

1987

LDS Church Employee Credit Union v. Jean Asay v. Donna Nelson and Harper R. Nelson : Brief of Appellant

Utah Court of Appeals

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David McPhie; Attorney for Plaintiff/Respondent; Michael A. Katz; Attorney for Third Party Defendants.

Glen J. Ellis; Ellis & Ellis Attorneys; Attorney for Appellants.

Recommended Citation

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DOCKET NO. 870161-CA

UTAH COURT OF APPEALS

LDS CHURCH EMPLOYEES CREDIT UNION,)	
Plaintiff & Respondent)	
vs.)	
JEAN ASAY,)	
Defendant & Appellant)	
vs.)	
DONNA NELSON & HARPER R. NELSON,)	
Third Party Defendants.)	

CASE NO. 87-0161CA

PRIORITY 146

APPELLANTS BRIEF

Appeal from a Judgment from the Fifth
Circuit Court, Salt Lake County,
Murray Department, the Honorable
LeRoy H. Griffiths, Judge

GLEN J. ELLIS
ELLIS & ELLIS, ATTORNEYS
60 E. 100 S. Suite 102
PO Box 1097
Provo, Utah, 84603

Attorney for Appellants

DAVID MCPHIE
3450 S. Highland Drive,
Suite 301,
SLC, Utah 84106

Attorney for Plaintiff/ Respondent

Michael A. Katz
311 S State Suite 320
SLC, Utah 84111

Attorney for Third Party Defendants.

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AUG 26 1987

COURT OF APPEALS

DAVID A. McPHIE, #2216
HINTZE, BROWN, FAUST, BLAKESLEY & McPHIE
Attorney for Plaintiff
3450 S. Highland Drive, Suite 301
Salt Lake City, Utah 84106
Telephone: 484-7632

IN THE FIFTH CIRCUIT COURT, STATE OF UTAH
IN AND FOR SALT LAKE COUNTY, MURRAY DEPARTMENT

LDS CHURCH EMPLOYEES CREDIT)	
UNION, a Utah corporation,)	
	)	AFFIDAVIT OF DAVID A. McPHIE
Plaintiff,	)	FOR ATTORNEYS FEES
)	
v.	)	Civil No. 85CVM-06470
)	
JEAN ASAY,	)	Judge Griffiths
)	
Defendant-)	
Third Party Plaintiff,)	
)	
v.)	
)	
DONNA NELSON and HARPER R.)	
NELSON,)	
)	
Third Party Defendants.)	
<hr/>		
STATE OF UTAH)	
	:	ss.
COUNTY OF SALT LAKE)	

COMES NOW David A. McPhie, attorney for the plaintiff in the above captioned matter, and being first duly sworn and upon oath, deposes and states that:

1. In connection with the above captioned case, I rendered services to the LDS Church Employees Credit Union on the dates indicated, and billed them the amounts of money for the services indicated as being rendered listed on Schedule A attached hereto.

2. In that all of the work performed, or costs incurred, as described in the entries marked with a "*" were performed directly in pursuance of the plaintiffs complaint against the defendant, and not in investigation or defense against the counterclaim of the defendant.

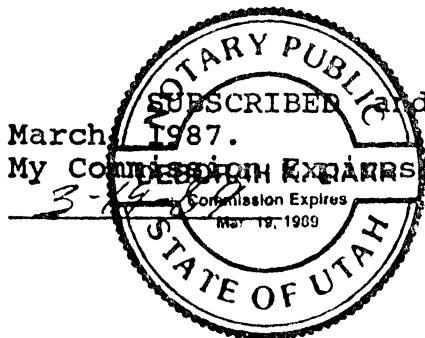
3. The work performed, and the monies billed to the plaintiff for the services marked with a "#" of Schedule A, were rendered for purposes of defending against the counterclaim of the defendant.

4. Costs incurred in this case are in the amounts of \$12.50 for filing, \$6.75 for service of process and \$280.20 in deposition costs. The depositions taken pursued both plaintiffs complaint and defendants counterclaim.

5. The attorneys fees indicated in this affidavit include defending against the defendants and third party defendants objections to the proposed order of the plaintiff prepared subsequent to trial, and indicated with a "+".

6. This is the end of my affidavit.

DATED this 17th day of March, 1987.



David A. McPhie
David A. McPhie

Leah A. McPhie
NOTARY PUBLIC in and for
Salt Lake County

Schedule A

* = plaintiffs complaint
 # = defendants counterclaim
 + = plaintiffs defense against objections to proposed order


1985

Amount \$

9/25 Dictation of summons and complaint	150.00*	
9/25 Review of drafts of summons and complaint	15.00*	
9/25 Filing fee	12.50*	
10/85 Service of process	6.75*	
11/13 Dictation of reply to counterclaim	30.00#	✓
11/14 Preparation of reply to counterclaim	6.00#	✓ 58.50
11/14 Review of reply to counterclaim	22.50#	✓

1986

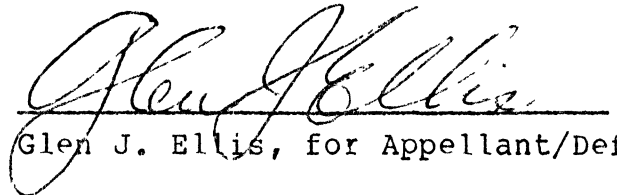
1/13 Dictation of notice of deposition	18.00* 18.00#	
2/12 Preparation for deposition, travel, conference	81.00* 81.00#	
2/13 Deposition	67.50* 67.50#	
2/86 Deposition costs	140.10* 140.10#	

 Dictation of motion for summary judgment,
 affidavit of Tom Capece, notice of hearing 150.00*

/27	review/revision of motion, affidavit	
/4	travel for signature on affidavit	18.00*
/16	review of motion to amend counterclaim, counterclaim, affidavit of Paul Clint	40.00#
/24	court appearance on MSJ, their motion to amend	100.00* 20.00#
/24	dictation of order denying SJ, request for trial	125.00*
/6	dictation of motion to dismiss counterclaim, set up depositions, interrogatories, requests for the production of documents, schedule conf.	80.00# 200.00*
7	dictation of letter to Trujillo	40.00*
8	preparation of motion to dismiss, calls to Nelsons, notices of deposition	16.00#
12	meeting with CU on case, notes	56.00*
14	preparation for deposition, Clint, Nelsons	40.00* 20.00#
14	king of depositions	60.00* 60.00#
1	dictation of letter to atty Garrett for Nelsons	32.00#
5	appearance at motion to dismiss	80.00#
.7	meeting with CU persons on answers to interrogatories	128.00#
3	dictation of responses to discovery	80.00#

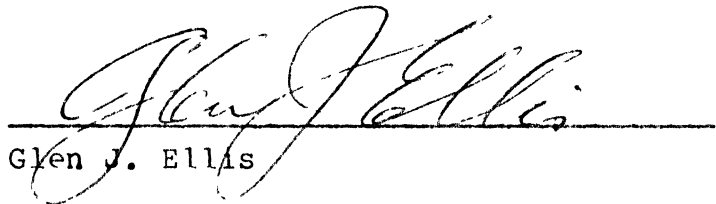
4. Grant Defendant attorney fees against Third Party Defendants for a Bad Faith refusal to admit their debt when it was due, and an asserted defense without merit, which they abandoned on the day of trial.

Respectfully submitted this 25th day of August, 1987.


Glen J. Ellis, for Appellant/Def.

NOTICE OF MAILING

Mailed the Original and five copies of the foregoing Appellant's Brief to the Clerk of the Utah Court of Appeals, 400 Midtown Plaza, 230 South 500 East, SLC, Utah, 84102; and two copies each to David A. McPhie, attorney for Plaintiff, 3450 S. Highland Drive, Suite 301, SLC, Utah 84106 and Michael A. Katz, attorney for Third Party Defendants, 311 South State Street, Suite 320, SKC, Utah 84111, postage prepaid this 25th of August, 1987.


Glen J. Ellis

IN THE CIRCUIT COURT, STATE OF UTAH
IN AND FOR SALT LAKE COUNTY, MURRAY DEPARTMENT

* * *

LDS CHURCH EMPLOYEES CREDIT
UNION, a Utah corporation,

Plaintiff,

Civil No. 85CVM-6470

vs.

Deposition of:

JEAN ASAY,

JEAN ASAY

Defendant.

* * *

BE IT REMEMBERED that on the 13th day of February, 1986, the deposition of JEAN ASAY, produced as a witness by and on behalf of the Plaintiff in the above-entitled action in the above-named Court, was taken before Cecilee Gruendell, a Certified Shorthand Reporter and Notary Public in and for the State of Utah, commencing at the hour of 9:22 o'clock a.m. of said day, at the offices of David A. McPhie, 56 East Broadway, Suite 600, Salt Lake City, Salt Lake County, State of Utah.

That the said deposition was taken pursuant to Notice.

* * *

1 I put this delicately, didn't tell the truth on one loan, so
2 it was denied him, and he was applying for another loan
3 through another company.

4 Q To pay for the house?

5 A Yes, the whole house. In order to qualify for
6 that loan, he needed some security, which would have been
7 money in a savings account.

8 Q You mean he needed to be able to show that he had
9 some money in a bank somewhere?

10 A That he had some money in a bank, yes. So we had
11 the cash money.

12 Q When you say "we," TVC?

13 A TVC had the cash money. We went down to LDS
14 Credit Union where Mr. Harper banked.

15 Q Mr. Harper?

16 A Excuse me, we always called him Harper. Mr.
17 Harper Nelson was his name.

18 Q When you say we went down, who went down?

19 A Linda Thayne and myself. She was another person
20 that worked there.

21 Q Okay.

22 A Took the money, and put it in Harper's, Mr.
23 Nelson's savings, account, which was his wife's, Dona Nelson.

24 Q Okay.

25 MR. TRUJILLO: Her name at that time was?

1 THE WITNESS: Dona Brighton.

2 Q (BY MR. McPHIE) Before she married Mr. Nelson?

3 A Nelson, I believe.

4 Q Go ahead. What happened next?

5 A Put the money in his account and borrowed it back
6 out.

7 Q Well, when you say "borrowed it back out," took
8 out a loan at the credit union. You didn't take those very
9 dollars out of that account?

10 A Right. So we had, in a sense, a secured loan, was
11 my understanding, that the loan was secured, and that when
12 the loan closed on their house, the money would be paid back.
13 I, me, Jean Asay personally, would be responsible for the
14 interest. It was a verbal agreement between Mr. Nelson and
15 myself that he would take care of that. But that's neither
16 here nor there.

17 Q When you say it was a verbal agreement?

18 A Just told me it wouldn't have amounted to, I
19 believe \$100.

20 Q So if I understand it, your plan was, TVC would go
21 put the money in Nelson's account, and it ended up, Mrs.
22 Nelson's account, and offer that as security on a loan that
23 you would get from the credit union, you personally would get
24 from the credit union?

25 A Uh-huh. I sat there in Mrs. Sartori's office,

1 however you say it, and asked her numerable times, "Are you
2 sure this money is secure? This is a lot of money for me.
3 Are you sure that nobody can touch this money without my
4 signature?" She said yes. Two or three times I asked her
5 with Miss Thayne sitting there, "Are you sure?" She said,
6 "No one can touch that money without your signature." I
7 said, "Okay."

8 Q Without your signature?

9 A Uh-huh. Then I understood that it would be mine
10 and Dona's that it would require, and so I felt pretty
11 comfortable that the money, when the time came, would be
12 there to pay the loan off.

13 Q Okay. Let me take you back to the loan situation
14 where you were applying for the loan. So you're saying that
15 the \$5,000 that went into the Nelson account was TVC money?

16 A Uh-huh.

17 Q When you went in to borrow the \$5,000 from the
18 credit union, what you essentially told the loan officer,
19 whoever you dealt with, was, "If you'll loan me \$5,000, me
20 personally, I will secure payment of my \$5,000 loan by
21 pledging the money that's in Nelson's share account"?

22 A Yes.

23 Q Okay. Mrs. Nelson, was she willing to do that?

24 A Yes.

25 Q Okay, was she there?

ORIGINAL

1 IN THE CIRCUIT COURT, STATE OF UTAH

2 SALT LAKE COUNTY, MURRAY DEPARTMENT

3 * * *

4 LDS CHURCH EMPLOYEES CREDIT)
UNION, a Utah corporation,)

5)
6 Plaintiff,)

Civil No. 85 06470

7 vs.)

Deposition of:

8 JEAN ASAY,)

PAUL FRANKLIN CLINT

9 Defendant.)
10

11 BE IT REMEMBERED that on Wednesday, the 14th day of
12 May, 1986, commencing at the hour of 2:40 p.m., the
13 deposition of PAUL FRANKLIN CLINT, produced as a witness
14 at the instance of the Plaintiff in the above-entitled action
15 now pending in the above-named Court, was taken before
16 JILL DUNFORD, a Certified Shorthand Reporter and Notary
17 Public, in and for the State of Utah, at the offices of
18 David A. McPhie, 56 East Broadway, Suite 600, Salt Lake
19 City, Utah; and

20 That said deposition was taken pursuant to Notice.

21 * * *

22
23
24
25
ASSOCIATED PROFESSIONAL REPORTERS

420 KEARNS BUILDING
SALT LAKE CITY UTAH 84101

1 A No.

2 Q Was a deal ever made between the Nelsons and
3 TVC concerning the building of a home on that lot?

4 A Yes.

5 Q What was the nature of the deal?

6 A We acted as go-between.

7 Q When you say we, you mean TVC?

8 A Between them and the builders, coordinated
9 the efforts to acquire the lot, worked out a process on
10 a plan whereby they could acquire equity using access to
11 some exchange privileges they had as a result of their
12 employment.

13 Q Who was the builder?

14 A Hang on--they say you block out unpleasant
15 memories.

16 Q Do you not presently remember the name of the
17 builder?

18 A I'm sorry, I don't. I'll think of it in a minute.

19 Q Mr. Nelson has testified that as the time came
20 to anticipate the home being completed and it became
21 time to obtain long-time financing for the home, it became
22 apparent that he would need to show that he had enough
23 money in the bank to cover closing costs in order to obtain
24 the financing, and that they did not have enough money to
25 demonstrate to a lender that he could cover the closing

1 costs, and that it was agreed between himself and TVC
2 through you that monies could be put in his account at the
3 LDS Church Employees Credit Union for purposes of it
4 appearing that he had enough money. Do you recall any
5 such agreement with him or anything like that?

6 A You bet.

7 Q Tell me in a nutshell, was my statement fairly
8 accurate or would you like to explain that? Is it different
9 than what I stated?

10 A A little bit different.

11 Q Give me your version, would you.

12 A The purpose was to--

13 Q The purpose of what?

14 A The purpose of the process that we went through
15 was to create funds where none existed. TVC went through
16 situations where, from time to time when we received
17 payments, that we had the use of for a few days and then
18 had to pay out to someone else.

19 So we developed a process whereby we would deposit
20 the money in the Nelsons' account. We arranged an agreement
21 with the LDS Credit Union to use his account as collateral
22 for someone else other than the Nelsons to borrow the
23 money back using the account as collateral. In essence,
24 to create funds where none had existed prior. The money
25 was not real, it was not really there, because the loan

1 and the deposit canceled each other out.

2 Q You didn't tell me anything about your agreement
3 with Mr. Nelson.

4 A The agreement was to effect just exactly what
5 I described.

6 Q So \$5,000 was deposited by TVC into Mr. Nelson's
7 savings account?

8 A Yes.

9 Q This was an account that you and she had gone
10 in together to the credit union earlier and opened; is
11 that correct?

12 A I am under the impression that it was an account
13 that they had already had, it was an existing account.

14 Q Well, not to challenge you, but just to refresh
15 your memory if it's true, Mrs. Nelson testified 10 minutes
16 ago that the actual sequence was that you and she went in,
17 opened up an account in her name, and she put \$25 in it.

18 A Okay.

19 Q And your testimony now is that TVC through you
20 later put \$5,000 into that savings account in Mrs. Nelson's
21 name.

22 A That's right.

23 Q And your testimony is that your purpose in
24 doing that was to accomplish two things: One, have sufficient
25 monies in the Nelsons' account that they could qualify for

1 the long-term financing for their home so that it
2 would appear that they could cover closing costs, and
3 at the same time present to the credit union sufficient
4 security that they would lend back the \$5,000 to another
5 individual.

6 A Yes.

7 Q And did, in fact, Jean Asay borrow back the
8 \$5,000?

9 A Yes.

10 Q In her own name?

11 A Yes.

12 Q Did you have any agreement with Mr. Nelson or
13 Mrs. Nelson that you or TVC would, in fact, pay the closing
14 costs on the home?

15 A Yes.

16 Q Did there come a time when closing on the home
17 was scheduled and TVC or you personally did not have enough
18 funds to pay the closing costs?

19 A Yes.

20 Q Did you at that time make an agreement with
21 Mr. Nelson that he could, because you did not then or TVC
22 did not then have the money to cover the closing costs,
23 go and get \$4,288.50 out of Mrs. Nelson's account, the
24 very account the \$5,000 had been placed in and come
25 back to close and use that to cover the closing costs?

Michael A. Katz, #3817
GARRETT AND STURDY
ATTORNEYS FOR Third Party Defendants
311 SOUTH STATE STREET
SUITE 320
SALT LAKE CITY, UTAH 84111
TELEPHONE (801) 532-2707

IN THE FIFTH CIRCUIT COURT, STATE OF UTAH
SALT LAKE COUNTY, MURRAY DEPARTMENT

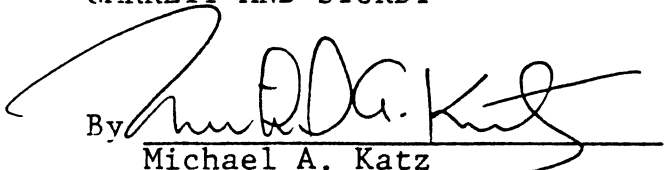
L.D.S. CHURCH EMPLOYEES)	
CREDIT UNION, a Utah)	
corporation,)	
)	
Plaintiff,	)	OFFER OF JUDGMENT
)	
vs.)	
)	
JEAN ASAY,)	
)	
Defendant and)	
Third Party Plaintiff,)	
)	
vs.)	
	)	Civil No. 85CVM-06470
DONNA NELSON and)	
HARPER R. NELSON,)	
)	
Third Party Defendants.)	

Pursuant to Rule 68(b), Utah Rules of Civil Procedure,
Third Party Defendants Donna Nelson and Harper R. Nelson
make an offer of judgment in favor of Jean Asay in the sum
of \$711.50.

DATED this 26th day of January, 1987.

GARRETT AND STURDY

By

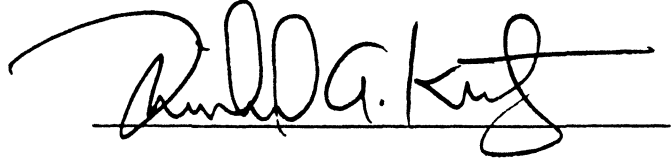

Michael A. Katz

CERTIFICATE OF DELIVERY

I hereby certify that on the 27th day of January, 1987,
I hand delivered a true and correct copy of the foregoing
Offer of Judgment to:

Mr. Jose Luis Trujillo
Attorney at Law
967 East 4800 South, Suite 3A
Salt Lake City, Utah 84117

Mr. David A. McPhie
Attorney at Law
56 E. Broadway, #600
Salt Lake City, Utah 84111

A handwritten signature in dark ink, appearing to read "D.A. McPhie", is written over a horizontal line.

Michael A. Katz, #3817
GARRETT AND STURDY
ATTORNEYS FOR Third Party Defendants
311 SOUTH STATE STREET
SUITE 320
SALT LAKE CITY UTAH 84111
TELEPHONE (801) 532-2707

IN THE FIFTH CIRCUIT COURT, STATE OF UTAH
SALT LAKE COUNTY, MURRAY DEPARTMENT

L.D.S. CHURCH EMPLOYEES)	
CREDIT UNION, a Utah)	
corporation,)	
)	
Plaintiff,	)	OBJECTIONS TO
	)	PROPOSED JUDGMENT
vs.)	
)	
JEAN ASAY,)	
)	
Defendant and)	
Third Party Plaintiff,)	
)	
vs.)	
	)	Civil No. 85CVM-06470
DONNA NELSON and)	
HAPPER R. NELSON,)	
)	
Third Party Defendants.)	

Pursuant to Rule 2.9, Rules of Practice for the Circuit Courts, State of Utah, Third Party Defendants Donna Nelson and Harper R. Nelson hereby object to the proposed Order and Judgment submitted by Plaintiff L.D.S. Church Employees Credit Union as to the specific item of attorney's fees as set forth therein.

This objection is based upon the pleadings and papers on file with the Court, the trial of this matter on January 27, 1987, and the argument set forth below.

ARGUMENT

Paragraph E of the Judgment sets forth the Plaintiff's claimed entitlement to attorney's fees in the sum of \$2,500.00. Those fees were awarded by the Court in its verbal ruling following trial. However, such fees must be rejected or, at the minimum, reduced substantially as a matter of law.

Utah follows the well-established majority rule that attorney's fees can only be recovered if provided for by statute or a contract existing between the parties. B & R Supply Co. vs. Bringham, 28 Utah 2d 442, 503 P.2d 1216 (1972). On our facts, there existed a Note running to Plaintiff executed by Jean Asay whereby Defendant agreed to pay those attorney's fees incurred in collection. Admittedly, Plaintiff did file suit on the Note in these proceedings premised upon Defendant's failure to pay. It is noted that no demand for payment was made upon Harper and Donna Nelson prior to instituting litigation. But, if an award of attorney's fees is based upon a contract, as here, the award must be strictly in accordance with the terms of the contract. Any services rendered which fall outside of collecting on the Note must be disallowed. With that substantial

limitation in mind, one should review the allegations raised in this lawsuit.

The majority of Plaintiff's counsel's time devoted to this case was incurred in defending against Defendant's Counterclaim for fraud. This includes most of the discovery conducted. Pursuant to the rules of apportionment, announced by the Utah Supreme Court in Utah Farm Production Credit Ass'n vs. Cox, 627 P.2d 62 (Utah, 1981), those fees must be disallowed. A copy of that important decision is attached for the Court's consideration.

In Utah Farm Production Credit Ass'n vs. Cox, plaintiff sued on a promissory note in the precise manner as occurred in the case at bar. In response, the defendant/borrower counterclaimed for an alleged mishandling of the loan as did Jean Asay in our instance. Relying on the earlier case of Stubbs v. Hemmert, 567 P.2d 168 (Utah, 1977), the Utah Supreme Court held: ". . . the plaintiff was not entitled to reimbursement for fees he had incurred in defending a counterclaim." 627 P.2d at 66.

The Court then went further and found that where the Court is left without a means to determine that portion of fees attributed to prosecuting the complaint, as contrasted with that portion spent in defending the counterclaim, the entire award of attorney's costs must fall. Unless counsel for the credit union made the necessary distinction, the \$2,500.00 claim must clearly fail in accord with the cited Utah cases.

5
/

Apart from the need to apportion, other limitations are put upon Plaintiff's rights to recover attorney's fees which apply on our facts. An appellate court will only uphold such an award where the amount is reasonable. And in the Court's consideration of reasonableness, the principal factor is the relationship of the fee to the amount recovered. Turtle Management, Inc. vs. Haggis Management, 645 P.2d 667 (Utah, 1982). Where the principal amount recovered is approximately 1/3 of the attorney's fees sought, the Court must substantially reduce the fees or the award becomes unreasonable. On our facts, this also indicates how Plaintiff spent substantially more time defending against Jean Asay's Counterclaim in relation to time spent recovering the Promissory Note indebtedness.

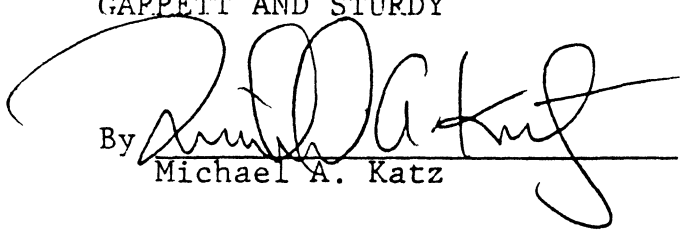
It may be argued that the Nelsons, as Third Party Defendants, have no right to object to the Credit Union's claims. So long as those fees are ultimately assessed against the Third Party Defendants as apparently happened here, their objection is well noted. At the commencement of trial on January 27, 1987, the objection of the Nelsons to any assessment of attorney's fees was made before the Court and opposing counsel.

In view of Plaintiff's failure to apportion his fees as strictly required by Utah law, and the underlying unreasonableness of those fees, Third Party Defendants Harper and Donna Nelson object to any award thereof.

DATED this 4th day of February, 1987.

GARRETT AND STURDY

By


Michael A. Katz

CERTIFICATE OF MAILING

I hereby certify that on the 4th day of February, 1987, a true and correct copy of the foregoing Objections to Proposed Judgment was mailed, postage prepaid, to:

David A. McPhie, Esq.
HINTZE, BROWN, FAUST, BLAKESLEY & McPHIE
3450 So. Highland Drive, Suite 301
Salt Lake City, Utah 84106

Mr. Jose Luis Trujillo
Attorney at Law
967 East 4800 South, Suite 3A
Salt Lake City, Utah 84117



CERTIFIED COPY

1 IN THE CIRCUIT COURT, STATE OF UTAH

2 SALT LAKE COUNTY, MURRAY DEPARTMENT

3 -o0o-

4 LDS CHURCH EMPLOYEES CREDIT)
UNION,)

5 Plaintiff,)

Case No. 85 CVM 6470

6 vs.)

HEARING

7 JEAN ASAY,)

8 Defendant.)

9 -o0o-

10
11 BE IT REMEMBERED that on the 19th day of March, 1987,
12 the above-entitled matter came on for hearing before the
13 Honorable L. H. Griffiths, sitting as Judge in the above-named
14 Court for the purpose of this cause, and that the following
15 proceedings were had.

16 -o0o-

17 APPEARANCES:

18 For the Plaintiff:

MR. DAVID A. McPHIE

Attorney at Law

3450 South Highland Drive, Suite 301

Salt Lake City, Utah 84106

20 For the Defendant:

MR. MICHAEL A. KATZ

Attorney at Law

311 South State, Suite 320

Salt Lake City, Utah 84111

23 MR. J. L. TRUJILLO

24
25 ASSOCIATED PROFESSIONAL REPORTERS

420 KEARNS BUILDING
SALT LAKE CITY UTAH 84101

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1 to trial, to add up the time that I was in this case. She told me
2 that I was in it 18, 19, 20 hours. I came in and testified about
3 that and said that I antici--that that didn't include time I'd
4 spent preparing and actual trial time that day and so my testimony
5 was what it was and the Court made its order.

6 Because of the memorandum of points and authorities
7 that Mr. Katz filed, and we agree with this point, it became
8 clear to me that I had to separate out time spent defending
9 against the counterclaim. So, I asked my secretary to actually
10 pull the time slips themselves, which I had not seen prior to
11 coming to Court. And we made, from the actual time slips, an
12 affidavit which I have submitted to the Court and which I have
13 submitted to Mr. Katz, but he only got it yesterday, and which I
14 submitted to Jean Asay's lawyer, but I don't know if he's got it,
15 where I've got all the time and all the services listed and I
16 have the services that were directly in pursuit of the complaint
17 marked with an asterisk. I have the services that were directly
18 resolved--or directly involved with defending against the counter-
19 claim marked with a pound sign, and I took the billings that
20 involved deposition, where we inquired as to both the plaintiff's
21 cause of action and the anticipated counterclaim and I split the
22 costs--I split the billings between counterclaim and plaintiff's
23 cause equally.

24 There's also in this affidavit three items that are marked
25 with neither an asterisk nor a pound sign but are marked with a pl

1 THE COURT: Well, I--I don't think that there's
2 anything to--

3 MR. McPHIE: I will say this for Mr. Katz's position.
4 I know that he was offering the money through the thing, clear
5 back in the fall of 1986, because Mr. Trujillo, the defendant's
6 counsel, was calling me and saying, if you will settle for the
7 amount that he has agreed to pay, that is Nelson to Asay, we will
8 pass it through to you, and I said, we will not settle because of
9 the fees. And I did make an error in my testimony to you. I
10 said I hadn't seen Mr. Ellis until the day of trial. I did see
11 Mr. Ellis in the down--in the Salt Lake Department of the Circuit
12 Court a few days before trial, at which time I indicated that the
13 matter wasn't settling for the offer of the Nelsons to the Asays
14 because of the fees of the plaintiff.

15 THE COURT: Okay. Well, I guess if we leave it up to
16 human, we can complicate just about anything to the point that
17 it's really difficult to follow where equity lies in certain
18 things. You can talk about procedure and the Rules of Civil
19 Procedure, and they're laid out so that everything should work
20 along orderly. You have substantive laws which regards to when
21 attorney fees are--should be allowed, and then we can add all of
22 the different types of peripheral things that in effect affect
23 all of these rules and substantive laws.

24 When we had this lawsuit, it was apparent to myself,
25 as the Judge, as I ruled on it after hearing the evidence, that

1 Jean Asay owed some money to the credit union. The Nelsons had
2 already stated to me at the beginning of the trial, through Mr.
3 Katz, that they owed Jean Asay. They said that, and I accepted
4 it, and Mr. Katz left.

5 We had a difficult case from the standpoint that we,
6 the parties were--felt very strongly about their points. We had
7 testimony, it wasn't simple testimony, even though you're talking
8 about a simple note, there were several of the witnesses who,
9 particularly as I remember, Mr. Clint, who in effect is--several
10 times in that trial, I had to caution him that he wasn't really a
11 party to the action, and he was trying to make statements like a
12 party to the action. In fact, right at the beginning, I had to
13 tell him that he was--he was out of order, that he wasn't a party
14 to the action, he wasn't Jean Asay and his--the attorney for Jean
15 Asay would have to be heard.

16 I didn't know why, what the circumstances were right at
17 the beginning, I thought it was kind of strange for Mr. Clint to
18 be attempting to speak on behalf of Jean Asay, and then I found,
19 after the testimony came in, it to be apparent that Jean Asay
20 didn't appear, that Jean Asay was, in effect, a front for Mr.
21 Clint. She was in fact, as I remember the testimony, his
22 secretary. That, for some reason, the two notes were taken out in
23 her name, but she was doing it more as a--either as a friend or
24 as an employee of him. And why he didn't take it out in his own
25 name, I have no way of knowing, and I guess there's a good reason,

1 but that be--it wasn't important to me after awhile.

2 Jean Asay, from the standpoint that she didn't show up,
3 apparently had been assured by someone, that no matter what
4 happened, she was--judgment or no judgment, she wasn't going to
5 be really hurt, because if she was, I guess I'd--at least as far
6 as if I was her, I'd have been here; but she apparently had been
7 assured by somebody that you won't need to come because we're
8 talking about, you know, nearly a thousand dollars, if you take
9 just the basic amount that was owed, plus interest and the Court
10 costs.

11 And now, it wasn't into this case very long that I
12 could see that whatever the principal amount was involved, the
13 attorney's fees was going to be another matter. Here we had a
14 case that was a year-and-a-half old, that had a lot of hours in
15 it. And I'm not--and as I say, I'm well aware of this problem,
16 where we have a case that after it's--everything is said and done
17 in it, that you have an attorney fee that's say, three times the
18 amount of the note, the principal that the party sued on.

19 I can remember the discussion with a Supreme Court
20 Justice about this. He--we were talking about being on the
21 bench, it's not a new subject, we hear it at the Bar bulletins,
22 how can we hold down the cost of suits, this particular case that
23 I just spoke to the Justice, he had on his desk, and he had to
24 decide, had nothing to do with this matter, but it was similar
25 in that he had a judgment for one of the parties in the neighborho

CONCLUSION:

This is a simple matter, in which the Defendant, Jean Asay was put into financial peril because she trusted the Nelsons to honor their commitment to pay off a loan she obtained thru her employer for the Nelsons' benefit. When they defaulted, the Credit Union found it more to their benefit to sue Mrs. Asay, than to pursue the Nelsons' whose overdraft of a different account cause the shortage in the first instance; the Credit Union made that election because they had a written promise to pay attorney fees. They never attempted in any way to collect the money from the Nelsons.

Not content to stick an innocent person with attorney fees, the Credit Union attorney made claim for all the fees expended by him in the case, not making any effort in the trial to apportion the fees. Apparently being of the persuasion that he could collect fees not only in connection with the action on the note, but also for work expended to defend the Credit Union against a Counterclaim, the only testimony on fees given at trial included both.

Following the trial the Court called a hearing on the objections filed by Defendant and Third Party Defendants, and revised its Judgment; appeal followed, and based on the foregoing, this court should :

1. Grant Judgment to the Defendant on her Counterclaim for bad faith on the part of the Credit Union in using her funds to cover other persons debts.

2. Stike down the award in favor of Plaintiff and against Defendant, the debt sued upon being admittedly owed by the Third Party Defendants, and not by Defendant.

3. Deny Plaintiff any attorney fees, for failure to properly apportion his charges.

savings account at the Credit Union. Mrs. Asay, to accommodate the Nelsons, borrowed from the same Credit Union the closing costs of \$5,000., the Nelsons were to pay the loan off as payments became due. Contrary to that agreement, the Nelsons overdrafted their checking account at the Credit Union. The Credit Union, contrary to their commitment to not invade the money Clint had put into Savings, under his secretary Jean Asay's name, covered Nelsons' overdraft by dipping into the savings account. When the \$5,000. note came due, the savings account was short by \$877.03 of the amount necessary to pay the note. The Credit Union, knowing that the money was owed by the Nelsons, and not by Mrs. Asay, still elected to sue Mrs. Asay because they had her signature on a note which provided for the assessment of attorney fees. (see Transcript, Exhibit "E", p 29.)

The Nelsons' according to Plaintiff counsel's statements, could have settled the case at any time, by paying the \$877.03, but they would not and did not pay the money until after the matter had been through court, and Mrs. Asay had been stuck with their bad bill. It was only after this appeal was filed that counsel for the Nelsons tendered payment for the amount of their overdraft, interest, and costs. After this appeal was on file, the money was paid, and counsel for Nelsons went back to the lower court and obtained an order for Satisfaction of the Judgment. That order is in limbo, waiting for resolution of the appeal.

The described sequence of events, plus the fact that the Nelsons admitted liability, on the day of the trial, which they did not even attend, indicates extreme bad faith on their part. The looming question is, "Why did they not pay the money when it was due, why did they intentionally and knowingly leave the innocent Mrs. Asay to face an unnecessary legal action before they finally acknowledged their debt?"

d. Apart from the need to apportion, our appellate courts have refused to grant attorney fees which are disproportionate to the amount sued for. (Turtle Management Inc. vs Haggis Management, 645 P.2d 667, Utah 1982.) Any experienced lawyer knows that proving a promissory note, where the existence of the note and it's signature by defendant is admitted, is the simplest type of legal action. Plaintiff's counsel, having failed to present any apportionment during trial persuaded the court to accept an affidavit, (Exhibit "F"), which accounts for \$2096.85 in time for doing the note foreclosure, and only \$1,101.10 in time for defending against the Counterclaim. A brief look at the Exhibits attached as "A", "B", and "C" shows that the real thrust of all the discovery, and the major use of lawyer time in this case was defense against the Counterclaim. Since the Affidavit itself was not part of the Trial, the Court, absent a motion to reopen to receive additional evidence, could not rely on that affidavit in awarding fees.

5. THE DEFENDANT IS ENTITLED TO BAD FAITH ATTORNEY FEES AGAINST
THIRD PARTY DEFENDANTS,

78-27-56 UCA was enacted by the Legislature in 1981 to remedy situations where a party to an action does not act in good faith, but makes the other party "go through the hoops" unnecessarily.

In this case, the Third Party Defendants, the Nelsons, in order to obtain a housing loan, entered into an agreement to put money belonging to a fourth party, Mr. Clint, into their

the Court did sign. He admits that an Objection to that proposed Judgment was timely filed, (ignoring the fact that defendant had also objected, see Transcript, Exhibit "E",p36), and that the purpose of the Hearing was to resolve the issue here on appeal; towit, whether the Court was free to award attorney fees on a promissory note, when a large portion of the attorney's time was spent on defending the plaintiff against a Counterclaim.

Mr. Katz, attorney for Third Party Defendants submitted in his Objection (Exhibit "D") such an excellently written argument, that it is necessary here only to adopt that argument in whole, by reference, and present only a capsule resume:

a. Attorney fees can only be awarded in Utah if there is an underlying Statute or Contract, on which the suit is successfully prosecuted. (quoting B & R Supply vs. Bringhurst, 28 Ut 2nd 442, 503 P.2d 1216).

b. Any services to plaintiff by counsel, not lying within the parameters of the suit for collection of the note are not includeable. (Utah Farm Production Credit Ass'n vs. Cox 627 P2d 62, (Ut 1981)). The doctrine of apportionment in Cox is derived from the earlier case of Stubbs V. Hemmert 567 P.2d 168 (1977) In Cox, the court held, "...the plaintiff was not entitled to reimbursement for fees he had incurred in defending a counterclaim." 627 P.2d at 66.

c.The Cox case decision goes further, and holds that where the plaintiff's attorney does not apportion his time, as between the complaint, and defense of the counterclaim, the court is powerless to grant any fees.

paragraph b. of Rule 68, nor was it a tender of money which may be accomplished under paragraph a. of Rule 68 up to the date of the trial.

b. An Offer of Judgment under paragraph 68b. requires a minimum of 10 days before trial so that the other party may either accept or reject the offer. Under the circumstances, it was not a valid profer, and entitled the Third Party Defendants to no protection.

c. The Offer of Judgment, in order to be valid under Rule 68b, must be at least as advantageous as the ultimate judgment, including costs, or it gives not protection to the offeror. In this case, the Judgment rendered by the court was for more money (\$877.03), than the amount of the offer, (\$711.50), so the offer is not effective. The offer is also silent with respect to costs, the Judgment awarded costs of \$194. and interest of \$272.

4. THE COURT ERRED IN AWARDING ATTORNEY FEES TO PLAINTIFF, WHEN THE EVIDENCE INCLUDED NO ATTEMPT TO APPORTION THE FEES.

Exhibit "C" attached is the amended Judgment signed by Judge Griffiths after the March 18th hearing, the Transcript of which is attached as Exhibit "E". The hearing was convened on motion of the court, following the filing of Objections (Exhibit "D") by both Defendant and Third Party Defendants.

Exhibit "C", prepared by Plaintiff's Counsel, is designated as a "Judgment", but essentially rehearses all of the Findings of Fact, plus the action taken at the second Hearing, plus the amended Judgment.

On page 3 of Exhibit "C", counsel admits that he submitted a proposed order (meaning the first Judgment), which

indicates that the true facts were known by Mr. Clint, as well as by Plaintiff's attorney. In the trial however, the Judge took the rather peculiar position that because Clint arranged for his secretary, Mrs. Asay to obtain the loan in her name, that somehow that barred Clint from testifying about things which he knew, because he was not a party, and the judge refused to allow the man to testify!(see Transcript, p.30, Exhibit "E").

78-24-1 and 2, UCA provide that any person competent to perceive is deemed competent to be a witness. There is no requirement in the law that a person must be a party in order to testify about facts within his knowledge. The judge went on to draw some very strange conclusions, based on no evidence, that because Jean Asay did not show up on the date of the trial, that .."someone , that no matter what happened, she was--judgment or no judgment, she wasn't going to be really hurt..." (Transcript, p. 31). As a matter of fact, Mrs. Asay did not appear because she went to the wrong court building. The judge's bias is too apparent to need comment. His prejudice against Paul Clint left a gap in the testimony such that the Judge dismissed defendants' counterclaim, though the salient facts appear in the deposition, which was published, and were well known to plaintiff and its counsel, as appears in the depositions, Exhibits "A" & "B".

3. WHETHER THE THIRD PARTY DEFENDANT MADE A VALID PROFER OF JUDGMENT.

On the morning of the trial, January 26, 1987, the Third Party Defendants thru their attorney, delivered to the court a document entitled, "OFFER OF JUDGMENT", (Exhibit "C", attached). Although it purports to be pursuant to Rule 68(b), URCP, the offer fails in several ways to comply with the rule.

a. It was not made 10 days before trial, as required by

Credit Union took money which all parties involved knew belonged to Jean Asay's employer, and used it to cover the Nelsons' bad checks. The Credit Union's attorney was well familiar with the situation, and its attorney discussed the situation in Exhibit "B", attached;

(question by Mr. McPhie) "...what in fact happened was that the Nelsons simply overdrafted their checking account at the credit union and the credit union covered their overdraft on their checking account with their savings account until their savings account was exhausted and the seven-hundred-something dollars that had remained in their savings were all exhausted through covering overdrafts on the Nelsons' checking account..."

The Judge erred in not granting Defendants the relief sought in their counter-claim, his prejudice is apparent in the comments he made in the Hearing Transcript pp 30, that even though the Nelsons were the ones who used the money which should have paid the note in full, and the Credit Union appropriated money out of a restricted account, to make it easy on themselves, that he still held the Plaintiff's entitled to Judgment against Defendants. His conclusions are illogical in light of the facts. Defendant was in fact the victim; it was her money which the credit union took to cover the Nelsons' overdraft, and to charge her with the shortage only adds insult to injury.

2. THE JUDGE'S REFUSAL TO ALLOW PAUL CLINT TO TESTIFY WAS PREJUDICIAL ERROR.

In this matter, the Plaintiff took the depositions of Paul Clint, Jean Asay and Mr. Nelson. The deposition of Clint was published at the trial, and Exhibit "B" contains salient portions of the questions propounded to Mr. Clint. It clearly

the second hearing, after the Judgment had already been signed, an affidavit from David A. McPhie, (Exhibit "F" attached) which purported to separate the fees on the note action from those on the Counterclaim. A copy of the amended Judgment is attached as Exhibit "G".

E. SUMMARY OF ARGUMENTS:

1. Defendant was not liable to Plaintiff on the note, and the sums appropriated by Plaintiff from Defendant's account should have been offset against the note.
2. The Judge's refusal to allow Paul Clint to testify was prejudicial error.
3. The Third Party Plaintiffs' Offer of Judgment was ineffectual and did not preclude the court granting judgment against the Third party, who really owed the money to the Plaintiff for which Plaintiff sued Defendant.
4. Plaintiff was not entitled to attorney fees where counsel did not apportion his time and fees between the note, which provided for attorney fees, and defense of the counterclaim which did not.
5. Defendant is entitled to attorney fees against the Third Party Defendants, who admitted all along that they owed the money in contest, but delayed paying it until after the litigation was in court.

F. ARGUMENTS:

1. DEFENDANT WAS NOT LIABLE TO PLAINTIFF ON THE NOTE, AND WAS ENTITLED TO AN OFFSET FOR AMOUNTS TAKEN FROM DEFENDANT'S ACCOUNT TO COVER THIRD PARTY DEFENDANT'S BAD CHECKS.

The simple truth in this case, as stated by the judge in his summation (Transcript p.29- 30, copy attached as Exhibit "H") was that the Nelsons, who had written bad checks on their account at the Credit Union, stood by and did nothing while the

employer, to cover the bounced check. (Clint deposition, p.20-21 copies of the Clint deposition pages are attached as Exhibit "B").

This created a \$877.03 difference between the amount in the savings account under the Nelson's name, and the balance due on Mrs. Asay's note. The Credit Union, rather than collect the money from the Nelsons, whom they knew owed it, elected to sue Mrs. Asay on her note, because against her they could claim attorney fees.

The morning of the trial, the Nelsons' attorney Mr. Katz appeared before the court, and submitted to the court a document entitled "Offer of Judgment" (Copy attached as Exhibit "C"). No money was paid, the sum "offered", \$711.50, was less than the amount later determined to be owed by Nelsons, and did not include costs as required by Rule 68b. Nelsons' attorney did not stay for the trial. The "Offer" was not timely, and at the end of the trial, the court awarded Judgment against the Nelsons for the same amount as it awarded Judgment to Plaintiff and against Defendant, \$877.03, plus \$2500. attorney fees, plus costs and interest.

The Nelsons' attorney filed an objection to the proposed Order and Judgment, in which the undersigned joined, insofar as it related to the granting of attorney fees to Plaintiff.

The court held a second hearing, and after noting that Mr. Katz correctly cited the applicable law (see Third Party Defendants' Objection to Proposed Judgment, copy attached as Exhibit "D"), the court acknowledged that it had erred in granting attorney's fees without requiring apportionment, (Hearing Transcript, p32, copy attached as Exhibit "E"). The Court erred again, in accepting, some weeks after the trial, at

Simultaneously the court ruled that Defendant was entitled to the same Judgment against Third Party Defendant. Third Party Defendant objected to the proposed Judgment, on the grounds that there had been no apportionment of the attorney fees and there was no written agreement for the third party to pay attorney fees to Defendant, and to strike the award of attorney fees altogether because Plaintiff, in his presenting of evidence in support of his claim for fees, did not apportion the fees as between the time spent on the promissory note suit, and that spent on defense of the Counterclaim.

Defendant joined in the Objection. Upon hearing, the Court admitted that it had erred in not apportioning the fees, but accepted an affidavit filed at the second hearing which purported to apportion the fees. The court amended the Judgment to make the attorney fees \$2,000. The amended judgment, was signed March 25, 1987, defendant appealed April 14, 1987, on all issues.

2. STATEMENT OF THE FACTS: As a part of a real estate transaction between Defendant Asay's employer, Paul Clint and the Third Party Defendants, Nelsons, the Nelsons were required to show that they had money in the bank for closing costs. Clint put \$5,000. in a Credit Union Savings Account in the Nelson's name, with an agreement that the Nelsons would pay off a \$5,000. promissory note to the Credit Union, borrowed by Jean Asay. (Paul Clint deposition, pp.9-12; Jean Asay deposition, pp 6-8, Asay deposition pages attached as Exhibit "A").

The Nelsons, who had a checking account thru the same Credit Union, bounced a check (or checks), which the Credit Union covered (without informing Asay) by simply taking the money out of the Savings Account money belonging to Asay's

C. STATUTES, RULES & CASES DETERMINATIVE:

1. 78-24-1&2 UCA

2. Rule 68b, Utah Rules of Civil Procedure: "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...."

3. B&R SUPPLY vs. BRINGHURST 28 Ut2d 442, 503 P.2d 1216

4. Utah Farm Production vs. Cox 627 P.2d 62

5. Stubbs vs. Hemmert 567 P.2d 168

6. Turtle Management vs. Haggis 645 P.2d 667.

7. 78-27-56 UCA. "In civil actions, where not otherwise provided by statute or agreement, the court may award reasonable attorney fees to a prevailing party if the court determines that the action or defense to the action was without merit and not brought or asserted in good faith."

D. STATEMENT OF THE CASE:

1. NATURE OF THE CASE, COURSE OF PROCEEDINGS & DISPOSITION IN THE COURT BELOW:

After a non-jury trial, the Circuit Court granted judgment in favor of Plaintiff and against defendant on a \$877.03 balance due on a \$5,000. note. The court also awarded Attorney fees of \$2500., not apportioning fees in connection with suit on the note, from fees incurred to defend against the Counterclaim. The Court dismissed the Counterclaim, which was based on defendant's contention that she had posted \$5,000. cash with the Credit Union to guarantee Third Party Defendants' payment of the note, but that the Credit Union had, contrary to instructions, invaded the \$5,000. to cover a check overdraft on Third Party Defendants' checking account, and that the \$877.03 balance due on the note was not Defendant's fault.

UTAH COURT OF APPEALS

LDS CHURCH EMPLOYEES CREDIT UNION,)	
Plaintiff & Respondent)	
vs.	)	CASE NO. 87-0161CA
)	
JEAN ASAY,)	
Defendant & Appellant)	
vs.)	
)	
DONNA NELSON & HARPER R. NELSON,)	
Third Party Defendants.)	

APPELLANTS BRIEF

A. STATEMENT OF JURISDICTION AND NATURE OF PROCEEDINGS BELOW:

Jurisdiction to hear this appeal is conferred by 78-4-11 and 78-2a-3(2)(c) UCA. In the court below, Plaintiff was granted Judgment against Defendant/Appellant, and Defendant/Appellant was granted Judgment against Third Party Defendants. Appeal is made as to both Judgments.

B. STATEMENT OF ISSUES PRESENTED FOR REVIEW:

1. Whether the court erred in denying Defendant judgment against the Plaintiff on her counterclaim.
2. Whether the court erred in refusing to allow Paul Clint to testify as to material matters dealing with the transaction.
3. Whether the Third Party Defendant made a valid Profer of Judgment.
4. Whether the court erred in failing to apportion attorney fees.
5. Whether Appellant is entitled to attorney fees from Third Party Defendant on her judgment.

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UTAH COURT OF APPEALS

LDS CHURCH EMPLOYEES CREDIT UNION,)	
Plaintiff & Respondent)	
vs.	)	CASE NO. 87-0161CA
JEAN ASAY,)	
Defendant & Appellant)	
vs.)	
DONNA NELSON & HARPER R. NELSON,)	
Third Party Defendants.)	

APPELLANTS BRIEF

Appeal from a Judgment from the Fifth
Circuit Court, Salt Lake County,
Murray Department, the Honorable
LeRoy H. Griffiths, Judge

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Attorney for Plaintiff/ Respondent

Michael A. Katz
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SLC, Utah 84111

Attorney for Third Party Defendants.

8/11 Review of answers to interrogatories, motion, trial date	32.00#
8/11 Preparation of final answers to interrogatories, request for production, motion compel, affidavit, for fees	22.00#
9/2 Dictation of notice of continuance on motion to compel, meeting with Trujillo	26.00# 30.00*
10/22 Call from Trujillo, Re: Nelson default, he wanted payoff	16.00*
11/5 Call to Trujillo to quote fees and costs to date	18.00*
11/7 Call to Trujillo, he had settlement offer, rejected, asked for continuance said we would not agree	18.00*
11/13 Preparation for trial	54.00*
12/1 Preparation of new request for trial setting	50.00*
<u>1987</u>	
1/7 Call to Tom to notify about trial, set up meeting day before	18.00*
1/27 Conference with Tom and Mary in preparation for trial	117.00*
1/27 Preparation for and appearance at trial	6.00* 100.00#
1/28 Dictation of judgment	90.00*
1/29 Preparation of judgment, copies, mailing	18.00*

2/12

Review of objections to orders by Nelsens,
reschedule instructions

90.00+

3/86

Research law in support of proposed motion

80.00+

3/86

Preparation of memorandum of points and
authorities in support of proposed motion

150.00+

* = 2,096.85

= 1,101.10

+ = 320.00

Total Fees = \$3,517.85

DAVID A. McPHIE, #2216
HINTZE, BROWN, FAUST, BLAKESLEY & McPHIE
Attorney for Plaintiff
3450 S. Highland Drive, Suite 301
Salt Lake City, Utah 84106
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FILED

JAN 7 1987

CLERK OF THE CIRCUIT COURT

IN THE FIFTH CIRCUIT COURT, STATE OF UTAH
IN AND FOR SALT LAKE COUNTY, MURRAY DEPARTMENT

LDS CHURCH EMPLOYEES CREDIT
UNION, a Utah corporation,

Plaintiff,

v.

JEAN ASAY,

Defendant-
Third Party Plaintiff,

v.

DONNA NELSON and HARPER R.
NELSON,

Third Party Defendants.

JUDGMENT

Civil No. 85CVM-06470

Judge Griffiths

STATE OF UTAH)
COUNTY OF SALT LAKE) SS
I, THE UNDERSIGNED, CLERK OF THE CIRCUIT)
COURT OF SALT LAKE COUNTY, UTAH, DO HEREBY)
CERTIFY THAT THE ANNEXED AND FOREGOING IS A)
TRUE AND FULL COPY OF AN ORIGINAL DOCUMENT)
ON FILE IN MY OFFICE AS SUCH CLERK)
WITNESS MY HAND AND SEAL OF SAID COURT)
THIS 15 DAY OF JANUARY 1987)
CLERK OF THE CIRCUIT COURT)
BY J. J. J. DEPUTY

THIS MATTER came on for trial before the Honorable Judge L.H. Griffiths, in his courtroom located at 5025 S. State Street, Murray, Utah, at the regularly scheduled time, that being on Tuesday, the 27th day of January, 1987, at the hour of 10:00 a.m.

The plaintiff appeared through its authorized agents, Tom Capece and Mary Sartori, and through their attorney of record, David A. McPhie. The defendant Jean Asay did not appear, but was represented by her attorneys of record, Jose Luis Trujillo and Glen Ellis. The third party defendants, Nelson, did not appear, but were represented by their attorney of record, Michael A.

Katz.

The court first considered the motion of counsel for the defendant to withdraw from the case, along with the motion filed the previous day by proposed substitute counsel, Glen Ellis. The court having found that the matter had previously been set for trial on two separate occasions and that the motions for withdrawal of counsel and continuance were brought on the date of trial, the court denied both motions.

Counsel for the third party defendants Nelson, did submit both orally and in writing, an offer of judgment, which offer was accepted by defendant through her counsel, and by the court.

Counsel for plaintiff made an opening statement, as did counsel for the defendant. The court received testimony, proffers of evidence and argument from both the plaintiff and defendant concerning both the complaint and the counterclaim. Subsequent to the presentation of the defendants case in chief on her counterclaim, counsel for the plaintiff made a motion for dismissal of the counterclaim of the defendant. No testimony was given in support of the defendants third-party complaint.

The court having considered the testimony, documents admitted into evidence, the proffers of evidence and arguments of both counsel, having considered the file, and good cause appearing therefor, did grant the motion of the plaintiff, dismissing the counterclaim of the defendant.

Further, based on the testimony, documents admitted into evidence, arguments of counsel, consideration of the file, and the undersigned Clerk of the Circuit Court of Salt Lake County Utah do hereby certify that the annexed and foregoing is a true and correct copy of an original document on file in the office of such clerk.

WITNESS MY HAND AND SEAL OF SAID COURT

STATE OF UTAH)
COUNTY OF SALT LAKE) ss. _____
CLERK OF THE CIRCUIT COURT OF SALT LAKE COUNTY UTAH DO HEREBY
CERTIFY THAT THE ANNEXED AND FOREGOING IS A
TRUE AND CORRECT COPY OF AN ORIGINAL DOCUMENT
ON FILE IN THE OFFICE OF SUCH CLERK

2

good cause therefor, the court entered a judgment on behalf of the plaintiff as against the defendant Jean Asay, in the amounts of:

- A. \$877.03 in principal;
- B. \$272.00 in interest at the note rate from March 11th, 1985, until the date of trial;
- C. Costs of court in the amount of \$194.00;
- D. Attorneys fees in the amount of \$2,500.00;
- E. For a total judgment in the amount of \$3,843.03, with a provision that said judgment should bear interest at the note rate, that being at 16.5% per annum, until paid in full.

Further, counsel for plaintiff submitted a proposed order which the court did sign.

Subsequently, counsel for third-party defendants, Nelson, did file an objection to the proposed order of the plaintiff. The defendant, Jean Asay, did, through her counsel, join in the objection to plaintiffs proposed order. Further, that the court did schedule for purposes of resolving said disputes about plaintiffs proposed order, a hearing held on the 18th day of March, 1987, at the hour of 2:00 p.m. before the court. Further, that the plaintiff appeared through its counsel, David A. McPhie. Defendant appeared through her counsel, Glen Ellis, and third-party defendants appeared through their counsel, Michael Katz.

Counsel for all parties made proffers of evidence and argument to the court concerning the objections of the defendant

and third-party defendants to the proposed order of the

STATE OF UTAH
COUNTY OF SALT LAKE
THE UNDERSIGNED, CLERK OF THE CIRCUIT
COURT OF SALT LAKE COUNTY, UTAH DO HEREBY
CERTIFY THAT THE ABOVE AND FOREGOING IS A
TRUE AND CORRECT COPY OF AN ORIGINAL DOCUMENT
FILED IN CASE NO. 87-00000000000000000000
AT THE COURT OF SAID COURT

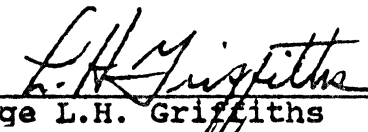
plaintiff, and the court having heard the matter fully, and having considered the file, and good cause appearing therefor, now amends its former ruling in the above captioned matter, and makes the following order.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that plaintiff be awarded judgment against the defendant as follows:

- A. In the principal amount of \$877.03;
- B. Interest thereon at the note rate from March 11th, 1985 until the date of trial in the amount of \$272.00;
- C. Costs of court in the amount of \$194.00;
- E. Attorneys fees in the amount of \$2,000.00;
- F. For a total judgment in favor of the plaintiff as against the defendant, Jean Asay, in the amount of \$3,343.03. It is the further order of the court that this judgment bear interest at the note rate, that being at the rate of 16.5% per annum, until paid in full.

It is the further order of the court that this order be entered nunc pro tunc in place of the order previously signed, and effective dated the 25th day of February, 1987.

DATED this 7th day of April, 1987.



Judge L.H. Griffiths

CERTIFICATE OF MAILING IN ACCORDANCE WITH RULE 4.5

I hereby certify that I mailed a true and correct copy of the foregoing judgment to the following in accordance with Rule 4.5

cc 188