

1996

Kay Gneiting, Kerry Rick Hubble; and Wilderness Building Systems, Inc. v. Dennis Vance : Brief of Appellee

Utah Court of Appeals

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KAY GNEITING, KERRY RICK	:	
HUBBLE; and WILDERNESS	:	
BUILDING SYSTEMS, INC.	:	
	:	
Third-Party Plaintiffs	:	
and Appellants	:	
	:	
vs.	:	
	:	Case No.960285-CA
DENNIS VANCE,	:	
	:	
Third-Party Defendant	:	Priority No. 15
and Appellee	:	
	:	
	:	

Appeal from Judgment of the Third District Court,
Salt Lake County, State of Utah, Judge Homer F. Wilkinson

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REFERENCES TO THE RECORD

All references to the Record on appeal, as paginated by the trial court clerk, are designated as "R".

IDENTITY OF PARTIES IN BRIEF

For purposes of this Brief and in compliance with URAP 24(d), Appellants, Kay Gneitting, Kerry Rick Hubble, and Wilderness Building Systems, Inc. shall be referred to jointly herein as "Wilderness and Hubble". Appellee, Dennis Vance, shall be referred to herein as "Vance".

STATEMENT OF JURISDICTION OF THE UTAH COURT OF APPEALS

This appeal was poured-over to the Court of Appeals for disposition by the Supreme Court on April 19, 1996.

STATEMENT OF DETERMINATIVE STATUTES

Utah Rules of Appellate Procedure 33

Utah Rules of Civil Procedure 59(e)

Utah Rules of Civil Procedure 64D(d)

Utah Rules of Civil Procedure 69

STATEMENT OF ISSUES PRESENTED FOR REVIEW

Taken from the Summary of Argument portion of Wilderness and Hubble's Brief (pages 3-4), Wilderness and Hubble appear to be presenting the following issues for this Court's review:

1. Was the commission to which Vance was entitled pursuant to an agreement with Leon and Arlene Robinson ("Robinsons") "earnings from personal services", thereby making "twenty-five per centum" of those disposable earnings the maximum amount available for attachment or garnishment within the meaning of Utah Rules of Civil Procedure 64(D)?

2. Was the trial court's order for the disclosure of the dollar amount of the settlement agreement among Robinsons, Kerry Rick Hubble, and Wilderness Building Systems, Inc., in camera, in chambers to Vance's counsel, proper?

3. Did the trial court appropriately enter a judgment in favor of Dennis Vance for \$12,751.08?

Other matters creep into Wilderness and Hubble's Brief and are addressed in the body of Vance's Brief.

STANDARD OF REVIEW

The standard of review is correctness, without deference to the trial court.

STATEMENT OF MATERIAL FACTS

1. In April of 1992, Vance, entered into an oral agreement with Robinsons whereby he agreed to personally work with an attorney retained to represent the Robinsons against Wilderness and Hubble and to provide that attorney with the facts of which he was aware to enable the Robinsons to file a lawsuit and, through his continued aid, obtain a judgment against Wilderness and Hubble. (*Affidavit of Vance*, ¶3, R710)

2. In consideration for his personal services, Vance was to receive a commission of 40% of the amounts recovered by the Robinsons after a judgment was entered against Wilderness and Hubble, less Robinsons' costs and attorney's fees. (*Response of Scott Mitchell, attorney for the Robinsons dated April 14, 1995*,

R724-725; Affidavit of Vance, ¶3, R710)

3. Scott Mitchell was retained to represent the interests of the Robinsons against Wilderness and Hubble and successfully obtained a judgment against them for \$41,364.53 on 30 April, 1993, and an additional judgment against Wilderness and Hubble for punitive damages in the amount of \$49,560.12 on August 18, 1994. On that same day a judgment was rendered against Vance and in favor of Wilderness and Hubble for \$24,780.56.

4. On or about the 20th day of September of 1994, Wilderness and Hubble filed a Motion and a Memorandum in Support of Motion for an Order of Execution against Vance's payment proceeds pursuant to Utah Rules of Civil Procedure 69. (R380-387)

5. As part of that Memorandum, specifically at paragraph 5 thereof, Wilderness and Hubble asserted "that they are entitled to a garnishment order against any and all sums due Dennis Blaine Vance from Leon and Arlene Robinson". (R385)

6. On the 20th day of October of 1994, the trial court signed an Order and Writ of Attachment ("Initial Order") pursuant to Rule 69 of the Utah Rules of Civil Procedure. (R423-425)

7. The Initial Order instructed the:

"Sheriff or Constable of Salt Lake County . . . to collect the judgment, with costs, interest, and fees, and to sell enough of Third Party Defendant's [Vance's] non-exempt personal property, including but not limited to any and all sums due and owing by Leon and Arlene Robinson to said Third Party Defendant, Dennis Blaine Vance" (R424)

8. On the 17th day of February of 1995, an Application for Writ of Garnishment was filed to garnish amounts owed by the

Robinsons to Vance, and the court issued an Order of Attachment.
(R655-656 and Wilderness and Hubble's Brief ¶3 at page 1)

9. On or about the 13th day of March, 1995, the trial court signed an Amended Order ("Amended Order") pursuant to Rule 69 of the Utah Rules of Civil Procedure. (R658-660)

10. The Amended Order signed, pursuant to the old Rule 69(o) (now 69(s)) of the Utah Rules of Civil Procedure, ordered that:

"any and all sums due and owing by Plaintiffs Leon and Arlene Robinson to Third Party Defendant, Dennis Blaine Vance are attached and shall be applied towards satisfaction of the Third Party Plaintiff's judgments against Third Party Defendant". (R659-660)

The Amended Order made no reference to non-exempt property as had been properly noted in the Initial Order. (See Fact #7)

11. Rule 69(o) URCP, (now 69(s) which was in effect at the time of the court's order), grants courts only the right to:

"order any property of the judgment debtor, not exempt from execution, in possession of the judgment debtor or any other person, or due to the judgment debtor, to be applied toward satisfaction of the judgment". (URCP 69(s), *emphasis added*)

12. At the time the Amended Order was signed, only the proceeds from an earlier garnishment against the Robinsons received from West One Bank were in the possession of the Robinsons and none of the amounts which were transferred or credited for the personal services of Vance, apparently on March 16, 1995, were in the possession of the Robinsons. (*Uncontroverted Fact #9 from Vance's Memorandum in Support of Claim for Exemption, R688; See responsive Memorandum in Opposition filed by Wilderness and Hubble R726-736*)

13. At no time have any of the proceeds to which Vance is entitled from the Robinsons pursuant to the agreement for personal services been in Vance's possession. (*Uncontroverted Fact #10 from Vance's Memorandum in Support of Claim for Exemption, R688; See responsive Memorandum in Opposition filed by Wilderness and Hubble R726-736; See also uncontroverted Affidavit of Vance dated April 11, 1995, ¶ 6, R709-711*)

14. The amount due and owing Vance from the Robinsons was based solely upon a contract for personal services between Vance and the Robinsons wherein Vance was to receive 40% of all amounts recovered by the Robinsons as Plaintiffs and against Wilderness and Hubble, less attorney's fees and costs. (*See admission of Robinsons in their "Response to Claim of Exemption on Behalf of Dennis Vance" filed by Scott B. Mitchell, attorney for the Robinsons on April 14, 1995, R724-725; See also Affidavit of Vance dated April 11, 1995, R709-711*)

15. Vance performed all services necessary in order to enable the Robinsons to recover a judgment against Wilderness and Hubble. (*Uncontroverted Fact #12 from Vance's Memorandum in Support of Claim for Exemption, R689; See responsive Memorandum in Opposition filed by Wilderness and Hubble R726-236; See also uncontroverted Affidavit of Vance dated April 11, 1995, ¶ 5, R709-711*)

16. On or about the 16th day of March, 1995, on the eve of foreclosure of assets of Wilderness and Hubble, Wilderness and Hubble and Robinsons entered into a Stipulated Settlement

Agreement, designed to be confidential in nature, wherein the total judgment was deemed satisfied. *(See Wilderness and Hubble's Brief, ¶8 at page 8 and Exhibit D attached to that Brief)*

17. Funds to which Vance would otherwise have been entitled under his agreement with the Robinsons were retained by Wilderness and Hubble as an offset under the apparent authority of the Amended Order and were never delivered to the Robinsons or Vance. *(Uncontroverted Fact #14 from Vance's Memorandum in Support of Claim for Exemption, R689; See responsive Memorandum in Opposition filed by Wilderness and Hubble R726-736)*

18. Rule 69(g), Utah Rules of Civil Procedure (as amended effective January 1, 1995) requires that at the time a Writ of Execution is issued, the clerk shall attach to the writ a notice of execution and exemptions and a right to a hearing and two copies of an application by which the judgment debtor may request a hearing. *(URCP 69(g))*

19. No such notice was ever given to the judgment debtor, Dennis Vance. *(Uncontroverted Fact #16 from Vance's Memorandum in Support of Claim for Exemption, R689; See responsive Memorandum in Opposition filed by Wilderness and Hubble, R726-736; See also the file reflecting no notice.)*

20. Section 69(h), Utah Rules of Civil Procedure (as amended effective January 1, 1995), states that "the judgment debtor . . . may request a hearing to claim any exemption to the execution". *(URCP 69(h))*

21. Vance complied with that provision and filed a Request

for Hearing on the 6th day of April, 1995. That action began this matter now under appeal. (*See Request for Hearing R712-713*)

22. On April 14, 1995, the trial court initiated a telephone conference call with counsel for Wilderness and Hubble and Vance and memorialized the substance thereof in a Minute Entry which reads:

Telephone call with court, Kent Christiansen & Jeff Swinton. Counsel agree there is a dispute as to the law and enter a stipulation that third-party plaintiff's (sic) to respond by 04-24-95 to initial third-party memorandum and answer by 04-28-95. The court will then rule in the law and the parties will determine if an evidentiary hearing is necessary. (*R723 and a copy attached to this Brief as Exhibit "A"*)

23. On May 2, 1995, counsel for Vance filed a Notice to Submit for Decision requesting that the court act upon the memoranda filed. Vance, as the only party having requested a hearing, had effectively withdrawn that request by filing the Notice to Submit. Copies were sent to opposing counsel. A copy of the Notice to Submit is attached hereto as Exhibit "B" (*R835-837*)

24. No objection to the Notice to Submit was made nor was a request for a hearing filed by either counsel for Wilderness and Hubble or counsel for Robinsons. (*See file*)

25. Six weeks later, on June 19, 1995, the court, having received no objections or further requests from counsel, initiated a conference call among all three counsel to announce its decision. The court memorialized the call with a Minute Entry which reads:

Telephone conference with court, Jeff Swinton, Kent

Christiansen and Scott Mitchell. Motion for claim exemption of Dennis Vance is granted. Costs and attorney fees must come off on his portion and the attorney's (sic) are to work out the money amount. (R840, Exhibit "E" to Wilderness and Hubble's Brief)

26. A copy of an Order was circulated among counsel on June 19, 1995. No objections were filed, and three weeks later, on July 10, 1995, the Order was signed and entered by the court ("July Order"). A copy of the July Order is attached as Exhibit "F" to Wilderness and Hubble's Brief. (R841-843)

27. The July Order resolved all legal issues and specifically created a self-effectuating formula for determining the exemption to which Vance was entitled, requiring that the parties "attempt to determine, agree and divide among themselves the amounts to be paid to or retained by each, Robinsons, Vance, and Hubble." (Exhibit "F" to Wilderness and Hubble's Brief and R842)

28. The trial court anticipated the cooperation of the parties and did not provide for any additional court involvement, having instructed the parties to complete the calculations without court participation. (R841-843)

29. The July Order was a final order.

30. No appeal was taken from the July Order within 30 days of its entry and Wilderness and Hubble's rights to appeal expired on August 11, 1995. (See file)

31. Failing to receive the ordered cooperation from Wilderness and Hubble, Vance sought the trial court's supplemental post-judgment assistance. Vance filed a document on August 17,

1995, entitled "Request for Compliance Order and Determination of Accounting to Fix Exemption for Vance" which sought to have the trial court enforce compliance with its final July Order ("Supplemental Request"). A copy of the Supplemental Request is attached hereto as Exhibit "C". (R844-854)

32. On September 7, 1995, Scott Mitchell, counsel for Robinsons, responded to the Supplemental Request indicating that, Plaintiffs represent that they are ready, willing and able to provide the requested information in accordance with the order to the Court

Counsel also clarified the amount of attorney's fees and costs actually received by him and his clients and the amount retained by Vance. (R859-860)

33. On September 5, 1995, counsel for Wilderness and Hubble responded to the Supplemental Request by stating that they

...would propose to the Court that the terms and conditions of the settlement agreement be disclosed to the Court, *in camera*, and that the Court render its decision as to what, if any amounts, are due Third-Party Defendant Vance; thus preserving the confidentiality of the Wilderness Building Systems, Hubble and Robinsons' settlement agreement. (R857)

34. Acting on the expressed willingness and suggestion of Wilderness and Hubble, on October 12, 1995, the court invited all three counsel into chambers to have Wilderness and Hubble, *in camera*, disclose the dollar amount of the confidential settlement agreement so the parties could calculate the amount of the exemption as set forth in the final July Order. (See Notice dated 25 September 1995, R876)

35. As is noted in the Minute Entry of that in-chambers

hearing, "The parties agreed on formula, and judgments were determined." Counsel for Vance was instructed to prepare an order to document the agreement reached among the parties in the presence of the trial court. (*See Minute Entry of 12 October, 1995, attached hereto as Exhibit "D"; R878*)

36. Counsel for Vance prepared the document on October 12, 1995, and entitled it "Judgment on Claim of Dennis Vance" ("Supplement Order"), a copy of which is attached hereto as Exhibit "E" and sent copies to other counsel via facsimile on that day. It was signed and entered twelve days later, on October 24, 1995, without objection. (*R879-881*)

37. On October 27, 1995, the Notice of Appeal was filed, referencing only the court's order "entered in this matter on October 24, 1995". (*R883-884*)

38. On December 11, 1995, Vance filed a Motion for Summary Disposition which included a request under Rule 33, URAP, that this Court determine that this appeal is frivolous, taken for delay, and interposed for an improper purpose such as to harass and cause needless increase in the cost of litigation. Ruling on that Motion was deferred. (*See file*)

39. Vance, is a debt collector by profession and his income is generated from commissions or percentage payments from amounts he personally collects for his clients. (*Vance Affidavit, ¶2, page 2, R709*)

SUMMARY OF ARGUMENT

Vance first argues that this Court has no jurisdiction over the trial court's order of July 10th which was not appealed until October 27, 1995. The July Order was a "final order" requiring no further intervention by the court. Further aid was sought only because of Wilderness and Hubble's lack of cooperation. That resulted in a supplemental judgment issued by the court on October 24, 1996. Therefore, the appeal was not timely filed.

Vance, a debt collector by profession, entered into an oral contract with the Robinsons to aid in the collection of a claim they had against Wilderness and Hubble. Vance was to receive 40% of all amounts recovered from Wilderness and Hubble, less the Robinsons' attorney's fees and costs. A judgment was obtained against Wilderness and Hubble and collected by Robinsons. A judgment was also rendered against Vance and collection efforts of Wilderness and Hubble through attempted garnishment and ultimately a court ordered equivalent of garnishment in the form of an order of attachment on the commission owed to Vance and held by or due to be paid to Robinsons from Wilderness and Hubble, without consideration of Vance's statutory exemption, resulted in this action.

Wilderness and Hubble argue that there was no commission agreement. Vance disagrees, and for good and substantiated reason. He cites references to the record showing the understanding of all of the parties to the terms of that agreement.

Vance argues that the money to which he is entitled, is "earnings for personal services", thereby subject to the protection afforded by Utah Rules of Civil Procedure 64D(d)(viii)(A) which provides that the maximum amount of his disposable earnings available for attachment or garnishment is twenty-five per centum of his disposable earnings.

Wilderness and Hubble waived any rights they had for an evidentiary hearing on the exemption issue; they participated in two conference calls with the court and never sought more. After the court's ruling, Wilderness and Hubble accepted the actions taken by the trial court without objection, until this appeal.

Finally, Wilderness and Hubble argue that Vance should not be entitled to retain anything at all while at the same time forgetting that the court found Wilderness and Hubble liable for punitive damages in light of their dealings with the Robinsons. Vance argues that those demanding equity from a Court must have clean hands themselves.

ARGUMENT

I. THIS COURT HAS NO JURISDICTION OVER THE ORDERS SUBMITTED FOR REVIEW

Wilderness and Hubble's appeal focuses on the July Order. The July Order was a final order requiring no further intervention by the trial court. No appeal was timely taken and this Court therefore has no jurisdiction to hear it now. By the time it became apparent to Vance that Wilderness and Hubble would not

voluntarily cooperate with the July Order, the time for appealing the July Order had expired. Vance was required to seek post-judgment help from the trial court which resulted in the Supplemental Order from which Wilderness and Hubble have appealed.

By this appeal, Wilderness and Hubble are seeking only to further delay the obligation to return to Vance the money Wilderness and Hubble wrongfully withheld, which was always exempt from execution in March of 1995. They are also attempting to force Vance to exhaust any hope of personal recovery through his required payment of attorney's fees to lay claim to his statutory exemption.

By their contempt of the July Order, Wilderness and Hubble are now seeking to wrongfully and belatedly capitalize on the supplemental involvement of the trial court which they, themselves, forced upon Vance. They failed to timely appeal the final July Order and are now seeking a second bite of the apple by asking this Court to integrate that July Order with the Supplemental Order.

In the case of Wheelwright v. Roman, 165 P. 513, 514 (Utah 1917) the Utah State Supreme Court was asked to interpret the finality of a judgment which declared:

. . .that the deceased was the owner of all of said real estate at the time of her death, that at said time she also was the owner of all of the notes and mortgages, and that the defendant surrender all of said notes and mortgages to the plaintiff, as administratrix of said estate, and to account to her for any interest he had theretofore collected and for the rents and profits derived by him from said real estate since the death of the decedent. (Emphasis added)

On that occasion, the Court found at 517:

Plaintiff's counsel further contend that, in view that the judgment requires an accounting to be made by the defendant, for that reason the judgment is not final, and hence not appealable. The contention is not tenable. What is required from the defendant is a part of the final judgment. . . . The mere fact that the defendant is ordered to deliver the property to the plaintiff and to account to her for the interest that he may have collected on the notes and mortgages, etc., does not affect the finality of the judgment. (Emphasis added)

The Wheelwright analysis parallels the facts of this case. What was required of the parties in this action--to sit down and determine among themselves how the money should be divided--was "a part of the final judgment". In the Wheelwright case, accounting "for any interest he had theretofore collected and for the rents and profits derived by him from said real estate since the death of the decedent" clearly required some analysis and discussion among the parties but was not contemplated to have involved the court. Based upon that, the 1917 order was final. In like manner, the July Order in this case was final and the right to appeal could not be extended by the intentional failure on the part of Wilderness and Hubble to comply with the ministerial functions the trial court delegated to the parties and their counsel.

Although what remained to be done by the parties in our case was not technically an "accounting", there are cases in Utah which may be viewed as similar to this in that they address circumstances where an accounting remained to be provided. Some have found that the order appealed from is interlocutory. Those

cases include, however, either one or both of the following elements not found in our case. Either they are actions wherein an accounting is a part of the actual relief being sought (See Meagher v. Equity Oil Company, 299 P.2d 827 (Utah 1956)); or, it is anticipated at the time of the order that the court's subsequent involvement or later determination will be required (See Olson v. Salt Lake City Sch. Dist., 724 P.2d 960 (Utah 1986)).

Vance did not seek an accounting, only a determination of his entitlement to an exemption and the court granted that request. Further, the court asked the parties to calculate the numbers among themselves with no reference to or anticipation of any later court determination. The court's later involvement was not the result of unfinished work by the court, but of contempt of the court's July Order by Wilderness and Hubble. Ultimately Wilderness and Hubble volunteered to provide the information, in camera, and the court granted that request in October, 1995.

Even in the Meagher case cited above, the court held at 831 that although the portion of the order dealing with the requested accounting was viewed as interlocutory, "the judgment is final insofar as it determines the rights of the parties hereto in the Sheridan lease." Utah follows the general rule nationally, and the Meagher case, supra, is cited for that proposition in 3 ALR 2d 342, Later Case Service at page 300. The general proposition noted at 346 in the body of the annotation which reads:

. . . most courts recognize the general rule that finality for purposes of appeal is not necessarily

destroyed by reason of a provision for future accounting. The determinative factor is whether the equities have been finally adjudicated or the rights of the parties ascertained and finally determined.

Therefore, the determination in the July Order that Vance's commission under his agreement with the Robinsons is earnings from personal services and that the maximum amount of his disposable earnings available for attachment or garnishment is twenty-five per centum of his disposable earnings is fixed, final, and no longer subject to appeal. (See URCP 64D(d)(viii)(A)) The time for appealing the July Order passed without an extension sought or granted.

The July Order went even further than ruling on the substantive legal issue. It went into some detail to set forth the formula under which the numbers could be determined among the parties. It required the deduction of all amounts owed back to the Robinsons by Vance for their attorney's fees and costs under their agreement and it further required that Vance's aggregate disposable earnings available for attachment or garnishment be "calculated in accordance with this order under Rule 64D (d) (viii) (A), URCP."

The ALR citation, *supra*, at 373-374 addresses circumstances where the order fixes the principles under which the account is to be taken. There appears to be no Utah case on point and the ALR citation notes that most of the cases on that point have arisen in Illinois where it has generally been held that

"a decree which determines the equities in controversy is final for purposes of appeal, where it fixes the rules and principles upon which the account is to be

made." (Emphasis added)

If Wilderness and Hubble had felt that the July Order was confusing or required further clarification for its proper interpretation, Wilderness and Hubble could and should have filed a Motion to alter or amend the judgment under Rule 59(e), Utah Rules of Civil Procedure within 10 days after the entry of the judgment. They did not. They could have appealed it within 30 days after the entry of judgment. They did not. Now they are essentially seeking a retroactive extension of time to appeal the July Order. It is not warranted in the law.

The Supplemental Order was a post-judgment matter not originally contemplated by the July Order and was necessitated by the intentional disregard of the July Order by Wilderness and Hubble. The Supplemental Order, although titled as a Judgment to give it legal teeth, was merely the written representation of an agreement among counsel voluntarily entered into in the presence of the trial judge. There is nothing from which to draw objection. Again, if Wilderness and Hubble had felt that the Supplemental Order was confusing or required further clarification for its proper interpretation, Wilderness and Hubble could and should have filed a Motion to alter or amend the judgment under Rule 59(e), Utah Rules of Civil Procedure within 10 days after the entry of the judgment. They did not. They have now cast the burden upon this Court.

Counsel for Wilderness and Hubble now complains that the court should not have compelled Wilderness and Hubble's counsel to

disclose any information relating to the "confidential" settlement agreement between Wilderness and Hubble and Robinsons. He seems to have forgotten his own words written on September 5, 1995, wherein he responded to the Supplemental Request with a court-filed document stating that his clients...

...would propose to the Court that the terms and conditions of the settlement agreement be disclosed to the Court in camera, and that the Court render its decision as to what, if any amounts, are due Third-Party Defendant Vance; thus preserving the confidentiality of the Wilderness Building Systems, Hubble and Robinsons' settlement agreement. (R857)

His request became the court's command. An "in camera" meeting was scheduled by the court. Counsel for Wilderness and Hubble then sat in that meeting with the other attorneys in this case on October 12, 1995. There is no evidence in the record that he asked the court then for "an opportunity at hearing to present evidence supporting the grounds and reasons for maintaining the confidential nature of the settlement agreement" as he now suggests on appeal should have occurred. (See *Wilderness and Hubble's Brief at 9-10 and Minute Entry at R878*) He did not raise that issue earlier in his responsive Memorandum filed on September 5, 1995. (Fact #33, above, and R857) He noted no objection for the record to the numbers agreed upon by the parties and which counsel for Vance was instructed to put in judgment form. The actual Supplemental Order was transmitted via facsimile to counsel for Wilderness and Hubble on October 12 and no objection was voiced or filed. It was not until 12 days later that the Supplemental Order was signed and entered. Again, no response.

Counsel for Wilderness and Hubble had outlined the procedure for the court and indicated that if it were followed, it would preserve, in his words, "the confidentiality of Wilderness Building Systems, Hubble and Robinsons' settlement agreement". There has been no violation of the confidential nature of the agreement except to the extent volunteered by counsel for Wilderness and Hubble.

The Supplemental Order is not a "judgment" in the sense contemplated by the law. It is an agreement among attorneys that received court approval, entitled "judgment" for purposes of collection. This Court has no jurisdiction to hear an appeal from a joint agreement among parties, even if it is entitled a "judgment". Therefore, this entire appeal should be summarily dismissed.

Finally, this appeal is either, or both, frivolous or taken for delay. The pattern of conduct leading up to this appeal illustrates the degree of foot-dragging, gamesmanship, and contempt of the trial court's order displayed by Wilderness and Hubble. The appeal from the July Order has no merit at all. The weak basis under which the appeal has been brought--particularly in light of the attempted belated integration of the July Order speaks volumes regarding true motive.

Wilderness and Hubble are keenly aware of the extended cost of this action, which began merely with a Request for Hearing to determine Vance's right to an exemption to sustain life. Vance was successful under the legal theory, however, Wilderness and

Hubble have been careful to ensure that every dollar to which Vance is entitled is consumed by attorney's fees.

As a result, under Rule 33, URAP, Vance respectfully requests that this Court order that he receive, from either Wilderness and Hubble or their counsel, costs, which include damages, doubled, and his reasonable attorney's fees in this matter.

II. VANCE IS ENTITLED TO 40% OF ALL AMOUNTS CREDITED TO ROBINSONS FROM WILDERNESS AND HUBBLE.

Wilderness and Hubble argue that there was no agreement for Vance to receive 40% of the amounts recovered by Robinsons from him. In support of their argument, Wilderness and Hubble point out apparent inconsistencies in the trial and deposition testimony of Vance throughout these proceedings. Taken out of context, inconsistencies appear, but the actions of Wilderness and Hubble prior to the allegations in their Brief say just the opposite. Wilderness and Hubble are attempting to hide that from this Court. *(See Wilderness and Hubble's Brief, Fact #7 at page 2.)*

On September 20, 1994, Wilderness and Hubble filed a document with the trial court entitled "Memorandum in Support of Motion for and Order of Execution Against Payment Proceeds Pursuant to U.R.C.P. Rule 69" (R383-387) ("September Memo"). That was where Wilderness and Hubble made the argument to the trial court that they were entitled to execute on the 40% payment claim which Vance was entitled to receive from Robinsons. In that Memorandum Wilderness and Hubble commented upon the clarity of Vance's deposition testimony:

4. During his deposition of April 13, 1992, Third-Party Defendant Vance also indicated that he and the Robinsons had agreed that he would receive forty percent (40%) of any funds collected against the Defendants relative to the lawsuit. (September Memo, page 3--emphasis added; R385)

In the September Memo, Wilderness and Hubble further stressed the trial testimony to support their claim for Vance's money.

3. The evidence presented at the June 1, 1994 trial revealed that Dennis Vance entered into an agreement with the Robinsons prior to the commencement of this lawsuit wherein he would receive a percentage of any recovery they might obtain from Defendants Kerry Rick Hubble, Wilderness Building Systems, Inc. or Kevin Kay Gneiting." (September Memo, page 3--emphasis added; R385)

Now, ironically, Wilderness and Hubble have done a flip-flop, have either ignored or forgotten their own statements and conclusions filed in September, 1994. Today in their Brief at page 8 they twist the facts and say:

During the June 1, 1994 trial of this matter, Dennis Vance also testified unequivocally that there was no agreement between he and the Robinsons relative to this case. (Emphasis added)

Look who's talking about inconsistencies. Even the Robinsons have acknowledged that such an agreement exists. (See Fact #14) Robinsons' counsel filed a Response to Vance's claim for an exemption on the 14th day of April 1995, and admitted that there was an agreement, and that attorneys fees and costs should be taken from it. If there were no such agreement then why did counsel for Wilderness and Hubble author the language in the Amended Order, entered on March 13, 1995, which reads:

" . . . it is ordered that any and all sums due and owing by Plaintiffs Leon and Arlene Robinson to said Third-Party Defendant, Dennis Vance are attached and

shall be applied towards the satisfaction of Third-Party Plaintiff's judgments against Third-Party Defendant."
(Order at pages 2-3; R658-660)

Certainly there was an agreement. Vance is entitled to recover and is further entitled to claim his rightful exemption.

III. UTAH AND THE VAST MAJORITY OF COURTS RECOGNIZE AN EXEMPTION FOR EARNINGS FROM PERSONAL SERVICES SIMILAR TO THOSE PROVIDED BY VANCE

Wilderness and Hubble have attempted to persuade this Court to follow a small minority of other jurisdictions, using cases that are dissimilar, and overlooking entirely what has been said about this issue in the State of Utah. The issue for this Court is simple. Is the money to which Vance is entitled, "earnings for personal services"?

Wilderness and Hubble would have this Court stumble over whether the money is "wages" or whether it is "disposable earnings", whether Vance is an "independent contractor" or an "employee", and finally suggest that this Court make its decision on the good old "strong policy consideration" argument in light of Vance's conduct.

Vance was clearly "self-employed". He retained the services of no other person or entity in his arrangement with Robinsons except, perhaps, their attorney. The commission or percentage to which he is entitled was based solely upon his own efforts. Wilderness and Hubble's arguments are all red-herrings designed to cause this Court to look beyond the mark.

Initially, let's examine the policy considerations for the exemption law in the first place. Wilderness and Hubble admit

that Utah's law and federal law under the Consumer Credit Protection Act are "almost identical". (*Wilderness and Hubble's Brief at page 8*) Much of the interpretation of the federal law and also states' laws is found in issues before federal bankruptcy courts which must look to the applicable state law for governance.

In the case of In re Duncan, 140 B.R. 210 (Bkrtcy.E.D.Tenn. 1992) the court was faced with a claimed exemption for an insurance renewal commission that came to the debtor after he ceased working for the insurance company, but based upon prior sales. The court honored the claimed exemption (which is important in and of itself) but even more interesting is the analysis the court followed, which should be a map for this Court. The court said:

The only issues before the court are the trustee's contentions that the exemption is available only to employees rather than to independent contractors such as the debtor, and that, even if the exemption is available to independent contractors, the renewal commission at issue do not constitute compensation for personal services as required by Tenn. Code Section 26-2-105 (1980).

Because there is no Tennessee case law dispositive of either issue raised by the trustee, it is necessary to look to other jurisdictions for guidance. The analysis is made easier because state wage garnishment exemption statutes must comply with the federal Consumer Credit Protection Act. Consequently, the language of most state wage garnishment exemption statutes, Tennessee included, is substantially identical to the language of 15 U.S.C.A. Sections 1672 and 1673 (West 1982)

There is a split of authority as to whether the exemption statute applies to independent contractors. Some courts have relied on the language of the statute and the congressional intent behind the federal act to deny protection other than to wage earners in an employee-employer relationship. . . . However, other

courts, relying on identical statutory language and their interpretation of the congressional intent have extended protection to independent contractors. . . . This court finds the latter line of cases to be persuasive.

The intent of Congress in its enactment of Subchapter II of the Consumer Credit Protection Act is best stated by the Act itself. Section 1671 of title 15, entitled "Congressional findings and declaration of purpose", provides in part:

(a) The Congress finds:

(1) The unrestricted garnishment of compensation due for personal services encourages the making of predatory extensions of credit. Such extensions of credit divert money into excessive credit payments and thereby hinder the production and flow of goods in interstate commerce.

(2) The application of garnishment as a creditor's remedy frequently results in loss of employment by the debtor, and the resulting disruption of employment, production, and consumption constitutes a substantial burden on interstate commerce.

(3) The great disparities among the laws of the several States relating to garnishment have, in effect, destroyed the uniformity of the bankruptcy laws and frustrated the purposes thereof in many areas of the country.

(b) On the basis of the findings stated in subsection (a) of this section, the Congress determines that the provisions of this subchapter are necessary and proper for the purpose of carrying into execution the powers of the Congress to regulate commerce and to establish uniform bankruptcy laws.
15 U.S.C.A. Section 1671 (West 1982)

The Duncan court then concluded:

Clearly, the intent of Congress in its enactment of Subchapter II of the Consumer Credit Protection Act was to grant an exemption to wage earners from the burden of garnishments, to protect employment of wage earners, and to prevent bankruptcies. It was to grant relief for the

wage earner debtors and "more particularly for his family," against economically destructive garnishments. . . . These concerns apply equally to individuals working as independent contractors as well as those engaged in traditional employee relationships. *Marian Health Center v. Cooks*, 451 N.W.2d at 848. Further, the language of the statute simply does not limit its effect to employees. "Earnings" include all compensation for personal services, including commissions. Tenn Code Ann. Section 26-2-105(1980). Therefore, the exemption is available to independent contractors to the extent that the compensation sought to be garnished is for personal services. (Id. at 212-213) (emphasis added)

In the case of Matter of Glickman, 126 B.R. 124 (Bkrtcy. M.D. Fla. 1991) a Florida bankruptcy court also held that an independent contractor is entitled to the exemption, reemphasized the reasoning of the Duncan court, and added some of its own.

The Statute does not limit the term "payment of any money or other thing due" to wages alone. The Statute also does not limit the term "person" to an employee as opposed to an independent contractor. To read the Statute otherwise might render it unconstitutional as discriminating between different classes receiving compensation. See White at 533.

The purpose of the exemption laws is to prevent the unfortunate citizen from being deprived of the necessities of life and to preserve for him and his family certain things reasonably necessary to enable him to earn a livelihood, and, where his livelihood is produced by his personal labor and services, to so protect him and his family that such earnings may not be taken from them and they be left destitute and a charge upon charity.

The rule appears to be in almost all jurisdictions that exemption statutes should be liberally construed in favor of the debtor that the very purpose of the statute in preserving to the unfortunate debtor and his family means of living without becoming a charge upon the public may be accomplished. (Id. at 126) (emphasis added in the first paragraph only)

The court went on to reiterate that, as in Utah, "Nothing in the Statute limits its operation to employees." (Id. at 126-127)

This interpretation of the intention of the Statutes is not limited to bankruptcy courts. In the case of Marian Health Center v. Cooks, 451 N.W.2d 846 (Iowa App. 1989) cited above, the court held:

The phrase "personal services" as used by the legislature means wages for work done by the person. This was intended to distinguish it from certificates of deposit or other investments. The intent of the legislature could not have been to distinguish employees from independent contractors. One of the express purposes of the statute is to prevent bankruptcies and the predatory extension of credit. Garnishing an independent contractor's income to exhaustion will result in bankruptcy as surely as it will with an employee. . . . The income of the appellant is protected by the Iowa exemption law." (Id. at 848) (emphasis added)

Speaking once again to the issue of renewal commissions, the court in First Nat. Bank of Guthrie v. Brown, 579 P.2d 825 (Okla. 1978) held:

We view such commissions as deferred compensation for making the initial sale and as an incentive to encourage the insurance agents to service their customers, in order to encourage renewals. Thus, the commissions constitute compensation for personal services, and accordingly come within the definition of "earnings". (Id at 827)

There is nothing in the Utah statute that distinguishes between employees and independent contractors. There is nothing in it that mandates that "periodic earnings" must mean weekly, monthly, or even yearly. Remember, even the renewal commissions of a retired insurance agent (never an employee of the company)--whenever they are paid--are exempt.

Even if the points made above were not enough, most persuasive is Utah law itself. In the Utah case of Russell M.

Miller Company v. Givan, 325 P.2d 908 (Utah 1958) the court reiterated the theme represented above:

It seems clear beyond dispute that the language of the statute "earnings of the judgment debtor for his personal services," is intended to have a broader application than the restrictive meaning of the phrase "wages of a laborer" which the plaintiff seeks to place thereon. This idea is implemented by the generally approved rule that exemption statutes are liberally construed in favor of the debtor to protect him and his family from hardship.

The fact that the debtor may use some capital or credit, tools or equipment, or automobiles or other property as an aid in producing such income would not deprive him of the benefit of the exemption allowed by law. Even if the plaintiff had shown, as he contends, that part of the defendant's income was a return on capital investment, or that other elements than the efforts of the debtor actually produced part of the income, defendant would still be entitled to his exemption on the portion of his income representing reasonable compensation for his efforts, provided it could be ascertained. (Id at 909-910)

THIS IS THE LAW IN UTAH. Not many states have their own controlling case-law, but Utah does, and it should be followed.

Wilderness and Hubble have brought to this Court's attention the few cases that lean in favor in their theory, however, they fall woefully short in terms of persuasive impact. The cases cited by Wilderness and Hubble can be easily distinguished.

In the case of Funk v. Utah State Tax Com'n 839 P.2d 818 (Utah 1992) the court dealt with the issue of whether a state tax refund was viewed as disposable earnings subject to the exemption. There the court ruled in harmony with every other court in the nation, including the case of Kokoszka v. Belford, 417 U.S.642 (1974) also cited by Wilderness and Hubble. In the Kokoszka case the issue was a federal income tax refund. The rationale for

those two cases and which does not control the issues currently before this Court, is articulated in the Funk case as follows:

The Kokoszka rationale regarding the CCPA applies equally to the almost identical language of Rule 64D(d)(vii). Wage earners generally do not rely on tax refunds as a means of support to the same extent that they rely on periodic payments of compensation. . . Most people do not budget tax refunds into their regular living expenses. Thus, allowing garnishment of an entire tax refund by creditors would not place the type of hardship on a debtor that Rule 64D and the CCPA seek to avoid. (Funk at 821) (emphasis added)

Wilderness and Hubble stretch in every way possible to make the Funk and Kokoszka cases cover the factual foundation of Vance's claim. They suggest that "the Robinson judgment is within the very same class of claims" as set forth in those cases. In summary, Wilderness and Hubble state: "Vance's claim is clearly not wages, salary, or regular commission earned on a week-to-week, month-to-month, or even year-to-year basis." They are right. It isn't--but it doesn't need to be. In spite of Wilderness and Hubble's efforts to confuse the Court, that definition is simply not the standard. The standard is found in Rule 64D(d)(vii), Utah Rules of Civil Procedure, which reads:

"Earnings" or "earnings for personal services" means compensation paid or payable for personal services whether denominated as wages, salary, commission, bonus or otherwise . . ."

Any modification or embellishment of that definition by Wilderness and Hubble should be ignored.

Two other cases cited by Wilderness and Hubble in earlier memoranda are wholly without impact. Anticipating they may be added on Reply, we address them briefly here. In the case of

Coones v. Federal Deposit Ins. Corp., 796 P.2d 803 (Wyo. 1990) the court found that profits received from the sale of livestock and crops were not covered by that state's exemption statute. The court distinguished those profits and business earnings, passed on only secondarily to the owners, as different from "compensation paid or payable for personal services", inasmuch as the owners had no obligation to pay themselves out of the operation of the farm and ranch. In our case, the obligation to pay was on a third party--the Robinsons--and was not controlled by Vance.

In the case of Coward v. Smith, 636 P.2d 793 (Kan. 1981) the Kansas court likened Smith's independent contractor status to the operator of a business. Smith had hired 6 or 7 other people to help him in the project. The court's definition of an independent contractor in the Coward case was one who,

. . .generally employs others to perform the labor and his compensation includes more than compensation for his personal services. It includes personal services performed by the contractor's employees, reimbursement for equipment used, and a return on capital." (Id. at 796)

Even if it were on point, the Miller v. Givan case, supra, in Utah specifically overrules application of that Kansas case in this state. If Vance is characterized as an "independent contractor", it is only for tax purposes. He is not the sort discussed in the Coward case. He has no employees; provides no equipment; and, does not receive a return on capital. He keeps what he earns as compensation for his--and only his--personal services.

Vance makes his living by helping others collect debts that

are owed them and taking a percentage of the recovery. (See Fact #39, Affidavit R710) He has no assurance if, when, and how much will be recovered, but when it does come, it is his sole source of income. Some recoveries are larger than others but that is not a basis for denying an exemption. There is no law to that effect--anywhere.

IV. REGARDLESS OF THE SEMANTICS OF GARNISHMENT OR EXECUTION, WILDERNESS AND HUBBLE SOUGHT THE SAME THING USING BOTH LABELS. WILDERNESS AND HUBBLE WAIVED ANY RIGHTS TO AN EVIDENTIARY HEARING

Wilderness and Hubble attempt to make something out of the fact that although a garnishment was issued, none was served. Instead, both before and after the issuance of the Writ of Garnishment, Wilderness and Hubble went directly to the Court and sought garnishment's equivalent--an Order of Execution against Vance's earnings in the possession of the Robinsons--which was viewed as in their September Memo (R383-387) as the same thing. In the September Memo Wilderness and Hubble state:

5. Third-Party Plaintiffs assert that they are entitled to a garnishment order against any and all sums due Dennis Blaine Vance from Leon and Arlene Robinson. (September Memo at page 3; R385)

They sought a garnishment order and received its equivalent in the Amended Order signed by this Court attaching property of Vance in the possession of a third party. It was not required that Vance be "served with a notice of execution". The Order was granted in open court in the presence of counsel for the Robinsons and Vance, personally appearing pro se. Based upon that "notice" in open court, followed up with the March 13, 1995, Amended Order

which was sent to Vance (without mention of his exemption rights), Vance filed a Request for Hearing (*See Request for Hearing R712-713*). On April 14, 1995, the court initiated a telephone conference call with counsel for Wilderness and Hubble and Vance and set a timeline for briefing the issues. Memoranda were filed and evidence was presented by affidavits.

On May 2, 1995, counsel for Vance filed a Notice to Submit for Decision requesting that the court act upon the memoranda and affidavits filed. Vance, as the only party having requested a hearing, had effectively withdrawn that request by filing the Notice to Submit. Copies were sent to opposing counsel. No one objected. No one requested a hearing. The court waited for six weeks--until, on June 19, 1995, the court initiated a conference call among all three counsel to announce its decision. A copy of an Order was circulated among counsel on June 19, 1995. No objections were filed, and three weeks later, on July 10, 1995, the Order was signed and entered by the court. Only now, a year later on appeal, do we hear Wilderness and Hubble say they "were never afforded the opportunity to present evidence and/or testimony concerning the existence or nonexistence of Vance's claimed entitlement...". (*See Wilderness and Hubble's Brief at page 6, and Fact #10 at page 2*) That simply is not true. They never sought the opportunity and did not complain thereafter--until this appeal. If Wilderness and Hubble were prejudiced by the lack of a hearing, they should begin the discussion by looking to themselves and their counsel.

V. EQUITY DEMANDS EQUITY

It appears rather clear from the file that the trial court felt a need to penalize Vance--but only after it had first penalized Wilderness and Hubble. Now Wilderness and Hubble innocently point to Vance as "the perpetrator and orchestrator of a scheme to defraud all of the parties in this case". (*Wilderness and Hubble's Brief at page 14*) Wilderness and Hubble are attempting to sway the Court's emotions beyond the boundaries of the law by suggesting that there is "a very strong policy consideration against the allowance of Vance's claim". (*Wilderness and Hubble's Brief at page 14*) What Wilderness and Hubble seem to forget, and one would hope is not lost on this Court, is that it was Wilderness and Hubble who were found to have defrauded the Robinsons in the first instance. Furthermore, the same judge who found against Vance on the underlying claim, maturely distanced himself from his feelings toward Vance and ruled that Vance was entitled to an exemption as a matter of law.

In their final attack, Wilderness and Hubble conclude their Brief with: "To allow him to escape the economic consequences of his wrongful acts, and indeed compensate him therefore (sic), goes against every tenet of fairness and justice." This is the pot calling the kettle "black". A large judgment remains in place against Vance and is sufficient punishment. By denying Vance the minimum protection of his statutorily granted exemption, this Court would be allowing Wilderness and Hubble to benefit further from their fraud.

One demanding equity from a Court must have clean hands himself. Equity demands equity. Even if equity were rightfully deserved, which it is not, such cannot override the statutory right Vance has to this Court's protection of his exemption from execution.

CONCLUSION AND RELIEF SOUGHT

Based upon the foregoing, Vance respectfully requests that this Court either refuse to hear this appeal based upon the July Order, or, if addressed, to affirm the, careful, methodical, and mature decision of the trial court and award Vance his costs, which include damages, doubled, and his reasonable attorney fees in this matter.

Respectfully submitted this 7th day of June, 1996.

STOKER & SWINTON


Jeffrey C. Swinton
Attorneys for Appellee

CERTIFICATE OF SERVICE

I hereby certify that I delivered two true and correct copies of the foregoing Brief of Appellee by depositing two copies thereof in the U.S. Mails, postage prepaid, this 7th day of June, 1996, addressed as follows:

Kent L. Christiansen
Christiansen & Sonntag
Attorneys for Appellants
345 IBM Plaza
420 East South Temple
Salt Lake City, Utah 84111

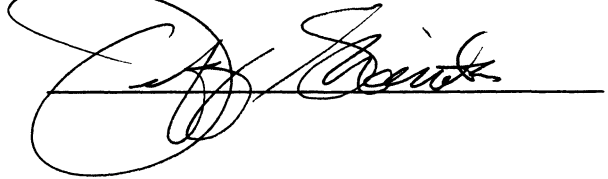


EXHIBIT "A"

EXHIBIT A

IN THE THIRD JUDICIAL DISTRICT COURT
SALT LAKE COUNTY, STATE OF UTAH

ROBINSON, LEON W	:	MINUTE ENTRY
	:	
PLAINTIFF	:	CASE NUMBER 920902754 CV
	:	DATE 04/17/95
VS	:	HONORABLE HOMER F WILKINSON
	:	COURT REPORTER
GNEITING, KAY	:	COURT CLERK DAG
DEFENDANT	:	

TYPE OF HEARING:
PRESENT:

P. ATTY.
D. ATTY.

TELEPHONE CALL WITH THE COURT, KENT CHRISTIANSEN & JEFF SWINTON
COUNSEL AGREE THERE IS A DISPUTE AS TO THE LAW AND ENTER
A STIPULATION THAT THIRD-PARTY PLAINTIFF'S TO RESPOND BY
04-24-95 TO INITIAL THIRD-PARTY MEMORANDUM AND ANSWER TO BY
04-28-95. THE COURT WILL THEN RULE IN THE LAW AND THE PARTIES
WILL DETERMINE IF AN EVIDENTIARY HEARING IS NECESSARY.

00723

EXHIBIT "B"

EXHIBIT B

Jeffrey C. Swinton #3178
STOKER & SWINTON
Attorneys for Third Party
Defendant Dennis Vance
311 South State Street, Suite 400
Salt Lake City, Utah 84111
Telephone: (801) 359-4000

FILED

CLERK OF DISTRICT COURT
SALT LAKE COUNTY
BY *[Signature]*

IN THE THIRD JUDICIAL DISTRICT COURT FOR SALT LAKE COUNTY
STATE OF UTAH

LEON W. ROBINSON and
ARLENE ROBINSON,

Plaintiffs,

vs.

KAY GNEITING; KERRY RICK
HUBBLE; and WILDERNESS
BUILDING SYSTEMS, INC.
a Utah corporation,

Defendants.

NOTICE TO SUBMIT
FOR
DECISION

KAY GNEITING; KERRY RICK
HUBBLE; and WILDERNESS
BUILDING SYSTEMS, INC., a
Utah corporation,

Third Party Plaintiffs,

vs.

DENNIS VANCE,

Third Party Defendant.

Civil No. 920902754


Judge Homer F. Wilkinson

COMES NOW, Dennis Vance, by and through his attorney of record, Jeffrey C. Swinton, of the law firm of Stoker & Swinton, and respectfully requests this Court to act upon the Memoranda on file herein regarding the exemption claim of Dennis Vance. The matter has now been fully briefed and is ready for this Court's consideration.

000820

RESPECTFULLY SUBMITTED this 2nd day of May, 1995.

STOKER & SWINTON



Jeffrey C. Swinton
Attorneys for Third Party
Defendant Dennis Vance

CERTIFICATE OF MAILING

The undersigned hereby verifies that on the 2nd day of May, 1995, a true and correct copy of the foregoing Notice to Submit was mailed by first-class mail, postage pre-paid, to the following:

Kent L. Christiansen
Christiansen & Sonntag
420 E. South Temple, #345
Salt Lake City, Utah 84111

Scott B. Mitchell
Lehman, Jensen & Donahue
8 East 300 South, #620
Salt Lake City, Utah 84111

Michael G. Barker
56 East Broadway, #600
Salt Lake City, Utah 84111

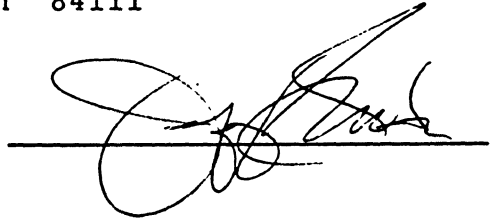


EXHIBIT "C"

EXHIBIT C

Jeffrey C. Swinton #3178
STOKER & SWINTON
Attorneys for Third Party
Defendant Dennis Vance
311 South State Street, Suite 400
Salt Lake City, Utah 84111
Telephone: (801) 359-4000

FILED
THIRD JUDICIAL DISTRICT

AUG 17 1995

SALT LAKE COUNTY

By *m. j. swinton*

IN THE THIRD JUDICIAL DISTRICT COURT FOR SALT LAKE COUNTY
STATE OF UTAH

LEON W. ROBINSON and
ARLENE ROBINSON,

Plaintiffs,

vs.

KAY GNEITING; KERRY RICK
HUBBLE; and WILDERNESS
BUILDING SYSTEMS, INC.
a Utah corporation,

Defendants.

KAY GNEITING; KERRY RICK
HUBBLE; and WILDERNESS
BUILDING SYSTEMS, INC., a
Utah corporation,

Third Party Plaintiffs,

vs.

DENNIS VANCE,

Third Party Defendant.

REQUEST FOR COMPLIANCE
ORDER AND DETERMINATION
OF ACCOUNTING TO FIX
EXEMPTION FOR VANCE

Civil No. 920902754

Judge Homer F. Wilkinson

COMES NOW, Dennis Vance, by and through his counsel, and requests an Order from this Court compelling compliance with its Order dated July 10, 1995 ("Order") and fixing the amount of cash to which Vance is entitled thereunder.

On July 10, 1995, this Court signed an Order which created a formula for determining the exemption to which Vance was entitled.

000844

A copy of that Order is attached hereto, as Exhibit "A" and specifically required that the parties "attempt to determine, agree and divide among themselves the amounts to be paid to or retained by each, Robinsons, Vance, and Hubble."

On July 10, 1995, counsel for Vance sent a letter to counsel for Robinsons and Hubble, a copy of which is attached hereto as Exhibit "B". In response, counsel for Robinsons sent a letter on July 12, 1995, to counsel for Hubble, a copy of which is attached hereto as Exhibit "C". On July 13, 1995, counsel for Hubble sent a letter to counsel for Vance, a copy of which is attached as Exhibit "D". On July 14, 1995, counsel for Vance responded to the July 13th letter and gave counsel for Hubble until July 19, 1995, to obtain his clients' cooperation to share information from their confidential agreement sufficient to allow compliance with this Court's Order. (See Exhibit "E")

Follow-up conversations have produced nothing except the confirmation from counsel for Robinsons that their attorneys fees totalled \$19,140.66. Vance is entitled to his exemption and cash is being wrongfully retained by either counsel for Hubble or Robinsons.

Therefore, Vance respectfully requests this Court to do the following:

1. Require counsel for Hubble and Robinsons to disclose the total amount of consideration passing pursuant to the confidential agreement (coupled with prior garnishments) referred to among the parties.

2. After determining the total consideration paid by Hubble to the Robinsons, multiplying that figure by 40% to determine the fee to which Vance was entitled.

3. After determining the fee to which Vance is entitled, subtracting therefrom \$19,140.66 for the attorney's fees and costs paid to Robinsons' counsel as required by paragraph 2 of the Order.

4. After determining the balance to which Vance is entitled after payment of the attorneys fees and costs, determining the amount of the remainder which is "disposable earnings" under Utah Law, allowing a deduction for the amounts required by law to be withheld from a sole proprietor for taxes, and awarding Vance that specific amount.

5. After deducting the amount paid to Vance for taxes, multiplying the remainder by 25% to determine the amount to which Hubble is entitled and ordering the remaining 75% to be paid forthwith to Vance.

6. Granting Vance his attorney's fees and costs for the time required in bringing this Request and interest on the amount awarded accruing from July 10, 1995 until paid in full.

RESPECTFULLY SUBMITTED this 15th day of August, 1995.

STOKER & SWINTON

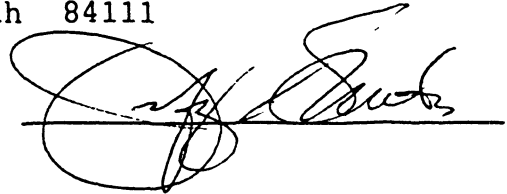
By 
Jeffrey C. Swinton
Attorneys for Dennis Vance

CERTIFICATE OF MAILING

The undersigned hereby verifies that on the 15th day of August, 1995, a true and correct copy of the foregoing Request was mailed, postage prepaid, to the following:

Kent L. Christiansen
Christiansen & Sonntag
420 E. South Temple, #345
Salt Lake City, Utah 84111

Scott B. Mitchell
Lehman, Jensen & Donahue
8 East 300 South, #620
Salt Lake City, Utah 84111

A handwritten signature in dark ink, appearing to read "S. B. Mitchell", is written over a horizontal line.

.1111 1 0 1995

SALT LAKE COUNTY

By _____
Deputy Clerk

Jeffrey C. Swinton #3178
STOKER & SWINTON
Attorneys for Third Party
Defendant Dennis Vance
311 South State Street, Suite 400
Salt Lake City, Utah 84111
Telephone: (801) 359-4000

IN THE THIRD JUDICIAL DISTRICT COURT FOR SALT LAKE COUNTY

STATE OF UTAH

LEON W. ROBINSON and
ARLENE ROBINSON,

Plaintiffs,

vs.

KAY GNEITING; KERRY RICK
HUBBLE; and WILDERNESS
BUILDING SYSTEMS, INC.
a Utah corporation,

Defendants.

ORDER ON CLAIM OF EXEMPTION
OF DENNIS VANCE

KAY GNEITING; KERRY RICK
HUBBLE; and WILDERNESS
BUILDING SYSTEMS, INC., a
Utah corporation,

Third Party Plaintiffs,

vs.

DENNIS VANCE,

Third Party Defendant.

Civil No. 920902754

Judge Homer F. Wilkinson

This matter was presented by Memoranda filed by Jeffrey C. Swinton of the law firm of Stoker & Swinton, on behalf of the movant, Third Party Defendant, Dennis Vance ("Vance"), with responsive Memoranda filed by Kent L. Christiansen of the law firm of Christiansen & Sonntag on behalf of Third Party Plaintiffs, Kerry Rick Hubble and Wilderness Building Systems, Inc. ("Hubble"),

and by Scott Mitchell on behalf of Plaintiffs, Leon and Arlene Robinson ("Robinsons").

The Court, in a conference call in which all three counsel participated on June 19, 1995, announced its decision. The Court having read all Memoranda and being fully advised in the premises, and good cause appearing therefor, it is hereby:

ORDERED, ADJUDGED AND DECREED, that,

1. The commission to which Dennis Vance is entitled under his agreement with the Robinsons is "earnings from personal services" within the meaning of Rule 64D(d)(vii), URCP;

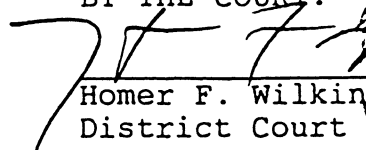
2. This Court requires the deduction of all amounts owed to Robinsons by Vance for their attorneys' fees and costs under their agreement with Vance to be deducted before arriving at the amount of Vance's "disposable earnings" within the meaning of Rule 64D(d)(vii), URCP;

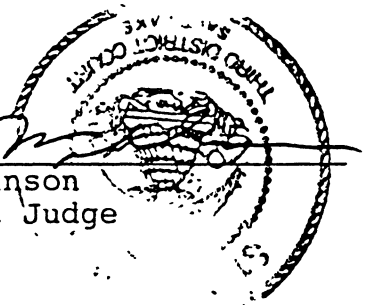
3. The maximum amount of Vance's aggregate disposable earnings available for attachment or garnishment by Hubble is "twenty-five per centum" of his "disposable earnings" calculated in accordance with this Order under Rule 64D(d)(viii)(A), URCP; and,

4. The parties shall attempt to determine, agree and divide among themselves the amounts to be paid to or retained by each, Robinsons, Vance, and Hubble.

Dated this 18 day of July, 1995.

BY THE COURT:


Homer F. Wilkinson
District Court Judge

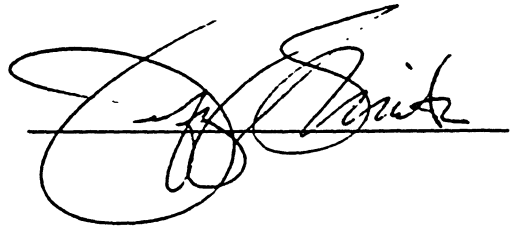


CERTIFICATE OF SERVICE

The undersigned hereby verifies that on the 19th day of June, 1995, a true and correct copy of the foregoing Order was mailed by first-class mail, postage pre-paid, to the following:

Kent L. Christiansen
Christiansen & Sonntag
420 E. South Temple, #345
Salt Lake City, Utah 84111

Scott B. Mitchell
Judge Building, Suite 620
8 East 300 South
Salt Lake City, Utah 84111

A handwritten signature in black ink, appearing to read "S. B. Mitchell", is written over a horizontal line.

STEPHEN G. STOKER, P.C.
JEFFREY C. SWINTON, P.C.

LAW OFFICES
STOKER & SWINTON
A PARTNERSHIP OF PROFESSIONAL CORPORATIONS
311 SOUTH STATE STREET, SUITE 400
SALT LAKE CITY, UTAH 84111
TELEPHONE (801) 359-4000

TELECOPIER
(801) 359-6603

July 10, 1995

Kent L. Christiansen
Christiansen & Sonntag
420 E South Temple, #345
Salt Lake City, Utah 84111


Scott B. Mitchell
Judge Building, Suite 620
8 East 300 South
Salt Lake City, Utah 84111

Dear Kent and Scott:

Enclosed please find the Order which I sent to you on the 19th of June, 1995 which has now been signed on the 10th of July, 1995 by Judge Wilkinson.

As you were aware, the court has asked that we determine, agree and divide among ourselves the amounts to be paid or retained by each of our clients. In light of this I would appreciate knowing the details of the settlement agreement between your clients and the amount of consideration given the Robinsons. Please communicate with me before Friday, July 14.

Sincerely,


JEFFREY C. SWINTON

JCS:js
Enclosure
cc: Dennis Vance

Scott B. Mitchell

Attorney at Law

SUITE 620 JUDGE BUILDING
8 EAST 300 SOUTH
SALT LAKE CITY, UTAH 84111

TELEPHONE: (801) 532-7858

TELECOPIER: (801) 363-1715

July 12, 1995

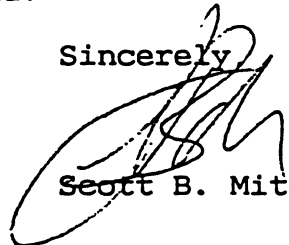
Kent L. Christiansen
420 E. South Temple, Suite 345
Salt Lake City, Utah 84111

Re: Hubble v. Vance

Dear Kent:

In response to Jeff Swinton's letter of July 10, 1995, and in accordance with the Stipulated Settlement, Satisfaction, and Release of All Claims on file with the court, you are hereby notified of Vance's demand for details regarding our clients' settlement agreement. At your earliest convenience, please let me know how you intend to respond.

Sincerely,



Scott B. Mitchell

SBM:km
cc: Jeffrey Swinton

000852 EXHIBIT C

KENT L. CHRISTIANSEN†

JAMES L. SONNTAG‡

SYLVIA O. KRALIK

LUCY L. SONNTAG*

RANDY J. CHRISTIANSEN
of Counsel

LAW OFFICES

CHRISTIANSEN & SONNTAG

345 IBM PLAZA

420 EAST SOUTH TEMPLE

SALT LAKE CITY, UTAH 84111

TELEPHONE (801) 359-3762

FACSIMILE (801) 359-3763

†ALSO ADMITTED TO THE
COLORADO BAR

‡REGISTERED PATENT
ATTORNEY ALSO ADMITTED

TO THE NEW YORK BAR

*REGISTERED PATENT
AGENT NOT ADMITTED

TO THE BAR

July 13, 1995

Jeffrey C. Swinton
STOKER & SWINTON
311 South State Street, Suite 400
Salt Lake City, Utah 84111

RE: *Wilderness Building Systems, Inc. v. Dennis Vance*

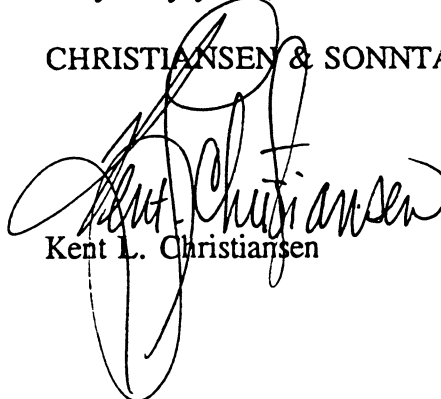
Dear Jeff:

Thank you for your letter of July 10, 1995. I have discussed the substance of your letter with my clients and they have expressed to me their need for verification of any agreement that existed between Vance and the Robinsons. In addition, there was a confidentiality provision in the settlement agreement that still needs to be addressed.

I would appreciate receiving a copy of the signed agreement between Vance and the Robinsons evidencing his claim for compensation, and any other documentation or verification that such an agreement indeed existed. Thank you for your cooperation and assistance in this matter. I look forward to hearing from you.

Very truly yours,

CHRISTIANSEN & SONNTAG



Kent L. Christiansen

KLC/br

LAW OFFICES

STOKER & SWINTON,

A PARTNERSHIP OF PROFESSIONAL CORPORATIONS

311 SOUTH STATE STREET, SUITE 400

SALT LAKE CITY, UTAH 84111

TELEPHONE (801) 359-4000

STEPHEN G. STOKER, P.C.
JEFFREY C. SWINTON, P.C.

TELECOPIER
(801) 359-6603

July 14, 1995

Kent L. Christiansen
Christiansen & Sonntag
420 East South Temple
Salt Lake City, Utah 84111

Re: Wilderness Building Systems vs. Vance

Dear Kent:

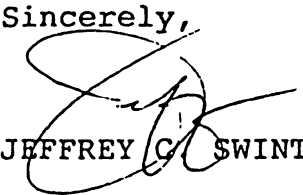
I'm in receipt of your letter of July 13, 1995. The Agreement between Vance and the Robinsons was an oral agreement entered into with full knowledge of Scott Mitchell, attorney for the Robinsons.

Pursuant to that Agreement Mr. Vance was to receive 40% of all amounts recovered by the Robinsons after a judgment was entered against Hubble and Wilderness Building Systems, subject to an offset for attorney's fees as set forth in the Response to Claim of Exemption filed by Scott Mitchell, a copy of which is enclosed herewith.

Relative to the confidentiality provision of the Settlement Agreement, I'm asking that you and Mr. Mitchell agree between yourselves and your clients to share the Settlement Agreement with me and mine. Judge Wilkinson expects us to work this out among us however failing that, I will immediately present the matter back to him for additional enforcement.

Please let me know no later than Wednesday, July 19 if your clients are willing to cooperate with the Courts' Order which says that "the parties shall attempt to determine, agree and divide among themselves the amounts to be paid to or retained by each, Robinsons, Vance and Hubble." Your cooperation is appreciated.

Sincerely,


JEFFREY C. SWINTON

JCS:js
Enclosure
cc: Dennis Vance

000004 EXHIBIT E

EXHIBIT "D"

EXHIBIT D

IN THE THIRD JUDICIAL DISTRICT COURT

SALT LAKE COUNTY, STATE OF UTAH

ROBINSON, LEON W	:	MINUTE ENTRY
	:	
PLAINTIFF	:	CASE NUMBER 920902754 CV
	:	DATE 10/12/95
VS	:	HONORABLE HOMER F WILKINSON
	:	COURT REPORTER
GNEITING, KAY	:	COURT CLERK MTF
	:	
DEFENDANT	:	

TYPE OF HEARING: IN-COURT CONFERENCE
PRESENT:

P. ATTY. MITCHELL, SCOTT B
D. ATTY. CHRISTIANSEN, K & SWINTON, J

THIS CASE COMES NOW BEFORE THE COURT FOR HEARING (IN CHAMBERS), WITH APPEARANCES AS SHOWN ABOVE. BASED ON DISCUSSION WITH RESPECTIVE COUNSEL, THE COURT ORDERS THE SETTLEMENT AGREEMENT BETWEEN THE PARTIES BE DISCLOSED, HOWEVER IT IS TO BE KEPT CONFIDENTIAL AS TO THE ATTORNEY'S FOR ROBINSON, GNEITING, AND VANCE. THE PARTIES AGREED ON FORMULA, AND JUDGMENTS WERE DETERMINED. MR. SWINTON TO PREPARE THE JUDGMENT.

EXHIBIT "E"

EXHIBIT E

JUDGEMENT

FILED DISTRICT COURT
Third Judicial District

OCT 24 1995

Jeffrey C. Swinton #3178
 STOKER & SWINTON
 Attorneys for Third Party
 Defendant Dennis Vance
 311 South State Street, Suite 400
 Salt Lake City, Utah 84111
 Telephone: (801) 359-4000

By D. Garner
 SALT LAKE COUNTY
 Deputy Clerk

IN THE THIRD JUDICIAL DISTRICT COURT FOR SALT LAKE COUNTY

STATE OF UTAH

LEON W. ROBINSON and
 ARLENE ROBINSON,
 Plaintiffs,
 vs.

KAY GNEITING; KERRY RICK
 HUBBLE; and WILDERNESS
 BUILDING SYSTEMS, INC.
 a Utah corporation,
 Defendants.

JUDGMENT ON CLAIM OF
 OF DENNIS VANCE

2203711
 10-25-95-801 am

KAY GNEITING; KERRY RICK
 HUBBLE; and WILDERNESS
 BUILDING SYSTEMS, INC., a
 Utah corporation,

Third Party Plaintiffs,

vs.

DENNIS VANCE,
 Third Party Defendant.

Civil No. 920902754

Judge Homer F. Wilkinson

The matter of determining the amount of the exemption to which Dennis Vance is entitled based upon this Court's Order of July 10, 1995, was presented by Memoranda filed by Jeffrey C. Swinton of the law firm of Stoker & Swinton, on behalf of the movant, Third Party Defendant, Dennis Vance ("Vance"), with responsive Memoranda filed by Kent L. Christiansen of the law firm of Christiansen & Sonntag on behalf of Third Party Plaintiffs, Kerry Rick Hubble and Wilderness Building Systems, Inc. ("Hubble"), and by Scott Mitchell

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on behalf of Plaintiffs, Leon and Arlene Robinson ("Robinsons"), as well as in oral argument in a Hearing held on October 12, 1995, with all three counsel in attendance.

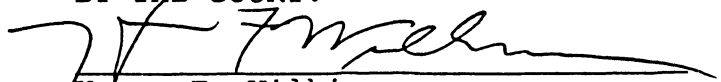
Based upon the Memoranda and Arguments, this Court has ordered the attorneys for Hubble and Robinson to disclose the amount of consideration set forth in the March 16, 1995, Settlement Agreement between Hubble and Robinsons to the Court and ordered them and counsel for Vance to maintain that figure in confidence between them alone. The Court further denied Vance's claim for recovery of attorney's fees. Having therefore read the Memoranda, heard oral arguments and received information regarding the amount of final settlement;

THIS COURT HEREBY ENTERS JUDGMENT FOR THE AMOUNT OF THE EXEMPTION IN FAVOR OF DENNIS VANCE, AND AGAINST KERRY RICK HUBBLE, AND WILDERNESS BUILDING SYSTEMS, JOINTLY AND SEVERALLY, in the amount of \$12,057.37, plus pre-judgment interest accruing from March 16, 1995, to October 12, 1995, at the statutory rate of 10% per annum for an additional amount of \$693.71. The TOTAL JUDGMENT is therefore \$12,751.08.

Interest shall continue to accrue on the Total Judgment amount from October 12, 1995, until paid in full at the post-judgment rate of 9.22% per annum.

MADE AND ENTERED THIS 24 DAY OF OCTOBER, 1995.

BY THE COURT:


Homer F. Wilkinson
District Court Judge

CERTIFICATE OF SERVICE

The undersigned hereby verifies that on the 12th day of October, 1995, a true and correct copy of the foregoing Judgment was transmitted via Facsimile to the following:

Kent L. Christiansen
Christiansen & Sonntag
420 E. South Temple, #345
Salt Lake City, Utah 84111
359-3763

Scott B. Mitchell
175 South Main Street
Suite 1112
Salt Lake City, Utah 84111
359-5473

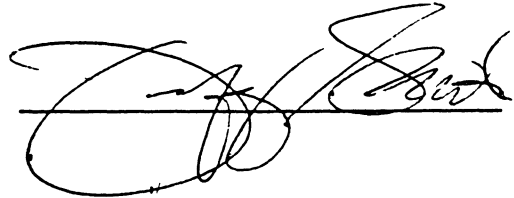
A handwritten signature in dark ink, appearing to read "Scott B. Mitchell", is written over a horizontal line.

EXHIBIT "F"

Utah Rules of Appellate Procedure 33

all questions of law involved in the case presented upon the appeal and necessary to the final determination of the case.

(b) **Decision in criminal cases.** If a judgment of conviction is reversed, a new trial shall be held unless otherwise specified by the court. If a judgment of conviction or other order is affirmed or modified, the judgment or order affirmed or modified shall be executed.

(c) **Decision and opinion in writing; entry of decision.** When a judgment, decree, or order is reversed, modified, or the reasons shall be stated concisely in writing and filed with the clerk. Any justice or judge concurring or dissenting may likewise give reasons in writing and file the same with the clerk. The entry by the clerk in the records of the court shall constitute the entry of the judgment of the court.

(d) **Decision without opinion.** If, after oral argument, the court concludes that a case satisfies the criteria set forth in Rule 31(b), it may dispose of the case by order without written opinion. The decision shall have only such effect as precedent as is provided for by Rule 31(f).

(e) **Notice of decision.** Immediately upon the entry of the decision, the clerk shall give notice to the respective parties and make the decision public in accordance with the direction of the court.

(Amended effective October 1, 1992.)

Rule 31. Expedited appeals decided after oral argument without written opinion.

(a) **Motion and stipulation for expedited hearing.** After the filing of all briefs in an appeal, a party may move for an expedited decision without a written opinion. The motion shall be in the form prescribed by Rule 23 and shall describe the nature of the case, the issues presented and any special reasons the parties may have for an expedited decision. The court may dispose of any qualified case under this rule upon its own motion before or after oral argument.

(b) **Cases which qualify for expedited decision.** The following are matters which the court may consider for expedited decision without opinion:

- (1) appeals involving uncomplicated factual issues based primarily on documents;
- (2) summary judgments;
- (3) dismissals for failure to state a claim;
- (4) dismissals for lack of personal or subject matter jurisdiction; and
- (5) judgments or orders based on uncomplicated issues of law.

(c) In all motions brought under this rule, the substantive rules of law should be deemed settled, although the parties may differ as to their application.

(d) **Appeals ineligible for expedited decision.** The court will not grant a motion for an expedited appeal in cases raising substantial constitutional issues, issues of significant public interest, issues of law of first impression, or complicated issues of fact or law.

(e) **Procedure if expedited motion is granted.** If a motion for expedited decision is granted, the appeal will be given an expedited setting for oral argument within 45 to 60 days from the date of the order granting the motion. Within two days after submission of the appeal, the court will conference, decide the case, and issue a written order which need not be accompanied by an opinion. Entry of the order by the clerk in the records of the court, shall constitute the entry of the judgment of the court.

(f) **Effect as precedent.** Appeals decided under this rule will not stand as precedent, but, in other respects, will have the same force and effect as other decisions of the court.

(g) **Issuance of written opinion.** If it appears to the court after the case has been submitted for decision that a written opinion should be issued, the time limitation in paragraph (e)

(Amended effective October 1, 1992.)

Rule 32. Interest on judgment.

Unless otherwise provided by law, if a judgment for money in a civil case is affirmed, whatever interest is allowed by law shall be payable from the date the judgment was entered in the trial court.

Rule 33. Damages for delay or frivolous appeal; recovery of attorney's fees.

(a) **Damages for delay or frivolous appeal.** Except in a first appeal of right in a criminal case, if the court determines that a motion made or appeal taken under these rules is either frivolous or for delay, it shall award just damages, which may include single or double costs, as defined in Rule 34, and/or reasonable attorney fees, to the prevailing party. The court may order that the damages be paid by the party or by the party's attorney.

(b) **Definitions.** For the purposes of these rules, a frivolous appeal, motion, brief, or other paper is one that is not grounded in fact, not warranted by existing law, or not based on a good faith argument to extend, modify, or reverse existing law. An appeal, motion, brief, or other paper interposed for the purpose of delay is one interposed for any improper purpose such as to harass, cause needless increase in the cost of litigation, or gain time that will benefit only the party filing the appeal, motion, brief, or other paper.

(c) **Procedures.**

(1) The court may award damages upon request of any party or upon its own motion. A party may request damages under this rule only as part of the appellee's motion for summary disposition under Rule 10, as part of the appellee's brief, or as part of a party's response to a motion or other paper.

(2) If the award of damages is upon the motion of the court, the court shall issue to the party or the party's attorney or both an order to show cause why such damages should not be awarded. The order to show cause shall set forth the allegations which form the basis of the damages and permit at least ten days in which to respond unless otherwise ordered for good cause shown. The order to show cause may be part of the notice of oral argument.

(3) If requested by a party against whom damages may be awarded, the court shall grant a hearing.

Rule 34. Award of costs.

(a) **To whom allowed.** Except as otherwise provided by law, if an appeal is dismissed, costs shall be taxed against the appellant unless otherwise agreed by the parties or ordered by the court; if a judgment or order is affirmed, costs shall be taxed against appellant unless otherwise ordered; if a judgment or order is reversed, costs shall be taxed against the appellee unless otherwise ordered; if a judgment or order is affirmed or reversed in part, or is vacated, costs shall be allowed as ordered by the court. Costs shall not be allowed or taxed in a criminal case.

(b) **Costs for and against the state of Utah.** In cases involving the state of Utah or an agency or officer thereof, an award of costs for or against the state shall be at the discretion of the court unless specifically required or prohibited by law.

(c) **Costs of briefs and attachments, record, bonds and other expenses on appeal.** The following may be taxed as costs in favor of the prevailing party in the appeal: the actual costs of a printed or typewritten brief or memoranda and attachments not to exceed \$3.00 for each page; actual costs incurred in the preparation and transmission of the record, including costs of the reporter's transcript unless otherwise ordered by the court; premiums paid for superseas or cost bonds to preserve rights pending appeal; and the fees for filing and docketing the appeal.

Utah Rules of Civil Procedure 59(e)

Rule 59. New trials; amendments of judgment.

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

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

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

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

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

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

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

(7) Error in law.

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

(c) **Affidavits; time for filing.** When the application for a new trial is made under Subdivision (a)(1), (2), (3), or (4), it shall be supported by affidavit. Whenever a motion for a new trial is based upon affidavits they shall be served with the motion. The opposing party has 10 days after such service within which to serve opposing affidavits. The time within which the affidavits or opposing affidavits shall be served may be extended for an additional period not exceeding 20 days either by the court for good cause shown or by the parties by written stipulation. The court may permit reply affidavits.

(d) **On initiative of court.** Not later than 10 days after entry of judgment the court of its own initiative may order a new trial for any reason for which it might have granted a new trial on motion of a party, and in the order shall specify the grounds therefor.

(e) **Motion to alter or amend a judgment.** A motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment.

Rule 60. Relief from judgment or order.

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

(b) **Mistakes; inadvertence; excusable neglect; newly discovered evidence; fraud, etc.** On motion and upon such terms as are just, the court may in the furtherance of justice relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59; (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an

adverse party; (4) when, for any cause, the summons in an action has not been personally served upon the defendant as required by Rule 4(e) and the defendant has failed to appear in said action; (5) the judgment is void; (6) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (7) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time and for reasons (1), (2), (3), or (4), not more than 3 months after the judgment, order, or proceeding was entered or taken. A motion under this Subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order or proceeding or to set aside a judgment for fraud upon the court. The procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

Rule 61. Harmless error.

No error in either the admission or the exclusion of evidence, and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties, is ground for granting a new trial or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.

Rule 62. Stay of proceedings to enforce a judgment.

(a) **Stay upon entry of judgment.** Execution or other proceedings to enforce a judgment may issue immediately upon the entry of the judgment, unless the court in its discretion and on such conditions for the security of the adverse party as are proper, otherwise directs.

(b) **Stay on motion for new trial or for judgment.** In its discretion and on such conditions for the security of the adverse party as are proper, the court may stay the execution of, or any proceedings to enforce, a judgment pending the disposition of a motion for a new trial or to alter or amend a judgment made pursuant to Rule 59, or of a motion for relief from a judgment or order made pursuant to Rule 60, or of a motion for judgment in accordance with a motion for a directed verdict made pursuant to Rule 50, or of a motion for amendment to the findings or for additional findings made pursuant to Rule 52(b).

(c) **Injunction pending appeal.** When an appeal is taken from an interlocutory or final judgment granting, dissolving, or denying an injunction, the court in its discretion may suspend, modify, restore, or grant an injunction during the pendency of the appeal upon such conditions as it considers proper for the security of the rights of the adverse party.

(d) **Stay upon appeal.** When an appeal is taken the appellant by giving a supersedeas bond may obtain a stay, unless such a stay is otherwise prohibited by law or these rules. The bond may be given at or after the time of filing the notice of appeal. The stay is effective when the supersedeas bond is approved by the court.

(e) **Stay in favor of the state, or agency thereof.** When an appeal is taken by the United States, the state of Utah, or an officer or agency of either, or by direction of any department of either, and the operation or enforcement of the judgment is stayed, no bond, obligation, or other security shall be required from the appellant.

(f) **Stay in quo warranto proceedings.** Where the defendant is adjudged guilty of usurping, intruding into or unlawfully holding public office, civil or military, within this state,

Utah Rules of Civil Procedure 64D(d)

(i) **Examination of defendant or third party.** The defendant may be required to attend before the court or a master appointed by the court, to be examined on oath respecting his property. Any person owing debts to the defendant, or having in his possession or under his control any credits or other personal property belonging to the defendant, may likewise be required to appear before the court or a master and be examined respecting the same. The court or master, after any examination conducted pursuant to this subdivision, may order personal property capable of manual delivery to be delivered to the officer, on such terms as may be just, having reference to any liens thereon or claims against the same, and may require a memorandum to be given of all other personal property, containing the amount and description thereof. The court may make such provision for witness fees and mileage as may be just, provided that if any third party has refused to give the officer executing the writ a memorandum of any debts or credits, requested under the provisions of Subdivision (h) of this rule, such party may be required to pay the costs of any proceeding taken for the purpose of obtaining such information.

(j) **Sale of attached property before judgment.**

(1) **Where property is perishable.** If any of the property attached is perishable, the officer must sell the same in the manner in which such property is sold on execution. The proceeds and other property attached by him must be retained by him to answer any judgment that may be recovered in the action, unless released or discharged, or subjected to execution upon another judgment recovered previous to issuing the attachment.

(2) **Other property.** Whenever property has been taken by an officer under a writ of attachment, and it is made to appear satisfactorily to the court that the interest of the parties to the action will be subserved by a sale thereof, the court may order such property sold in the same manner as property sold under an execution, and the proceeds to be deposited in the court to abide the judgment in the action. Such order can be made only upon notice to the adverse party, in case such party has been personally served in the action.

(k) **Satisfaction of judgment; deficiency; redelivery of property.** If judgment is recovered by the plaintiff, the officer must satisfy the same out of the property attached by him which has not been delivered to the defendant or a claimant as herein provided, or subjected to a prior lien, if it is sufficient for that purpose, by paying to the plaintiff the proceeds of all sales of perishable property sold by him, or of any debts or credits collected by him or so much as shall be necessary to satisfy the judgment; and, if any balance remains due and an execution shall have been issued on the judgment, by selling under the execution so much of the property, real or personal, as may be necessary to satisfy the balance, if enough for that purpose remains in his hands. Notice of the sales must be given and the sales conducted as in other cases of sales on execution. If, after selling all the property attached by him remaining in his hands and after deducting his fees and applying the proceeds, together with the proceeds of any debts or credits collected by him, to the payment of the judgment, any balance shall remain due, the officer must proceed to collect the same as upon an execution in other cases. Whenever the judgment shall have been paid, the officer, upon reasonable demand, must deliver to the defendant the attached property remaining in his hands and any proceeds of the property attached unapplied on the judgment.

(l) **Proceedings where defendant prevails.** If the defendant recovers judgment against the plaintiff, any undertaking received in the action, all the proceeds of sales and money collected by the officer and all the property attached remain-

attachment shall be discharged and the property released therefrom.

(m) **Liability of third persons after attachment.** All persons having in their possession or under their control any credits or other personal property belonging to the defendant, or owing any debts to the defendant at the time of service upon them of a copy of the writ of attachment shall be, unless such property is delivered up or transferred or such debts are paid to the officer, liable to the plaintiff for the amount of such credits, property or debts, until the attachment is discharged, or such debts, credits, or other personal property are released from the attachment, or until any judgment recovered by the plaintiff is satisfied. Payment of such debts, or delivery or transfer of such property or debts, to the officer shall be a sufficient discharge for the same as to the defendant.

(n) **Release of attachment upon real property.** Whenever an order has been made discharging or releasing an attachment upon real property, a certified copy of such order must be filed in the office of the county recorder in which the notice of attachment has been filed, and shall be indexed in like manner.

(o) **Attachment before maturity of claim.** A party may commence an action upon an obligation before it is due and have an attachment against the property of the debtor upon any one or more of the grounds set forth in Subdivisions (a)(4), (5), (6) and (7) of this rule. The property attached, or its proceeds, shall be held subject to the judgment thereafter to be rendered; but no judgment shall be rendered on such claim until the obligation shall by its terms become due.

Rule 64D. Garnishment.

(a) **Availability of writ of garnishment (Pre-judgment and after judgment).** Except as provided in Rule 64A and as authorized and permitted therein a writ of garnishment is available as provided for herein.

(i) **Before judgment.** A writ of garnishment is available as a means of attachment before judgment, other than for defendant's earnings from personal services as hereinafter defined in Subdivision (d)(vii), at any time after the filing of a complaint in cases in which a writ of attachment is available under Rule 64C.

(ii) **After judgment or order.** A writ of garnishment is available in aid of execution to satisfy a money judgment or other order requiring the payment of money. Such judgments and orders are hereinafter sometimes referred to collectively as "judgment".

(iii) **Property subject to garnishment.** The property subject to garnishment that a writ may be used to levy upon or affect is all the accrued credits, chattels, goods, effects, debts, choses in action, money and other personal property and rights to property of the defendant in the possession of a third person, or under the control or constituting a performance obligation to the defendant of any third person, whether due or yet to become due at the time of service of the writ of garnishment, which are not exempt from garnishment or exempt under any applicable provisions of state or federal law (hereinafter sometimes referred to as "Property Subject to Garnishment").

(iv) **As used in this Rule 64D,** the term "plaintiff" means the person or entity seeking by garnishment to attach or execute upon the property of another subject to garnishment and the term "defendant" means the person or entity whose property subject to garnishment is sought to be attached or executed upon by the plaintiff.

(b) **Requirements for issuance of a prejudgment writ of garnishment.** The clerk shall issue a prejudgment writ or writs of garnishment, with or without notice to the defendant, directed to the person(s) sought to be charged as garnishee(s) and so identified in the affidavit required by Subdivision (b)(i) before entry upon the order of the court in which the action is

filed. Several writs may be issued at the same time so long as there is only one named garnishee in a single writ. No writ shall issue unless there is attached thereto the fee required by Subdivision (d)(ii). Subject to Rule 64A, the court shall issue its order for the issuance of a prejudgment writ of garnishment only upon the occurrence of the following:

(i) A finding that the plaintiff has filed with the clerk an affidavit briefly setting forth: admissible evidence of facts showing that plaintiff's claim is one for which attachment is authorized by Rule 64C; the amount due the plaintiff for which the complaint seeks judgment; that plaintiff has good reason to believe and does believe that defendant has Property Subject to Garnishment in the possession or in the control of or otherwise owing from one or more specified third persons who plaintiff seeks to charge as garnishees or that such third persons plaintiff seeks to charge as garnishees are otherwise indebted to the defendant; and that such Property Subject to Garnishment is not earnings for the personal services of the defendant, or otherwise exempt from garnishment.

(ii) A finding that plaintiff has filed with the clerk a bond or undertaking in the form and amount required for the issuance of a writ of attachment.

(iii) Exceptions to the sufficiency of the sureties on plaintiff's prejudgment garnishment bond or undertaking and the justification of such sureties shall be made within the times and in the manner and with the effect provided in Rule 64C(c).

(c) **Requirements for issuance of writ of garnishment after judgment or other order.** After the entry of a judgment or other order requiring the payment of money, the clerk of any court from which execution thereon may be issued shall issue a writ or writs of garnishment, without the necessity for an undertaking, upon the filing of an application by the plaintiff: (i) identifying the person sought to be charged as a garnishee; (ii) stating whether such property consists in whole or in part of earnings from personal services as hereinafter defined in Subdivision (d)(vii) of this rule and (iii) stating the remaining amount due on the judgment. Several writs may be issued at the same time so long as there is only one named garnishee in a single writ. No writ shall issue unless there is attached thereto the fee required by Subdivision (d)(ii).

(d) **Content and effect of writ; to whom directed (Pre-judgment or after judgment).**

(i) The writ of garnishment shall be issued in the name of the State of Utah and shall be directed to the person or persons designated in the plaintiff's affidavit or application as garnishee or garnishees, advising each such person that each is attached as garnishee in the action, and commanding each of them not to pay or deliver any non-exempt Property Subject to Garnishment as defined in Subdivision (a)(iii) herein in their possession, custody or control, or part thereof, due or to become due to the defendant up to the amount remaining due on the judgment (Subdivision (c)(iii)) if the writ is issued after judgment or the amount claimed to be due the plaintiff (Subdivision (b)(i)) if a prejudgment writ is issued, whichever is applicable, and to retain possession and control of all such property until further order of the court or as otherwise discharged or released as provided for herein. In the case of a prejudgment writ, the writ shall contain a designation that it is a prejudgment writ and further note the date and time of expiration of the writ. At the time the writ of garnishment is issued, the clerk shall attach to the writ a notice of garnishment and exemptions, interrogatories to the garnishee and two copies of an application by which the defendant may request a hearing.

(ii) The writ shall require the garnishee to give an-

the date of service of the writ. Service of a copy of the answers to interrogatories shall be made upon the plaintiff and the original filed with the clerk. The plaintiff shall provide a \$10.00 fee to the garnishee. The interrogatories may in substance inquire: (1) whether the garnishee is indebted to the defendant, either in property or in money, whether the same is now due and, if not, when it is to become due; (2) whether there is any Property Subject to Garnishment in the possession, custody or control of the garnishee and, if so, the value of the same; (3) whether the garnishee knows of any debts owing to the defendant, whether due or not, or of any Property Subject to Garnishment belonging to the defendant or in which defendant has an interest, whether in the possession or under the control of the garnishee or another, and, if so, the particulars thereof; (4) whether the garnishee is retaining or deducting any amount in satisfaction of a claim the garnishee has against the plaintiff or the defendant, a designation as to whom such claim relates, and the amount retained or deducted; and (5) as to any other relevant information plaintiff may desire, including defendant's job, position or occupation, defendant's rate and method of compensation, defendant's pay period and the computation of the amount of defendant's accrued disposable earnings attached by the writ.

(iii) If the garnishee has possession, custody or control of Property Subject to Garnishment, the garnishee shall serve within five (5) business days of service of the writ of garnishment upon the garnishee a copy of the writ of garnishment, answers to interrogatories, notice of garnishment and exemptions, and two copies of an application by which a hearing may be requested, upon: (1) the defendant at the last known address of the defendant shown on the records of the garnishee at the time the writ of garnishment was served on the garnishee; and (2) upon any other person shown upon the records of the garnishee to be a co-owner or having an interest in the property or money garnished at the last known address of the co-owner or other interested person as shown on the records of the garnishee at the time the writ of garnishment was served on the garnishee. If that which is garnished is an account, such as a bank account or the like, the copies of the writ of garnishment, answers to interrogatories, notice of garnishment and exemptions, and applications for hearing shall be served at the addresses maintained in the records of the garnishee for that account. Service shall be by first class mail or by hand delivery to the defendant and all others. In the answer to interrogatories, the garnishee shall state that the garnishee has mailed or hand delivered a copy of the writ of garnishment, answers to interrogatories, notice of garnishment and exemptions, and two copies of an application by which a hearing may be requested to the defendant and all other persons entitled thereto and state the manner and date of compliance therewith.

(iv) The notice of garnishment and exemptions that is to be served upon the defendant and others entitled to its receipt shall indicate in substance that certain money is exempt from garnishment including but not limited to, Social Security benefits, Supplemental Security Income benefits, Veterans' benefits, unemployment benefits, Workers' Compensation benefits, public assistance (welfare), alimony, child support, certain pensions, and part or all of wages or other earnings from personal services. The notice shall also indicate that the defendant or other person notified must request a hearing within ten days from the date of service of the notice upon the defendant or other person, but in no case later than the time at which the court orders the disposition of the Property

Subject to Garnishment provided for herein, which shall not be sooner than ten (10) days from the service of the notice, if such defendant or other person desires to claim any exemption that has not already been reflected in the answers to interrogatories, believes that the writ of garnishment was issued improperly, or that the answers to interrogatories are inaccurate. For purposes of this provision, the date of service shall be the date of mailing, if mailed, or date of delivery, if hand-delivered, and no period for mailing (Rule 6(e)) shall be used in computing the time period.

(v) Priority among writs of garnishment served upon a garnishee shall be in order of their service.

(vi) A writ of garnishment attaching earnings for personal services shall attach only that portion of the defendant's accrued and unpaid disposable earnings hereinafter specified. The writ shall so advise the garnishee and shall direct the garnishee to withhold from the defendant's accrued disposable earnings only the amount attached pursuant to the writ. Earnings for personal services shall be deemed to accrue on the last day of the period in which they were earned or to which they relate. If the writ is served before or on the date the defendant's earnings accrue and before the same have been paid to the defendant, the writ shall be deemed to have been served at the time the periodic earnings accrued;

(vii) "Earnings" or "earnings from personal services" means compensation paid or payable for personal services, whether denominated as wages, salary, commission, bonus, or otherwise, and includes periodic payments pursuant to a pension or retirement program. "Disposable earnings" means that part of a defendant's earnings remaining after the deduction of all amounts required by law to be withheld. For purposes of a garnishment to enforce payment of a judgment arising out of a failure to support dependent children, earnings also include, in addition to those items listed above, periodic payments pursuant to insurance policies of any type, including unemployment compensation, insurance benefit payments, and all gain derived from capital, from labor, or from both combined, including profit gained through sale or conversion of capital assets or as otherwise modified or adopted by law for the support of dependent children.

(viii) The maximum portion of the aggregate disposable earnings of defendant (if an individual) becoming due the defendant which is subject to garnishment is the lesser of:

(A) Twenty-five per centum of defendant's disposable earnings (fifty per centum for a garnishment to enforce payment of a judgment arising out of failure to support dependent children) computed for the pay period for which the earnings accrued; or

(B) The amount by which the defendant's aggregate disposable earnings computed for the pay period for which the earnings accrued exceeds the number of weeks in the period multiplied by thirty times the federal minimum hourly wage prescribed by the Fair Labor Standards Act in effect at the time the earnings are payable.

(ix) Unless otherwise ordered by the Court, the garnishee shall treat the defendant's earnings becoming due from the garnishee as the defendant's entire aggregate earnings for the purpose of computing the sum attached by the garnishment.

(e) **Service of writ; return; general service (Pre-judgment or after judgment).** The writ, any order pursuant to subdivision(s) of this rule, and any order pursuant to Rule 64A(2) shall be served upon the garnishee by a sheriff,

order and return thereof made in the same manner as a return of service upon a summons. All other service may be by first class mail or hand delivery.

(f) **Release or discharge of garnishment (Pre-judgment or after judgment).** At any time either before or after the service of any writ of garnishment, the defendant may obtain a release or discharge thereof in the same manner and under the same conditions as a release or discharge of a writ of attachment may be obtained under the provisions of Subdivision (f) of Rule 64C. The plaintiff may release a writ of garnishment by filing with the clerk a release of garnishment and serving a copy thereof upon the garnishee.

(g) **Answer of garnishee; delivery of property (Pre-judgment or after judgment).** The garnishee shall, within the time required by Subdivision (d)(ii) hereof, serve upon the court and the plaintiff verified answers to the interrogatories and provide proof(s) of service upon defendant of the copy of the writ of garnishment, answers to interrogatories, the notice of garnishment and exemptions, and the applications by which a hearing may be requested, stating the manner and date of service. The garnishee may also deliver to the officer serving the writ the Property Subject to Garnishment as shown by the answer of the garnishee, and the officer shall make return of such property and money with the writ to the court, to be dealt with as thereafter ordered by the court. Thereupon, the garnishee shall be relieved from further liability in the proceedings, unless the answer shall be successfully controverted as hereinafter provided or the garnishee has willfully failed to serve copies of the writ of garnishment, answers to interrogatories, notice of garnishment and exemptions, and the applications by which a request for a hearing may be made on the defendant and other persons entitled thereto.

(h) **Procedure (Pre-judgment or after judgment).** The defendant or any other person who owns or claims an interest in the property subject to garnishment that is garnisheed may request a hearing to claim any exemption to the garnishment, or to challenge the issuance of the writ or the accuracy of the answers to interrogatories. Such request must be filed within ten days of the service (for purposes of this provision the date of service shall be the date of mailing if mailed or date of delivery if hand-delivered and no period for mailing pursuant to Rule 6(e) shall be used in computing the time period) of the copy of the materials required to be served by Subdivision (d)(iii) upon the defendant and all others entitled to receive the same. A request for hearing filed prior to any request for the issuance of an Order to the garnishee to pay Property Subject to Garnishment shall be deemed as timely filed. The request for a hearing, which shall be provided by the garnishee to the defendant and other persons shall be in a form to enable the defendant or other person to specify the grounds upon which the defendant challenges the issuance of the writ or the accuracy of the answers to interrogatories, or claims the amount garnisheed to be exempt, in whole or in part, including, but not limited to exemptions claimed for Social Security benefits, Supplemental Security Income benefits, Veterans' benefits, unemployment benefits, Workers' Compensation benefits, public assistance (welfare) benefits, alimony and child support, pensions, wage or other earnings for personal service, and non-ownership of the garnisheed property. Where personal services are compensated, but no amounts are required by law to be withheld, the amounts that would have been required to be withheld by law had the defendant been an employee of the garnishee are exempt.

(i) **If no request for hearing is filed.** If a request for hearing is not filed as provided for in this Rule and the time for doing so has expired and the writ of garnishment was issued in aid of execution of a judgment or order for

plaintiff's request, shall release the Property Subject to Garnishment paid into court to plaintiff or plaintiff's attorney, or shall issue an order to the garnishee to pay the Property Subject to Garnishment that was withheld by the garnishee directly to plaintiff or plaintiff's attorney or as otherwise ordered by the court. If a request for hearing is not filed as provided for in this Rule and the time for doing so has expired and the writ issued was a prejudgment writ of garnishment, then the court or the clerk, upon plaintiff's request, shall issue an order to the garnishee to pay the Property Subject to Garnishment into court by delivery of such property to the sheriff or constable for that purpose. Property Subject to Garnishment that is paid into court pursuant to a prejudgment writ of garnishment or at any time when a request for hearing has been filed shall be held by the clerk pending order of the court.

(ii) **Effect of failure to request hearing.** If the defendant or any other person to whom the materials required to be served by Subdivision (d)(iii) fails to request a hearing as provided for herein, then defendant and such other persons shall be deemed to have accepted as correct the garnishee's answers to interrogatories and the amounts stated therein to be not exempt from garnishment except as reflected in the answers to interrogatories.

(iii) **If a request for hearing is filed.** If a request for hearing is filed by or on behalf of the defendant or by any other person, the court shall set the matter for hearing within ten (10) days from the filing of the request and serve notice of that hearing upon all parties and claimants by first class mail. If the court determines at the hearing that the writ was issued improperly, that the answers to interrogatories are inaccurate, or that any assets garnished are exempt from or are not subject to garnishment, the court shall immediately issue an order to the garnishee releasing such assets or portion thereof from the writ of garnishment. If the court finds that the assets or a portion thereof are subject to garnishment and not exempt, it shall issue an order to pay the Property Subject to Garnishment directly to plaintiff or plaintiff's attorney or as otherwise ordered by the court, except in the case of a prejudgment writ of garnishment where the order shall require that such property be paid into court by delivery of such property to the sheriff or constable for that purpose. Property Subject to Garnishment that is paid into court shall be held by the clerk pending order of the court.

(iv) **If the property is other than money or its equivalent.** Where the property is other than money or its equivalent, the court shall order that the garnishee deliver such property to the sheriff, constable, deputy, or such other person designated by court order. In the case of a writ issued after judgment, the person to whom the property was delivered shall sell as much of such property as may be necessary to satisfy the judgment together with costs of the garnishment proceedings and deposit the proceeds into court to be distributed by order of the court. Any surplus of such personal property or the proceeds thereof necessary to satisfy the writ of garnishment shall be returned to the defendant unless otherwise ordered by a court of competent jurisdiction. In the case of a prejudgment writ, the person to whom the property is delivered shall maintain possession of the property until further order of the court.

(i) **Reply to answer of garnishee; trial of issues; judgment (Pre-judgment or after judgment).** The plaintiff or defendant may, within 10 days after the service of any answers to interrogatories, file and serve upon the garnishee

and the other party to the principal action a reply to the whole or any part thereof and may also allege any matters which would charge the garnishee with liability except that all claims for exemptions to garnishment or non-ownership of property garnished shall be resolved under the procedures as otherwise provided for in Subdivision (h) herein. Such new matter in reply shall be taken as denied and the matter thus at issue shall be tried in the same manner as other issues of like nature. Judgment shall be entered upon the verdict or finding the same as if the garnishee had answered according to such verdict or finding. Costs shall be awarded in accordance with the provisions of Rule 54(d).

(j) **Proceedings on failure of garnishee to comply with rule (Pre-judgment or after judgment).** If a garnishee fails to answer interrogatories after payment of the required fee, or if any garnishee shall fail to send to the defendant the copy of the writ, answers to interrogatories, notice and applications required by Sections (d)(iii) of this Rule, the court may order the garnishee to appear before the court and show cause why the garnishee should not be held in contempt therefor and why the court should not order the garnishee to pay expenses and costs incurred by other parties to the proceeding as a result of garnishee's failure. After the garnishee has been personally served with an order to appear before the court and show cause, the court may make such orders as are just. Unless the court finds there was substantial justification for the garnishee's failure or that other circumstances make an award of expenses or costs unjust, the court shall order the garnishee to pay reasonable expenses, including attorney's fees, incurred as a result of garnishee's failure.

(k) **Release of garnishee for amount paid (Pre-judgment or after judgment).** Except as provided for herein, a garnishee who acts in accordance with this Rule shall be released from all demands by the defendant for all Property Subject to Garnishment that is paid, delivered or accounted for by the garnishee pursuant to this Rule.

(l) **Interpleader of third persons (Pre-judgment or after judgment).** When any person other than the defendant claims or may claim that the property held in the possession, custody, or control of the garnishee pursuant to a Writ is not subject to garnishment, the court may on motion order that such claimant be interpleaded as a defendant to the garnishment action, and if not already subject to the jurisdiction of the court, provide for notice thereof, in such form as the court shall direct, together with service of a copy of the order upon such third-party claimant in the manner required for the service of a summons. Thereupon the garnishee may pay or deliver to the court such property held pursuant to the Writ, which shall be a complete discharge from all liability to any party for the amount so paid or property so delivered. The third-party claimant shall thereupon be deemed a defendant to the garnishment action and shall answer within 10 days, setting forth any claim or defense. In case of default, judgment may be rendered as in any other cases of default which shall extinguish any claim of such third-party claimant.

(m) **Claims of garnishee against plaintiff or defendant (Pre-judgment or after judgment).** Every garnishee shall be allowed to retain or deduct out of the Property Subject to Garnishment all demands against the plaintiff and against the defendant of which the garnishee could have availed itself if the garnishee had not been served as garnishee, whether the same are at the time due or not so long as the claims are liquidated, but only to the extent that the amounts retained and deducted are applied to reduce a debt or other obligation of the plaintiff or defendant, except that should such property, otherwise subject to garnishment, be held as security for the payment of a debt or other obligation of the defendant to the garnishee, then such property need not be applied at that time but must remain subject to being applied at any time pending

the payment in full of the debt or other obligation. In answering the interrogatories propounded to the garnishee, the garnishee shall specify the amount retained or deducted and the person against whom the claim is made. Amounts retained and deducted for amounts owed by the plaintiff to the garnishee shall also be applied in reduction of any judgment amount rendered in favor of plaintiff and against defendant. All amounts properly garnisheed in excess of those amounts retained or deducted pursuant to this subdivision are subject to payment and distribution in accordance with this Rule.

(n) **Liability of garnishee on negotiable instruments (Pre-judgment or after judgment).** No person shall be liable as garnishee by reason of having drawn, accepted, made or endorsed any negotiable instrument which is not in the possession, custody, or control of the garnishee at the time of service of the writ of garnishment.

(o) **When garnishee is mortgagee or pledgee (Pre-judgment or after judgment).** When any Property Subject to Garnishment is mortgaged or pledged, or in any way held for the payment of a debt to the garnishee, the plaintiff may obtain an order from the court authorizing the plaintiff to pay the total amount of the obligation to the garnishee in accordance with the terms of the mortgage, pledge or obligation, and requiring the garnishee to deliver such Property Subject to Garnishment according to the order of the court upon payment to such garnishee of the total obligation.

(p) **Where property is held to secure performance of other obligation (Pre-judgment or after judgment).** If the Property Subject to Garnishment secures any obligation other than the payment of money and if the obligation secured does not require the personal performance of the defendant and can be performed by the plaintiff or its designee, the court may, upon plaintiff's motion, authorize the plaintiff or its designee to perform the obligation or tender performance and that upon such performance, or any tender thereof which is refused, the garnishee shall deliver the Property Subject to Garnishment in accordance with the order of the Court.

(q) **Disposition of property (Pre-judgment or after judgment).** The Property Subject to Garnishment under either Subdivision (o) or (p) of this Rule or the proceeds from the sale thereof shall be applied to the extent available, first to satisfy any costs of sale, then to repay any amount paid by the plaintiff to the garnishee to satisfy the obligation of the defendant to the garnishee, then to pay the costs to perform the obligation of the defendant to the garnishee for an obligation other than the payment of money, and then to satisfy the writ of garnishment.

(r) **Order against garnishee for debt not due (Pre-judgment or after judgment).** When an order is made requiring a garnishee to pay an amount to the plaintiff or plaintiff's attorney or into court or otherwise provide property for disposition by the court and the same is not yet due to the defendant, payment or providing of property shall not be required until such payment or property is otherwise due the defendant from the garnishee.

(s) **Failure to proceed against garnisheed property (Pre-judgment or after judgment).** Notwithstanding any other provision of this Rule, if a plaintiff fails, within sixty days from the filing of the garnishee's answers to interrogatories, to secure and personally serve on the garnishee an order requiring the garnishee to pay the property garnisheed into court or as otherwise provided herein, then the writ, which commanded the garnishee to hold the amount or property, shall be released and the garnishee discharged without further order of the court. If the Property Subject to Garnishment or any part thereof has been deposited with the court and the writ of garnishment was issued in aid of the execution of a judgment or order for the payment of money,

garnishee's answers to interrogatories, to request a release of the property garnisheed from the court in accordance with Subdivision (h)(i), then the writ shall be released; the garnisheed property shall be returned to the garnishee; and the garnishee discharged without further order of the court. Property Subject to Garnishment deposited with the court pursuant to a prejudgment writ of garnishment shall be released only upon order of the court. A release under this subdivision may be stayed upon order of the court for good cause shown. Such order shall not be binding upon the garnishee until served upon it.

(t) **Costs (Pre-judgment or after judgment).**

(i) Costs shall be allowed as a matter of course to the plaintiff and against the defendant in the pursuit of any garnishee action instituted after judgment unless the court otherwise directs; provided, however, where an appeal or other proceeding for review is taken, costs of the garnishee action shall abide the final determination of the cause. Costs against the State of Utah, its officers and agencies shall be imposed only to the extent permitted by law.

(ii) The plaintiff must serve upon the defendant a copy of a memorandum of the items of necessary costs and disbursements in the garnishee action or actions, and file with the court a like memorandum duly verified stating that the items are correct, the disbursements have been necessarily incurred in the garnishee action, and the items of costs have not been claimed in any previous memorandum. The memorandum or memoranda may be filed at any time after judgment is rendered but in no event later than five days after the receipt of funds that would pay the judgment in full but for the payment of any costs associated with a garnishee action for which a memorandum or memoranda have not been filed with the court. A party dissatisfied with the costs claimed, may, within seven days after service of the memorandum of costs of the garnishee action, file a motion to have the costs taxed by the court.

(iii) All costs incurred in garnishee actions prior to the rendering of a judgment shall be taxed according to Rule 54(d) of these rules.

(u) (i) A garnishment issued to enforce a judgment obtained by the Office of Recovery Services, within the Department of Social Services, for repayment of overpayments, as defined in Section 62A-11-202, shall continue to operate and require the garnishee to withhold the nonexempt portion of disposable earnings, as defined in Subsection 62A-11-103(2), at each succeeding earnings disbursement interval until the garnishment is released in writing by the court or the Office of Recovery Services.

(ii) The garnishment described in Subdivision (u)(i) may not exceed 25% of earnings, as defined in Subsection 62A-11-103(3), or the amount permitted under Section 303(a) of the Consumer Credit Protection Act, 15 U.S.C. Section 1673(a), whichever is less.

(Amended effective April 24, 1989; April 1, 1990.)

Rule 64E. Application of rule to other parties.

The foregoing provisions of Rules 64A, 64B, 64C, and 64D authorizing provisional remedies to the plaintiff in an action shall likewise be available to a defendant or other party who has filed a counterclaim, cross-complaint, or other claim seeking an affirmative judgment, the party seeking such affirmative judgment being deemed the plaintiff, the party against whom the judgment is sought being deemed the defendant, and the counterclaim, cross-complaint or other claim being deemed the complaint.

Rule 64F. Waiver of bond or undertaking.

Notwithstanding the provisions of Rules 64B, 64C and 64D

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be just, subject to the further direction of the court; provided that if money is paid into court under this rule it shall be deposited and withdrawn in accordance with Section 78-27-4, Utah Code Annotated 1953, or any like statute.

Rule 68. Offer of judgment.

(a) **Tender of money before suit.** When in an action for the recovery of money only, the defendant alleges in his answer that before the commencement of the action he tendered to the plaintiff the full amount to which the plaintiff was entitled, and thereupon deposits in court for the plaintiff the amount so tendered, and the allegation is found to be true, the plaintiff cannot recover costs, but must pay costs to the defendant.

(b) **Offer before trial.** At any time more than 10 days before the trial begins, a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against him for the money or property or to the effect specified in his offer, with costs then accrued. If within 10 days after the service of the offer the adverse party serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance together with proof of service thereof and thereupon judgment shall be entered. An offer not accepted shall be deemed withdrawn and evidence thereof is not admissible except in a proceeding to determine costs. If the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer. The fact that an offer is made but not accepted does not preclude a subsequent offer.

Rule 69. Execution and proceedings supplemental thereto.

(a) **Availability of writ of execution.** A writ of execution is available to a judgment creditor to satisfy a judgment or other order requiring the delivery of property or the payment of money by a judgment debtor.

(b) **Property subject to execution.** A writ of execution may be used to levy upon all of the judgment debtor's personal property and real property which is not exempt from execution under state or federal law.

(c) **Issuance of writ of execution.** Unless otherwise ordered by the court, a writ of execution may be issued at any time within eight years following the entry of a judgment or order (except an execution may be stayed pursuant to Rule 62), either in the county in which such judgment was rendered, or in any county in which a transcript thereof has been filed and docketed in the office of the clerk of the district court. Notwithstanding the death of a party after judgment, execution thereon may be issued, or such judgment may be enforced, as follows:

(1) In case of the death of the judgment creditor, upon the application of an authorized executor or administrator, or successor in interest.

(2) In case of the death of the judgment debtor, if the judgment is for the recovery of real or personal property or the enforcement of a lien thereon.

(d) **Contents of writ and to whom it may be directed.** The writ of execution shall be issued in the name of the State of Utah, and subscribed by the clerk of the court. It shall be issued to the sheriff or constable of any county in the state (and may be issued at the same time to different counties) but where it requires the delivery of possession or sale of real property, it shall be issued to the sheriff of the county where the real property or some part thereof is situated. If it requires delivery of possession or sale of personal property, it may be issued to a constable. It must intelligibly refer to the judgment, stating the court, the docket number, the county where the same is entered or docketed, the names of the parties, the judgment, and, if it is for the

actually due thereon. The writ may be accompanied by a praecipe executed by the judgment creditor or the judgment creditor's counsel generally or specifically describing the real or personal property to be levied upon. It shall be directed to the sheriff of the county in which it is to be executed in cases involving real property, and shall require the officer to proceed in accordance with the terms of the writ; provided that if such writ is against the property of the judgment debtor generally it may direct the sheriff or constable to satisfy the judgment, with interest, out of the non-exempt personal property of the debtor, and if sufficient non-exempt personal property cannot be found, then the sheriff shall satisfy the judgment, with interest, out of the judgment debtor's non-exempt real property.

(e) **When writ to be returned.** The writ of execution shall be served at any time within sixty days after its receipt by the officer. It shall then be returned to the court from which it issued, and when it is returned the clerk must attach it to the record.

(f) **Service of the writ.** Unless the execution otherwise directs, the officer must execute the writ against the non-exempt property of the judgment debtor by levying on a sufficient amount of property, if there is sufficient property; collecting or selling the choses in action and selling the other property in the manner set forth herein. Levy includes the seizure of the property and holding the property in person or through one or more agents, including the judgment debtor, appointed by the officer. When there is more property of the judgment debtor than is sufficient to satisfy the judgment and accruing costs within view of the officer, the officer must levy only on such part of the property as the judgment debtor may indicate, if the property indicated is amply sufficient to satisfy the judgment and costs.

When an officer has served an execution issued out of any court the officer may complete the return thereof after such date of service.

(g) **Notice to judgment debtor of sale and of exempt property and right to a hearing.** At the time the writ of execution is issued, the clerk shall attach to the writ a notice of execution and exemptions and right to a hearing and two copies of an application by which the judgment debtor may request a hearing.

Upon service of the writ, the sheriff or constable shall serve upon the judgment debtor, in the same manner as service of a summons in a civil action, or cause to be transmitted by both regular and certified mail, returned receipt requested, to the judgment debtor's last known address as provided by the judgment creditor, (i) the notice of execution and exemptions and right to a hearing, and (ii) the application by which the judgment debtor may request a hearing. Upon service of the writ, the sheriff or constable may also set the date of sale or delivery and serve upon the judgment debtor notice of the date and time of sale or delivery in the same manner as service of the notice of execution and exemptions and right to a hearing.

The notice of execution and exemptions that is to be served upon the judgment debtor shall indicate in substance that certain property is or may be exempt from execution including but not limited to a homestead; tools of the trade; a motor vehicle used for the judgment debtor's business or profession; social security benefits; supplemental security income benefits; veterans' benefits; unemployment benefits; workers' compensation benefits; public assistance (welfare); alimony; child support; certain pensions; part or all of wages or other earnings from personal services; certain furnishings and appliances; musical instruments; and heirlooms (each not to exceed the amount allowed by law). The notice shall also indicate that the list is a partial list and other various property exemptions may be available under federal law or the Utah exemptions statute, and that the judgment debtor

must request a hearing within ten (10) days from the date of service of the notice upon the judgment debtor. For purposes of this provision, the date of service shall be the date of mailing, if mailed, or date of delivery, if hand-delivered, and no period for mailing under Rule 6(e) shall be used in computing the time period.

If the writ, the notice of execution and exemptions and right to a hearing cannot be served upon the judgment debtor in the same manner as service of a summons in a civil action, and the judgment creditor does not have available the judgment debtor's last known address, only the following notice need be published under the caption of the case in a newspaper of general circulation in each county in which the property levied upon, or some part thereof, is situated:

TO _____, Judgment Debtor:

A writ of execution has been issued in the above-captioned case, directed to the sheriff or constable of _____ County, commanding the sheriff or constable as follows:

"WHEREAS, _____ [Quoting body of writ of execution]."

YOU MAY HAVE A RIGHT TO EXEMPT PROPERTY from the sale under statutes of the United States or this state, including Utah Code Annotated, Title 78, Chapter 23, in the manner described in those statutes.

The date of publication shall be deemed the date of service and the date of publication shall be not less than ten (10) days prior to the date of sale or delivery.

This paragraph (g) shall not be applicable to judicial mortgage foreclosure proceedings commenced under Utah Code Annotated, Title 78, Chapter 37.

(h) Request for hearing.

(1) **Time for request.** The judgment debtor or any other person who owns or claims an interest in the property subject to execution may request a hearing to claim any exemption to the execution, or to challenge the issuance of the writ. Such request must be filed or served upon the judgment creditor or the attorney for the judgment creditor within ten (10) days of the service upon the judgment debtor of the materials required to be served by paragraph (g) upon the judgment debtor. The request for a hearing, which shall be provided to the judgment debtor shall be in a form to enable the judgment debtor to specify the grounds upon which the judgment debtor challenges the issuance of the writ or claims the property executed upon to be exempt, in whole or in part.

(2) **If a request for hearing is filed.** If a request for hearing is filed by or on behalf of the judgment debtor, the court shall set the matter for hearing within ten (10) days from the filing of the request and serve notice of that hearing upon all parties by first class mail. If the court determines at the hearing that the writ was issued improperly, or that any property seized is exempt from or is not subject to execution, the court shall immediately issue an order to the officer releasing such property or portion thereof from the writ of execution. If the court finds that the property or a portion thereof is subject to execution and not exempt, it shall issue an order directing the officer to proceed with the sale of the non-exempt property subject to execution. If the originally scheduled date of sale for which notice has been given has passed, notice of the new date and time of sale shall be provided as required herein. No sale may be held until the Court has decided upon the issues presented at the hearing. At the hearing, the court may award costs as it deems appropriate.

(3) **If no request for hearing is filed.** If a request for

time for doing so has expired, then the officer shall proceed to sell or deliver the property subject to execution in accordance with the writ and this Rule 69.

(4) This paragraph (h) shall not be applicable to judicial mortgage foreclosure proceedings commenced under Utah Code Annotated, Title 78, Chapter 37.

(i) Proceedings on sale of property.

(1) **Notice of sale.** Before the sale of the property on execution notice thereof must be given as follows: (A) in case of perishable property or animals, by posting written notice of the time and place of sale, and generally describing the property to be sold, in the district courthouse and in at least three other public places of the county or city where the sale is to take place, for such a time as may be reasonable, considering the character and condition of the property; (B) in case of other personal property, by posting written notice of the time and place of sale, and generally describing the property to be sold, in the district courthouse and in at least three public places of the county or city where the sale is to take place, for not less than seven nor more than 14 days, and by publishing a copy thereof at least one time not less than one day preceding the sale in some newspaper of general circulation published or circulated in the county where the sale is to take place, if there is one; (C) in case of real property, by posting written notice of the time and place of sale, and particularly describing the property, for 21 days, on the property to be sold, at the place of sale, at the district courthouse of the county where the real property to be sold is situated, and in at least three public places of the county or city where the sale is to take place, and by publishing a copy thereof at least 3 times, once a week for 3 successive weeks immediately preceding the sale, in some newspaper of general circulation published or circulated in the county, if there is one. In addition, except for the sale of perishable property or animals, if notice of the date and time of sale has not been served upon the judgment debtor previously, notice of the date and time of sale shall be served upon the judgment debtor personally or by causing the same to be transmitted by regular or certified mail to the judgment debtor's last known address.

(2) **Postponement.** If at the time and place appointed for the sale of any real or personal property on execution the officer shall deem it expedient and for the interest of all persons concerned to postpone the sale for want of purchasers, or other sufficient cause, the officer may postpone the same from time to time, until the same shall be completed; and in every such case the officer shall make public declaration thereof at the time and place previously appointed for the sale, and if such postponement is for a longer time than 72 hours, notice thereof shall be given in the same manner as the original notice of such sale is required to be given.

(3) **Conduct of sale.** All sales of property under execution must be made at auction to the highest bidder, Monday through Saturday, legal holidays excluded, between the hours of 9 o'clock a.m. and 8 o'clock p.m. After sufficient property has been sold to satisfy the execution no more shall be sold. Neither the officer holding the execution nor such officer's deputy shall become a purchaser, or be interested in any purchase at such sale. When the sale is of personal property capable of manual delivery it must be within view of those who attend the sale. The sale must be held in a place reasonably accessible to the general public. The property must be sold in such parcels as are likely to bring the highest price; and when the sale is of real property, consisting of several known lots or parcels, they must be sold separately; or when a portion of such real property is claimed by a third

person, and the third person requires it to be sold separately, such portion must be thus sold. All sales of real property must be made at the courthouse of the county in which the property, or some part thereof, is situated. The judgment debtor, if present at the sale, may also direct the order in which the property, real or personal, shall be sold, when such property consists of several known lots or parcels, or of articles which can be sold to advantage separately, and the officer must follow such directions. The officer shall pay to the judgment creditor or the attorney for the judgment creditor so much of the sales proceeds as will satisfy the judgment. Any excess in the proceeds over the judgment and reasonable accrued costs must be returned to the judgment debtor, unless otherwise directed by the judgment or the court.

(4) **Accounting of sale.** Upon request of the judgment debtor or the judgment debtor's attorney, the plaintiff shall deliver an accounting of any execution sale, including the amount due on the judgment, accrued costs, and the amount realized at the sale.

(5) **Purchaser refusing to pay.** Every bid shall be deemed an irrevocable offer; and if the purchaser refuses to pay the amount bid for the property struck off to such purchaser at a sale under execution, the officer may again sell the property at any time to the highest bidder, and if any loss is occasioned thereby, the party refusing to pay, in addition to being liable on such bid, is guilty of a contempt of court and may be punished accordingly. When a purchaser refuses to pay, the officer may also, in such officer's discretion, thereafter reject any other bid of such person.

(6) **Personal property.** When the purchaser of any personal property pays the purchase money, the officer making the sale shall deliver the property to the purchaser (if such property is capable of manual delivery) and shall execute and deliver to the purchaser a certificate of sale and payment. Such certificate shall state that all right, title and interest which the debtor had in and to such property on the day the execution or attachment was levied, and any right, title and interest since acquired, is transferred to the purchaser.

(7) **Real property.** Upon a sale of real property the officer shall give to the purchaser a certificate of sale, containing: (A) a particular description of the real property sold; (B) the price paid by the purchaser for each lot or parcel if sold separately; (C) the whole price paid; (D) a statement to the effect that all right, title, interest and claim of the judgment debtor in and to the property is conveyed to the purchaser; provided that where such sale is subject to redemption that fact shall be stated also. A duplicate of such certificate shall be filed for record by the officer in the office of the recorder of the county. The real property sold shall be subject to redemption, except where the estate sold is less than a leasehold of a two-years' unexpired term, in which event said sale is absolute.

(j) **Redemption of real property from sale.**

(1) **Who may redeem.** Real property sold subject to redemption, or any part sold separately, may be redeemed by the following persons or their successors in interest: (A) the judgment debtor; (B) a creditor having a lien by judgment, mortgage, or other lien on the property sold, or on some share or part thereof, subsequent to that on which the property was sold.

(2) **Redemption; how made.** The person seeking redemption may make payment of the amount required to the person from whom the property is being redeemed, or for such person to the officer who made the sale, or such officer's successor in office. At the same time the redemptioner must produce to the officer or person from whom the redemptioner seeks to redeem, and serve with the

notice to the officer; (A) a certified copy of the judgment under which the redemptioner claims the right to redeem, or, if the redemptioner redeems upon a mortgage or other lien, a copy certified by the recorder; (B) an assignment, properly acknowledged or proved where the same is necessary to establish the claim; (C) an affidavit by the redemptioner or an authorized agent showing the amount then actually due on the judgment, mortgage or other lien.

(3) **Time for redemption; amount to be paid.** The property may be redeemed within six months after the sale by paying the amount of the purchase with a surcharge of 6 percent thereon in addition, together with the amount of any assessment or taxes, and any reasonable sum for fire insurance and necessary maintenance, upkeep, or repair of any improvements upon the property, which the purchaser may have paid thereon after the purchase, with interest at the lawful rate on such other amounts, and, if the purchaser is also a creditor having a lien prior to that of the person seeking redemption, other than the judgment under which said purchase was made, the amount of such other lien, with interest.

In the event there is a disagreement as to whether any sum demanded for redemption is reasonable or proper, the person seeking redemption may pay the amount necessary for redemption, less the amount in dispute, to the court out of which execution or order authorizing the sale was issued, and at the same time file with the court and serve upon the purchaser a petition setting forth the item or items demanded to which the redemptioner objects, together with the grounds of objection; and thereupon the court shall enter an order fixing a time for hearing of such objections. A copy of the order fixing time for hearing shall be served on the purchaser not less than five days before the day of hearing. Upon the hearing of the petition the court shall enter an order determining the amount required for redemption. In the event an additional amount to that theretofore paid to the clerk is required, the person seeking redemption shall pay to the clerk such additional amount within 7 days. The purchaser shall forthwith execute and deliver a proper certificate of redemption upon being paid the amount required by the court for redemption.

(4) **Subsequent redemptions.** If the property is redeemed by a creditor, any other creditor having a right of redemption may, within 60 days after the last redemption and within six months after the sale, redeem the property from such last redemptioner in the same manner as provided in the preceding paragraph, upon paying the sum of such last redemption, with a surcharge of three percent thereon in addition, and the amount of any assessment or tax, and any reasonable sum for fire insurance and necessary maintenance, upkeep or repair of any improvements upon the property which the last redemptioner may have paid thereon, with interest on such amount, and, in addition, the amount of any lien held by such last redemptioner prior to the redemptioner's own, with interest.

(5) **Notice of redemption.** Written notice of any redemption shall be given to the officer and a duplicate filed with the recorder of the county. Similar notice shall be given of any taxes or assessments or any sums for fire insurance, and necessary maintenance, upkeep or repair of any improvements upon the property, paid by the person redeeming, or the amount of any lien acquired, other than upon which the redemption was made. Failure to file such notice shall relieve any subsequent redemp-

tioner of the obligation to pay such taxes, assessments, or other liens.

(6) **Certificate of redemption or conveyance.** If no redemption is made within six months after the sale, the purchaser or the purchaser's assignee is entitled to a conveyance; or if so redeemed, whenever 60 days have elapsed and no other redemption by a creditor has been made and notice thereof has been given, the last redemption, or assignee, is entitled to a sheriff's deed at the expiration of six months after the sale. If the judgment debtor redeems, the judgment debtor must make the same payments as are required to effect a redemption by a creditor. If the debtor redeems, the effect of the sale is terminated and the debtor is restored to the debtor's estate. Upon a redemption by the debtor, the person to whom the payment is made must execute and deliver to the debtor a certificate of redemption, duly acknowledged. Such certificate must be filed and recorded in the office of the county recorder where the property is situated.

(7) **Rents during period of redemption.** The purchaser from the time of sale until a redemption, and a redemptioner from the time of redemption until another redemption, is entitled to receive from any tenant in possession the rents of the property sold or the value of the use and occupation thereof. But when any rents or profits have been received by the judgment creditor or purchaser, or their assigns, from the property thus sold preceding such redemption, the amounts of such rents and profits shall be a credit upon the redemption money to be paid; and if the redemptioner or judgment debtor, before the expiration of the time allowed for such redemption, demands in writing of such purchaser or creditor, or their assigns, a written and verified statement of the amounts of such rents and profits thus received, the period for redemption is extended five days after such sworn statement is given by such purchaser or such purchaser's assigns to such redemptioner or debtor. If such purchaser or such purchaser's assigns shall for a period of one month from and after such demand, fail or refuse to give such statement, such redemptioner or debtor may, within 60 days after such demand, bring an action to compel an accounting and disclosure of such rents and profits, and until 15 days from and after the final determination of such action the right of redemption is extended to such redemptioner or debtor.

(k) **Remedies of purchaser.**

(1) **For waste.** Until the expiration of the time allowed for redemption, the court may restrain the commission of waste on the property, upon motion, with or without notice, of the purchaser, or such purchaser's successor in interest. But it is not waste for the person in possession of the property at the time of sale, or entitled to possession afterwards, during the period allowed for redemption, to continue to use it in the same manner in which it was previously used, or to use it in the ordinary course of husbandry, or to make the necessary repairs or buildings thereon or to use wood or timber on the property therefor, or for the repair of fences, or for fuel for a family while such person occupies the property. After the estate has become absolute, the purchaser or a successor in interest may maintain an action to recover damages for injury to the property by the tenant or other person in possession after sale and before possession is delivered under the conveyance.

(2) **Where purchaser fails to obtain possession of property or is dispossessed thereof or evicted therefrom.** Where, because of irregularities in the proceedings concerning the sale, or because the property sold was not subject to execution and sale, or because of the

reversal or discharge of the judgment, a purchaser of property sold on execution, or a successor in interest, fails to obtain the property or is dispossessed thereof or evicted therefrom, the court having jurisdiction thereof shall, on motion of such party and after such notice to the judgment creditor as the court may prescribe, enter judgment against such judgment creditor for the price paid by the purchaser, together with interest. In the alternative, if such purchaser or a successor in interest, fails to recover possession of any property or is dispossessed thereof or evicted therefrom in consequence of irregularity in the proceedings concerning the sale, or because the property sold was not subject to execution and sale, the court having jurisdiction thereof shall, on motion of such party and after such notice to the judgment debtor as the court may prescribe, revive the original judgment in the name of the petitioner for the amount paid by such purchaser at the sale, with interest thereon from the time of payment at the same rate that the original judgment bore; and the judgment so revived shall have the same force and effect as would an original judgment of the date of the revival.

(l) **Contribution and reimbursement; how enforced.**

When upon an execution against several persons more than a pro rata part of the judgment is satisfied out of the proceeds of the sale of the property of one, or one of them pays, without a sale, more than such person's proportion, and the right of contribution exists, such person may compel such contribution from the others; and where a judgment against several is upon an obligation of one or more as security for the others, and the surety has paid the amount or any part thereof, by sale of property or otherwise, the surety may require reimbursement from the principal. The person entitled to contribution or reimbursement shall, within one month after payment, or sale of the property in the event there is a sale, file in the court where the judgment was rendered a notice of such payment and the claim for contribution or reimbursement. Upon the filing of such notice the clerk must make an entry thereof in the margin of the docket which shall have the effect of a judgment against the other judgment debtors to the extent of their liability for contribution or reimbursement.

(m) **Payment of judgment by person indebted to judgment debtor.** After the issuance of an execution and before its return, any person indebted to the judgment debtor may pay to the officer the amount of the debt, or so much thereof as may be necessary to satisfy the execution, and the officer's receipt is a sufficient discharge for the amount paid.

(n) **Where property is claimed by third person.** If an officer shall proceed to levy any execution on any goods or chattels claimed by any person other than the defendant, or should the officer be requested by the judgment creditor so to do, such officer may require the judgment creditor to give an undertaking, with good and sufficient sureties, to pay all costs and damages that the officer may sustain by reason of the detention or sale of such property; and until such undertaking is given, the officer may refuse to proceed against such property.

(o) **Order for appearance of judgment debtor; arrest.** At any time when execution may issue on a judgment, the court from which an execution might issue shall, upon written motion of the judgment creditor, with or without notice as the court may determine, issue an order requiring the judgment debtor, or if a corporation, any officer thereof, to appear before the court, a master, or other person appointed by the court, at a specified time and place to answer concerning the judgment debtor's property. A judgment debtor, or if a corporation, any officer thereof, may be required to attend outside the county in which such person resides, but the court may make such order as to mileage and expenses as is just. The order may also restrain the judgment debtor from dispos-

ing of any nonexempt property pending the hearing. Upon the hearing such proceedings may be had for the application of the property of the judgment debtor toward the satisfaction of the judgment as on execution against such property.

(p) **Examination of debtor of judgment debtor.** At any time when execution may issue on a judgment, upon proof by affidavit or otherwise to the satisfaction of the court that any person or corporation has property of such judgment debtor or is indebted to the judgment debtor in an amount exceeding two hundred fifty dollars, not exempt from execution, the court may order such person or corporation or any officer or agent thereof, to appear before the court or a master at a specified time and place to answer concerning the same. Witness fees and mileage, if any, may be awarded by the court.

(q) **Order prohibiting transfer of property.** If it appears that a person or corporation, alleged to have property of the judgment debtor or to be indebted to the judgment debtor in an amount exceeding fifty dollars, not exempt from execution, claims an interest in the property adverse to such judgment debtor or denies such indebtedness, the court may order such person or corporation to refrain from transferring or otherwise disposing of such interest or debt until such time as may reasonably be necessary for the judgment creditor to bring an action to determine such interest or claim and prosecute the same to judgment. Such order may be modified or vacated by the court at any time upon such terms as may be just.

(r) **Witnesses.** Witnesses may be required to appear and testify in any proceedings brought under this rule in the same manner as upon the trial of an issue.

(s) **Order for property to be applied on judgment.** The court or master may order any property of the judgment debtor, not exempt from execution, in the possession of the judgment debtor or any other person, or due to the judgment debtor, to be applied towards the satisfaction of the judgment.

(t) **Appointment of receiver.** The court may appoint a receiver of the property of the judgment debtor, not exempt from execution, and may forbid any transfer or other disposition thereof or interference therewith until its further order therein; provided that before any receiver shall be vested with the real property of the judgment debtor a certified copy of the appointment shall be recorded in the office of the recorder of the county in which any real estate sought to be affected thereby is situated.

Rule 70. Judgment for specific acts; vesting title.

If a judgment directs a party to execute a conveyance of land or to deliver deeds or other documents or to perform any other specific act and the party fails to comply within the time specified, the court may direct the act to be done at the cost of the disobedient party by some other person appointed by the court and the act when so done has like effect as if done by the party. On application of the party entitled to performance and upon order of the court, the clerk shall issue a writ of attachment or sequestration against the property of the disobedient party to compel obedience to the judgment. The court may also in proper cases adjudge the party in contempt. If real or personal property is within the state, the court in lieu of directing a conveyance thereof may enter a judgment divesting the title of any party and vesting it in others and such judgment has the effect of a conveyance executed in due form of law. When any order or judgment is for the delivery of possession, the party in whose favor it is entered is entitled to a writ of execution or assistance upon application to the clerk.

Rule 71A. Process in behalf of and against persons not parties.

When an order is made in favor of a person who is not a party to the action, he may enforce obedience to the order by the same process as if he were a party; and, when obedience to

an order may be lawfully enforced against a person who is not a party, he is liable to the same process for enforcing obedience to the order as if he were a party.

Rule 71B. Proceedings where parties not summoned.

(a) **Effect of failure to serve all defendants.** Where the action is against two or more defendants and the summons is served on one or more, but not all of them, the plaintiff may proceed against the defendants served in the same manner as if they were the only defendants.

(b) **Proceedings after judgment against parties not originally served.** When a judgment has been recovered against one or more, but not all, of several persons jointly indebted upon an obligation, the plaintiff may require any person not originally served with the summons to appear and show cause why he should not be bound by the judgment in the same manner as though he had been originally served with process.

(c) **Summons and affidavit; contents and service.** The plaintiff shall issue a summons, describing the judgment, and requiring the defendant to appear within the time required for appearance in response to an original summons, and show cause why he should not be bound by such judgment. The summons, together with a copy of an affidavit on behalf of the plaintiff to the effect that the judgment, or some part thereof remains unsatisfied, and specifying the amount actually due thereon, shall be served upon the defendant and returned in the same manner as the original summons.

(d) **What constitutes the pleadings.** The pleadings shall consist of plaintiff's affidavit, the summons, and the answer of the defendant, if any; provided that if defendant denies his liability on the obligation upon which the judgment was originally recovered, a copy of the original complaint and judgment shall be included.

(e) **Hearing; judgment.** The matter may be tried as other cases; but if the issues are found against the defendant, the judgment shall not exceed the amount of the original judgment remaining unsatisfied, with interest and costs.

PART IX.

APPEALS.

Rules 72 to 76. Repealed.

PART X.

DISTRICT COURTS AND CLERKS.

Rule 77. District courts and clerks.

(a) **District courts always open.** The district courts shall be deemed always open for the purpose of filing any pleading or other proper paper, of issuing and returning mesne and final process, and of making and directing all interlocutory motions, orders, and rules.

(b) **Trials and hearings; orders in chambers.** All trials upon the merits shall be conducted in open court and so far as convenient in a regular courtroom. All other acts or proceedings may be done or conducted by a judge in chambers without the attendance of the clerk or other court officials and at any place within the state, either within or without the district; but no hearing, other than one ex parte, shall be conducted outside the county wherein the matter is pending without the consent of all the parties to the action affected thereby.

(c) **Clerk's office and orders by clerk.** The clerk's office with the clerk or a deputy in attendance shall be open during business hours on all days except Saturdays, Sundays, and legal holidays. All motions and applications in the clerk's office for issuing mesne process, for issuing final process to enforce and execute judgments, for entering defaults or judgments by