

1996

# Hub Cap Annie, INC., Plaintiff and Appellee, vs. Don C. Jensen & Wheel Cover Marketing, INC., Defendants and Appellants : Brief of Appellant

Utah Court of Appeals

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Brenda L. Flanders; Flanders & Associates; Attorneys for Plaintiff/Appellee .

Micheal A. Jensen; Attorney at Law; Attorney for Defendants/Appellants.

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IN THE UTAH COURT OF APPEALS

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HUB CAP ANNIE, INC.,

Plaintiff and Appellee,

vs.

DON C. JENSEN AND  
WHEEL COVER MARKETING, INC.,

Defendants and Appellants.

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CASE NO. 960592-CA

Priority No. 15

UTAH COURT OF APPEALS  
BRIEF

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BRIEF OF APPELLANT

DOCKET NO. 960592-CA

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Appeal from Judgment Denying Sanctions and Costs  
Against Plaintiff and Plaintiff's Attorney  
Third Judicial District Court,  
Salt Lake County, State of Utah  
The Honorable Sandra N. Peuler, Third District Court Judge

---

Brenda L. Flanders  
Flanders & Associates  
56 East Broadway, Suite 400  
Salt Lake City, Utah 84111  
(801) 355-3839  
Attorney for  
Plaintiff/Appellee

Michael A. Jensen, #7231  
Attorney at Law  
First Interstate Plaza, Suite 900  
170 South Main Street  
Salt Lake City, Utah 84101-1655  
(801) 575-5000; FAX: 575-5006  
Attorney for  
Defendants/Appellants

MAY - 5 1997

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Brenda L. Flanders  
Flanders & Associates  
56 East Broadway, Suite 400  
Salt Lake City, Utah 84111  
(801) 355-3839  
Attorney for  
Plaintiff/Appellee

Michael A. Jensen, #7231  
Attorney at Law  
First Interstate Plaza, Suite 900  
170 South Main Street  
Salt Lake City, Utah 84101-1655  
(801) 575-5000; FAX: 575-5006  
Attorney for  
Defendants/Appellants

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## **JURISDICTION OF THE COURT**

Jurisdiction is conferred upon this Court by virtue of § 78-2a-3(2)(j), *U.C.A.*



**ISSUES PRESENTED FOR REVIEW,  
STANDARD OF REVIEW, AND  
PRESERVATION OF ISSUE**

1. **Issue:** Whether the trial court erred in denying Rule 37 sanctions against the Plaintiff/Appellee and its attorney, Brenda L. Flanders (“Flanders”), without any finding that Flanders was “substantially justified” as required by Rule 37, *Utah R. Civ. P.*

**Standard of Review:** This issue is a question of law and is reviewed for correctness, although there are no cases precisely on point, *see e.g., United Park City Mines Co. v. Greater Park City Co.*, 870 P.2d 880, 885 (Utah 1993); *Society of Separationists, Inc. v. Taggart*, 862 P.2d 1339, 1341 (Utah 1993).

**Preservation of Issue:** This issue was raised in the form of a Notice of Appeal on July 29, 1996. (R. 1752-53.)

2. **Issue:** Whether the trial court erred in denying Rule 11, *Utah R. Civ. P.*, sanctions against Flanders for repeatedly filing written memoranda relating to or in opposition to the Defendants’/Appellants’ motion to dismiss without a reasonable inquiry of the facts or law and without any argument for the extension, modification, or reversal of existing law. The trial court made no findings on this issue. The most logical inference from the trial court’s denial of Rule 11 sanctions against Flanders is that the trial court found no violation of Rule 11.

**Standard of Review:** This is a question of law and is reviewed for correctness. *See e.g., Barnard v. Sutliff*, 846 P.2d 1229, 1233-35 (Utah 1992); *Schoney v. Memorial*

*Estates, Inc.*, 863 P.2d 59, 62 (Utah Ct. App. 1993); *Rimensburger v. Rimensburger*, 841 P.2d 709, 711 (Utah Ct. App. 1992); *Taylor v. Estate of Taylor*, 770 P.2d 163, 171 (Utah Ct. App. 1989) (“whether specific conduct amounts to a violation of Rule 11 is a question of law”)

**Preservation of Issue:** This issue was raised in the form of a Notice of Appeal on July 29, 1996 (R. 1752-53.)

3. **Issue:** Whether the trial court erred in denying the Defendants/Appellants their costs pursuant to Rule 54(d), *Utah R. Civ. P.*, when the Plaintiff’s case was dismissed without prejudice.

**Standard of Review:** This issue is reviewed under an abuse of discretion standard. See *Morgan v. Morgan*, 795 P.2d 684, 686 (Utah Ct. App. 1990).

**Preservation of Issue:** This issue was raised in the form of an Amended Notice of Appeal on January 3, 1997. (R. 1795-96.)

## STATUTORY PROVISIONS

**Utah Code Annotated. § 78-27-56, U.C.A.**

(1) In civil actions, the court shall award reasonable attorney's 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, except under Subsection (2).

(2) The court, in its discretion, may award no fees or limited fees against a party under Subsection (1), but only if the court:

(a) finds the party has filed an affidavit of impecuniosity in the action before the court; or

(b) the court enters in the record the reason for not awarding fees under the provisions of Subsection (1).

## **RULES OF CIVIL PROCEDURE**

### **Utah Rules of Civil Procedure, Rule 4(e) (pertinent part):**

(e) Personal service. Personal service shall be made as follows:

. . . .

(5) Upon any corporation, not herein otherwise provided for, upon a partnership or other unincorporated association which is subject to suit under a common name, by delivering a copy thereof to an officer, a managing or general agent, or other agent authorized by appointment or by law to receive service of process and, if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the defendant. If no such officer or agent can be found within the state, and the defendant has, or advertises or holds itself out as having, an office or place of business within the state or elsewhere, or does business within this state or elsewhere, then upon the person in charge of such office or place of business; . .

### **Utah Rules of Civil Procedure, Rule 11 (pertinent part):**

Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney . . . . A party who is not represented by an attorney shall sign his pleading, motion, or other paper and state his address. . . . The signature of an attorney or party constitutes a certification by him that he has read the pleading, motion, or other paper; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. If a pleading, motion, or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant. If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses

incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

**Utah Rules of Civil Procedure, Rule 15(a) (pertinent part):**

(a) Amendments. A party may amend his pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it at any time within 20 days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders.

**Utah Rules of Civil Procedure, Rule 33 (pertinent part):**

(a) Availability; procedures for use. Any party may serve upon any other party written interrogatories to be answered by the party served . . . . Each interrogatory shall be answered separately and fully in writing . . . The answers are to be signed by the person making them . . . . The party upon whom the interrogatories have been served shall serve a copy of the answers and objections, if any, within 30 days after the service of the interrogatories . . .

**Utah Rules of Civil Procedure, Rule 37 (pertinent part):**

(a) Motion for order compelling discovery. A party, upon reasonable notice to other parties and all persons affected thereby, may apply for an order compelling discovery as follows:

. . . .

(2) Motion. If a deponent fails to answer a question propounded or submitted under Rule 30 or 31, or a corporation or other entity fails to make a designation under Rule 30(b)(6) or 31(a), or a party fails to answer an interrogatory submitted under Rule 33, or if a party, in response to a request for inspection submitted under Rule 34, fails to respond that inspection will be permitted as requested or fails to permit inspection as requested, the discovering party may move for an order compelling an answer . . . .

(3) Evasive or incomplete answer. For purposes of this subdivision an evasive or incomplete answer is to be treated as a failure to answer.

(4) Award of expenses of motion. If the motion is granted, the court shall, after opportunity for hearing, require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in obtaining the order, including attorney fees, unless the court finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust.

. . . .

(d) Failure of party to . . . serve answers to interrogatories or respond to request for inspection. If a party . . . fails . . . serve answers or objections to interrogatories . . . , the court in which the action is pending on motion may make such orders in regard to the failure as are just, . . . In lieu of any order or in addition thereto, the court shall require the party failing to act or the attorney advising him or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

**Utah Rules of Civil Procedure, Rule 54(d) (pertinent part):**

(d) Costs.

(1) To whom awarded. Except when express provision therefor is made either in a statute of this state or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs; provided, however, where an appeal or other proceeding for review is taken, costs of the action, other than costs in connection with such appeal or other proceeding for review, shall abide the final determination of the cause. . . .

(2) How assessed. The party who claims his costs must within five days after the entry of judgment serve upon the adverse party against whom costs are claimed, a copy of a memorandum of the items of his costs and necessary disbursements in the action, and file with the court a like memorandum thereof duly verified stating that to affiant's knowledge the items are correct, and that the disbursements have been necessarily incurred in the action or proceeding. A party dissatisfied with the costs claimed may, within seven days after service of the memorandum of costs, file a motion to have the bill of costs taxed by the court in which the judgment was rendered.

A memorandum of costs served and filed after the verdict, or at the time of or subsequent to the service and filing of the findings of fact and conclusions of law, but before the entry of judgment, shall nevertheless be considered as served and filed on the date judgment is entered.

## **STATEMENT OF THE CASE**

### **Nature of the Case**

The underlying action brought by the Plaintiff/Appellee, Hub Cap Annie, Inc., (“HCA”) was for breach of an alleged franchise agreement between HCA and Defendant/Appellant Wheel Cover Marketing, Inc. (“Company”). HCA also included as defendants two individual incorporators of the Company, including the other appellant in this appeal, Don C. Jensen (“Don”). However, HCA’s Complaint was eventually dismissed for insufficiency of service of process. None of the merits of HCA’s causes of action were ever tried. Rather, the 2 years of proceedings consisted of a multitude of motions to dismiss HCA’s Complaint and subsequently to impose sanctions against HCA and its attorney, Brenda L. Flanders (“Flanders”).

The Company’s basis for seeking dismissal of HCA’s complaint was that no proper individual was served who could accept service for the Company. Nearly all of the proceedings were to determine this central issue: Was Troy Richards (“Richards”), a former employee and director of the Company, a proper person to accept service for the Company pursuant to Rule 4, *Utah R. Civ. P.*?

### **Course of Proceedings**

The trial court held only one hearing during the entire proceedings, despite dozens of requests by the Company and Don for such hearings. One hearing was also held at the Utah Supreme Court on a petition for extraordinary relief brought by the Company

because Judge Peuler, who was newly assigned to this case after Judge Frederick recused himself, would not review any of Judge Frederick's prior rulings in the case, including the Company's motion to dismiss. The Supreme Court entered an order the same day vacating the part of Judge Peuler's minute entry which stated that she had no authority to review Judge Frederick's rulings. The first hearing in the trial court was then held, and HCA's Complaint was dismissed without prejudice for insufficiency of service of process. Amazingly, this issue was first brought to the attention of the trial court in June 1995 in Don's Answer to HCA's Complaint. Nonetheless, it took from June 1995 until April 1996 before the trial court ruled on this issue and dismissed HCA's Complaint.

### **Disposition**

The trial court (1) dismissed HCA's Complaint without prejudice, (2) denied the Company's request for Rule 11 and Rule 37 sanctions against HCA and Flanders, and (3) denied costs to the Defendants/Appellants.

### **Relevant Facts**

1. HCA, a franchisor and a Nevada corporation, brought this action against the Company and Don on August 17, 1994.

2. The Company, an alleged franchisee, filed its Articles of Dissolution on September 14, 1994, with Utah's Division of Corporations. *Addendum 1.* (R. 493.)

3. Don was a director and an owner of the Company, and for all times since the filing of this action, he was the Company's only director and the only individual involved in any meaningful activity with the Company. (R. 490.)

4. In an attempt to comply with the service requirements of Rule 4, *Utah R. Civ. P.*, HCA served Richards who at the time of service was a former employee/director of the Company. (R. 45-47.) In response to such service, Richards filed, without counsel, a one-page letter with the trial court. *Addendum 2*. (R. 485.) His unsigned letter clearly stated that he had left the Company approximately six weeks prior to the date on which he was served. *Id.*

5. HCA eventually served Don 276 days after the commencement of this action. (R. 68.)

6. HCA took the position that (1) Richards was a proper person to accept service for the Company; and (2) his unsigned letter on file with the trial court was the Company's official "Answer" to the Complaint. (R. 401, 410, 412.) Moreover, HCA tenaciously held to this position throughout the proceedings without any factual or legal authority.

7. The Company and Don took the opposing and eventually correct position that (1) HCA failed to serve the Company because Richards was not a proper person to accept service for the Company, and (2) Richards' unsigned letter could not stand as the Company's "Answer." (R. 373-79.)

8. On February 7, 1995, Flanders conducted a deposition of Richards with no other attorneys or parties present. (R. 402, 656.) Until early 1996, Flanders had the only copy of that deposition, although she quoted from it several times beginning in early November 1995 to support HCA's argument that Richards filed the Company's "Answer." (R. 400, 402, 408, 656.)



9. Throughout protracted proceedings from October 1995 to April 1996, consisting of scores of motions,<sup>1</sup> HCA filed numerous memoranda which lacked any factual or legal authority on several material issues. Such actions unduly and unreasonably prolonged this litigation causing the company and Don to incur substantial legal expenses.

10. For months during these proceedings, Flanders refused to provide to the Company's counsel, Michael A. Jensen ("Jensen"), the name of the court reporter who transcribed Richards' deposition, which Flanders conducted prior to service on the Company or Don. (R. 945-51.) The Company and Don finally filed a Motion to Compel, pursuant to Rule 37, *Utah R. Civ. P.* (R. 967-68.) The trial court granted their motion but failed to grant sanctions against HCA or Flanders. (R. 1253-56, 1734-35.) The trial court also failed to make any findings that HCA and Flanders were "substantially justified" in refusing to provide the name of the court reporter who transcribed Richards' deposition, despite HCA's use of the deposition to support its insistence that Richards was a proper person to accept service for the Company. (R. 402, 408.)

11. Without factual or legal authority, HCA and Flanders tenaciously held to their position that the Company was properly served and that the "letter" on file with the trial

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<sup>1</sup> These proceedings included a petition to Utah's Supreme Court for Extraordinary Relief when Judge Sandra N. Peuler refused to reconsider any of Judge Frederick's prior rulings, all without hearing, whom Judge Peuler had replaced in this action after Judge Frederick recused himself from this case. The Supreme Court entered an order the following day which clarified for Judge Peuler that she had the authority and duty to review any prior rulings by Judge Frederick. Judge Peuler then held the first hearing, except for the one with the Utah Supreme Court, in this action and considered the Company's Motion to Dismiss. Shortly thereafter, Judge Peuler dismissed HCA's Complaint for failure to serve a proper person.

court was properly the Company's "Answer." (R. 408-09.) Since HCA's position was not based on any legal foundation, the Company and Don filed their Motion for Rule 11 sanctions against HCA and Flanders.

12. The trial court signed a Final Order on July 1, 1996, in which it dismissed HCA's Complaint, denied the Company's and Don's Motion for Rule 11 sanctions against HCA and Flanders, and denied the Company's and Don's Motion for Reconsideration on their motion for Rule 37 sanctions against HCA and Flanders.

*Addendum 3.* (R. 1734-35.) The trial court failed to make any findings of fact or conclusions of law on the issues relating to violations of Rules 11 or Rule 37, *Utah R. Civ. P. See id.*

13. Upon dismissal of HCA's Complaint for failure to serve the Company, the Company and Don filed on July 8, 1996, their Verified Memorandum of Costs, pursuant to Rule 54(d), *Utah R. Civ. P.*, in the amount of \$223.60. (R. 1737-38.) After further protracted proceedings and admitted errors by the trial court,<sup>2</sup> an order was eventually entered denying costs to the Company and Don. *Addendum 4.* (R. 1791.)

14. On January 3, 1997, the Company and Don timely filed their Amended Notice of Appeal.<sup>3</sup>

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<sup>2</sup> The trial court entered ambiguous and conflicting minute entries that required five months to correct; the trial court eventually admitted its mistakes.

<sup>3</sup> The trial court failed to timely forward a copy of the Amended Notice of Appeal to the Court of Appeals. This was apparently accomplished only after counsel for the Company informed both the Court of Appeals and the Trial Court that no such action had been taken. Accordingly, the Docketing Statement does not include any mention of the appeal on the issue of costs. Also, that portion of the Record following

## SUMMARY OF ARGUMENT

**I.** Flanders refused to provide to Jensen the name of the court reporter who had transcribed Richards' deposition, which was conducted by Flanders at a time when no parties had been served and no attorneys were present. Richards' deposition was cited repeatedly by HCA to support its contention that Richards was a proper person to accept service for the Company. Although the trial court granted the Company's motion to compel and ordered Flanders to provide the name of the court reporter to Jensen so that he could obtain a copy of Richards' deposition, the trial court failed to impose any sanctions against HCA or Flanders as Rule 37 requires. Further, the trial court failed to find that HCA and Flanders were substantially justified in withholding the name of the court reporter or that an award of sanctions would be unjust. Therefore, the Company and Don brought their appeal and now contend that the trial court erred as a matter of law by not imposing sanctions against HCA and/or Flanders.

**II.** Flanders violated Rule 11 numerous times in her pleadings filed with the trial court and also with the Utah Supreme Court.<sup>4</sup> Flanders repeatedly made unfounded and erroneous assertions that (1) Utah law requires a corporation to immediately report any changes in its officers and directors to the Division of Corporations; (2) under Utah law, a corporation's officers and directors are in fact those officers and directors whose names

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the Record that was indexed by the trial court's clerk.

<sup>4</sup> See footnote 1, *supra*.

appear on the most recent Annual Report on file with the Division of Corporations, notwithstanding that such officers or directors may have resigned or departed the corporation; (3) Utah law defines a director to be an officer for purposes of service of process; (4) Utah law permits service on a corporation by serving one of its directors; and (5) an unsigned letter from a former director of the Company could stand as the Company's official and legal "Answer" to the Plaintiff's Complaint.

None of Flanders' assertions were supported by citation or reference to statute, rule, case, or any other authority. Moreover, Flanders not once argued that existing law should be modified or extended. In effect, Flanders repeatedly failed to make any reasonable inquiry into the law or facts to support her material assertions and which assertions unnecessarily prolonged the proceedings in the trial court prior to the dismissal of the Plaintiff's Complaint for insufficiency of service of process. Despite the numerous violations of Rule 11, the trial court denied the Company's and Don's requests for sanctions, and the trial court also failed to articulate any findings of fact or conclusions of law on this issue. The Company and Don believe the trial court erred as a matter of law by not imposing sanctions against Flanders.

**III.** Upon entry of the final order in this action, the Company and Don filed their Memorandum of Costs, pursuant to Rule 54(d), *Utah R. Civ. P.* However, the trial court refused to tax any of the Defendants' costs against HCA and again failed to articulate any findings of fact or conclusions of law. Rule 54(d) clearly grants costs to the prevailing party. The Company and Don were clearly the prevailing parties. The Company and

Don believe that the trial court erred as a matter of law by not taxing HCA for their reasonably necessary costs.

## ARGUMENT

- I. The trial court erred by not imposing sanctions against HCA and/or Flanders when the court granted the Company's and Don's Motion to Compel but failed to make any findings that HCA or Flanders was substantially justified in withholding the information sought or that sanctions would be unjust.

Rule 37, *Utah R. Civ. P.*, mandates the court to impose sanctions to the prevailing party unless the court finds that the non-prevailing party was substantially justified or that sanctions would be unjust:

(a) Motion for order compelling discovery. A party, upon reasonable notice to other parties and all persons affected thereby, may apply for an order compelling discovery . . .

(4) Award of expenses of motion. If the motion is granted, the court shall, after opportunity for hearing, require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in obtaining the order, including attorney fees, unless the court finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust.

. . . .

(d) Failure of party to . . . serve answers to interrogatories or respond to request for inspection. If a party . . . fails . . . serve answers or objections to interrogatories . . . , the court in which the action is pending on motion may make such orders in regard to the failure as are just, . . . In lieu of any order or in addition thereto, the court shall require the party failing to act or the attorney advising him or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

Rule 37(a)(4) & (d), *Utah R. Civ. P.* (emphasis added).

The operative term “shall,” in Rule 37(a)(4), requires the trial court to impose sanctions, unless the court finds that opposition to the motion was substantially justified or that sanctions would be unjust.<sup>5</sup> Without making any findings that HCA’s and Flanders’ opposition to the Company’s request were substantially justified or that sanctions would be unjust, the trial court must impose sanctions pursuant to Rule 37.

Moreover, sanctions are appropriate under Rule 37(d) without any prior court order compelling HCA or Flanders to provide the information sought. *See Schoney v. Memorial Estates, Inc.*, 790 P.2d 584, 585 (Utah Ct. App. 1990) (*citing from* C. Wright and A. Miller, FEDERAL PRACTICE AND PROCEDURE § 2291, at 812-13, 817 (1970)); *see also W.B. Gardner, Inc. v. Park West Village, Inc.*, 568 P.2d 734, 738 (Utah 1977).

The intransigence of Flanders in this matter is inexcusable. In three letters, Jensen requested Flanders to provide the name of the court reporter who transcribed Richards’ deposition. (R. 954-56.); *Addendum 5* at 1-3. In her response, Flanders stated that:

“you were told previously that Rocky Mountain Court Reporters prepared the transcript of the deposition of Richards.”

*See Flanders Letter*, dated January 10, 1996; *Addendum 5* at 5. (R. 958.)

Instead of berating Jensen, Flanders could have easily acknowledged her error and supplied the correct name of the reporter. Jensen’s Letter, dated January 15, 1996, expressly called this issue to her attention:

Further, there is no listing in the Salt Lake City telephone directory for a “Rocky Mountain Court Reporters.” Please clarify and please respond

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<sup>5</sup>Rule 37 also requires the court to conduct a hearing, and the court also failed to meet this requirement.

with all the information that I have repeatedly requested: name, address, telephone number, and date of deposition.

*See Jensen Letter*, dated January 15, 1996; *Addendum 5* at 7. (R 960.)

In reply, Flanders engaged in a tirade against Jensen and again offered information that proved to be in error:

“On or about June 21, 1995, the court reporter filed with the Court a Certification of Finalization of the original deposition transcript of Troy A. Richards.”

*See Flanders Letter*, dated January 18, 1996; *Addendum 5* at 12. (R. 965.)

No such document was ever listed in the Court’s Docket for this case nor filed in the Court’s Record in this action. Moreover, Flanders failed to provide the requested information. If the trial court had made findings on the issue of whether HCA and Flanders were substantially justified in withholding the information sought by the Company, the court could have reached no other rational conclusion than to find that HCA and Flanders were not substantially justified in withholding the information sought and no other circumstances existed to make an award to the Company unjust.

The Company’s and Don’s requests to Flanders were made in a series of letters, and were not in the customary form for interrogatories or requests for the production of documents. *See Addendum 5*. Nonetheless, the requests were necessary and they focused on a single bit of information so that a copy of Richards’ deposition could be obtained. Only after months of requesting this information was a motion to compel filed.

Flanders and HCA argue that since the letters were not in the traditional form for discovery pursuant to Rule 33, they do not fit within Rule 37 for sanctions. This is a technicality, or form over substance, that attempts to obscure the unreasonable conduct of Flanders. First, Rule 33 does not require any particular words, language or form in issuing requests for discovery.<sup>6</sup> Second, Rule 37 imposes no special language or form requirements on the party seeking discovery. Third, Rule 37 plainly allows an award of expenses if “the motion is granted”. Fourth, whatever technical problems that may have existed were mooted when the court accepted and granted the motion to compel without any comment on whether technical deficiencies existed. In effect, the court sanctioned the appropriateness of the Motion to Compel and ruled on it pursuant to Rule 37.

**II. The trial court erred by (1) not making any findings of fact or conclusions of law on the issue of whether HCA and/or Flanders violated Rule 11, and (2) not imposing Rule 11 sanctions against Flanders for repeatedly violating Rule 11.**

Rule 11, *Utah R. Civ. P.*, requires sanctions by using the term “shall” whenever the court finds that the an attorney violates Rule 11:

Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record . . . The signature of an attorney or party constitutes a certification by him that he has read the pleading, motion, or other paper; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless

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<sup>6</sup> The relevant portion of Rule 33 is presented *supra* and the full text of the Rule is contained in *Addendum 7*. The Rule only refers to an interrogatory, which is a written question. See BLACK’S LAW DICTIONARY 819 (6th ed. 1990).



increase in the cost of litigation. . . If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

Rule 11, *Utah R. Civ. P.* (emphasis added).

Rule 11 requires an attorney or party to make some inquiry into both the facts and the law before the paper is filed, and the level of inquiry is tested against a standard of reasonableness under the circumstances. *See Taylor v. Taylor*, 770 P.2d 163, 170 (Utah Ct. App. 1989) (award of attorney fees was appropriate as a sanction for attorney's filing an invalid document with the Complaint because a reasonable inquiry would have disclosed that the document contained the signature of only one witness and was therefore invalid); *see also Giffen v. R.W.L.*, 913 P.2d 761, 763-64 (Utah Ct. App. 1996) (sanctions affirmed because the attorney made allegations that were not well grounded in fact and failed to make any reasonable inquiry into existing law). "This objective approach allows sanctions to be imposed in a greater range of circumstances than did the pre-amendment, subjective 'bad faith' approach." *Taylor*, 770 P.2d at 17. "Whether specific conduct amounts to a violation of Rule 11 is a question of law." *Id.* at 171. "If a Rule 11 violation is shown, an appropriate sanction is mandated." *Id.*; *see also Barton v. Utah Transit Authority*, 872 P.2d 1036, n. 6 (Utah 1994) ("once a court finds a violation, it must (1) impose sanctions and (2) be able to retain jurisdiction to enforce those sanctions") (emphasis added).

The Defendants request sanctions against Flanders because of many violations of Rule 11. Only five categories of violations are specifically detailed below, although within each category of violations, Flanders generally violated Rule 11 multiple times in various memoranda filed by her on HCA's behalf.<sup>7</sup>

- a. **Flanders violated Rule 11 when she filed the Plaintiff's Motion to Strike Amended Answer and Counterclaim and then failed to acknowledge existing law and failed to argue for an extension, modification, or reversal of existing law.**

Rule 15(a) governs amendments to pleadings, including Counterclaims.

**(a) Amendments.** A party may amend his pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it at any time within 20 days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. . . .

Rule 15(a), *Utah R. Civ. P.* (emphasis added).

The Rule clearly permits Don to amend his counterclaim once without leave of court "at any time before a responsive pleading is served." The only response HCA offered was a Motion to Dismiss Counterclaim. However, a Motion to Dismiss is not a "responsive pleading." *See Heritage Bank & Trust v. Landon*, 770 P.2d 1009, 1010 (Utah Ct. App. 1989). Don was entitled by right to amend his Counterclaim once without leave of court.

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<sup>7</sup> Most of Flanders' memoranda contain the same language, statement of facts, and arguments - often identical.

Therefore, HCA's Motion to Strike Answer and Counterclaim based on Rule 15(a) was filed without merit.

In her Argument, Flanders asserted that a "Motion to Dismiss the Counterclaim was a responsive pleading to the Answer and Counterclaim." *Pl. 's Mem. in Supp. of Mot. to Strike*, dated July 31, 1995 at 3 (R. 187.) Not only is her statement without any legal foundation, Flanders failed to cite any authority, except Rule 15, *Utah R. Civ. P.*, for her assertion. Flanders also failed to acknowledge or cite *Heritage*, although *Heritage* is expressly cited in the annotated section following Rule 15, *Utah R. Civ. P.*, under the heading of "Responsive pleading." (quotes in original). (R. 1650-52.) Flanders ignored *Heritage* and failed to offer any extension, modification, or reversal of the law which clearly holds that a "motion to dismiss" is not a responsive pleading.

From the foregoing, Flanders failed to make any reasonable inquiry of the law. A mere reading of the annotations following Rule 15 would have revealed to Ms. Flanders that Don was perfectly within his rights to file an Amended Answer without leave of court. It is equally clear that Flanders failed to make an argument for extending, modifying, or reversing the law. Hence, Flanders violated Rule 11 when she filed HCA's Motion to Strike Amended Answer and Counterclaim. Ironically and incredibly, Flanders had the audacity to ask the court for her attorney's fees:

The Amended Answer and Counterclaim filed by Don must be stricken due to his failure to comply with Rule 15(a), Utah Rules of Civil Procedure, and HCA should be granted its fees and costs for having to file the Motion to Dismiss and this Motion to Strike.

*Pl. 's Mem. in Supp. of Mot. to Strike*, dated July 31, 1995 at 4, (R. 188.)

Since Flanders violated Rule 11, sanctions must be imposed against her.

- b. Flanders violated Rule 11 when she filed HCA's Reply Memorandum in Support of its Motion to Dismiss Amended Counterclaim and then failed to make a reasonable inquiry of the alleged "Answer" of Richards.**

Don's Response in Opposition to HCA's Motion to Dismiss correctly asserted that the Company had not filed an Answer to HCA's Complaint. *See Def. 's Mem. in Opp'n.*, dated September 21, 1995, at 2, 10. (R. 318, 326.) Don's knowledge was based on the fact that he was the only active member of the Company, that he owned more than 80% of the Company, that he was the Registered Agent for the Company, and that on August 5, 1994, he personally fired Richards for embezzlement and other crimes. *Id.*

In HCA's Reply Memorandum, Flanders declared that Don's "allegation simply is false." *See Pl. 's Reply*, dated September 18, 1995 at 4, (R. 287.) However, a reasonable inquiry of the alleged "Answer" would have revealed to Flanders that on its face and from Richards' own words, he left the Company more than six weeks prior to when HCA served him. Further, his letter is unsigned and must be stricken as a matter of law pursuant to Rule 11, *Utah R. Civ. P.*, unless Richards would "promptly" sign his "Answer."

Despite these facially obvious facts, Flanders boldly asserted that Don's Response to the "Plaintiff's Motion to Dismiss Amended Counterclaim is without merit and should be dismissed." *See Pl. 's Reply*, dated September 18, 1995 at 5. (R. 288.) The alleged "Answer" is a one-page, unsigned letter from Richards. *Addendum 2*. More directly at issue, however, are Richards' own words that he had departed the Company: "I left Don and Utah Wheels on or about August 20, 1994 due to poor working conditions and his failure to pay wages." *See Addendum 2*. Richards was served on October 4, 1994 (R. 45.)

Flanders failed to make any reasonable inquiry into the validity of service on Richards. First, an attorney would reasonably understand that an unsigned pleading must be stricken pursuant to Rule 11, *Utah R. Civ. P.* Second, an attorney would also reasonably question the validity of HCA's service of process where the person served is initially thought to be an agent of the corporation but who, upon service, states in clear, unambiguous language that he left the corporation more than six weeks before he was served. *See Addendum 2*. Third, Richards was at most a director and never an officer of the Company (R. 1566.) Fourth, there is no statutory basis for serving a director. *See Rule 4(e), Utah R. Civ. P.* There is also no rule or case law which permits service on a director or which supports Flanders' theory of the law. These four factors compel an attorney to seriously and reasonably question whether service of Richards was effective and proper service on the Company. Yet, Flanders defended beyond reason her assertion

that the Company was properly served when HCA served Richards six weeks after he admitted leaving the Company.

At the same time, however, Flanders never once discussed or analyzed Richards' own words, from the letter he filed with the Court or from his deposition; *i.e.*, that he had left the Company 6-8 weeks prior to being served. *See e.g. Pl. 's Memorandum*; (R. 395-415.) Flanders failed to address this critical fact in any memoranda, although in nearly all memoranda she vigorously argued that Richards properly filed the Company's "Answer" to HCA's Complaint. *Id.*

Flanders also failed to make any reasonable inquiry into the facts or the law. By tenaciously clinging to an unreasonable position, she abused the judicial process and violated Rule 11. Consequently, sanctions must be imposed against Flanders.

- c. Flanders violated Rule 11 because she failed to make any reasonable inquiry of existing law and failed to argue for an extension, modification, or reversal of existing law in numerous memoranda when she wrongly asserted as fact and law that (1) a corporation has a duty to notify the State of Utah of changes in its officers and directors; (2) Utah Law allows service on a director; and (3) by definition a director is an officer and a managing agent.**
  - 1. Flanders repeatedly argued, without any reasonable inquiry of existing law, that a corporation, including a dissolved corporation, has a duty to immediately notify the State of Utah of changes in its officers and directors, other than annually.**

In several memoranda, Flanders stated as a "Material Fact" that:

Under Utah law, a corporation is required to register with the State of Utah and to maintain a current, accurate statement of some of the directors and officers of a corporation. The records of the State of Utah demonstrate that, at all times material hereto, including at present, Troy A. Richards is and was listed as a director of Wheel Cover.

*Pl. 's Resp. to Mot. for Clarification and Reconsideration*, dated March 11, 1996, at 3 ¶ 7, (R. 1305.); *Pl. 's Resp. to Pet. for Extraord. Relief*, dated March 7, 1996, at 17 ¶ 5, (R. 1361.); *Pl. 's Resp.*, dated November 29, 1995, at 2, 8, (R. 647, 653.); *Pl. 's Resp.*, dated November 2, 1995, at 2 ¶ 5. (R. 396.)

Flanders substantially and materially relied on the above “statement of fact,”<sup>8</sup> or conclusion of law, throughout each of her arguments. However, not once did Flanders cite any rule, statute, or case law to support her theory of the law regarding a corporation’s duty to “maintain a current, accurate statement of some of the directors and officers of a corporation.” *Id.* The conclusion of law, or statement of fact, however characterized, is fundamentally wrong and lacks any legal support. *See Danielson*<sup>9</sup> *Letter*, dated March 15, 1996. *See Addendum 6.* (R. 1560.)

Further, Ms. Flanders failed to analyze or discuss the facially obvious facts in the Company’s Articles of Dissolution. That one-page document clearly classifies Richards as belonging to a group of shareholders that is separate and apart from the group of shareholders comprising the Board of Directors. *See Addendum 1.* Flanders stated with

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<sup>8</sup>Quotes are used here because Flanders placed the paragraph quoted above in the Statement of Facts section of her memoranda.

<sup>9</sup> George Danielsen was at the time Division Counsel for the Division of Corporations. He wrote a letter to the Company’s counsel, Jensen, in which he clearly stated that a corporation has no duty to keep the Division informed of changes in officers and directors. He also stated that each succeeding report filed with the Division superseded the prior filings, including Articles of Dissolution.

precision the dates and contents of specific Annual Reports of the Company on file with the Division of Corporations. *See Pl. 's Resp.*, dated November 29, 1995, at 9-10 ¶¶ 37-39. (R. 654-55.) Yet, she completely ignored any mention or discussion of the Company's Articles of Dissolution, which is the most recent document filed. Once the Company filed its Articles of Dissolution, it had "no further duty...to notify the Division of Corporations of any changes in its officers or directors." *Addendum 6*. Moreover, Flanders cited no authority for her theory of corporate law or her theory of service of process on corporations. In essence, Flanders failed to make any reasonable inquiry of the statutes or case law on this material issue and which issue was the sole basis for her contention that Richards was remained a director of the Company. (R. 655.)

**2. Flanders repeatedly argued, without any reasonable inquiry of existing law, that Utah Law allows service on a director.**

Flanders unreasonably and persistently argued that since Richards was a director, service on the Company could be effectuated by service on Richards. *See e.g., Pl. 's Resp.*, dated March 11, 1996, at 22; (R. 1324, 1327-28.) *Pl. 's Resp.*, dated March 7, 1996, at 33 (R. 1377.) However, Flanders failed to cite a single statute, rule, or case as authority for her view of the law. Flanders also failed to make a good faith argument to extend, modify, or reverse existing law. Flanders clearly violated Rule 11 and sanctions must be imposed against her.



**3. Flanders repeatedly argued, without any reasonable inquiry of existing law, that by “definition, a director is an officer, a managing or general agent and is an agent of the corporation for purposes of service of process.”**

Without citing to any authority, Flanders repeatedly asserted as fact or law that “by definition, a director is an officer, managing or general agent and is an agent of the corporation for purpose of service of process.” *See e.g., Pl. 's Resp.*, dated March 11, 1996, at 25; (R. 1327.) *Pl. 's Resp.*, dated March 7, 1996, at 34; (R. 1378.) *Pl.s' Resp.*, dated November 2, 1995, at 17. (R. 411.) There is no basis in fact or law that such definition exists. This was a material assertion in supporting Flanders’ arguments that service on the Company was effective because Richards was a director. Notwithstanding the fact that Richards was no longer a director of the Company at the time he was served, Flanders insisted that he was still a director in fact because he continued to be listed as a director in the records of the Division of Corporations; and therefore he could be served as an agent of the Company. *See id.*

Flanders most obviously violated Rule 11 numerous time and sanctions must be imposed against her.

The strenuous defense by Flanders on the issue of whether Richards was a proper person to accept service for the Company is most bizarre and irrational at best. Since a dismissal pursuant to Rule 12(b)(5), “insufficiency of service of process,” is without prejudice, Flanders knows that HCA could merely refile its Complaint and begin afresh. Flanders should have realized that this was a frivolous fight and that her unreasonable

defense of this issue only served to waste the court's resources, cause undue delay, and cause unnecessary expenses to her client, to the Company, to Don and to the trial court.<sup>10</sup>

Again, Flanders violated Rule 11 because she failed to make any reasonable inquiry into the law or facts. Accordingly, sanctions must be imposed against her.

- d. Flanders violated Rule 11 when she stated as fact, in several memoranda to the court and in letters to Counsel for the Defendants that a Certificate of Finalization for Richards' deposition was in the court's file, and failed to make a reasonable inquiry of the court's file or docket.**

On November 14, 1995, Jensen began requesting information from Flanders that would permit him to obtain a copy of Richards' deposition, which Flanders conducted in February 1995. The central issue of this case was whether Richards was a proper person to accept service for the Company. Therefore, his deposition potentially contained material facts. However, Flanders never responded to Jensen's first request for the reporter's identity made in November, 1995. *See Addendum 5* at 1. He renewed his request in subsequent letters, but Flanders repeatedly failed to provide the necessary information by insisting that such information was available to Jensen in the court's file, when in fact it was not available and never had been available. *See Addendum 5* at 12.

For example, in a letter from Flanders dated January 18, 1996, she states:

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<sup>10</sup>At first blush, one might say the same about the Company and Don. However, prior to October 1995, Don was a *pro se* defendant and the Company had not been served. On January 5, 1996, Judge Frederick acted *sua sponte* in entering a default judgment against the Company and awarding attorney's fees in the amount of \$13,000 to Flanders, even though Flanders never submitted an affidavit for such fees. (R. 871-76.) Instead of filing an appeal on Judge Frederick's ruling, which was obviously in error, the Company and Don pursued the less costly path of seeking a dismissal based on insufficiency of service of process.

Finally, you claim that you have not received information regarding the identity of the court reporter that transcribed Mr. Troy A. Richards' deposition. This is a bold misrepresentation. You have received this information on at least three occasions. On or about June 21, 1995, the court reporter filed with the Court a Certification of Finalization of the original deposition transcript of Troy A. Richards. This certificate reflects the name of the court reporter, the name of the court reporting company, address and the telephone number. If you desired, you could have obtained this information. It is not my fault that you have been remiss in your obligations as an attorney to your client.

*See Letter from Flanders* dated January 18, 1996 (emphasis added). *Addendum 5* at 12. (R. 965-66.)

Since Flanders repeatedly refused to provide the information requested, the Defendants filed on January 22, 1996, a Motion to Compel. It was granted by the court on February 22, 1996. (R. 1254.) The Defendants' Memorandum in Support of its Motion to Compel expressly addressed Flanders' incorrect assertion that the "Certificate" was on file with the trial court.

Third, Flanders continually provides false, incorrect, or misleading information. In her letter dated January 18, 1996, she claims that

"on or about June 21, 1995, the court reporter filed with the Court a Certification of Finalization of the original deposition transcript of Troy A. Richards."

*See Flanders Letter*, dated January 18, 1996.

If such a document is filed with the Court, the Defendants cannot locate it. Moreover, the Clerk of the Court cannot find it. No such document is listed in the Court's Docket for this case. Again, Flanders provided information that is neither correct nor helpful, yet she chastises the Defendants' Counsel for being "remiss."

*See Def.'s Mem. in Supp.*, dated January 22, 1996, at 8. (R. 949.)

In HCA's Response, filed on February 5, 1996, Flanders again insisted that the "Certificate" was available in the court's file:

This is a bold misrepresentation. Don has received this information on at least three occasions. On or about June 21, 1995, the court reporter filed with the Court a Certification of Finalization of the original deposition transcript of Troy A. Richards. HCA received this certification in June, 1995. This certificate reflects the name of the court reporter, the name of the court reporting company, address and the telephone number. If Don desired, he could have obtained this information.

*See Pl. 's Resp.*, dated February 5, 1996 at 3. (R. 1158.)

The "Certificate" was never in the court's file nor was it ever listed in the docket. Despite the express, unambiguous allegation in the Defendants' Memorandum that Flanders was wrong and that the "Certificate" was not within the court's file, Flanders completely ignored the Defendants' challenge. Rather, she perpetuated her incorrect assertion that the "Certificate" was on file with the court. Flanders made no reasonable inquiry of the court's files. A simple inquiry of the court's docket for this case would have revealed to her that no such "Certificate" was on file. A simple telephone call to the Clerk of the court asking for an inspection of the court's file would likewise have revealed to Flanders that no such "Certificate" was on file.

Since Flanders was so insistent on this issue, Jensen asked the Clerk of the court by telephone whether the Certificate was in the court's file. The Clerk could not find it. Jensen then visited the court to personally inspect the file and the docket to determine if the Certificate was perhaps misfiled and was somehow omitted from the docket. He also

inquired of the Clerk of the court to determine if such “Certificates” could be filed elsewhere. All such inquiries failed to produce any evidence that the “Certificate” was ever within the court’s custody. Yet, Flanders wasted the court’s resources and caused undue delay and expense to the Defendants in obtaining the deposition of Richards, simply because she refused to make a reasonable inquiry into the facts, in direct violation of Rule 11.

This bizarre behavior is also evidence that Flanders distrusts other attorneys while believing in her own infallibility. There are several examples the Defendants could cite to illustrate this point, but in the interest of economy of words, they are excluded. However, one example is noteworthy.

During Jensen’s efforts to obtain information about Richards’ deposition, Flanders provided an incorrect name for the court reporter. *See Addendum 5* at 5. When Jensen informed her that the name she had provided was not listed in the telephone directory (she would not provide the telephone number), she brushed that assertion aside and refused to correct her error. *See Addendum 5* at 12. Only in HCA’s Response to the Defendants’ Motion to Compel did Flanders finally admit that the name she had provided was incorrect. *See Pl. ’s Resp.*, dated February 5, 1996, at 4. (R. 1159.) However, instead of being apologetic, Flanders stated that “Michael is or should be aware of this [error], however, he is wasting the Court’s resources arguing over semantics.” *Id.*

The use of the word “semantics” was obviously inappropriate. It was not the meaning of the name that was at issue but the actual name so that Mr. Jensen could locate

the telephone number. Flanders could have easily provided the telephone number as requested, but she refused to do so. Jensen had never heard of the court reporter's name prior to this time, and Flanders had no basis to assert that he "is or should be aware" of the correct name. Her actions underscore her callous disregard for other attorneys and her refusal to make a reasonable inquiry into the facts.

Most importantly, Richards' deposition proved to be of material importance. It provided for the first time definitive evidence from a source other than Don that Richards departed the Company in early August 1994; that he began employment with a competitor of the Company; that he was never an officer of the Company; that he never attended any meetings of the officers or directors of the Company; and that he never held himself out to be an officer or director of the Company. (R. 1556-57.) His deposition also proves that Flanders knew of this information and failed to divulge it to the court at the very instant that she was quoting from selected parts of the deposition to show that Richards had provided a one-page letter to the Court, allegedly as the Company's "Answer." Since Flanders had refused to provide copies of the relevant pages from Richards' deposition<sup>11</sup> and also refused to provide sufficient information for Jensen to obtain a copy of it, he suspected that she was intentionally and deceptively hiding

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<sup>11</sup> Flanders first quoted from Richards' deposition in her memorandum, dated November 2, 1995, to oppose the Company's motion to strike Richards' one-page letter as the Company's "Answer." (R. 400, 402, 408.) Flanders failed to attach copies of cited pages. Not until March 11, 1996, did Flanders finally attach any pages from Richards' deposition.

material facts from the court and the Defendants. In December, 1995, Jensen expressed his suspicion in a memorandum:

Plaintiff purportedly deposed Richards, but Plaintiff has consistently withheld that deposition from this Court and from the Defendants despite efforts by Counsel for Defendants to obtain the deposition or in the alternative to obtain the name of the Reporter from whom a copy can be obtained. Plaintiff's withholding of such deposition is suspicious because it [the deposition] should offer evidence on the issue of whether Richards considers himself a Director of the Company. A reasonable and prudent deposition of Richards should have included questions about Richards' Director status with the Company. Plaintiff's silence on this issue has been less than forthcoming.

*See Def.'s Reply Mem.*, dated December 4, 1995, at 10 (emphasis added).  
(R. 701.)

Jensen's statement above was truly prophetic. A few days prior to his statement, Flanders disingenuously assailed the credibility of Don's testimony about Richards' departure from the Company. *See Pl.'s Resp.*, dated November 29, 1995, at 10. (R. 655.) While Flanders was attacking Don's credibility on this issue, she possessed sufficient knowledge that Richards' deposition fully corroborated Don's Affidavit on the issue of when Richards' departed the Company. Withholding this information was an abuse of the judicial process and in violation of Rule 11. Therefore, sanctions must be imposed against Flanders.

- e. Flanders violated Rule 11 many times by wrongly asserting that the court had made findings or determinations, and she failed to cite to the Record because the court had made no such findings or determinations.**

- 1. Flanders wrongly asserted, without citing to the Record, that the court had determined that the Company was sufficiently served and that Richards was a proper agent to accept service for the Company.**

In numerous memoranda, Flanders vigorously defended against the Defendants' motions by repeatedly asserting that the court had previously determined that Richards was a proper agent to accept service for the Company. *See e.g., Pl. 's Resp.*, dated March 11, 1996, at 18, 36-37; (R. 1320, 1338-39.) *Pl. 's Resp. to Petition*, dated March 7, 1996, at 29-30; (R. 1373-74.) *Pl. 's Mem. in Support*, dated January 26, 1996, at 8; (R. 990.) *Pl. 's Resp.*, dated November 29, 1995, at 16-17. (R. 661-62.) Flanders failed in every instance to cite to any part of the Record to support her assertion. *Id.*

Flanders abused the judicial process by repeatedly asserting that the court had made findings or determinations on this issue when it was never decided by the court until Judge Peuler entered her Minute Entry dated April 23, 1996. (R. 1605-08.) Judge Peuler's Minute Entry did not overturn or reverse any prior rulings. It was the first ruling on the issue. Prior to Judge Peuler's ruling on April 23, 1996, the trial court had never made any findings nor articulated its reasoning, its understanding of the facts, or any conclusions of law on the issue of whether Richards was a proper person to accept service for the Company. Moreover, it is important to note that the only findings in the



Record, on the issue of whether Richards was a proper person for service, directly controverts Flanders' erroneous assertion.

Flanders violated Rule 11 by repeatedly asserting that the court had made findings when in fact it had not done so. These material assertions caused undue delays and substantially increased the costs of this litigation. As a result, sanctions must be imposed against Flanders.

- 2. Flanders wrongly asserted, without citing to the Record, that the court had determined that Don's Amended Answer and Counterclaim was frivolous or non-meritorious.**

It is well settled in Utah that a grant of attorney's fees is permitted by contract, by statute, or rule. In addition to Rule 11, discussed above, Utah provides for a possible statutory basis for the award of attorney fees:

(1) In civil actions, the court shall award reasonable attorney's 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 . . .

§78-27-56, *U.C.A.* (emphasis added).

The number of minute entries and orders in this case is not extensive. In particular, the Court's Minute Entry dated October 4, 1995 was brief and void of any findings of fact or conclusions of law:

*"Plaintiff's Motion to Dismiss Amended Counterclaim of Defendant Don Jensen is granted for the reasons specified in the supporting Memoranda."*

*See* Minute Entry, dated October 4, 1995. (R. 344.)

From this terse Minute Entry, it is clear that Judge Frederick failed to make any findings that the Company's actions were without merit or that the Company failed to act in good faith. *See* §78-27-56, *U.C.A.*; Rule 11, *Utah R. Civ. P.*; *see also* *Watkiss & Campbell v. Foa & Son*, 808 P.2d 1061, 1068 (Utah 1991) ("trial court must make specific findings with regard to each element of the statute"). Further, Judge Frederick failed to articulate whether he was imposing sanctions pursuant to §78-27-56, *U.C.A.*, or Rule 11, *Utah R. Civ. P.*

Judge Frederick's failure to cite any authority for imposing sanctions is fatal since the trial court is obligated to make its authority clear and make appropriate findings. *See* *Butler, Crockett and Walsh Dev. Corp. v. Pinecrest Pipeline Operating, Co.*, 909 P.2d 225, 231 (Utah 1995) (*citing* *Acton v. J.B. Deliran*, 737 P.2d 996, 999 (Utah 1987) (court reversed and remanded the award of sanctions because it found it "impossible" to determine whether the imposition of sanctions was proper as a matter of law and, if the sanctions were imposed for a violation of Rule 11, whether the district court abused its discretion in formulating the type and amount of the sanction)) (emphasis added).

Somehow, however, Flanders determined that she, and she alone, could read Judge Frederick's mind, and that she could therefore proclaim to the court that his cryptic Minute Entry made determinations that:

- (1) Don's pleadings were "non-meritorious." *See Pl. 's Resp.* dated March 11, 1996 at 10. (R. 1310.)
- (2) Don's opposition was "frivolous." *See Pl. 's Resp. to Petition*, dated March 7, 1996, at 44. (R. 1388.)

- (3) Don's pleadings were "non-meritorious." *See Pl.s' Resp.*, dated January 26, 1996 at 3. (R. 985.)
- (4) Don's defenses were "non-meritorious". *See Pl. 'a Resp.*, dated November 29, 1995, at 14. (R. 659.)

In every instance above, Flanders argues that since the court had already made findings, the law of the case doctrine prevents the court's review of the court's own rulings. Yet, Flanders never cited to the Record to show where the court had made findings or determined the issue of whether Don's actions were lacking in merit or put forth in bad faith.

Flanders repeatedly violated Rule 11 by failing to make any reasonable inquiry into the facts, in this case the Record, and the law. Accordingly, sanctions must be imposed against Flanders for her violations.

**III. The trial court erred by denying costs, pursuant to Rule 54(d), to the Company and Don following the court's granting their Motion to Dismiss, and in doing so, the trial court also failed to make any findings on whether the Company's costs were taxable costs.**

Rule 54(d), *Utah R. Civ. P.*, requires costs to be awarded to the prevailing party as a matter of law:

(d) Costs.

(1) To whom awarded. Except when express provision therefor is made either in a statute of this state or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs; provided, however, where an appeal or other proceeding for review is taken, costs of the action, other than costs in connection with such appeal or other proceeding for review, shall abide the final determination of the cause. . . .

Rule 54(d), *Utah R. Civ. P.* (emphasis added).

The Utah Supreme Court has defined costs to mean “those fees which are required to be paid to the court and to witnesses, and for which the statutes authorize to be included in the judgment.” *See Morgan v. Morgan*, 795 P.2d 684, 686-87 (Utah Ct. App. 1990).

HCA initiated the instant action. Don and the Company responded reasonably and appropriately, and they minimized their costs. The trial court, however, required Don to pay fees to file his compulsory counterclaim and to demand a trial by jury. It was necessary for him to pay these fees in order to preserve the Company’s counterclaim<sup>12</sup> and the right to a trial by jury.

When the case was finally dismissed, the fees previously paid to the trial court were not refunded nor were those fees transferrable to the identical case filed again by HCA.<sup>13</sup> It is manifestly unjust to require the Company and Don to pay the same fees twice simply because HCA and Flanders failed to properly serve its action in the first place. HCA has only itself to blame for its failure.

---

<sup>12</sup>Don’s counterclaim was properly filed as a derivative action which belonged to the Company.

<sup>13</sup> The Plaintiff filed the same action against the same defendants on June 7, 1996, filed as Case No. 960903093. The Plaintiff did not even wait for the Court’s Final Order to be signed.

- a. The Court's filing fee for a jury demand is mandatory, and the Company and Don have a fundamental right to a trial by jury.**

It is immaterial whether a jury was used in this action. Perhaps it is unfortunate that the trial court does not refund the jury fee when a jury is not used. However, pursuant to Rule 38, *Utah R. Civ. P.*, the Company and Don were required to make their jury demand "not later than 10 days after the service of the last pleading." Thus, this fundamental right would have been lost if it had not been demanded in a timely manner and with fee paid.

Again, HCA filed a duplicate action against the Company and Don even before the Final Order was signed. Thus, Don and the Company were put in the unjust position of being required to again pay to the court the same fees they paid in the prior case. Had HCA properly commenced its action, the Company and Don would have avoided duplicate costs. Again, the Plaintiff has only itself to blame.

- b. Since HCA extensively relied on the deposition of Richards in an attempt to justify its service of process, the Company sought a copy of his deposition in an effort to rebut HCA's argument.**

Utah's Supreme Court has specifically ruled that costs of depositions are not recoverable unless "the trial court is persuaded that they were taken in good faith and, in the light of the circumstances, appeared to be essential for the development and presentation of the case." *See Morgan* 795 P.2d at 687 (citing *Frampton v. Wilson*, 605

P.2d 771, 773-74 (Utah 1980)) (holding that depositions need only be “reasonably necessary”).

In the instant case, HCA, through Flanders, repeatedly and consistently relied on Richards’ deposition in an attempt to persuade the court that Richards was a proper person to accept service for the Company. (R. 1375, 1416.) HCA and Flanders also intentionally withheld the court reporter’s identity from Jensen.<sup>14</sup> Jensen only obtained a copy of Richards’ deposition after the Court so ordered. In fact, the deposition was most revealing. It clearly showed that Richards had left the Company’s employment nearly two months before he was served with HCA’s Complaint. It also clearly showed that Richards was never an officer of the Company nor did he know that he was a director of the Company. (R. 1556-57.)

The Company brought to HCA’s and the trial court’s attention that Richards’ letter expressly admitted that he had left the Company’s employment nearly two months prior to being served. However, HCA consistently ignored this fact and failed to acknowledge Richards’ statement. The court also failed to acknowledge Richards’ own statement. Only after the court and HCA had clearly ignored this critical fact and only after HCA

---

<sup>14</sup> The use of “intentionally” may be viewed as presumptuous. However, the logical inference from the following facts led the Company and Don to confidently assert that Flanders’ conduct in withholding Richards’ deposition was intentional. Flanders expressly and frequently cited to Richards’ deposition, including reference to specific pages of his deposition. Yet, she failed to attach any copies of Richards’ deposition or any of the pages she cited until March 11, 1996. The reasons for such omissions appear clear when one reads from the pages cited, because Richards’ testimony substantiates the fact that (1) Richards left the Company weeks prior to being served and (2) that he was never an officer of the Company. Richards also admitted that he was unaware that he was listed as a director in the records of the Division of Corporations.

had used Richards' deposition as support for its argument that Richards was an officer and director of the Company, did the Company obtain a copy of Richards' deposition. Had HCA or the trial court addressed this issue, the need for Richards' deposition could have been avoided altogether.

It is unclear from the Court's order whether the court relied on Richards' deposition. *Addendum 3.* (R. 1734-35.) It is clear however, that the Company submitted to the court Richards' testimony from his deposition to rebut HCA's argument that Richards was an officer and director of the Company when he was served with HCA's Complaint. (R. 1566.) Even if the Court did not rely on Richards' deposition in its final analysis, the deposition was, at the time and under the circumstances, "reasonably necessary" for the "development and presentation of the [Company's] case." *See Morgan*, 795 P.2d at 687. Moreover, there is no evidence that the Company did not act in good faith in obtaining a copy of Richards' deposition. Had HCA not relied on Richards' deposition, the Company would not have had any reason to obtain a copy of it. Again, HCA has only itself to blame.

## CONCLUSION

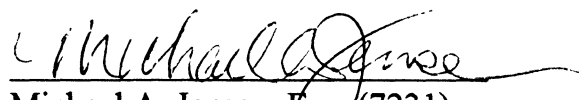
Flanders' flagrant violations of Rule 11 are too numerous to cite all of them. Nonetheless, in each instance, Flanders failed to make any reasonable inquiry into the law or facts to support her statements of fact or her assertions of law. The trial court failed to make any findings of fact or conclusions of law in denying Rule 11 sanctions against Flanders or HCA. However, it is clear that Flanders frequently violated Rule 11.

The trial court also erred in not imposing sanctions against Flanders or HCA pursuant to Rule 37, when the trial court granted the Company's and Don's motion to compel but failed to find that Flanders or HCA were substantially justified in withholding the information sought or that an award of sanctions would be unjust.

The trial court further erred when it failed to tax costs against HCA when HCA's Complaint was dismissed for insufficiency of service of process after more than 20 months of costly proceedings. Again, the trial court failed to make any findings, although the Company and Don specifically requested, by motion, the trial court to make such findings on their costs. (R. 1764-65.)

The Company and Don now urge this Court to rule as a matter of law that Flanders violated Rule 11 numerous times, that the trial court erred by not imposing sanctions against Flanders or HCA pursuant to Rule 37, and that the trial court erred by not taxing the Defendants' costs against HCA. If this Court so rules, these matters should be remanded to the trial court to impose sanctions and costs consistent with this Court's rulings.

DATED this 5th day of May 1997.

  
Michael A. Jensen, Esq. (7231)  
Counsel for Defendants/Appellants



**CERTIFICATE OF SERVICE**  
Court of Appeals Case No. 960592-CA  
Third District Court Case No. 940905231CV

**HUB CAP ANNIE, INC.**

**v.**

**DON C. JENSEN AND WHEEL COVER MARKETING, INC.**

---

I, Michael A. Jensen, Counsel for Appellants in the above action, hereby certify that on this day I personally served the foregoing BRIEF OF APPELLANTS by personally depositing two copies thereof with the United States Postal Service, postage prepaid, to:

BRENDA L. FLANDERS  
Flanders & Associates  
56 East Broadway, Suite 400  
Salt Lake City, Utah 84111  
(801) 355-3839

DATED this 5th day of May 1997.

  
\_\_\_\_\_  
MICHAEL A. JENSEN, Esq.

## **ADDENDUM INDEX**

### **Addendum 1**

Articles of Dissolution, dated September 1, 1994, Registered on September 14, 1994. (R. 493.)

### **Addendum 2**

Richards' Letter, dated October 10, 1994, filed on October 21, 1994. (R. 485.)

### **Addendum 3**

Trial Court's Final Order, dated July 1, 1996; signed Minute Entry dated May 28, 1996. (R. 1734-35.)

### **Addendum 4**

Trial Court's Order on Costs, dated December 17, 1996. (R. 1791.)

### **Addendum 5**

Exchange of letters between Jensen and Flanders. (R. 954-66.)

### **Addendum 6**

Letter from George Danielson, dated March 15, 1996, former Counsel to Division of Corporations. (R. 1506-07.)

### **Addendum 7**

Full Text of Rules 4, 11, 15, 33, 37, and 54, *Utah R. Civ. P.*, as electronically copied from Michie's LAW ON DISC™

Tab 1



00150501

## Articles of Dissolution

RECEIVED

SEP 14 1994

Pursuant to the provisions of the Utah Revised Business Corporation Act, the undersigned corporation adopts the following Articles of Dissolution:

UT DIV. OF CORP. & COMM. CODE

Must be typewritten

**First:** This name of the Corporation is:

Wheel Cover Marketing, Inc. dba Utah Wheels Covers

**Second:** This dissolution was approved by the shareholders.

A. The number of votes entitled to be cast, by voting group, on the proposal for dissolution is:

Voting Group	Number of Votes
<u>Board of Directors</u>	<u>20,000</u>
<u>Troy Richards</u>	<u>1,000</u>

B. The total number of votes to be cast for dissolution was: 21,000  
The total number of votes cast against dissolution was: 00

OR

The total number of votes cast for dissolution by each voting group was \_\_\_\_\_.  
This number was sufficient for approval.

**Third:** This dissolution was authorized by the shareholders on: August 5, 1994

**Fourth:** The address of the Corporation's principal office or other address where service of process may be mailed:

1124 E. 3300 So. Salt Lake City, Utah 84106

Street Address

City/State

Zip

Under penalties of perjury, I declare that these Articles of Dissolution have been examined by me and are, to the best of my knowledge and belief, true, correct and complete.

By: Don E. Jensen

Title: Sec. - Treas.

Dated: Sept. 1, 1994

Send forms in duplicate to:

### SPECIAL NOTE:

Utah law requires corporations seeking dissolution to satisfy all outstanding state taxes the corporation owes. Please inquire with the Utah Tax Commission at: (801) 530-4848

State of Utah  
Division of Corporations  
and Commercial Code  
160 East 300 South/Box 45801  
Salt Lake City, Ut. 84145-0801  
(801) 530-4849

State of Utah  
Department of Commerce  
Division of Corporations and Commercial Code  
I hereby certify that the foregoing has been filed and approved on the \_\_\_\_\_ day of \_\_\_\_\_ 19\_\_\_\_ in the office of this Division and hereby issue this Certificate thereof.

Examiner



KORLA T. WOODS  
Division Director

Tab 2

FILED  
CLERK OF COURT  
91 OCT 21 PM 4:33  
BY *[Signature]*

2240 W. 3800 S., Apt. I 307  
Salt Lake City, Utah 84119  
October 10, 1994

To Whom It May Concern:

JUDGE J. DENNIS FREDERICK

RESPONSE TO:

Hub Cap Annie, Inc.  
vs.  
Jim and Don Jensen

Civil Case #941600130 940905221

I, Troy Richards, was hired by Don C. Jensen, representing himself as the owner of a Hubcap Annie franchise in Salt Lake City, Utah, on or about March 12, 1993. My employment was for the purpose of sales and service of automotive parts, i.e. hubcaps, wheel covers and related items. I assumed the company was a legal and licensed company doing business in the State of Utah.

Shortly after hire, I was told by Don C. Jensen that the Hubcap Annie name would be terminated and the company would operate under a new name, i.e. Utah Wheels and Covers. I was instructed to remove decals, labels, etc. containing the Hubcap Annie name, and to remove the name from the store front, company vehicles, etc.. I had no knowledge of what, if anything, was transpiring between Don Jensen and Hubcap Annie, Inc..

I left Don and Utah Wheels on or about August 20, 1994 due to poor working conditions and his failure to pay wages.

If I may be of further assistance, please contact me.

Sincerely,

T. A. Richards

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Tab 3

**MICHAEL A. JENSEN (7231)**  
**Attorney at Law**  
720 E. Three Fountains Dr #74  
Murray, UT 84107-5252  
(801) 288-9428  
FAX: 288-0708

JUL - 1 1996

Counsel for Defendants

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

240 East 400 South  
Salt Lake City, Utah 84111  
Third District Court Clerk: 535-5111; In-Court Clerk: 535-5678

**HUB CAP ANNIE, INC.**  
Nevada corporation,

Plaintiff

v.

**DON C. JENSEN, and  
WHEEL COVER MARKETING, INC.**

**FINAL ORDER**

CIVIL NO. 940905231

Honorable Sandra N. Peuler

Upon consideration of several motions by the Defendants, it hereby is

**ORDERED**, that the Defendants' Motion to Dismiss is Granted without prejudice because the Plaintiff attempted to serve Defendant Wheel Cover Marketing, Inc. by ~~incorrectly~~ <sup>SNP</sup> serving Mr. Troy A. Richards, who was not at the time a proper person for service as contemplated by Rule 3, *Utah R. Civ. P.*, ~~and who had advised the Plaintiff on~~ <sup>SNP</sup> ~~October 21, 1994 that he had no association with the Defendant corporation, and no other~~ Defendant was served within 120 days as required by Rule 3; and it further is



**ORDERED**, that the Default Judgment entered against Wheel Cover Marketing, Inc., dated January 5, 1996, be vacated because the Plaintiff's Complaint, upon which such judgment was predicated, is dismissed and the Defendants' request for attorney's fees is denied; and it further is

**ORDERED**, that the Judgment entered against Don C. Jensen, dated October 23, 1995, is set aside and vacated; and it further is

**ORDERED**, that the Defendants' Motion for Rule 11 Sanctions against Brenda L. Flanders is denied; and it further is

**ORDERED**, that the Defendants' Motion for Clarification and Reconsideration, in which the Defendants' sought Rule 37 sanctions against Brenda L. Flanders, is denied.

DATED this \_\_\_\_/\_\_\_\_ day of <sup>July</sup>~~June~~, 1996.



---

SANDRA N. PEULER  
Third District Court Judge

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

-----

HUB CAP ANNIE, INC., a Nevada corporation,	:	MINUTE ENTRY
	:	
Plaintiff,	:	CASE NO. 940905231
	:	
vs.	:	
	:	
JAMES R. JENSEN, DON C. JENSEN and WHEEL COVER MARKETING, INC., a Utah corporation,	:	
	:	
Defendants.	:	

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After a review of the pleadings in this matter, the Court rules as follows:

1. The Judgment entered against Don Jensen on October 23, 1995, is set aside.
2. Defendant's Motion for Rule 11 Sanctions is denied.
3. Defendant's Motion for Clarification and Reconsideration is denied.

Defendant's counsel is directed to prepare an Order consistent with this ruling.

Dated this 28 day of May, 1996.



---

SANDRA N. PEULER  
DISTRICT COURT JUDGE

Tab 4

DEC 17 1996

SALT LAKE COUNTY

By

*K. G. Peters*  
Clerk

**MICHAEL A. JENSEN (7231)**  
Attorney at Law  
720 E. Three Fountains Dr #74  
Murray, UT 84107-5252  
(801) 288-9428  
FAX: 288-0708

Counsel for Defendants

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

240 East 400 South  
Salt Lake City, Utah 84111  
Third District Court Clerk: 535-5111; In-Court Clerk: 535-5678

**HUB CAP ANNIE, INC.**  
Nevada corporation,

Plaintiff

v.

**DON C. JENSEN, and  
WHEEL COVER MARKETING, INC.**

Defendants

**ORDER ON DEFENDANTS'  
MEMORANDUM OF COSTS**

CIVIL NO. 940905231CV

Judge Sandra N. Peuler

Upon reviewing the Defendants' Memorandum of Costs and the Plaintiff's opposition in the form of a Motion to Tax, and the Defendants' opposition memorandum, the Court hereby orders that the Defendants' Memorandum of Costs is denied.

DATED this 17 day of December 1996.

*Sandra N. Peuler*  
Judge Sandra N. Peuler  
Third District Court Judge



Tab 5

**MICHAEL A. JENSEN, ATTORNEY AT LAW**

720 East Three Fountains Drive #74 • Murray, Utah 84107-5252 • (801) 288-9428 • Fax: 288-0708

November 14, 1995

Brenda L. Flanders  
Flanders & Associates  
56 East Broadway, Suite 400  
Salt Lake City, UT 84111

**RE: Hub Cap Annie, Inc. v. Wheel Cover Marketing & Don C. Jensen  
Civil No. 940905231**

Dear Ms. Flanders:

Please forward to me the names, addresses, telephone numbers, and dates of all persons or institutions you deposed on the above matter. Also, please provide the full names, addresses, and telephone numbers of the respective Reporters for each deposition so that I may order copies as appropriate.

Very truly yours,

A handwritten signature in black ink, appearing to read "Michael A. Jensen", with a long horizontal flourish extending to the right.

Michael A. Jensen  
Counsel for Don C. Jensen and  
Wheel Cover Marketing, Inc.

**MICHAEL A. JENSEN, ATTORNEY AT LAW**

720 East Three Fountains Drive #74 • Murray, Utah 84107-5252 • (801) 288-9428 • Fax: 288-0708

January 4, 1996

Brenda L. Flanders  
Flanders & Associates  
56 East Broadway, Suite 400  
Salt Lake City, UT 84111

**RE: Hub Cap Annie, Inc. v. Wheel Cover Marketing, Inc. et al  
Civil No. 940905231**

Dear Ms. Flanders:

Please be advised that I have conflict with your proposed date to depose my client, Don C. Jensen, on January 17, 1996. We will need to reschedule it. I suggest the dates of Friday, February 2, 1996 or Monday, February 5, 1996. Please confirm which date is better for you. More importantly, however, since our Motion to Dismiss is pending before the Court, I request that you wait until the Court rules on that motion before conducting any further depositions.

Also, I have not received a reply to my letter requesting the name, address, and telephone number of the Reporter who prepared the transcript of the deposition of Mr. Troy Richards. I should appreciate your reply on this matter.

Very truly yours,

A handwritten signature in black ink, appearing to read "Michael A. Jensen", with a long horizontal flourish extending to the right.

Michael A. Jensen  
Counsel for Don C. Jensen and  
Wheel Cover Marketing, Inc.

641115

**MICHAEL A. JENSEN, ATTORNEY AT LAW**

720 East Three Fountains Drive #74 • Murray, Utah 84107-5252 • (801) 288-9428 • Fax: 288-0708

January 8, 1996

Brenda L. Flanders  
Flanders & Associates  
56 East Broadway, Suite 400  
Salt Lake City, UT 84111

**RE: Hub Cap Annie, Inc. v. Wheel Cover Marketing, Inc. et al**  
**Civil No. 940905231**

Dear Ms. Flanders:

I am in receipt of your Notice of Rescheduled Date of Deposition. However, I still have conflicts with any date that week and will not be able to attend any depositions that week. In my letter of January 4th, I suggested two other dates. However, I now request your cooperation in holding any further depositions in abeyance until (1) we can obtain a copy of the deposition you apparently conducted of Mr. Troy Richards; and (2) until the Court rules on our Motion to Dismiss. If you will not cooperate with us on this matter, we will be forced to seek a protective order.

Notwithstanding this request, I renew my request for the third time for the name, address, and telephone number of the Reporter who prepared the transcript of the deposition of Mr. Troy Richards. I should appreciate your reply on this matter.

Very truly yours,



Michael A. Jensen  
Counsel for Don C. Jensen and  
Wheel Cover Marketing, Inc.

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**MICHAEL A. JENSEN, ATTORNEY AT LAW**

720 East Three Fountains Drive #74 • Murray, Utah 84107-5252 • (801) 288-9428 • Fax: 288-0708

January 10, 1996

Brenda L. Flanders  
Flanders & Associates  
56 East Broadway, Suite 400  
Salt Lake City, UT 84111

**RE: Hub Cap Annie, Inc. v. Wheel Cover Marketing, Inc. et al  
Civil No. 940905231**

Dear Ms. Flanders:

I am representing Wheel Cover Marketing, Inc. Accordingly, all communications, including copies of motions, notices, etc., should be sent to my attention at the above address. I formally filed a Notice of Appearance with the Court on November 14, 1995 and mailed a copy to you.

I notice that you continue to send copies to Wheel Cover Marketing, Inc. in C/O of Mr. Troy Richards. That is improper for two basic reasons:

- (1) Mr. Richards is no longer associated with Wheel Cover Marketing, Inc; and
- (2) Even if he were part of the company, I am legal Counsel for Wheel Cover Marketing, Inc. and it is a violation of Rule 4.2 of the Rules of Professional Conduct for you to continue to communicate with the company other than through me.

You are hereby requested to cease all communications with the Defendant, Wheel Cover Marketing, Inc., except through me, the company's only legal representative.

Very truly yours,



Michael A. Jensen  
Counsel for Wheel Cover Marketing, Inc.

CC: Cindy Beverly, Judge Frederick's In-Court Clerk

000557  
4

# FLANDERS & ASSOCIATES

Attorneys at Law  
56 East Broadway  
Suite 400  
Salt Lake City, Utah 84111  
Telephone (801) 355-3839  
Telefax (801) 355-6955

Brenda L. Flanders  
Dena C. Sarandos

January 10, 1996

Michael A. Jensen  
720 East Three Fountains Drive #74  
Murray, Utah 84107-5252

Re: Hub Cap Annie, Inc., v. Wheel Cover Marketing, Inc.  
Civil No. 940905231

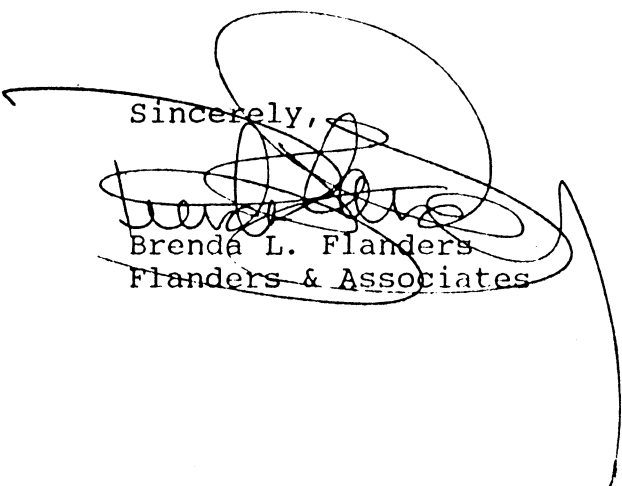
Dear Michael:

I am in receipt of your letter dated January 8, 1996. I am not inclined to reschedule the deposition for Don Jensen again. In your previous letter, you requested that I reschedule Don's deposition. I tried to accommodate you by rescheduling the deposition for January 19, 1996. Unless you provide me with a compelling and legitimate reason for continuing the deposition, I will not do so. In addition, I will file a Motion to Compel and for Sanctions against you and your client. Clearly, you and your client already have caused excessive delay in this case.

Finally, you were told previously that Rocky Mountain Court Reporters prepared the transcript of the deposition of Troy Richards.

I look forward to hearing from you regarding the deposition of Don Jensen.

Sincerely,

  
Brenda L. Flanders  
Flanders & Associates

cc: Rose U. Bowe

009878

5

# FLANDERS & ASSOCIATES

Attorneys at Law  
56 East Broadway  
Suite 400  
Salt Lake City, Utah 84111  
Telephone (801) 355-3839  
Telefax (801) 355-6955

Brenda L. Flanders  
Dena C. Sarandos

January 11, 1996

Michael A. Jensen  
720 East Three Fountains Drive #74  
Murray, Utah 84107-5252

Re: Hub Cap Annie, Inc., v. Wheel Cover Marketing, Inc.  
Civil No. 940905231

Dear Michael:

I am in receipt of your letter dated January 10, 1996 regarding your demand that I do not send copies of pleadings to Mr. Troy Richards for Wheel Cover Marketing, Inc. May I remind you that Judge Frederick ruled that Don Jensen cannot pursue claims on behalf of Wheel Cover Marketing, Inc. Accordingly, he cannot retain you to do so. Wheel Cover is no longer is a viable party in this action. Judge Frederick has executed the default judgment against Wheel Cover Marketing Inc.

You have copied Cindy Beverly, Judge Frederick's clerk, on your letter. If you continue to make ex-parte communications with the Judge, I will file a Motion to Strike the Answer filed for Don Jensen and will request sanctions against you personally.

Finally, Judge Frederick ordered your client to pay \$1,156.32 before he would decide any further motions. If your client does not remit payment of this amount, I will proceed with a collection action against him.

Sincerely,

  
Brenda L. Flanders  
Flanders & Associates

cc: Rose U. Bowe

000009

**FAX LETTER: Original to follow by mail.**

January 15, 1996

Brenda L. Flanders  
Flanders & Associates  
56 East Broadway, Suite 400  
Salt Lake City, UT 84111

**RE: Hub Cap Annie, Inc. v. Wheel Cover Marketing, Inc. et al  
Civil No. 940905231**

Dear Ms. Flanders:

I received on Friday your letter dated January 10, 1996, and on Saturday, I received your letter dated January 11, 1996. Your lack of cooperation in this matter is disappointing. However, your baseless statements and threats are very disturbing. Let me address them in numbered paragraphs so that you can respond appropriately.

1. In your January 10th letter, you stated that,

“I tried to accommodate you by rescheduling Don’s deposition for January 19, 1996.”

Please clarify this statement because I am unaware that you rescheduled the deposition to January 19th at my request. My request was for February 2nd or 5th, or for postponing any depositions until the Court rules on the issue of jurisdiction.

2. Also, in your letter of January 10th, you claim that you previously informed me of the reporter’s identity for Mr. Richards’ deposition. I have never received such information. Please identify the form and date of the communication in which that information was conveyed. Further, there is no listing in the Salt Lake City telephone directory for a “Rocky Mountain Court Reporters.” Please clarify and please respond with all the information that I have repeatedly requested: name, address, telephone number, and date of deposition.

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3. Since I had not received a response from you, I filed and served a motion for protective order last Friday, January 12, 1996. As you are well aware, sanctions are inappropriate under Rule 37(d) upon our application for relief under a protective order. Accordingly, if you seek sanctions against us, we will seek Rule 11 sanctions against you.

4. Again, in your January 10th letter you allege that my client and I "already have caused excessive delay in this case." This may be your assessment but the facts speak otherwise. First, your insistence that the letter filed with the Court by Mr. Richards was a legitimate "answer" was without merit since any unsigned pleading must be stricken under Rule 11 and the Court obviously agreed. Your continued defense of that untenable position caused excessive delays in this case.

Second, you continue to stubbornly cling to the notion that Mr. Richards is a director of Wheel Cover Marketing, Inc. That is an absurd position. You have proffered no evidence. More importantly, you completely ignored Mr. Richards' own statement that he left the Company "on or about August 20, 1994." You also completely ignored the Company's Articles of Dissolution. And, you falsely claimed that Utah law requires a dissolved corporation to keep the State informed of changes in its officers and directors. There is no such law or regulation and you know it. Again, your baseless assertions have caused excessive delays in this case.

5. In your letter of January 11th, you again make threats of sanctions:

"You have copied Cindy Beverly, Judge Frederick's clerk, on your letter. If you continue to make ex-parte communications with the Judge, I will file a Motion to Strike the Answer filed for Don Jensen and will request sanctions against you personally."

Perhaps you misapprehend the meaning of "ex parte"; it means "one sided." Can you identify any communication in this instance which is one-sided? Such threats are without proper legal foundation when you incorrectly state the facts.

6. Also, in your letter of January 11th, you assert another nonexistent fact:

“May I remind you that Judge Frederick ruled that Don Jensen cannot pursue claims on behalf of Wheel Cover Marketing, Inc. Accordingly, he cannot retain you to do so. Wheel Cover is no longer a viable party in this action.”

Please identify which of Judge Frederick’s rulings prohibits my representation of Wheel Cover Marketing, Inc. And if I cannot represent the Company, who can? Are you asserting that the Company is not entitled to legal representation? Also, you appear to be asserting that the Company has no right of appeal and that the default judgment is final. If that is your contention, then will you oppose a motion for certification on that judgment? If you do not agree that I am the legal representative of the Company and follow Rule 4.2 of Utah’s Professional Code of Conduct, I will be forced to establish that recognition by appropriate action with the Court.

Finally, please understand that my clients and I are prepared to use every avenue available to us throughout these proceedings to defeat your baseless assertions. We are confident that we will prevail on all the issues that we have raised so far. Judge Frederick is tragically in error on this matter so far but that will be reversed in the near future.

Very truly yours,

A handwritten signature in black ink, appearing to read "Michael Jensen", with a long horizontal flourish extending to the right.

Michael A. Jensen  
Counsel for Wheel Cover Marketing and  
Don C. Jensen

**FAX LETTER: Original to follow by mail.**

January 18, 1996

Brenda L. Flanders  
Flanders & Associates  
56 East Broadway, Suite 400  
Salt Lake City, UT 84111

**RE: Hub Cap Annie, Inc. v. Wheel Cover Marketing, Inc. et al  
Civil No. 940905231**

Dear Ms. Flanders:

This letter will confirm our telephone conversation of today.

My client, Don C. Jensen, will not be at the deposition you scheduled for Friday, January 19, 1996. As I have repeatedly told you, I have a conflict and have suggested two alternative dates, both of which you ignored. More importantly, however, my clients should not be subjected to depositions until the Court rules on our motion to dismiss on jurisdictional grounds.

Since you have been notified that we will not be present, you are expected to mitigate any damages. Therefore, your threat to "have the reporter present" tomorrow and to attempt to collect those costs is reprehensible.

With a new judge, we expect that a hearing will be held in the near future and that this entire matter will be properly and fairly resolved. In the meanwhile, postponing depositions, other discovery, and collection attempts on judgments should be held in abeyance. Your cooperation will be appreciated.

Finally, you continue to deny us the information regarding Mr. Richards' deposition. You claim that you gave me the information in a telephone call on November 13, 1995. Please provide some verification of that allegation since I have no record of it. More to the point, however, why do insist on denying us that basic information? Your lack of cooperation on this matter is beyond belief and far beyond the civility required by our Professional Code of Conduct. Why you cannot simply

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Brenda L. Flanders  
January 18, 1996  
Page 2

send a letter or a fax with the information which we have requested numerous times (name, address, telephone, and date of deposition) is incomprehensible. Instead of arguing that we should be able to have the information, why do you not simply send it once and for all? It would save a lot of time and contention.

Very truly yours,

A handwritten signature in black ink, appearing to read "Michael A. Jensen", with a long horizontal flourish extending to the right.

Michael A. Jensen  
Counsel for Wheel Cover Marketing and  
Don C. Jensen



## FLANDERS & ASSOCIATES

Attorneys at Law  
56 East Broadway  
Suite 400  
Salt Lake City, Utah 84111  
Telephone (801) 355-3839  
Telefax (801) 355-6955

Brenda L. Flanders  
Dena C. Sarandos

January 18, 1996

VIA HAND-DELIVERY

Michael A. Jensen  
720 East Three Fountains Drive #74  
Murray, Utah 84107-5252

Re: Hub Cap Annie, Inc., v. Wheel Cover Marketing, Inc.  
Civil No. 940905231

Dear Michael:

In your letter dated January 15, 1996, you reiterate that you have filed a protective order to prevent Don Jensen from testifying at his deposition which is scheduled on January 19, 1996. This is unacceptable. Rule 26(c) of the *Utah Rules of Civil Procedure*, specifically states that "the court in the district where the deposition is to be taken may make any order which justice requires to protect a party" from a deposition. You have not obtained such an order. Consequently, I expect you to instruct your client to attend his deposition that has been scheduled for January 19, 1996. If your client does not attend, I will seek sanctions against him and you and request an award for the costs of the deposition.

You indicate that sanctions are inappropriate under Rule 37(d) of the *Utah Rules of Civil Procedure*. Your interpretation of this rule is incorrect. I suggest you reread the rule and scrutinize the language more carefully.

Finally, you claim that you have not received information regarding the identity of the court reporter that transcribed Mr. Troy A. Richards' deposition. This is a bold misrepresentation. You have received this information on at least three occasions. On or about June 2, 1995, the court reporter filed with the Court a Certification of Finalization of the original deposition transcript of Troy A. Richards. This certificate reflects the name of the court reporter, the name of the court reporting company, the

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address and the telephone number. If you desired, you could have obtained this information. It is not my fault that you have been remiss in your obligations as an attorney to your client. In addition, I told you the court reporter's company name during a conversation we had over the telephone. Also, last week, you were sent the name of the court reporter who transcribed the deposition of Troy A. Richards.

It is unfortunate that you do not follow the rules of professional responsibility and the rules of civil procedure. I hope that you terminate your baseless allegations that the information regarding the court reporter has not been divulged to you.

Sincerely,

  
Brenda L. Flanders  
Flanders & Associates

cc: Rose U. Bowe

Tab 6



Michael O. Leavitt  
Governor  
Douglas C. Borba  
Executive Director  
Korla T. Woods  
Division Director

# State of Utah

DEPARTMENT OF COMMERCE  
Division of Corporations and Commercial Code

Heber M. Wells Building  
160 East 300 South/P.O. Box 45801  
Salt Lake City, Utah 84145-0801  
(801) 530-6024  
(801) 530-6438 (FAX)

RECEIVED  
THIRD JUDICIAL DISTRICT  
MAR 18 1996  
SALT LAKE COUNTY  
By \_\_\_\_\_

March 15, 1996

Michael A. Jensen, Attorney-at-law  
First Interstate Plaza, Ninth Floor  
Salt Lake City, Utah 84101-1655

RE: Duty of Corporation to report changes in its officers and directors.

Dear Mr. Jensen:

In response to the question of whether a corporation has a duty to report to the State of Utah any changes in its officers or directors, I offer the following statement:

Pursuant to §16-10a-302, Utah Code Annotated, a corporation may elect directors and appoint officers and agents of the corporation. Pursuant to §16-10a-808, U.C.A., the "shareholders of a corporation may remove one or more directors with or without cause unless the articles of incorporation provide that directors may be removed only for cause." Pursuant to the same §16-10a-808, a "director who is removed pursuant to this section may deliver to the division for filing a statement to that effect pursuant to §16-10a-1608." The operative word "may" in the preceding sentence is permissive and not mandatory. The Commentary to §16-10a-1608 reinforces this point by stating that the section *allows* a person to file such a statement.

To benefit from the statutes governing corporations, the Division requires that an active corporation file an Annual Report each year. This Report requires the listing of current officers and directors. As each Annual Report is filed, it supersedes the prior Annual Report. Further, changes in officers and directors that occur between the filing of Annual Reports may be reported to the Division as an Amended Annual Report. However, there is no requirement for a corporation to file an Amended Annual Report or to report the changes in its officers and directors that occur during the time period between Annual Reports. Once again, the Commentary to §16-10a-1608 indicates that a corporation may file an amended annual report to accomplish the result provided under §16-10a-1608.

However, once a corporation files pursuant to §16-10a-1403, U.C.A., Articles of Dissolution, the dissolved corporation has no further duty to file an Annual Report or to notify the Division of any changes in its officers or directors. In fact, the Commentary to §16-10a-1403 states that articles of dissolution "is the only filing required for a voluntary dissolution" (emphasis added).



Michael A. Jensen

March 15, 1996

page 2

I hope this has adequately responded to your concerns.

Sincerely,

A handwritten signature in black ink, appearing to read "George Danielson", with a long horizontal flourish extending to the right.

George Danielson  
Division Counsel

Tab 7

## **Rule 4**

### **Rule 4. Process.**

(a) Signing of summons. The summons shall be signed and issued by the plaintiff or the plaintiff's attorney. Separate summonses may be signed and served.

(b) Time of service. In an action commenced under Rule 3(a)(1), the summons together with a copy of the complaint shall be served no later than 120 days after the filing of the complaint unless the court allows a longer period of time for good cause shown. If the summons and complaint are not timely served, the action shall be dismissed, without prejudice on application of any party or upon the court's own initiative. In any action brought against two or more defendants on which service has been obtained upon one of them within the 120 days or such longer period as may be allowed by the court, the other or others may be served or appear at any time prior to trial.

(c) Contents of summons. The summons shall contain the name of the court, the address of the court, the names of the parties to the action, and the county in which it is brought. It shall be directed to the defendant, state the name, address and telephone number of the plaintiff's attorney, if any, and otherwise the plaintiff's address and telephone number. It shall state the time within which the defendant is required to answer the complaint in writing, and shall notify the defendant that in case of failure to do so, judgment by default will be rendered against the defendant. It shall state either that the complaint is on file with the court or that the complaint will be filed with the court within ten days of service. If service is made by publication, the summons shall briefly state the subject matter and the sum of money or other relief demanded, and that the complaint is on file.

(d) By whom served. The summons and complaint may be served in this state or any other state or territory of the United States, by the sheriff or constable, or by the deputy of either, by a United States Marshal or by the marshal's deputy, or by any other person 18 years of age or older at the time of service, and not a party to

the action or a party's attorney.

(e) Personal service. Personal service shall be made as follows:

(1) Upon any individual other than one covered by subparagraphs (2), (3) or (4) below, by delivering a copy of the summons and/or the complaint to the individual personally, or by leaving a copy at the individual's dwelling house or usual place of abode with some person of suitable age and discretion there residing, or by delivering a copy of the summons and/or the complaint to an agent authorized by appointment or by law to receive service of process;

(2) Upon an infant (being a person under 14 years) by delivering a copy to the infant and also to the infant's father, mother or guardian or, if none can be found within the state, then to any person having the care and control of the infant, or with whom the infant resides, or in whose service the infant is employed;

(3) Upon a natural person judicially declared to be of unsound mind or incapable of conducting his own affairs, by delivering a copy to the person and to the person's legal representative if one has been appointed and in the absence of such representative, to the individual, if any, who has care, custody or control of the person;

(4) Upon an individual incarcerated or committed at a facility operated by the state or any of its political subdivisions, by delivering a copy to the person who has the care, custody, or control of the individual to be served, or to that person's designee or to the guardian or conservator of the individual to be served if one has been appointed, who shall, in any case, promptly deliver the process to the individual served;

(5) Upon any corporation, not herein otherwise provided for, upon a partnership or other unincorporated association which is subject to suit under a common name, by delivering a copy thereof to an officer, a managing or general agent, or other agent authorized by appointment or by law to receive service of process and, if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the defendant. If no such officer or agent can be found within the state, and the defendant has, or advertises or holds itself out as having, an office



or place of business within the state or elsewhere, or does business within this state or elsewhere, then upon the person in charge of such office or place of business;

(6) Upon an incorporated city or town, by delivering a copy thereof to the recorder;

(7) Upon a county, by delivering a copy to the county clerk of such county;

(8) Upon a school district or board of education, by delivering a copy to the superintendent or business administrator of the board;

(9) Upon an irrigation or drainage district, by delivering a copy to the president or secretary of its board;

(10) Upon the state of Utah, in such cases as by law are authorized to be brought against the state, by delivering a copy to the attorney general and any other person or agency required by statute to be served; and

(11) Upon a department or agency of the state of Utah, or upon any public board, commission or body, subject to suit, by delivering a copy to any member of its governing board, or to its executive employee or secretary.

(f) Service and proof of service in a foreign country. Service in a foreign country shall be made as follows:

(1) In the manner prescribed by the law of the foreign country for service in an action in any of its courts of general jurisdiction; or

(2) Upon an individual, by personal delivery; and upon a corporation, partnership or association, by delivering a copy to an officer or a managing general agent; provided that such service be made by a person who is not a party to the action, not a party's attorney, and is not less than 18 years of age, or who is designated by order of the court or by the foreign court; or

(3) By any form of mail, requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the party to be served as ordered by the court. Proof of service in a foreign country shall be made as prescribed in these rules for service within this state, or by the law of the foreign country, or by order of the court. When service is made pursuant to subpart (3) of this subdivision, proof of service shall include a receipt signed by the addressee or other evidence of delivery to the addressee

satisfactory to the court.

(g) Other service. Where the identity or whereabouts of the person to be served are unknown and cannot be ascertained through reasonable diligence, where service upon all of the individual parties is impracticable under the circumstances, or where there exists good cause to believe that the person to be served is avoiding service of process, the party seeking service of process may file a motion supported by affidavit requesting an order allowing service by publication, by mail, or by some other means. The supporting affidavit shall set forth the efforts made to identify, locate or serve the party to be served, or the circumstances which make it impracticable to serve all of the individual parties. If the motion is granted, the court shall order service of process by publication, by mail from the clerk of the court, by other means, or by some combination of the above, provided that the means of notice employed shall be reasonably calculated, under all the circumstances, to apprise the interested parties of the pendency of the action to the extent reasonably possible or practicable. The court's order shall also specify the content of the process to be served and the event or events as of which service shall be deemed complete. A copy of the court's order shall be served upon the defendant with the process specified by the court.

(h) Manner of proof. In a case commenced under Rule 3(a)(1), the party serving the process shall file proof of service with the court promptly, and in any event within the time during which the person served must respond to the process, and proof of service must be made within ten days after such service. Failure to file proof of service does not affect the validity of the service. In all cases commenced under Rule 3(a)(1) or Rule 3(a)(2), the proof of service shall be made as follows:

- (1) If served by a sheriff, constable, United States Marshal, or the deputy of any of them, by certificate with a statement as to the date, place, and manner of service;
- (2) If served by any other person, by affidavit with a statement as to the date, place, and manner of service, together with the affiant's age at the time of service;

- (3) If served by publication, by the affidavit of the publisher or printer or that person's designated agent, showing publication, and specifying the date of the first and last publications; and an affidavit by the clerk of the court of a deposit of a copy of the summons and complaint in the United States mail, if such mailing shall be required under this rule or by court order;
- (4) If served by United States mail, by the affidavit of the clerk of the court showing a deposit of a copy of the summons and complaint in the United States mail, as may be ordered by the court, together with any proof of receipt;
- (5) By the written admission or waiver of service by the person to be served, duly acknowledged, or otherwise proved.
- (i) Amendment. At any time in its discretion and upon such terms as it deems just, the court may allow any process or proof of service thereof to be amended, unless it clearly appears that material prejudice would result to the substantial rights of the party against whom the process issued.
- (j) Refusal of copy. If the person to be served refuses to accept a copy of the process, service shall be sufficient if the person serving the same shall state the name of the process and offer to deliver a copy thereof.
- (k) Date of service to be endorsed on copy. At the time of service, the person making such service shall endorse upon the copy of the summons left for the person being served, the date upon which the same was served, and shall sign his or her name thereto, and, if an officer, add his or her official title.
- (l) Designation of newspaper for publication of notice. In any proceeding where summons or other notice is required to be published, the court shall, upon the request of the party applying for such publication, designate the newspaper and authorize and direct that such publication shall be made therein; provided, that the newspaper selected shall be a newspaper of general circulation in the county where such publication is required to be made and shall be published in the English language.
- (Amended effective March 1, 1988; April 1, 1990.)

## **Rule 11**

### **Rule 11. Signing of pleadings, motions, and other papers; sanctions.**

Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in his individual name who is duly licensed to practice in the state of Utah. The attorney's address also shall be stated. A party who is not represented by an attorney shall sign his pleading, motion, or other paper and state his address. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. The rule in equity that the averments of an answer under oath must be overcome by the testimony of two witnesses or of one witness sustained by corroborating circumstances is abolished. The signature of an attorney or party constitutes a certification by him that he has read the pleading, motion, or other paper; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. If a pleading, motion, or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant. If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

(Amended effective Sept. 4, 1985.)

## **Rule 15**

### **Rule 15. Amended and supplemental pleadings.**

(a) Amendments. A party may amend his pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it at any time within 20 days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders.

(b) Amendments to conform to the evidence. When issues not raised by the pleading are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendments of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits. The court shall grant a continuance, if necessary, to enable the objecting party to meet such evidence.

(c) Relation back of amendments. Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading.

(d) Supplemental pleadings. Upon motion of a party the court may, upon reasonable notice and upon such terms as are just, permit him to serve a supplemental pleading setting forth transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented. Permission may be granted even though the original pleading is defective in its statement of a claim for relief or defense. If the court deems it advisable that the adverse party plead to the supplemental pleading, it shall so order, specifying the time therefor. Compiler's Notes. -- This rule is similar to Rule 15, F.R.C.P.

## **Rule 33**

### **Rule 33. Interrogatories to parties.**

(a) Availability; procedures for use. Any party may serve upon any other party written interrogatories to be answered by the party served or, if the party served is a public or private corporation, a partnership, an association, or a governmental agency, by any officer or agent, who shall furnish such information as is available to the party. Interrogatories may, without leave of court, be served upon the plaintiff after commencement of the action and upon any other party with or after service of the summons and complaint upon that party.

Each interrogatory shall be answered separately and fully in writing under oath, unless it is objected to, in which event the reasons for objection shall be stated in lieu of an answer. The answers are to be signed by the person making them, and the objections signed by the attorney making them. The party upon whom the interrogatories have been served shall serve a copy of the answers and objections, if any, within 30 days after the service of the interrogatories, except that a defendant may serve answers or objections within 45 days after service of the summons and complaint upon that defendant. The court may allow a shorter or longer time. The party submitting the interrogatories may move for an order under Rule 37(a) with respect to any objection to or other failure to answer an

interrogatory.

(b) Scope; use at trial. Interrogatories may relate to any matters which can be inquired into under Rule 26(b), and the answers may be used to the extent permitted by the Rules of Evidence. An interrogatory otherwise proper is not necessarily objectionable merely because an answer to the interrogatory involves an opinion or contention that relates to fact or the application of law to fact, but the court may order that such an interrogatory need not be answered until after designated discovery has been completed or until a pretrial conference or other later time.

(c) Option to produce business records. Where the answer to an interrogatory may be derived or ascertained from the business records of the party upon whom the interrogatory has been served or from an examination, audit, or inspection of such business records, including a compilation, abstract, or summary thereof and the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served, it is a sufficient answer to such interrogatory to specify the records from which the answer may be derived or ascertained and to afford to the party serving the interrogatory reasonable opportunity to examine, audit, or inspect such records and to make copies, compilations, abstracts, or summaries. A specification shall be in sufficient detail to permit the interrogating party to locate and to identify, as readily as can the party served, the records from which the answer may be ascertained.

(Amended effective Jan. 1, 1987.)

Compiler's Notes. -- This rule corresponds to Rule 33, F.R.C.P.

## **Rule 37**

### **Rule 37. Failure to make or cooperate in discovery; sanctions.**

(a) Motion for order compelling discovery. A party, upon reasonable notice to other parties and all persons affected thereby, may apply for an order compelling discovery as follows:

(1) Appropriate court. An application for an order to a party may be made to the court in which the action is pending, or, on matters relating to a deposition, to the court in the district where the deposition is being taken. An application for an order to a deponent who is not a party shall be made to the court in the district where the deposition is being taken.

(2) Motion. If a deponent fails to answer a question propounded or submitted under Rule 30 or 31, or a corporation or other entity fails to make a designation under Rule 30(b)(6) or 31(a), or a party fails to answer an interrogatory submitted under Rule 33, or if a party, in response to a request for inspection submitted under Rule 34, fails to respond that inspection will be permitted as requested or fails to permit inspection as requested, the discovering party may move for an order compelling an answer, or a designation, or an order compelling inspection in accordance with the request. When taking a deposition on oral examination, the proponent of the question may complete or adjourn the examination before he applies for an order.

If the court denies the motion in whole or in part, it may make such protective order as it would have been empowered to make on a motion made pursuant to Rule 26(c).

(3) Evasive or incomplete answer. For purposes of this subdivision an evasive or incomplete answer is to be treated as a failure to answer.

(4) Award of expenses of motion. If the motion is granted, the court shall, after opportunity for hearing, require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in obtaining the order, including attorney fees, unless the court finds that the



opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust.

If the motion is denied, the court shall, after opportunity for hearing, require the moving party or the attorney advising the motion or both of them to pay to the party or deponent who opposed the motion the reasonable expenses incurred in opposing the motion, including attorney fees, unless the court finds that the making of the motion was substantially justified or that other circumstances make an award of expenses unjust.

If the motion is granted in part and denied in part, the court may apportion the reasonable expenses incurred in relation to the motion among the parties and persons in a just manner.

(b) Failure to comply with order.

(1) Sanctions by court in district where deposition is taken. If a deponent fails to be sworn or to answer a question after being directed to do so by the court in the district in which the deposition is being taken, the failure may be considered a contempt of that court.

(2) Sanctions by court in which action is pending. If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under Subdivision (a) of this rule or Rule 35, or if a party fails to obey an order entered under Rule 26(f), the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:

(A) an order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(B) an order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence;

(C) an order striking out pleadings or parts thereof, staying further proceedings until the order is obeyed, dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

(D) in lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical or mental examination;

(E) where a party has failed to comply with an order under Rule 35(a) requiring him to produce another for examination, such orders as are listed in Paragraphs (A), (B), and (C) of this subdivision, unless the party failing to comply shows that he is unable to produce such person for examination.

In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising him or both to pay the reasonable expenses, including attorney fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

(c) Expenses on failure to admit. If a party fails to admit the genuineness of any document or the truth of any matter as requested under Rule 36, and if the party requesting the admissions thereafter proves the genuineness of the document or the truth of the matter, he may apply to the court for an order requiring the other party to pay him the reasonable expenses incurred in making that proof, including reasonable attorney's fees. The court shall make the order unless it finds that (1) the request was held objectionable pursuant to Rule 36(a), or (2) the admission sought was of no substantial importance, or (3) the party failing to admit had reasonable ground to believe that he might prevail on the matter, or (4) there was other good reason for the failure to admit.

(d) Failure of party to attend at own deposition or serve answers to interrogatories or respond to request for inspection. If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails (1) to appear before the officer who is to take his deposition, after being served with a proper notice, or (2) to serve answers or objections to interrogatories submitted under Rule 33, after proper service of the interrogatories, or (3) to serve a written response to a request for inspection submitted under Rule 34, after proper service of the request, the court in which the action is

pending on motion may make such orders in regard to the failure as are just, and among others it may take any action authorized under Paragraphs (A), (B), and (C) of Subdivision (b)(2) of this rule. In lieu of any order or in addition thereto, the court shall require the party failing to act or the attorney advising him or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

The failure to act described in this subdivision may not be excused on the ground that the discovery sought is objectionable unless the party failing to act has applied for a protective order as provided by Rule 26(c).

(e) Failure to participate in the framing of a discovery plan. If a party or his attorney fails to participate in good faith in the framing of a discovery plan by agreement as is required by Rule 26(f), the court may, after opportunity for hearing, require such party or his attorney to pay to any other party the reasonable expenses, including attorney fees, caused by the failure.

(Amended effective Jan. 1, 1987.)

Compiler's Notes. -- This rule corresponds to Rule 37, F.R.C.P.

## **Rule 54**

### **Rule 54. Judgments; costs.**

(a) Definition; form. "Judgment" as used in these rules includes a decree and any order from which an appeal lies. A judgment need not contain a recital of pleadings, the report of a master, or the record of prior proceedings.

(b) Judgment upon multiple claims and/or involving multiple parties. When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, and/or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination by the court that there is no just reason for delay and upon an express direction for the entry of judgment. In the

absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

(c) Demand for judgment.

(1) Generally. Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings. It may be given for or against one or more of several claimants; and it may, when the justice of the case requires it, determine the ultimate rights of the parties on each side as between or among themselves.

(2) Judgment by default. A judgment by default shall not be different in kind from, or exceed in amount, that specifically prayed for in the demand for judgment.

(d) Costs.

(1) To whom awarded. Except when express provision therefor is made either in a statute of this state or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs; provided, however, where an appeal or other proceeding for review is taken, costs of the action, other than costs in connection with such appeal or other proceeding for review, 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.

(2) How assessed. The party who claims his costs must within five days after the entry of judgment serve upon the adverse party against whom costs are claimed, a copy of a memorandum of the items of his costs and necessary disbursements in the action, and file with the court a like memorandum thereof duly verified stating that to affiant's knowledge the items are correct, and that the disbursements have been necessarily incurred in the action or proceeding. A party dissatisfied with the costs claimed may,

within seven days after service of the memorandum of costs, file a motion to have the bill of costs taxed by the court in which the judgment was rendered.

A memorandum of costs served and filed after the verdict, or at the time of or subsequent to the service and filing of the findings of fact and conclusions of law, but before the entry of judgment, shall nevertheless be considered as served and filed on the date judgment is entered.

(3), (4) [Deleted.]

(e) Interest and costs to be included in the judgment. The clerk must include in any judgment signed by him any interest on the verdict or decision from the time it was rendered, and the costs, if the same have been taxed or ascertained. The clerk must, within two days after the costs have been taxed or ascertained, in any case where not included in the judgment, insert the amount thereof in a blank left in the judgment for that purpose, and make a similar notation thereof in the register of actions and in the judgment docket.

(Amended effective January 1, 1985.)

Amendment Notes. -- Subdivisions (d)(3) and (d)(4), relating to the award of costs by the appellate court and costs in original proceedings before the Supreme Court, were repealed with the adoption of the Utah Rules of Appellate Procedure, effective January 1, 1985. See, now, Rule 34(d), Utah R.App.P.

Compiler's Notes. -- This rule is similar to Rule 54, F.R.C.P.