

1996

# Maxcine Archuleta v. Donald C. Hughes : Brief of Appellant

Utah Court of Appeals

Follow this and additional works at: [https://digitalcommons.law.byu.edu/byu\\_ca2](https://digitalcommons.law.byu.edu/byu_ca2)



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Court of Appeals; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

Donald C. Hughes, Esq.; Attorney Pro Se.

Mark E. Wilkey; Kimball, Parr, Waddoups, Brown and Gee; Attorney for Plaintiff/Appellant.

---

## Recommended Citation

Brief of Appellant, *Archuleta v. Hughes*, No. 960276 (Utah Court of Appeals, 1996).  
[https://digitalcommons.law.byu.edu/byu\\_ca2/205](https://digitalcommons.law.byu.edu/byu_ca2/205)

This Brief of Appellant is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Court of Appeals Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at [http://digitalcommons.law.byu.edu/utah\\_court\\_briefs/policies.html](http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html). Please contact the Repository Manager at [hunterlawlibrary@byu.edu](mailto:hunterlawlibrary@byu.edu) with questions or feedback.

BRIEF

UTAH  
DOCUMENT  
K F U  
50  
.A10

DOCKET NO. 960276-CA

IN THE COURT OF APPEALS

STATE OF UTAH

MAXCINE ARCHULETA,

Plaintiff/Appellant,

v.

DONALD C. HUGHES,

Defendant/Appellee.

:  
:  
:  
:  
:  
:  
:  
:  
:

Appeals Court  
No. 960276-CA

Trial Court  
No. 940700264

Priority No. 15

BRIEF OF APPELLEE <sup>and</sup>

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

The Honorable Glen Dawson

Mark E. Wilkey (4167)  
KIMBALL, PARR, WADDOUPS, BROWN & GEE  
Attorneys for Plaintiff/Appellant  
185 South State Street, Suite 1300  
Salt Lake City, Utah 84111  
Telephone: 801-532-7840

Donald C. Hughes, Esq.  
Attorney Pro Se  
P.O. Box 27611  
St. Louis, MO 63146

FILED

JUL 28 1996

COURT OF APPEALS

---

IN THE COURT OF APPEALS

STATE OF UTAH

---

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

---

BRIEF OF APPELLEE

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

The Honorable Glen Dawson

---

Mark E. Wilkey (4167)  
KIMBALL, PARR, WADDOUPS, BROWN & GEE  
Attorneys for Plaintiff/Appellant  
185 South State Street, Suite 1300  
Salt Lake City, Utah 84111  
Telephone: 801-532-7840

Donald C. Hughes, Esq.  
Attorney Pro Se  
P.O. Box 27611  
St. Louis, MO 63146

## TABLE OF CONTENTS

JURISDICTION OF THE COURT OF APPEALS . . . . .	1
ISSUES PRESENTED BY THIS APPEAL . . . . .	1
STATEMENT OF THE CASE . . . . .	4
STATEMENT OF FACTS . . . . .	5
SUMMARY OF ARGUMENTS . . . . .	8
I.    The trial court erred in denying Archuleta's Motion for Partial Summary Judgment as Hughes' retainer agreement was ambiguous and did not retain him to settle medical bills or collect undisputed PIP benefits Archuleta's own insurer. . . . .	10
II.   The trial court erred in not granting Archuleta's Motion for Partial Summary judgment as Utah ethical rules prohibit charging contingent fees for the routine collection of PIP insurance benefits. . . . .	14
III.  The trial court erred in refusing Archuleta's proffered jury instruction on Hughes' responsibility for the acts of his agent. . . .	16
IV.   The trial court erred when it refused to compel Hughes' production of certain credit union account records which could have produced evidence of both fraud and malpractice. . . . .	19
V.    As a matter of law, Hughes constructively defrauded Archuleta when he charged her an illegal and unreasonable contingent fee for collecting undisputed PIP benefits. . . . .	22
CONCLUSION . . . . .	24

## TABLE OF AUTHORITIES

### CASES

<u>Askew v. Hardman</u> , 884 P.2d 1258 (Utah Ct. App. 1994) . . . . .	3, 20, 21
<u>Attorney Grievance Commission v. Kemp</u> , 496 A.2d 672 (Md. 1985) . . . . .	15
<u>Blodgett v. Martsch</u> , 590 P.2d 298 (Utah 1978) . . . . .	22
<u>In re California Public Utilities Commission</u> , 892 F.2d 778 (9th Cir. 1989) . . . . .	21
<u>Continental Bank &amp; Trust Co. v. Bybee</u> , 306 P.2d 773 (Utah 1957) . . . . .	11
<u>Garland v. Fleischmann</u> , 831 P.2d 107 (Utah 1992) . . . . .	17
<u>In re Gerard</u> , 548 N.E.2d 1051 (Ill. 1989) . . . . .	23
<u>Gillman v. Department of Financial Institutions</u> , 782 P.2d 506 (Utah 1989) . . . . .	14, 15
<u>In re Hanna</u> , 362 S.E.2d 632 (S.C. 1987) . . . . .	15
<u>Higgins v. Salt Lake County</u> , 855 P.2d 231 (Utah 1993) . . . . .	2, 4
<u>Marshall v. Marshall</u> , 915 P.2d 508 (Utah App. 1996) . . . . .	3
<u>Ong International (U.S.A.), Inc. v. 11th Avenue Corp.</u> , 850 P.2d 447 (Utah 1993) . . . . .	3, 18
<u>Phillips v. JCM Development Corp.</u> , 666 P.2d 876 (Utah 1983) . . . . .	18
<u>Phillips v. Smith</u> , 768 P.2d 449 (Utah 1989) . . . . .	11, 22
<u>Phillips v. Smith</u> , 768 P.2d 449 (Utah 1989) . . . . .	16

FILED

OCT 22 1996

**COURT OF APPEALS**

---

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

---

Donald C. Hughes (1571)  
Defendant/Appellee  
Attorney Pro Se  
P.O. Box 572112  
Houston, TX 77257

Richard K. Glauser (4324)  
Attorney for Plaintiff/Appellant  
HANSON, EPPERSON & SMITH  
P.O. Box 2970  
Salt Lake City, UT 84110-2970  
(801) 363-7611

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]."

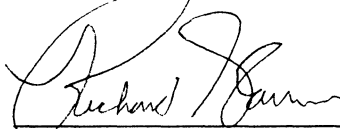
9. Page 7, line 4 of Paragraph 8, "[R. at 1076]" should read "[R. at 693 ¶9-11; R. at 694 ¶12 & 13, 1075 & 1076]."

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

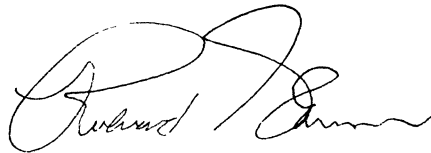


RICHARD K. GLAUSER  
Attorney for Appellant

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  
Attorney Pro Se  
P.O. Box 572112  
Houston, Texas 77257



<u>Pops &amp; Estrin, P.C. v. Reliance Insurance Co.,</u> 562 N.Y.S.2d 914 (N.Y. Civ. Ct. 1990) . . . . .	15
<u>Shaklee Corp. v. Gunnell,</u> 748 F.2d 548 (10th Cir. 1984) . . . . .	21
<u>State Farm Fire &amp; Casualty co. v. Geary,</u> 869 P.2d 952 (Utah App. 1994) . . . . .	2, 4
<u>Summerill v. Shipley,</u> 890 P.2d 1042 (Utah Ct. App. 1995) . . . . .	18, 19
<u>Utah Department of Transportation v. Osguthorpe,</u> 892 P.2d 4 (Utah 1995) . . . . .	3
<u>Utah State Bar v. Sumerhays &amp; Hayden</u> <u>Public Adjusters,</u> 905 P.2d 867 (Utah, 1995) . . . . .	5
<u>Von Hake v. Thomas,</u> 705 P.2d 766 (Utah 1985) . . . . .	22, 23
<u>Weahkee v. Norton,</u> 621 F.2d 1080 (10th Cir. 1980) . . . . .	20, 21

#### STATUTES

Utah Code Ann. § 78-2a-3(2)(j) . . . . .	1
--	---

#### MISCELLANEOUS

Brickman, <u>Contingent Fees Without Contingencies:</u> <u>Hamlet Without the Prince of Denmark?</u> 37 UCLA L. Rev. 29, 76-78 (1989) . . . . .	15
---	----

Plaintiff and Appellant Maxine Archuleta ("Archuleta") hereby submits, pursuant to Rules 24 and 26 of the Utah Rules of Appellate Procedure, her opening brief with respect to the Order Denying Plaintiff's Motion for Partial Summary Judgment entered on January 23, 1996, the Order Denying Plaintiff's Motion to Compel Discovery entered on December 5, 1995, and the Judgment of Non-Suit entered on January 24, 1996 by the Second Judicial District Court for Weber County.

#### **JURISDICTION OF THE COURT OF APPEALS**

This is an appeal of right taken from a Judgment of Non-Suit and final orders denying Archuleta's Motion for Partial Summary Judgment and Motion to Compel. No post-judgment motions were filed by either party. The final Judgment appealed from was entered on January 24, 1996. Archuleta filed a timely Notice of Appeal on February 21, 1996. Pursuant to Utah Code Ann. § 78-2a-3(2)(j) has been "poured over" to the Court of Appeals.

#### **ISSUES PRESENTED BY THIS APPEAL**

1. Did the trial court err in refusing to grant Archuleta's Motion for Partial Summary Judgment because Defendant and Appellee Donald C. Hughes ("Hughes") was not entitled to collect legal fees for services not covered by his written fee agreement where the fee agreement did not provide for the settlement of medical bills or collecting undisputed PIP benefits?

(a) Standard of review: The trial court's decision to grant or deny a motion for summary judgment is a question of law, which is reviewed for correctness. Higgins v. Salt Lake County, 855 P.2d 231, 235 (Utah 1993); State Farm Fire & Casualty co. v. Geary, 869 P.2d 952, 954 (Utah App. 1994).

(b) Issue preserved for appeal: Motion for Partial Summary Judgment filed by Archuleta, [R. at 738]; Order on Plaintiff's Motion for Partial Summary Judgment [R. at 690].

2. Did the trial court err in refusing to grant Archuleta's Motion for Partial Summary Judgment because Hughes was precluded by applicable ethical rules from charging Archuleta a contingent fee for the routine collection of PIP insurance benefits from her own insurer?

(a) Standard of review: Higgins v. Salt Lake County, 855 P.2d 231, 235 (Utah 1993); State Farm Fire & Casualty co. v. Geary, 869 P.2d 952, 954 (Utah App. 1994).

(b) Issue preserved for appeal: Motion for Partial Summary Judgment filed by Archuleta, [R. at 738]; Plaintiff's Supplemental Brief Re: Construction of Attorney Fee Agreement, [R. at 477]; Order on Plaintiff's Motion for Partial Summary Judgment [R. at 690].

3. Did the trial court err in refusing to grant Archuleta's Motion to Compel Discovery with regard to bank account information relating to Hughes' handling of certain

funds belonging to Archuleta, which information had a bearing on Archuleta's fraud and malpractice claims?

(a) Standard of review: Decisions regarding pre-trial discovery are committed to the sound discretion of the trial court, e.g., Utah Dept. of Transportation v. Osguthorpe, 892 P.2d 4,6 (Utah 1995); Marshall v. Marshall, 915 P.2d 508, 515 (Utah App. 1996). The wrongful denial of requested discovery, however, is presumed to be prejudicial rather than harmless, because the aggrieved party has been denied access to the requested information and cannot be required to prove that the information that has been denied would have affected the outcome of the trial. Askew v. Hardman, 884 P.2d 1258 (Utah Ct. App. 1994).

(b) Issue preserved for appeal: Motion to Compel Discovery [R. at 272]; Order on Several Motions (Denying Motion to Compel) at ¶ 8 [R. at 523-24].

4. Did the trial court err in refusing to give Archuleta's proffered jury instruction holding Hughes responsible for the acts of his agent who dealt with Archuleta on Hughes' behalf?

(a) Standard of review: A trial court's refusal to give a requested jury instruction is an issue of law, reviewed for correctness. Onq Int'l (U.S.A.), Inc. v. 11th Ave. Corp., 850 P.2d 447, 452 (Utah 1993).

(b) Issue preserved for appeal: [R. at 1052-60]

5. Did the trial court err in refusing to grant Archuleta's Motion for Partial Summary Judgment because Hughes constructively defrauded Archuleta by charging her an illegal and unreasonable contingent fee for collecting undisputed PIP benefits.

(a) Standard of review: Higgins v. Salt Lake County, 855 P.2d 231, 235 (Utah 1993); State Farm Fire & Casualty co. v. Geary, 869 P.2d 952, 954 (Utah App. 1994).

(b) Issue preserved for appeal: Motion for Partial Summary Judgment filed by Archuleta, [R. at 738]; Order on Plaintiff's Motion for Partial Summary Judgment. [R. at 690]

#### STATEMENT OF THE CASE

This is a legal malpractice case arising out of the representation and handling of a personal injury claim by Hughes. In particular, the case involves the interpretation and application of an "Attorney Retainer Contract" that was entered into by Archuleta and Hughes' representative, Ronald Bennett. Hughes, acting almost entirely through his adjuster, Bennett, settled Archuleta's case and charged her a contingent fee of one-third of the total amount recovered -- including \$2400 in PIP benefits that were undisputed and which she would have been entitled to upon submission to her insurer. Archuleta's claims against Hughes arise out of his handling of her claim, including his retaining the contingent fee from the PIP benefits due from Archuleta's insurer.

Archuleta moved for Partial Summary Judgment on the grounds that the written fee agreement between Archuleta and Hughes did not provide for the collection of contingent fees for the collection of PIP benefits and because charging a contingent fee to collect such benefits is illegal. Archuleta further moved for Partial Summary Judgment on the grounds that Hughes' conduct constituted, as a matter of law, constructive fraud. Archuleta also moved to compel discovery of certain bank records relating to Hughes' handling of settlement funds belonging to Archuleta, as these records had a direct bearing on Archuleta's claims for malpractice and fraud. At the jury trial held on Archuleta's claims, Archuleta requested that the jury be instructed that Hughes could be held liable for the acts or omissions of his agent, Bennett. Archuleta appeals from the denial of these motions and the refusal to give the requested jury instruction as to Hughes' liability for the acts of his agent.

#### **STATEMENT OF FACTS**

1. Less than a week after her auto accident injury, Archuleta was contacted by Ronald Bennett, a non-lawyer who worked as a "public adjuster."<sup>1</sup> Bennett offered to

---

<sup>1</sup>In Utah State Bar v. Sumerhays & Hayden Public Adjusters, 905 P. 2d 867 (Utah, 1995), the Utah Supreme Court held that representation of parties by public adjusters constituted the unauthorized practice of law. Accordingly, the Supreme Court upheld a permanent injunction against public adjusting.

"represent" her in seeking compensation from the responsible party. [R. at 961-65]

2. When Archuleta met with Bennett in his office at the back of a store, she signed an Attorney Retainer Agreement which designated Donald Hughes, the defendant-appellee here, as her attorney. [R. at 967-68]

3. Hughes, who resided in St. Louis at that time, admitted he was not present when the retainer was signed, that the blank contract spaces were probably completed by Bennett, and that he never personally met Archuleta, but claimed he recalled talking to her twice on the phone. [R. at 1176-78]

4. Hughes never corresponded with his "client," Archuleta, [R. at 969] and indeed did not even retain her phone number in his legal file. [R. at 1178] Neither Hughes nor Bennett explained to Archuleta the difference between liability payments from the other parties' insurer and PIP benefits from her own insurer. [R. at 970]

5. The "Attorney Retainer Agreement" signed by Archuleta was ambiguous regarding contingent compensation terms, and did not provide attorney fees for collecting undisputed insurance benefits due under Archuleta's own insurance policy from her insurer. (A copy of the Attorney Retainer Agreement is attached hereto as Attachment "A.")

6. Hughes "handled" Archuleta's case entirely from St. Louis. He did not obtain medical information about her

condition. Instead, Hughes authorized Bennett to initiate and conduct settlement discussions (in which he did not participate) with the insurance company. [R. at 85-86]

7. Bennett accepted the insurance company's first offer of \$6,500.00 with the proviso that unpaid medical expenses of \$2,400 be included in the settlement rather than being submitted for payment under the plaintiff's PIP policy and then reimbursed by the liability carrier. Archuleta was not told that the settlement included unpaid PIP benefits. [R. at 53]

8. Thus, the gross settlement payment of \$9,186 included \$2,400 for the balance of medical bills which would have been reimbursable as personal injury protection (PIP) benefits under Archuleta's own insurance policy<sup>2</sup> [R. at 1076], but had not been submitted to the insurer (at Bennett's direction). [R. at 981]

9. Hughes has admitted that the \$2400 of unpaid medical expenses would have been paid by Archuleta's PIP insurance if the bills had been submitted. [R. at 1063-64]

10. Despite this, Hughes took a full one-third fee of \$800 on the \$2400 included in the settlement for the medical

---

<sup>2</sup>Both the other driver and Archuleta were insured by the same insurance company, Allstate, and thus the total settlement received by Archuleta related to both proceeds from her "own" insurance policy as well as that of the other driver.

expenses that would have been paid under Archuleta's PIP coverage. [R. at 1075-76]

11. In addition, Hughes retained \$1186 from Archuleta's share of the settlement, ostensibly to pay pending hospital bills, even though his retainer agreement did not retain him to settle her bills. [R. at 1103]

12. This \$1,186 was returned to Archuleta after she dismissed plaintiff and retained another attorney. [R. at 1105] Hughes never resolved the outstanding medical bills or contacted the hospital to do so. [R. at 1110]

13. Archuleta moved for partial summary judgment on the grounds that as a matter of law Hughes was not entitled to collect a contingent fee on the \$2400 portion of the settlement that would have been payable to her under her own PIP benefits. [R. at 738]

14. Archuleta also moved to compel discovery responses relating to her discovery requests relating to Hughes' handling of the \$1186 that he had held in his account for the payment of medical bills. [R. at 272]

15. Both the summary judgment and the motion to compel discovery were denied. [R. at 523-34, 690]

16. A jury trial resulted in a verdict in favor of Hughes on Archuleta's claims that Hughes was guilty of legal malpractice. [R. at 688]

### SUMMARY OF ARGUMENTS

1. Hughes collected a one-third contingency fee for certain PIP insurance benefits obtained from Archuleta's own insurer rather than the tortfeasor who injured her. The written contingent fee agreement drafted by Hughes and signed by Archuleta must be construed strictly against Hughes. It does not allow Hughes to recover for settlement of medical bills or collection of undisputed PIP benefits.

2. Because there is virtually no risk of non-recovery in collection of PIP insurance benefits, the Utah State Bar and other courts and bar associations have determined that it is unethical to charge "contingent" fees for the collection of routine PIP insurance benefits. Hughes' collection of fees on Archuleta's PIP benefits was therefore prohibited.

3. Virtually all of the "work" done to settle Archuleta's case was performed by a "public adjuster," Ron Bennett, who was acting on behalf of Hughes. Utah agency law holds principals liable for the acts of their agents acting within the scope of their agency. It was therefore error for the trial court to refuse to give a jury instruction that Hughes was responsible for the acts and omissions of his agent -- Bennett. This error was compounded by the Court's statement: "Mr. Bennett is not on trial here." [R. at 970]

4. Archuleta sought discovery of bank records relating to Hughes' handling of certain settlement funds owed to her.

Hughes resisted this request on the fallacious grounds that these records were "privileged." Archuleta sought to compel production of this information, which motion was denied. The erroneous denial of discovery information is presumed to be prejudicial as the party requesting the information does not have the information to show whether it would have affected the outcome of the trial.

5. Because of his status as her attorney, Hughes is, as a matter of law, in a confidential relationship with Archuleta. His abuse of that relationship by failing to disclose that his charging of contingent fees for collection of PIP benefits, which were excessive and ethically prohibited, constituted constructive fraud on Archuleta.

#### ARGUMENT

- I. The trial court erred in denying Archuleta's Motion for Partial Summary Judgment as Hughes' retainer agreement was ambiguous and did not retain him to settle medical bills or collect undisputed PIP benefits Archuleta's own insurer.

The written "Attorney Retainer Agreement" pursuant to which Hughes was hired by Archuleta to represent her is a single-page, pre-printed "form" document with blanks that have been "filled-in" in handwriting. The document is less than one full page in length and is set forth in its entirety as Attachment "A." In describing the work to be completed by Hughes and the compensation for doing this work, the Agreement provides:

In consideration of the legal services to be rendered by Attorney Donald C. Hughes, hereinafter referred to as Attorney, for any claim that Maxine Archuleta, 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 [sic] day of October 1993 arising from a certain occurrence in [illegible] County, State of Utah, briefly described as follows: auto collision.

Client hereby authorizes Attorney to commence and prosecute said claim and assigns to Attorney a lien of 1/3 (1/3%) [sic] 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.

Attachment "A" at 1.

Under established case law in Utah, contingent fee agreements are to be "strictly construed against one who is 'both the attorney draftsman of and a party to the instrument.'" Phillips v. Smith, 768 P.2d 449, 451 (Utah 1989) quoting Continental Bank & Trust Co. v. Bybee, 306 P.2d 773, 775 (Utah 1957). In Phillips the Utah Supreme Court held that because a written contingent fee agreement was silent regarding the client's liability if representation was terminated prior to the obtaining recovery no fees were owed by the clients to attorneys who were discharged before settlement. "[T]he express agreement of the parties did not provide for the possibility that [attorneys'] representation

of the [clients] would be terminated before the [clients'] claim was settled. Therefore the [clients] owed the [attorneys] nothing when they terminated that representation." Phillips, 768 P.2d at 452.

The written Attorney Retainer Agreement prepared by Hughes and executed by Archuleta is hopelessly ambiguous. Read literally, it provides for payment to Hughes of a percentage of settlement amounts "obtained after trial or within 10 days of the date set for trial." Because there was no date set for trial and no trial of Archuleta's claims, under the rationale of Phillips no compensation was due to Hughes. Moreover, the written agreement is ambiguous as to the amount of compensation owing. The agreement calls for a "lien" of "1/3 (1/3%) of all amounts recovered." If this were strictly construed against Hughes, he would be entitled to .0033 of the amount recovered for Archuleta.

Even if it is possible to "gloss over" the problems inherent in the drafting of the Agreement, it simply **does not provide** for any fees to Hughes for settling Archuleta's medical bills or her claims against her own insurance company. Under long-established ethical rules, contingent fee agreements in Utah are required to be in writing. See Rule 1.5(c) Utah Rules of Professional Conduct. The Retainer Agreement signed by Archuleta allows Hughes to pursue claims Archuleta "may have against the party or parties responsible

for injuries and damages sustained by Archuleta . . . .” No mention is made of pursuing claims against her insurer. No mention is made of retaining Hughes to settle her medical bills. In the absence of a clear written statement that Hughes was to pursue such claims, there was no basis for him to collect contingent fees from Archuleta on the basis of settling her PIP claims against her own insurer.

The Utah State Bar’s fee arbitration panel has ruled that a retainer agreement similar to the one used by Hughes in this case was improper and limited the attorney to recovering the reasonable value of his services. See Utah Bar Journal, January 1994, p. 23 (Copy attached hereto as Attachment “B”) In that case, the tortfeasor had been uninsured, so an attorney filed a personal injury claim against his client’s own insurance company, collecting \$100,000 under the policy’s uninsured motorist provisions, retaining one-third of this recovery as his fee. While the client’s right to recovery stemmed from the same accident and injuries for which she had initially retained her attorney, the fee was found to be improper because the representation contract did not provide a fee for recovering from the client’s own insurance company. The attorney was admonished for charging an excessive fee and restricted to recovering only the reasonable value of services he had rendered.

The representation agreement in this case must similarly be construed strictly against Hughes, who provided the form to his client. It imply does not provide a fee for settling medical bills or collecting benefits under Archuleta's own contract of insurance. Because Hughes would not be allowed an \$800 fee for recovering \$2,400 in PIP benefits if he had directly submitted the medical expenses to Archuleta's own PIP carrier, he cannot be allowed to claim that fee by including this \$2,400 into the liability settlement.

Archuleta moved for partial summary judgment against Hughes on the issue of his fees with respect to her PIP benefits. Summary judgment should be granted when no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. *E.g., Gillman v. Dept. of Financial Institutions*, 782 P.2d 506 (Utah 1989). The undisputed material facts establish that even though Hughes' retainer agreement did not allow attorney fees for settling PIP claims with Archuleta's own insurer, he charged Archuleta a one-third contingency fee of \$800 on insurance settlement funds for medical bills that her insurer would have paid to Archuleta as PIP benefits if they had been submitted. On these facts, Archuleta was entitled to partial summary judgment as to \$800 of the fee charged by Hughes as a matter of law. This Court should reverse the trial court's refusal to grant summary judgment on this issue.

II. The trial court erred in not granting Archuleta's Motion for Partial Summary judgment as Utah ethical rules prohibit charging contingent fees for the routine collection of PIP insurance benefits.

It is undisputed that Hughes received \$800 of contingent fees from the settlement funds paid to Archuleta that represented one-third of the \$2400 PIP insurance benefits she was to receive from her own insurer, Allstate. Charging contingent fees for the collection of PIP insurance benefits is unethical and prohibited in Utah. Opinion 114 of the Utah State Bar's Ethic's Advisory Opinion Committee, which was issued on February 20, 1992, flatly prohibits the use of a one-third contingency fee for collection of PIP benefits from a client's insurer. The full opinion of the Committee is as follows:

Under the Utah Rules of Professional Conduct, which require that a lawyer's fee be reasonable, 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 of undisputed PIP payments are unreasonable. Contingent fees are generally higher [than fixed fees] because receipt of the fee itself is contingent on some possibility. Because PIP benefits are virtually guaranteed to accident victims a fee contingent on the receipt of those benefits is likely to be unreasonable.

(emphasis added) Accordingly, the Utah Bar advised Utah attorneys that Rule 1.5(a)<sup>3</sup> would be violated by charging a

---

<sup>3</sup>Which requires that lawyer's fees be reasonable.

contingent fee for the filing and collection of PIP or 'no fault' claims from the client's insurer.

The reasonableness of a contingent fee contract depends in part on the "realistic risk of non-recovery." Id. Since there is "virtually no risk" and minimal time involved for the lawyer, contingent fees are improper for the collection of PIP benefits. Id. This same conclusion has been reached in numerous other jurisdictions. See, e.g., Attorney Grievance Comm'n v. Kemp, 496 A.2d 672 (Md. 1985); Pops & Estrin, P.C. v. Reliance Insurance Co., 562 N.Y.S.2d 914 (N.Y. Civ. Ct. 1990); 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).

Hughes defended his fee in this case by asserting that Archuleta was obligated to introduce expert testimony that he had violated the "standard of care" expected of an attorney in Weber County, Utah. This is incorrect. The prohibition against levying contingent fees for collecting undisputed PIP benefits has nothing to do with a "standard of care." Courts and bar associations have the inherent authority to regulate attorney fee agreements. Phillips v. Smith, 768 P.2d 449,453 (Utah 1989) ("The awarding and approving of attorney's fees is subject to the inherent power of a court to regulate the professional conduct of attorneys.") When a fee agreement is prohibited by such regulation, the offending provision is

unenforceable as a matter of law. Allowing Hughes to retain the \$800 fee for settling Archuleta's PIP claims would defeat the established policy of the Utah State Bar and established precedent relating to the interpretation and enforcement of contingent fee contracts. As enforced by Hughes, his Agreement on this point was illegal and void. The trial court's denial of Archuleta's Motion for Summary Judgment on this point should be reversed.

**III. The trial court erred in refusing Archuleta's proffered jury instruction on Hughes' responsibility for the acts of his agent.**

It is undisputed that the actual handling of Archuleta's claim was accomplished-- with some claimed contact and direction by Hughes from St. Louis -- by Ronald Bennett, acting in the capacity of "public adjuster." It was Bennett who solicited Archuleta as a client. It was Bennett who "filled out" the "form" Retainer Agreement with Archuleta. It was Bennett who did not investigate the claim. It was Bennett who contacted the insurance company and negotiated the settlement agreement. In all of these actions, Bennett was acting on behalf of his principal, Hughes. Bennett is not an attorney. He has no authority to practice law or to prosecute claims on behalf of another in court. Only as an agent for Hughes were Bennett's acts permissible. As Bennett's principal, Hughes is inescapably responsible for Bennett's failure to thoroughly investigate Archuleta's case and his

negotiation of an inappropriate and illegal settlement agreement.

At trial, Hughes attempted to distance himself from Bennett's actions, Indeed, the theme of his defense was: "I am not Bennett." This technique was, in one sense, effective. Indeed, even the trial judge at one point stated that "Bennett is not on trial here." While Bennett was not on trial, he had acted as Hughes' agent throughout his handling of Archuleta's claim and his actions on behalf of Hughes were on trial because they were attributable -- as a matter of law -- to his principal, Hughes. "It is well established in the law that a principal is liable for the acts of his agent within the scope of the agent's authority, irrespective of whether the principal is disclosed or undisclosed." Garland v. Fleischmann, 831 P.2d 107, 110 (Utah 1992); *see also* Phillips v. JCM Development Corp., 666 P.2d 876, 881 (Utah 1983).

Notwithstanding the undisputed facts demonstrating Bennett's relationship with Hughes, as outlined above, the trial court refused to give a MUJI jury instruction on the "liability of a principal for the acts of agents." This prejudice of this error was compounded by Hughes' repeated statements in his defense that "he was not Bennett" and implicitly that he should not be identified with or held responsible for Bennett's acts.

A trial court's refusal to issue a proffered jury instruction presents a question of law for which no deference is granted to the trial court's conclusion. Ong International v. 11th Ave. Corp., 850 P.2d 447, 452 (Utah 1993). The erroneous omission of a jury instruction requires a new trial if the error was prejudicial. Summerill v. Shipley, 890 P.2d 1042 (Utah Ct. App. 1995) (failure to instruct that minor engaged in adult activity held to same standard of care as adult was prejudicial error, even though another instruction defined general standard of care, where opposing counsel and expert repeatedly referred to mitigating effect of defendant's youth and inexperience). Because Hughes' statements in his defense put the relationship and responsibility of Hughes for Bennett's acts squarely at issue, the refusal to give the jury instruction on vicarious liability of principals was prejudicial error requiring reversal and a new trial.

**IV. The trial court erred when it refused to compel Hughes' production of certain credit union account records which could have produced evidence of both fraud and malpractice.**

Archuleta sought through written discovery and subsequently through a Motion to Compel Discovery information regarding the \$1,186 that was withheld from the proceeds of her settlement for a period of several months. Specifically, Archuleta requested that Hughes produce:

[C]opies of all statements from that account [i.e. Hughes' Trust Account] for all times that any money

was held for plaintiff's benefit (i.e. from the date of settlement to the time the final \$1,185 was paid to the plaintiff.)

Defendant's Response to Plaintiff's Third Set of Interrogatories, Requests for Admissions and Request for Production of Documents, (copy attached as Attachment "C").

Hughes' Response to this Request was as follows:

Defendant objects to this request. This request is unduly burdensome, harassing and not calculated to lead to the admission of admissible evidence. The information sought is privileged.

Id. Archuleta moved to compel production of the trust account information. The trial court denied Archuleta's motion to compel.

Archuleta was certainly entitled to obtain through discovery copies of the bank statements for the account in which her money had been held. The account was at a credit union and appears to be a interest bearing account. It is unethical for Hughes to earn interest on money held in trust for Archuleta. He must account to her for interest earned and pay it over to her.<sup>4</sup> Moreover, Archuleta is entitled to verify that the money was in the trust account during the

---

<sup>4</sup>Rule 1.15(b) of the Utah Rules of Professional Conduct requires that :

[A] lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and upon request by the client or third person, shall promptly render a full accounting regarding such property. (emphasis added).

period of time it was held by the Hughes. There was some evidence that Hughes' spouse, a non-attorney, may have been a signatory on the account in which Archuleta's funds were held. This too would have been a violation of Hughes' ethical duties to Archuleta. Hughes opposed production of records for the account on the grounds that the bank statements contained privileged information concerning his clients. Such an assertion is untenable on its face. Bank records simply do not contain or reflect client names or other identifying information.

In Askew v. Hardman, 884 P.2d 1258 (Utah Ct. App. 1994), the Utah Court of Appeals set forth the principle that the erroneous denial of a discovery request is presumed to be prejudicial error and that the burden of justifying the denial of discovery is on the party resisting discovery:

However, the usual harmless-error analysis is inapposite where the trial court has erroneously denied a discovery request. In such situations, this court is required to presume prejudice unless it is shown that the denial was harmless. Weahkee v. Norton, 621 F.2d 1080, 1083 (10th Cir. 1980); accord Shaklee Corp. v. Gunnell, 748 F.2d 548, 550 (10th Cir. 1984). Prejudice is presumed because to require the requesting party to show that the error was harmful would place the requesting party in the untenable position of having to demonstrate that the contents of inaccessible information would have affected the outcome of the case. Because the requesting party does not have the information, he or she will never be able to demonstrate that the trial court's erroneous denial of a discovery request was anything but harmless. The burden of demonstrating that the erroneous denial of a discovery request was not prejudicial must

therefore rest with the party resisting discovery. See In re California Public Utilities Comm'n, 892 F.2d 778, 783-84 (9th Cir. 1989). Where we cannot determine from the record whether the requested documents might have changed the outcome of the trial, we cannot say that the error was harmless. Weahkee, 621 F.2d at 1083; Shaklee Corp., 748 F.2d at 550. Because defendant has not demonstrated that the denial of plaintiff's discovery request was not prejudicial, and because we cannot determine from the record whether the requested documents would have changed the outcome of the case, the trial court committed prejudicial error in denying plaintiff's discovery request.

884 P.2d at 1262-63 (emphasis added).

Under the rationale of Askew, the trial court's denial of discovery in the present case must be presumed to be prejudicial. Unless this Court can "determine from the record whether the requested documents might have changed the outcome of the trial" the error cannot be held to be harmless. There is simply no way to determine from the record whether the requested information might have changed the outcome of the trial. For this reason, in addition to the foregoing matters, Archuleta is entitled to a reversal and new trial.

**V. As a matter of law, Hughes constructively defrauded Archuleta when he charged her an Illegal and unreasonable contingent fee for collecting undisputed PIP benefits.**

Under well-established precedent in Utah, an attorney-client relationship is a fiduciary and confidential relationship. See, e.g., Phillips v. Smith, 768 P.2d 449, 451 (Utah 1989); Von Hake v. Thomas, 705 P.2d 766, 770 (Utah 1985); Blodgett v. Martsch, 590 P.2d 298, 301 (Utah 1978).

This confidential relationship exists as matter of law. Because he was her attorney, Hughes had a confidential relationship with Archuleta.

It is also well-established that this type of confidential relationship can give rise to a claim for constructive fraud where the dominant party (i.e. the attorney) breaches a duty owed to the other party, even though no intent to defraud existed. As stated in Blodgett v. Martsch,

If the circumstances are such that the [ a party ] could exercise extraordinary influence over the [other ] 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.

. . . . There are a few relationships (such as parent-child, attorney-client, trustee-cestui) which the law presumes to be confidential.

590 P.2d at 302 (citations omitted, emphasis added).

In Von Hake v. Thomas, 705 P.2d 766, 770 (Utah 1985), it was held that if: (1) a transaction between parties to a confidential relationship (2) benefits the dominant party in whom trust was reposed and (3) causes actual damage to the other party, then the dominant party has the burden of proving the transaction was in fact fair and not unduly influenced or

fraudulent; otherwise, the transaction will be set aside. Courts in other jurisdictions have held found constructive fraud based on the attorney-client relationship where an attorney collected an excessive fee and then failed to renegotiate that fee when it was discovered that his client's right to the money was not being challenged. *E.g., In re Gerard*, 548 N.E.2d 1051 (Ill. 1989).

As Archuleta's attorney, Hughes was in a confidential relationship with her. He entered into a fee contract with her which he used to collect a contingency fee forbidden by ethical rules, breaching his duty to disclose there was little or no risk involved in collecting her PIP benefits. This transaction benefitted him financially, and damaged Archuleta in the amount of \$800. These facts establish constructive fraud, and summary judgment should have been entered for Archuleta as a matter of law because Hughes failed to meet his burden of showing that the \$800 contingent fee was in fact fair and not the result of fraud or undue influence. See *Von Hake*, 705 P.2d at 769. As with the other matters discussed herein this error was prejudicial and warrants the reversal of the judgment entered in favor of Hughes.


#### CONCLUSION

On the basis of the foregoing cases and authorities, Appellant Maxine Archuleta respectfully requests that this Court reverse and, as appropriate, remand this matter for

further proceedings consistent with the established Utah precedent upon which she relies.

Dated this 18 day of July, 1996.

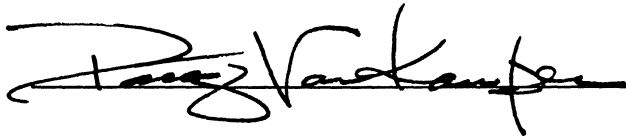
KIMBALL, PARR, WADDOUPS, BROWN & GEE

By:   
Mark E. Wilkey  
Attorneys for Appellant

**CERTIFICATE OF SERVICE**

On the 19<sup>th</sup> day of July, 1996, a true and correct copy of the foregoing was served via United States mail, first class postage prepaid on the following:

Donald C. Hughes, Esq.  
Attorney Pro Se  
P.O. Box 27611  
St. Louis, MO 63146

A handwritten signature in black ink, appearing to read "David VanKamper", written over a horizontal line.

# **ATTACHMENT "A"**

Attorney Retainer Agreement

21 27 REPLY

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 Robert J. 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 Ill., briefly described as follows: Personal Injury - Car Accident.

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 Clients 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 23 day of Oct, 1993  
Donald C. Hughes Maxine Q. Lee  
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.

# **ATTACHMENT "B"**

See Utah Bar Journal  
January 1994, p. 23

## ***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.

## **ATTACHMENT "C"**

Defendant's Response to Plaintiff's Third Set of  
Interrogatories, Requests for Admissions and  
Request for Production of Documents

Donald Hughes  
8816 Manchester Road, #242  
St. Louis, MO 63144  
Telephone: (314)968-8055

Attorney for: Pro Se

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

MAXINE ARCHULETA,  
Plaintiff,  
vs.  
DONALD HUGHES,  
Defendant

DEFENDANT'S RESPONSE TO  
PLAINTIFF'S THIRD SET OF  
INTERROGATORIES, REQUEST FOR  
ADMISSIONS AND REQUEST FOR  
PRODUCTION OF DOCUMENTS

Judge: Dawson

No. 940700264

Comes now the Defendant and answers the discovery request of the Plaintiff as follows:

RESPONSE TO INTERROGATORIES

1. Identify defendant's current employment including the names, address and phone numbers of all companies, partnerships, firms, entities or other organizations for which the defendant has done any work at any time during the last 12 months.

Answer: Defendant objects to this interrogatory. This interrogatory is unduly burdensome, harassing and not calculated to lead to admissible evidence. The information is privileged and not relevant nor material to the present case.

Response: This request is beyond the scope of discovery and is unduly burdensome, harassing and not reasonably calculated to lead to admissible evidence and therefore the same is denied.

#### RESPONSE TO REQUEST FOR PRODUCTION OF DOCUMENTS

11. Provide complete copies of defendant's tax returns for tax years 1992, 1993 and 1994 including all schedules and attachments.

Response: Defendant objects to this request. This request is unduly burdensome, harassing and not calculated to lead to admissible evidence. The information is privileged and not relevant nor material to the present case.

12. Provide a summary financial statement to verify the answer to interrogatory number six.

Response: Defendant objects to this request. This request is unduly burdensome, harassing and not calculated to lead to admissible evidence. The information is privileged and not relevant nor material to the present case.

13. Produce a copy of the \$5,000.00 check paid to the plaintiff from defendant's trust account.

Response: Defendant objects to this request. This request is unduly burdensome, harassing and not calculated to lead to admissible evidence. The request is onerous and burdensome and duplicative.

14. Produce copies of all statements from that account for all times that any money was held for plaintiff's benefit (i.e. from the date of settlement to the time the final \$1,185.00 was paid to the plaintiff).

Response: Defendant objects to this request. This request is unduly burdensome, harassing and not calculated to lead to admissible evidence. The request is onerous and burdensome and duplicative. The information sought is privileged.

Dated this 29 Day of July, 1995.

  
\_\_\_\_\_  
Donald Hughes

Subscribed and sworn this 29 day of July, 1995.

  
\_\_\_\_\_  
Notary Public