

1987

George M. Baker and Della A. Baker v. Western Surety and Craig A. Papa-Dakis : Brief of Respondent

Utah Court of Appeals

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CKET NO. 870267-CA IN THE COURT OF APPEALS OF THE STATE OF UTAH

GEORGE M. BAKER and
DELLA A. BAKER,

Plaintiffs/Appellants
and Cross-Respondents,

v.

WESTERN SURETY COMPANY,

Defendant/Respondent
and Cross-Appellant,

and

CRAIG A. PAPA-DAKIS,
individually and d/b/a
"AUTO-MART"; and AUTO-MART,

Defendant.

Case No: 870267-CA

Priority 14(b)

BRIEF OF RESPONDENT/CROSS-APPELLANT

APPEAL FROM AN ORDER OF THE THIRD JUDICIAL
DISTRICT COURT IN AND FOR SALT LAKE COUNTY,
STATE OF UTAH, THE HONORABLE HOMER F. WILKINSON

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GEORGE M. BAKER and
DELLA A. BAKER,

Plaintiffs/Appellants
and Cross-Respondents,

V.

WESTERN SURETY COMPANY,

Defendant/Respondent
and Cross-Appellant,

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IN THE COURT OF APPEALS OF THE STATE OF UTAH

GEORGE M. BAKER and)	
DELLA A. BAKER,)	
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Plaintiffs/Appellants)	
and Cross-Respondents,)	
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v.)	
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WESTERN SURETY COMPANY,)	Case No: 870267-CA
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Defendant/Respondent)	
and Cross-Appellant,)	
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and)	Priority 14(b)
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CRAIG A. PAPA-DAKIS,)	
individually and d/b/a)	
"AUTO-MART"; and AUTO-MART,)	
)	
Defendant.)	

BRIEF OF RESPONDENT/CROSS-APPELLANT

JURISDICTION

This court has jurisdiction over this appeal by virtue of the order of the Utah Supreme Court dated July 8, 1987, and Utah Code Ann. §78-2a-3(2)(h) (1987).

NATURE OF THE PROCEEDINGS

This is an appeal from an order of the Third Judicial District Court entered pursuant to Rule 60(b) of the Utah Rules of Civil Procedure. Said order granted the respondent Western Surety's motion for relief from the judgment previously entered

by the court. The cross-appeal of Western Surety is in the alternative only, and appeals from that part of the final order and judgment that denies Western Surety's motion to stay proceedings.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Was the trial court's decision under Rule 60(b) of the Utah Rules of Civil Procedure an abuse of its discretion?

The following issues are presented by the cross-appeal and are contingent upon this court's disposition of the appeal. Should the court affirm the trial court's order granting relief pursuant to Rule 60(b), cross-appellant Western Surety does not wish to disturb the order and judgment. Should the court reverse the trial court's order granting Rule 60(b) relief, Western Surety cross-appeals from that part of the order denying its motion to stay proceedings, raising the following issues:

2. Was the denial of Western Surety's motion to stay proceedings error in light of the pending interpleader action?

3. Was the entry of summary judgment in favor of the plaintiffs error in light of the prior filing of the interpleader action?

DETERMINATIVE STATUTES AND RULES

Rule 22 of the Utah Rules of Civil Procedure provides that:

Persons having claims against the plaintiff may be joined as defendants and required to

interplead when their claims are such that the plaintiff is or may be exposed to double or multiple liability. It is not ground for objecting to the joinder that the claims of the several claimants or the titles on which their claims depend do not have a common origin or are not identical but are adverse to and independent of one another, or that the plaintiff avers that he is not liable in whole or in part to any or all of the claimants. A defendant exposed to similar liability may obtain such interpleader by way of cross-claim or counterclaim. The provisions of this rule supplement and do not in any way limit the joinder of parties permitted in Rule 20.

Rule 60(b) of the Utah Rules of Civil Procedure provides as follows:

(b) Mistakes; inadvertence; excusable neglect; newly discovered evidence; fraud, etc. On motion and upon such terms as are just, the court may in the furtherance of justice relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party; (4) when, for any cause, the summons in an action has not been personally served upon the defendant as required by Rule 4(e) and the defendant has failed to appear in said action; (5) the judgment is void; (6) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (7) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time and for reasons (1), (2), (3), or (4), not more than 3 months after the

judgment, order, or proceeding was entered or taken. A motion under this Subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order or proceeding or to set aside a judgment for fraud upon the court. The procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

Rule 3(a) of the Utah Rules of Appellate Procedure provides, in pertinent part, that:

(a) Filing Appeal From Final Orders and Judgments. An appeal may be taken from a district court to the Supreme Court from all final orders and judgments, except as otherwise provided by law, by filing a notice of appeal with the clerk of the district court within the time allowed by Rule 4.

STATEMENT OF THE CASE

Western Surety submits the following statement of the case as the appellants' statement of the case is misleading and inaccurate, and does not contain a statement of facts free of legal conclusions and argument.

A. Nature of the Case

This action involves a claim by George and Della Baker (hereinafter "the Bakers") against a motor vehicle dealer, Craig Papa-Dakis dba Auto-Mart (hereinafter "dealer"), and a motor vehicle dealer's bond issued by Western Surety Company to the dealer. The motor vehicle dealer's bond provided that Western Surety would act as surety for the dealer and indemnify persons

for loss suffered by reason of the dealer's fraud or violation of the Motor Vehicle Business Act if the dealer failed to so indemnify such persons. The total aggregate annual liability of the bond, regardless of the number of claims, is limited to \$20,000.00. (See bond, R. at 10, reproduced at A-1.) The Bakers filed a complaint against the dealer and Western Surety alleging that the dealer had failed to provide clear and marketable title on a vehicle sold to them. (Complaint, R. at 2.)

At or near the time the Bakers filed their complaint, two other actions were filed against the dealer and Western Surety. (See certified copies of complaints, at A-25 and A-28.) In addition to the three lawsuits against the dealer and Western Surety, Western Surety was advised by the Motor Vehicle Business Administration for the State of Utah (hereinafter "Motor Vehicle Department") that thirty-five claims had been filed in its office against the dealer. (R. at 71.) Because the three lawsuits pending against the dealer and Western Surety and the other claims filed with the Motor Vehicle Department set forth claimed damages in excess of \$100,000 (greatly in excess of the \$20,000 bond limit), Western Surety prepared to file an interpleader action pursuant to Rule 22 of the Utah Rules of Civil Procedure to join all of the claimants in one action, so as to avoid multiple liability and so that all claimants to the bond could be heard and treated fairly and equitably. (See Motion to Stay

Proceedings, R. at 68.) A somewhat confusing course of proceedings followed due to the Bakers' constant efforts to gain undue advantage and priority over the other bond claimants and thwart the interpleader proceedings. The following events took place even though the Bakers' counsel was advised that the bond funds would be interpleaded so that all claimants could be treated equitably.

The interpleader action was filed and was assigned to the Honorable Richard H. Moffat on December 16, 1986. (See Complaint for Interpleader, R. at 90, certified copy reproduced at A-2.) Despite the filing of interpleader, the Bakers sought summary judgment against Western Surety in the action below (which was before the Honorable Homer F. Wilkinson). Judge Wilkinson granted the Bakers' motion for summary judgment¹ and concurrently denied a motion brought by Western Surety to stay proceedings, which was based upon the filing of the interpleader. (Order and Summary Judgment dated 12/31/86, R. at 100.)

With judgment granted in their favor, the Bakers attempted to frustrate the interpleader action further by garnishing every insurance agent in the State of Utah licensed to do Western Surety Business (R. at 110.) These garnishments took

¹ When the motion for relief from that judgment was heard on February 13, 1987, Judge Wilkinson indicated that he did not realize that interpleader had been filed at the time of the hearing on the motion for summary judgment, and that "in all probability [he] would have granted a stay there," if he had understood that interpleader had been filed. (Transcript of 2/13/87 hearing, p.21, R. at 329, reproduced at A-50.)

place outside of the interpleader action where the bond funds were held for the protection and benefit of all claimants for a determination of distribution by the interpleader court. Western Surety, therefore, sought an order from the interpleader court requiring the Bakers to interplead and satisfy their judgment within the interpleader action. (See Motion to Enjoin Execution, reproduced at A-14.) Judge Moffat declined to rule on that issue in the interpleader action, stating that Judge Wilkinson would have to consider any motion regarding the judgment entered in favor of the Bakers. (See transcript of 2/5/87 hearing, reproduced at A-17 to 20.) Western Surety, therefore, brought a motion for relief from judgment before Judge Wilkinson. Upon reviewing the motion in light of the preceding circumstances, Judge Wilkinson granted relief from judgment pursuant to Rule 60(b) of the Utah Rules of Civil Procedure, and entered an order and judgment, which reinstated the Bakers' summary judgment but required them to interplead to satisfy their claim and judgment. (Order dated 4/7/87, R. at 294, reproduced at A-21.) This appeal and cross-appeal followed.

B. Course of Proceedings and Statement of Facts.

The somewhat confusing course of proceedings in this matter is best understood when examined in chronological sequence. As the facts in this case consist basically of the

proceedings, the course of proceedings and statement of facts are set forth in strict chronological order below.

1. On September 29, 1986, the Bakers filed a complaint against the dealer and Western Surety with regard to a motor vehicle transaction that took place between the Bakers and the dealer. The case, Civil No. C86-7427, was assigned to the Honorable Homer F. Wilkinson. (Complaint, R. at 2.)

2. At or about the time the Bakers filed the complaint in this action, Western Surety was named in two other lawsuits involving the motor vehicle dealer's bond issued to the dealer. The first lawsuit was filed on or about September 22, 1986 by Great Basin GMC Trucks, Inc. in the Fifth Circuit Court, in and for Salt Lake County, Salt Lake Department, State of Utah, styled Great Basin GMC Trucks, Inc. v. Craig A. Papa-Dakis dba Auto-Mart and Western Surety Company, Civil No. 86-57954CV. The other lawsuit was filed by Safeway Credit Union One on or about October 1, 1986, in the Fifth Circuit Court of the State of Utah, Salt Lake County, Salt Lake Department, styled Safeway Credit Union One v. Robert Ockey, et al., Civil No. 86-CV-68912. (See certified copies of Complaints at A-25 and A-28.)

3. On October 29, 1986, Western Surety, through its counsel, received notice from the Utah Motor Vehicle Business Administration that thirty-five complaints had been filed in its office against the dealer. (Letter and printout from

Administration, Ex. A to Motion to Stay Proceedings, R. at 71.) Because of this notice and because the three pending lawsuits against the bond set forth claims exceeding the \$20,000.00 bond limit, Western Surety took steps to obtain information on all of the claims filed with the Motor Vehicle Department, preparatory to filing an action in interpleader to join all of the bond claimants in one action, such that the multiple claims could be expeditiously resolved between the proper parties and such that multiple lawsuits could be avoided. (Motion to Stay Proceedings, R. at 68; affidavit of John N. Braithwaite, R. at 87, reproduced at A-11.)

4. Before the interpleader action was commenced, the Bakers filed a motion for summary judgment against Western Surety on its motor vehicle dealer's bond on December 5, 1986. (R. at 43.)

5. On December 9, 1986, Western Surety filed a motion to stay the proceedings in the action below based upon the ground that an interpleader action was necessary because numerous claims existed against the \$20,000.00 bond, the total of which greatly exceeded the \$20,000.00 bond limit. The motion to stay was further based upon the fact that the Bakers would be included in the interpleader action with the other bond claimants. (Motion to Stay Proceedings, R. at 68.)

6. On December 16, 1986, Western Surety filed the interpleader action in the Third Judicial District Court, Civil

No. C86-9295. The case was assigned to the Honorable Richard H. Moffat and is still ongoing. The Bakers were included in the action as bond claimants. (Affidavit, R. at 87; Complaint for Interpleader, R. at 90, reproduced at A-2.)

7. Subsequent to the filing of the interpleader, a hearing was held on December 19, 1986 before Judge Wilkinson on the Bakers' motion for summary judgment and on Western Surety's motion to stay proceedings in the action below. The motion to stay proceedings was denied and the Bakers' motion for summary judgment was granted.² (Order and Summary Judgment dated 12/31/86, R. at 100.)

8. Pursuant to interpleader, the bond funds were deposited into the registry of the interpleader court (Civil No. C86-9295) on December 29, 1986. (See certified copy of Deposit and Order at A-34; receipt of S.L. County Clerk, reproduced at A-37.)

9. On December 31, 1986, the order and summary judgment in favor of the Bakers was signed and entered by Judge Wilkinson. (R. at 100.)

10. Although the bond funds were held in the registry of the court in interpleader, the Bakers sought satisfaction of their judgment by serving writs of garnishment upon numerous insurance agencies transacting business for Western Surety.

² See footnote 1.

execution attempts outside of interpleader, seeking an order
These writs were served between January 14, 1987 and
approximately January 27, 1987. (Garnishment affidavit, R. at
117; writs of garnishment, R. at 112, 114, 119 through 152.)

11. Because the execution attempts placed Western Surety
at risk beyond the obligation of the bond and despite the
pendency of interpleader, Western Surety filed a motion on
January 16, 1987 in the interpleader action to enjoin the Bakers'
requiring the Bakers to interplead to satisfy their judgment.
The motion was scheduled to be heard on January 30, 1987. (See
Motion to Enjoin Execution, reproduced at A-14; Amended notice of
hearing, reproduced at A-38.)

12. Despite the pending motion regarding satisfaction of
the Bakers' judgment, the Bakers continued to serve writs of
garnishment frustrating insurance agencies transacting business
for Western Surety. (R. at 119 through 152.) Because of this
and because the execution attempts placed Western Surety at risk
beyond the obligation of the bond, Western Surety sought and
obtained an order on January 26, 1987 temporarily restraining the
Bakers from executing on their judgment until the motion
concerning satisfaction of that judgment could be heard.

13. Pending the hearing on the motion before Judge
Moffat in the interpleader action, Western Surety filed a notice
of appeal on January 29, 1987 from that part of the December 31,
1986 order denying its motion to stay proceedings. The grounds

for the appeal were that Judge Wilkinson had erred by failing to recognize the jurisdiction of the interpleader, and by granting summary judgment in this action during the pendency of interpleader, which exposed Western Surety to multiple liability. It was Western Surety's position that the action should have been stayed since the interpleader action had been filed and the Bakers' claim was included in the interpleader. (R. at 153.) Contrary to the Bakers' assertion in its statement of facts that the notice of appeal was filed in response to a letter from the Utah State Insurance Commissioner³, Western Surety filed its notice of appeal to perfect its right to appeal pursuant to the thirty (30) day requirement of Rule 4(a) of the Utah Rules of Appellate Procedure on January 29, 1987.

14. On February 5, 1987⁴, Judge Moffat heard and considered the motion to enjoin the Bakers' execution outside of interpleader. He denied the motion on the ground that any limitation upon the satisfaction of the judgment obtained by the Bakers would have to be set in place by Judge Wilkinson since he

³ The letter referred to by the Bakers is appended hereto at A-41. A responsive letter written on behalf of Western Surety, is also appended hereto at A-43. A second letter from the Insurance Department that the Bakers have failed to direct the court's attention to is appended hereto at A-47. This second letter sets forth the Insurance Department's acknowledgment that the problem addressed by the Bakers was being resolved through the interpleader action.

⁴ The date of the hearing before Judge Moffat was changed from January 30, 1987 to February 5, 1987 to accommodate the Bakers' counsel.

had entered the judgment. In so doing, he dissolved the temporary restraining order and stated that he thought the order was wrongfully issued. Contrary to the Bakers' bald assertions that the TRO was improperly obtained in violation of numerous specific provisions (See appellant's brief, p. 5, n. 4), Judge Moffat did not set forth the specific reasons for vacating the TRO other than the fact that he did not believe he had jurisdiction over the judgment entered by Judge Wilkinson. (See transcript of 2/5/87 hearing, pp. 39-42, reproduced at A-17 to A-20.)

15. Based upon Judge Moffat's ruling that he could not limit execution on the judgment entered by Judge Wilkinson, Western Surety brought the matter immediately to the attention of Judge Wilkinson by filing a motion for relief from judgment or, in the alternative, to limit execution to the interpleaded funds. This motion was filed on February 6, 1987 and was heard on February 13, 1987. (R. at 161.)

16. Upon reviewing the memoranda and hearing the motion on February 13, 1987, Judge Wilkinson, after realizing that the interpleader action had been filed prior to his previous ruling, indicated that he would grant relief from judgment pursuant to Rule 60(b) of the Utah Rules of Civil Procedure. (Transcript of 2/13/87 hearing, pp. 19-24, R. at 329, reproduced at A-48 to A-53; reply memorandum, R. at 195.)

17. Because Judge Wilkinson had corrected the error previously committed in the entry of the December 31, 1986 order and judgment, appellate review of that order and judgment would no longer be necessary as it was in essence moot. Western Surety therefore voluntarily dismissed its appeal from that order on March 26, 1987, pursuant to Rule 37(b) of the Utah Rules of Appellate Procedure, as dictated by Rule 37(a) when all issues on appeal are moot. (See certified copy of Stipulation for Dismissal and Order of Dismissal, reproduced at A-54 and A-57, respectively.)

18. The case was remitted from the Utah Supreme Court back to the Third Judicial District Court on March 31, 1987. (Remittitur, R. at 292, 293, reproduced at A-59.)

19. After resolving an objection to the proposed order and judgment, Judge Wilkinson entered the order granting Rule 60(b) relief and the accompanying judgment on April 7, 1987. (Order and Judgment, R. at 294, reproduced at A-21.)

20. The Bakers filed their notice of appeal from the order granting relief from judgment pursuant to Rule 60(b) on April 30, 1987. (R. at 300.)

21. Western Surety filed its cross-appeal from the part of the order denying its motion to stay proceedings on May 12, 1987. (R. at 304.)

SUMMARY OF ARGUMENT

The trial court properly granted relief from judgment pursuant to Rule 60(b). Upon motion for relief from the December 31, 1986 order, the trial judge recognized that the interpleader action had been filed prior to the hearing on the Bakers' motion for summary judgment, and that interpleader jurisdiction had thereby been established over the bond funds. It was recognized that the prior order had undercut the purpose of interpleader and had thereby exposed Western Surety to multiple liability beyond its obligations on the bond, and had given the Bakers inequitable advantage over the other bond claimants in the interpleader action.

The trial court, in its discretion, saw a great need to grant relief from judgment and correct the error made in the entry of the previous order and judgment. Good grounds existed for relief under the provisions of Rule 60(b)(1), 60(b)(5) and 60(b)(7). Contrary to the Bakers' argument, the relief granted was not a correction of a clerical error under Rule 60(a) where leave of the appellate court must be obtained if an appeal has been docketed. The motion was brought within the three month requirement of Rule 60(b) and was brought in accordance with the detailed requirements of that rule. The motion was timely and the trial court had jurisdiction to grant such relief under Rule 60(b). Relief from the judgment was expressly granted under Rule 60(b). The trial court has broad discretion to grant such relief

and should not be reversed unless this discretion was abused. The decision must be affirmed if it is sustainable on any ground.

If it is determined that the trial court abused its discretion in granting relief under Rule 60(b), then this court should reverse the trial court's denial of Western Surety's motion to stay proceedings. The motion to stay proceedings was based on the fact that the interpleader action had been commenced and the Bakers were joined in that action. The trial court denied the motion to stay and granted the Bakers' motion for summary judgment. This destroyed the purpose of the equitable interpleader. The relief granted under Rule 60(b) remedied this problem. If the order under Rule 60(b) is reversed, however, the denial of the motion to stay proceedings must also be reversed, as it was that order that precipitated the later problems in the underlying action.

ARGUMENT

POINT I

THE TRIAL COURT'S RULING UNDER RULE 60(b)
SHOULD ONLY BE REVERSED IF THE COURT ABUSED ITS DISCRETION,
AND ITS DECISION SHOULD BE AFFIRMED IF IT IS
SUSTAINABLE ON ANY LEGAL BASIS.

The Bakers' appeal asserts that the trial court committed error in granting relief from judgment under Rule 60(b) of the Utah Rules of Civil Procedure and seeks a reversal of the court's ruling. The trial court, however, is endowed with considerable latitude of discretion in granting or denying a motion to relieve a party from a final judgment. Airkem

Intermountain, Inc. v. Parker, 30 Utah 2d 65, 513 P.2d 429, 431 (1973). Because of this broad discretion, the Utah Supreme Court has stated that it "will reverse the trial court [on Rule 60(b) decisions] only where an abuse of this discretion is clearly established." Id. See also Fackrell v. Fackrell, 740 P.2d 1318, 1320 (Utah 1987).

In reviewing a trial court's decision, an appellate court must also affirm the trial court if its decision is supportable on any legal ground. The Utah Supreme Court has stated that:

Under the rules of appellate review, we affirm the trial court if we can do so on any proper ground even if the court below assigned an incorrect reason for its ruling.

Allphin Realty, Inc. v. Sine, 595 P.2d 860, 861 (Utah 1979).

This rule of appellate review applies even if the proper ground was not raised in or considered by the lower court, and even if the proper ground is not urged on appeal. Goodsel v. Department of Business Regulation, 523 P.2d 1230, 1232 (Utah 1974); accord Limb v. Federated Milk Producers, Assoc., 23 Utah 2d 222, 461 P.2d 290, 293, n.2 (1969).

The circumstances of this case evidence the trial court's proper use of its discretion in granting Western Surety relief from the order and judgment entered on December 31, 1986. Numerous legal grounds exist for the trial court's ruling, including those indicated by the court from the bench. The

arguments raised by the Bakers do not clearly establish an abuse of discretion, and the order and judgment must be affirmed.

POINT II

RELIEF FROM JUDGMENT UNDER RULE 60(b) WAS PROPERLY GRANTED.

A. The Motion For Relief From Judgment Was Properly and Timely Filed.

The original order and judgment in this matter was entered by Judge Wilkinson on December 31, 1986. On February 6, 1987, Western Surety filed a motion entitled Motion for Relief From Judgment or, in the alternative, to Limit Execution to the Interpleaded Funds. (The motion was filed after having previously filed a motion in the interpleader action on January 16, 1987 regarding satisfaction of the Bakers judgment. Judge Moffat ruled on that motion on February 5, 1987, indicating that Judge Wilkinson would have to hear the matter because he had entered the judgment.) This motion, having been brought within thirty-seven days of the entry of judgment, was proper and timely under Rule 60(b). Rule 60(b) (set forth verbatim supra) provides that the motion shall be made within a reasonable time and for the reasons set forth in subparagraphs (1), (2), (3), or (4), not more than three months after the judgment or order was entered. As the motion at issue was brought thirty-seven days after entry of the order and judgment, the timeliness thereof under any part of Rule 60(b) is obvious.

The Bakers contend that Western Surety's "motion to amend" was untimely, citing Rule 59 of the Utah Rules of Civil Procedure. This argument is completely misplaced. Western Surety's motion was not a motion to amend pursuant to Rule 59. (See Motion and reply memorandum, R. at 161, 195.) Moreover, the court's order was explicitly entered pursuant to Rule 60(b) and not Rule 59. (See Order and Judgment, R. at 294, reproduced at A-21.)

The Bakers appear to be urging that all post-judgment motions, unless dealing only with the form of the judgment, must be made pursuant to Rule 59. This argument is groundless. Rule 60(b) covers an array of problems that might arise or might become apparent after the entry of a judgment. It grants the trial judge wide latitude to deal with certain problems "in the furtherance of justice" at the trial court level where such problems can best be handled without resort to appeal. Rule 60(b), Utah Rules of Civil Procedure. The argument that the motion is really a motion to amend raises nothing more than semantics and attempts to divest the trial court of the broad discretion it has to relieve a party from a judgment on any one of the numerous grounds set forth in Rule 60(b).

B. The Trial Court Had Jurisdiction To Grant Relief Under Rule 60(b) and Did Not Abuse Its Discretion in Granting Relief Pursuant Thereto as Numerous Grounds Support Its Decision.

1. The Trial Court Had Jurisdiction To Entertain a Motion Under Rule 60(b) and to Enter an Order Granting Relief Pursuant Thereto.

The motion filed on February 6, 1987 sought relief from judgment pursuant to Rule 60(b) or Rule 60(a), and, in the alternative, sought an order limiting execution to the bond funds held in interpleader. The court granted relief pursuant to Rule 60(b). Contrary to the Bakers' contentions, Western Surety does not claim that the court was acting under Rule 60(a). Indeed, the order entered on April 7, 1987 plainly states that "relief from judgment is granted pursuant to Rule 60(b)." (R. at 294.)

The Bakers argue that the court lacked jurisdiction under Rule 60(a) because the appeal from the original order had been docketed in the appellate court and leave of the appellate court had not been obtained. This is correct according to Rule 60(a), though entirely irrelevant to this appeal. Western Surety was fully aware of the requirements of Rule 60(a) in bringing its motion, as the motion sought relief under Rule 60(a) and 60(b). The day prior to the hearing on the motion, counsel for Western Surety called the Supreme Court clerk's office to check on the status of docketing and was informed that the appeal had not been docketed. (This information was later discovered to be erroneous or miscommunicated.) Western Surety did not learn that the appeal had been docketed until the time of the hearing when counsel for the Bakers represented that a telephone inquiry to

the Supreme Court that morning revealed that the appeal was docketed on February 11, 1987, two days before the hearing. (See transcript of 2/13/87 hearing, p. 20, R. at 329.)

In light of this argument concerning the docketing of the appeal and the requirements for correction of clerical errors under Rule 60(a) when appeals are docketed, Judge Wilkinson indicated that he had a very serious question concerning his jurisdiction to rule. Nevertheless, he saw the extreme need to grant relief from judgment and, did so by exercising his discretion "in the furtherance of justice." The Bakers contend that he abused his discretion. Clearly, he did not. The fortuitous circumstance that the appeal was docketed two days prior to hearing is inapposite here; it being relevant only to an order under Rule 60(a). The requirement of Rule 60(a) that leave of the appellate court must be sought to correct clerical errors does not appear in and does not govern Rule 60(b).

Clerical errors may be corrected at any time by the court under Rule 60(a), even on its own initiative. If an appeal is pending and is docketed, the appellate court obviously needs to be advised if clerical corrections are made to the order on appeal. Rule 60(b), on the other hand, governs something entirely different from clerical errors and allows a specified time period for motions brought pursuant thereto. Rule 60(b) expressly allows relief from a judgment to be sought thereunder within three months from the entry of judgment. A motion under

Rule 60(b) does not affect the finality of a judgment and does not extend the time for appeal. See Rule 60(b), Utah Rules of Civil Procedure, and Rule 4(b), Utah Rules of Appellate Procedure. Thus, any appeal from the original order or judgment must be perfected within thirty days despite a pending or anticipated motion under Rule 60(b)⁵. If such relief could not be sought if an appeal were filed, the three month allowance would be hollow and effectively reduced to one month.

Rule 60(b), however, does not require the trial court to seek leave of the appellate court to grant relief from its own judgment. The trial court is vested with discretion to grant relief from its own judgments if it sees fit. The reasons for this are readily seen. Obviously, if relief is denied, nothing is disturbed. If relief is granted, the original order appealed from is no longer a final and appealable order and the appeal will not go forward.

⁵ Western Surety filed its appeal on January 29, 1987 from the order entered on December 31, 1986. The filing of the appeal at that time was necessitated by the thirty-day requirement of Rule 4(a) of the Utah Rules of Appellate Procedure. Faced with the problem of being executed against on a judgment entered against it based on a motor vehicle dealer's bond, while that bond was the subject of an interpleader action that involved the Bakers' claim as well as the claims of other bond claimants, it was Western Surety's position that the proceedings before Judge Wilkinson should have been stayed pending proceedings in interpleader. Although its right to appeal was perfected, Western Surety attempted to have the matter resolved below so that the delay of an appeal would be unnecessary. (If the trial court corrects its own errors, it is simply unnecessary for the Supreme Court to make the correction.)

Finally, it is important to point out that the Supreme Court remitted the case back to the district court prior to the entry of the April 7, 1987 order. Western Surety voluntarily dismissed its appeal from the December 31, 1986 order on March 26, 1987 pursuant to Rule 37(b) of the Utah Rules of Appellate Procedure. This was done because Judge Wilkinson, upon hearing the motion for relief from judgment on February 13, 1987, indicated that he would grant the motion, correcting the error at issue on appeal. Thus, the appeal was no longer necessary as the only issue on appeal was mooted. Western Surety accordingly filed a stipulation and motion for voluntary dismissal under Rule 37(b) as dictated by the latter part of Rule 37(a) when all issues on appeal are moot. The case was remitted from the Utah Supreme Court back to the Third Judicial District Court on March 31, 1987. (Remittitur, R. at 292, reproduced at A-59.) The order granting relief from judgment was entered seven days later on April 7, 1987. (Order and Judgment, R. at 294, reproduced at A-21.) Thus, the Supreme Court had no involvement with the case at the time the order was entered in any event. The Rule 60(b) motion was brought in accordance with the detailed requirements of that rule and the trial court properly entertained and granted the motion by order of April 7, 1987.

2. Numerous Grounds Existed For Granting Relief

Pursuant to Rule 60(b) and the Trial Court Did Not Abuse Its Discretion in Granting Such Relief.

At or about the time the Bakers filed their complaint against Western Surety, two other lawsuits were filed against Western Surety also claiming rights to the bond funds. (See certified copies of Complaints at A-25 and A-28.) Additionally, Western Surety was advised by the Motor Vehicle Department that approximately thirty-five other claims had been filed against the bonded dealer pursuant to Utah Code Ann. §41-3-18. (R. at 71.) Section 41-3-18 provides that a person who suffers damage by reason of fraud or other certain violations of the Motor Vehicle Code may "maintain an action for recovery against the dealer,... and the sureties upon their respective bonds."

The motor vehicle dealer's bond issued by Western Surety to the dealer pursuant to Utah Code Ann. §41-3-16(1) provides that Western Surety shall act as surety for the dealer pursuant to Section 41-3-16(1) and indemnify persons for loss suffered by reason of violation of the conditions contained therein (fraud and certain violations of the Motor Vehicle Code) if the dealer fails to so indemnify such persons, "in the total aggregate annual penal sum of Twenty Thousand and no/100 Dollars (\$20,000.00), as required by Utah Code Ann. §41-3-16(1)." (R. at 10.) The bond is reproduced at A-1.

Because multiple claims existed against the dealer and the bond, Western Surety was exposed to multiple liability. The sum of the claims in the three lawsuits exceeded the \$20,000.00 bond limit, while the sum of all claims received from the Motor

Vehicle Department exceeded \$100,000.00. Western Surety was therefore entitled, pursuant to Rule 22 of the Utah Rules of Civil Procedure, to require the claimants to interplead their claims against the bond. The Utah Supreme Court has explained the interpleader rule as follows:

An action in interpleader is a proceeding in equity in which a person who has possession of money or property which may be owned or claimed by others seeks to rid himself of risk of liability, or possible multiple liability, by disclaiming his interest and submitting the matter of ownership for adjudication by the court.

Terry's Sales, Inc. v. Vander Veur, 618 P.2d 29, 31 (Utah 1980).

While Western Surety was preparing to file an interpleader action to join all claimants in one action so that all claims could be equitably resolved, the Bakers filed a motion for summary judgment in the action below. This occurred despite the fact that counsel for the Bakers was advised that the interpleader action was being filed and that it would include the Bakers' claim. Western Surety responded by filing a motion to stay the proceedings. This latter motion was based on the ground that an interpleader action, which would include the Bakers' claim, would be filed as soon as information on the numerous claims was received from the Motor Vehicle Department. (R. at 68.)

Western Surety filed the interpleader action on December 16, 1986, naming all of the bond claimants known to it, including the Bakers. The action was assigned to Judge Moffat and Civil

No. C86-9295. (R. at 90.) A certified copy of the complaint for interpleader is attached at A-2. Interpleader jurisdiction was thereby established. It is the well-established and universally accepted rule that interpleader jurisdiction is established under Rule 22 by the filing of the complaint for interpleader. 3A Moore's Federal Practice ¶22.10, p.22-99. (This is contrary to federal statutory interpleader where deposit of the funds is necessary for jurisdiction.)

In cases outside statutory interpleader, deposit is not a jurisdictional requisite to interpleader, although deposit is universally permitted and often required within the discretion of the court as a means of safeguarding the disputed fund and facilitating execution of judgment.

Id. See also Percival Const. Co. v. Miller & Miller Auctioneers, Inc., 532 F.2d 166 (10th Cir. 1976). Utah's interpleader rule is identical to Rule 22(1) of the Federal Rules of Civil Procedure.

Interpleader jurisdiction was therefore established when the complaint was filed on December 16, 1986 and the \$20,000.00 bond became the res of that action and was under the jurisdiction of the interpleader court. The fact that the actual bond funds were not deposited into the registry of the court until December 29, 1986 is of no jurisdictional significance. It was tendered into court in any event before the entry of the order and judgment on December 31, 1986. (See clerk's receipt, reproduced at A-37; Deposit and Order, at A-34.)

The Bakers' motion for summary judgment and Western Surety's motion to stay proceedings were heard on December 19, 1986. Judge Wilkinson was advised by affidavit of counsel for Western Surety that the interpleader action had been commenced. (Affidavit of John N. Braithwaite, R. at 87.) Despite this fact, Judge Wilkinson denied the motion to stay proceedings and granted the Bakers summary judgment. (It later became apparent that Judge Wilkinson did not fully understand that interpleader had been filed. See footnote 1.) The order and judgment was entered on December 31, 1986. (R. at 100.) The entry of that order and judgment placed Western Surety at risk beyond its surety obligation on the bond, thereby creating the very problem that interpleader was designed to avoid, i.e., multiple liability.

Based upon the reasoning of Surety Co. of the Pacific v. Piver, 149 Cal. App. 3d Supp. 29, 197 Cal. Rptg. 531 (Cal. App. Dept. Super. Ct. 1983), and other cases involving interpleader of bond funds, Western Surety moved the interpleader court to enjoin execution upon the judgment obtained by the Bakers outside of the interpleader action, and for an order requiring the Bakers to interplead and satisfy their claim (now reduced to judgment) within the interpleader action. (See certified copy of Motion to Enjoin Execution, at A-14.)

The Piver case was directly on point. In that case, a surety filed a cross-complaint in interpleader after learning of multiple claims against a statutory contractor's license bond.

Before filing its cross-complaint for interpleader, one of the claimants obtained a judgment against the surety and the principal in a separate action. Upon the surety's motion the trial court restrained all parties from instituting or further prosecuting any other proceeding which affected the rights and obligations of the parties to the interpleader action. The order included a restraint upon Shamrock, the claimant with the judgment, from executing upon or enforcing that judgment. The appellate court affirmed the trial court's order and stated that:

The circumstance that Shamrock's claim has been reduced to judgment does not preclude such restraint.

* * *

A restraint against enforcing a judgment, as here, may be essential to the protection of interpleader jurisdiction. [Citations omitted] Indeed, there may be situations in which the various claimants to particular property or a fund should be permitted to proceed to judgment in a proper forum of their choice, being restrained in the interpleader action only as to the enforcement of any judgment so obtained. That is the established practice under Rule 22, Federal Rules of Civil Procedure. (State Farm Fire & Cas. Co. v. Tashire (1967) 386 U.S. 523, 535, 87 S.Ct. 1199, 1206, 18 L.Ed.2d 270, 278; [further citations omitted]) As revised in 1975, the California statute is in conformity with Rule 22.

Id. at 532. Accord Board of Ed. v. Superior Court, 97 Cal. App.3d 977, 159 Cal. Rptr. 265 (Cal. Ct. App. 1979).

Piver presented a situation identical to that before Judge Moffat. The Bakers had a judgment against Western Surety on the bond that was the subject matter of the interpleader action. They sought to enforce that judgment outside of

interpleader, claiming priority by virtue of their judgment. If allowed to enforce their judgment outside of interpleader, the purpose of interpleader would be destroyed and Western Surety would be subject to multiple judgments and potential liability beyond its obligations as a surety. Such would be contrary to the interpleader rule, the statute requiring the bond, and the bond itself.

Another case with circumstances similar to the case at hand is Fidelity and Deposit Co. of Md. v. Santa Monica Fin. Co., 6 Cal. Rptr. 213 (Cal. Ct. App. 1960). In that case, a bond claimant that had filed a separate action prior to the filing of interpleader was enjoined from further pursuing that action and required to interplead. A synopsis of this case appears in the addendum at A-60.

Judge Moffat denied the motion before him, however, on the ground that it should be handled by Judge Wilkinson, who had entered the judgment in the first instance. (See transcript of 2/5/87 hearing, pp. 39-42, at A-17 to A-20.) The matter was then brought immediately to the attention of Judge Wilkinson. In considering the motion for relief from judgment, Judge Wilkinson granted relief pursuant to Rule 60(b) from the prior order and judgment entered by him on December 31, 1986. The relief granted was consistent with the equitable interpleader rule and the reasoning of Piver and Santa Monica. As will be demonstrated below, good grounds existed for relief from the prior judgment.

First of all, Judge Wilkinson recognized that the judgment rendered against Western Surety was in connection with a motor vehicle dealer's bond, which was governed by Utah Code Ann. §41-3-16(1) and the language of the bond itself. The statute provides that:

Before a new or used motor vehicle dealer's license is issued the applicant shall file with the administrator a good and sufficient corporate surety bond in the amount of \$20,000.00. The corporate surety shall be duly licensed to do business within the state. The bond shall be approved as to form by the attorney general, and conditioned that the applicant will conduct business as a dealer without fraud or fraudulent representation, and without violation of this chapter, and may be continuous in form. The total aggregate annual liability on the bond to all persons making claims may not exceed \$20,000.00. [Emphasis added.]

The bond itself similarly provides that:

The total aggregate annual liability of this bond, regardless of the number of claims, may not exceed \$20,000.00.

(R. at 10, bond reproduced at A-1.)

Upon hearing the 60(b) motion and being advised of the circumstances that had developed in this case since the entry of the December 31, 1986 order and judgment, Judge Wilkinson recognized that an error had been made. He then realized that interpleader had been filed prior to the hearing on the motion for summary judgment and that the order and judgment had been entered in error. In his discretion, he corrected that error. Rule 60(b) allows such relief. The Tenth Circuit Court of

Appeals, interpreting the substantively similar Federal Rule 60(b), has allowed correction of judicial errors under Rule 60(b)(1). See Security Mut. Cas. Co. v. Century Cas. Co., 621 F.2d 1062, 1067 (10th Cir. 1980). This is particularly so when, as here, the error is recognized by the rendering judge and is the result of judicial oversight. Id. at 1067.

The grounds for relief under Rule 60(b)(1) include "mistake, inadvertence, surprise, or excusable neglect." The circumstances that arose in this case following the entry of the December 31, 1986 order, warranted relief under Rule 60(b)(1). Although judgment was entered in favor of the Bakers "against defendant Western Surety Company," Western Surety fully anticipated the Bakers to satisfy their judgment within the interpleader action since the bond was the res of the Bakers' claim and judgment against Western Surety and was the subject of the interpleader.

When the Bakers attempted to garnish Western Surety assets, Western Surety asked the interpleader court to require the Bakers to interplead to satisfy their judgment. Although the motion was based on substantial case authority (Piver, Santa Monica, and cases cited therein), Judge Moffat did not feel like he could limit the judgment entered by another judge and he declined to limit the execution. At that point, it was obvious that either a mistake had been made with the entry of the order reflecting a judgment "against Western Surety," or it was error

to have entered the judgment at all in view of the filing of interpleader. Judge Wilkinson expressly recognized this as a mistake in granting relief from the judgment, stating "[i]f your judgment just says a blanket judgment against Western Surety, then I think that's incorrect." (Transcript of 2/13/87 hearing, p.24, R. at 329.) Clearly, the rendering judge has discretion to grant relief under Rule 60(b)(1) from a mistake made in the preparation of an order.

The Bakers argue that because the order was approved as to form, relief cannot be granted therefrom. Approval of the order as to form, however, does not in any way negate the fact that a mistake was made in the order, and it certainly does not negate inadvertence in preparation and approval of the order. Approval of the form of an order by counsel merely indicates counsel's belief that the order reflects the judge's ruling. Furthermore, the Bakers contradict themselves by so arguing. The Bakers argue, on the one hand, that the relief granted was substantive (see point I, part C, of Appellant's brief), and on the other hand, that the relief granted was with respect to the form of the order and that Western Surety could not complain, having approved the form. As pointed out in the argument, supra, relief under Rule 60(b) is not limited to either the form of an order or its substance. Rule 60(b) allows relief from orders and judgments for an array of problems, all within the rendering

court's discretion. The relief granted may be one of form or substance.

Grounds for relief from the previous order also existed under Rule 60(b)(5), which provides for relief when the judgment is void. There are three ways in which a judgment can be void.

A judgment is void only if the court which rendered it lacked jurisdiction of the subject matter or of the parties, or if it acted in a manner inconsistent with due process of law.

Brimhall v. Mecham, 27 Utah 2d 222, 494 P.2d 525, 526 (1972).

In the case below, the court lacked jurisdiction over the bond funds, as they had come within the jurisdiction of the interpleader court on December 16, 1986. As set forth in the argument, supra, interpleader jurisdiction is established when the complaint is filed. With the commencement of interpleader, the bond, and specifically the bond funds, became the res of interpleader and the interpleader court took jurisdiction over them. Thus, Judge Wilkinson lacked jurisdiction over the bond funds and, therefore, lacked jurisdiction to enter the type of judgment that was entered on December 31, 1986.

Many cases state two requisites for a valid judgment, that the court: have jurisdiction over the subject matter; and jurisdiction over the parties (the crucial issue usually being jurisdiction over the defendant) that is needed for the type of judgment, i.e., in personam, quasi in rem, or in rem, that it renders.

7 Moore's Federal Practice ¶60.25[2], p.60-225.

Because the claim against Western Surety was necessarily dependent upon the bond and Western Surety's liability was

limited to the \$20,000.00 bond funds, Judge Wilkinson lacked the quasi in rem jurisdiction necessary to enter a judgment against Western Surety. Rather, the judgment must be limited to the bond funds which are in interpleader. The judgment entered "against Western Surety" on December 31, 1986 was therefore void since Judge Wilkinson lacked the jurisdiction (quasi in rem) over Western Surety that was necessary to enter such a judgment. Judge Wilkinson granted relief from that void judgment and entered a judgment against the bond funds held in interpleader.

The judgment of December 31, 1986 was void for a second reason. By entering the judgment after interpleader was commenced, Western Surety was exposed to multiple liability, and specifically liability in excess of its obligations as surety, undercutting the purpose of Rule 22 Interpleader. The Bakers properly should have been required to interplead to prove and satisfy their claim. The court therefore "acted in a manner inconsistent with due process of law." Brimhall, at 526. Western Surety was entitled, by virtue of Rule 22 of the Utah Rules of Civil Procedure, to require the Bakers and all other persons having claim against the bond to interplead their claims. Due process of law was thwarted by the entry of the December 31, 1986 judgment. The judgment was therefore void on that basis. Judge Wilkinson properly granted relief from that void judgment and entered a judgment in favor of the Bakers against the bond funds, effectively requiring them to interplead to satisfy their

judgment. This new judgment is consistent with due process of law and consistent with legal precedent involving interpleader of bond funds. See Piver and Santa Monica.

In addition to the grounds set forth in Rule 60(b)(1) and 60(b)(5), relief from judgment was properly granted for reasons under Rule 60(b)(7). Rule 60(b)(7) grants a trial court wide discretion to grant relief from an order or judgment for "any other reason justifying relief from the operation of the judgment." Judge Wilkinson recognized the problem that had developed with the entry of the December 31, 1986 judgment. He recognized that it exposed Western Surety to multiple liability and undercut the purpose of interpleader, while granting undue advantage to the Bakers over the other bond claimants. (See Maryland Casualty Co. v. Glassell-Taylor & Robinson, 156 F.2d 519, 523 (5th Cir. 1946), where it was stated that one purpose of interpleader is to prevent a race to the swift and provide equitable consideration of multiple claims.) Relief from judgment under Rule 60(b)(7) was therefore justified. As set forth in Point I of the argument, the trial judge has wide discretion in granting relief from judgment, and his decision must be affirmed if it is sustainable on any legal basis, even if the trial judge assigned an incorrect reason for his ruling and did not consider the appropriate ground. Allphin Realty, at 861. Judge Wilkinson did not abuse his discretion in granting relief

from judgment, and his order and judgment of April 7, 1987 should be affirmed.

POINT III

THE BAKERS' CONTENTION THAT NO GROUNDS EXISTED FOR RELIEF UNDER RULE 60(b) AND THAT NO GROUNDS EXISTED FOR LIMITING THEIR JUDGMENT TO THE INTERPLEADED FUNDS IS BASED ON A MISUNDERSTANDING OF WESTERN SURETY'S OBLIGATION ON THE BOND AND A MINUNDERSTANDING OF INTERPLEADER.

Western Surety's obligation as a surety arises by virtue of its bond. The obligation of the bond is expressly limited to an aggregate of \$20,000 on an annual basis, regardless of the number of claims. The Bakers suggest that this limitation is debatable under the case of Dennis Dillon Oldsmobile, Inc. v. Zdunich, 668 P.2d 557 (Utah 1983). To the contrary, the limitation is recognized by Dillon Oldsmobile to be in accordance with the statute.

In Dillon Oldsmobile, the court examined two motor vehicle dealer's bonds issued pursuant to Utah Code Ann. §41-3-16. Although the language of the two bonds was identical, they had been treated separately by two trial courts below and had been interpreted differently. One of the trial courts had ruled that there was no aggregate limitation on the surety's liability on the bond and the other trial court had ruled to the contrary. The cases were consolidated for appeal. The Supreme Court identified the determinative issue to be whether the language of the bonds was more comprehensive with respect to the

surety's liability than is required by Section 41-3-16(1). The bonds in Dillon Oldsmobile provided that the surety was bound

"to idemnify any and all persons, firms and corporations for any loss suffered by reason of violation of the conditions hereafter contained, in the penal sum of Twenty Thousand Dollars (\$20,000.00). . . for the payment of which, well and truly to be made, we bind ourselves. . . ." [Emphasis original.]

Id. at 559.

After examining this language and the statute itself, the court held:

By the literal language of the bonds, the sureties rendered themselves liable up to a maximum of \$20,000.00 for any loss suffered by any and all persons. [Emphasis original.]

Id. at 561. The court further held that where the terms of the bond are more comprehensive than required by statute, the surety is bound by the language of the bond.

The bond issued by Western Surety in this case is entirely different from the bonds in Dillon Oldsmobile. The bond in the instant matter is limited to a total aggregate annual liability of \$20,000.00. This limitation is in accordance with Section 41-3-16(1) and is in accordance with the statutory requirement recognized by Dillon Oldsmobile⁶. Id. at 561. It is

⁶ It must also be noted that the Utah Legislature amended §41-3-16(1) and §41-3-18 in 1983. The amendments to these two sections made it clear that "the total aggregate annual liability on the bond to all persons making claims may not exceed \$20,000.00." The amendments also enacted specific limitation periods, requiring claims to be filed with the administrator within one year after the cause of action arises.

a well established rule of law that a surety may only be held for the amount stipulated in the bond. See Western Surety Co. v. Childers, 372 P.2d 214, 215 (Okla. 1962). The judgment in this case was, therefore, properly limited to the bond funds held in interpleader as Western Surety's only obligation arises by reason of the bond and the bond funds were under the jurisdiction of interpleader.

The Bakers contend that the bond is nothing more than a contract and that Western Surety breached its obligation on the contract by failing to pay the Bakers once judgment had been entered against the dealer and once summary judgment was entered against Western Surety on December 31, 1986. This contention is apparently based on a misunderstanding of the bond itself, as well as a misunderstanding of the consequence of the filing of the interpleader and the basis of Judge Wilkinson's order granting relief from judgment.

First of all, the Bakers misunderstand the obligation of Western Surety on the bond. The judgment entered against the dealer was a default judgment. The Bakers plainly misread the bond in asserting that Western Surety was obligated to pay all judgments rendered against the dealer. With respect to judgments against the dealer, the bond provides that if the principal [the dealer] indemnifies persons for loss suffered by reason of fraud, violations of the motor vehicle business act and certain other laws respecting commerce in motor vehicles, and pays judgments

adjudged against him on account of fraud or violation of the designated laws respecting motor vehicles, then the surety's obligation is null and void. (See bond, R. at 10, reproduced at A-1.)

By the plain wording of the bond, Western Surety is only obligated to indemnify persons for loss suffered by reason of fraud and violation of the Motor Vehicle Code and other laws respecting commerce in motor vehicles, and is only so obligated as a surety. That is, Western Surety's obligation does not arise unless the dealer fails to indemnify persons for the identified losses. Western Surety is certainly not obligated on its bond for all judgments entered against the dealer. Ordinary money judgments against the dealer, which do not involve fraud or a violation of the Motor Vehicle Code do not raise an obligation under the bond. The bond is statutorily required for the specific reasons detailed in Utah Code Ann. §41-3-16(1).

The default judgment entered against the dealer did not establish fraud or a violation of the motor vehicle code. It is a generally accepted rule that a default judgment against one defendant is not binding on another defendant and does not establish facts against the answering defendant. See, Clugston v. Moore, 655 P.2d 29, 31 (Ariz. Ct. App. 1982).

The Bakers' contention that Western Surety agreed to pay attorney's fees in cases successfully prosecuted to judgment furthers their misreading of the bond. The bond provides that

"said bounden principal" shall pay reasonable attorney's fees in cases successfully prosecuted to judgment.

The second error with the Bakers' contention that Western Surety has breached its obligation on the bond deals with a misunderstanding of interpleader. The interpleader action was commenced on December 16, 1986, before the hearing on the Bakers' motion for summary judgment and fifteen days prior to the entry of the order granting the Bakers summary judgment. As indicated in the argument, supra, interpleader jurisdiction was established by the filing of the complaint. At that time, the bond became the res of interpleader and was under the jurisdiction of the interpleader court. Thus, the entire obligation of Western Surety on its bond became the subject of interpleader. This is dictated by the bond itself and by the statute, Utah Code Ann. §41-3-16.

When the circumstances following entry of the summary judgment were related to Judge Wilkinson by the motion for relief from judgment, he recognized his previous error and the existence of jurisdiction in the interpleader court. Upon hearing the motion, Judge Wilkinson stated that if he had understood that the interpleader action was filed at the time of hearing the Bakers' motion for summary judgment and Western Surety's motion to stay proceedings, "in all probability [he] would have granted a stay there." (Transcript of 2/13/87 hearing, p. 21, R. at 329, reproduced at A-50.) Judge Wilkinson, therefore, corrected his

previous error and granted relief from the prior judgment. He re-entered judgment in favor of the Bakers, but directed that satisfaction of that judgment was limited to the bond funds under the jurisdiction of the interpleader court. Legal basis for such a limitation had been shown in the strikingly similar Piver case and the Santa Monica case. Execution is limited to the bond funds because they became the jurisdiction of the interpleader court prior to the entry of judgment and because those funds are the extent of Western Surety's liability.

The requirement that the Bakers interplead to satisfy their judgment is consistent with Rule 22 of the Utah Rules of Civil Procedure and due process of law. It is by the very authority cited by Western Surety that the Bakers are even entitled to have summary judgment entered in their favor outside of interpleader. See Piver, at 532. Indeed, with the filing of interpleader, Judge Wilkinson could have declined to enter judgment and required the Bakers to interplead to prove their claim in addition to satisfying it. It is only by the procedure outlined in Piver that a bond claimant is able to obtain a judgment outside of interpleader once it is commenced.

The cases cited by the Bakers concerning indefinite stays of execution are not applicable. There is no indefinite stay of execution in this case. Taylor National, Inc. v. Jensen Brothers Construction, 641 P.2d 150 (Utah 1982), held that the trial court in that case had erred by permanently staying

execution of the judgment entered. Id. at 154. The court further stated that a party receiving a judgment is entitled to have that judgment enforced by the granting court. Id. The order and judgment entered by Judge Wilkinson on April 7, 1987 is not in conflict with Taylor National. Execution has not been permanently stayed in this action. In fact, execution has not been stayed at all. Execution is merely directed to the interpleaded funds in accordance with Rule 22 interpleader. Ketchum Coal Co. v. Christensen, 48 Utah 214, 159 P. 541 (1916), cited by the Bakers, is likewise inapposite.

CROSS-APPEAL
POINT I

THE DENIAL OF THE MOTION TO STAY PROCEEDINGS WAS
ERROR IN LIGHT OF THE PENDING INTERPLEADER
ACTION AND SUMMARY JUDGMENT SHOULD NOT HAVE
BEEN GRANTED OUTSIDE OF INTERPLEADER.

Western Surety's cross-appeal concerns only the denial of Western Surety's motion to stay proceedings and is in the alternative only, contingent upon this court's disposition of the Bakers' appeal. Western Surety believes that Judge Wilkinson properly granted Rule 60(b) relief in the furtherance of justice and that the new order and judgment entered on April 7, 1987 is consistent with the equity of interpleader and case law regarding interpleader of bond funds. Should this court affirm Judge Wilkinson's order granting relief pursuant to Rule 60(b), Western Surety does not wish to disturb the order and judgment. If this court, however, reverses the trial court's order, Western Surety

contends that its motion to stay proceedings should have been granted in the first instance and, therefore, cross-appeals from that part of the order denying its motion to stay proceedings.

As established in the argument, supra, interpleader jurisdiction was established on December 16, 1986. At that time, the bond funds were under the jurisdiction of the interpleader court. Neither Western Surety nor any bond claimant could dispose of or execute upon the funds absent an order from the interpleader court. These funds were deposited into the registry of the court on December 29, 1986, prior to the entry of summary judgment in favor of the Bakers. Western Surety was entitled pursuant to Rule 22 to require all bond claimants to interplead their claims. The express purpose of Rule 22 is to avoid multiple liability. Hearing was held on Western Surety's motion to stay proceedings and the Bakers' motion for summary judgment on December 19, 1986. The trial court was advised by affidavit of counsel for Western Surety that the interpleader had been commenced. For some reason, Judge Wilkinson failed to recognize this fact initially and he denied the motion to stay proceedings and granted the motion for summary judgment. He later acknowledged that had he fully understood that interpleader had been commenced he, in all probability, would have granted a stay. (See footnote 1.)

The denial of the motion to stay proceedings was clear error. The granting of summary judgment undercut the purpose of

the interpleader by exposing Western Surety to multiple liability. The Bakers were included in the interpleader action and should have been required to interplead their claim. The denial of the motion to stay proceedings was also error in that the court lacked the jurisdiction over Western Surety necessary to render the judgment entered on December 31, 1986. 7 Moore's Federal Practice ¶60.25[2], p.60-225. The bond funds, which represented the extent of Western Surety's liability, were no longer at the disposal of Western Surety. The court had jurisdiction over those funds in interpleader. The trial court below lacked quasi in rem jurisdiction over Western Surety and should have granted a stay of proceedings and required the Bakers to interplead to prove their claim.

POINT II

WESTERN SURETY'S CROSS-APPEAL WAS TIMELY AND PROPER UNDER THE APPLICABLE RULES.

The Bakers contend that Western Surety's cross-appeal was untimely and is barred by the prior dismissal of the appeal from the December 31, 1986 order. These contentions are without merit, as they fail to consider the nature of the orders entered by the court below.

Rule 3(a) of the Utah Rules of Appellate Procedure provides that an appeal may be taken from all "final orders and judgments." The advisory committee note to Rule 3(a) indicates that the rule retains the "final judgment rule" of the prior

appellate rule in Rule 72(a). On January 29, 1987, Western Surety appealed from part of the order and judgment entered on December 31, 1986, pursuant to Rule 3(a) of the Utah Rules of Appellate Procedure. This was necessary for the perfection of Western Surety's right to appeal, despite a pending motion in the interpleader court seeking to require the Bakers to interplead to satisfy their judgment. As entered, the order and judgment of December 31, 1986 ended the litigation and left no claim remaining for resolution. It was therefore a final order and judgment.

Although its right to appeal was perfected by the filing of the notice of appeal on January 29, 1987, Western Surety attempted to have the matter resolved below so that the delay of an appeal would be unnecessary. Judge Wilkinson resolved the matter by granting relief from judgment pursuant to Rule 60(b) of the Utah Rules of Civil Procedure. The order granting relief from judgment and the new judgment was entered on April 7, 1987. At that point, the December 31, 1986 order and judgment ceased to be a viable, final and appealable order. Relief from that judgment had been granted and a new order and judgment was entered. Accordingly, no appeal could lie from the order entered on December 31, 1986.

Because appellate review would no longer be necessary and because the issues involved with Western Surety's appeal of the December 31, 1986 order were mooted, Western Surety

voluntarily dismissed its appeal from that order by filing a stipulation for dismissal pursuant to Rule 37(b) of the Utah Rules of Appellate Procedure as dictated by Rule 37(a) when all issues in the appeal are mooted. (Stipulation for dismissal, reproduced at A-54.) By order of the Supreme Court of the State of Utah, the appeal from the December 31, 1986 order was dismissed pursuant to Rule 37(b). (Order of dismissal, reproduced at A-57.)

The order granting relief from judgment and the new judgment was entered by the court below on April 7, 1987. The December 31, 1986 order and judgment was, therefore, no longer a viable order and judgment. Furthermore, Western Surety's appeal from that order had become moot. Contrary to the Bakers contentions, Western Surety's cross-appeal of the denial of its motion to stay proceedings runs from the date of the final order entered on April 7, 1987, rather than from the prior order. This is explained by the authors of a well accepted work on Federal Practice and Procedure, as follows:

An application for relief from a judgment under Rule 60(b) also does not extend the time for taking an appeal. Even if the court hears and denies the motion before the appeal time would have run, the appeal must be taken within the prior period measured from the date of the judgment, not from the denial of the motion. If, however, the court grants the motion and enters a new judgment, the time for appeal will date from the entry of that judgment. [Emphasis added.]

11 C. Wright & A. Miller, Federal Practice and Procedure, §2871 (1973).

The contention that the appeal is untimely, and that such would be obvious if the court had entered two separate orders on separate pieces of paper on December 31, 1986, is without merit. The order denying Western Surety's motion to stay proceedings, standing alone, was not a final order. Said order did not end the litigation. See Crosland v. Peck, 738 P.2d 631 (Utah 1987). The order denying the motion to stay is only appealable if, and when, a final order or judgment has been entered. The final order and judgment was entered on April 7, 1987. The order and judgment of December 31, 1986 is no longer viable and is no longer appealable as it is not a final order and judgment in this case. The Bakers filed their notice of appeal from the April 7, 1987 order on April 30, 1987. Western Surety filed its cross-appeal from the part of the order denying its motion to stay proceedings on May 12, 1987, twelve days after the Bakers' notice of appeal. Rule 4(d) of the Utah Rules of Appellate Procedure provides that:

If a timely notice of appeal is filed by a party, any other party may file a notice of appeal within 14 days after the date on which the first notice of appeal was filed or within the time otherwise prescribed by paragraph (a) of this rule, whichever period last expires.

The notice of cross-appeal was timely filed within the above rule.

The fallacy of the Bakers' contention that Western Surety's cross-appeal is barred by its prior dismissal of the

appeal from the earlier order, and that its cross-appeal from the order denying its motion to stay proceedings runs from December 31, 1986, is obvious if one merely considers the ramifications of their contentions. If the Bakers' argument is correct, and it is assumed, arguendo, that the December 31, 1986 order remained a viable, final and appealable order, Western Surety should have allowed its appeal to remain pending despite the fact that it was mooted. The Bakers' argument would require a moot appeal to remain pending until it is determined whether or not the new order and judgment (which is the final and appealable order) will be appealed from. The problems inherent in such a procedure are obvious and the continuation of an appeal that is moot is completely inconsistent with the rules governing appellate procedure. There cannot be two separate dates from which an appeal runs. There is only one final and appealable order and all appeals must run from that date. The final order in this case was entered on April 7, 1987.

CONCLUSION

This court should affirm the trial court's order of April 7, 1987 granting relief from judgment pursuant to Rule 60(b). The motion was brought and considered in accordance with the detailed requirements of that rule and the court, in the furtherance of justice, saw fit to grant such relief. The ruling was based on the grounds set forth in Rule 60(b) and was rendered in the

exercise of the court's sound discretion, which should not be overturned absent clear evidence of an abuse of that discretion.

Should this court find technical error in the trial court's decision or find technical error with the trial court's jurisdiction to entertain and grant the motion for relief under Rule 60(b), the matter should be remanded to the trial court so that any such technical deficiencies can be remedied and the Rule 60(b) order can be re-considered and re-entered in the trial court's discretion.

In the alternative, if this court reverses the trial court, Western Surety's cross-appeal should be reviewed and the order denying the motion to stay proceedings should be reversed. The proceedings below should have been stayed in the first instance since the Bakers' claims were included in the interpleader action that had already been filed. If the order denying the stay is reversed and a stay of the proceedings below is ordered, the Bakers will be able to participate in the interpleader action as dictated by the equitable interpleader rule, along with the other bond claimants.

RESPECTFULLY SUBMITTED this 26th day of October, 1987.

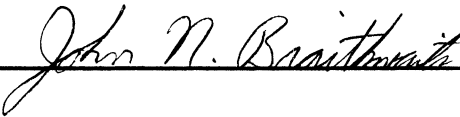
HANSON, DUNN, EPPERSON & SMITH


JOHN N. BRAITHWAITE

CERTIFICATE OF SERVICE

I hereby certify that I caused four (4) copies of the foregoing Brief of Respondent to be hand-delivered on this 26th day of October, 1987, to the following:

John D. Parken
PARKEN & KECK
9 Exchange Place
Suite 808
Salt Lake City, Utah 84111



5/baker

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BOND OF MOTOR VEHICLE DEALER, SALESMAN OR CRUSHER

KNOW ALL PERSONS BY THESE PRESENTS: That we, Craig A. Papa-Dakis Auto Mart of
 Street Address 2540 South Main Street City Salt Lake City
 County of Salt Lake, Utah, as Principal and WESTERN SURETY COMPANY

a Surety Company qualified and authorized to do business in the State of Utah as Surety, are jointly and severally held and firmly bound to the people of the State of Utah to indemnify persons, firms and corporations for loss suffered by reason of violation of the conditions hereinafter contained, in the total aggregate annual penal sum of Twenty Thousand and Dollars (\$20,000), as required by Utah Code Ann. § 41-3-16(1), (1953, as amended), lawful money of the United States for^{po/} the payment of which, well and truly to be made, we bind ourselves, our heirs, executors, administrators, successors and assigns, jointly, severally and firmly by these presents. The total aggregate annual liability of this bond, regardless of the number of claims, may not exceed \$20,000.00

THE CONDITION OF THIS OBLIGATION IS SUCH, That,

WHEREAS, the above bounden principal has applied for a license to do business as a _____
 Motor Vehicle Dealer within the State of Utah, and that pursuant to the application, a license has been or is about to be issued.

NOW, THEREFORE, if the above bounden principal shall obtain said license to do business as such _____ Motor Vehicle Dealer and shall well and truly observe and comply with all requirements and provisions of THE ACT PROVIDING FOR THE REGULATION AND CONTROL OF THE BUSINESS OF DEALING IN MOTOR VEHICLES, as provided by Chapter 3, Title 41, Utah Code Ann. (1953, as amended), and indemnify persons, firms and corporations in accordance with Utah Code Ann. § 41-3-16(1), (1953, as amended), for loss suffered by reason of the fraud or fraudulent representations made or through the violation of any of the provisions of said Motor Vehicle Business Act or any law respecting commerce in motor vehicles, or rule or regulation respecting commerce in motor vehicles promulgated by a licensing or regulating authority and shall pay judgments and costs adjudged against said principal so as not to exceed a total aggregate annual liability of \$ 20,000.00 regardless of the number of claims on this bond on account of fraud or fraudulent representations or for any violation or violations of said laws, rules or regulations during the time of said license and all lawful renewals thereof, then the above obligation shall be null and void, otherwise to remain in full force and effect. Said bounden principal shall also pay reasonable attorney's fees in cases successfully prosecuted to judgment.

The Surety herein reserves the right to withdraw as such surety except as to any liability already incurred or accrued hereunder and may do so upon the giving of written notice of such withdrawal to the principal and to the Motor Vehicle Business Administrator, provided, however, that no withdrawal shall be effective for any purpose until sixty days shall have elapsed from and after the receipt of such notice by the said administrator, and further provided that no withdrawal shall in anywise affect the liability of said surety arising out of fraud or fraudulent representations or for any violation or violations of said laws, rules or regulation by the principal hereunder prior to the expiration of such period of sixty days, regardless of whether or not the loss suffered has been reduced to judgment before the lapse of sixty days.

Signed and sealed this 4th day of February, 19 86

CRAIG A. PAPA-DAKIS AUTO MART

ATTEST

By [Signature] that this photostat is a true and correct copy of the original with the Motor Vehicle Business Administrator, State of Utah.
 BY [Signature] Principal
WESTERN SURETY COMPANY
 BY [Signature] Surety
Attorney-in-Fact
S. Conn. Asst. Sec.

Approved as to form of Utah
 Office of the Utah Attorney General
[Signature]
 MVBA-1 (Rev. 5-84)

DEC 16 4 04 PM '86

H. DIXON HINDLEY CLERK
3rd DIST. COURT

H. DIXON HINDLEY CLERK
3rd DIST. COURT

B. [Signature]

WESTERN SURETY COMPANY,
Plaintiff,
vs.
ROBERT BENSON, WAYNE THOMAS,
TIMOTHY L. RYAN, ALLRED BUICK-
GMC TRUCKS, UTAH DRIV-UR-SELF
SYSTEM, INC., JOHN R. SZYMANSKI,
LISA KILLOUGH, SAFEWAY CREDIT
UNION ONE, GREAT BASIN GMC
TRUCKS, INC., ROBERT and CAROL
OCKEY, LYLE E. KOESTEL, DEREK and
DEANNA M. GENT, GEORGE M. and
DELLA A. BAKER, AMERICA FIRST
CREDIT UNION, ROBERT S. HARTUNG,
C.D.P. CREDIT ASSOCIATION, TRUDY
L. CLEGG, REV. JONG SOO HAM,
LARRY E. MAYCOCK, FRUTOS and
FRANCES SALAZ, RANDY A. DOWNS,
NEAL PAGE, CINDY and LINDA JENSEN,
MICHAEL F. OLSEN, IKE SPENCER,
RICHARD D. HEINZ, KHAMBONG
PHETCHAMPHONE, SAM J. IRA, SR.,
KEN GARFF IMPORTS-GARFF
ENTERPRISES, INC., ALLEN D. and
CELIA D. CAMPBELL, RAY BATTISON
dba KLEEN KAR SALES, PETE
KARAPANOS, CRAIG A. PAPA-DAKIS
dba AUTO MART, and JOHN and
JANE DOES 1 through 100,
Defendants.

Civil No. 86-7275

ASSIGNED TO:
JUDGE RICHARD A. ROY

Plaintiff, Western Surety Company (hereinafter "Western Surety"), pursuant to Rules 22 and 57 of the Utah Rules of Civil Procedure, and Utah Code Annotated Section 78-33-1 et seq., alleges as a cause of action against the defendants as follows:

GENERAL ALLEGATIONS

1. Defendant Craig A. Papa-Dakis dba Auto Mart (hereinafter "Auto Mart") operated a motor vehicle dealership in Salt Lake County, Utah at all times relevant herein.

2. All other defendants (hereinafter "interpleader defendants"), including John and Jane Does 1 through 100, have purchased motor vehicles from defendant Auto Mart and/or sold motor vehicles to defendant Auto Mart, or have otherwise entered into transactions concerning motor vehicles with defendant Auto Mart.

3. Western Surety is a surety company qualified and authorized to do business in the state of Utah, having its principal place of business in Sioux Falls, South Dakota.

4. Western Surety issued Motor Vehicle Dealer Bond #58161261 to defendant Craig A. Papa-Dakis dba Auto Mart, said bond having an effective date of February 4, 1986. A true and accurate copy of said bond is attached hereto as Exhibit "A."

5. Said bond is issued pursuant to Section 41-3-16(1)

and is governed by Section 41-3-16(1) and the terms and conditions of the bond.

6. The total aggregate annual liability of said bond to all persons making claims thereon is limited to \$20,000.

7. The interpleader defendants are potential or actual claimants under the bond and have made claims or may be entitled to make claims against defendant Auto Mart and against Western Surety based on their motor vehicle transactions with defendant Auto Mart.

8. By reason of the conflicting claims, actual or potential, Western Surety is in great doubt as to which of the claimants is entitled to be paid and the amounts to be paid.

FIRST CAUSE OF ACTION

(Interpleader)

9. Plaintiff realleges and hereby incorporates by reference its allegations contained in Paragraphs 1 through 8 set forth above.

10. The interpleader defendants represent conflicting claims against Western Surety's bond and Western Surety is in great doubt as to which of the interpleader defendants is entitled to be paid and the amounts to be paid.

11. Western Surety is, therefore, exposed to multiple liability and several lawsuits and is further exposed to numerous additional potential lawsuits.

12. Pursuant to Rule 22 of the Utah Rules of Civil Procedure, Western Surety is entitled to join all persons having claims against it as defendants in this action, requiring them to interplead their claims in the instant action and litigate the amount of damages to which they are entitled.

13. Western Surety hereby represents that it will deposit the \$20,000 aggregate annual limit of the bond in question into the registry of this Court, or otherwise deposit the amount of \$20,000 as ordered by the Court, in order to satisfy its liability or potential liability to the interpleader defendants, and alleges that it will thereby be entitled to an order discharging it from any and all further liability on its bond to any and all claimants.

SECOND CAUSE OF ACTION

(Injunction)

14. Plaintiff realleges and hereby incorporates by reference its allegations contained in Paragraphs 1 through 13 set forth above.

15. Defendant Great Basin GMC Trucks, Inc. has filed a complaint with the Fifth Circuit Court, in and for Salt Lake County, Salt Lake Department, State of Utah, entitled Great Basin GMC Trucks, Inc. v. Western Surety Company, et al., Civil No. 86-57954CV, wherein defendant Great Basin GMC Trucks, Inc. seeks recovery against Western Surety's bond, which is the subject of this action.

16. Defendants George M. Baker and Della A. Baker have filed a complaint with the Third Judicial District Court in and for Salt Lake County, State of Utah, entitled George M. Baker and Della A. Baker v. Western Surety Company, et al., Civil No. C86-7427, wherein defendants George M. Baker and Della A. Baker seek recovery against Western Surety's bond which is the subject of this action.

17. Defendant Safeway Credit Union One has filed a complaint with the Fifth Circuit Court of the State of Utah, Salt Lake County, Salt Lake Department, entitled Safeway Credit Union One v. Western Surety Company, et al., Civil No. 86-CV-68912, wherein defendant Safeway Credit Union One seeks recovery against Western Surety's bond, which is the subject of this action.

18. The complaints filed by defendant Great Basin GMC Trucks, Inc., defendants George M. and Della A. Baker, and defendant Safeway Credit Union One, in the absence of the claims or potential claims of the other interpleader defendants, subject Western Surety to multiple conflicting claims and prejudice the rights of the other claimants, and such actions should, therefore, be enjoined.

19. All interpleader defendants should be enjoined from proceeding against Western Surety on its bond until all claimants are before the Court in the instant action.

THIRD CAUSE OF ACTION

(Discharge)

20. Plaintiff realleges and hereby incorporates by reference its allegations contained in Paragraphs 1 through 19 set forth above.

21. Western Surety hereby represents that it will deposit the \$20,000 aggregate annual limit of the bond in question into the registry of this Court, or otherwise deposit the amount of \$20,000 as ordered by the Court, in order to satisfy its liability or potential liability to the interpleader defendants, and alleges that it will thereby be entitled to an order discharging it from any and all further liability on its bond to any and all claimants.

FOURTH CAUSE OF ACTION

(Indemnification)

22. Plaintiff realleges and hereby incorporates by reference its allegations contained in Paragraphs 1 through 21 set forth above.

23. At or near the time the bond in question was issued by Western Surety, defendant Craig A. Papa-Dakis signed an indemnity agreement on behalf of himself and Craig A. Papa-Dakis dba Auto Mart, whereby he agreed to indemnify Western Surety from and against any liability, including costs and attorney's fees, that Western Surety might sustain by reason of said bond. A true

and correct copy of the application for bond, which includes the written indemnity, is attached hereto as Exhibit "B."

24. By reason of the written indemnity agreement, Western Surety is entitled to indemnity from defendant Craig A. Papa-Dakis for all expenditures incurred by Western Surety by reason of the claims made against this bond, including costs and attorney's fees incurred in undertaking the defense of claims made against it, costs and attorney's fees incurred in undertaking the prosecution of this action, and any and all other expenditures incurred by reason of said bond.

WHEREFORE, plaintiff Western Surety Company prays for judgment against defendants and further prays that the Court adjudge as follows:

1. On the First Cause of Action against all interpleader defendants as follows:

(a) That each of the interpleader defendants be required to interplead their claims and settle among themselves their rights to the bond amount.

(b) That the Court direct Western Surety where and to whom to deposit its bond amount of \$20,000, or any part thereof.

(c) That Western Surety be discharged from all liability on its bond, except to the person whom the Court shall adjudge entitled to custody of the bond amount of \$20,000, or any part thereof.

(d) That Western Surety recover its costs and attorney's fees and that the same be deducted from the amount that the Court directs to be paid as prayed for in subparagraphs (b) and (c).

(e) That the Court grant plaintiff its costs, attorney's fees, and such other and further relief as may appear just.

2. On the Second Cause of Action against all interpleader defendants as follows:

(a) That each of the interpleader defendants be restrained from instituting or prosecuting any action against Western Surety to recover on the bond.

(b) That the Court grant plaintiff its costs, attorney's fees, and such other and further relief as may appear just.

3. On the Third Cause of Action against all interpleader defendants as follows:

(a) That Western Surety be discharged from any and all liability on its bond, except to the person whom the Court shall adjudge entitled to custody of the bond amount of \$20,000, or any part thereof.

(b) That the Court grant plaintiff its costs, attorney's fees, and such other and further relief as may appear just.

4. On the Fourth Cause of Action against defendant Craig A. Papa-Dakis dba Auto Mart as follows:

(a) For judgment in its favor and against defendant Craig A. Papa-Dakis for any and all losses, costs, charges, damages, counsel fees and expenses whatsoever and the sum of its bond or any part thereof as the Court directs Western Surety to pay, and all attorney's fees and expenses incurred by Western Surety in bringing this action and defending any other actions, and for interest at the highest legal rate.

(b) That the Court grant plaintiff such other and further relief as may appear just.

DATED this 16th day of December, 1986.

HANSON, DUNN, EPPERSON & SMITH

John N. Braithwaite
JOHN N. BRAITHWAITE
Attorneys for Western Surety Company

Plaintiff's address:

101 South Phillips Avenue
Sioux Falls, SD 57192

8/86-743M.1

STATE OF UTAH
COUNTY OF SALT LAKE) SS
I, THE UNDERSIGNED, CLERK OF THE DISTRICT
COURT OF SALT LAKE COUNTY, UTAH, DO HEREBY
CERTIFY THAT THE ANNEXED AND FORWARDED
BY ME AND FULL COPY OF ALL ORIGINALS
WILL BE FILED IN MY OFFICE AS SUCH CLERK
OF THE DISTRICT COURT OF SALT LAKE COUNTY
AND SEAL OF SAID COURT
THIS 20 DAY OF DECEMBER 1986
BY William H. Hinkle CLERK
BY William H. Hinkle DEPUTY

FILED IN CLERK'S OFFICE
SALT LAKE COUNTY, UTAH

DEC 17 4 07 PM '86

H. DIXON HINDLEY CLERK
3rd DIST. COURT

[Handwritten signature]

John N. Braithwaite, Bar No. 4544
HANSON, DUNN, EPPERSON & SMITH
A Professional Corporation
650 Clark Leaming Office Center
175 South West Temple, Suite 650
Salt Lake City, Utah 84101
Telephone: (801) 363-7611

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

GEORGE M. BAKER and)
DELLA A. BAKER,)

Plaintiffs,)

vs.)

WESTERN SURETY COMPANY;)
CRAIG A. PAPA-DAKIS,)
individually and d/b/a)
"AUTO-MART"; and AUTO-MART,)
an unregistered fictitious name,)

Defendants.)

AFFIDAVIT OF
JOHN N. BRAITHWAITE

Civil No. C86-7427

The Honorable
Homer F. Wilkinson

STATE OF UTAH)
: ss.
COUNTY OF SALT LAKE)

John N. Braithwaite, being first duly sworn, upon oath,
deposes and says that:

1. I am the attorney of record for Western Surety
Company in the above entitled action.

2. On or about the 9th day of December, 1986, I, on
behalf of Western Surety Company, filed a motion to stay this
action based upon the ground that Western Surety Company intended

to file an interpleader action pursuant to Rule 22 of the Utah Rules of Civil Procedure, which interpleader action would include the claim brought against Western Surety Company in this lawsuit.

3. A complaint for interpleader has now been filed in the Third Judicial District Court in and for Salt Lake County, State of Utah, Civil No. C86-9295. A true and correct copy of said complaint for interpleader is attached hereto as Exhibit "A."

4. Said complaint for interpleader includes George M. Baker and Della A. Baker as defendants and thereby includes the claim brought against Western Surety in this lawsuit.

DATED this 17th day of December, 1986.

HANSON, DUNN, EPPERSON & SMITH

John N. Braithwaite
JOHN N. BRAITHWAITE

Subscribed and sworn to before me this 17 day of December, 1986.

My Commission Expires:
4-19-87

Doddy Nunley
NOTARY PUBLIC
Residing at Bountiful, Utah

CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy
of the foregoing to be hand-delivered this 17th day of
December, 1986, to:

John D. Parken
Marcella L. Keck
310 South Main, Suite 1330
Salt Lake City, UT 84101

and I further certify that I caused a true and correct copy of
the foregoing to be mailed, postage prepaid, this 17th day
December, 1986, to:

Craig A. Papa-Dakis
1630 South Main
Salt Lake City, UT 84115

John V. Brailsworth

8/86-600D.11

FILMED

EXHIBIT 100-100000

JAN 16 3 53 PM '87

John N. Braithwaite, Bar No. 4544
HANSON, DUNN, EPPERSON & SMITH
A Professional Corporation
650 Clark Leaming Office Center
175 South West Temple, Suite 650
Salt Lake City, Utah 84101
Telephone: (801) 363-7611

BY Richard H. Moffat
DEPUTY CLERK

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

WESTERN SURETY COMPANY,

Plaintiff,

vs.

ROBERT BENSON, WAYNE THOMAS,
TIMOTHY L. RYAN, ALLRED BUICK-
GMC TRUCKS, UTAH DRIV-UR-SELF
SYSTEM, INC., JOHN R. SZYMANSKI,
LISA KILLOUGH, SAFEWAY CREDIT
UNION ONE, GREAT BASIN GMC
TRUCKS, INC., ROBERT and CAROL
OCKEY, LYLE E. KOESTEL, DEREK and
DEANNA M. GENT, GEORGE M. and
DELLA A. BAKER, AMERICA FIRST
CREDIT UNION, ROBERT S. HARTUNG,
C.D.P. CREDIT ASSOCIATION, TRUDY
L. CLEGG, REV. JONG SOO HAM,
LARRY E. MAYCOCK, FRUTOS and
FRANCES SALAZ, RANDY A. DOWNS,
NEAL PAGE, CINDY and LINDA JENSEN,
MICHAEL F. OLSEN, IKE SPENCER,
RICHARD D. HEINZ, KHAMBONG
PHETCHAMPHONE, SAM J. IRA, SR.,
KEN GARFF IMPORTS-GARFF
ENTERPRISES, INC., ALLEN D. and
CELIA D. CAMPBELL, RAY BATTISON
dba KLEEN KAR SALES, PETE
KARAPANOS, CRAIG A. PAPA-DAKIS
dba AUTO MART, JOHN and JANE
DOES 1 through 100, and UTAH
STATE TAX COMMISSION,

Defendants.

MOTION TO ENJOIN
EXECUTION AND
DETERMINE PRIORITY
TO BOND FUNDS

Civil No. C86-9295

Judge Richard H. Moffat

Western Surety Company hereby moves the above entitled Court for an injunction, enjoining defendants George M. and Della A. Baker from executing upon the judgment obtained against Western Surety Company in the action styled George M. Baker and Della A. Baker v. Western Surety Company; Craig A. Papa-Dakis, et al., Civil No. C86-7427, and requiring defendants George M. and Della A. Baker to interplead their claim to the bond funds in the instant action.

Western Surety Company further moves this Court to determine priority to the bond funds held by the Court pursuant to this action for interpleader.

DATED this 16th day of January, 1987.

HANSON, DUNN, EPPERSON & SMITH


JOHN N. BRAITHWAITE

CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy
of the foregoing to be HAND DELIVERED this 16th day of
January, 1987, to the following:

John D. Parken
Marcella L. Keck
310 South Main, Suite 1330
Salt Lake City, UT 84101

Dody Nunley

and I further certify that a copy of the foregoing was mailed to
each of the named party defendants in this action on the 16th
day of January, 1987.

Dody Nunley

9/86-743M.8

STATE OF UTAH)
COUNTY OF SALT LAKE) SS
I, THE UNDERSIGNED, CLERK OF THE DISTRICT
COURT OF SALT LAKE COUNTY, UTAH, DO HEREBY
CERTIFY THAT THE ANNEXED AND FOREGOING IS
A TRUE AND FULL COPY OF AN ORIGINAL OCCU-
RRENT ON FILE IN MY OFFICE AS SUCH CLERK.
WITNESS MY HAND AND SEAL OF SAID COURT
THIS 20 DAY OF October 1987
H. DIXON NINDLEY, CLERK
A-16
-3- BY John D. Parken DEPUTY

1 THE COURT: That should be resolved by Judge
2 Wilkinson now, not by me.

3 MR. BRAITHWAITE: The motion against Western
4 Surety upon the bond liability, pursuant to the statute,
5 31-4-18, only upon the bond.

6 THE COURT: That question I think, Mr. Braithwaite
7 you have got to approach with Judge Wilkinson. That's his
8 law suit. He tried that case. You're asking me now to
9 make a ruling about whether that judgment can be executed---
10 could be satisfied and that is not in this case. It proper-
11 -ly shouldn't be a part of this case. That should be a part
12 of the case with Judge Wilkinson;so I frankly think that to
13 the extent--well, I frankly think the order was wrongfully
14 issued and I am going to dissolve the temporary restraining
15 order.

16 Now, that does not make any ruling and not intended
17 to be a ruling as to whether or not the Baker judgment has
18 priority against this fund;but I am not going to, in this
19 action, stay the execution of that judgment and if they want
20 to go try and execute anyplace they want to, such defenses
21 as may be available to those executions can be raised;but
22 they'll have to be raised in that case.

23 Now, if they execute against the fund here, that will
24 clearly raise the question of the priority that we're driving
25 at here. But everybody is entitled to be heard on that, not
 just the people who are here today. So that in the event the
 execution is made as against the County Attorney's Office

1 an objection could or should be filed. And as to that,
2 based upon the fact that that's a priority, that shouldn't
3 be granted; in which event, we'll notice it up or somebody
4 will notice it up and we'll hear that issue totally and
5 completely, with everyone who has been named in the action
6 to receive notice, because everybody's entitled to that.
7 But in so far as what is going on in that other case over
8 there, I am not going to continue the temporary restraining
9 order and it's hereby dissolved.

10 MR. BRAITHWAITE: Well, Your Honor, then our Motion
11 to Enjoin Execution was also combined with a Motion to
12 Determine Priority.

13 THE COURT: Not going to determine priority in this
14 case here today. You haven't even got all the parties here
15 and you don't even have notice to all the parties or service.

16 MR. BRAITHWAITE: All the parties have received
17 notice, Your Honor. And Your Honor is quite correct, there
18 are eight of the parties that have not yet been served.

19 THE COURT: I think as to the question of priority
20 everybody who is in this action is entitled to be heard and
21 the action I have just taken is not going to allow Mr.
22 Parken's clients to go out and latch on to that \$20,000
23 fund. If they do that, you can raise the objection and file
24 the very kind of thing that we're talking about: A petition
25 to determine or motion to determine priorities in this case.
I will, at that point, take that under advisement, but every-
body is entitled to be heard; so everybody is entitled to be

1 noticed as to that issue. That's still up in the
2 air and going to stay up in the air until we have everybody
3 here who has an interest and we'll hear it. But as to the
4 staying of the judgment and the Baker versus Western Surety
5 Company case, I don't think that I have any jurisdiction
6 to stay that. Judge Wilkinson is the judge who heard it and
7 he was asked to stay it and he refused to do it. If you
8 want to go back and repetition him on that, you may. But
9 I think until that's done, I haven't got any right to step
10 in and tell them they can't do that. To protect the fund,
11 if they execute against it and I haven't said they can't do
12 that and I haven't said I am going to allow them to get the
13 fund either. I am going to allow them whatever they think
14 they can execute, on that judgment and you're going to have
15 to get your relief from the Supreme Court or Judge Wilkinson.
16 It's perfectly clear that it's improper for me to substitute
17 my judgment for his.

18 MR. BRAITHWAITE: Under Your Honor's ruling, however,
19 I think the case of Surety Company of the Pacific versus
20 Piver is exactly the situation we have here. This court
21 does have the authority to enjoin the execution outside of
22 the interpleader action.

23 THE COURT: Well, I think may be I have, but I
24 don't think I am going to tell that to Judge Wilkinson what
25 you've already asked him to do and already turned it down.
 That would reverse him. I don't have any jurisdiction by
 this action over anything outside of the fund. That's all

1 I have jurisdiction over in this case. The question
2 as to the effectiveness and extent of the judgment granted
3 in the Baker case is really Judge Wilkinson's, it isn't mine.
4 If I substituted my judgment for him, I would clearly be
5 wrong. So that will be the order. You may prepare it,
6 Mr. Paken.

7 MR. PARKEN: Appreciate it, Your Honor.

8 MR. LEWIS: Could we set a date for a hearing,
9 Your Honor?

10 THE COURT: You haven't got service on everybody
11 yet. Get your service and talk to Kathy about settin' a
12 date. My Law and Motion comes up every Friday. If we're
13 going to have an extended hearing, we'll need a special
14 setting. We can give that to you as soon as you know you
15 have got everybody in the action you think you can get into
16 the action. If you will just contact Kathy, we'll figure a
17 date out.

18
19 (WHEREUPON this hearing was concluded.)
20
21
22
23
24
25

FILED

LED IN CLERK'S OFFICE
Salt Lake County, Utah

APR 7 1987

H. Dixon Hixley, Clerk 3rd Dist Court
By S. A. Shields Deputy Clerk

John N. Braithwaite, Bar No. 4544
HANSON, DUNN, EPPERSON & SMITH
A Professional Corporation
650 Clark Leaming Office Center
175 South West Temple, Suite 650
Salt Lake City, Utah 84101
Telephone: (801) 363-7611

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

GEORGE M. BAKER and
DELLA A. BAKER,

Plaintiffs,

vs.

WESTERN SURETY COMPANY;
CRAIG A. PAPA-DAKIS,
individually and d/b/a
"AUTO-MART"; and AUTO-MART,
an unregistered fictitious name,

Defendants.

Bk 213 NO. 373
4-9-87-8:27 am.

ORDER AND JUDGMENT

Civil No. C86-7427

The Honorable
Homer F. Wilkinson

The Motion of Western Surety Company For Relief From Judgment or, in the alternative, To Limit Execution to the Interpleaded Funds came on regularly for hearing before this Court, the Honorable Homer F. Wilkinson presiding, on Friday, February 13, 1987, at approximately 9:00 a.m., Western Surety Company appearing by and through its counsel, John N. Braithwaite, plaintiffs appearing by and through their counsel, John D. Parken, the Court having reviewed the pleadings on file

herein, having reviewed the memoranda supporting and opposing said motion, having heard and considered the arguments and the representations of counsel, being fully advised in the premises, and good cause appearing therefore,

IT IS HEREBY ORDERED that the motion of Western Surety Company for relief from judgment is granted pursuant to Rule 60(b) of the Utah Rules of Civil Procedure for the reason that the Order and Summary Judgment previously signed and entered by this Court on December 31, 1986 was entered by mistake and is incorrect, and for the reason that said Order and Summary Judgment is otherwise void. Relief from judgment is accordingly granted and the Order and Summary Judgment previously entered is modified and corrected pursuant to Rule 60(b) of the Utah Rules of Civil Procedure, so as to be entered in its entirety as follows:

IT IS HEREBY ORDERED that Western Surety Company's motion to stay proceedings is denied; and it is hereby

FURTHER ORDERED that no genuine dispute exists as to any fact material to the determination of plaintiffs' motion for summary judgment and plaintiffs are granted summary judgment against Western Surety Company's bond in the amount of \$15,800.14, together with interest at the rate of twelve (12) per cent per annum from and after December 31, 1986, and together with plaintiffs' costs incurred in this action, but with each

party to bear their own counsel fees, and it is hereby

FURTHER ORDERED that the summary judgment awarded to the plaintiffs is against the bond only, that the plaintiffs are only entitled to relief against the bond funds, which funds are deposited in the registry of the Court in the interpleader action, and that the plaintiffs' relief against the bond funds is limited as determined by the Court in the interpleader action filed on December 16, 1986, Civil No. C86-9295; and it is hereby

FURTHER ORDERED that Western Surety Company's liability is limited to the bond.

DATED this 7 day of April, 1987.

BY THE COURT:

ATTEST
H. DIXON HINDLEY
Clerk

G. A. Shields
Deputy Clerk

The Honorable HOMER F. WILKINSON
Third District Court Judge

APPROVED AS TO FORM:

John D. Parker
Attorney for Plaintiffs

12/16

CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy
of the foregoing ORDER AND JUDGMENT to be hand delivered this
31st day of March, 1987, to the following:

John D. Parken
Marcella L. Keck
310 South Main, Suite 1330
Salt Lake City, UT 84101

John N. Braithwaite

9/86-600D.27

FILED

1986 SEP 22 PM 1:03

CLERK OF THE CIRCUIT COURT
SALT LAKE DEPARTMENT



1 RICHARD C. CAHOON -#A535
2 MARSDEN, ORTON & CAHOON
3 ATTORNEYS FOR PLAINTIFFS
4 68 SOUTH MAIN, FIFTH FLOOR
5 SALT LAKE CITY, UTAH 84101
6 TELEPHONE: (801)521-3800

STATE OF UTAH
County of Salt Lake

I, the undersigned, Clerk of the Circuit Court of the State of Utah, Salt Lake County, Salt Lake Department, do hereby certify that the annexed and foregoing is a true and correct copy of an original document on file in my office as such clerk.

Witness my hand and seal of said Court This 23 day of October 19 87

PAUL L. VANCE, Clerk

By

Paul L. Vance

Deputy

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

11
12 GREAT BASIN GMC TRUCKS, INC.)

13 Plaintiff)

14 vs.)

15 CRAIG A. PAPADAKIS d/b/a)
16 AUTO MART and WESTERN)
17 SURETY COMPANY, a Utah)
18 Corporation,)

19 Defendant.)

AMENDED COMPLAINT

Civil No. 86-57954CV

20 For cause of action, Plaintiff complains and alleges against
21 Defendant as follows:

22 Count I

23 1. The amount in controversy herein is less than \$10,000

1 exclusive of cost of court.

2 2. The Defendant on June 28, 1986 fraudulently with an
3 intent to defraud Plaintiff, issued a check for \$8511.00 and took
4 possession of a 1985 Chevrolet truck, vehicle identification
5 number 1GCEK14H1FF364925.

6 3. Defendant owes the sum of \$8,511.00 for a 1985 Chev-
7 rolet truck, as shown on the statement attached hereto as Exhibit
8 "A" and incorporated herein by reference.

9 4. The Plaintiff's agreement for purchase of this auto-
10 mobile provides for the payment of reasonable attorney's fees,
11 costs of collection and interest at the rate of 18% per annum,
12 from July, 28, 1986, until paid.

13 5. The Defendant has issued a "bad check", a copy of which
14 is attached hereto as Exhibit "B", thus failing to pay the usm
15 owed to Plaintiff. Plaintiff has give Defendant written notice
16 as provided in Section 7-15-2 Utah Code Annotated 1953, as
17 amended.

18 **Count II**

19 6. Plaintiff incorporates by reference the allegations
20 contained in paragraphs 1-5 of Count I as if fully set forth
21 herein.

22 7. The Defendant Western Surety Company issued a bond
23

1 pursuant to Section 41-3-16 Utah Code Annotated 1953 as amended.

2 8. The Plaintiff pursuant to Section 41-3-16(a) has filed a
3 claim in writing with the State Administrator.

4 9. The Plaintiff has not been paid the sum of \$8511.00 by
5 either of the defendants.

6 WHEREFORE, Plaintiff demands Judgment against the Defendant
7 Craig A. Papadakis as follows on Count I:

8 1. For the sum of \$8511.00.

9 2. Reasonable Attorney Fees.

10 3. Interest and costs.

11 4. Such other and further relief as the Court deems just
12 and equitable.

13 On Count II against defendant Western Surety Company:

14 1. For the sum of \$8511.00.

15 2. Interest and costs.

16 3. Such other and further relief as the court deems just
17 and equitable.

18 DATED this 19 day of September, 1986.

20
21 

22 RICHARD C. CAHOON
23 MARSDEN, ORTON & CAHOON
Attorneys for Plaintiff

24 Plaintiff's Address: A-27
2800 South 300 West
P.O. Box 15469
Salt Lake City, Utah 84115

County of Salt Lake, State of Utah, I, the undersigned Clerk of the Circuit Court, State of Utah, Salt Lake County, Salt Lake Department, do hereby certify that the annexed and foregoing is a true and full copy of an original document on file in my office as such clerk.

Witness my hand and seal of said Court This _____ day of _____ 19 _____
PAUL L. VANCE, Clerk

By _____ Deputy

35.00

FILED

1988 OCT -1 AM 10:00

CLERK OF THE DISTRICT COURT
SALT LAKE DEPARTMENT

Mark A. Wolfert - 4171
BRUCE L. RICHARDS & ASSOCIATES
Attorneys for Plaintiff
P.O. Box 26786
Salt Lake City, UT 84126-0786
Telephone: (801) 972-0307

IN THE CIRCUIT COURT FOR SALT LAKE COUNTY

SALT LAKE DEPARTMENT, STATE OF UTAH

SAFeway CREDIT UNION ONE
formerly known as Safeway
Credit Union,

Plaintiff,

-vs-

ROBERT OCKEY, CAROL OCKEY also
known as Carol Fossat, and
CRAIG A. PAPA-DAKIS dba Craig
A. Papa-Dakis Auto Mart,
WESTERN SURETY COMPANY,

Defendants.

C O M P L A I N T

Civil No. 86-68912 CV

Plaintiff, Safeway Credit Union formerly known as Safeway Credit Union, alleges and complains of the Defendants as follows:

FIRST CAUSE OF ACTION

1. Plaintiff is a credit union authorized to and doing business in Salt Lake County, Utah.

2. Defendants Robert Ockey and Carol Ockey also known as Carol Fossat are residents of Salt Lake County, Utah.

3. Defendant Craig A. Papa-Dakis dba Craig A. Papa-Dakis Auto Mart is a resident of and doing business in Salt Lake County, Utah.

4. Defendant Western Surety Company is a surety company qualified and authorized to do business in the State of Utah as a surety.

5. The amount in controversy, exclusive of costs and interest, is less than \$10,000.00.

6. This cause of action arose in Salt Lake County, Utah.

7. On or about September 5, 1985, Defendants Robert and Carol Ockey executed and delivered to Plaintiff a Safeway Credit Union Paymaster Promissory Note and Loan Agreement, a copy of which is attached hereto and incorporated herein by reference as Exhibit "A."

8. On or about September 5, 1985, said Defendants also executed a security agreement and financing statement whereby they pledged a 1982 Toyota Pickup Truck to the Plaintiff as collateral for the loan in Exhibit "A." A true and correct copy of the security agreement and financing statement is attached hereto and incorporated herein by reference as Exhibit "B."

9. Plaintiff has a perfected first lien security interest in the 1982 Toyota Pickup Truck by way of the first lien notation on the Utah Certificate of Title, the original being in the hands of the Plaintiff. A true and correct copy of said title is attached hereto and incorporated herein by reference as Exhibit "C."

10. Pursuant to the terms and conditions of the note in Exhibit "A," Defendants Robert and Carol Ockey were to make regular monthly payments to Plaintiff, which they have failed to

do; said Defendants are therefore in default under the terms and conditions of the agreements in Exhibits "A" and "B."

11. Defendants owe to Plaintiff and Plaintiff is entitled to recover from Defendants the amount of \$4585.14 plus interest at the rate of fourteen percent (14%) per annum from and after August 22, 1986.

12. Plaintiff is also entitled to recover a reasonable attorneys fee from the Defendants pursuant to the agreement in Exhibit "A."

SECOND CAUSE OF ACTION

13. Plaintiff incorporates by reference paragraphs 1 through 12 of the First Cause of Action.

14. Subsequent to Defendants Ockeyes' loan agreement with Plaintiff in September, 1985, and subsequent to Defendant Craig A. Papa-Dakis dba Craig A. Papa-Dakis Auto Mart's bond dated February 4, 1986, Defendant Craig A. Papa-Dakis dba Craig A. Papa-Dakis Auto Mart came into possession of the 1982 Toyota Pickup Truck.

15. Defendants Ockeyes had surrendered the vehicle to Defendant Craig A. Papa-Dakis dba Craig A. Papa-Dakis Auto Mart for the purpose of trading it in on a new vehicle.

16. Defendant Craig A. Papa-Dakis dba Craig A. Papa-Dakis Auto Mart was to tender the amount due on the Defendants Ockeyes' obligation with the Plaintiff to Plaintiff credit union, which said Defendant has failed to do.

17. Despite notice and demand to the contrary, Defendant Craig A. Papa-Dakis dba Craig A. Papa-Dakis Auto Mart has failed and refused to return the vehicle to Plaintiff or Defendants Ockeyes, and has also failed to pay to Plaintiff the amount of the underlying obligation.

18. Defendant Craig A. Papa-Dakis dba Craig A. Papa-Dakis Auto Mart has also violated provisions of Title 41 regarding the proper registration of vehicles with the Utah Department of Motor Vehicles.

19. By virtue of said Defendant's conversion and violation of Title 41, Plaintiff has been damaged in the amount of \$4585.14 plus interest at the rate of fourteen percent (14%) per annum from and after August 22, 1986 until paid, which amounts Plaintiff is entitled to collect from said Defendant.

20. Plaintiff is also entitled to a reasonable attorney's fee.

THIRD CAUSE OF ACTION

21. Plaintiff incorporates by reference paragraphs 1 through 2 of the First and Second Causes of Action.

22. On or about February 4, 1986, Defendant Western Surety Company executed and filed its bond of Motor Vehicle Dealer, Salesman or Crusher, Bond #58161261, a true and correct copy of which is attached hereto and incorporated herein by reference as Exhibit "D."

23. Said bond proports to be executed and filed pursuant to Utah Code Annotated §41-3-16(1), (1953, as amended), promising to indemnify persons, firms and corporations for loss suffered in the total aggregate annual penal sum of \$20,000.00.

24. Said bond also binds the said Defendant to pay reasonable attorney's fees in cases that are successfully prosecuted to judgment.

25. Pursuant to §41-3-16(1) of the Utah Code, Plaintiff filed a written claim with the administrator within one year after this cause of action arose, a true and correct copy of which claim is attached hereto as Exhibit "E."

26. Having not received an acceptable response to that claim, Plaintiff is filing this action against Defendant Western Surety Company within two (2) years after the claim was filed, as required by said title, chapter and section.

27. Plaintiff is entitled to recover the amount of its damages from the Defendant on Defendant's bond in the amount of \$4585.14 plus interest at the rate of fourteen percent (14%) per annum from and after August 22, 1986, until the date paid, and its reasonable attorney's fees and costs of court.

WHEREFORE, Plaintiff prays for judgment against the Defendants as follows:

1. For damages against the Defendants Robert and Carol Ockey also known as Carol Fossat in the amount of \$4585.14 plus interest at the rate of fourteen percent (14%) per annum from August 22, 1986, until the date paid on Plaintiff's First Cause of Action;

2. For damages against the Defendant Craig A. Papa-Dakis dba Craig A. Papa-Dakis Auto Mart in the amount of \$4585.14 plus interest at the rate of fourteen percent (14%) per annum from August 22, 1986, until the date paid on Plaintiff's Second Cause of Action;

3. For damages against Defendant Western Surety Company in the amount of \$4585.14 plus interest at the rate of fourteen percent (14%) per annum from August 22, 1986, until the date paid on Plaintiff's Third Cause of Action;

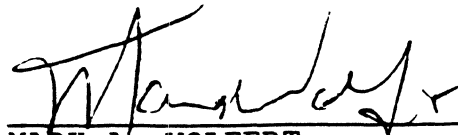
4. For reasonable attorneys fees;

5. For costs of court; and

6. For such other relief as the Court deems just and equitable.

DATED this 30th day of September, 1986.

BRUCE L. RICHARDS & ASSOCIATES



MARK A. WOLFERT
Attorneys for Plaintiff
1600 West 2200 South, Suite 102
P.O. Box 26786
Salt Lake City, UT 84126-0786

Plaintiff's address:
3226 South Main Street
Salt Lake City, UT 84115

H. Dixon Hindley, Clerk 3rd Dist. Court
By R. Grotz
Deputy Clerk


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

Hon. Richard H. Moffat

Western Surety Company hereby deposits the \$20,000 aggregate annual limit of its bond, which is the subject of this action, into the registry of the above-entitled court, and requests that the sum deposited be held in an interest-bearing account.

DATED this 29th day of December, 1986.

HANSON, DUNN, EPPERSON & SMITH


JOHN N. BRAITHWAITE
Attorney for Western Surety
Company

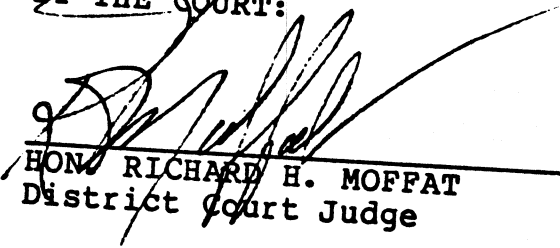
ORDER

Western Surety Company, having deposited the \$20,000 aggregate annual limit of its bond into the registry of the court,

IT IS HEREBY ORDERED that the deposit of the \$20,000 bond amount by Western Surety Company be held in an interest bearing account until further order of this court.

DATED this 29 day of December, 1986.

BY THE COURT:


HON. RICHARD H. MOFFAT
District Court Judge

13/86-743.1

STATE OF UTAH)
COUNTY OF SALT LAKE) ss

I, THE UNDERSIGNED, CLERK OF THE DISTRICT COURT OF SALT LAKE COUNTY, UTAH DO HEREBY CERTIFY THAT THE ANNEXED AND FOREGOING IS A TRUE AND FULL COPY OF AN ORIGINAL DOCUMENT ON FILE IN MY OFFICE AS SUCH CLERK.

WITNESS MY HAND AND SEAL OF SAID COURT
THIS 20 DAY OF October 19 87

H. DIXON HINDLEY, CLERK
BY Richard H. Moffat DEPUTY

SALT LAKE COUNTY CLERK
ROOM A-204 • COURTS BUILDING
240 EAST FOURTH SOUTH
SALT LAKE CITY, UTAH

Nº 18847

Dec 29 19 86

FINES & FORFEITURES

RECEIVED Hanson Dunn Eggerson & Smith
OF

Twenty Thousand and no/100 DOLLARS 20 000.00

Western Surety Co Vs Robert Jensen Et al

Court Tender (Int Bearing)

H. DIXON HINDLEY, CLERK

CASE NO. C86-9295

BY Vas
DEPUTY

John W. Braithwaite, Bar No. 4544
HANSON, DOWD, KPPERSON & SMITH
A Professional Corporation
650 Clark Leaming Office Center
175 South West Temple, Suite 650
Salt Lake City, Utah 84101
Telephone: (801) 363-7611

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

WESTERN SURETY COMPANY,

Plaintiff,

vs.

ROBERT BENSON, WAYNE THOMAS,
TIMOTHY L. RYAN, ALLRED BUICK-
GMC TRUCKS, UTAH DRIV-UR-SELF
SYSTEM, INC., JOHN R. SZYMANSKI,
LISA KILLOUGH, SAFEWAY CREDIT
UNION ONE, GREAT BASIN GMC
TRUCKS, INC., ROBERT and CAROL
OCKEY, LYLE E. KOESTEL, DEREK and
DEANNA M. GENT, GEORGE M. and
DELLA A. BAKER, AMERICA FIRST
CREDIT UNION, ROBERT S. HARTUNG,
C.D.P. CREDIT ASSOCIATION, TRUDY
L. CLEGG, REV. JONG SOO HAM,
LARRY E. MAYCOCK, FRUTOS and
FRANCES SALAZ, RANDY A. DOWNS,
NEAL PAGE, CINDY and LINDA JENSEN,
MICHAEL F. OLSEN, IKE SPENCER,
RICHARD D. HEINZ, KHAMBONG
PHETCHAMPHONE, SAM J. IRA, SR.,
KEN GARFF IMPORTS-GARFF
ENTERPRISES, INC., ALLEN D. and
CELIA D. CAMPBELL, RAY BATTISON
dba KLEEN KAR SALES, PETE
KARAPANOS, CRAIG A. PAPA-DAKIS
dba AUTO MART, JOHN and JANE
DOES 1 through 100, and UTAH
STATE TAX COMMISSION,

Defendants.

NOTICE

AMENDED

NOTICE OF HEARING

Civil No. C86-9295

Judge Richard H. Moffat

TO THE ABOVE NAMED PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that the hearing on plaintiff's MOTION TO ENJOIN EXECUTION AND DETERMINE PRIORITY TO BOND FUNDS, previously scheduled for Friday, the 30th day of January, 1987, at the hour of 9:00 a.m., has been continued to and will be heard on Thursday, the 5th day of February, at 9:30 a.m., and will be heard in conjunction with an Order To Show Cause why the temporary restraining order issued in this matter should not remain in effect. Both matters will be heard before the Honorable Richard H. Moffat, District Court Judge, 451 South 200 East, Third Floor, Salt Lake City, UT 84111.

DATED this 27th day of January, 1987.

HANSON, DUNN, EPPERSON & SMITH



JOHN N. BRAITHWAITE
Attorney for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of the foregoing to be HAND DELIVERED this 27 day of January, 1987, to the following:

John D. Parken
Marcella L. Keck
310 South Main, Suite 1330
Salt Lake City, UT 84101

D. Munday

and I further certify that a copy of the foregoing was mailed to each of the named party defendants in this action on the 27 day of January, 1987.

D. Munday

9/86-743M.17

STATE OF UTAH) ss
COUNTY OF SALT LAKE)

I, THE UNDERSIGNED, CLERK OF THE DISTRICT COURT OF SALT LAKE COUNTY, UTAH, DO HEREBY CERTIFY THAT THE ANNEXED AND FOREGOING IS A TRUE AND FULL COPY OF AN ORIGINAL DOCUMENT ON FILE IN MY OFFICE AS SUCH CLERK.

WITNESS MY HAND AND SEAL OF SAID COURT THIS 29 DAY OF October 1986
H. DIXON MINDLEY, CLERK
BY William R. Keck DEPUTY



STATE OF UTAH
INSURANCE DEPARTMENT

WMAN H. BANGERTER
Governor

160 East 300 South
P.O. Box 45803
Salt Lake City, Utah 84145
Phone: (801) 530-6400

HAROLD C. YANCEY
Insurance Commissioner

CERTIFIED MAIL

January 27, 1987

Western Surety Company
101 South Phillips Avenue
Sioux Falls, SD 57192

Attention: Joe Patrick Kirby, President

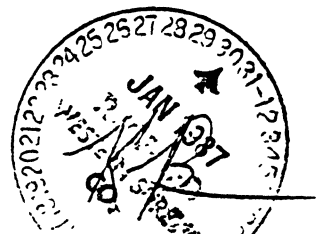
RE: Our File No. 22101

Dear Mr. Kirby:

On January 13, 1987 the above referred to file was opened pursuant to a complaint filed with the Department alleging that Western Surety has failed to satisfy an existing judgment entered in the Third District Court in the State of Utah, Salt Lake County (Civil No. C86-7427). The complaint was forwarded to Western Surety Company on or about January 16, 1987 and we are awaiting the company's response. However, an additional matter has come to the attention of the Commissioner which causes this correspondence to be forwarded to you.

The judgment at issue in this matter was entered on December 30, 1986. It was the understanding of counsel for the plaintiff in those proceedings that Western Surety would not voluntarily pay the judgment. While we understand that Western Surety has the right of appeal, it was also the understanding of plaintiff's counsel that Western Surety would not appeal. Accordingly, if that is the fact, then Western Surety is obliged to satisfy the judgment.

The Commissioner views this matter with much concern. Because of the position taken by Western Surety, through its counsel in Salt Lake City, plaintiff has been forced to seek the enforcement and satisfaction of the judgment through a massive garnishment of Western Surety Company agents doing business in this state. The garnishment has been issued to approximately twenty (20) agents and will continue until the judgment is satisfied. We have received complaints from agents, who were not parties to the lawsuit, concerning the garnishment of their trust account funds.



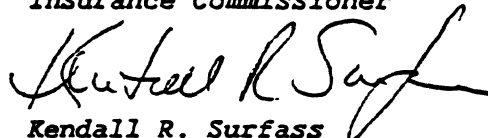
It is the position of the Commissioner that Western Surety must satisfy the judgment and not allow the continued garnishment of its agents in this state. We view the matter of the outstanding garnishment procedures to be totally unnecessary. Furthermore, Utah insureds may be placed in a perilous position under the garnishment of funds intended as premium for coverage.

Under the Utah Insurance Code, Section 31A-2-308(11), the Commissioner may revoke the Certificate of Authority of any licensee whose methods and practices he finds would endanger the legitimate interest of customers and the public. In light of that provision, the conduct of Western Surety in failing to satisfy an outstanding judgment would, in the opinion of the Commissioner, place the Certificate of Authority of the company in jeopardy in this state. The Commissioner cannot find good cause, under these facts, for Western Surety to allow a garnishment of its agents, which may jeopardize policyholders as well as the legitimate interests of the public. Subject to Western Surety's right of appeal of the judgment that is currently outstanding, the Commissioner demands that Western Surety honor the judgment and satisfy it in full. Should the company decide not to appeal the judgment and not satisfy it, the Commissioner will file a Notice of Hearing and Order to Show Cause and consider all appropriate penalties in enforcement of the Insurance Code.

Your cooperation in attendance to this matter is greatly appreciated. The Commissioner expects the written response of Western Surety within ten (10) days of receipt of this correspondence.

Sincerely,

HAROLD C. YANCEY, CPCU
Insurance Commissioner


Kendall R. Surfass
Market Conduct Staff Counsel

KRS:lm

1105L

LAW OFFICES
HANSON, DUNN, EPPERSON & SMITH

A PROFESSIONAL CORPORATION
650 CLARK LEAMING OFFICE CENTER

175 SOUTH WEST TEMPLE
SALT LAKE CITY, UTAH 84101
TELEPHONE (801) 363-7811

February 6, 1987

TIM DALTON DUNN
DAVID H. EPPERSON
LOWELL V. SMITH
ROBERT R. WALLACE
PAUL H. MATTHEWS
SCOTT W. CHRISTENSEN
TERRY M. PLANT
CLIFFORD C. ROSS
THEODORE E. KANELL
T. J. TSAKALOS
CURTIS J. DRAKE
ANNE SWENSEN
JOHN N. BRAITHWAITE
GORDON K. JENSEN
MARK DALTON DUNN

STEWART & STEWART	1895
STEWART STEWART & ALEXANDER	1911
STEWART ALEXANDER & BUDGE	1923
STEWART STEWART & CANNON	1933
STEWART CANNON & HANSON	1943
HANSON & BALDWIN	1956
HANSON BRANDT & WADSWORTH	1972
HANSON WADSWORTH & RUSSON	1973
HANSON RUSSON HANSON & DUNN	1977
HANSON RUSSON & DUNN	1982

REX J. HANSON
(1911-1980)

STATE OF UTAH INSURANCE DEPARTMENT
160 East 300 South
Salt Lake City, UT 84145

Attn: Harold C. Yancey, Insurance Commissioner
Kendall R. Surfass

RE: Bond No. 58161261 - Craig A. Papa-Dakis dba Auto Mart
Insurance Dept. File No. 22101

Gentlemen:

This letter will serve to respond to your correspondence of January 27, 1987. We sincerely hope that some of the concerns set forth in that letter have been laid to rest by your receipt of our letter dated January 28, 1987. We will now expand upon the matters discussed in our previous letter and address specifically the concerns set forth in your most recent letter.

As you are now aware, this matter concerns a motor vehicle dealer's bond issued to Craig A. Papa-Dakis dba Auto Mart on February 4, 1986. During the Fall of 1986, three separate lawsuits were filed against the principal and Western Surety Company, one of which was filed by George M. and Della A. Baker. With the filing of the third lawsuit, it became apparent that the claims might exceed the \$20,000 bond limit. Accordingly, Western Surety Company began taking steps to file an interpleader action, such that all claimants could be heard and have an opportunity to participate in any bond distribution. Upon contacting the Motor Vehicle Department, we learned that approximately 35 claims had been filed against the principal during 1986. Prior to the filing of this interpleader action, the Baker's counsel, John Parken, was informed of the existence of numerous claims and the necessity of an interpleader action. Despite such knowledge, the Bakers continued to prosecute their action toward judgment.

Prior to the entry of judgment in favor of the Bakers, and prior to any hearing on the matter, Western Surety Company filed its complaint for interpleader, naming approximately 35

Mr. Harold Yancey
Mr. Kendall Surfass
State of Utah Insurance Dept.
February 6, 1987
Page 2

claimants. The 35 named claimants were those who had filed a claim with the Department of Motor Vehicles as required by law. These 35 claimants included George and Della Baker, along with the other two claimants that had previously filed suit.

Prior to the hearing on the Baker's motion for summary judgment, Western Surety filed a motion to stay the proceedings based upon the filing of the interpleader and the inclusion of the Bakers in that action. The motion to stay proceedings was denied and the Bakers' motion for summary judgment was granted. At that point, Western Surety believed that the judgment entered would be satisfied within the interpleader action against the bond funds held under the interpleader jurisdiction. It became apparent, however, that the Bakers did not wish to enter the interpleader action to satisfy their judgment, but instead desired to execute upon that judgment separate and apart from the interpleader and the bond funds, in an effort to recover the entirety of their judgment in the amount of \$15,800.14.

In mid-January, the Bakers attempted to satisfy their judgment by instituting garnishment proceedings and serving numerous agents throughout the state with writs of garnishment. At this point, it became necessary to obtain an order temporarily restraining such execution, pending a ruling by the judge in the interpleader action concerning such garnishment procedures. This hearing was held on February 5, 1987. At this hearing, the Honorable Richard H. Moffat, Third District Court Judge, ruled that he could not restrain execution upon the judgment outside of the interpleader action because of his limited jurisdiction, which, by his ruling, is over the interpleader action only and the \$20,000 bond amount deposited therein. Judge Moffat indicated that execution outside of the interpleader action must be limited or otherwise ruled upon by the judge handling the matter in the Baker action.

The problem that has developed at this point is that the Bakers have obtained a judgment against the bond and apparently feel that, by reason of the judgment, they have priority to the \$20,000. The interpleader action was filed before such judgment was obtained, however. Western Surety Company does not dispute the fact that the Bakers are entitled to participate in the interpleader action and receive whatever monies they are entitled to therein. It is simply the position of Western Surety that satisfaction of the judgment must be within the interpleader action, out of the bond funds that are the subject of that action.

Mr. Harold Yancey
Mr. Kendall Surfass
State of Utah Insurance Dept.
February 6, 1987
Page 3

With the above described posture of this matter, it is apparent that a ruling must be made at some point limiting execution upon the Bakers' judgment to the interpleaded bond funds. Perhaps the isolated summary judgment granted in favor of the Bakers should not have been considered with the interpleader already established. Accordingly, Western Surety Company has appealed the denial of its motion to stay proceedings. It should be noted at this point that it has never been represented to plaintiffs' counsel that Western Surety would not appeal. Rather, representations were simply made that Western Surety Company would not appeal plaintiffs' claim on the merits. Plaintiffs' claim is not being disputed on the merits. It is merely Western Surety Company's position with this appeal that plaintiffs' claim should have been considered within the interpleader action and satisfied therein, rather than considered in isolation. If the plaintiffs' claim had been considered in the interpleader action, the attempts to satisfy the judgment outside of the interpleader action would not occur.

With the appeal of the denial of Western Surety Company's motion to stay proceedings pending, execution upon the judgment subsequently rendered will be stayed pending the appeal. It remains Western Surety Company's position, however, that the Bakers may participate in the interpleader action and satisfy their judgment therein despite the pendency of the appeal. Western Surety Company is not unwilling to satisfy the judgment entered against it and the plaintiffs have not been forced to seek the enforcement and satisfaction of their judgment through garnishment proceedings. The plaintiffs have full right and are entitled to satisfy their judgment within the interpleader action. The plaintiffs are not entitled, however, to satisfy that judgment outside of the interpleader action, as such would place a risk of double liability upon Western Surety Company because the \$20,000 bond amount is held by the Court and under the interpleader court's jurisdiction.

It is truly unfortunate that this matter has come to rest in its current posture. It has not been Western Surety's intent to delay or hinder the Bakers in seeking satisfaction of their judgment. Rather, Western Surety has admitted its liability on the \$20,000 bond and tendered the same into the Court with interpleader jurisdiction. Satisfaction of judgments obtained following the filing of that interpleader must be made within the interpleader action.

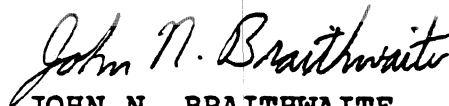
We hope that this letter will provide you with the information necessary to understand the posture of these claims.

Mr. Harold Yancey
Mr. Kendall Surfass
State of Utah Insurance Dept.
February 6, 1987
Page 4

If you have any questions or concerns at all about this matter,
please feel free to contact the undersigned counsel for Western
Surety Company.

Very truly yours,

HANSON, DUNN, EPPERSON & SMITH

A handwritten signature in cursive script, reading "John N. Braithwaite".

JOHN N. BRAITHWAITE
Attorneys for Western Surety Co.

JNB/dn
cc: Kevin Bonnett
Western Surety Company

9/86-600D.23



FEB 17 1987

ORMAN H. BANGERTER
Governor

STATE OF UTAH
INSURANCE DEPARTMENT

HAROLD C. YANCEY
Insurance Commissioner

160 East 300 South
P.O. Box 45803
Salt Lake City, Utah 84145
Phone: (801) 530-6400

February 12, 1987

Hanson, Dunn, Epperson & Smith
650 Clark Leaming Office Center
175 South West Temple
Salt Lake City, UT 84101

Attention: John N. Braithwaite

RE: Our File No. 22101

Dear Mr. Braithwaite:

I am in receipt of your February 6, 1987 hand-delivered letter in response to the Baker complaint. We agree that it is truly unfortunate that this matter has come to rest in its current posture. We also believe that it is not Western Surety's intent to delay or hinder the Bakers in seeking satisfaction of the judgment, but further understand that Western Surety would resolve the matter through the interpleader jurisdiction. We note that you have appealed the Judge's decision to refuse the stay of the summary judgment proceedings. It is my understanding that an appropriate bond should be filed in connection with that appeal to stay the execution of the Baker judgment. To that end, we would appreciate verification that the appropriate bond has been filed so that further collection by garnishment of Western Surety agents in this state can be discontinued in light of the appellate posture of the case.

If you have any questions concerning this correspondence please do not hesitate to contact me.

Sincerely,

HAROLD C. YANCEY, CPCU
Insurance Commissioner

Kendall R. Surfass
Market Conduct Staff Counsel

KRS:lm

1182L

1 liability when we had filed the Interpleader Action which
2 was specifically to take care of that. I believe that the
3 Appeal can be completely unnecessary. If we were to limit
4 the Bakers to the satisfaction of their Judgment as they
5 are entitled to recover against the Bond Funds.

6 Your Honor, in the previous hearing on December
7 19th indicated that you were not ruling on priority, that
8 that was not before you. We didn't know that the Bakers
9 simply because they obtained a Judgment first would be
10 entitled to priority. We still don't know that. No one
11 has ruled on that. There's no Utah case on point. And I
12 submit, Your Honor, that Interpleader was properly filed in
13 this matter and that the Bakers have a Summary Judgment
14 against Western Surety. But Western Surety's liability is
15 limited to the \$20,000 Bond Fund, and at this time I
16 believe something needs to be done with that. Either an
17 Order needs to be done limiting execution to their
18 involvement in the Interpleader Action or the Order that
19 was entered needs to be revised to explicitly set forth
20 what was intended to be entered.

21 I would submit it on that basis, Your Honor.

22 THE COURT: First of all let me state this. In
23 reading your memorandums I was concerned that I don't even
24 know if I have jurisdiction in this matter but I am going
25 to rule and I still think there's a serious question. I

1 know there's a serious question and whether I have
2 jurisdiction with that Appeal up there, of course they can
3 grant me the right to make it, but I think right now the
4 case is really in their hands. So, I think there's a very
5 serious question there.

6 MR. BRAITHWAITE: May I make one comment, Your
7 Honor. A phone call yesterday afternoon to the Supreme
8 Court indicated that this was not docketed yet.

9 THE COURT: That might be. I don't want to get on
10 that. All I know what you said in your memorandum, you
11 said it's on appeal to the Supreme Court.

12 MR. PARKEN: I want the record to be absolutely
13 clear on that point, Your Honor. I think it's
14 jurisdictional. The Utah Supreme Court's records, and I
15 checked with them this morning, indicate that Mr.
16 Braithwaite's appeal in this case was docketed in the Utah
17 Supreme Court on February 11th under Case No. 870059.

18 THE COURT: Okay. Well, there you are.

19 MR. BRAITHWAITE. I don't think that takes
20 jurisdiction away from Rule 60(b), Your honor, that's only
21 in Rule 60(a).

22 THE COURT: Well, this may be another matter
23 you're to be contesting, I don't know, but I have a serious
24 -- very serious question, I'll restate it, whether I have
25 jurisdiction.

1 Now, going back to the first situation of when
2 this was before me of course on the Summary Judgment, and I
3 don't remember exactly what was presented to me at that
4 time. I do remember your being in here and I do remember
5 granting the judgment. I don't remember specifically
6 whether you said, and I'm not saying you didn't, whether
7 you said there was -- the interpleader action had been
8 filed. I do remember some statement being made that the
9 bonding company wasn't sufficiently satisfied that they had
10 liability at that point. Something to that effect.

11 Now, other than that I don't remember much about
12 it. That was one of the things that I felt that the
13 plaintiff was entitled to proceed with their case. If the
14 Interpleader Action had been perfected in all probability I
15 would have granted a stay there. I don't know. I maybe
16 wanted to look at the law on it.

17 MR. BRAITHWAITE: If Your Honor would review the
18 memoranda on file for that Motion I think you will see that
19 it was --

20 THE COURT: I know what you're saying. I'm saying
21 that I did grant the Summary Judgment because of the fact
22 that they were there. They were before the Court. They
23 had come in. They had their action filed, perfected and
24 that even if the Interpleader Action had been filed, which
25 I don't remember if I knew or didn't know that it was

1 certainly filed just for the purpose of granting the stay
2 and still the bonding company was questioning whether they
3 had liability in this situation. But I am of the opinion,
4 and I would so rule, that the judgment awarded to the
5 plaintiff against Western Surety would only go to against
6 the bond. Western Surety is not liable for more money than
7 what they have contracted to pay out and that's the bond
8 amount. When they paid this into Court under Interpleader
9 Action, of course that's what you're on the Supreme Court,
10 whether the plaintiff can -- are entitled to that money
11 first since they've got their judgment and whether they
12 have to go into the Interpleader Action and get their
13 money.

14 It's my opinion that a Judge Moffitt had
15 jurisdiction to grant a stay in that action since that
16 money was then paid into the Court and the Interpleader
17 action filed with that Court. Course he thought other-
18 wise. Who has the jurisdiction to grant that stay is a
19 question. But I am saying that I definitely, and I'm
20 ruling, that the plaintiff is only entitled to release
21 against the bond. And whether they can get in and get the
22 money first or whether it has to go through the
23 Interpleader Action, the Supreme Court kicks it back here,
24 I guess we'll have to look at it again if they want to rule
25 on it, then I guess they'll make the decision.

1 MR. BRAITHWAITE: Thank you, Your Honor.

2 THE COURT: And, as I say, maybe this whole Ruling
3 of mine is mute because they have jurisdiction. But I am
4 stating that position.

5 MR. PARKEN: I'm wondering if the Court wants to
6 specify so as to avoid objections to the Order under what
7 Rule Court is amending its earlier judgment to limit, as
8 you say, our judgment to the bond.

9 MR. BRAITHWAITE: Is the Court amending its prior
10 order or entering a new order?

11 THE COURT: Well, I'm ruling -- I don't know what
12 you -- I haven't read your judgment. If your judgment just
13 says a blanket judgment against Western Surety then I think
14 that's incorrect. I think you're entitled to Judgment
15 against the amount of the bond of Western Surety or the
16 bond itself. And whether this is -- of course you're to
17 state the alteration I guess there's a 10-day situation
18 there, but I think the judgment itself is void, and I think
19 under Rule --

20 MR. BRAITHWAITE: 60(b).

21 THE COURT: To void judgment. I think the
22 judgment itself is void.

23 MR PARKEN: That's the basis of your ruling?

24 THE COURT: If that's the way it's worded, I
25 haven't read your judgment. I'm saying that my judgment

1 would only go against Western Surety against the bond. And
2 I don't know how your judgment reads.

3 MR. PARKEN: And the order should reflect that
4 that's pursuant to Rule 60(b)?

5 THE COURT: Well, I haven't checked it. Is that
6 right, counsel? I know judgment -- 60(b) says if a
7 judgment is void, isn't that the one?

8 MR. BRAITHWAITE: 60(b) sub 5 refers to judgments
9 that are void. 60(b) sub 1 refers to mistakes,
10 inadvertence, excusable neglect.

11 THE COURT: I think it's really both. If you've
12 got it worded such that it's against them I think it's a
13 mistake. I think it's a void judgment.

14 MR. PARKEN: Okay.

15 MR. BRAITHWAITE: Thank you, Your Honor.

16 THE COURT: Okay.

17 (THEREUPON, the Motion was
18 concluded.)
19
20
21
22
23
24
25

UNITED STATE OF AMERICA

State of Utah

ss.

County of Salt Lake

I, GEOFFREY J. BUTLER, Clerk of the Supreme Court of the State of Utah, do hereby

certify that the foregoing is a full, true and correct copy of the ~~judgment rendered~~

Stipulation and Motion for Dismissal of Appeal, Order of Dismissal
and copy of the Supreme Court Remittitur in Case No. 870059.

in the foregoing entitled action, now of record and on file in my office.

In Testimony Whereof, I have hereunto set my hand

and affixed the seal of said Supreme Court this

the TWENTIETH

day of OCTOBER A.D. 19 87

GEOFFREY J. BUTLER

Clerk, Supreme Court

By

Lathen Decker
Deputy Clerk

FILED

MAR 26 1987

Clerk, Supreme Court, Utah

John N. Braithwaite, Bar No. 4544
HANSON, DUNN, EPPERSON & SMITH
A Professional Corporation
650 Clark Leaming Office Center
175 South West Temple, Suite 650
Salt Lake City, Utah 84101
Telephone: (801) 363-7611


IN THE SUPREME COURT OF THE STATE OF UTAH

GEORGE M. BAKER and)	
DELLA A. BAKER,)	
)	
Plaintiffs/Respondents,)	STIPULATION AND MOTION
)	FOR DISMISSAL OF APPEAL
vs.)	
)	
<u>WESTERN SURETY COMPANY;</u>)	
CRAIG A. PAPA-DAKIS,)	Case No. 870059
individually and d/b/a)	
"AUTO-MART"; and AUTO-MART,)	District Court
an unregistered fictitious name,)	Civil No. C86-7427
)	
Defendant/Appellant.)	


Defendant and appellant, Western Surety Company, by and through its counsel, John N. Braithwaite, and plaintiffs and respondents, George M. Baker and Della A. Baker, by and through their counsel, John D. Parken, hereby stipulate and agree as follows:

1. The above captioned appeal, referenced by Case No. 870059, may be dismissed.

2. Each party shall bear its own costs and attorney's fees incurred by this appeal.


JOHN N. BRAITHWAITE
HANSON, DUNN, EPPERSON & SMITH
Attorneys for Defendant/Appellant
Western Surety Company

Date March 23, 1987


JOHN B. PARKER
Attorney for Plaintiffs/Respondents
George M. Baker and Della A. Baker


Date 23 MAR 87

MOTION

Based upon the foregoing stipulation,
defendant/appellant Western Surety Company, by and through its
counsel, John N. Braithwaite, respectfully moves this Court for
an order dismissing this appeal.

DATED this 25th day of March, 1987.

HANSON, DUNN, EPPERSON & SMITH


JOHN N. BRAITHWAITE
Attorneys for Defendant/Appellant
Western Surety Company

1/86-600D.33

John N. Braithwaite, Bar No. 4544
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IN THE SUPREME COURT OF THE STATE OF UTAH

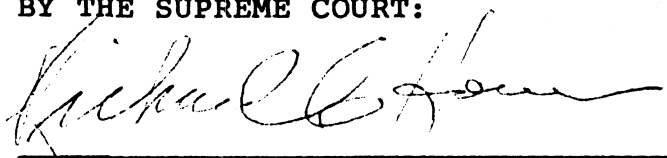
GEORGE M. BAKER and)	
DELLA A. BAKER,)	
)	
Plaintiffs/Respondents,)	ORDER OF DISMISSAL
)	
vs.)	
)	
WESTERN SURETY COMPANY;)	Case No. 870059
CRAIG A. PAPA-DAKIS,)	
individually and d/b/a)	District Court
"AUTO-MART"; and AUTO-MART,)	Civil No. C86-7427
an unregistered fictitious name,)	
)	
Defendant/Appellant.)	

Based upon the stipulation of the parties and the motion of the appellant Western Surety Company for the dismissal of this appeal, and pursuant to Rule 37(b) of the Utah Rules of Appellate Procedure,

IT IS HEREBY ORDERED that the above-referenced appeal is dismissed.

DATED this 26th day of March, 1987.

BY THE SUPREME COURT:



CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy
of the foregoing to be mailed, postage prepaid, this 26th
day of March, 1987, to the following:

John D. Parken
Marcella L. Keck
310 South Main, Suite 1330
Salt Lake City, UT 84101

John N. Braithwaite

1/86-743M.1

IN THE SUPREME COURT OF THE STATE OF UTAH

-----oo00oo-----

Regular February Term, 1987

March 26, 1987

George M. Baker and
Della A. Baker,
Plaintiffs and Respondents,

REMITTITUR
No. 870059
District No. C86-7427

v.

Western Surety Company;
Craig A. Papa-Dakis,
individually and dba
"Auto-Mart"; and Auto-Mart
and Unregistered fictitious name,
Defendants and Appellant.

Stipulation to dismiss, having been considered, it is
ordered that the same be, and hereby is, granted.

Issued: March 31, 1987

Record: None

SYNOPSIS OF FIDELITY & DEPOSIT CO. OF MD.

v. SANTA MONICA FIN. CO., 6 Cal. Rptr. 213 (Cal. Ct. App. 1960)

In this case, a surety had issued a \$5,000.00 bond to a motor vehicle dealer, which bond became the subject of multiple claims exceeding the bond penalty. Prior to the filing of the interpleader in that case, one of the claimants filed an independent action against the surety and the dealer. Upon application of the surety, an injunction was entered, enjoining the claimant from further prosecuting its action. In affirming the granting of the injunction, the appellate court cited an earlier case and stated:

"The very purpose of this action was to avoid a multiplicity of suits and to ascertain and equitably distribute the available bond fund among those who are entitled to share therein. The proportions and extent to which each is entitled to participate in that fund, subject to the maximum liability prescribed by the bond, is measured by the proportionate loss sustained by each on account of the derelictions of the broker." [Citations omitted] In aid of such jurisdiction, an injunction against the prosecution of other actions, pending the determination of the rights of the various claimants, may properly be granted by the court in the exercise of its discretion.

Id. at 217.