

1996

Maxine Archuleta v. Donald C. Hughes : Reply Brief

Utah Court of Appeals

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Donald C. Hughes; Defendant/Appellee.

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DOCKET NO. 960276-CA

IN THE COURT OF APPEALS

STATE OF UTAH

MAXCINE ARCHULETA,	:	Appeals Court
	:	No. 960276-CA
Plaintiff/Appellant,	:	
	:	Trial Court
v.	:	No. 940700264
DONALD C. HUGHES,	:	
	:	
Defendant/Appellee.	:	

APPELLANT'S REPLY BRIEF

Appeal from the Second Judicial District Court
for Davis County, State of Utah

The Honorable Glen Dawson

Argument Priority Classification 15

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FILED

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COURT OF APPEALS

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ARGUMENT

POINT I

**AS A MATTER OF LAW, DEFENDANT COLLECTED AND THEREBY
TERMINATED PLAINTIFF'S PIP PAYMENT RIGHTS AND CHARGED A FEE
THEREON IN VIOLATION OF LAW AND HIS AGREEMENT WITH HIS CLIENT**

Defendant repeatedly asserts in his brief that "there was no settlement with the PIP carrier." (For example, see Defendant's Brief, page 2 of Point II; Defendant wrongfully failed to number the pages of his brief.) As a matter of law, these assertions are not correct. First, it is uncontroverted that the Plaintiff's PIP carrier was Allstate. (Defendant's Brief, Statement of Fact 4.) It is also uncontested that Allstate was the liability carrier for the adverse driver and that it was Allstate with which the Defendant negotiated and obtained a settlement that included all unpaid medical bills. (See Defendant's Brief, Statement of Fact 13.)

As a matter of law, because the settlement included the medical benefits to which the Plaintiff was entitled, her rights to the PIP benefits were extinguished. In Jones v. Transamerica Insurance Co., 592 P.2d 609 (Utah 1979), the plaintiff claimed injuries from an automobile accident. He asserted various claims to his own PIP carrier and it refused to pay them. Thereafter, he entered into a settlement agreement and signed a complete release with the tortfeasor's insurance carrier. He then sued his own insurance carrier for PIP benefits. In upholding summary judgment for the insurer, this Court stated:

An injured person will not be permitted to recover from an insurance carrier (over and above what the carrier has previously paid in benefits) once he has successfully recovered from his tortfeasor for personal injuries. Any other interpretation would be to permit double recovery.

. . . .

Double recovery for a single item of loss was never contemplated by the legislature and we will not permit any type of automatic reward or "windfall" to an injured plaintiff.

. . . .

Plaintiff accepted the \$6,000 from his tortfeasors as additional recovery in lieu of any further insurance benefits to which he might have been entitled.

. . . .

The rights to which the subrogee succeeds can be no greater than those of the person for whom he is substituted. By executing the release, plaintiff discharged the tortfeasors of any and all liability, notwithstanding the attempted "specific exclusion" relating to no-fault benefits. By so doing, plaintiff has chosen his recovery and cannot now successfully assert a claim against his insurer.

Id. at 611-12. As a matter of law, when Mr. Hughes settled Archuleta's tort claim to include the unpaid medical expenses of \$2,400, he cut off all of her rights to any further PIP benefits. The outstanding claims for PIP benefits are included as a matter of law in the recovery from the tortfeasor. Hence, the right to PIP benefits is cut off to prevent a double recovery.

Mr. Hughes' suggestion to this Court that he never collected PIP benefits demonstrates an ignorance of Utah tort law and specifically of the principles set forth in Jones, supra.

Not only did Mr. Hughes collect the unpaid PIP medical expenses as a matter of law, but the particular facts of this case make it clear that the PIP payments were intentionally collected factually. The uncontroverted facts establish that Ron Bennett accepted the insurance company's offer of \$6,500 with a proviso that the unpaid medical expenses of \$2,786 be included in the settlement rather than being submitted for payment under the Plaintiff's PIP policy and then reimbursed by the liability carrier.

Because medical expenses of \$600 had been submitted to the PIP carrier and had been paid, only \$2,400 of this \$2,786 would have been paid by the PIP carrier if those expenses had been submitted. (R. at 694 and R. at 1063-64.) Archuleta was never told that the settlement included unpaid PIP benefits. (R. at 693, ¶¶ 9-11; 694, ¶¶ 12, 13; 697, ¶ 44; 698, ¶¶ 46-51.) Of course, the jury was never told that Donald Hughes would be responsible for the acts of his agent, Ronald Bennett, and perhaps that explains the jury's verdict.

Furthermore, it is also clear that under Hughes' contingent fee agreement he was not entitled to collect \$800 as the one-third attorney fee charged on the \$2,400 of unpaid medical expenses that would have been paid by PIP. The interpretation of a written attorney fee agreement presents a question of law to be decided by the court and not by the jury. Phillips v. Smith, 768 P.2d 449 (Utah 1989). Because the interpretation of this written attorney fee agreement was a question of law, no contract issues were tried

to the jury. Neither Utah law nor the written contract between the parties provided for a contingent fee for the collection of PIP benefits. (See pp. 9-16 of Appendix B, R. at 700-707.)

Despite the conclusory denial by Hughes in his brief in opposition to Plaintiff's Motion for Partial Summary Judgment, there were no genuine issues of fact raised in opposition to Plaintiff's Motion for Partial Summary Judgment that were material to this contract issue. The following four undisputed facts are determinative:

1. The \$9,286 gross settlement of the PI case included \$2,400 of unpaid medical expenses related to the injuries sustained in the wreck. (R. at 693) (Uncontroverted Fact #10 which was based on Hughes' own admissions at deposition and which Hughes did not dispute in his response to Plaintiff's Motion for Partial Summary Judgment).

2. Hughes took a full one-third attorney fee of \$800 on the \$2,400 of unpaid medical expenses that were included in the settlement. (R. at 693) (Uncontroverted Fact #11 which was based on Hughes' answers to interrogatories and his own deposition testimony and which Hughes did not dispute in his response to Plaintiff's Motion for Partial Summary Judgment).

3. The \$2,400 of unpaid medical expenses were never submitted for payment under the PIP portion of Archuleta's own insurance policy. (R. at 694) (Uncontroverted Fact #12 which was admitted by Hughes at deposition and which Hughes did not dispute

in his response to Plaintiff's Motion for Partial Summary Judgment).

4. The \$2,400 of unpaid medical expenses would have been paid by Archuleta's PIP insurance if the bills had been submitted to them for payment. (R. at 694) (Uncontroverted Fact #13 which is based on Hughes' admissions at deposition and the deposition testimony of the PIP adjuster and which Hughes did not dispute in his response to Plaintiff's Motion for Partial Summary Judgment).

These four undisputed facts clearly establish that Plaintiff is entitled to judgment as a matter of law for a full refund of this \$800 attorney fee which was wrongfully collected.

Not only did Hughes fail to refute the four necessary elements above establishing partial summary judgment on this point, but the affidavit he did submit was substantively defective.

As pointed out by Plaintiff at R-440 and in her Motion to Strike Portions of Defendant's Affidavit (R. at 449), many portions of the affidavit submitted by Hughes in support of his Memorandum in Opposition to Plaintiff's Motion for Summary Judgment were not based on personal knowledge as required by Utah R. Civ. P. 56(e). (Nor did Hughes affirmatively claim to have personal knowledge of the "facts" asserted in the affidavit as required by Utah R. Civ. P. 56(e).) (GNS Partnership v. Fullmer, 873 P.2d 1157 (Utah App. 1994).) Thus, Plaintiff's Motion to Strike portions of Defendant's affidavit (R. at 449) should have been granted. Howick v. Bank of Salt Lake, 28 Utah 2d 64, 65, 498 P.2d 352, 353-54 (1972). Because inadmissible evidence cannot be considered in ruling on a motion

for summary judgment, D & L Supply v. Saurini, 775 P.2d 420, 421 (Utah 1989), any portion of Defendant's Affidavit that was not based on personal knowledge could not be considered by the Court in ruling on Plaintiff's Motion for Summary Judgment. But, more importantly, even if these defects are overlooked, the plain fact remains that Hughes did not dispute the four simple elements that establish that Plaintiff is entitled to judgment as a matter of law for refund of the \$800 attorney fee charged for collecting the \$2,400 of medical bills that should have been paid under the PIP portion with Archuleta's own policy.

Hughes claimed that even if the bills had been paid by PIP, he still would have been entitled to a one-third fee because of his attorney retainer agreement. (R. at 1098, lines 24 & 25; R. at 1100.) He was wrong about this because contingent fees on PIP benefits are simply not permitted under Utah law for the reasons set forth at pages 11-16 of Appendix B (R. at 702-707). See also Utah State Bar Ethics Advisory Opinion #114, Trial Exhibit #14, R. at 586).

Defendant's new claim that no fee was taken on PIP benefits is simply without merit. The uncontroverted fact established by the depositions of both adjusters present at the settlement conference was that the insurance company offered \$6,500 to settle the case and that offer was accepted by Bennett, acting as agent for Hughes. It was then agreed that the \$2,786 in unpaid medical expenses would be added to the settlement rather than submitted to the PIP carrier (\$2,400 of which would have been paid under PIP). (R. at 693)

(Undisputed fact #10). Since an attorney is not permitted to charge a one-third attorney fee on PIP benefits, he certainly cannot collect a one-third attorney fee on the same money simply by "slipping" the PIP benefits into the liability settlement. That is exactly the kind of slippery conduct that lawyers must avoid.

In an attempt to avoid the **clear** liability on the PIP issue, Mr. Hughes raises several completely unfounded claims in an attempt to confuse the matter. These will now be briefly addressed:

1. Mr. Hughes attempts to claim that the PIP benefits were disputed. Specifically, he states:

Maxcine Archuleta ran into a dead end on PIP payments. Her PIP benefits were not routine. They were not uncontested and they were not paid.

(Appellee's Brief, p. 4 of Point II.)

Of course, there is not a single citation to support this allegation. In fact, the only evidence regarding this issue is that Allstate requested additional information from the treating physician on the need for an MRI. (R. at 568 and R. at 572.) The physician responded with an adequate explanation (R. at 574) and the medical bill was paid (copy of Allstate check at R. 571). There is no evidence that Mr. Hughes was even aware of this interaction at the time he settled the claim. In his brief, Hughes further contends that "the liability claim settled before the PIP adjuster resolved her concerns or paid any bills." (Appellee's Brief, p. 2 of Point II.) That is not true. The bill that was questioned was paid in full (line 1 of Trial Exhibit #1, R. at 533, copy of Allstate check at R. 571) (Trial Exhibit #10) (see also

testimony of Hughes, R. at 1084). More importantly, the moving papers supporting the motion for summary judgment established that Hughes himself admitted in his deposition that the \$2,400 of unpaid medical expenses would have been paid by Archuleta's PIP insurance if the bills had been submitted for payment. (R. at 694.) These acknowledgements were not only based upon the admissions of Mr. Hughes in his deposition but also based upon the deposition of the Allstate PIP adjuster, Sandra McIntosh.

2. In support of his position that he did not take a PIP fee, Mr. Hughes points to the fact that he did not take a fee on the \$618 paid by the PIP carrier when Maxcine Archuleta submitted her bills directly to them. Mr. Hughes specifically cites paragraph 4 of his affidavit which applies only to the approximately \$600 of expenses that were submitted to the PIP carrier by Archuleta, and which was paid in full by the PIP carrier. The fact that he did not take a fee on the first \$618 cannot possibly be construed as a denial that he took a fee of \$800 on the remaining \$2,400 of unpaid medical expenses that would have been paid by the PIP carrier if submitted to them. (R. at 694.)

3. Mr. Hughes claims that at trial Maxcine Archuleta was not able to identify and refer to her medical bills to establish \$3,000. He then suggests that she did not have \$3,000 in medical bills. This is denied by the fact that the moving papers in support of the Motion for Partial Summary Judgment establish that there was \$3,000 of medical bills from the accident. This claim is

completely without merit as established by Mr. Hughes' own testimony at trial. Mr. Hughes himself testified:

I think the PIP would have paid them. I don't think there is any question they would have paid up to their \$3,000 limit.

(R. at 1063, lines 23-25; and R. at 1064, lines 1-17.)

4. Mr. Hughes then raises the possibility that some of her medical bills would be denied as unrelated to the accident because of a subsequent injury. Again, this is contrary to Mr. Hughes' testimony as indicated above. Furthermore, Mr. Hughes indicated at trial:

She'll also tell you and admit on the stand that in (inaudible) therapy that she hurt her hamstring (inaudible), but needed additional physical therapy for that.

(R. at 942, lines 23-25; and R. at 943.)

The alleged subsequent injury arose out of physical therapy Ms. Archuleta was receiving for this accident. Therefore, it arises from this accident. McCorvey v. Utah State Dept. of Transportation, 868 P.2d 41, 45 (Utah 1993).

5. In his brief, Mr. Hughes states: "In this case nothing was done to discourage or suggest to plaintiff that she not submit bills for PIP benefits." (Appellee's Brief, p. 7 of Point II.) Again, the undisputed evidence is to the contrary. Maxcine Archuleta testified at trial:

Q: What did you do with this bill?

A: This is one of the ones I gave Ron.

Q: All right. You didn't take this up to Allstate?

A: No.

Q: You gave it to Mr. Bennett?

A: Yes. Ron Bennett.

Q: Why did you take it to him instead of taking it to Allstate?
A: Because he told me he would handle it from here on.

(R. at 981.) It is significant that the record discloses on the very next two pages a discussion with the court about the party admission exception to the hearsay rule and the court states in front of the jury: "I don't have any evidence in front of me of an agency relationship. I'm very familiar with the hearsay rule but anyway you go ahead." (R. at 983.)

As indicated in the briefs, Ron Bennett did not testify at trial. Hence, it is uncontested that Ron Bennett told Ms. Archuleta to bring the medical bills to him and he would take care of them rather than submit them to the insurer. It was the same Ron Bennett, while acting for Mr. Hughes, who specifically asked Allstate to include the medical bills in the settlement rather than pay them under PIP so that Ron Bennett and Mr. Hughes could take a fee on those amounts. Unfortunately, as indicated hereafter, the jury was never told that Mr. Hughes must be responsible for the actions of his agent, Ron Bennett.

6. Finally, Mr. Hughes suggests that the bills were not paid by PIP so that Maxcine Archuleta could submit them to her health insurance carrier. There is not a shred of evidence in Mr. Hughes' affidavit or documents opposing the Motion for Partial Summary Judgment that even remotely hints to this. Furthermore, the uncontested testimony of Maxcine Archuleta establishes that the health insurance carrier refused to pay bills that should have been paid by the PIP carrier:

Q: Why didn't you submit these bills to your health provider, the health insurer through your--your work, your company?

A: Because they were related to the accident and the money had already been refused on it.

.

Q: You decided that on your own?

A: No. Not really. They just--anything that was related to the accident--Ron told me anything that's related to the accident has to be separate from anything else.

[R. at 1017.]

.

Q: Okay. You told us that Mr. Bennett first told you not to submit them to your health insurance provider?

A: Right.

[R. at 1018, lines 16-19.]

As a matter of law, the PIP carrier is made the primary insurer and obligor on all medical bills related to an automobile accident. Utah Code Ann. § 31A-22-309(4). As a matter of law, health insurers refuse to pay medical expenses based on that statute until a PIP exhaustion letter or other documentation is established to show that all PIP limits have been paid. Strangely enough, Ron Bennett's advice to Maxcine Archuleta was entirely correct and Maxcine Archuleta testified that the health insurance carrier refused to pay the bills. In any event, whether the bills can be paid by health insurance or not, it does not give Donald

Hughes the right to take a contingent fee on PIP benefits and entitlements.

POINT II

**AS A MATTER OF LAW, ARCHULETA WAS ENTITLED TO A REFUND
OF THE \$3,095 ATTORNEY FEE BECAUSE THE CONTRACT
DID NOT PROVIDE FOR A FEE FOR THE SPECIFIC WORK DONE
OR THE RESULT OBTAINED IN THIS CASE**

The interpretation of a written attorney fee agreement presents a question of law. Phillips v. Smith, 768 P.2d 449 (Utah 1989). Furthermore, a court will strictly construe the terms in the contract against one who is both the attorney draftsman of and a party to the instrument. Continental Bank & Trust Co. v. Bybee, 6 Utah 2d 98, 102, 306 P.2d 773, 775 (1957). For these reasons, the purported "facts" set forth by the Defendant in his brief are not relevant. Likewise, these were not issues for the jury and were not and could not have been tried to the jury. Since they are issues of law, this Court will review the issues for correctness and should not give any deference to a jury verdict or a ruling of the court below.

It was undisputed that Hughes collected \$3,095 as a full one-third of the \$9,286 settlement. As pointed out by the Plaintiff at R-444, R-699, R-707 and R-738-39, the written attorney retainer agreement prepared by Hughes and signed by Archuleta clearly provides for a contingent fee payable to Hughes only when settlement or judgment is "obtained after trial or within 10 days of the date set for trial." Clearly, that was a contingency that did not occur in this case since there was no trial nor a date set for the trial of Archuleta's underlying case. Thus, under the

rationale of Phillips, supra, Hughes cannot claim a contingent one-third fee under the terms of his written attorney retainer agreement. Therefore, Archuleta must be granted summary judgment on her contract claim for a refund of the \$3,095 attorney fee charged by Hughes. Although Plaintiff acknowledges that Hughes may have a right to seek fees on the basis of quantum meruit pursuant to Phillips, 768 P.2d at 452, n. 5. Here, that would be extremely small since Hughes did very little on Archuleta's case. Hughes admitted there was no direct tangible evidence that he put even one hour of his own time into the case (R. at 1160) nor did he make any cash payments to Bennett for the work Bennett did on the case (R. at 1161).

POINT III

THE TIMING OF THE HEARING OF THE MOTION FOR SUMMARY JUDGMENT IS OF NO SIGNIFICANCE

In his opposing brief, Hughes seems to imply that the Court's ruling on Plaintiff's Motion for Partial Summary Judgment should be based on the jury's verdict rather than the pleadings and affidavits submitted in support of or in opposition to Plaintiff's Motion for Partial Summary Judgment because the final hearing on the motion was held after the jury had retired. A court's ruling on a Motion for Summary Judgment must still be based on the evidence submitted in support of or in opposition to the motion irrespective of when a hearing is held. (Utah R. Civ. P. 56.) Otherwise, the very purpose of Rule 56 would be defeated. The court has no discretion to defer ruling on a properly presented motion for summary judgment nor to defer the issues to a jury if

the moving party is entitled to judgment as a matter of law. (Utah R. Civ. P. 56.) Furthermore, the Court not the jury must decide issues of law.

POINT IV

PLAINTIFF WAS ENTITLED TO THE REQUESTED "AGENCY" JURY INSTRUCTION

A. THE REQUESTED JURY INSTRUCTION IS IDENTIFIED IN THE RECORD.

In his brief, Hughes complains that the agency instruction requested by Plaintiff was not identified. That argument is without merit. The agency instruction requested by Plaintiff was MUJI 25.2. A copy is found at R-497 of the record. Arguments of Plaintiff's counsel that include specific references to this MUJI instruction are found at R-1052 of the record.¹

B. NUMEROUS AGENCY ISSUES WERE RAISED AT TRIAL.

Agency issues were raised throughout the trial. For example, at R-969-70 (a copy of transcript attached at Appendix H), Plaintiff attempted to introduce evidence of Bennett's involvement in soliciting Archuleta on behalf of Hughes. Hughes objected to the questioning and the Court granted the objection. Plaintiff's counsel attempted to argue the point but was cut off by the Court with the following statement:

But that's Mr. Bennett. Mr. Bennett is not on trial here. I've granted the objection. Move on to your next question, please.

(R. at 970, lines 1-3.)

¹The reporter who transcribed that hearing misspelled "MUJI" as "MOOCHIE" and also transcribed "agency" as "agent fee."

Note that the Court's pronouncement was made in the jury's presence.

Based on the foregoing, there is no wonder the jury determined no liability on Mr. Hughes even though Ron Bennett told Ms. Archuleta to bring the medical bills to him, not to submit them to the PIP carrier, insisted that they be included in the settlement and took a contingent fee on those funds, all without any disclosure to Ms. Archuleta of the ramifications of those actions. In fact, as the uncontroverted facts establish, the case was handled by Mr. Bennett and not by Mr. Hughes. Maxcine Archuleta never met Mr. Hughes. Hughes never sent her any correspondence until after he was fired. He claimed he could remember talking to her on the phone only twice (R. at 1095) (although Ms. Archuleta said it was only once and occurred after the case had settled (R. at 970-71)). Mr. Hughes did very little work and had extremely limited involvement in this case. Instead, virtually all the work done on the case was done by Mr. Bennett. No wonder Mr. Hughes vehemently opposed the agency instruction (R. at 969-70).

Hughes fails to give a single reference to the record in support of his claim that he had fully accepted responsibility for Bennett's acts and omissions. The record reveals that the very opposite was true. In addition to R-970 mentioned above, see R-1053 for Hughes' shifting response to the Court's simple question of whether there was an agency relationship between him and Bennett. At lines 1-8, Hughes says Bennett was his employee, and

at lines 13 & 14 says he was not. Hughes never accepted responsibility for Bennett's acts. Hughes opposed Plaintiff's requested agency jury instruction and the Court refused to give it.

At page 20 of his brief, Hughes states: "Neither party called Bennett as a witness. Perhaps that is because neither party thought he had much to add" That statement lacks candor. The true reason Bennett was not called at trial was because his whereabouts were unknown. (See R. at 459 for Plaintiff's Motion to Preclude the Testimony of Ronald S. Bennett on the grounds that Defendant claimed not to know where to find him or refused to disclose the information; see also R. at 928, lines 20-25, and R. at 929 where Hughes tells the Court he spoke to Bennett six weeks earlier but did not at the time of trial know where he was nor how to contact him.)

C. ARCHULETA PROVIDED A PROPER CITATION TO THE JUDGE'S QUOTE THAT "BENNETT IS NOT ON TRIAL HERE."

Hughes denies that the Judge commented that "Bennett is not on trial here" and complains that no citation or reference to the record was included in Plaintiff's brief. Hughes is in error on both points. The citation is found at page 9, paragraph 3 of Plaintiff's main brief. The citation is to R-970 which is correct. A copy of the transcript showing the Court's statement that "Bennett is not on trial here" is attached at Appendix H.

This comment by the Court was highly prejudicial and made the need for an agency instruction even greater. How could the jury be expected to hold Hughes accountable for malpractice that included

numerous acts and omissions by Bennett without a clear instruction that Hughes was responsible for Bennett's acts. It certainly cannot be said that this error was harmless in the face of the court granting Hughes' objection to testimony about Bennett's acts with the statement that "Bennett [was] not on trial." The court was telling the jury to disregard Bennett's actions entirely.

POINT V

PLAINTIFF WAS CLEARLY ENTITLED TO OBTAIN COPIES OF THE CREDIT UNION STATEMENTS SOUGHT IN DISCOVERY

The Court clearly should have granted Plaintiff's Motion to Compel Discovery of credit union statements that would establish the amount of interest earned by Hughes on Archuleta's money. Defendant refused to produce the bank statements on the grounds that the information would identify other legal clients of his and thereby violate their confidentiality. That claim is clearly erroneous on its face. Credit Union statements simply do not contain or reflect client names nor any other identifying information. They show only dates, amounts and check numbers. Hughes has no right to conceal this information from Archuleta since it was her money that he had kept in this account.

In his opposing brief at the third to the last (unnumbered) page, Defendant claims that "her [Plaintiff's] attorney refused the suggestion the Court examine the bank records to assure that the funds were there. Plaintiff's counsel would only be satisfied with his auditing the bank records and having them in his possession." That is a blatant misrepresentation. No reference to the record is provided because it simply did not happen. Instead, the very

opposite is true. The transcript of a telephone hearing on Plaintiff's Motion to Compel Discovery held on the 29th of November, 1995, is found at R-906-18. During that hearing, Plaintiff's attorney agreed that any confidential material that might be reflected on the statements being sought should be redacted.

[PLAINTIFF'S COUNSEL]

Now, I would agree that if there is confidential information on that, if there is confidential information, it should be redacted, it should be blacked out. If there's a client name, if there's a client address, that should be blacked out

(R. at 915, lines 18-23.)

Of course no such confidential information would be found on those documents, but if there were, it would be easy to protect that information and still give Plaintiff the documents to which she was entitled.

In his brief, Hughes seems to be changing course and switching his argument from that of protecting client confidentiality to that of protecting certain information from possible use in another case. That argument was not raised below. If that had been a legitimate concern, the proper course of action would have been a motion for protective order limiting the use of the information to the case at hand. It certainly would not be proper to deprive Archuleta of discovery and access to information that could lead to admissible evidence simply to protect Defendant from the possible use of the information in another case, particularly when Defendant's concerns are not clearly expressed.

A. THE COURT SHOULD TAKE THIS OPPORTUNITY TO PROVIDE GUIDANCE ON THE PROPER WAY TO RESPOND TO A MOTION TO COMPEL DISCOVERY OF DOCUMENTS WHEN A CLAIM OF PRIVILEGE IS MADE.

Duplicate credit union or bank statements are inexpensive and easy to obtain. In this case, Hughes should have been required to produce copies of the credit union statements for "in camera" inspection by the Court so that the Court could properly determine whether or not there was a legitimate claim of privilege. See United Mercantile Agencies v. Silver Fleet Motor Express, Inc., 1 F.R.D. 709 (W.D. Ky. 1941); Collins & Aikman Corp. v. J.P. Stevens & Co., 51 F.R.D. 219, 169 U.S.P.Q. 296 (D.C.S.C. 1971). If client names or addresses or other identifying information were present in the statements, they could have been redacted on the copy provided to Plaintiff but not on the copy provided to the trial court so that the court would have been able to verify that the redacted material was truly privileged.

The Appellate Court should take this opportunity to provide guidance on the proper way to respond to a motion to compel discovery of documents when a claim of privilege is made. When it is not unduly burdensome or inconvenient to do so, copies of the documents should be produced with the portion for which a "privilege" is claimed being "blackened out" or otherwise removed from what is provided to the requesting party. At the same time, an unredacted copy should be provided to the Court for "in camera" inspection. This would allow the court to verify that the removed material was indeed privileged. Otherwise, it is impossible for

the requesting party to verify that information or documents being withheld are subject to a valid claim of privilege. In certain cases the court may also consider appointing a discovery master for the purpose of confirming that only truly privileged material is being withheld.

POINT VI

THE UNDISPUTED FACTS ESTABLISH THAT DEFENDANT WAS GUILTY OF CONSTRUCTIVE FRAUD

When Mr. Bennett, while acting for Mr. Hughes, directed Allstate to include the PIP amount into the final settlement so that an attorney's contingent fee could be taken on those sums, he performed an action that worked to the benefit of Mr. Hughes and to the detriment of Mr. Hughes' client, Maxcine Archuleta. Unfortunately, we will never know how often this sad event occurs and is never caught or complained of. In its ethics opinion #114, the Utah State Bar has recognized this scenario as a continuing problem (R. at 586-91). To this date, Mr. Hughes sees nothing wrong with this type of activity. Perhaps that is because he has done the same thing many times in the past. Perhaps it is still being done. This case presents a classic opportunity for this Court to place some teeth into the ethics opinion against collecting contingent fees on PIP amounts. The legal mechanism of constructive fraud is already in place and must be applied to the facts presented here.

In circumstances where a defendant exercises extraordinary influence over the plaintiff and should be aware of the trust and confidence placed by the plaintiff on the defendant, the defendant

is said to be in a "confidential relationship." Blodgett v. Martsch, 590 P.2d 298 (Utah 1978). In these circumstances, the law recognizes constructive fraud, and if there is found to be the "slightest trace of undue influence or unfair advantage, redress will be given to the injured party." Id. at 302. The law presumes an attorney-client relationship to be just such a confidential relationship. Id. at 302.

To establish constructive fraud, it is not necessary to establish an actual intent to defraud. Rather, it results from a breach of the obligation implicit in the relationship. Von Hake v. Thomas, 705 P.2d 766 (Utah 1985); Harrell v. Branson, 344 So. 2d 604 (Fla. App. 1977). If a confidential relationship exists, any transaction that benefits the party in whom trust is reposed is presumed to have been unfair and to have resulted from undue influence and fraud. Furthermore, the benefitting party bears the burden of proving that the transaction is fair. Von Hake, supra.

It has been explained by the Utah State Bar's Ethics Advisory Opinion Committee that the client must be "[f]ully informed as to the degree of risk justifying a contingent fee." Opinion 114 (R. at 586). The West Virginia Supreme Court of Appeals explained further that the requirement that a client be fully informed especially applies to a contingent-fee contract.

The client needs to be fully informed as to the degree of risk justifying a contingent fee The clearest case where there would be an absence of real risk would be a case in which an attorney attempts to collect from a client a supposedly contingent fee for obtaining insurance proceeds for a client when

there is no indication that the insurer will resist the claim.

Committee on Legal Ethics v. Tatterson, 352 S.E.2d 107, 114-15 (W.V. Sup. Ct. App. 1986).

Here, Mr. Hughes has never come forward with any evidence to establish that he explained to his client, Maxcine Archuleta, that he was taking a fee on PIP claims which had no risk by his own admission and testimony. Instead, without any disclosure he benefitted himself to the detriment of his client and by doing so violated an ethics opinion and the case law cited above. This is the classic case crying out for constructive fraud.

All three elements of constructive fraud are met:

1. A confidential relationship existed. (Von Hake, supra; Blodgett, supra; and In re Swan's Estate, 4 Utah 2d 277, 281, 283 P.2d 682, 684 (1956).

2. A transaction that benefitted the superior party in a confidential relationship.

3. Actual damages.

Clearly, Plaintiff should have been granted partial summary judgment on the issue of constructive fraud. The only remaining issue should have been the amount of punitive damages to be awarded.

CONCLUSION

This appeal presents only questions of law. Even if she were not entitled to a refund of the entire fee, Plaintiff is entitled to \$800 as a refund of the one-third fee charged on the \$2,400 of unpaid medical expenses that would have been paid by her own PIP

carrier if they had simply been submitted to it. The four facts material to this issue are simple and were undisputed by the parties at the summary judgment level. The timing of the hearing on the motion was of no significance and the Court did not have discretion to defer to a jury rather than grant a Rule 56 motion since the Plaintiff was entitled to judgment as a matter of law.

Furthermore, the written contract simply did not provide for a fee for a case that settled more than ten days before trial. There is really no ambiguity in the contract language that controls the outcome of this issue. But even if the language is deemed to be ambiguous, that ambiguity must be resolved against the attorney draftsman and not in his favor. The result is not as draconian as it appears, however, since the Defendant may still be entitled to a fee based on a theory of quantum meruit.

Plaintiff was entitled to her proposed agency jury instruction. The Court's error in refusing the instruction was particularly prejudicial in light of the Court's sustaining an objection to a question about Bennett's actions by stating in the jury's presence that "Bennett is not on trial here."

Plaintiff was clearly entitled to copies of the credit union statements for the period during which her money was on deposit so that she could determine for herself how much interest Hughes had earned thereon. Defendant's claim of privilege is simply not supportable. Any legitimate claim of privilege could have been easily avoided by redacting any privileged information on the copy of the statement provided to Plaintiff.

Finally, all the elements of constructive fraud were established by undisputed facts presented in a properly supported motion for summary judgment which should have been granted.

October 21st, 1996
Date

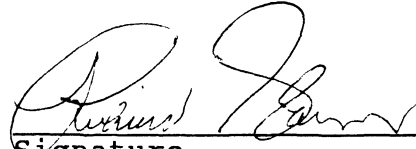
Richard K. Glauser
Richard Glauser
Attorney for Plaintiff/Appellant

CERTIFICATE OF SERVICE

I hereby certify that I mailed 2 copies of the foregoing brief,
postage pre-paid to:

Donald C. Hughes
P.O. Box 572112
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October 27th, 1996
Date


Signature

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IN THE SECOND JUDICIAL DISTRICT COURT
OF DAVIS COUNTY, STATE OF UTAH

MAXCINE ARCHULETA,	:	PLAINTIFF'S MOTION FOR
Plaintiff,	:	PARTIAL SUMMARY JUDGEMENT
vs.	:	
DONALD C. HUGHES	:	Civil No.940700264
Defendant.	:	Judge Dawson

Plaintiff hereby moves for partial Summary Judgement against defendant on portions of all three of her claims.

1. Plaintiff is entitled to Summary Judgement against defendant for \$800 as the amount of attorney fees charged on \$2,400 of unpaid medical expenses that were included in the liability settlement of a personal injury case but which should have been submitted for payment under the PIP portion of plaintiff's own policy. Summary Judgement is mandated because neither Utah law nor the contract provide for contingent fees for the collection of PIP benefits.

2. Plaintiff is entitled to Summary Judgement against defendant for fraud. The uncontested facts of this case establish constructive fraud as a matter of law. Because of the fraud, plaintiff is entitled to Summary Judgement against defendant for the balance of her attorney fees paid. She is further entitled to punitive damages in an amount to be determined at trial. Plaintiff

is entitled to a refund of all attorney fees paid because the contract itself does not provide for a fee for the work done in this case nor for the result obtained.

3. Finally, plaintiff is entitled to Summary Judgement on the issue of legal malpractice. The uncontested facts of this case show that, as a matter of law, defendant's legal representation fell far short of the required standard of care for lawyers representing clients in personal injury actions. Plaintiff's damages for this malpractice is the difference between what her case should have been worth and the \$5,000 that she actually received. A trial will be required on the issue of those damages.

Pursuant to the Code of Judicial Administration, a Memorandum of Points and Authorities in Support of Plaintiff's Partial Motion for Summary Judgement accompanies this Motion.

11-1-95
Date

Dan Wilson
Daniel L. Wilson
Attorney for Plaintiff

Mailed To: Donald C. Hughes
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St. Louis, MO 63146

11-1-95
Date

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IN THE SECOND JUDICIAL DISTRICT COURT
OF DAVIS COUNTY, STATE OF UTAH

MAXCINE ARCHULETA,	:	MEMORANDUM IN SUPPORT
	:	OF PLAINTIFF'S MOTION
Plaintiff,	:	FOR PARTIAL SUMMARY
	:	JUDGEMENT
vs.	:	
DONALD C. HUGHES	:	Civil No.940700264
Defendant.	:	Judge Dawson

Plaintiff submits the following Memorandum in Support of her Motion for Partial Summary Judgement.

UNDISPUTED FACTS

1. This is a fraud, legal malpractice and breach of contract case (Complaint).

2. Defendant (Hughes), a lawyer, represented plaintiff (Archuleta) in a personal injury (PI) case. (Hughes' deposition, page 23, lines 17-19.)

3. Less than a week after having been injured in an auto accident, Archuleta was contacted by Ronald Bennett, a non-lawyer who offered to represent her. (Archuleta's deposition, page 65, line 23.)

4. In response to the solicitation, Archuleta visited Bennett and signed an Attorney Retainer Agreement (the contract) retaining Donald Hughes, the defendant herein, as her attorney. (Archuleta's deposition page 59.)

5. The Attorney Retainer Agreement (the contract) was in writing and is attached at EXHIBIT 1. (Hughes' Answers to Interrogatories and Request for Production of documents.) (Hughes' deposition, page 38, lines 5-12.)

6. The tortfeasor in the underlying PI case was insured by Allstate insurance company. (Hughes' deposition, page 64, lines 18-20.)

7. In addition to insuring the tortfeasor, Allstate Insurance Company also insured Archuleta's vehicle. (Hughes' deposition, page 108, line 5.)

8 Archuleta's insurance with Allstate included Personal Injury Protection (PIP) coverage. (Hughes' deposition, page 61, line 21.)

9. Archuleta's PI case settled for a total of \$9,286.00. (Hughes' Answers to Interrogatories and Request for Production of Documents.)

10. The \$9,286.00 gross settlement of the PI case included \$2,400 for unpaid medical expenses related to injuries sustained in the wreck. (Hughes' deposition, page 63, lines 16-22 and page 152, lines 12-25.)

11. Hughes took a full one-third attorney fee of \$800 on the \$2,400 of unpaid medical expenses that were included in the settlement. (Defendant's answers to Interrogatories and Request for Production of Documents.) (Hughes' deposition page 55, lines 12-25.)

12. The \$2,400 of unpaid medical expenses were never submitted to Allstate Insurance Company for payment under the PIP portion of Archuleta's policy. (Hughes' deposition page 63, lines 23-25.)

13. Hughes admits the \$2,400 of unpaid medical expenses would have been paid by Archuleta's PIP insurance if the bills had been submitted for payment. (Hughes' deposition, page 63, lines 23-25 and page 64, lines 1 and 2.) (See also deposition of the Allstate PIP adjustor, Sandra McIntosh, page 35.)

14. Hughes admits he was not present when Archuleta signed the attorney retainer agreement. (Hughes' deposition, page 38.)

15. In fact, Hughes admits he never personally met Archuleta, his client. (Hughes' deposition, page 38.)

16. Hughes admits he had a non-lawyer [Bennett] obtain the clients signature on his attorney retainer agreement and on the medical release form. (Hughes' deposition, page 40, lines 21-24.)

17. Hughes further admits that neither he nor the client filled in the blank spaces of his attorney retainer agreement and instead that Bennett probably did so. (Hughes' deposition, page 40, lines 9-12.)

18. Hughes admits he did not have sufficient control over Bennett to create an employer/employee relationship. (Hughes' deposition page 36, lines 13-16.)

19. Hughes only recalls talking to Archuleta twice and both conversations were by phone. (Hughes' deposition page 46, lines 19-25.) [NOTE- Archuleta says they had only one conversation and

that occurred by phone after Bennett had agreed to a settlement.]

20. Archuleta's phone number was not even in Hughes' legal file. (Hughes' deposition, page 51, lines 18-21.)

21. Hughes never sent any type of correspondence to his client, Archuleta. (Hughes' deposition page 149, lines 16-18.)

22. Hughes never telephoned his client. (Hughes' deposition, page 150, lines 2-5.)

23. Hughes told his client he would investigate the case. (Hughes' deposition, page 41, lines 9-11.)

24. Hughes never spoke to the driver who caused the wreck. (Hughes' deposition, page 85, line 10.)

25. Hughes never spoke to the police officer who investigated the collision. (Hughes' deposition page 85, line 8.)

26. Hughes never spoke to the person who witnessed the collision. (Hughes' deposition page 85, lines 1.)

27. Hughes admits he never spoke to any insurance adjustor about liability. (Hughes' deposition, page 7, line 6.)

28. Hughes doesn't specifically remember talking to any insurance adjustor about anything until after the case was settled. (Hughes' deposition, page 89, lines 1-20.)

29. All three adjustors who worked on the file state categorically that they never spoke to Hughes nor even knew he was involved in the case until after it was settled. (See deposition of McIntosh, Ulrich and Palmer.)

30. Hughes didn't file suit and didn't do any discovery. (Hughes' deposition, page 128.)

31. Hughes didn't obtain repair records and didn't know how much damage had been done to his client's car. (Hughes' deposition, page 72.)

32. Hughes did not request that his client be evaluated by an orthopedic specialist even though she had an orthopedic injury. (Hughes' deposition, page 98 and 99.)

33. Hughes never spoke to his client's doctor. (Hughes' deposition, page 57, lines 11-13.)

34. Hughes didn't ask any doctor to provide a permanent impairment rating for his client. (Hughes' deposition, page 45, line 12-14.)

34. There is no evidence that the client had even been released from treatment at the time of settlement. (Hughes' deposition, page 73 and 74.)

35. In fact, Archuleta had not been released from treatment. (Archuleta's deposition, page 54, lines 3-5.)

36. Hughes didn't know the liability limits of the applicable policy. (Hughes' deposition, page 64-69.)

37. Hughes didn't know the minimum limits of liability required by law but thought it might be \$15,000. (Hughes' deposition, page 68, line 15 through page 69 line 10.)

38. Hughes never corresponded with the insurance company. (Hughes' Answers to Interrogatories and Request ^{for} Production of Documents.)

39. Hughes' entire legal file on Archuleta's case contains only 21 pages. The are: (1) a form contract; (2) a medical release

form; (3) a PIP form; (4) 16 pages of medical bills; (5) a Release of All Claims form; and (6) a settlement accounting form [which Archuleta denies receiving]. The file contains no correspondence of any kind, no pleadings, no notes, no summaries, no medical records [only partial bills], no reports, no photos, no repair records and no demand package. (Hughes' Answers to Interrogatories and Request for Production of Documents.) (Hughes' deposition, page 37, line 15-20.)

40. Hughes did not submit any type of a demand to the insurance company, (neither verbally nor in writing). (Hughes' deposition, page 112, line 25 to page 113 line 4 and page 128.)

41. Hughes authorized a non-lawyer [Bennett] to initiate and conduct settlement discussions with the insurance company. (Hughes' deposition pages 111 & 112.)

42. Hughes did not attend the settlement meeting between Bennett and the insurance adjustors. (Hughes' deposition 112, lines 8 & 9.)

43. Hughes admits he did not have enough control over Bennett to even consider him an employee. (Hughes' deposition, page 36, lines 13-16.)

44. At the settlement meeting with the adjustors, the non-lawyer [Bennett] agreed to accept the insurance company's first offer. (Hughes' deposition, page 112-115.)

45. Hughes recommended that Archuleta accept the insurance company's first offer. (Hughes' deposition, page 67, lines 17-19 and pages 112-115.)

46. The offer, the Release of All Claims, the check and the accounting were all presented to the client by Bennett, a non-lawyer. (Hughes' deposition, page 133, line 17-21.)

47. Hughes retained \$1,186.00 from Archuleta's share of the settlement [ostensibly to pay unpaid medical bills at Davis Hospital] and yet admits he was not retained by Archuleta to settle her bills. (Hughes' deposition, page 172, lines 4-7.)

48. Hughes further admits he did not even know the amount of unpaid medical bills. (Hughes' deposition, page 140-141.)

49. Hughes admits having kept Archuleta's \$1,186.00 in an account that included his wife (a non-lawyer) as a signatory. (Hughes' deposition, page 170, lines 4-20.)

50. Hughes did not resolve any of the outstanding medical bills. (Archuleta's deposition, pages 107-110.)

51. The employees of Davis Hospital who were responsible for the accounts testified that they had no contact with Hughes. (Depositions of Carol Stout and Quana Neves.)

I. SUMMARY OF PLAINTIFF'S CLAIMS

Plaintiff has three separate claims against defendant. Based on the undisputed facts of this case, plaintiff is entitled to partial Summary Judgement on all three claims. These claims are summarized as follows and are explained in more detail in Section II of this memorandum.

1. Plaintiff is entitled to judgement against defendant for \$800 as the amount of attorney fee charged on the \$2,400 of unpaid medical expenses that were included in the liability settlement but

which should have been submitted for payment under the PIP portion of plaintiff's own policy. Summary Judgement is mandated because Utah law doesn't permit a contingent fee for collection of PIP benefits. Furthermore, the contract itself does not provide a fee for collecting benefits from the plaintiff's own insurance company.

2. Plaintiff is entitled to Summary Judgement against defendant for fraud because the uncontested facts establish constructive fraud. Because of the fraud, plaintiff is entitled to judgement against defendant for \$2,295 as the balance of attorney fees paid. (\$3,095 less credit for the \$800 to which she is entitled pursuant to paragraph 1 above.) Plaintiff is further entitled to punitive damages pursuant to UCA § 78-18-1 in an amount to be determined at trial. Plaintiff is also entitled to a refund of all attorney fees paid because the contract itself does not provide for a fee for the work done in this case nor for the result obtained.

3. Finally, plaintiff is entitled to judgement for legal malpractice. Fraud is per se malpractice. But in addition, the uncontested facts of this case show that, as a matter of law, defendant's legal representation fell far short of the required standard of care for lawyers representing clients in personal injury actions. Plaintiff's damages for this malpractice is the difference between what her case should have been worth and the \$5,000 that she actually received. A trial will be required on the issue of those damages.

II. ARGUMENT

1. PLAINTIFF IS ENTITLED TO SUMMARY JUDGEMENT FOR \$800

The \$2,400 of unpaid medical expenses should not have been included in the liability settlement. Instead, they should have been submitted to plaintiff's own PIP insurance carrier. It is undisputed that the bills would have been paid if they had been submitted. (Uncontested fact #13.) Clearly, if they would have been submitted for payment under the PIP policy, no attorney fee would have been charged thereon.

Defendant claims that even if the bills had been paid by PIP he still would have been entitled to a one-third fee because of his attorney retainer agreement. Defendant is wrong for at least two reasons as set forth at ¶ 1(A). and 1(B) below. But before addressing those issues, it is appropriate to first examine the courts role in determining an attorney's right to charge and collect a fee. Courts have inherent supervisory authority to decide in a fee dispute whether the contractual attorney's fee is reasonable and to refuse to enforce any contract that calls for clearly excessive or unreasonable fees. ABA/BNA Lawyer's Manual on Professional Conduct 41:308 (Sept. 1995) citing Pfeifer v. Sentry Ins., 745 F.Supp. 1434, 1443 (D.C. Wis 1990). When the amount of the fee is challenged, the burden of proof as to reasonableness is upon the attorney. Pfeifer, supra. Attorney fee agreements must be fair, reasonable and fully explained to the client. Such contracts are strictly construed against the attorney. Lawyer's Manual on Professional Conduct, supra 41:318, citing Severson,

Werson, Berke & Melchior v. Bollinger, 1 Cal.Rptr 2d 531 (Calif. Ct. App. 1991).

Both plaintiff and defendant agree that defendant charged a one-third contingency fee of \$800 for collecting \$2,400 of medical expenses incurred by plaintiff as a result of her injury. (Undisputed Fact #11.) Both parties also agree that the \$2,400 of medical expenses were never submitted to plaintiff's PIP insurer. (Undisputed Fact #12.) And that if the bills had been submitted, they would have been paid under the PIP policy. (Undisputed Fact #13.)

Defendant maintains that this action involves a contractual dispute over the meaning of the retainer agreement that plaintiff and defendant allegedly entered into, with defendant interpreting the agreement as authorizing the collection of fees based in part on the amount received as PIP benefits. Because of impermissible irregularities in the presentation and signing of the agreement, plaintiff would dispute the validity of the attorney retainer agreement if a trial were required. But even assuming that the attorney retainer agreement is valid, defendant's interpretation is completely contrary to law. First, because contingent fees for the collection of PIP benefits are not permitted by law; and, secondly, because the contract in this case does not provide for a fee for the work done in this case nor for the result obtained. Each of these is explained in more detail below:

1. (A) THE CONTINGENT FEE IN THIS CASE IS PROHIBITED BY LAW

Contingent fees are prohibited for the routine collection of PIP benefits. (See Lawyer's Manual on Professional Conduct, supra, 41:314 "A common disciplinary problem involves lawyers who charge a contingent fee for the recovery of no-fault benefits, ...to which the client's entitlement is not seriously in doubt.")

In Opinion 114, issued February 20, 1992 by the Utah State Bar's Ethics Advisory Opinion Committee (courtesy copy attached as EXHIBIT 2, cited in ABA/BNA Lawyer's Manual on Professional Conduct 1001:8501 (Sept. 1995) it was held:

Under the Utah Rules of Professional Conduct, [Rule 1.5(a)] contingent fees charged for the routine filing and collection of undisputed PIP or "no fault" claims from the client's insurer are unreasonable and excessive. State bars, courts, and commentators facing this issue uniformly agree that contingent fees charged on the recovery or undisputed PIP payments are unreasonable. "Contingent fees are generally higher [than fixed fees' because receipt of the fee is itself contingent on some possibility. Because PIP benefits are virtually guaranteed to accident victims a fee contingent on receipt of those benefits is likely to be unreasonable."

(quoting the State Bar of Georgia Op. 37).

The opinion explained further that the ABA has recognized that "[a] contract for a contingent fee, where sanctioned by law, should be reasonable under all the circumstances of the case, including the risk and uncertainty of the compensation." (emphasis in original). "There must be a realistic risk of non-recovery." Id.

Since the "no fault" legislation of many states requires PIP coverage, and since payment of these benefits is typically generated automatically by filing a claim form with the insurer, "there is virtually no risk and the time required for the lawyer is

minimal" [Therefore], "[state bar ethics committees and] courts uniformly hold that contingent fees are an improper measure of professional compensation in such cases." Id, citing State Bar of Georgia Op. 37; South Carolina Bar Op. 83-3; Maryland State Bar Association, Formal Opinions 76-1 & 77-4; Attorney Grievance Comm'n v. Kemp, 496 A.2d 672 (Md. 1985); Pops & Estrin, P.C. v. Reliance Ins. Co., 562 N.Y.S. 2d 914 (N.Y. Civ. Ct. 1990); Hausen v. Davis, 448 N.Y.S.2d 87 (N.Y. Civ. Ct. 1981); In re Hanna, 362 S.E. 2d 632 (S.C. 1987); and Brickman, Contingent Fees Without Contingencies: Hamlet Without the Prince of Denmark?, 37 UCLA L. Rev. 29, 76-78 (1989).

In Attorney Grievance Comm'n v. Kemp, supra, the Maryland Court of Appeals held that a one-third contingent fee in a personal injury case was clearly excessive where it was collected by the attorney on PIP payments that followed automatically upon the filing of a simple form. The court cited a Maryland State Bar Association Formal Opinion as follows:

[I]t would be unethical, in virtually all cases, for a lawyer to charge a contingent fee for collecting a claim against his client's own insurer under the PIP coverage when the attorney has been engaged on a contingent fee basis to handle a personal injury claim against a third party... [C]ontingent fees are permissible only when they are reasonable under all the circumstances, including such relevant factors as the risk and uncertainly.

Similarly, in The Florida Bar v. Gentry, 475 So.2d 678, 679 par. 9 (Fla. 1985), the court found that "[it] was unfair or excessive to charge an attorney's fee for personal injury protection benefits as to this client because the statute itself

provides for reasonable attorney's fee if there is a dispute." Utah Code Ann. § 31A-22-309 also provides for attorney's fees in the event a dispute arises over PIP benefits. There is no rational reason to permit a contingent fee when the statute already provides for an award of attorney fees in an action to compel payment of PIP benefits.

Even when PIP benefits are not at issue, courts have generally adhered to the same rule prohibiting an attorney from collecting a contingency fee absent a contingency. Here, there was no contingency. The Utah Bar in Opinion 114, supra cited "a significant body of case law "supporting" the general conclusion that where there is virtually no risk of non-recovery, a contingent fee charged by an attorney on the amount of the recovery is inappropriate." Citing e.g., Rosquist v. Soo Line R.R., 692 F.2d 1107, 1114 (7th Cir. 1982); Donnarumma v. Barracuda Tanker Corp., 79 F.R.D. 455, 67 (D.Cal. 1978); Kiser v. Miller. 364 F. Supp. 1311, 19 (D.D.C. 1973); In Re Swartz. 686 P2d 1236, 3943 (Ariz.1984); People v. Nutt, 696 P.2d 242 48 (Colo. 1984); Anderson v. Kenelly, 547 P2d 260, 61 (Colo. Ct. App. 1975); Robinson v. Sharp, 66 N.E. 299, 301, (Ill. 1903); Horton v. Butler, 387 So. 2d 1315, 17-18 (La.Ct. App. 1980); Thomton, Sperry & Jensen, Ltd v. Anderson, 352 N.W. 2d 467, 69 (Minn. Ct. App. 1984); Citizen Bank v. C & H Constr. & Paying Co., 600 P2d 1212, 18 (N.M. 1979); and Redevelopment Comm'n of Hendersonville v. Hyder, 201 S.E. 2d 236, 39 (N.C. Ct. App. 1973).

1.(B) THE CONTRACT DOES NOT PROVIDE FOR A FEE FOR COLLECTING PIP BENEFITS FROM PLAINTIFF'S OWN INSURANCE COMPANY

The attorney retainer agreement was a contract in writing. Therefore, its terms are construed as a matter of law and do not present a jury question. As a matter of law, the contract simply does not authorize a fee for recovering PIP benefits. In fact, its doubtful the contract in this case provides for the payment of any fees whatsoever. The agreement is hopelessly ambiguous and does not provide for any fee from a settlement unless that settlement is "...obtained after trial or within 10 days of the date set for trial...". That did not occur in this case as no trial was set because no suit was even filed. Clearly the contract is incomplete because of missing words or terms but in accordance with well established law concerning the interpretation of attorney fee agreements, ^{it must be construed against the attorney.} This subject was addressed by the Utah State Court in the case of Phillips v. Smith, 768 P2d 449 (Utah 1989) as follows:

"In interpreting the contract, we must be mindful of the general principle that a court will strictly construe terms in a contract against one who is "both the attorney draftsman of and a party to the instrument." Continental Bank & Trust Co. v. Bybee, 6 Utah 2d 98, 102, 306 P2d 773, 775 (1957). We also note that in the present circumstances, this principle is reinforced by the fact that the instrument at issue relates to an attorney/client contingent fee arrangement." Id at 451.

The first paragraph of the attorney retainer agreement appears to be missing a phrase that would indicate the client is retaining the attorney. Contingent fee contracts are strictly construed against the attorney. But, even if that paragraph were read to provide for defendant being retained to represent the plaintiff, it would still be limited only to claims against, "...the party or

parties responsible for injuries and damages sustained by the client...". Clearly, this would include only the tortfeasor and would not include Archuleta's own insurance company. After all, her insurance company is not, "a party or parties responsible for injury and damages sustained by the client".

An attorney retainer agreement very similar to this one was the subject of a prior ruling of the State Bar as reported at page 23 of the Utah State Bar Journal in January of 1994. In that case, the attorney was retained to represent a client in a personal injury matter involving the client's son who was struck by an automobile. When it was discovered that the motorist was uninsured, the attorney filed a claim against the client's own insurance company and collected policy limits of \$100,000 under the uninsured motorist portion of the policy. The attorney kept one-third of the recovery as a fee. A fee arbitration panel found that this was an improper fee because the contract between the attorney and client did not contain language providing for a fee on a recovery from the client's own insurance company. The attorney was admonished for charging an excessive fee and it was ruled that the attorney was entitled only to the reasonable value of the services rendered. See Utah State Bar Journal article, January 1994, copy attached at EXHIBIT 3.

The contract in this case does not provide for actions against plaintiff's own insurance company. Clearly, defendant would not have been entitled to a fee for recovering the \$2,400 of unpaid medical expenses from plaintiff's PIP carrier because the contract

doesn't provide for it. He certainly can't claim a fee by "slipping" the \$2,400 into the liability settlement rather than submitting the bills to the PIP carrier.

Moreover, the attorney retainer agreement in this case only provides for an attorney fee in those rare cases where a recovery is, "...obtained after trial or within 10 days of the date set for trial...". While it is unlikely that this was the intent of the parties, still, the law clearly provides that an ambiguous attorney retainer agreement is construed against the attorney who is also the drafter of that instrument. In this case, there is no way the defendant can claim the right to an attorney fee based on the attorney retainer agreement.

2.A. THE DEFENDANT COMMITTED FRAUD AGAINST THE PLAINTIFF

Plaintiff has alleged fraud based on the fact that Defendant Hughes inflated his attorney fee by \$800 by settling her personal~~ly~~ injury claim to include \$2,400 of medical expenses that should have simply been submitted to her PIP carrier. This was a violation of Hughes' duty, when explaining the basis for his contingency fee, to disclose to the plaintiff the availability of PIP insurance that would automatically pay the medical bills; and to disclose the lack of risk in collecting those benefits.

The Utah Supreme Court has explained that there are two types of fraud: actual fraud and constructive fraud. For actual fraud, the plaintiff must in the absence of a confidential relationship, prove the defendant knowingly misrepresented a material fact with intent to induce the plaintiff to act or refrain from action and

that the plaintiff, reasonably relying on the misrepresentation acted, or failed to act, to his detriment. Blodgett v. Martsch, 590 P2d 298 (Utah 1978). But, if the circumstances are such that the defendant could exercise extraordinary influence over the plaintiff and the defendant was or should have been aware the plaintiff reposed trust and confidence in the defendant and reasonably relied on defendant's guidance, then the parties are said to be in "confidential relationship" and the plaintiff's burden is considerably diminished. "A course of dealing between persons so situated is watched with extreme jealousy and solicitude, and if there is found the slightest trace of undue influence or unfair advantage, redress will be given to the injured party." Id at 302.

The law presumes an attorney-client relationship to be just such a confidential relationship. Id at ³⁰²~~301~~. The breach of duty by the dominant party in a confidential relationship may be regarded as constructive fraud. "It is unnecessary for the plaintiff to show an intent to defraud; constructive fraud is an equitable doctrine employed by the courts to rectify injury resulting from breach of the obligation implicit in the relationship." Id at 302. See also: Von Hake v. Thomas, 705 P2d 766 (Utah 1985); Harrell v. Branson, 344 So.2d 604 (Fla.App. 1977) ("Constructive fraud may exist independent of an intent to defraud...[E]quity...attributes the same or similar effects as those that follow from actual fraud and...gives the same or similar relief.")

"If a confidential relationship is found to exist between parties, any transaction that benefits the party in whom trust is reposed is presumed to have been unfair and to have resulted from undue influence and fraud...The benefiting party then bears the burden of persuading the fact finder by a preponderance of the evidence that the transaction was in fact fair and not the result of fraud or undue influence. If that burden is not carried, the transaction will be set aside." Von Hake, supra.

It has been explained by the Utah State Bar's Ethics Advisory Opinion Committee that the client must be "fully informed as to the degree of risk justifying a contingent fee." Opinion 114. The West Virginia Supreme Court of Appeals explained further that the requirement that a client be fully informed especially applies to a contingent-fee contract. "The client needs to be fully informed as to the degree of risk justifying a contingent fee...The clearest case where there would be an absence of real risk would be a case in which an attorney attempts to collect from a client a supposedly contingent fee for obtaining insurance proceeds for a client when there is no indication that the insurer will resist the claim." Committee on Legal Ethics v. Tatterson, 352 S.E.2d 107, 114-15 (1986).

In Tatterson, the court found the attorney in that case misrepresented the difficulty in obtaining life insurance proceeds for a client. The court found that, in so doing the attorney violated disciplinary Rule 1-102(A)(4) which provides that an attorney "shall not engage in conduct involving dishonesty, fraud,

deceit, or misrepresentation."

A similar finding was made by the Illinois Supreme Court in In re Gerard, 548 N.E.2d 1051 (1989), where it was held that "[c]ollecting an excessive fee in and of itself can constitute fraud subject to discipline under Rule 1-102(A)(4); intent to defraud or deceive is not an element."

In In re Gerard, the court found there was clear and convincing evidence that the attorney never explained to the client the simple procedures he used to collect her money; and that by failing to explain this to the client while collecting a large fee, the attorney engaged in fraudulent conduct by omission. See also Homa v. Friendly Mobile Manor, 612 A.2d 322 (Md.App. 1992) ("[T]he nondisclosure of a material fact can also constitute fraud where a duty of disclosure exists. Where there is a fiduciary relationship, a duty of disclosure is imposed. A fiduciary relationship exists between an attorney and the client and carry with it the requirement of utmost good faith and loyalty and the obligation of [the fiduciary relationship]); Cornell v. Wunchel, 408 N.W.2d 369 (Iowa 1987) ("Concealment of or failure to disclose a material fact can constitute fraud in Iowa...To be actionable, the concealment must be by a party under a duty to communicate the concealed fact...A duty to disclose material facts arises...when it is shown that one of the parties has superior knowledge or a special situation, such as an attorney-client relationship, exists between the parties.

The court in In re Gerard further found there was constructive fraud by virtue of the attorney-client relationship, and that the fiduciary duty was breached when the attorney collected the excessive fee and then failed to initiate a renegotiation of that fee when it was discovered that his client's rights to the money were not being challenged.

The court specifically found that intent to defraud was not necessary and that ignorance of the law and of the disciplinary rules was no excuse. The court explained as follows:

We would have thought it was general knowledge among the members of the bar that a contingent fee is to be collected only if an attorney successfully champions the legal rights and claims of his client, with the result that the client is compensated through a settlement with, or judgement against, those who denied his claims.

Respondent's defense in this proceeding is ignorance...But if respondent, realizing his ignorance of contingent fees..., had sought to remedy it by doing the research necessary to draft a proper contingent fee agreement, presumably he would not now be before us;...

Respondent comments in his brief that [the client] never asked him to renegotiate his fee...But a client's acquiescence to an attorney's misconduct does not purge it of its unethical character.

Where, as here, an attorney-client relationship existed, the parties entered into a contingent fee contract, and the attorney failed to disclose that payment of the plaintiff's medical expenses was automatic and involved little or no risk, it was fraudulent of the attorney to collect a portion of the medical expenses as part of his contingency fee. As the dominant party in the confidential relationship such a breach is regarded as constructive fraud.

It has been held that an attorney who is guilty of actual fraud or bad faith toward his client, or who violates the

requirements of his professional responsibility, is not entitled to any compensation for his services. 7 Am Jur 2d Attorneys at Law § 260 p. 207.

The undisputed facts of this case mandate that plaintiff be granted Summary Judgement that defendant has committed fraud for the reasons set forth above. As such, plaintiff is entitled to a full refund of her attorney fees of \$3,095 (less credit for the \$800 that should be awarded pursuant to paragraph 1 above).

2.B. BECAUSE OF THE FRAUD, PLAINTIFF IS ALSO ENTITLED TO PUNITIVE DAMAGES IN AN AMOUNT TO BE DETERMINED AT TRIAL.

An attorney is liable for any loss sustained by his client as a result of the attorney's fraud. 7 Am Jur 2d Attorneys at Law § 215 p. 258. Punitive damages are awarded pursuant to statute, only if compensatory damages are awarded and "it is established by clear and convincing evidence that the acts or omissions of the tortfeasor are the result of willful and malicious or intentionally fraudulent conduct, or conduct that manifests a knowing and reckless indifference toward, and a disregard of, the rights of others." Utah Code Ann. § 78-18-1 (1)(a).

It has been held that, where a court ordered the return on money received by an attorney as a contingency fee based upon his breach of fiduciary duty, that constituted a compensatory damage award and was sufficient basis for the further award of punitive damages. Homa v. Friendly Mobile Manor, 612 A.2d 322 (Md.App. 1992).

In Cummings v. Pinder, 574 A.2d 843 (Del.Supr. 1990), the court found that, "...while ordinary negligence will not suffice to

support an award of punitive damages, intentional or willful conduct with reckless disregard for the interests of a client may subject an attorney to...punitive damages." The court in Cummings v. Pinder awarded punitive damages in an amount reasonably proportionate to the amount of compensatory damages where the attorney failed to advise his client fully concerning her right to pursue a claim against her own insurance carrier; unilaterally increased the contingency fee; and intentionally stopped payment on an insurance company check endorsed to his client. In this case, Hughes is guilty of very much the same conduct.

In Homa v. Friendly Mobile Manor, supra, the Court explained that punitive damages are awarded to punish conduct characterized by "evil motive, intent to injure or fraud," (emphasis in original) and defined "actual malice" "as conduct characterized by evil motive, intent to injure, ill will or fraud." (emphasis in original). The court found that intent to injure need not accompany fraudulent conduct to meet this standard of actual malice. The court held further that:

Punitive damages may be awarded in an action for deceit "where the wrong involved some violation of duty springing from a relationship of trust or confidence, or where the fraud is gross, or the case presents other extraordinary or exceptional circumstances clearly indicating malice and wilfulness. quoting Finch v. Hughes Aircraft Co., 469 A.2d 867 (1984)...

In Finch, we found gross fraud where the attorney violated his fiduciary duty to his client by submitting to his client false and fraudulent bills, over-charging his client by \$23,077 for professional services.

Similarly, the New Mexico Court of Appeals, in Rodrigues v. Horton, 622 P2d 261 (1980) held that punitive damages were properly

awarded against an attorney when his conduct was maliciously intentional fraudulent, or committed with a wanton disregard of the plaintiff's rights. The attorney in that case misled his client about a settlement, settled a different claim without authorization and charged excessive fees for miscellaneous services. The court found that the amount awarded as punitive damages was appropriate as long as it is not so unrelated to the actual damages as to manifest passion and prejudice.

3. PLAINTIFF IS ENTITLED TO SUMMARY JUDGEMENT THAT DEFENDANT COMMITTED MALPRACTICE

Fraud is per se malpractice. But in addition, as a matter of law, defendant's conduct throughout his representation of plaintiff in the underlying action falls far short of the standard of care required for attorneys. This is true for at least two reasons as set forth below. First, the actions of Bennett, a non-lawyer clearly constitutes the unauthorized practice of law. Defendant's conduct in assisting and participating in this unauthorized practice of law constitutes malpractice. A lawyer is prohibited from assisting any person in the performance of activity that constitutes the unauthorized practice of law or from sharing legal fees with a nonlawyer or forming a partnership with a nonlawyer involving the practice of law. Rules 5.4 5.5, Rules of Professional Conduct.

In Louisiana State bar Ass'n v. Edwins, 540 So.2d 295 (La. 1989), an attorney entered a relationship with a paralegal which resulted in the paralegal performing legal tasks without supervision and exercising professional judgement reserved only for

attorneys. The client testified and the court found that the paralegal held himself out to be a lawyer, entered an employment and contingent fee contract with the client, and did not reveal he was not a lawyer and arrange for the client to meet the actual lawyer until after the suit had been filed. In this case, Hughes never met his client even though the case was settled.

The court in Louisiana State Bar Ass'n v. Edwins, supra found that delegation of work by a lawyer is proper only if the lawyer maintains a direct relationship with his client, supervises the delegated work, and has professional responsibility for the work product. Under the facts indicated above, the court found the attorney knowingly assisted the paralegal in the unauthorized practice of law.

Similarly, the Utah State Bar admonished an attorney for failure to supervise a legal assistant, and publicly reprimanded a different attorney for failure to supervise nonlawyer assistants. Vol. 6, #7 Utah Bar Journal, Discipline Corner, pp. 24-25 (Aug./Sept. 1993). In the latter case, the lawyer permitted a paralegal to meet with a client and provide advice. Similarly, a private reprimand was given to an attorney when a nonlawyer assistant interviewed a client, took the information relating to a bankruptcy, advised the client as to the nature of the bankruptcy to be filed, and prepared the bankruptcy schedules. The attorney did not meet with the client until the first meeting with the creditors. Vol. 6, #1 Utah Bar Journal, Discipline Corner, p. 22 (Jan. 1993).

Pursuant to the case law and the rules of professional conduct, the actions of this defendant in permitting Bennett to present the attorney retainer agreement, fill in portions of that agreement, initiate and conduct settlement negotiations, present the terms of the settlement to the client, and present the Release of All Claims to the client constitutes assisting a non-lawyer in the unauthorized practice of law. Since an attorney who violates his professional responsibility to a client is not entitled to any compensation for his services, the contingency fee contract entered into between the plaintiff and defendant should be set aside by this court and plaintiff granted judgement for the full amount of the fee charged.

In addition to the fraud and assisting in the unauthorized practice of law, the undisputed facts of this case establish malpractice as a matter of law. Hughes never met his client. He only recalled talking to her twice over the phone. His client's phone number wasn't even in his legal file. Hughes never sent any type of correspondence to his client and he never telephoned her. He told his client he would investigate the case but he didn't talk to the driver who was alleged to have caused the wreck. He didn't talk to the police officer who investigated the collision. He never spoke to the person who witnesses the collision. He never spoke to any insurance adjustor about liability. He doesn't specifically recall talking to any insurance adjustor about anything until after the case was settled. All three of the adjustors who worked on the file testified that they never spoke to

the defendant and didn't even know he was involved in the case until after it was settled.

Hughes didn't file suit and didn't do any discovery. He didn't obtain repair records for the car and didn't know how much damage had been done to his clients car.

Hughes never spoke to his client's doctor. He didn't request that his client be evaluated by an orthopedic specialist even though she had an orthopedic injury and an MRI had revealed a bulging disk. Defendant never asked any doctor to provide a permanent impairment rating for his client. Plaintiff hadn't even been released from treatment at the time the defendant recommended that she accept \$5,000 as her share of the settlement.

Defendant didn't know the liability limits of the applicable policy and thought that the minimum limits of liability required by law was only \$15,000.

Defendant never corresponded with the insurance company. His entire legal file contained only 21 pages, five of which were forms and 16 of which were medical bills. (There is evidence that even the medical bills were obtained after the settlement.) The file contained no correspondence of any kind. No pleadings. No notes. No summaries. No medical records [only partial bills]. No reports. No photos. No repair records. No demand package.

Hughes did not submit a written demand to the insurance company and didn't even make a verbal demand. Hughes authorized a non-lawyer to initiate and conduct the settlement discussions with the insurance company. Hughes didn't even attend the settlement

meeting. The non-lawyer agreed to accept the insurance company's first offer and Hughes recommend the plaintiff accept it.

As a matter of law, the attorney's actions in this case do not meet the standard of care required of an attorney in a personal injury action. Essentially he did no work at all. The only thing he even claims to have done was to speak to the client over the phone and to have authorized a non-lawyer to handle her case. Clearly, plaintiff is entitled to Summary Judgement on the issue of attorney malpractice.

Plaintiff's damages for defendant's malpractice equals the amount that her personal injury case was worth less the \$5,000 she actually received. Plaintiff is entitled a trial on this issue.

CONCLUSION

Plaintiff is entitled to Summary Judgement against defendant for \$800 as the amount of the attorney fee charged for including unpaid medical expenses in a liability settlement when PIP insurance was available to pay the expenses. Plaintiff is further entitled to Summary Judgement that defendant has committed a fraud against plaintiff. Because of the fraud, plaintiff is entitled to a refund of the entire attorney fee charged in this matter and is further entitled to punitive damages in an amount to be determined at trial. In addition, the contract doesn't provide for any fee in the circumstances of the underlying case.

Plaintiff is further entitled to Summary Judgement on the issue of malpractice because as a matter of law defendant's conduct fails to meet the standard of care required of an attorney

representing a client in a personal action. Plaintiff's is entitled to a trial on the issue of damages as a result of defendant's malpractice.

The only issues to be tried are defendant's actual damages as a result of malpractice and the amount of punitive damages to which plaintiff is entitled because of defendant's fraud.

11-1-95
Date

Dan Wilson
Daniel L. Wilson
Attorney for Plaintiff

Mailed To: Donald C. Hughes
P.O. Box 27611
St. Louis, MO 63146

11-1-95
Date

Kristi L. Wilson
Signature

ATTORNEY RETAINER AGREEMENT

In consideration of the legal services to be rendered by Attorney Donald C. Hughes, hereinafter referred to as Attorney, for any claims that Maxine R. Hughes, hereinafter referred to as Client, may have against the party or parties responsible for injuries and damages sustained by Client on or about the 15 day of Oct, 1993, arising from a certain occurrence in Clark County, State of Georgia, briefly described as follows: Car accident on Oct 15, 1993.

Client hereby authorizes Attorney to commence and prosecute said claim and assigns to Attorney a lien of 1/2 (1/2 %) of all amounts recovered by compromise, settlement or judgment obtained after trial or within 10 days of the date set for trial. It is understood by Client that this agreement extends only through preparation and trial of the claim, and not to the defense or prosecution of any appeal that may be required.

IF NO RECOVERY IS OBTAINED, NO FEE SHALL BE PAYABLE TO ATTORNEY.

The parties to this agreement further agree as follows:

All expenses of investigation, preparation, and suit including doctors reports, reports of other experts, witness fees, filing fees and other court costs shall be paid as follows: Advanced by Attorney

Any costs or expenses advances by Attorney shall be reimbursed in full from Client's share of any recovery.

Attorney retains the right to employ associate counsel of his choice and at his expense. Attorney further retains the right to withdraw from the case for any reason and at any time upon proper notice to Client.

Client agrees not to drop the action or withdraw in the absence of Attorney's express written recommendation to do so. Client further agrees not to negotiate, discuss, or accept any settlement of this matter from any individual, corporation, firm or other entity unless presented to Client by Attorney.

Client agrees to keep Attorney advised of his whereabouts at all times and to cooperate in the preparation and trial of the case, to appear upon reasonable notice for depositions and court appearances, and to comply with all

reasonable requests made of him by Attorney in connection with the preparation and prosecution of this case.

If Attorney is discharged before conclusion of the case, client agrees to pay an attorney fee of \$90.00 per hour for time spent on this case, plus costs incurred.

Client hereby authorizes Attorney to release any and all hospital records, to the parties responsible for client's injuries, or their attorneys and insurance companies when deemed necessary by Attorney to obtain a recovery.

Attorney agrees to prosecute client's claim with reasonable diligence and vigor.

Client grants Attorney a lien on his claim for Attorney's fees and costs and authorizes Attorney to retain his fee and costs from any amount recovered by compromise, judgement or otherwise.

Client acknowledges that any claim such as the one involved in this case is by its nature unpredictable and that Attorney has made no representation as to what amount, if any, client may be entitled to recover.

DATED this 33 day of Oct, 1993
Donald C. Hughes Maxine R. Hughes
DONALD C. HUGHES Client
Client

NOTE: THIS IS A CONTRACT. It protects both you and your attorney and will prevent misunderstandings. Read it carefully. Please discussed or if you have any questions.

UTAH STATE BAR
ETHICS ADVISORY OPINION COMMITTEE

Opinion No. 114
(Approved February 20, 1992)

Issue: Is a one-third contingency fee charged by an attorney unreasonable or excessive if the recovery includes personal injury protection ("PIP" or "no fault") payments from the client's insurer?

Opinion: Under the Utah Rules of Professional Conduct, which require that a lawyer's fee be reasonable,¹ contingent fees charged for the routine filing and collection of undisputed PIP or "no fault" claims from the client's insurer are unreasonable and excessive.² State bars, courts, and commentators facing this issue uniformly agree that contingent fees charged on the recovery of undisputed PIP payments are unreasonable. "Contingent fees are generally higher [than fixed fees] because receipt of the fee is itself contingent on some possibility. Because PIP benefits are virtually guaranteed to accident victims a fee contingent on receipt of those benefits is likely to be unreasonable."³

Analysis of Authority: The validity and utility of the contingent fee was long ago recognized in the United States. It is justified mainly because it is often the only

¹Utah Rules of Professional Conduct Rule 1.5(a).

²This Opinion is intended to address only those situations in which undisputed PIP benefits are obtained from the client's insurer. This Opinion does not address the propriety of contingent fees in less obvious cases. For example, when a client has been offered a settlement from an adverse party's insurer, and then retains an attorney to assist the client in obtaining a greater recovery than that already offered, a question may arise concerning the ethical propriety of a contingent fee that includes a percentage of the total recovery. The issue of whether an attorney may properly receive a contingent fee on the eventual recovery without first deducting from the recovery that amount offered prior to the attorney's retention is not covered by this Opinion.

³State Bar of Georgia Op. 37, *Lair's Manual on Professional Conduct* § 801:2703 (ABA/BNA Jan. 20, 1984).

way that "a person of ordinary means may prosecute a just claim to judgment."⁴ Due to its vast potential for abuse, however, the contingent fee must be regulated.⁵ Accordingly, the ABA has recognized that "[a] contract for a contingent fee, where sanctioned by law, should be reasonable under all the circumstances of the case, including the risk and uncertainty of the compensation."⁶ Implicit in the concept of the contingent fee is the notion that there is an actual contingency upon which the attorney's chances of being compensated are based. In other words, there must be a realistic risk of nonrecovery. A fairly large body of case law supports this general conclusion.⁷ Commentators also agree.⁸

⁴*In re Swartz*, 686 P.2d 1236, 1242 (Ariz. 1984), quoting Note, *Lawyer's Tight-Rope—Use and Abuse of Fees*, 41 Cornell L.Q. 683, 689 (1956).

⁵*Id.*

⁶ABA Canons of Professional Ethics 13 (emphasis added).

⁷E.g., *Rosquist v. Soo Line R.R.*, 692 F.2d 1107, 1114 (7th Cir. 1982); *Donnarumma v. Barracuda Tanker Corp.*, 79 F.R.D. 455, 467 (D. Cal. 1978); *Kiser v. Miller*, 364 F. Supp. 1311, 1319 (D.D.C. 1973); *In re Swartz*, 686 P.2d 1236, 1239-43 (Ariz. 1984); *People v. Nutt*, 696 P.2d 242, 248 (Colo. 1984); *Anderson v. Kenelly*, 547 P.2d 260, 261 (Colo. Ct. App. 1975); *Robinson v. Sharp*, 66 N.E. 299, 301 (Ill. 1903); *Horton v. Butler*, 387 So. 2d 1315, 1317-18 (La. Ct. App. 1980), *cert. denied*, 394 So. 2d 607 (La. 1980); *Thomton, Sperry & Jensen, Ltd. v. Anderson*, 352 N.W.2d 467, 469 (Minn. Ct. App. 1984); *Citizens Bank v. C & H Construction & Paving Co.*, 600 P.2d 1212, 1218 (N.M. 1979); *Redevelopment Comm'n of Hendersonville v. Hyder*, 201 S.E.2d 236, 239 (N.C. Ct. App. 1973); *Committee on Legal Ethics v. Tatterson*, 352 S.E.2d 107, 113-14 (W. Va. 1986).

⁸Annotation, *Reasonableness of Contingent Fee in Personal Injury Action*, 46 Am. Jur. Proof of Facts 2d 1, 24-27 (1986). According to this annotation:

A larger fee may be authorized in a case in which the fee depends entirely on the attorney's success than in one in which the attorney is to be paid regardless of the outcome. It is said that contingent compensation is properly larger than absolute compensation, because the extent of the services required cannot be predicted when the fee agreement is made, and because the attorney's services are at his peril.

* * * *

Disputes over the reasonableness of contingent fee contracts often involve a question of the actual degree of risk assumed by the attorney in accepting the case. If there is little risk involved in the litigation, the fact that the attorney was retained on a contingent fee basis may be entitled to little weight in assessing the reasonableness of

During the last twenty years, many states have adopted "no fault" legislation mandating that all automobile owners carry PIP coverage. "The purpose behind this legislatively mandated requirement 'is to assure financial compensation to victims of motor vehicle accidents without regard to the fault of the named insured or other persons entitled to PIP benefits.'"⁹ In the vast majority of these cases "payment is generated automatically by simply filing a standard one page claim form with the insurer."¹⁰ "Since there is virtually no risk and the time to be required to the lawyer is minimal, [state bar ethics committees and] courts uniformly hold that contingent fees are an improper measure of professional compensation in such cases."¹¹

State bars that have considered this matter have stated their positions clearly and concisely. According to the State Bar of Georgia:

Generally a lawyer may not charge a fee contingent on a client's receipt of PIP benefits (accident insurance providing compensation to injured persons without regard to fault). Contingent fees are generally higher because receipt of the fee is itself contingent on some possibility. Since PIP benefits are virtually guaranteed to accident victims a fee contingent on receipt of those benefits is likely to be unreasonable.¹²

The South Carolina Bar agrees:

A lawyer may not consider the amounts recovered from the client's personal injury protection insurance coverage in determining the percentage of his contingent fee unless the insurer denies coverage because of a good faith question concerning the causal connection be-

the contracted fee.

Id. at 25. See also Brickman, *Contingent Fees Without Contingencies: Hamlet Without the Prince of Denmark?*, 37 UCLA L. Rev. 29, 76-78 (1989) (noting that although explicit judicial and scholarly statements about the risk requirement are rare, "[t]hey occur primarily in cases involving recovery under 'no fault' statutes, insurance claims, and claims under a statute providing for the recovery of attorney's fees").

⁹Attorney Grievance Comm'n v. Kemp, 496 A.2d 672, 678 (Md. 1985), *quoting* Pennsylvania Nat'l Mut. Casualty Ins. Co. v. Gartelman, 416 A.2d 734, 736 (Md. 1980).

¹⁰*Id.*

¹¹Brickman, *supra* note 8, at 78.

¹²State Bar of Georgia Op. 37, Lawyer's Manual on Professional Conduct § 801:2703 (ABA/BNA Jan. 20, 1984).

tween the injury and accident. Only when there is a question concerning the availability of coverage are the lawyer's time, labor, skill and expertise instrumental in establishing the injury resulting from the accident. Those factors are not needed when the insurer admits liability or the insurer makes a bad faith denial of coverage. The client must be fully informed and should make the decision whether a fixed fee may be reasonable.¹³

Similarly, the Maryland State Bar Association has concluded that "[w]hen there is virtually no risk and no uncertainty, contingent fees represent an improper measure of professional compensation" and thus charging a contingent fee for collection of PIP benefits is "unreasonable and unconscionable."¹⁴

For these reasons, many attorneys handling personal injury matters on a contingent fee basis submit the PIP claim as a perfunctory accommodation to the client. However, since filling out forms of a legal nature, simple though they may be, is certainly part of a lawyer's work, the Committee feels that a reasonable charge based on the time actually spent in the preparation of the claim may be ethically charged. Also, if a genuine dispute arises with the insurance carrier requiring the attorney to perform substantial legal services to establish coverage and to generate recovery, of course, he may make an appropriate charge based on time spent and other relevant factors, and, in some cases, based on a contingent fee arrangement.

Courts facing this issue agree that contingent fees charged by an attorney for the recovery of PIP payments are almost always inappropriate.¹⁵ In *Attorney Grievance Comm'n v. Kemp*,¹⁶ the Maryland Court of Appeals held that a one-third contingent fee in a personal injury case was clearly excessive where it was collected by the attorney on PIP payments that followed automatically upon the filing of a

¹³South Carolina Bar Op. 83-3, Lawyer's Manual on Professional Conduct Sec. 801:7907 (ABA/BNA undated).

¹⁴Formal Opinions of the Maryland State Bar Ass'n Comm. on Ethics 76-1 and 77-4 (1976).

¹⁵See, e.g., *Attorney Grievance Comm'n v. Kemp*, 496 A.2d 672 (Md. 1985); *Pops & Estrin, P.C. v. Reliance Ins. Co.*, 562 N.Y.S.2d 914 (N.Y. Civ. Ct. 1990); *Hausen v. Davis*, 448 N.Y.S.2d 87 (N.Y. Civ. Ct. 1981); *In re Hanna*, 362 S.E.2d 632 (S.C. 1987); see also *Brickman*, *supra* note 8, at 78.

¹⁶496 A.2d 672, 677-79 (Md. 1985).

simple form.¹⁷ Referring to a 1976 Maryland State Bar Association Formal Opinion,¹⁸ the court stated:

[I]t would be unethical, in virtually all cases, for a lawyer to charge a contingent fee for collecting a claim against his client's own insurer under the PIP coverage when the attorney has been engaged on a contingent fee basis to handle a personal injury claim against a third party. . . . [C]ontingent fees are permissible only when they are reasonable under all the circumstances, including such relevant factors as the risk and uncertainty.¹⁹

A significant body of case law also supports the general conclusion that where there is virtually no risk of nonrecovery, a contingent fee charged by an attorney on the amount of the recovery is inappropriate.²⁰ For example, in *Committee on Legal Ethics v. Tatterson*,²¹ the Supreme Court of Appeals of West Virginia held that disbarment was warranted where, while other disciplinary proceedings were pending against him, an attorney charged a one-third contingent fee to collect the undisputed proceeds of a life insurance policy. The court found that such a contingent fee was not justified, stating:

The client needs to be fully informed as to the degree of risk justifying a contingent fee. Courts generally have insisted that a contingent fee

¹⁷*Id.*

¹⁸*See supra* note 14.

¹⁹*Kemp*, 496 A.2d at 678. It appears that every other court facing this issue has reached the same conclusion. *See Pops & Estrin P.C. v. Reliance Ins. Co.*, 562 N.Y.S.2d 914, 915 (N.Y. Civ. Ct. 1990) (holding that "an attorney and his client may enter into a private arrangement to collect a fee in connection with the representation in a no fault matter. This arrangement is perfectly valid so long as the terms of the agreement are not put in the form of a contingency fee."); *Hausen v. Davis*, 448 N.Y.S.2d 87, 89 (N.Y. Civ. Ct. 1981) (holding that where the attorney had secured a contingent fee on a no fault claim in the same way that he had done in the personal injury action and where the insurer had never denied the claim and payment was made on the no fault claim within 30 days of submission the contingent fee on the no-fault claim was unreasonable); *In re Hanna*, 362 S.E.2d 632 (S.C. 1987) (holding that an attorney representing a client in a personal injury or wrongful death action on a contingency basis should not charge for collecting PIP benefits, unless the PIP claim is disputed or denied).

²⁰*See supra* note 7 and accompanying text.

²¹352 S.E.2d 107 (W. Va. 1986).

be truly contingent. The typically elevated contingent fee reflecting the risk to the attorney of receiving no fee will usually be permitted only if the representation indeed involves a significant degree of risk. The clearest case where there would be an absence of real risk would be a case in which an attorney attempts to collect from a client a supposedly contingent fee for obtaining insurance proceeds for a client when there is no indication that the insurer will resist the claim. In the absence of any real risk, an attorney's purportedly contingent fee which is grossly disproportionate to the amount of work required is 'clearly an excessive fee'²²

Conclusion: Based upon the above authorities and reasoning, it is clear that in the vast majority of cases, a contingent fee charged for the routine filing and recovery of undisputed PIP benefits is unreasonable and thus unethical under Utah Rules of Professional Conduct 1.5.

²²*Id.* at 113-14.

Discipline Corner

ADMONITION

An attorney was Admonished for charging an excessive fee in violation of Rule 1.5(a), FEES of the Rules of Professional Conduct based upon a recommendation by a Screening Panel of the Ethics and Discipline Committee. The attorney was retained to represent a client in a personal injury matter involving the client's son who was struck by an automobile. When it was discovered that the motorist was uninsured the attorney filed a claim against the client's own insurance company and collected policy limits of \$100,000.00 under the uninsured motorist portion of the policy. The attorney kept one-third as a fee. A fee arbitration panel found this was an improper fee in that the contingency fee agreement between the attorney and the client did not include recovery from the client's own insurance company. Therefore, the attorney was entitled only to the reasonable value of the services rendered.

Donald Hughes
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Attorney, Pro Se

IN THE SECOND JUDICIAL DISTRICT COURT IN AND FOR DAVIS
COUNTY, STATE OF UTAH

MAXINE ARCHULETA,
Plaintiff,
vs.
DONALD HUGHES,
Defendant

MEMORANDUM IN OPPOSITION TO
PLAINTIFF'S MOTION FOR PARTIAL
SUMMARY JUDGMENT

Case No. 940700264
Judge Dawson

Comes now Don Hughes and submits the following memorandum in
opposition to plaintiff's motion for partial summary judgment.

GENERAL CONSIDERATIONS

Summary judgment is only appropriate if there are no undisputed
material issues of fact. On summary judgment the facts are interpreted in the
light most favorable to the non-moving party. *Sandy City v Salt Lake City*, 827
P2d 212 (Utah 1992); *Rollins v Petersen*, 813 P2d 1156 (Utah 1991); *Rutherford v*
AT&T Communications of Mountain States, 844 P2d 949 (Utah 1992). In the context
of claims against attorneys the facts are also viewed in favor of the non-moving
party. "It is only necessary for the non-moving party to show 'facts'

controverting the 'facts ' asserted by the moving party." *Breuer-Harrison v Combe*, 799 P2d 727, 728 (Utah App 1990).

Plaintiff has chosen not to cite any Utah authorities relating to attorney malpractice. The only Utah authority case related to an attorney client dispute referenced by plaintiff is *Phillips v Smith*, 768 P2d 449 (Utah 1989). This case is a dispute over an attorney's lien. The question posed to the court is what happens when the parties fail to cover certain eventualities, such as the early termination of counsel on contingent fee agreement. The holding of the court was that ordinary contract law applies to interpretation of contingent fee agreements.

There is good reason plaintiff has avoided the Utah case authorities. They are uniformly against the position of plaintiff. The necessary elements of a claim against an attorney are well established in Utah law. The Court of Appeals in *Breuer-Harrison, Inc. v Combe* 799 P2d 716, 727 (Utah 1990) says, "Once this [attorney client] relationship is proven, the client has the burden of showing two additional elements: 1) negligence on the part of the attorney, and 2) that such negligence was the proximate cause of damage to the client." The court cites *Dunn v McKay Burton and Thurman*, 584 P2d 894, 896 (Utah 1978) as authority for this statement.

"The elements of legal malpractice include: (1) an attorney-client relationship; (2) a duty of the attorney to the client; (3) a breach of that duty; and

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(4) damages suffered by the client proximately caused by the attorney's breach of duty." *Harline v Barker* 854 P2d 595, 598 (Utah App 1993).

Whether an attorney breached the standard of care is an issue of fact. "A genuine issue of fact exists where, on the facts in the record, reasonable minds could differ on whether defendant's conduct measures up to the required standard." *Jackson v Dabney*, 645 P2d 615 (Utah 1982).

The standard of care is determined by expert testimony. Utah, as virtually every jurisdiction requires the standard of professional care be proven by expert testimony. The standard of care is a question of fact to be determined through expert testimony. *Kellas v Sawilosky*, 322 SE2d 897 (GA 1984); *Gruse v Belline* 486 NE2d 398 (1985); *Brown v Small* 825 P2d 1209 (Mont 1992); *Boigegrain v Gilbert*, 784 P2d 849 (Colo App 1989); *Somma v Gracey* 544 A2d 668 (1988).

After the standard of care is proven the plaintiff must prove the defendant breached the standard and that there are damages proximately caused by the breach of the standard. This is the trial within a trial referenced supra. "Proximate cause is an issue of fact." *Harline supra* at 600. See also *Swift Stop, Inc. v Wight*, 845 P2d 250, 253 (Utah App 1992).

These are the legal doctrines enunciated by the Utah appellate courts applying to claims against attorneys. None of this body of law is cited by the plaintiff. The requirements of proving a duty and applicable the standard of care is for expert opinion. In this particular case the reasons for expert testimony

apply. The claimed breach is not simple such as a missed statute of limitations but is "constructive" duties asserted by plaintiff's counsel. Evaluation of the standard of care requires the assistance of expert witnesses.

DEFENDANT'S STATEMENT OF FACTS

Plaintiff's attorney has set out approximately 6 pages of what he claims to be undisputed facts. Virtually all of the so called undisputed facts are either false, misstatements of the record or wholly taken out of context. The so called undisputed facts of the plaintiff are denied and a detailed statement of facts controverting the "facts" of plaintiff are stated below. The following statement of facts relies on the affidavit of Don Hughes and citation to relevant points in the record.

1. Hughes was contacted by phone in St. Louis, Missouri by Maxine Archuleta on or about October 19, 1993 requesting that he represent her in a potential claim for injuries suffered in an automobile accident. Ron Bennett and the plaintiff were on the phone when defendant answered.

2. Before contacting Hughes, Maxine Archuleta claims to have been referred to Ron Bennett, a licensed public adjuster by her friend Vsana Skinner. She claims, " ...Vsana skinner referred me--you know, she contacted Ron about the accident I was in. Irene knows Ron. Q. That's Irene Roche? A. Yes, and --" Archuleta deposition at page 65. Plaintiff sought out Don Hughes to retain him.

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3. Maxine Archuleta executed the retainer agreement attached hereto as Exhibit A on October 23, 1993 in the presence of Ron Bennett.

4. Maxine Archuleta's initial medical bills totaling \$618 were submitted to Allstate Insurance as PIP carrier. Allstate paid these initial bills. See drafts attached to the deposition of Sandra McIntosh. Maxine Archuleta handled the routine submission of these bills herself. See application for PIP benefits attached to deposition of Sandra McIntosh. No attorney's fee was taken by Hughes on any of the routinely submitted bills. See affidavit of Don Hughes and application for PIP benefits attached to the deposition of Sandra McIntosh.

5. On November 17, 1993 Maxine Archuleta had an MRI. The results were: "Discs appear essentially unremarkable at all levels. There may be a minuscule annular bulge at C3-4 but no evidence of herniation extruded fragment or foraminal compromise. Cord intrinsically normal without evidence of mass, syninx, etc. No evidence of congenital or acquired spinal stenosis. IMPRESSION: ESSENTIALLY NORMAL MAGNETIC RESONANCE SCAN, CERVICAL SPINE WITH ABOVE OBSERVATIONS." (emphasis in original) See report attached to the deposition of Sandra McIntosh.

6. On January 7, 1994 Sandra McIntosh as claim representative of Allstate Insurance PIP benefits sent a letter to Maxine Archuleta's physician questioning why Allstate should pay the MRI bill when she could find "nothing in your records which identify clinical symptoms such as parathesias or radiculopathy

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suggesting nerve impingement." See letter of McIntosh attached to her deposition.

7. The response was that Maxine Archuleta had complained of severe back pain from her neck to her tail bone on October 21, 1993. By November 15, 1993 the symptoms had mostly resolved except pain going down into her shoulders and persistent neck pain. Even though the objective observations showed the pain to be localized her physician was unable to observe any signs of acute disease he did not want to miss something if there was radicular pain. The negative MRI gave him a basis for encouraging Maxine Archuleta to resume her regular work load and continue physical therapy. "I felt the results aided me in encouraging her to get back to work at an earlier time and to continue with physical therapy." See letter of January 12, 1994 attached to deposition of Sandra McIntosh.

8. Maxine Archuleta continued physical therapy only until the \$3,000 threshold was reached. Maxine Archuleta did not want to continue medical treatment. See Archuleta deposition pages 50 to 52. Maxine Archuleta has not been back to see any physician or therapist of any kind for her back problems since terminating physical therapy. See Archuleta deposition at page 55.

9. Other than possibly missing 3 or 4 days immediately after the accident and occasionally leaving work early to make physical therapy appointments

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Maxine Archuleta did not miss any work because of her accident. See Archuleta deposition page 53.

10. Maxine Archuleta refused to go to physical therapy or to receive any further treatment after her medical bills exceeded the \$3,000 threshold. See Archuleta deposition pages 48 to 55.

11. Maxine Archuleta does not claim to have any evidence that she was permanently injured in the car accident. Her physician told her she suffered a strain and that was all. Archuleta deposition at pages 40 and 41.

12. It was Hughes opinion that a fair settlement for the injury suffered by Maxine Archuleta would be in the \$5,000 range. See Hughes affidavit and Hughes deposition page 104.

13. Hughes engaged Ron Bennett, a licensed public adjuster to carry out the initial negotiations with Allstate Insurance. Hughes was aware of Bennett's skill as an accident investigator and his abilities in dealing with insurance personnel. Hughes was personally aware of the excellent job Bennett had done on other occasions for Hughes and for other attorneys including plaintiff's counsel, Dan Wilson. Hughes conveyed to Bennett his assessment of the case and instructions in how to proceed with the negotiations. The offer received from Allstate was higher than the value placed on the case by Hughes.

14. Hughes was of the opinion that the higher offer was due in part to Bennett's relationship with Allstate personnel and in part that Allstate did not know the lack of plaintiff's evidence demonstrating positive injury.

15. The use of a skilled public adjuster or paralegal is consistent with the standard of practice in Weber County. Hughes had previously used Bennett in this manner and is aware of other attorneys engaging Bennett in the same function, including plaintiff's counsel, Dan Wilson. Hughes maintained responsible control over all aspects of the case and delivered a fair and reasonable result for Maxine Archuleta. See affidavit of Hughes.

16. The settlement received from Allstate as liability carrier consisted of \$9,286 in new money and payment to the PIP carrier (Allstate) of \$618 in subrogation rights. See draft attached to deposition of Maxine Archuleta and draft attached to deposition of Sandra McIntosh.

17. Maxine Archuleta was given a written accounting of the funds at the time she executed the release. See affidavit of Don Hughes.

18. Maxine Archuleta had medical bills that did not relate in any way to the accident, including medical bills for her children. Maxine Archuleta requested that she receive \$5,000 of the funds and that Hughes attempt to compromise the hospital bills for herself and her children with the balance of the funds. Maxine Archuleta was informed that she was responsible for her medical

bills and would have to pay any that were not compromised or exceeded the amount retained in trust.

19. In July of 1994 Maxine Archuleta asked Hughes to no longer try to resolve her medical bills and asked for the return of the funds being held in trust. The funds were returned to her. See deposition of Hughes.

20. Don Hughes graduated from the charter class of the J. Rueben Clark Law School at Brigham Young University. He was admitted to the Utah Bar in April of 1976. In the course of following years Hughes has represented hundreds of clients including many personal injury cases. Hughes is familiar with the standard of practice in Weber and Davis Counties through his nearly two decades of practice.

21. A contingent fee agreement of 1/3 of any settlement, compromise or judgment is fair and comports with the standard of practice of attorneys in the second judicial district. The retainer agreement between Hughes and Archuleta is fair and reasonable and comports with the standards of conduct generally prevailing in the second judicial district. Defendant did not inflate his attorney's fee.

22. Hughes represented Maxine Archuleta in a manner consistent with the standards of practice current in Weber and Davis Counties. Don Hughes achieved a fair and reasonable settlement for Maxine Archuleta. Maxine Archuleta received positive gain from the representation of Don Hughes and

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suffered no damage. Maxine Archuleta was fairly and adequately compensated for her injuries. See affidavit of Don Hughes.

POINT ONE

PLAINTIFF'S FIRST CLAIM IS NOT MERITORIOUS

Plaintiff's first claim is that \$2,400 of additional medical bills should have been submitted to Allstate as the PIP carrier and no fee should have been charged. In addition to being wrong on the law there are no undisputed facts supporting plaintiff's claim.

Plaintiff fails to establish the standard of care. The standard of care is a fact issue that must be established by expert opinion. The only expert opinion in the record is that of the defendant and that is to the effect that all of the acts of the defendant met the standard of care.

Even if plaintiff's interpretation of the law were right it still does not establish a standard of care. The plaintiff cites an ABA/BNA Lawyer's Manual for the proposition that contingent fees should not be collected on routine PIP filings. Even if this proposition were promulgated by unchallenged expert opinion it still does not establish the standard of care in this case. The burden is on the plaintiff to establish the standard of care by competent evidence.

There is no proof this case represented routine PIP fillings. The evidence in the record is to the contrary. The insurance company was questioning PIP

filings and making demands of the physician for justification of why he was performing procedures when there was no physical evidence of their necessity.

Plaintiff also fails to take into account that the negotiations proceeded rapidly to conclusion when Allstate as liability carrier offered settlement on the whole case. Plaintiff elected to take the settlement and attempt to reach a compromise with her medical providers.

This claim is not ripe for summary judgment. To prevail on summary judgment the plaintiff must: 1) prove the standard of care by uncontroverted expert testimony; 2) The plaintiff must prove by uncontroverted evidence the defendant breached the standard of care; and 3) that damages were suffered by the plaintiff as the proximate cause of the breach. The plaintiff has failed on all counts. The plaintiff has not even asserted a prima facie case let alone an uncontested set of facts upon which the law can be applied.

POINT TWO

THERE WAS NO FRAUD CONSTRUCTIVE OF OTHERWISE

It is good to see the plaintiff dropping the claim for actual fraud. It is good to see the acknowledgment that there is no evidence of misrepresentation. Plaintiff has been forced to rely on "constructive fraud." Plaintiff acknowledges that there is no evidence that the defendant misrepresented anything to her or concealed anything from her.

Plaintiff's counsel sets out the basis of the "constructive" fraud claim in the first paragraph of his point 2.A. on page 16 of his memorandum.

"Plaintiff has alleged fraud based on the fact that Defendant Hughes **inflated** his attorney fee by \$800 by settling her personally [sic] claim to include \$2,400 of medical expenses that **should have simply been submitted to her PIP carrier**. This was a **violation of Hughes' duty**, when **explaining** the basis for his contingency fee, to disclose to the plaintiff the availability of PIP insurance that would automatically pay the medical bills; and **to disclose** the lack of risk in collecting those benefits." (emphasis added)

There are two problems with plaintiff's fraud claim. First, plaintiff's counsel is wrong on the law. See defendant's reply brief in support of his motion to dismiss plaintiff's fraud claim for a listing of cases and arguments. There is no evidence of any misrepresentation or omission. Secondly, plaintiff has failed to assert let alone prove by uncontested facts the necessary elements of fraud.

"Constructive" fraud is an equitable matter. Its availability is defined in 37 Am Jur 2d § 4. "Where an action is one at law for damages, and not in equity, proof of actual fraud is ordinarily required. On the other hand, courts of equity may grant relief on the ground of constructive fraud such as would not authorize relief by way of an action of deceit at law." Plaintiff has chosen to file a suit at law for damages and does not seek equitable remedies. "Constructive" fraud is not available to her in this case.

But even if it were plaintiff has failed to assert and prove by uncontested facts a claim for relief. Each of the emphasized portions of the quote from plaintiff's memorandum is an assertion of a standard of care or an asserted duty. Plaintiff's counsel asserts Hughes inflated his attorney's fee \$800. This is denied. He asserts the bills should have been submitted to the PIP carrier. This shows a lack of understanding of the facts of the case and also asserts a duty that has not been established by plaintiff. Plaintiff asserts a breach of a duty to disclose the availability of PIP insurance. This duty is asserted without expert testimony and also ignores the fact that plaintiff was already submitting her own PIP claims before she retained defendant. Plaintiff also asserts there was a duty to disclose a lack of risk in collecting PIP benefits. This duty is asserted without expert opinion in the record. It also ignores the facts of this case. The plaintiff received \$618 of PIP benefits before the adjuster began questioning treatments when there was no supporting clinical evidence for the treatments.

"Constructive" fraud is sometimes applied to the realm of fiduciaries and others that owe duties. In this case plaintiff has failed to produce expert testimony that establishes any duty. The only evidence in the record on the matter is the affidavit and deposition of the defendant.

This claim is not ripe for summary judgment. The plaintiff fails to state a prima facie claim for fraud let alone a claim based on uncontested facts. Plaintiff

has failed to 1) establish the duty of care; 2) prove a breach of the standard of care or; 3) to show any damages proximately flowing from any breach.

The only expert testimony in the record establishing a standard of care is that of the defendant.

POINT THREE

NO CLAIM FOR MALPRACTICE HAS BEEN PROVEN

Plaintiff's third claim is "that as a matter of law, defendant's legal representation fell short of the required standard of care for clients representing clients in personal injury actions." The same analysis as previously stated applies to this claim as well.

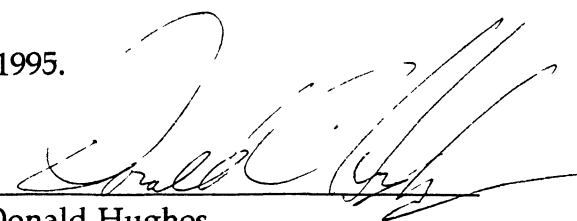
The general rule is that negligence cases are not subject to summary judgment. *Preston v Lamb* 436 P2d 1021 (Utah 1968). This applies to attorney negligence as well. *Jackson, supra*. The standard of care and question of breach are fact questions for the jury on receipt of proper expert opinion. *Jackson, supra*; *Brown, supra*. The plaintiff has failed to show any damages proximately flowing from any claimed breach.

CONCLUSION

This case is not one that is ripe for summary judgment. The issues of fraud and punitive damages should be disposed of by defendant's motion to dismiss and plaintiff's claim of malpractice should proceed to trial. Plaintiff's motion for partial summary judgment should be denied.

SV 17 RECD


Dated this 12th day of November, 1995.


Donald Hughes

CERTIFICATE OF MAILING

I hereby certify that I mailed a true and correct copy of the foregoing
memorandum and accompanying memorandum to the following this ____ day of
November, 1995 to the following:

Dan Wilson
290 25th Street
Ogden, UT 84401


Donald Hughes

NOV 17 RECD

Donald Hughes
PO Box 27611
St. Louis, MO 63146
Telephone: (314) 968-8055
Fax: (314) 968-8055

Attorney, Pro Se

IN THE SECOND JUDICIAL DISTRICT COURT IN AND FOR DAVIS
COUNTY, STATE OF UTAH

MAXINE ARCHULETA,
Plaintiff,
vs.
DONALD HUGHES,
Defendant

AFFIDAVIT IN SUPPORT OF
DEFENDANT'S OPPOSITION TO
PLAINTIFF'S MOTION FOR PARTIAL
SUMMARY JUDGMENT

Case No. 940700264
Judge Dawson

BEING FIRST DULY SWORN, Don Hughes deposes and says as follows:

1. Hughes was contacted by phone in St. Louis, Missouri by Maxine Archuleta on or about October 19, 1993 requesting that he represent her in a potential claim for injuries suffered in an automobile accident. Ron Bennett and the plaintiff were on the phone when defendant answered.

2. Before contacting Hughes, Maxine Archuleta claims to have been referred to Ron Bennett, a licensed public adjuster by her friend Vsana Skinner. She claims, " ...Vsana skinner referred me--you know, she contacted Ron about the accident I was in. Irene knows Ron. Q. That's Irene Roche? A. Yes, and --" Archuleta deposition at page 65. Plaintiff sought out Don Hughes to retain him.

JUDY 17 REC'D

3. Maxine Archuleta executed the retainer agreement attached hereto as Exhibit A on October 23, 1993 in the presence of Ron Bennett.

4. Maxine Archuleta's initial medical bills totaling \$618 were submitted to Allstate Insurance as PIP carrier. Allstate paid these initial bills. See drafts attached to the deposition of Sandra McIntosh. Maxine Archuleta handled the routine submission of these bills herself. See application for PIP benefits attached to deposition of Sandra McIntosh. No attorney's fee was taken by Hughes on any of these routinely submitted bills.

5. On November 17, 1993 Maxine Archuleta had an MRI. The results were: "Discs appear essentially unremarkable at all levels. There may be a minuscule annular bulge at C3-4 but no evidence of herniation extruded fragment or foraminal compromise. Cord intrinsically normal without evidence of mass, syninx, etc. No evidence of congenital or acquired spinal stenosis. IMPRESSION: ESSENTIALLY NORMAL MAGNETIC RESONANCE SCAN, CERVICAL SPINE WITH ABOVE OBSERVATIONS." See letter attached to deposition of Sandra McIntosh.

6. On January 7, 1994 Sandra McIntosh as claim representative of Allstate Insurance PIP benefits sent a letter to Maxine Archuleta's physician questioning why Allstate should pay the MRI bill when she could find "nothing in your records which identify clinical symptoms such as parathesias or radiculopathy

suggesting nerve impingement." See letter attached to deposition of Sandra McIntosh.

7. The response was that Maxine Archuleta had complained of severe back pain from her neck to her tail bone on October 21, 1993. By November 15, 1993 the symptoms had mostly resolved except pain going down into her shoulders and persistent neck pain. Even though the objective observations showed the pain to be localized her physician was unable to observe any signs of acute disease he did not want to miss something if there was radicular pain. The negative MRI gave him a basis for encouraging Maxine Archuleta to resume her regular work load and continue physical therapy. "I felt the results aided me in encouraging her to get back to work at an earlier time and to continue with physical therapy." See letter of January 12, 1994 attached to deposition of Sandra McIntosh.

8. Maxine Archuleta continued physical therapy only until the \$3,000 threshold was reached. Maxine Archuleta did not want to continue medical treatment. See Archuleta deposition pages 50 to 52. Maxine Archuleta has not been back to see any physician or therapist of any kind for her back problems since terminating physical therapy. See Archuleta deposition at page 55.

9. Other than possibly missing 3 or 4 days immediately after the accident and occasionally leaving work early to make physical therapy appointments

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Maxine Archuleta did not miss any work because of her accident. See Archuleta deposition page 53.

10. Maxine Archuleta refused to go to physical therapy or to receive any further treatment after her medical bills exceeded the \$3,000 threshold. See Archuleta deposition pages 48 to 55.

11. Maxine Archuleta does not claim to have any evidence that she was permanently injured in the car accident. Her physician told her she suffered a strain and that was all. Archuleta deposition at pages 40 and 41.

12. It was Hughes opinion that a fair settlement for the injury suffered by Maxine Archuleta would be in the \$5,000 range.

13. Hughes engaged Ron Bennett, a licensed public adjuster to carry out the initial negotiations with Allstate Insurance. Hughes was aware of Bennett's skill as an accident investigator and his abilities in dealing with insurance personnel. Hughes was personally aware of the excellent job Bennett had done on other occasions for Hughes and for other attorneys including plaintiff's counsel, Dan Wilson. Hughes conveyed to Bennett his assessment of the case and instructions in how to proceed with the negotiations. The offer received from Allstate was higher than the value placed on the case by Hughes.

14. Hughes was of the opinion that the higher offer was due in part to Bennett's relationship with Allstate personnel and in part that Allstate did not know the lack of plaintiff's evidence demonstrating positive injury.

15. The use of a skilled public adjuster or paralegal is consistent with the standard of practice in Weber County. Hughes had previously used Bennett in this manner and is aware of other attorneys engaging Bennett in the same function, including plaintiff's counsel, Dan Wilson. Hughes maintained responsible control over all aspects of the case and delivered a fair and reasonable result for Maxine Archuleta. See affidavit of Hughes.

16. The settlement received from Allstate as liability carrier consisted of \$9,286 in new money and payment to the PIP carrier (Allstate) of \$618 in subrogation rights. See draft attached to deposition of Maxine Archuleta and draft attached to deposition of Sandra McIntosh.

17. Maxine Archuleta was given a written accounting of the funds at the time she executed the release.

18. Maxine Archuleta had medical bills that did not relate in any way to the accident, including medical bills for her children. Maxine Archuleta requested that she receive \$5,000 of the funds and that Hughes attempt to compromise the hospital bills for herself and her children with the balance of the funds. Maxine Archuleta was informed that she was responsible for her medical bills and would have to pay any that were not compromised or exceeded the amount retained in trust.

19. In July of 1994 Maxine Archuleta asked Hughes to no longer represent her and asked for the return of the funds being held in trust. The funds were returned to her.

20. Don Hughes graduated from the charter class of the J. Rueben Clark Law School at Brigham Young University. He was admitted to the Utah Bar in April of 1976. In the course of following years Hughes has represented hundreds of clients including many personal injury cases. Hughes is familiar with the standards of practice in Weber and Davis Counties through his nearly two decades of practice. Hughes is familiar with the standards of practice as relates to cases similar to the accident of plaintiff.

21. A contingent fee agreement of 1/3 of any settlement, compromise or judgment is fair and comports with the standard of practice of attorneys in the second judicial district. The retainer agreement between Hughes and Archuleta is fair and reasonable and comports with the standards of conduct generally prevailing in the second judicial district. Defendant did not inflate his attorney's fee.

22. Hughes represented Maxine Archuleta in a manner consistent with the standards of practice current in Weber and Davis Counties. Don Hughes achieved a fair and reasonable settlement for Maxine Archuleta. Maxine Archuleta received positive gain from the representation of Don Hughes and

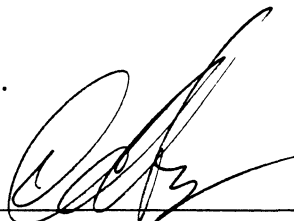
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suffered no damage. Maxine Archuleta was fairly and adequately compensated for her injuries.

23. Hughes did not make any misrepresentations to plaintiff, nor did he omit any material facts. All disclosures required by the standard of care were made. Hughes fulfilled both his contractual responsibilities to plaintiff as well as his responsibilities as her attorney.

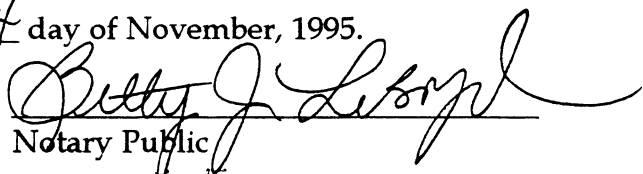
24. The statements contained herein are true and correct to the best of my knowledge. Those things of which I do not have direct knowledge I believe to be true upon information and belief. The source of information of matters not directly experienced by me includes the pleadings and discovery performed in this case and in trial preparation. Significant sources are often cited where applicable.

Dated this 14 day of November, 1995.

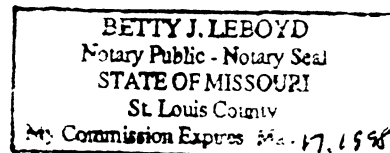


Donald Hughes

Subscribed and sworn before me this 14 day of November, 1995.



Notary Public



Daniel L. Wilson, #4257
Attorney for Plaintiff
290-25th Street, Suite 204
Ogden, Utah 84401
Telephone: (801) 621-6119

IN THE SECOND JUDICIAL DISTRICT COURT
OF DAVIS COUNTY, STATE OF UTAH

MAXCINE ARCHULETA,	:	PLAINTIFF'S MOTION TO STRIKE
	:	PORTIONS OF DEFENDANT'S
Plaintiff,	:	AFFIDAVIT OF NOVEMBER 14, 1995
	:	SUBMITTED IN OPPOSITION TO
vs.	:	PLAINTIFF'S MOTION FOR PARTIAL
	:	SUMMARY JUDGEMENT
DONALD C. HUGHES	:	
	:	Civil No.940700264
Defendant.	:	Judge Dawson

Plaintiff hereby moves to strike portions of defendant's Affidavit for the reasons set forth below.

Pursuant to Rule 56(e) of the Utah Rules of Civil Procedure, Affidavit's in Support of or Opposing a Motion for Summary Judgement, "...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." URCP 56 (e) and G.N.S. Partnership v. Fullmer, 873 P2d 1157. Furthermore, "[I]nadmissible evidence cannot be considered in ruling on a Motion for Summary Judgement," D and L Supply v. Saurini, 775 P2d 420, 421 (Utah 1989). An Affidavit which does not meet the requirements of Rule 56 (e) is subject to a Motion to Strike. Howick v. Bank of Salt Lake, 28 Utah 2d 64, 65, 498 P2d 352, 353-354 (1972). The following paragraphs of Defendant's Affidavit must be stricken for the reasons set forth below:

(A copy of Hughes' Affidavit is attached for the convenience of the Court.)

1. Paragraph two contains legal arguments based on the deposition of the plaintiff. That is legal argument based on someone else's testimony. The final sentence of that paragraph states, "Plaintiff sought out Don Hughes to retain him." Clearly the defendant does not know what was in the plaintiff's mind. He cannot testify about her motives or intent. There is nothing in paragraph 2 that is based on the personal knowledge of the defendant. This entire paragraph must be stricken from Defendant's Affidavit.

2. Paragraph three of Defendant's Affidavit states, "Maxcine Archuleta executed the Retainer Agreement attached hereto as Exhibit A on October 23, 1993 in the presence of Ron Bennett." Defendant does not claim to have been present at the time this Retainer Agreement was executed. At his own deposition, defendant admitted he was not present when Archuleta signed the Attorney Retainer Agreement. (Hughes deposition, page 38.) Since he was not present, the defendant can have no personal knowledge concerning the alleged fact. While the fact itself may be true, nonetheless, it is not a fact upon which the defendant can testify. Therefore, paragraph three of his Affidavit must be stricken.

3. Paragraph four contains six sentences. Each of the first five sentences must be stricken. The first three of these sentences state facts which are not within defendant's personal knowledge. The fourth and fifth sentences are based on an unsworn

document attached as an exhibit to a deposition. But neither this witness nor any other testified that they had any personal knowledge about whether or not the form in question had been filled out by Maxcine Archuleta personally or who may have provided assistance in filling out that form. Therefore, sentences four and five are not based on the personal knowledge of the defendant and are not supported by any sworn testimony of any witness. Clearly both must be stricken from this Affidavit. The only sentence within paragraph four that can survive this Motion to Strike is the final sentence that states that "no attorney fees were taken by Hughes on any of the routinely submitted bills." That information is within his personal knowledge and is properly established by Affidavit for purposes of this Motion.


4. None of the information contained in paragraphs five, and seven are within ^{his} personal knowledge of the defendant. All are based on unsworn documents.

5. All of the information contained in paragraphs eight, nine, ten and eleven of Defendant's Affidavit consist exclusively of arguments based upon the ^{deposition} Affidavit of the plaintiff. Nothing in paragraphs eight, nine, ten or eleven of Defendant's Affidavit is based on his personal knowledge nor does defendant affirmatively show that he is competent to testify as to the matters stated therein. Therefore, all of paragraphs eight, nine, ten and eleven must be stricken.

6. Paragraph 17 must be stricken because it states a purported fact that is not within the defendant's personal


knowledge. He admitted at deposition that he wasn't present when that event supposedly occurred. He can't testify to it if he wasn't even there.

11-27-95
Date


Daniel L. Wilson
Attorney for Plaintiff

Mailed to: Donald C. Hughes
P.O. Box 27611
St. Louis, MO 63146

11-27-95
Date


Signature

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IN THE SECOND JUDICIAL DISTRICT COURT
OF DAVIS COUNTY, STATE OF UTAH

MAXCINE ARCHULETA,	:	PLAINTIFF'S REPLY IN SUPPORT
Plaintiff,	:	OF HER MOTION FOR PARTIAL
	:	SUMMARY JUDGEMENT
vs.	:	
DONALD C. HUGHES	:	
Defendant.	:	Civil No.940700264
	:	Judge Dawson

OBJECTIONS TO DEFENDANT'S PURPORTED STATEMENTS OF FACT

Several of defendant's purported Statements of Fact must be stricken for failure to comply with Rule 4-501(2) (b) of the Code of Judicial Administration which requires that all such purported statements to be properly supported by an accurate reference to the record, and furthermore because of Rule 56(e) of the Utah Rules of Civil Procedure which requires that all facts relied upon in Support of or in Opposition to a Motion for Summary Judgement be based on personal knowledge. This latter requirement also places upon the affiant the duty to affirmatively show that he is competent to testify as to the matters stated therein. See, URCP 56(e) and G.N.S. Partnership v. Fullmer, 873 P2d 1157.

The following portions of Defendant's Purported Statements of Fact must be stricken:

1. Paragraph two of Defendant's Purported Statements of Fact must be stricken for two reasons. All but the last sentence fails

to accurately refer to the record as required by Rule 4-501(2) (b) of the Code of Judicial Administration because it contains an incomplete quote. Defendant has conveniently omitted lines 22 and 23 of page 65 of the plaintiff's deposition wherein she was asked:

Q: Did you speak with Ron [Bennett] over the phone ever?

A: He called me.

It is fundamentally unfair and dishonest to try to prove a point by including only portions of a quotation but fail to include the part of the quotation that specifically addresses the fact in controversy. The answer to that specific question unequivocally contradicts defendant's assertion.

Moreover, the last sentence of Defendant's Purported Statement of Fact number two - "Plaintiff sought out Don Hughes to retain him" - is totally unsupported by the record. In fact, it is directly contrary to the record evidence. Defendant has no personal knowledge of this fact and no other witness has testified that way. Consequently, all of defendant's purported statement of fact number two must be stricken.

2. Defendant's Purported Statement of Fact number three must be stricken because it is unsupported by references to the record. An identical paragraph in Defendant's Affidavit is the subject of a separate Motion to Strike for the reason that it concerns matters not within the personal knowledge of the defendant.

3. Defendant's purported statement of fact number four must be stricken because of inadequate references to the record and because it is based on unsworn testimony. Specifically, the

statement "that Maxcine Archuleta handled the routine submission of these bills herself" is unsupported by references to the record. There was no testimony during the deposition of any witness as to whether or not Maxcine Archuleta handled the submission of these bills herself or whether someone else did it or whether she received the assistance of defendant's agent.

No objection is made to the portion of defendant's purported fact number four that states that, "no attorney's fee was taken by Hughes on any of the routinely submitted bills.

4. All of Defendant's Purported Statement of Fact numbers five and seven must be stricken because they are based on unsworn documents. The documents were attached as exhibits to the deposition of Sandra MacIntosh but neither she nor any other witness has given any testimony as to the creation of the documents nor the source of the information contained therein. Therefore, all of the information contained in Defendant's Purported Statements of Fact numbers five and seven are based on heresy and must be stricken.

5. Defendant's purported fact number 17 must be stricken for failure to specifically refer to the portion of the record upon which the statement is based. Defendant cites his own Affidavit, but in that Affidavit, he does not claim to have personal knowledge that the fact is true. Instead, at page 38 of his deposition, he admitted that he was not present when this event allegedly occurred. Therefore, he cannot testify concerning this fact since he has no personal knowledge about it.

ARGUMENT

1. PLAINTIFF IS ENTITLED TO SUMMARY JUDGEMENT FOR \$800.

It appears that defendant opposes plaintiff's claim for refund of the \$800 attorney fee on the grounds that plaintiff has failed to show negligence. At page 11 of his Opposing Memorandum, defendant states the proposition that for plaintiff to prevail on her motion for Summary Judgement, she must prove a standard of care by expert testimony and that this standard of care was breached. Defendant misses the point of plaintiff's argument. Plaintiff is entitled to summary judgement with respect to the \$800 not because of malpractice or negligence, but instead because of reasons that are based purely on contract law which do not depend on any issues of fact. The attorney retainer agreement is a contract in writing. Therefore, its terms are construed as a matter of law and do not present a jury question. As a matter of law, the contract simply does not authorize a fee for recovering PIP benefits. Plaintiff need not rely on any arguments concerning the standard of care or other negligence arguments. She is entitled to the refund of the \$800 based on the contract itself which does not provide for any such fee.

Even if the contract did provide for fee (which it doesn't) those [missing] terms would be unenforceable because such an agreement is prohibited by law. However this Court need not reach that issue because of the simple fact that contract does not provide for a fee in the facts and circumstances of this case.

PLAINTIFF IS ALSO ENTITLED TO A FULL
REFUND OF THE BALANCE OF THE ATTORNEY FEES OF \$2,295

More importantly, plaintiff must be granted Summary Judgement against defendant for a refund of the entire attorney fee charged in this case because the attorney retainer agreement didn't provide for any attorney fee in the facts of this case. Defendant's failure to address the issue in his memorandum is a clear indication that defendant has no grounds upon which to claim a right to his fee in this case.

PLAINTIFF IS ENTITLED TO SUMMARY
JUDGEMENT ON HER CLAIM OF CONSTRUCTIVE FRAUD

Defendant's Opposition to Plaintiff's Motion for Summary Judgement on her theory of constructive fraud is based on two grounds. First of all, he claims that constructive fraud is an "equitable" claim and that since plaintiff has chosen to file a suit at law for damages and has not sought equitable remedies that constructive fraud is not available to her. (Page 12 of Defendant's Opposing Memorandum.) And on the further grounds that plaintiff has failed to produce expert testimony that establishes any duty [of defendant to act as a fiduciary]. (Page 13 of Defendant's Opposing Memorandum.)

Defendant is wrong on both points. The elements of constructive fraud are as follows:

1. A confidential relationship (Von Hake v. Thomas, 705 P2d 766 at 769 (Utah 1985), quoting Blodgett v. Martsch, 590 P2d 298, 302 (Utah 1978).

2. A transaction that has benefitted the superior party in a confidential relationship Von Hake, supra, at 769.

3. Actual damages.

The undisputed facts of this case establish all three elements of constructive fraud. While the question of whether a relationship is confidential is generally a question of fact, it is not always so, the attorney client relationship is one of the very few relationships that is defined as being presumptively confidential. Blodgett, supra at 302; Von Hake, supra at 770; and, In re: Swan's estate, 4 Utah 2d at 281, 283 P2d at 684. There is no requirement in this case that the plaintiff present evidence that a confidential relationship existed because it is undisputed that the defendant represented plaintiff as an attorney in a personal injury case. (Undisputed fact number two of Plaintiff Main Memorandum and Hughes' deposition at page 23, lines 17-19. Such a relationship is defined by law as confidential. Therefore, there are no fact issues to be resolved with respect to whether or not a confidential relationship existed between plaintiff and defendant.

Nor is there a dispute as to whether there was a transaction that benefitted the superior party in this confidential relationship. Both plaintiff and defendant agree that defendant charged a one-third contingent fee of \$800 for collecting \$2,400 of medical expenses incurred by plaintiff as a result of her injury (Undisputed fact number 11 of plaintiff's main brief). Both parties also agree that the \$2,400 of medical expenses were never

submitted to plaintiff's PIP insurer. (Undisputed fact number 12 of plaintiff's main brief). And furthermore, that if the bills had been submitted to plaintiff's insurance carrier, they would have been paid under the PIP policy. (Undisputed fact number 13 of plaintiff's main brief.) Those are the undisputed facts of this case. Based on those facts, there can be no result other than to conclude as a matter of law that this constituted a transaction that benefitted Hughes by \$800. Nor can there be any other conclusion than that the attorney is the superior party in the confidential relationship created when an attorney represents a client. Based on these undisputed facts, the law further provides that such a transaction is presumed to have been unfair and to have resulted from undue influence and fraud. Von Hake, supra at 767.

Based on these undisputed showings, the burden of proof has shifted. The benefitting party, the defendant in this case, bears the burden of persuading the fact finder by a preponderance of the evidence that the transaction was in fact fair and not the result of fraud or undue influence. Von Hake, supra at 769. Because the defendant in this case has failed to make any showing sufficient to establish that collecting \$800 on PIP benefits was in fact fair and not the result of fraud or undue influence, he has failed to meet the burden of proof that would be his at trial. Since he has failed to carry the burden at this level, Summary Judgement must be entered against him. Celotex Corp v. Catrett, 477 US 317, 322 (1986). This is the law followed by the Utah Court of Appeals in Reeves v. Geigy Pharmaceutical Inc., 764 P2d 636, 642 (Utah App.

1988). As a matter of law, since the defendant bears the burden of proof at trial he cannot sit back and merely claim to have evidence that he will present at trial. That's not how the law of Summary Judgement works in Utah. He has an affirmative duty to come forward with admissible evidence at the Motion for Summary Judgement because the burden of proof is his.

It's extremely doubtful that he could ever meet that burden of proof by the required preponderance of evidence but it makes no difference now whether he could or could not. This is a Motion for Summary Judgement. He has the burden of proof. He has set forth no facts to show, "...that the transaction was in fact fair and not the result of fraud or undue influence." Von Hake, supra. at 769. Therefore, while the defendant could possibly have had a trial on the issue by submitting an Affidavit that properly addressed these issues, he has failed to do so and thus cannot survive this Motion for Summary Judgement. Geigy, supra.

Finally, the requirement of actual damages is clearly been met in the amount of \$800.

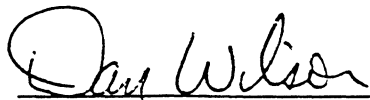
While a trial will be required on the issue of punitive damages, that is the only remaining issue with respect to plaintiff's claim of fraud

**PLAINTIFF IS ENTITLED TO SUMMARY
JUDGEMENT THAT DEFENDANT COMMITTED MALPRACTICE**

Summary Judgement on the issue of malpractice is mandated because fraud, having already been established, is per se

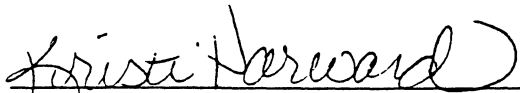
malpractice. However a trial will be required on the issue of damages.

11-27-95
Date


Daniel L. Wilson
Attorney for Plaintiff

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P.O. Box 27611
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11-27-95
Date


Signature

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IN THE SECOND JUDICIAL DISTRICT COURT
OF DAVIS COUNTY, STATE OF UTAH

MAXCINE ARCHULETA,	:	PLAINTIFF'S SUPPLEMENTAL BRIEF
Plaintiff,	:	RE: CONSTRUCTION OF
	:	ATTORNEY FEE AGREEMENT
vs.	:	
DONALD C. HUGHES	:	Civil No.940700264
Defendant.	:	Judge Dawson

Pursuant to the Court's request to provide additional citations to cases that have addressed the issue of how to construe written Attorney retainer agreements, the Plaintiff submits the following:

First of all, Plaintiff notes that the interpretation of a written contract is usually a matter of law. Overson v. United States Fidelity and Guaranty, 587 P2d 149 (Utah 1978). (Copy attached) Furthermore, whether or not a contract is ambiguous is also a matter of law, 17A Am Jur 2d, Contracts § 339 and cases cited therein.

Where an ambiguity is found to exist in a contract, the resolution of that ambiguity is still a question of law for the Court, unless contradictory evidence is presented to clarify the ambiguity. Overson, supra. However, there is a major exception to that general principal in those cases where a party to the contract was both the Attorney draftsman of and a party to the instrument.

In all such cases, proper construction of such an instrument is strictly against the Attorney draftsman who is also a party to the instrument. Continental Bank and Trust Company v. Bybee, 306 P2d 773 (Utah 1957). (Copy attached). While that is an older case, it's application was reinforced by the Utah Supreme Court as recently as 1989 in the case of Phillips v. Smith, 768 P2d 449 (Utah 1989) at Page 451 of that decision, (copy attached), the Court quoted Continental Bank and Trust Company v. Bybee, supra, and noted that the rule is even reinforced when the instrument at issue relates to an Attorney-Client contingent fee arrangement such as that that is presented in this case. Phillips, supra at 451.

At the hearing on this matter, Defendant urged the Court to construe an ambiguity in the contract in his favor. While it's possible the Supreme might reverse it's holding in Continental Bank and Trust Company and in Phillips, there is no other case in Utah that suggests that the Court is unhappy with the rule of law set forth therein. Therefore, those decisions appear to be binding on this Court and if the Court finds the contract presents an ambiguity, that ambiguity must be resolved against Defendant rather than in his favor.

Plaintiff notes that the effect of this decision is not as prejudicial as it may appear because the Supreme Court in Phillips also recognized and reinforced the principle that even if a contingent fee agreement is rendered void, the Attorney is still entitled to seek fees on the basis of quantum meruit. Phillips, supra at 452, footnote 5.

12-3-95
Date

Dan Wilson
Daniel L. Wilson
Attorney for Plaintiff

Mailed to: Donald C. Hughes
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VIA FAX TRANSMISSION: (314) 968-8055

12-3-95
Date

Heather Judeau
Signature

OVERSON v. UNITED STATES FIDELITY AND GUARANTY Utah 149

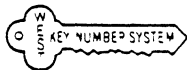
Cite as 587 P.2d 149

Plaintiff incurred attorney's fees of \$14,920, which included \$2,500 for an attorney she had previously retained. Plaintiff was compelled to engage in extensive discovery, particularly in regard to the assets and defendant's ownership thereof, which in several instances he claimed were owned by others. There is no basis in the record after reviewing the circumstances to deem the fractional award of attorney's fees to plaintiff as an abuse of discretion.

ELLETT, C. J., and CROCKETT, WILKINS and HALL, JJ., concur.

PER CURIAM:

Pursuant to respondent's petition for rehearing in this case, the Court makes the following addendum to the decision heretofore rendered: The case is remanded to the district court to determine whether considerations of equity and justice require the making of a further award to plaintiff of attorney's fees incurred because of this appeal; and if so, the amount.¹ With such amendment the petition is denied.



Kirt OVERSON, Plaintiff and Appellant,
v.

UNITED STATES FIDELITY AND
GUARANTY COMPANY, a/k/a USF &
G, an insurance company, Defendant
and Respondent.

No. 15470.

Supreme Court of Utah.

Nov. 14, 1978.

Insured brought declaratory judgment action against insurer to determine effect of coverage provisions of a general liability policy designed to protect against losses occurring in construction project. The Fifth District Court, Millard County, Harlan Burns, J., directed a verdict in favor of

insurer and dismissed action with prejudice and insured appealed. The Supreme Court, Hall, J., held that where the policy expressly and unambiguously excluded coverage for property damage to "property in the care, custody or control of the insured or as to which the insured is for any purpose exercising physical control" and "damage to work performed by or on behalf of named insured arising out of due work or any portion thereof, or out of materials, parts or equipment furnished in connection therewith," insured was not entitled to coverage for destruction by fire of building under construction by the insured, a subcontractor, arising out of work done by the insured's employees and materials supplied by the insured.

Affirmed.

1. Contracts ⇐ 176(1)

Interpretation of a contract's language is usually a matter of law.

2. Insurance ⇐ 435.24(7)

Where general liability insurance policy expressly and unambiguously excluded coverage for property damage to "property in the care, custody or control of the insured or as to which the insured is for any purpose exercising physical control" and "damage to work performed by or on behalf of the Named Insured arising out of due work or any portion thereof, or out of materials, parts or equipment furnished in connection therewith," insured was not entitled to coverage for destruction by fire of building under construction by the insured, a subcontractor, arising out of work done by the insured's employees and materials supplied by the insured.

Philip R. Fishler, of Strong & Hanni, Salt Lake City, and LeKay G. Jackson, of Jackson & Jackson, Delta, for plaintiff and appellant.

George A. Hunt, of Snow, Christensen & Martineau, Salt Lake City, for defendant and respondent.

1. Eastman v. Eastman, Utah, 553 P.2d 514.

HALL, Justice:

This is a declaratory judgment action filed by plaintiff ("Overson") against defendant insurer ("USF & G") to determine the effect of coverage provisions of an insurance policy.

Overson was insured under a general liability policy issued by USF & G designed to protect against losses that might occur in construction projects. The policy excluded certain types of loss from coverage including the following clauses which are the focus of this appeal:

This insurance does not apply:

(k) to property damage to

(3) property in the care, custody or control of the insured or as to which the insured is for any purpose exercising physical control;

(o) to property damage to work performed by or on behalf of the Named Insured arising out of the work or any portion thereof, or out of materials, parts or equipment furnished in connection therewith;

Overson had sub-contracted to construct two quonset-type metal buildings to be used for potato storage. Other sub-contractors were engaged to furnish the steel, footings, foundations and electrical work, to pour concrete, to provide certain carpentry work, and the like. When almost completed, one of the buildings was totally destroyed by fire. The general contractor had directed Overson to enlarge two louvred ventilation panels. When Overson's employees encountered difficulty in removing one of the panels, an acetylene torch was used in an attempt to cut the head off a stripped bolt. The flame from the torch suddenly ignited the foam insulation and the building was totally destroyed within minutes. The employees of Overson were the only people in and around the building at the time of the incident.

1. 48 Tenn.App. 419, 348 S.W.2d 512 (1961). See also *Madden v. Vitamilk Dairy, Inc.*, 59

Overson sued USF & G to determine whether the fire loss was covered by the policy. USF & G's motion for summary judgment was denied and the matter was tried to a jury. After plaintiff's case, the trial court directed a verdict and dismissed the action with prejudice, deciding that, as a matter of law, the policy did not cover the fire loss due to the clear, unambiguous language of the policy exclusions. Overson appeals, asserting that (1) the policy was ambiguous; and (2) there was a jury question as to who had "care, custody or control."

Overson cites a number of cases which interpret language similar to that contained in clause (k) as being ambiguous. However, each case cited addresses close factual questions, not present here, as to whether or not the property was actually in the insured's care, custody or control at the time of the accident. In the instant case it appears that the facts are clear (i. e., Overson's control) and the exclusionary language of the policy is clear, such that the former is included within and subject to the latter. Language such as was used in the policy here generally has been said to be clear and unambiguous. This is reflected in *Hill v. United States Fidelity and Guaranty Co.*,¹ wherein the court stated:

We think the exclusion clause of the policy which provides that said policy does not offer indemnity for damage to "Property in the care, custody or control of the insured or property as to which the insured for any purpose is exercising control," is clear and unambiguous and, as has been stated in many cases, the Courts will not create an ambiguity where none exists.

Likewise, there is no factual dispute as to clause (o) in the matter before us. The damage in question was property damage to work performed by the insured (erecting and insulating building) which arose out of work done by the insured employees (cutting bolt and removing louvres) and materials supplied by the insured (foam insulation).

Wash.2d 237, 367 P.2d 127 (1961), and 62 A.L.R.2d 1242.

BEKINS BAR V RANCH v. UTAH FARM PRODUCTION Utah 151

Cite as 587 P.2d 151

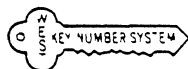
[1] All of these facts being undisputed, there is no genuine issue of fact to be resolved. The accepted principle is that the interpretation of a contract's language is usually a law matter.² This principle was articulated in the case of *Central Credit Collection Control Corp. v. Grayson*³ as follows:

Interpretation of a written contract is usually a question of law for the court. If its terms are clear and unambiguous, summary judgment is proper. Even where some ambiguity exists in the contract, resolution of the ambiguity is still a question of law for the court, unless contradictory evidence is presented to clarify the ambiguity.

[2] Therefore, because there is no dispute as to material fact the court could properly have granted USF & G's motion for summary judgment. That such preliminary motion was denied does not show the existence of a fact issue which would preclude a subsequent directed verdict.⁴

The judgment is affirmed with costs on appeal to USF & G.

ELLETT, C. J., and CROCKETT, MAUGHAN and WILKINS, JJ., concur.



BEKINS BAR V RANCH, a Utah Corporation, Plaintiff and Appellant,

v.

UTAH FARM PRODUCTION CREDIT ASSOCIATION, Defendant and Respondent.

No. 15563.

Supreme Court of Utah.

Nov. 14, 1978.

Appeal was taken from order of dismissal entered by the Third District Court,

2. *Pacific States Cast Iron Pipe Co. v. Harsh Utah Corp.*, 5 Utah 2d 244, 300 P 2d 610 (1956).

3. 7 Wash.App 56, 499 P 2d 57 (1972).

Salt Lake County, David B. Dee, J., in response to motion to dismiss which was filed before answer and supported by affidavits and other materials outside the pleadings and which trial court treated as one for summary judgment. The Supreme Court, Wilkins, J., held that dismissal on merits after treating defendant's motion to dismiss as one for summary judgment was improper, where motion to dismiss was not specifically denominated as Rule 12(b) motion, nor did it expressly state that motion was based upon failure to state claim upon which reason could be granted under 12(b)(6), and no notice was given to plaintiff in advance of memorandum decision that the motion would be treated as a motion for summary judgment.

Reversed and remanded.

1. Trial ⇐ 165

When motion to dismiss is made and matters outside pleading are presented to and not excluded by court, record must clearly and affirmatively demonstrate that all parties, including nonmovant, are given reasonable opportunity to present additional pertinent material if they wish. Rules of Civil Procedure, rules 12(b), (b)(6), 56.

2. Judgment ⇐ 183, 184

Dismissal on merits after treating defendant's motion to dismiss as one for summary judgment was improper, where motion to dismiss was not specifically denominated a Rule 12(b) motion, nor did it expressly state that motion was based upon failure to state claim upon which reason could be granted under 12(b)(6), and no notice was given to plaintiff in advance of memorandum decision that motion would be treated as motion for summary judgment. Rules of Civil Procedure, rules 12(b), (b)(6), 56.

Ralph J. Hafen, Salt Lake City, for plaintiff and appellant.

4. *Richardson v. Grand Central Corp.*, Utah, 572 P.2d 395 (1977).

6 Utah 2d 98

The CONTINENTAL BANK AND TRUST COMPANY, a Utah Banking Corporation, Plaintiff,

v.

David H. BYBEE and Verda M. Bybee,
Defendants and Appellants,

W. H. Adams Carpet Company, Third-Party Defendants and Respondents.

No. 8500.

Supreme Court of Utah.

Feb. 8, 1957.

Action on a note wherein defendant filed a third party complaint. From a judgment of the Third Circuit Court, Salt Lake County, Joseph G. Jeppson, J., dismissing the third-party complaint, the defendants appealed. The Supreme Court, McDonough, C. J., held, inter alia, that where buyer of carpet executed note which was negotiated by seller without recourse to bank and thereafter upon buyer's complaint of breach of warranty buyer and seller signed agreement prepared by buyer who was an attorney which included a provision that seller would "cancel any and all evidences of any indebtedness" by buyer to seller "their assignees, or transferees, or agents" and on back of settlement check appeared the words "in full settlement on adjustment on carpet installed", parties intended only an adjustment of purchase price by amount of such settlement check and not that seller would assume buyer's obligation on note.

Affirmed.

1. Contracts ⇨147(1)

Evidence ⇨461(1)

The intent of parties to contract should be ascertained first from the four corners of instrument itself, second from other contemporaneous writings concerning the same subject matter, and third from extrinsic parol evidence of the intentions.¹

1. *Mathis v. Madsen*, 1 Utah 2d 46, 261 P.2d 952.

2. *Penn Star Mining Co. v. Lyman*, 64 Utah 343, 231 P. 107; *Jensen v. Kidman*, 85 Utah 27, 38 P.2d 303.

2. Evidence ⇨448

If ambiguity in contract can be reconciled from a reasonable interpretation of the instrument, extrinsic evidence should not be allowed.²

3. Contracts ⇨164

If instrument on its face remains ambiguous in spite of reasonable construction, intent of parties may be ascertained in light of all written instruments which were a part of same transaction.³

4. Contracts ⇨147(1)

Evidence ⇨461(1)

If intent of parties to contract remains ambiguous even after examination of written instruments which were part of the same transaction, then parol evidence may be admitted, and rules of construction may be invoked to declare intention of parties.⁴

5. Compromise and Settlement ⇨12

Where buyer of carpet executed note which was negotiated by seller without recourse to bank and thereafter upon buyer's complaint of breach of warranty buyer and seller signed agreement prepared by buyer, who was an attorney, which included a provision that seller would "cancel any and all evidences of any indebtedness" by buyer to seller, "their assignees, or transferees, or agents", and on back of settlement check appeared the words "in full settlement on adjustment on carpet installed", parties intended only an adjustment of purchase price by amount of such settlement check and not that seller would assume buyer's obligation on note.

6. Contracts ⇨153

Where party to contract was both the attorney draftsman of and party to the instrument, proper construction of such instrument should be strictly against him.

David H. Bybee, L. M. Haynie, Salt Lake City, for appellants.

3. *Strike v. White*, 91 Utah 170, 63 P.2d 600.

4. *Milford State Bank v. West Field Canal & Irr. Co.*, 108 Utah 528, 162 P.2d 101.

Peter W. Billings and Albert J. Colton, Salt Lake City, for respondents.

McDONOUGH, Chief Justice.

Defendant appeals from the dismissal of a third-party complaint by which he impleaded respondent, Adams Carpet Company, to an action on a note held by plaintiff (not a party to this appeal). Defendant admits liability on the note to the plaintiff holder in due course, but asserts that the third-party defendant was obligated to "save appellants harmless" on the note.

In February, 1955, appellant David H. Bybee entered into an agreement with respondent Adams Carpet Company (the third-party defendants below) whereby carpet of a specified type was to be installed in the appellant's home for a purchase price of \$607. The carpet was installed and accepted, the appellants paying \$50 cash upon installation and \$127 shortly thereafter. The Bybees then signed a promissory note for the balance of \$430, which note was promptly discounted and negotiated without recourse to the Continental Bank and Trust Company. Appellants knew of the negotiation, and made one payment to the bank of \$74.86, the first of six monthly payments promised on the note.

Thereafter, Bybee complained of an unsightly, long seam near one end of the carpet which had widened to over an inch in places. The manager of Adams Carpet Company made several visits to appellants' home in attempting to adjust the matter, and on one occasion took with him a crew of men who worked over the seam and reburled it. Later, the manager offered to remove the carpet and refund the appellants' money, which offer was refused.

In response to David H. Bybee's letter of May 13, 1955, which threatened court action should no adjustment be effected within five days, the carpet company's agent and manager, Thompson, telephoned Bybee and negotiated an adjustment settlement of \$100 to be paid to Bybee by Adams Carpet Company. The same day Thompson

and Bybee signed an agreement, and Bybee received both the check for \$100 and a bill of sale for the carpet marked, "paid in full." Above Bybee's indorsement on the check Thompson had written, "In full settlement on adjustment on carpet installed in the Bybee residence."

The agreement had been drawn up by the appellant, David H. Bybee, who is an attorney at law, purportedly to include the oral terms settled over the telephone by the parties. It read as follows:

"Agreement

"This Agreement made and entered into by and between W. H. Adams & Sons of Salt Lake County, Utah and David H. Bybee of Davis County, Utah.

"Witneseth:

"That Whereas, David H. Bybee has heretofore purchased a carpet from W. H. Adams & Sons which carpet has heretofore been installed and placed in the living room of the home of Mr. and Mrs. David H. Bybee at 6885 Orchard Drive, Bountiful, Utah, and a contract for payment of the unpaid purchase price had been entered into;

"And, Whereas, he is dissatisfied with said carpet,

"And, Whereas, W. H. Adams & Sons are desirous of making an amicable settlement: It Is Mutually Agreed:

"1. That W. H. Adams & Sons will pay to David H. Bybee the sum of One Hundred (\$100.00) Dollars.

"2. Will give David H. Bybee a Bill of Sale for the carpet showing complete payment and vesting the title of the property in David H. Bybee.

"3. Will cancel any and all evidences of any indebtedness by David H. Bybee to the W. H. Adams & Sons, their assignees, or transferees, or agents.

"4. David H. Bybee will give and does by these presents give to W. H. Adams & Sons a complete release from any and all liability, damages, actions or any claim that he may have against W. H. Adams & Sons by reason of having purchased the aforesaid carpet.

"Dated May 18, 1955.

"W. H. Adams & Sons
"By: /s/ C. M. Thompson
"/s/ David S. Bybee
"David H. Bybee"

Appellants' only contention is that the trial court erred in applying an individual or subjective standard of meaning to a bilateral contract in writing. This proposition is tersely supported by quotations from Wigmore on Evidence, American Jurisprudence and two Utah cases, all of which assume the very question which should be decided: That the contract in writing was unambiguous on its face.

Respondent argues both that the agreement was not unambiguous on its face, and that the interpretation by the trial court in light of all the evidence was reasonable in finding the contract did not include a promise to assume payment of the promissory note in the hands of the bank. Respondent claims that paragraphs 3 and 4 were merely mutual releases between the parties themselves.

[1-4] The sole question before this court, then, is whether the parties intended by this agreement that respondent should assume the obligation on the note held by Continental Bank. This intent should be ascertained first from the four corners of the instrument itself, second from other contemporaneous writings concerning the same subject matter, and third from the extrinsic parol evidence of the intentions. Mathis v. Madsen, 1 Utah 2d 46, 261 P.2d 952. If the ambiguity can be reconciled from a reasonable interpretation of the instrument, extrinsic evidence should not be allowed. Penn Star Mining Co. v. Lyman, 64 Utah 343, 231 P. 107; Jensen v. Kid-

man, 85 Utah 27, 38 P.2d 303. If the instrument on its face remains ambiguous in spite of the reasonable construction, the intent may be ascertained in the light of all written instruments which were a part of the same transaction. Strike v. White, 91 Utah 170, 63 P.2d 600. If the intent is ambiguous still, then parol evidence may be admitted, Milford State Bank v. West Field Canal & Irr. Co., 108 Utah 523, 162 P.2d 101; and rules of construction may be invoked to declare the intention of the parties. Penn Star Mining Co. v. Lyman, supra.

[5] On the face of the agreement set out above, the words in paragraph 3 raise some doubt as to whether a negotiated note should be canceled as an evidence of indebtedness "by David H. Bybee to the W. H. Adams & Sons, their assignees, or transferees, or agents." But this ambiguity is reconciled when the contemporary writing on the back of the \$100 settlement check is construed together with the agreement. The words, "In full settlement on adjustment on carpet installed in the Bybee residence," which were written above David Bybee's negotiation of the \$100 check from respondent to Bybee clearly indicate that the parties intended only an adjustment of the purchase price by a \$100 reduction, and not that respondent would assume Bybee's obligation on the promissory note in the hands of the bank.

It is not credible that respondent intended that Bybee should be given both \$100 and the carpet free from further obligation, merely to assuage him from a claimed breach of warranty, the damages of which would be only a fraction of the purchase price.

[6] Extrinsic parol evidence and rules of construction bear out this interpretation. Since Bybee was both the attorney draftsman of and a party to the instrument, the proper construction of this instrument should be strictly against him. When the instrument neither mentioned the promissory note in paragraph 3, nor asked for

return of the note, which after all is proper means of legally cancelling a negotiable instrument, we feel the parties did not intend such note to be assumed by respondent Adams Carpet Company.

The ambiguity within the four corners of the instrument in question can be clarified

by the contemporary writing, rules of construction, and the parol extrinsic evidence within the record.

Judgment is affirmed. Costs to respondents.

CROCKETT, WADE, WORTHEN and HENRIOD, JJ., concur.

ZIMMERMAN, Justice:

Elmer Lee PHILLIPS and Nilda
Phillips, Plaintiffs and
Appellants,

v.

Dr. J.A. SMITH, Jr., University Medical
Center, and Jane Does Nos. 1-5,
Defendants.

Ungricht, Randle & Deamer, Real Party
in Interest and Appellee.

No. 20873.

Supreme Court of Utah.

Jan. 23, 1989.

Attorney sued client to recover fees pursuant to a contingent fee agreement. The Third District Court, Salt Lake County, John A. Rokich, J., entered order enforcing attorney's lien. Client appealed. The Supreme Court, Zimmerman, J., held that attorney's lien was invalid, since recovery had been obtained by another attorney, and contingent fee agreement did not cover possibility of change of counsel.

Reversed.

Stewart, J., dissented and filed opinion in which Howe, Associate C.J., concurred.

1. Attorney and Client ⇐183

Attorney's lien does not attach until after the commencement of a lawsuit. U.C.A.1953, 78-51-41.

2. Attorney and Client ⇐174

Attorney's lien did not attach, where client discharged attorney and obtained settlement of lawsuit through use of another firm, and contingency fee arrangement with first firm did not cover this eventuality. U.C.A.1953, 78-51-41; Rules of Prof. Conduct, Rule 1.5(c).

Brian C. Harrison, Provo, for plaintiffs and appellants.

Steven Randle, Salt Lake City, for real party in interest and appellee.

Nilda Phillips appeals from an order enforcing an attorney's lien. Nilda and her now-deceased husband, Elmer Lee Phillips, brought a medical malpractice action, initially retaining the law firm of Ungricht, Randle & Deamer ("the Ungricht firm"). Before any resolution was achieved, the Phillipses terminated their relationship with the Ungricht firm and hired new counsel. The new counsel negotiated a settlement. The Ungricht firm sought to enforce an attorney's lien on the settlement amount, claiming it was entitled to a contingency fee of one-third of the settlement figure. The trial court ruled in favor of the Ungricht firm. We reverse because we find the attorney's lien to be invalid.

In November of 1983, the Phillipses retained the Ungricht firm to represent them in a medical malpractice claim against Dr. J.A. Smith, Jr., the University of Utah Medical Center, and others. The claim arose out of an operation performed by Dr. Smith on Mr. Phillips. The Phillipses and the Ungricht firm entered into a preprinted written contract that provided for the payment to the firm of a contingent fee of one-third of the "amount recovered."

The Ungricht firm gave defendants advance notice of the Phillipses' intent to sue, as required by section 78-14-8 of the Code, and then opened settlement negotiations. Utah Code Ann. § 78-14-8 (1987). The hospital and other defendants offered \$35,000 to settle the case. The Ungricht firm sent the Phillipses a letter dated June 15, 1984, advising them to accept the offer and expressing doubt that either further negotiations or a trial would result in a larger recovery. The letter, written by Michael L. Deamer, stated in pertinent part:

In my opinion and in the opinion of Jerry Ungricht of this office, we very strongly recommend that you consider and take the settlement offer. This is based upon our careful evaluation of the case and subsequent evaluations in light of conversations with you and subsequent evaluations in light of our investigation of recoveries for similar personal injuries. I can appreciate that you feel you have

been badly wronged and you ought to receive \$100,000 or even a Million Dollars. In my opinion you will never receive those amounts.

The letter also described four alternative courses of action then available to the Phillipses. Options one and three are at issue here.

1. Terminate this law firm's representation of the matter and turn the matter over to another law firm.
2. Hire another attorney at your expense to make a "second opinion" analysis of the facts and evidence.
3. Authorize me to make a counter offer for \$25,000 in cash plus a pass through of the medical bills with further authorization to accept some amount in that range including a figure half way between, subject to your final approval.
4. Accept the offer as currently stated.

The Phillipses rejected the offer and instructed the Ungricht firm to continue settlement negotiations and to make a \$45,000 counter offer. Through further negotiations, the firm obtained a settlement offer of approximately \$40,000. The firm communicated the offer to the Phillipses, who rejected it and terminated the employment of the Ungricht firm. The Phillipses then retained another firm to pursue their claim.

After being discharged, and before any suit was filed or settlement consummated, the Ungricht firm filed a "Notice of Attorney's Lien" against the Phillipses for \$13,161.44, one-third of the \$40,000 settlement offer negotiated by the firm. The Phillipses, through their new counsel, then formally filed suit against the hospital and other defendants. Eventually, new counsel negotiated and the Phillipses accepted a settlement of approximately \$40,000, on terms essentially identical to those defendants

had offered before the Ungricht firm was discharged and new counsel retained.

The hospital, having been notified of the Ungricht firm's lien on the settlement amount, moved for a determination of the Ungricht firm's entitlement to the claimed attorney fee. The Ungricht firm moved for an order enforcing its attorney's lien. The trial court issued an order enforcing the lien for \$13,314.78. That order is the subject of this appeal. The parties have placed \$15,000 in an interest-bearing account to await a final determination of this issue.

[1] Before this Court, Mrs. Phillips¹ challenges the trial court's order on various procedural grounds that we do not reach because we find the underlying attorney's lien to be invalid. The lien asserted by the Ungricht firm is a statutory creature governed by section 78-51-41 of the Code. That section provides in pertinent part:

The compensation of an attorney and counselor for his services is governed by agreement, express or implied, which is not restrained by law. From the commencement of an action,² or the service of an answer containing a counterclaim, the attorney who appears for a party has a lien upon his client's cause of action or counterclaim, which attaches to a verdict, report, decision or judgment in his client's favor and to the proceeds thereof in whosoever hands they may come, and cannot be affected by any settlement between the parties before or after judgment.

Utah Code Ann. § 78-51-41 (1987).

[2] Under the statute, an attorney's lien can arise only out of the "agreement, express or implied" between the lawyer and the client. Therefore, the statutory lien is only as good as the underlying agreement regarding compensation. *Cf. Bishop v.*

1. Elmer Lee Phillips died shortly after settlement of the malpractice claim.

2. Although we do not reach the issue because it was not raised on appeal, we observe that the statutory attorney's lien would appear to be unavailable to the Ungricht firm, even if the fee agreement had covered the contingency that arose in this case. The statute requires that there be a "commencement of an action" before

any lien arises. Utah Code Ann. § 78-51-41 (1987). An action is "commenced" in Utah when a complaint is filed. Utah R.Civ.P. 3. While it represented the Phillipses, the Ungricht firm did not file a complaint. It went no further than filing a notice of intent to sue pursuant to Utah Code Ann. § 78-14-8. That does not appear to satisfy the technical requirements of the lien statute.

Parker, 103 Utah 145, 151, 134 P.2d 180, 183 (1943) (applying the predecessor to section 78-51-41). Here, the agreement was set forth in a written contract between the Ungricht firm and the Phillipses that states in relevant part: "I agree to pay my attorneys for the above legal services as follows: Retainer \$500 for costs. One-third (1/3) of amount recovered and value less costs advanced."³ In order for the statutory lien to attach as the Ungricht firm argues, this agreement must be read as providing for payment to the firm of a fee of one-third of the amount of any recovery obtained by the Phillipses on their malpractice claim, even a recovery resulting from the efforts of a successor attorney after the termination of the relationship between the Ungricht firm and the Phillipses and without regard to any fee arrangement the Phillipses may have made with successor counsel. We conclude that the contract cannot be so read.

In interpreting the contract, we must be mindful of the general principle that a court will strictly construe terms in a con-

tract against one who is "both the attorney draftsman of and a party to the instrument." *Continental Bank & Trust Co. v. Bybee*, 6 Utah 2d 98, 102, 306 P.2d 773, 775 (1957). We also note that in the present circumstances, this principle is reinforced by the fact that the instrument at issue relates to an attorney/client contingent fee arrangement. The present Rules of Professional Conduct of the Utah State Bar require that all contingent fee agreements be in writing.⁴ That requirement, which does not apply to other types of fee arrangements, reflects in part a concern that contingent fee arrangements are particularly likely to be misunderstood by clients. That concern is enhanced where the clients are unsophisticated with respect to legal matters as in the present case. The rule is meant to ensure that clients will be fully informed as to the terms and consequences of the contingent fee agreement.

The written contract in the present case is silent concerning the liability of the Phillipses for the contingent fee should either they or the law firm terminate the relation-

3. The contract is a standard form agreement prepared by the Ungricht firm. The specific matters of representation and fee arrangement are handwritten in spaces provided on the form. These handwritten portions are indicated here with italics. The complete written contract states:

EMPLOYMENT AGREEMENT

I, [sic] hereby retain and employ the law firm of UNGRICHT, RANDLE & DEAMER ... as my attorneys in the following matters: *Medical Malpractice Action for Elmer Lee Phillips.*

I agree to pay my attorneys for the above legal services as follows: Retainer \$500 for costs. *One-third (1/3) of amount recovered and value less costs advanced.*

I agree that the above retainer shall be the minimum fee charged and unless otherwise agreed in advance, the terms of this agreement shall extend to other matters for which the client requests services after the date of this agreement.

I agree additionally to pay court costs, filing and service fees, subpoena costs, photos, court reporter costs, traveling and lodging expenses of my attorneys outside of Salt Lake City, Utah, long distance telephone calls and word processing costs, when billed to me periodically.

I acknowledge that the above attorneys have not made any guarantee regarding the successful termination of said legal matters,

and I request that my attorneys not settle nor compromise this matter without my express approval.

In the event I fail to pay the fees and costs when billed, for whatever reason, I hereby grant my attorneys a lien on said legal matters and agree to pay interest on all amounts overdue thirty days or more at an annual percentage rate of 18% (1 1/2% per month) until paid, plus all court costs and reasonable attorney's fees to enforce collection.

4. Rule 1.5(c) provides:

A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited.... A contingent fee agreement shall be in writing and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal, litigation and other expenses to be deducted from the recovery, and whether such expenses are to be deducted before or after the contingent fee is calculated. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination.

Utah Rule of Professional Conduct 1.5(c).

ship before any recovery is obtained. It simply provides for a flat fee of one-third of the recovery. We conclude that as a matter of law, the agreement must be interpreted as being predicated on the assumption that the Ungricht firm would handle the matter through its conclusion by settlement or trial and that its drafter completely failed to provide for the possibility that the firm or the clients might choose to terminate the relationship before the claim was resolved. Since the agreement here did not provide for the contingency that arose, the lien founded upon the agreement is invalid.

Our conclusion regarding the agreement's meaning is supported by the letter sent by the Ungricht firm to the Phillipses on June 15th. The letter outlined four alternative courses of action that the Phillipses could consider in evaluating defendants' settlement offer of \$35,000. One of these alternatives was to "[t]erminate this law firm's representation of the matter and turn the matter over to another law firm." The letter did not suggest that if the Phillipses followed this course, they would still have to pay the Ungricht firm a full one-third of any money the Phillipses might obtain at some future date through the efforts of their new lawyers as well as paying a fee to the new lawyers. Yet the knowledge of such a liability would have been of great importance to the Phillipses in weighing the relative advantages of the various options set out in the letter. The silence of the letter regarding any liability for the contingent fee supports our conclusion that the parties' fee agreement did not provide for the possibility of the Phillipses' dismissing the Ungricht firm and seeking other counsel before settlement.

Finally, the interpretation argued by the Ungricht firm could lead to an unconscionable result. For example, if the Phillipses' new counsel had settled the claim for double or quadruple the amount negotiated by the Ungricht firm, the Ungricht firm would be entitled to a full one-third of that larger

sum even though it had not contributed to obtaining the larger sum. Such a result certainly cannot be presumed to have been within the contemplation of the parties to the fee agreement in the absence of very clear language to that effect in the agreement.

We are cognizant that the facts of this case may make it appear inequitable to invalidate the attorney's lien and leave the Ungricht firm without that guarantee of compensation for the services performed. However, equitable principles are not at issue here.⁵ An attorney's "charging" lien under section 78-51-41, as opposed to a common law "retaining" lien, *see Midvale Motors, Inc. v. Saunders*, 21 Utah 2d 181, 183-84, 442 P.2d 938, 940 (1968), is purely a creature of statute. The lien's validity is dependent upon the terms of the agreement between the lawyer and the client. Here, the express agreement of the parties did not provide for the possibility that Ungricht's representation of the Phillipses would be terminated before the Phillipses' claim was settled. Therefore, the Phillipses owed the Ungricht firm nothing under the written contract when they terminated that representation.

The trial court's order enforcing the attorney's lien is reversed.

HALL, C.J., and DURHAM, J.,
concur.

STEWART, Justice: (dissenting).

I respectfully dissent.

The plaintiffs hired the law firm of Ungricht, Randle & Deamer ("Ungricht") to pursue a medical malpractice claim against the defendants. The plaintiffs were to pay Ungricht a one-third contingent fee. Ungricht filed the required notice of intent to commence an action, performed much of the legal research, prepared a complaint (although it was never filed), engaged in multiple settlement offers and negotiations, and obtained a settlement offer of

5. The Ungricht firm may be entitled to compensation under a *quantum meruit* theory, but we do not reach that question because the present action only involves enforcement of a statutory

lien. For this reason the issues addressed by Justice Stewart have no bearing on the disposition of this appeal.

§39 984 31 The Phillipses were dissatisfied with the offer, discharged Ungricht, and hired Brian C Harrison, who presently represents the Phillipses. He was to be paid a one-quarter contingent fee. Eight months later, Harrison obtained an identical settlement offer, and the case was settled.

The majority focuses on whether Ungricht has a lien under Utah Code Ann § 78-51-41 (1987). The majority properly states that the statutory attorney's lien, § 78-51-41, "is only as good as the underlying agreement regarding compensation." While that is true, the real question in this case is, how much compensation is owed Harrison and how much is owed the Ungricht firm? Because of the special nature of attorney fees contracts and the power of the courts over fee agreements, the question of what is owed the two groups of attorneys ought to be decided in one proceeding. Indeed, requiring them to be decided in two separate proceedings as the majority does, is not only inefficient and costly but also will likely lead to mischief and inequitable results. The attorneys and the trial court recognized as much in the proceedings below—indeed, the parties stipulated to the court's settlement of the entire fee controversy in this case.

The majority's ruling will be unnecessarily burdensome to the Phillipses, the Ungricht law firm, and possibly to Harrison. In effect, the majority holds that Harrison is entitled to the full contingent fee although he reached a settlement identical to the proffered settlement obtained by Un-

gricht. The majority suggests that the Ungricht firm may, however, recover something in a second, independent suit based on *quantum meruit*, but that may subject the Phillipses to a fee that may or may not be equitable from their point of view, having already paid Harrison a full fee.¹

The awarding and approving of attorney fees is subject to the inherent power of a court to regulate the professional conduct of attorneys. *Seal v Pipeline, Inc.*, 731 F.2d 1194, 1196 (5th Cir 1984) (citing *Schlesinger v Tittelbaum*, 475 F.2d 137 (3d Cir), *cert denied*, 414 U.S. 1111, 94 S.Ct. 840, 38 L.Ed.2d 738 (1973)). The existence of an attorney-client relationship is governed not only by contract law, *see Anderson v Gauley*, 100 Idaho 796, 801, 606 P.2d 90, 95 (1980), but also by numerous ethical principles. *See* Rules of Professional Conduct, Rule 1.5 (adopted by Utah Supreme Court, effective January 1, 1988).

It has been held unjust for attorney fees to exceed the amount provided by a single contingent fee agreement when successive law firms are involved as here. *See Reubenbaum v B & H Express, Inc.*, 6 A.D.2d 47, 174 N.Y.S.2d 287, 290-91 (1958). *But see Adams v Fisher*, 390 So.2d 1248, 1251 (Fla. Dist. Ct. App. 1980). That result, however, may depend on the understanding of the attorneys and the client.

The time and place to resolve the issue is clearly in the trial court on remand. All interested parties will be before the court. The only issue to settle will be the claims of counsel to the funds set aside as attor-

1. Damages are recoverable for breach of contract where the attorney under a contingent fee arrangement has been discharged without cause.

It has been held that where an attorney is employed on a contingent contract to perform legal services, his discharge without fault on his part before he has performed his work, constitutes a breach of the contract and renders the client liable to respond in damages. The measure of damages in that situation is the agreed percentage of the amount the client is subsequently able to secure by settlement or judgment less a fair allowance for services and expenses not expended by the discharged attorney in performing the balance of the contract. In some instances the right to recover the full fee has been upheld

Other cases, although allowing the attorney to recover as for breach of contract, do not allow the full fee as the measure of damages where the employment contract had not been substantially performed.

Some cases hold that an attorney discharged under a contingent fee contract without fault on his part may at his election recover the reasonable value of the services rendered up to the time of discharge. In other jurisdictions the discharged attorney has no election and may not recover on the contract, but is restricted to a quantum meruit recovery.

7 Am. Jur.2d Attorneys at Law § 298 at 321-22 (1980) (footnotes omitted). Whether there was a discharge here has not been determined.

ney fees. In dealing with a problem similar to the one at hand, the court in *Seal* stated:

The dispute before the court is not one between a client and an attorney over the validity of an employment contract or the setting of a fair fee. The fee has been found fully earned and appropriate, albeit on the high side of this court's preference. The sole issue is apportionment of the earned fee between the lawyers who earned it.

The magistrate chose to apportion the fee as between Bart and Robin, allowing Bart 13% and awarding the balance to Robin. Breland, the first attorney employed, was compensated exclusively on a *quantum meruit* basis. We find that disparate treatment inappropriate under the circumstances of this case.

The scenario of seriatim attorneys is regrettable, but as the magistrate found, Breland and Bart were discharged without cause. Each was retained by Seal to assist in the recovery of damages for his injuries. Each undertook the same professional obligations. Each had the same 40% contingent fee agreement. Each contributed to the ultimate result. Each is entitled to the same evaluation of his contributions and professional efforts, measured by the guidelines established by DR 2-106(B) of the Code of Professional Responsibility....

731 F.2d at 1195-96.

A just result can only be obtained by apportioning fees among the successive counsel. See, e.g., *Seal*, 731 F.2d at 1196; *LaBach v. Hampton*, 585 S.W.2d 434 (Ky. Ct.App.1979). And that should be done in one proceeding before disbursement of proceeds from which the fees should be paid. *Continental Bank & Trust Co. v. Bybee*, 6 Utah 2d 98, 306 P.2d 773 (1957), and *Midvale Motors, Inc. v. Saunders*, 21 Utah 2d 181, 442 P.2d 938 (1968), which are relied on by the majority, are not applicable to this case.

A determination of the total fees payable and an apportionment of them between the attorneys, if appropriate, in the trial court is exactly what all the parties wanted.

Their express stipulation authorized the trial court to resolve the issue of attorney fees:

The Court: Is it stipulated that I can hear this matter with regards to the lien, attorney's lien for fees in this matter? Mr. Harrison: Yes.

The Court: So, *there will be no need for any type of further action and based upon what is presented to me today I can make a decision as to whether or not they're entitled to fees.*

Mr. Harrison: I think if the Court looks at the law—I brought a case that should be dispositive on the issue, your Honor, and I believe once the court reviews that case that the course will be clear.

So, I guess with that provision I suggest that I think the court should hear that issue of the attorney's lien that was filed by predecessor counsel, and I think that is appropriate prior to defendant's and our settlement being entered as a court order.

The Court: Is that agreeable with all parties, then?

Mr. Randle: That's agreed, your Honor.

The Court: Is that agreeable, Mr. Harrison?

Mr. Harrison: Yes.

The Court: So, we all understand that I will determine, first of all, whether they have a right to a lien. If they have a right to a lien, there may be the necessity of an evidentiary hearing to determine the amount of fees you're entitled to. Is that stipulated to by all parties, that that is the issue before me?

Mr. Harrison: Yes.

Mr. Randle: Yes.

(Emphasis added.)

This case should be reversed and remanded for an apportionment of fees between the Ungricht firm and Harrison.

HOWE, Associate C.J., concurs in the dissenting opinion of STEWART, J.



1 MR. WILSON: Sure.

2 Q During the entire time of that four months,
3 did you ever -- before the case was settled, did you
4 ever speak to Don Hughes?

5 A No.

6 Q Did Don Hughes ever explain to you what he
7 was going to do in your case?

8 A No.

9 Q Because you never talked to him?

10 A I never did.

11 Q Did he explain what his fee would be?

12 A No.

13 Q Did -- Did Mr. Bennett tell you what the fee
14 would be?

15 A Ron did. Yes.

16 Q Okay. Did you feel you were solicited by
17 Mr. Bennett?

18 MR. HUGHES: I'll object, Your Honor.

19 THE COURT: What's the basis.

20 MR. HUGHES: Its relevance.

21 THE COURT: I'll grant the objection.

22 MR. WILSON: Your Honor, I believe there is a
23 body of law that says solicitation in itself may be
24 malpractice.

25 MR. HUGHES: But you've got to --

1 THE COURT: But that's Mr. Bennett. Mr.
2 Bennett is not on trial here. I've granted the
3 objection. Move on to your next question, please.

4 Q (By MR. WILSON) All right. Whoever you
5 hired as your attorney, did you expect them to do a
6 good job?

7 A Yes. I did.

8 Q Did you expect them to make sure that you
9 got whatever benefits you were entitled to?

10 A Yes. I did.

11 Q Yourself, did you even know the difference
12 between personal injury protection benefits and
13 liability coverage?

14 A No.

15 Q Did Mr. Hughes ever explain that to you?

16 A No.

17 Q Did Mr. Bennett ever explain that to you?

18 A No.

19 Q Did Mr. Hughes ever write you any letters of
20 any kind, did you ever get any correspondence up until
21 the time the case settled?

22 A No.

23 Q Did you eventually talk to him once over the
24 phone?

25 A Yeah. I did.

IN THE COURT OF APPEALS

STATE OF UTAH

MAXCINE ARCHULETA,	:	Appeals Court
	:	No. 960276-CA
Plaintiff/Appellant,	:	
	:	Trial Court
v.	:	No. 940700264
DONALD C. HUGHES,	:	
	:	
Defendant/Appellee.	:	

ERRATA TO APPELLANT'S BRIEF

Appeal from the Second Judicial District Court
for Davis County, State of Utah

The Honorable Glen Dawson

Argument Priority Classification 15

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Appellant hereby submits the following notice of errors in her opening brief previously filed. Appellant requests that this errata be attached to Appellant's main brief, sufficient copies have been provided for that purpose. A copy is also attached as Appendix I to Appellant's Reply Brief.

ERRATA TO APPELLANT'S BRIEF

1. The cover erroneously identifies the Appellant's Brief as the "Brief of Appellee."

2. In the Table of Contents, under the heading "Summary of Arguments, sub heading, "I", line 5 should read, ". . .undisputed PIP benefits *from* Archuleta's own. . ."

3. Page 6, line 2, "[R. at 961-965]" should be corrected to read "[R. at 692 ¶3]."

4. Page 6, line 5 of Paragraph 3, "[R. at 1176-78]" should read "[R. at 1176, R. at 694 ¶14-19]."

5. Page 6, line 2 of Paragraph 4, "[R. at 969]" should read "[R. at 695 and 969]."

6. Page 6, line 3 of Paragraph 4, "[R. at 1178]" should read "[R. at 695]."

7. Page 7, line 3 of Paragraph 6, "[R. at 85-86]" should read "[R. at 695-697]."

8. Page 7, lines 6 & 7 of Paragraph 7, "[R. at 53]" should read "[R. at 693 ¶9-11; 694 ¶12 & 13; 697 ¶44; 698 ¶46-51]."

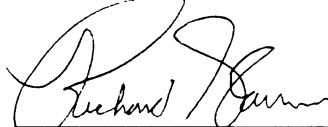
9. Page 7, line 4 of Paragraph 8, "[R. at 1076]" should read "[R. at 693 ¶9-11; R. at 694 ¶12 & 13, 1075 & 1076]."

10. Page 7, line 6 of Paragraph 8, add "uncontroverted testimony."

11. Page 7, line 3 of Paragraph 9, add "and [R. at 694 ¶13]."
12. Page 8, line 2 of Paragraph 10, add "and [R. at 693 ¶11]."
13. Page 8, line 2 of Paragraph 15, "[R. at 523-34, 690]" should read "[R. at 523-25, 690]."
14. Page 18, line 5 of the first full Paragraph, add after the quote, "[R. at 970 lines 1-3]."

DATED this 21st day of October, 1996.

HANSON, EPPERSON & SMITH



RICHARD K. GLAUSER
Attorney for Appellant

CERTIFICATE OF SERVICE

I hereby certify that I caused to be mailed, postage prepaid, this 22 day of October, 1996, two (2) true and correct copies of the foregoing Errata to Appellant's Brief to the following:

Don Hughes
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