEN PETTIT." (R. at 345-377.)

In similar circumstances, Utah courts have found that the party has intervened on a "de facto basis." In *Utah Ass'n of Counties v. Tax Comm'n*, 895 P.2d 819 (Utah 1995), the Utah Supreme Court said the following:

[I]t is unclear whether UAC [the Utah Association of Counties] properly intervened in the hearing. (footnote omitted). Although the counties submitted a formal motion to intervene at the request of the Commission, it was not acted upon. UAC did not join in that motion, but its counsel, who was also representing the counties, actively participated throughout the entire hearing, including regular examination of witnesses with the permission of the Commission. At no time did the Commission or [AT&T Communications] object to UAC's participation. ***We therefore find that the Commission has waived its right to challenge UAC's participation in this review. UAC adequately intervened in the hearing below on a de facto basis.***

Id. at 820 (citing *Schulz, Davis & Warren v. Marinkovich*, 203 Mont. 12, 661 P.2d 5, 8 (1983)); *see also Ostler v. Buhler*, 1999 UT 99, ¶ 7-8, 989 P.2d 1073.

Under these precedents, there was no error by the trial court. Land Solutions was “*de facto*” a party to the litigation. Indeed, it would elevate form over substance, and would be unjust, to allow a party to obtain a favorable oral ruling on a motion to intervene, thereafter act as if the motion had been granted, participate throughout the proceedings, and after receiving an unfavorable ruling on the merits, raise as error the trial court’s failure to enter a written order allowing intervention – an order which the party never submitted to the court for execution.

B. 90th South Joint Venture Need Not Be Joined As A Party.

Defendants, citing *Cassidy v. Salt Lake Fire Civ. Serv. Council*, 1999 UT App 65, ¶ 9, 976 P.2d 607, correctly note that the issue of failure to join an indispensable party may be raised for the first time on appeal. (Appellants Br. 16.) But the fact that the issue may be raised for the first time on appeal does not mean that waiting until appeal to raise the issue will be without consequence.¹¹ The leading case analyzing the effect of an appellant’s failure to raise the indispensable party issue in the trial court is the U.S. Supreme Court’s *Provident Tradesmans Bank & Trust v. Patterson*, 390 U.S. 102 (1968)

¹¹ Although it may be raised for the first time on appeal, the issue of indispensability under Rule 19 is not a jurisdictional question. *See Thunder Basin Coal Co. v. Southwestern Public Service Co.*, 104 F.3d 1205, 1211 n.4 (10th Cir. 1997) (citing 7 CHARLES A. WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE § 1611, at 171-74 (2d ed. 1986)).

decision.¹² There several individuals who had been involved in a car accident sought a declaration that the driver of the vehicle was a “permissive user” under the owner’s insurance policy. *Id.* at 106. While the vehicle owner’s insurer was named as a defendant, the vehicle owner himself was not. The case proceeded to judgment in favor of the individuals. On appeal, the Third Circuit reversed the trial court’s judgment on the ground that the vehicle owner was an indispensable party—an issue not raised in the trial court. *Id.* at 106.

The U.S. Supreme Court granted certiorari. *Id.* at 107. It held that the Third Circuit “erred in not allowing the judgment to stand.” *Id.* at 109. The Court explained that when the issue is raised for the first time on appeal, Rule 19’s interests “must . . . be viewed entirely from an appellate perspective since the matter of joinder was not considered in the trial court.” *Id.* at 109. Accordingly, though “the defendant may properly wish to avoid multiple litigation, or inconsistent relief, or sole responsibility for a liability he shares with another. After trial, however, if the defendant has failed to assert this interest, it is quite proper to consider it foreclosed.” *Id.* at 110. Similarly, after trial the plaintiff’s interest in preserving a fully litigated judgment “should be overborne only by rather greater opposing considerations than would be required at an earlier stage when the plaintiffs’ only concern was for a federal rather than a state forum.” *Id.* at 112.

¹² As the Utah Supreme Court has noted, “Rule 19 of the Utah rules is essentially similar to rule 19 of the Federal Rules of Civil Procedure. Therefore, in addition to applicable Utah cases, we look to the abundant federal experience in the area for guidance.” *Landes v. Capital City Bank*, 795 P.2d 1127, 1130 (Utah 1990).

Following *Provident* numerous courts have rejected indispensable party arguments raised for the first time on appeal. For instance, in *Air-Exec, Inc. v. Two Jacks, Inc.*, 584 F.2d 942, 945 (10th Cir. 1978), the court stated:

The bank's interest was known at the time of the pretrial order and mentioned in it. Defendants made no attempts to force it to become a party to the litigation and made no complaints about its absence until after trial. In the face of its knowledge of the bank's interest it filed no objection to the pretrial statement of admitted facts that the plaintiff is "the" proper party to bring the action. Therefore it is **bound by the pretrial** order, as above discussed. *Provident Tradesmens Bank & Trust v. Patterson* (citation omitted), in an analogous situation, states, "After trial . . . **if the defendant has failed to assert this interest, (to require joinder) it is quite proper to consider it foreclosed.** (Emphasis added).

See also Continental Insurance Co. of New York v. Cotton, 427 F.2d 48, 51 (9th Cir. 1970) (citing *Provident*).

1. Defendants Did Not Argue That 90th South Joint Venture Was Indispensable in the Trial Court.

On pages 16 to 18 of their appeal brief, defendants provide a long list of steps they claim to have taken "to address the issue of defendants [sic] failure to join Land Solutions, L.C. and 90th South Joint Venture, LLC." But an examination of defendants' claimed "steps" shows that they do not relate to 90th South Joint Venture LLC. Rather, they all relate to (i) defendants' argument that Land Solutions is an indispensable party (Items 1, 2, 4, 9), (ii) defendants' claim that Glen Pettit should be dismissed (Items 5, 6,

7,¹³ 8) or (iii) are simply irrelevant (Items 3, 10). Indeed, had defendants really wanted 90th South Joint Venture, LLC to participate, the obvious move would have been to do what Land Solutions did, seek intervention. That simple expedient would have solved the problem, and avoided the mysterious and convoluted series of “steps” defendants identify.¹⁴

In truth, Defendants did not attempt to have 90th South Joint Venture LLC intervene or otherwise attempt to have it joined as a party in the trial court. Even in their Rule 60(b) Motion, defendants did not ask for 90th South Joint Venture to be joined as a party. (R. at 661-662.) Given that no party asked the trial court to join 90th South Joint

¹³ In item 7, defendants mischaracterize their “Motion to Set Aside Judgment, Motion for Relief From Judgment, Motion for New Trial and For Other Relief,” as claiming that 90th South Joint Venture LLC was one of the “real parties in interest.” (Appellants Br. 17.) In fact, with respect to Pettit, the motion claimed only that Pettit’s “sole involvement was through business entities, and then – because the sale transaction actually failed to close – not at all.” (R. at 585.)

¹⁴ Joinder pursuant to Rule 19 is contingent upon an initial requirement that the absent party claim a legally protected interest relating to the subject matter of the action. When persons are aware of an action, but choose not to claim an interest by failing to join in the action, they are not considered necessary parties. *See United States v. Bowen*, 172 F.3d 682, 689 (9th Cir. 1999). “If a defendant is capable of bringing into the litigation a nonparty whose presence is allegedly required to fully resolve the controversy and if that nonparty is otherwise capable of intervening, then the nonparty cannot be considered indispensable under Rule 19(b).” *Thunder Basin Coal Co. v. Southwestern Public Serv. Co.*, 104 F.3d 1205, 1211 (10th Cir. 1997)(adopting reasoning of *Pasco Int’l (London) Ltd. v. Stenograph Corp.*, 637 F.2d 496, 503-504 (7th Cir. 1980)). In this matter, defendants have identified no jurisdictional or other legal impediment to 90 South’s intervention under Utah R. Civ. P. 24. In fact, 90th South, through its the sole member and manager Glen Pettit, deliberately chose not to intervene in this matter. Intentionally forgoing 90th South’s right to intervene belies Pettit’s current argument that 90th South was either a necessary or indispensable party under Utah R. Civ. P. 19.

Venture LLC as a party, its failure to do so can hardly be asserted to be an abuse of discretion. *Green v. Louder*, 2001 UT 62, ¶ 40, 29 P.2d 638.

2. This Court Should Not Require or Order 90th South Joint Venture's Joinder.

Even if this Court, on appeal, were inclined to consider the issue notwithstanding defendants' failure to urge it in the trial court, the record demonstrates that 90th South Joint Venture is not a necessary party under Rule 19(a) of the Utah Rules of Civil Procedure.

In *Landes v. Capital City Bank, et al.*, 795 P.2d 1127, 1130 (Utah 1990), the Utah Supreme Court explained

To determine whether a party is necessary, a court should consider the two general factors in rule 19(a). First, a party is necessary if 'in his absence complete relief cannot be accorded among those already parties.' Second, a party is necessary if

he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest.

(Citations omitted.) The record demonstrates that neither factor is met here.

First, 90th South Joint Venture LLC's absence presents no obstacle to awarding Bourne complete relief. The primary relief sought in the Complaint was a declaration regarding the meaning and interpretation of the Purchase Agreement and, based on that declaration, an order quieting title to the Property in Bourne. This relief could be – and

was – granted regardless of whether 90th South Joint Venture appeared as a party. Bourne is now free to deal with the Property as it chooses. Moreover, 90th South Joint Venture does not have any defense to Bourne’s contract based causes of action that was not already presented by (or that could not have been presented by) the named defendants.

Second, assuming *arguendo* that 90th South Joint Venture does claim an interest in the Property, any such interest was adequately protected by the presence of Glen Pettit, 90th South Joint Venture LLC’s manager and sole member. 90th South Joint Venture LLC’s interests in vindicating defendants’ interpretation of the Purchase Agreement are presumably identical to those of Pettit. *See e.g., Smith v. Osguthorpe*, 2002 UT App 361, ¶ 51, 58 P.3d 854 (finding that absent party’s interests were adequately protected because he was “a member of the family partnership” that was a party).

For similar reasons, the absence of 90th South Joint Venture does not leave any of the parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations. Well-established principles of claim preclusion and issue preclusion would prevent 90th South Joint Venture from litigating in a subsequent suit claims for relief or issues that were (or could and should have been) litigated in this suit. In general, these doctrines prevent parties or their “privies” from relitigating claims for relief or issues “which were once adjudicated on the merits and have resulted in a final

judgment.” *Brigham Young University v. Tremco Consultants, Inc.*, 2005 UT 19, ¶ 27, 110 P.3d 678.¹⁵

Here 90th South Joint Venture and Pettit, its manager and sole member, are unquestionably privies. Under Utah law, “[t]he legal definition of a person in privity with another, is a person so identified in interest with another that he represents the same legal right.” *Press Publishing, Ltd., v. Matol Botanical Int’l, Ltd.*, 2001 UT 106, ¶ 20, 37 P.3d 1121 (Utah 2001) (quoting *Searle Bros. v. Searle*, 588 P.2d 689, 691 (Utah 1978)). Applying this definition, the *Press Publishing* court held that officers, directors, and affiliates of the closely-held corporations were “privies” because their “legal rights and interests are identical” with those of the defendant in a prior suit. *Id.* ¶ 21, 37 P.3d at 1128. The same obtains here.

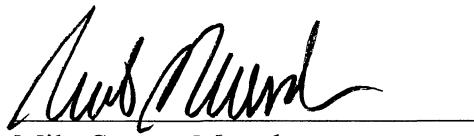
CONCLUSION

¹⁵ For claim preclusion to apply, three requirements must be met: “(1) [T]he subsequent action must involve the same parties, their privies, or their assigns as the first action, (2) the claim to be barred must have been brought or have been available in the first action, and (3) the first action must have produced a final judgment on the merits of the claim.” *Brigham Young*, 2005 UT 19, ¶ 26, 110 P.3d at 678 (quoting *Culbertson v. Bd. of County Comm’rs*, 2001 UT 108, ¶13, 44 P.3d 642). For issue preclusion to apply, four requirements must be met: “[1] [T]he party against whom issue preclusion is asserted must have been a party to or in privity with a party to the prior adjudication; [2] the issue decided in the prior adjudication must be identical to the one presented in the instant action; [3] the issue in the first action must have been completely, fully, and fairly litigated; and [4] the first suit must have resulted in a final judgment on the merits.” *Id.* ¶ 27 (quoting *Murdock v. Springville Mun. Corp.*, 1999 UT 39 at ¶18, 982 P.2d 65).

For the reasons stated, Bourne respectfully requests that the Court affirm the trial court's summary judgment order and judgment in all respects. Bourne further requests that it be awarded its attorney fees and costs incurred in connection with this appeal.

RESPECTFULLY SUBMITTED this 6th day of February, 2008.

DORSEY & WHITNEY, LLP

A handwritten signature in black ink, appearing to read "Milo Marsden", is written over a horizontal line.

Milo Steven Marsden

Craig R. Kleinman

Patricia C. Staible

Attorneys for Plaintiff/Appellee Horton V.
Bourne Partnership

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that **two** true and correct copies of the foregoing **BRIEF OF APPELLEE** was served via U.S. First Class Mail, postage prepaid on the 6th day of February, 2008, to the following:

Walter T. Keane
2150 South 1300 East, Suite 500
Salt Lake City, Utah 84106



ADDENDUM A

DETERMINATIVE STATUTES AND RULES

The statutes and rules whose interpretation is determinative of the appeal or are of central importance to the appeal are as follows:

Utah Code Ann. § 38-9-1. Definitions.

As used in this chapter:

(1) "Interest holder" means a person who holds or possesses a present, lawful property interest in certain real property, including an owner, title holder, mortgagee, trustee, or beneficial owner.

(2) "Lien claimant" means a person claiming an interest in real property who offers a document for recording or filing with any county recorder in the state asserting a lien or other claim of interest in certain real property.

(3) "Owner" means a person who has a vested ownership interest in certain real property.

(4) "Record interest holder" means a person who holds or possesses a present, lawful property interest in certain real property, including an owner, titleholder, mortgagee, trustee, or beneficial owner, and whose name and interest in that real property appears in the county recorder's records for the county in which the property is located.

(5) "Record owner" means an owner whose name and ownership interest in certain real property is recorded or filed in the county recorder's records for the county in which the property is located.

(6) "Wrongful lien" means any document that purports to create a lien or encumbrance on an owner's interest in certain real property and at the time it is recorded or filed is not:

- (a) expressly authorized by this chapter or another state or federal statute;
- (b) authorized by or contained in an order or judgment of a court of competent jurisdiction in the state; or
- (c) signed by or authorized pursuant to a document signed by the owner of the real property.

Utah Code Ann. § 38-9-4. Civil liability for filing wrongful lien -- Damages.

(1) A lien claimant who records or files or causes a wrongful lien as defined in Section 38-9-1 to be recorded or filed in the office of the county recorder against real property is liable to a record interest holder for any actual damages proximately caused by the wrongful lien.

(2) If the person in violation of this Subsection (1) refuses to release or correct the wrongful lien within ten days from the date of written request from a record interest holder of the real property delivered personally or mailed to the last-known address of the lien claimant, the person is liable to that record interest holder for \$1,000 or for treble actual damages, whichever is greater, and for reasonable attorney fees and costs.

(3) A person is liable to the record owner of real property for \$3,000 or for treble actual damages, whichever is greater, and for reasonable attorney fees and costs, who records or files or causes to be recorded or filed a wrongful lien as defined in

Section 38-9-1 in the office of the county recorder against the real property, knowing or having reason to know that the document:

- (a) is a wrongful lien;
- (b) is groundless; or
- (c) contains a material misstatement or false claim.

Utah Code Ann. § 38-9-7. Petition to nullify lien -- Notice to lien claimant -- Summary relief -- Finding of wrongful lien -- Wrongful lien is void.

(1) Any record interest holder of real property against which a wrongful lien as defined in Section 38-9-1 has been recorded may petition the district court in the county in which the document was recorded for summary relief to nullify the lien.

(2) The petition shall state with specificity the claim that the lien is a wrongful lien and shall be supported by a sworn affidavit of the record interest holder.

(3) (a) If the court finds the petition insufficient, it may dismiss the petition without a hearing.

(b) If the court finds the petition is sufficient, the court shall schedule a hearing within ten days to determine whether the document is a wrongful lien.

(c) The record interest holder shall serve a copy of the petition on the lien claimant and a notice of the hearing pursuant to Rules of Civil Procedure, Rule 4, Process.

(d) The lien claimant is entitled to attend and contest the petition.

(4) A summary proceeding under this section is only to determine whether or not a document is a wrongful lien. The proceeding shall not determine any other property or legal rights of the parties nor restrict other legal remedies of any party.

(5) (a) Following a hearing on the matter, if the court determines that the document is a wrongful lien, the court shall issue an order declaring the wrongful lien void ab initio, releasing the property from the lien, and awarding costs and reasonable attorney's fees to the petitioner.

(b) (i) The record interest holder may record a certified copy of the order with the county recorder.

(ii) The order shall contain a legal description of the real property.

(c) If the court determines that the claim of lien is valid, the court shall dismiss the petition and may award costs and reasonable attorney's fees to the lien claimant. The dismissal order shall contain a legal description of the real property. The prevailing lien claimant may record a certified copy of the dismissal order.

(6) If the district court determines that the lien is a wrongful lien as defined in Section 38-9-1, the wrongful lien is void ab initio and provides no notice of claim or interest.

(7) If the petition contains a claim for damages, the damage proceedings may not be expedited under this section.

78-33-1. Jurisdiction of district courts -- Form -- Effect.

The district courts within their respective jurisdictions shall have power to declare rights, status, and other legal relations, whether or not further relief is or could be claimed. No action or proceeding shall be open to objection on the ground that a declaratory judgment or decree is prayed for. The declaration may be either affirmative or negative in form and effect; and such declaration shall have the force and effect of a final judgment or decree.

Utah Code Ann. § 78-33-2. Rights, status, legal relations under instruments or statutes may be determined.

Any person interested under a deed, will or written contract, or whose rights, status or other legal relations are affected by a statute, municipal ordinance, contract or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract or franchise and obtain a declaration of rights, status or other legal relations thereunder.

Utah Code Ann. § 78-33-11. Parties.

When declaratory relief is sought all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceeding. In any proceeding which involves the validity of a municipal or county ordinance or franchise such municipality or county shall be made a party, and shall be entitled to be heard, and if a statute or state franchise or permit is alleged to be invalid the attorney general shall be served with a copy of the proceeding and be entitled to be heard.

Utah Code Ann. § 78-33-12. Chapter to be liberally construed.

This chapter is declared to be remedial; its purpose is to settle and to afford relief from uncertainty and insecurity with respect to rights, status and other legal relations; and is to be liberally construed and administered.

Utah Code Ann. § 78-40-1. Action to determine adverse claim to property -- Authorized.

An action may be brought by any person against another who claims an estate or interest in real property or an interest or claim to personal property adverse to him, for the purpose of determining such adverse claim.

Utah R. Civ. P. 7. Pleadings allowed; motions, memoranda, hearings, orders, objection to commissioner's order.

(c) Memoranda.

(c)(1) Memoranda required, exceptions, filing times. All motions, except uncontested or ex parte motions, shall be accompanied by a supporting memorandum. Within ten days after service of the motion and supporting memorandum, a party opposing the motion shall file a memorandum in opposition. Within five days after service of the memorandum in opposition, the moving party may file a reply memorandum, which shall be limited to rebuttal of matters raised in the memorandum in opposition. No other memoranda will be considered without leave of court. A party may attach a proposed order to its initial memorandum.

(c)(3) Content.

(c)(3)(A) A memorandum supporting a motion for summary judgment shall contain a statement of material facts as to which the moving party contends no genuine

issue exists. Each fact shall be separately stated and numbered and supported by citation to relevant materials, such as affidavits or discovery materials. Each fact set forth in the moving party's memorandum is deemed admitted for the purpose of summary judgment unless controverted by the responding party.

(c)(3)(B) A memorandum opposing a motion for summary judgment shall contain a verbatim restatement of each of the moving party's facts that is controverted, and may contain a separate statement of additional facts in dispute. For each of the moving party's facts that is controverted, the opposing party shall provide an explanation of the grounds for any dispute, supported by citation to relevant materials, such as affidavits or discovery materials. For any additional facts set forth in the opposing memorandum, each fact shall be separately stated and numbered and supported by citation to supporting materials, such as affidavits or discovery materials.

Utah R. Civ. P. 19. Joinder of persons needed for just adjudication.

(a) Persons to be joined if feasible. A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. If he has not been so joined, the court shall order that he be made a party. If he should join as a

plaintiff but refuses to do so, he may be made a defendant, or, in a proper case, an involuntary plaintiff. If the joined party objects to venue and his joinder would render the venue of the action improper, he shall be dismissed from the action.

(b) Determination by court whenever joinder not feasible. If a person as described in Subdivision (a)(1)-(2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to him or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measure, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

(c) Pleading reasons for nonjoinder. A pleading asserting a claim for relief shall state the names, if known to the pleader, of any persons as described in Subdivision (a)(1)-(2) hereof who are not joined, and the reasons why they are not joined.

(d) Exception of class actions. This rule is subject to the provisions of Rule 23.

Utah R. Civ. P. Rule 56. Summary judgment.

(a) For claimant. A party seeking to recover upon a claim, counterclaim or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move for summary judgment upon all or any part thereof.

(b) For defending party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought, may, at any time, move for summary judgment as to all or any part thereof.

(c) Motion and proceedings thereon. The motion, memoranda and affidavits shall be in accordance with Rule 7. The judgment sought shall be rendered if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) Case not fully adjudicated on motion. If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) Form of affidavits; further testimony; defense required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as

would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the pleadings, but the response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. Summary judgment, if appropriate, shall be entered against a party failing to file such a response.

(f) When affidavits are unavailable. Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) Affidavits made in bad faith. If any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party presenting them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

Utah R. Civ. P. 59. New trials; amendments of judgment.

(a) Grounds. Subject to the provisions of Rule 61, a new trial may be granted to all or any of the parties and on all or part of the issues, for any of the following causes; provided, however, that on a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment:

(a)(1) Irregularity in the proceedings of the court, jury or adverse party, or any order of the court, or abuse of discretion by which either party was prevented from having a fair trial.

(a)(2) Misconduct of the jury; and whenever any one or more of the jurors have been induced to assent to any general or special verdict, or to a finding on any question submitted to them by the court, by resort to a determination by chance or as a result of bribery, such misconduct may be proved by the affidavit of any one of the jurors.

(a)(3) Accident or surprise, which ordinary prudence could not have guarded against.

(a)(4) Newly discovered evidence, material for the party making the application, which he could not, with reasonable diligence, have discovered and produced at the trial.

(a)(5) Excessive or inadequate damages, appearing to have been given under the influence of passion or prejudice.

(a)(6) Insufficiency of the evidence to justify the verdict or other decision, or that it is against law.

(a)(7) Error in law.

(b) Time for motion. A motion for a new trial shall be served not later than 10 days after the entry of the judgment.

Utah R. Civ. P. 60. Relief from judgment or order.

(b) Mistakes; inadvertence; excusable neglect; newly discovered evidence; fraud, etc. On motion and upon such terms as are just, the court may in the furtherance of justice relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time and for reasons (1), (2), or (3), not more than 3 months after the judgment, order, or proceeding was entered or taken. A motion under this Subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order or proceeding or to set aside a judgment for fraud upon the court. The procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.